

**IN THE HIGH COURT AT CALCUTTA  
ORIGINAL SIDE**

**RESERVED ON: 05.05.2026  
DELIVERED ON: 14.05.2026**

**PRESENT:**

**THE HON'BLE MR. JUSTICE GAURANG KANTH**

**AP 3 OF 2026**

**BHAGWAN DAS KOTHARI AND ORS**

**VERSUS**

**CHITRITA DEY AND ORS.**

**Appearance: -**

**Mr. Shuvasish Sengupta, Adv.  
Mr. Lalit Baid, Adv.  
Mr. Akash Munshi, Adv.  
Mr. Tamoghna Saha, Adv.  
Ms. Sanjana Shaw, Adv.  
Mr. Kuldeep Das, Adv.**

**..... for the Petitioner**

**Mr. Aniruddha Chatterjee, Sr. Adv.  
Mr. Kushal Chatterjee, Adv.  
Ms. Sayanti Nandy, Adv.**

**..... for the Respondent**

**JUDGMENT**

**Gaurang Kanth, J. :-**

- 1.** The Petitioners have preferred the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of an arbitrator for adjudication of the disputes and differences alleged to have arisen between the parties out of and in connection with the Agreement for Sale dated 30.03.2015.
- 2.** The facts leading to the filing of the present petition are as follows.
- 3.** Respondent Nos. 2 and 3, vide Agreement to Sale dated 24.04.2006, purchased the flat being Unit No. 3B, measuring about 2245.43 sq.ft.

super built-up area on the 3rd floor of premises No. 12, Shakespeare Sarani, Kolkata – 700071, together with one car parking space at the ground floor, from Respondent No. 1 as owner and Respondent No. 4 as the Developer and Confirming Party. Possession of the said flat was handed over to Respondent Nos. 2 and 3 on 09.06.2008. Later, pending registration of the said flat in the name of Respondent Nos. 2 and 3, the said Respondents approached the Petitioners for the sale of the said flat. Accordingly, the Petitioners entered into an Agreement for Sale dated 30.03.2015 with Respondent No. 1 as the vendor, Respondent Nos. 2 and 3 as the original buyers, and Respondent No. 4 as the Developer, in respect of the said flat. The total consideration for the said flat was agreed at Rs. 2,45,00,000/-. According to the Petitioners, the entire sale consideration was paid and possession of the said flat was handed over to them in the year 2015 itself.

4. It is the case of the Petitioners that under Clause 5.1 of the said Agreement for Sale, Respondent Nos. 1 and 4 were required to complete the sale and execute the conveyance in favour of the Petitioners within 15 days of the vendor and the Developer being ready, willing and able to execute and register the conveyance deed. However, according to the Petitioners, the execution and registration of the conveyance deed were deferred from time to time on various grounds.
5. The Petitioners have stated that Respondent No. 4 forwarded a draft conveyance deed, though certain clauses contained therein were objected to by the Petitioners, resulting in several meetings and exchanges between the parties. According to the Petitioners, the issues remained unresolved. The Petitioners have further alleged that conveyance deeds in respect of

several other flats in the said premises were also not executed, as a result whereof the flat owners were unable to constitute a flat owners' association or obtain access to the accounts and records relating to the maintenance of the building. It is stated that Respondent No. 4 continued to manage and maintain the building premises, however, vide letter dated 17.08.2023, intimated that it would not be continuing with the maintenance activities beyond 30.08.2023.

- 6.** The Petitioners have further stated that complaints were raised from time to time by the Petitioners and other residents regarding maintenance and upkeep of the building, which were denied by Respondent No. 4. Thereafter, by a letter dated 06.08.2025, the Petitioners called upon the Respondents to execute the conveyance deed. Respondent No. 4, by its reply dated 19.08.2025, denied any liability to execute the conveyance deed and stated that such obligation, if any, vested upon Respondent No. 1.
- 7.** In view of the disputes and differences alleged to have arisen between the parties, the Petitioners invoked the arbitration clause contained in Clause 9.1 of the Agreement for Sale dated 30.03.2015 by issuing a notice dated 10.09.2025 under Section 21 of the Arbitration and Conciliation Act, 1996. By the said notice, the Petitioners proposed the name of Mr. Saptarshi Banerjee, Advocate, as the Sole Arbitrator for adjudication of the disputes between the parties.
- 8.** The arbitration clause contained in the Agreement provides that disputes and differences arising out of or relating to the said unit and/or the agreement shall be referred to arbitration of Mr. Pankaj Shroff, Advocate, of 7B, Kiran Sankar Roy Road, Calcutta – 700001, or such person as may

be nominated by him. The Petitioners, however, contended that Mr. Pankaj Shroff had acted on behalf of the Respondents and was therefore ineligible to act as an arbitrator in the disputes between the parties.

