

OD-14

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

AP/166/2025
ALOK JHUNJHUNWALA AND ANR
VS
AMBUJA NEOTIA HOTEL VENTURES (FORMERLY
KNOWN AS GGL HOTEL AND RESORT CO. LTD.)

BEFORE:

The Hon'ble JUSTICE SHAMPA SARKAR

Date: 2nd December, 2025.

Appearance:

Mr. Arnab Mukherjee, Adv.

Mr. B. K. Upadhyay, Adv.

Ms. Madhurima Mukherjee, Adv. ...for petitioners.

Mr. Debjit Mukherjee, Adv.

Mr. Abhishek Banerjee, Adv.

Ms. Priyanka Jana, Adv. ...for respondent.

The Court: Affidavit-in-opposition is taken on record. The petitioners do not wish to file a reply.

This is an application for appointment of an Arbitrator in terms of clause (h) of the General Terms and Conditions, which was made applicable to the letter of allotment of the plots issued by the respondent, in favour of the petitioners.

The agreement was for provisional allotment of four plots in the proposed Simana Project to be developed by the respondent. The allotment letters were issued on January 15, 2003, March 3, 2003, and September 29, 2003. Those allotment letters referred to the General Terms and Conditions and there is a dispute resolution clause. The clause provided that all disputes and differences relating to or connected with the farm plot or anything done in presence thereof shall be referred to arbitration by a sole Arbitrator to be appointed by mutual consent.

The respondent had sought for adjudication of disputes by an arbitrator, by filing AP/126/2022. The dispute arose out of unpaid instalments by the petitioners in respect of the said plots and the right of the respondent to adjust the money paid by the petitioners against huge outstanding dues. An Arbitrator was appointed by the High Court. The proceedings commenced. The respondent, who was the claimant, filed the Statement of Claim on June 28, 2022. The petitioners sought time to file their Statement of Defence and counter claim on the next date. The learned Arbitrator fixed July 26, 2022, for filing of the Statement of Defence and the counter claim. On July 26, 2022, the petitioners prayed for a further extension and the time was extended by a period of three weeks. The petitioners filed their counter statement on August 16, 2022, but no counter claim was filed. Both oral and documentary evidences were adduced by the parties and the arbitral proceeding was concluded and stood terminated, with the passing of the award on May 10, 2024. The award was corrected by a corrigendum on July 19, 2024. Thereafter, on March 10, 2025, the petitioners invoked arbitration by issuing a notice under section 21 of the said Act, claiming refund of Rs.25,39,508/-, being the amount paid by the petitioners towards the allotment of those plots.

It is urged by Mr. Mukherjee, learned advocate for the petitioners that the cause of action arose with the passing of the award on May 10, 2024. The learned Arbitrator recorded that the respondent was not entitled to recover the maintenance charges and other dues from the money advanced by the petitioners. Thus, the right of the petitioners to recover the amount advanced had crystallised with the passing of the award. The respondent could not illegally retain the money. The respondent should either refund the

money with interest or allot the land. On the issue of limitation, it is urged that limitation is a mixed question of law and fact and the learned Arbitrator would be the appropriate forum to decide such issue. The jurisdiction of the referral court should be restricted to the satisfaction that an arbitration agreement existed between the parties, nothing more, nothing less. The law also provides that, if the learned Arbitrator ultimately found that the respondent was unnecessarily dragged into a frivolous proceeding, the learned Arbitrator could award costs.

Under such circumstances, it is urged that, this court must discharge its duty by referring the matter to arbitration. Reference has been made to the case of Aslam Ismail Khan Deshmukh Vs. ASAP Fluids Private Limited and Anr. reported in (2025) 1 Supreme Court Cases 502.

Mr. Debjit Mukherjee, learned advocate for the respondent relies on the affidavit in opposition and submits that the allotments were made in 2003. Several opportunities were given to the petitioners by the learned Arbitrator, to file their counter claim. The petitioners did not avail of such opportunity. The learned Arbitrator recorded that the agreement between the parties had been terminated in 2018. Under such circumstances, the question of referring the dispute would not arise as the claim was ex facie barred by limitation.

Heard learned advocates for the respective parties and considered their submissions. The letters of provisional allotment of the plots were issued in 2003. The respondent had claimed that the petitioners had stopped making payment of common area maintenance [CAM] since June 1, 2011, which resulted in accumulation of huge outstanding dues. The petitioners not only failed to pay the CAM, but by a letter dated July 22, 2010, requested for

exemption from payment of the CAM charges. They also expressed their disinclination to execute the deed of registration in respect of the plots on the premise that, due to an income tax raid, the bank account of the petitioners had been sealed. Thus, the respondent had claimed Rs.11,72,990/- towards CAM charges. Reliance was placed on various letters written by the respondent in respect of the contention that, demands were raised upon the petitioners but the petitioners did not pay. Accordingly, the respondent had sought to adjust the advance money paid by the petitioners against the dues. When the disputes arose between the parties, the respondent invoked arbitration. It appears that the learned arbitrator recorded that on September 3, 2018, the allotment was cancelled. Even at that stage the petitioners kept quiet. The petitioners were also informed that the plots would be sold by an auction. Thus, silence of the petitioners continued from 2010 and the petitioners had suddenly woken up in March 2025, when the learned arbitrator recorded that despite opportunity to file the counter-claim, the same was not filed and petitioners had never prayed for recovery or refund of the amount. The petitioners seek either delivery of the plots or refund. Both these claims are barred by limitation.

