OD-1

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

AP/138/2025
M/S BCN ENCLAVE PRIVATE LIMITED
VS
SMT GOURI DAS AND ORS.

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 27th August 2025.

Appearance:

Mr. Shyak Mitra, Adv,.
Mr. Sanjoy Chattopadhyay, Adv.
Ms.Neha Gupta, Adv.
...for petitioner.

Mr. Sk. Md. Ismail, Adv.
Mr. Aditya Chakraborty, Adv.
Mr. Sk. Nijamuddin, Adv.
...for respondents.

1. This is an application for appointment of an arbitrator under Clause 17 of the Development Agreement dated July 13, 2011. The disputes arise out of non-refund of the money allegedly paid to the predecessor of the respondents.

2. The petitioner contends that the land owners were supposed to provide vacant possession of the premises to the petitioner upon execution of the said agreement. The petitioner was required to complete the proposed construction within 36 months from the date of sanction of the building plan. The time would extend by a further period of six months or as settled between the parties mutually.

3. According to Mr. Mitra, time was never of the essence, inasmuch as, the first pre-condition for delivery of possession upon construction of the building was subject to obtaining a sanction plan. Such plan could not be obtained. The respondent's predecessor land owner did not take any initiative. Vacant possession was not handed over to the petitioner. It is submitted that the penal clause provides for damages to be paid by the developer in case of delay.

Thus, time was not the essence. The land owner also had the opportunity to cancel the agreement, but neither of the parties cancelled the same. Reliance has been placed on clause 18.2 of the Agreement in support of the contention that any money spent on the property should be refunded by the land owner along with interest @ 18% per annum if the land owner delayed in compliance of his obligations. Furthermore, the petitioner would be entitled to claim damages for the losses suffered.

4. It is the specific case of the petitioner that more than Rs.24 lakhs had been paid to the land owner (since deceased) in two instalments at his request, but the land owner failed to hand over possession, failed to vacate the premises by evicting the tenants and also failed to discharge his obligations under the Agreement. The petitioner wrote various letters to the respondents; first by claiming specific performance and thereafter by claiming refund of the money. The petitioner also requested the heirs of the erstwhile land owner (respondents) to enter into a fresh development agreement and to execute a fresh power of attorney in favour of the petitioner.

5. Mr. Chakraborty, learned advocate for the respondent submits that the invocation is belated and the claim as also the dispute are a deadwood. The petitioner has been sleeping over his right since 2011. The allegations that the respondents sat tight over the matter and that the respondents failed to comply with their obligations, were demonstrative of the fact that there had been refusal to perform. Thus, the petitioner ought to have invoked the arbitration clause much earlier. It is further submitted that the allegation of receipt of Rs. 24 lakhs and above by the predecessor in interest of the respondents and thereafter by the respondents is also disputed. Such exchange of money is not available from any document. Mr. Chakraborty further refers to the clauses in the agreement in support of the contention that the period of 36 + 3 months was agreed to by the parties for completion of the

project and no further extensions were contemplated. Thus, time was the essence and such period expired sometime in the end of 2014. The claim for refund was equally time barred.

6. Heard learned advocates for the parties. This court finds that there was an agreement between the petitioner and the predecessor in interest of the respondents. The respondents as heirs shall be bound by the said arbitration clause. Moreover, there are adequate pleadings to show that neither the respondents nor their predecessor in interest had complied with their part of the obligation. There are specific pleadings that in January 27, 2015, a sum of Rs.50,000/- was paid to the respondents but the respondents failed to execute and register the development agreement, which is the subject matter in this application. The respondents failed to execute the deed of amalgamation and power of attorney despite having receipt of Rs.24,10,000/-. Multiple legal notices from 2018 to 2019 have been annexed to the application. It is the specific case that, verbal assurances were always given by the respondents that they were ready and willing to comply with their obligations. Sometime in July, 2022, the respondents requested for a No Objection from the petitioner, so that the respondents were able to transfer the property to a third party. Consequently, the petitioner prayed for refund of the amount of Rs.24,10,000/- along with interest and for further damages.

7. The issue of limitation in this case appears to be a mixed question of law and fact. In view of the specific averments that the parties were negotiating with each other and that there were verbal agreements with regard to the extension of time and also having regard to letters issued by the petitioner requesting the respondent to register the deed, to enter into another agreement, to sign the deed of amalgamation and to issue a fresh power of attorney in favour of the petitioner, it will be improper for this court to hold that the dispute is deadwood. In July, 2022, the respondents asked for a No Objection. Thus,

there is a possibility that such date would be the date of refusal. The petitioner could have expected till then that the respondents would want to continue the project with the petitioner. When the respondents were no longer willing to register the deed and had decided to execute a separate development agreement with a third party, the petitioner understood such action to be a refusal and claimed refund. The trend of the notices issued from 2018 to 2023 clearly indicate that the parties may have negotiated between 2018 to 2023. The respondent may have requested for a No Objection Certificate only as late as in July, 2022. The invocation was made in 2023 and thereafter on 12th May, 2025.

8. Extension of time for performance could be also have been made by conduct of parties and at this stage the petitioner's claim for refund of Rs.24,10,000/-, with interest and for damages, cannot be held to be deadwood. The petitioner no longer seeks specific performance, but claims refund of the amount along with interest @ 18% per annum and damages for the loss suffered.

9. None of the averments in the notices which have been issued between 2018 to 2025, have ever been denied by the respondents.

10. Thus, in my prima facie, view that the petitioner should be given an opportunity to prove his case including the issue of limitation.

11. Under such circumstances, the application is allowed and accordingly disposed of. This Court appoints Mr. Sourojit Dasgupta, learned Advocate, Bar Library Club, 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 remuneration as per the Schedule of the Arbitration and Conciliation Act, 1996.

(SHAMPA SARKAR, J.)

S.Mandi/pkd.