9. The said notice dated 10.09.2025 was received by the Respondents. Respondent No. 4 replied thereto by a letter dated 07.10.2025 reiterating the stand taken in its earlier communications. According to the Petitioners, since the disputes between the parties are arbitrable in nature and no consensus could be arrived at regarding appointment of an arbitrator, the present petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of an independent arbitrator.

**Submissions on Behalf of the Petitioners**

10. Learned Counsel appearing on behalf of the Petitioners submitted that the present petition satisfies all the requirements under Section 11(6) of the Arbitration and Conciliation Act, 1996. It was contended that there exists a valid and binding arbitration agreement between the parties contained in Clause 9.1 of the Agreement for Sale dated 30.03.2015. The disputes raised by the Petitioners arise directly out of and in connection with the said agreement and are therefore arbitrable in nature. Learned Counsel further submitted that the Petitioners duly invoked the arbitration agreement by issuance of a notice issued under Section 21 of the Act dated 10.09.2025 calling upon the Respondents to concur in the appointment of an arbitrator. Despite receipt of the said notice, the parties failed to arrive at any consensus regarding constitution of the Arbitral Tribunal. It was further submitted that the named arbitrator under the agreement, namely Mr. Pankaj Shroff, Advocate, having acted on behalf of Respondent No. 4,

is rendered ineligible to act as an arbitrator in view of the provisions of Section 12(5) of the Act. Accordingly, it was argued that this Court ought to exercise its jurisdiction under Section 11(6) of the Act and appoint an independent and impartial arbitrator for adjudication of the disputes between the parties.

**11.** Learned Counsel further submitted that the disputes raised in the present proceedings are not barred by limitation. It was contended that although the Agreement for Sale was executed on 30.03.2015 and possession of the flat was handed over upon payment of the entire sale consideration, the Respondents continued to assure the Petitioners that the conveyance deed would be executed and registered. It was submitted that the draft conveyance deed was also circulated by Respondent No. 4 and several meetings and exchanges took place between the parties regarding modification of certain clauses therein. According to the Petitioners, the cause of action continued subsisting as the Respondents never unequivocally refused to perform their obligations under the agreement until issuance of the reply dated 19.08.2025.

**12.** Learned Counsel submitted that the Petitioners had been continuously requesting Respondent No. 4 to execute the conveyance deed and the Respondents, from time to time, deferred the same on one ground or another. It was argued that only upon receipt of the communication dated 19.08.2025, whereby Respondent No. 4 expressly denied its liability to execute the conveyance deed, did a clear and unequivocal refusal arise, thereby giving rise to the disputes between the parties. In such circumstances, the invocation of arbitration by notice dated 10.09.2025 was within the prescribed period of limitation. In support of the said

contention, reliance was placed upon the decision of the Hon'ble Supreme Court in ***Ahmadsahab Abdul Mulla (2) v. Bibijan & Ors.*** reported as **(2009) 5 SCC 462**, wherein it was held that for a suit seeking specific performance of a contract, irrespective of whether a date for performance is fixed or not, limitation would commence from the date on which the plaintiff has notice that performance has been refused. It was thus contended that the disputes sought to be referred to arbitration cannot be held to be ex facie barred by limitation.