The Hon'ble Apex Court had defined the scope and jurisdiction of the referral Court, and held that the referral court should only satisfy itself as to the existence of an arbitration clause. However, the Hon'ble Apex Court also held that, the referral Court could weed out ex facie time barred and frivolous claim. Thus, if the referral Court finds that the application for reference to arbitration is either based on frivolous grounds or the dispute is no longer arbitrable, the referral Court should refrain from forcing a party to participate in a time consuming and expensive adjudicatory process.

The issue is whether in the facts of this case, such ratio can be applied. The award of the learned arbitrator which was published upon adjudication of the dispute between the parties, clearly records the entire facts and specifically refers to the failure of the petitioners to make a demand for recovery of the money at any stage between 2010 to 2023. The petitioners have invoked arbitration, seeking specific performance of the agreement by delivery of possession or in the alternative, refund of the money. The award records that the petitioners were never in physical possession. It also appears that the letters of allotment were cancelled in September, 2018. Even then, the petitioners were quiet. The petitioners failed to file a counter-claim, despite several opportunities.

The petitioners have not been able to show a single document indicating that, there was acknowledgement of the debt. Rather, the respondent claimed to have adjusted the money paid by the petitioners towards their outstanding dues. Although the claim failed but, the failure of the respondent in establishing their right to adjust the outstanding against the advance made by the petitioners, cannot give rise to a fresh cause of action, permitting the petitioners to seek enforcement of the letters of allotment of 2003, which stood cancelled and terminated way back in 2018. In this case, the records reveal that the claim is *ex facie* barred. The conduct of the petitioners reveal that they had never attempted to enforce their right. Limitation is not a mixed question of law and fact. The petitioners invoked arbitration after seven years from accrual of cause of action. The cause of action to enforce specific performance in the best case scenario for the petitioners arose in September, 2018 and expired three years thereafter. Refund of the money could have been claimed within three years, from the

date such refund or recovery of the money became due. At best, the said claim could have been made within three years from cancellation of the agreement. Reference is made to paragraphs from the following decisions.

In the decision of **SBI General Insurance Co. Ltd. vs. Krish Spinning** reported in **2024 SCC OnLine SC 1754**, the Hon'ble Supreme Court held as follows :-

"129. Insofar as the first issue is concerned, we are of the opinion that the observations made by us in Arif Azim (supra) do not require any clarification and should be construed as explained therein.

130. On the second issue it was observed by us in paragraph 67 that the referral courts, while exercising their powers under Section 11 of the Act, 1996, are under a duty to "prima-facie examine and reject non-arbitrable or dead claims, so as to protect the other party from being drawn into a time-consuming and costly arbitration process."

131. Our findings on both the aforesaid Issues have been summarized in paragraph 89 of the said decision thus:-

"89. Thus, from an exhaustive analysis of the position of law on the issues, we are of the view that while considering the issue of limitation in relation to petition under section 11(6) of the Act, 1996, the courts should satisfy themselves on two aspects by employing a two-pronged test – first, whether the petition under Section 11(6) of the Act, 1996 is barred by limitation; and secondly, whether the claims sought to be arbitrated are ex-facie dead claims and are thus barred by limitation on the date of commencement of arbitration proceedings. If either of these issues are answered against the party seeking referral of disputes to arbitration. The court may refuse to appoint an arbitral tribunal."

In the decision of **Arif Azim Co. Ltd. v. Aptech Ltd.**, reported in **(2024) 5 SCC 313**, the Hon'ble Apex Court held as follows:-

"92. Thus, from an exhaustive analysis of the position of law on the issues, we are of the view that while considering the issue of limitation in relation to a petition under Section 11(6) of the 1996 Act, the Courts should satisfy themselves on two aspects by employing a two-pronged test — first, whether the petition under Section 11(6) of the 1996 Act is barred by limitation; and secondly, whether the claims sought to be arbitrated are ex facie dead claims and are thus barred by limitation on the date of commencement of arbitration proceedings. If either of these issues are answered against the party seeking referral of disputes to arbitration, the Court may refuse to appoint an Arbitral Tribunal."

Under such circumstances, the application fails.

AP/166/2025 is accordingly disposed of.

(SHAMPA SARKAR, J.)

Pkd/TR.