

OCD 9

ORDER SHEET
AP-COM/888/2024
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

M/S GANAPATI CONSTRUCTION
VS
DEBASIS PAUL AND ORS.

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 29th April, 2025.

Appearance:
Mr. Siddhartha Banerjee, Adv.
Mr. Dyutiman Banerjee, Adv.
...for the petitioner

Mr. Pinaki Ranjan Mitra, Adv.
...for the respondents

1. This is an application for appointment of a learned arbitrator on the strength of Article – XVI Sub-Article 16.1 of the Development Agreement dated November 9, 2011.
2. The petitioner is the developer. The petitioner contends that the supplementary agreement was further entered into between the parties on November 29, 2016. By the supplementary agreement, terms and conditions created under the original agreement of November 9, 2011 was modified to some extent, but each and every provision of the said agreement was made applicable by incorporation.

3. It is contended by Mr. Banerjee that disputes and differences arose on and from 2017 when the respondents, being the landowners, had failed to execute the registered development agreement and perform their obligations under the agreement.
4. An application was filed before the concerned civil court for injunction and by virtue of such order of injunction, the petitioner continued the construction upto 2023, but the respondent failed to comply with certain terms and conditions. Allegedly, the respondents took possession some time in 2022 but failed and neglected to execute the registered development agreement. It is submitted that the respondents approached the consumer forum, alleging deficiency in service of the petitioner. The said application was dismissed. Similarly, the application for injunction filed by the petitioner was also dismissed for default. The petitioner invoked arbitration by a notice dated 1st April, 2024, wherein it was specifically contended that the respondents were restraining the petitioner from completing the remaining construction work and had also failed and neglected to execute a registered development agreement and a power of attorney. Further allegation was that the respondents had failed to refund the advance made by the petitioner as investments in the project.
5. To such invocation, the respondents replied through their learned advocate and denied the allegations. It was contended that the developer was holding the property as a licensee under the respondents. The developer had violated the terms and conditions of the agreement. The developer must

first comply with the terms and conditions of the agreement by delivering possession of the constructed portion as per the agreement and thereafter, call upon the respondents to fulfil their obligations.

6. Mr. Mitra, learned advocate for the respondents submits that the claim of the petitioner is time barred. Next contention is that, that the respondents were always in possession and the submission of the petitioner that the respondents were put in possession in 2022, was incorrect. Further contention is that the petitioner continued with the construction by virtue of an interim order passed by the learned civil court up to 2023, but are still in breach. Until the developer fulfils his obligations, the developer cannot pray for specific performance of the development agreement. Moreover, the development agreement was of 2011. The supplementary agreement is disputed. Under such circumstances, the matter should not be referred to arbitration. Reference has been made to the decision of the Hon'ble Apex Court in the matter of *ARIF AZIM COMPANY LIMITED VS. APTECH LIMITED reported at (2024) 5 SCC 313*.
7. Heard the parties. The development agreement contains an arbitration clause. There is a supplementary agreement which has incorporated all terms and conditions of the development agreement, including the arbitration clause. The question whether the supplementary agreement was a false and fabricated document, is an issue which has to be decided by the learned arbitrator upon evidence. The referral court is not required to go into the validity and veracity of the agreement. The next contention of Mr.

Mitra that the disputes and claim of the petitioner are ex-facie time barred, cannot be, prima facie accepted as the disputes raised by Mr. Banerjee do not appear to be 'deadwood'.

8. It is also the submission of the respondents that the construction continued upto 2023 by virtue of the injunction issued by a learned civil court. The performance of the contract continued upto 2022-2023. This fact is, prima facie, available from the records. The other contention of Mr. Mitra that the developer failed to comply with the terms and conditions of the agreement and committed breach thereof and as such is not entitled to claim performance of the said agreement is also a matter in dispute, which has to be decided by the learned arbitrator. Whether by conduct, the petitioner had abandoned the project and had abandoned the agreement, whether the petitioner was in breach, whether the respondents were already in possession and the developer was unable to complete the work etc. are matters which have to be decided by the learned arbitrator, as separate issues. The issue of limitation will also be decided by the learned Arbitrator.
9. The existence of the arbitration clause is available. No further deliberation on the objections of Mr. Mitra is warranted. If each of these objections are further dealt with, the same will constitute a mini trial.
10. In paragraph 92 in Arif Azim Co. Ltd. (supra), the Hon'ble Apex Court upon an exhaustive analysis of the position of law on the issues, were of the opinion that while considering whether reference should be made, the court should satisfy itself 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 second, whether the claims sought to be arbitrated were ex facie dead claims and thus barred by limitation on the date of commencement of the arbitration proceeding. If either of those two questions is answered against the party seeking reference of the disputes to arbitration, the Court may refuse to appoint an Arbitral Tribunal. From the records, it appears that by protection of an order passed by the civil court, construction continued up to 2023. This is also the case of the respondents. It is also true that in 2018, the respondents approached the consumer forum, alleging deficiency of service by the petitioner. The said application continued for a while and was ultimately dismissed. The reply of the respondents to the notice invoking arbitration also indicates that there is a live dispute. Whether by conduct, the parties extended the time for fulfilment of the terms of the contract, is an issue which has to be decided on evidence.

11. Under such circumstances, the two-pronged test is answered in favour of the respondents to the extent that the application under Section 11(6) of the Act has been filed within three years from invocation and the disputes do not appear to be ex facie dead claims. Whether the claim should be admitted or accepted or allowed, is to be decided by the learned arbitrator. The issue of limitation must also be decided by the learned Arbitrator.
12. At this juncture, Mr. Mitra and Mr. Banerjee both submit that instead of an arbitral tribunal, the parties consent to appointment of a learned sole

arbitrator for adjudication of the disputes between the parties. By recording such consent of the parties with regard to appointment of a sole arbitrator, this application is disposed of by appointing Mr. Saptangshu Basu, learned Senior Advocate, 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.)