**Submissions on Behalf of Respondent No. 4**

- 13.** Learned Senior Counsel appearing on behalf of Respondent No. 4 opposed the present petition and submitted that the disputes sought to be referred to arbitration are ex facie barred by limitation and, therefore, no reference of the Arbitration and Conciliation Act, 1996. It was contended that the Agreement for Sale dated 30.03.2015 was executed between the Petitioners as purchasers, Respondent No. 1 as vendor, and Respondent No. 4 merely as the confirming party. Referring to Clause 2.3 of the first Agreement dated 24.04.2006, Learned Senior Counsel submitted that the conveyance deed was required to be executed simultaneously with delivery of possession of the flat and the agreement specifically provided that in the event the conveyance deed was not executed at the relevant point of time, the responsibility for the same would lie solely upon the purchasers. According to Respondent No. 4, the original owners, being Respondent Nos. 2 and 3, admittedly took possession of the flat in the year 2008 itself but failed to have the conveyance deed executed contemporaneously therewith. As such, the cause of action, if any, arose in the year 2008 and

the present claims raised after almost eighteen years are hopelessly barred by limitation under Article 54 of the Schedule to the Limitation Act, 1963.

- 14.** Learned Senior Counsel further submitted that in proceedings under Section 11(6) of the Act, the Court is empowered to examine whether the claims sought to be referred are ex facie time-barred. It was argued that where the claims are clearly and manifestly barred by limitation, the Court ought not to refer the disputes to arbitration. In support of the said contention, reliance was placed upon the judgment of the Hon'ble Supreme Court in **Arif Azim Co. Ltd. v. Aptech Ltd.** reported as **(2024) 5 SCC 313**, particularly paragraph 92 thereof, wherein it was observed that the referral court can refuse reference where the claims are demonstrably barred by limitation. Reliance was also placed upon paragraph 39 of the decision of the Hon'ble Supreme Court in **Visa International Ltd. v. Continental Resources (USA) Ltd.** reported as **(2009) 2 SCC 55**, to contend that the Court exercising jurisdiction under Section 11(6) is not denuded of the power to examine preliminary issues, including whether a live and subsisting dispute exists between the parties.
- 15.** It was accordingly submitted that the Petitioners, having failed to seek enforcement of the alleged right within the prescribed period of limitation reckoned from the date of possession and the alleged obligation to execute the conveyance deed, cannot now seek to revive a stale and dead claim by invoking the arbitration clause after an inordinate lapse of time. On the aforesaid grounds, Respondent No. 4 prayed for dismissal of the present petition.

- 16.** No separate arguments were addressed on behalf of Respondent No. 1 and Respondent Nos. 2 and 3, who are respectively the vendor and the erstwhile owners of the premises in question.

### **Legal Analysis**

- 17.** This Court has heard the learned Counsel for the parties, considered the pleadings and documents placed on record, and applied its mind to the judgments cited at the Bar.
- 18.** The primary objection raised by Respondent No. 4 is that the claims sought to be referred are ex facie barred by limitation and that this Court ought to refuse reference on that ground. This objection is founded upon the two pronged test specifically articulated in **Arif Azim** (supra), wherein the Hon'ble Supreme Court held that the referral court must satisfy itself both that the Section 11(6) petition is within limitation and that the underlying claims are not ex facie dead claims barred by limitation as on the date of commencement of arbitral proceedings, and that failure on either count would justify refusal of reference.
- 19.** This Court has carefully considered the said submission. The two-pronged test in **Arif Azim** (supra) upon which Respondent No. 4 places reliance no longer represents the correct position of law. The Hon'ble Supreme Court, in **SBI General Insurance Co. Ltd. v. Krish Spinning** reported as **[2024 SCC OnLine SC 1754]**, has expressly reconsidered and authoritatively clarified the second limb of the **Arif Azim** (supra) test in the light of the seven Judge Bench decision in **Re: Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act**, reported as **1899 [(2024) 6 SCC 1]**. Since Respondent No. 4 has specifically relied upon **Arif Azim** (supra) that have since been

clarified, it is necessary to set out the operative clarification of the Hon'ble Supreme Court in **Krish Spinning** (supra) in extenso:

*"132. Insofar as our observations on the second issue are concerned, we clarify that the same were made in light of the observations made by this Court in many of its previous decisions, more particularly in Vidya Drolia (supra) and NTPC v. SPML (supra). However, in the case at hand, as is evident from the discussion in the preceding parts of this judgment, we have had the benefit of reconsidering certain aspects of the two decisions referred to above in the light of the pertinent observations made by a seven-Judge Bench of this Court in In Re: Interplay (supra).*

*133. Thus, we clarify that while determining the issue of limitation in exercise of the powers under Section 11(6) of the Act, 1996, the referral court should limit its enquiry to examining whether Section 11(6) application has been filed within the period of limitation of three years or not. The date of commencement of limitation period for this purpose shall have to be construed as per the decision in Arif Azim (supra). As a natural corollary, it is further clarified that the referral courts, at the stage of deciding an application for appointment of arbitrator, must not conduct an intricate evidentiary enquiry into the question whether the claims raised by the applicant are time barred and should leave that question for determination by the arbitrator. Such an approach gives true meaning to the legislative intention underlying Section 11(6-A) of the Act, and also to the view taken in In Re: Interplay (supra).*

*134. The observations made by us in Arif Azim (supra) are accordingly clarified....."*

- 20.** The position of law as it stands today is therefore clear and admits of no ambiguity. The jurisdiction of the referral court under Section 11(6) is confined to satisfying itself of the prima facie existence of a valid arbitration agreement and to examining whether the Section 11(6) petition itself has been filed within the three year period prescribed under Article 137 of the Limitation Act, 1963, which period commences upon failure or refusal to comply with the Section 21 notice, as held in **Arif Azim** (supra). The second limb of the **Arif Azim** test requiring the referral court to examine whether the underlying claims are ex facie dead and time-barred stands expressly clarified and overruled by **Krish Spinning** (supra). That question falls exclusively within the domain of the Arbitral Tribunal and any

intricate evidentiary enquiry into limitation of the underlying claims at the Section 11(6) stage is now impermissible.

- 21.** This Court accordingly holds that the objection of Respondent No. 4 that the underlying claims are barred by limitation is not available to be urged at this stage and cannot constitute a ground to refuse reference. The question whether the claims of the Petitioners are time barred involves determination of disputed questions of fact including the nature and scope of the obligations under the agreement, the conduct of the parties over the years, the alleged continuing assurances, the circulation and negotiation of the draft conveyance deed, and the precise point at which an unequivocal refusal to perform was communicated. None of these questions can or ought to be resolved in summary proceedings under Section 11(6). The said question is accordingly left entirely open for decision by the learned Arbitrator in accordance with law.
- 22.** Turning to the requirements for exercise of jurisdiction under Section 11(6), this Court is satisfied on the following:
- 23.** First, there prima facie exists a valid and binding arbitration agreement between the parties contained in Clause 9.1 of the Agreement for Sale dated 30.03.2015, which covers all disputes and differences arising out of or in relation to the said unit and the agreement.
- 24.** Second, the named arbitrator under the agreement, Mr. Pankaj Shroff, Advocate, is alleged to have acted on behalf of the Respondents and is therefore prima facie rendered ineligible to act as arbitrator by operation of Section 12(5) of the Act read with the Seventh Schedule thereto. The appointment mechanism under the agreement having thus failed, this Court's jurisdiction under Section 11(6) stands squarely attracted.

- 25.** Third, a notice invoking arbitration was duly issued by the Petitioners under Section 21 of the Act on 10.09.2025, which was received and responded to by the Respondents, yet no consensus on appointment of an arbitrator could be reached.
- 26.** Fourth, the present petition has been filed within three years from the date on which the right to apply for appointment accrued, being the date of failure to comply with the Section 21 notice. The petition is therefore within limitation.
- 27.** All conditions precedent for exercise of jurisdiction under Section 11(6) stand satisfied. This Court accordingly proceeds to appoint an independent arbitrator for adjudication of the disputes between the parties.
- 28.** Accordingly, this Court appoints Sounak Bhattacharya, (Mob. No. 9830420018), as the Sole Arbitrator to adjudicate all disputes and differences between the parties arising out of and in relation to the Agreement for Sale dated 30.03.2015. The appointment shall be subject to compliance with the disclosure requirements under Section 12 of the Arbitration and Conciliation Act, 1996. The learned Arbitrator shall be entitled to fix remuneration in accordance with the Fourth Schedule to the Act.
- 29.** The learned Arbitrator shall be at liberty to consider and decide all objections raised by any party, including the question of limitation of individual claims and any question of maintainability, as preliminary issues, after affording full opportunity of hearing to all parties. All questions on merits are expressly left open. The arbitral proceedings shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

**30.** With the aforesaid directions, the present petition stands allowed

**(Gaurang Kanth, J.)**

SAKIL AMED (P.A)

