

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL Division
ORIGINAL SIDE

BEFORE :-

THE HON'BLE JUSTICE SHAMPA SARKAR

A.P (COM) No.- 359 of 2024
[Old case No. AP/542/2023]

Namita Bhattacharjee and Ors.

Vs.

ATK Manor Developers LLP and Anr.

A.P (COM) No.- 607 of 2024

Namita Bhattacharjee and Ors.

Vs.

ATK Manor Developers LLP and Anr.

For the Petitioners	:	Mr. Sakya Sen, Sr. Adv. Mr. Rohit Banerjee, Adv. Mr. Arindam Paul, Adv.
For the Respondent No.1	:	Mr. Abhrajit Mitra, Sr. Adv. Mr. Suddhasatva Banerjee, Adv. Ms. Rituparna Chatterjee, Adv. Mr. Shashwat Nayak, Adv. Ms. Khushboo Chowdhury, Adv.
For the Respondent No.2	:	Mr. Shounak Mukhopadhyay, Adv Mr. Sayantan Bose, Adv. Ms. Manisha Das, Adv.
Judgment Reserved on	:	23.12.2025
Judgment Delivered on	:	<u>10.02.2026</u>
Judgment Uploaded on	:	<u>10.02.2026</u>

Shampa Sarkar, J.

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1. This is application under Section 11(6) of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as the said Act). The petitioners seeks appointment of an arbitrator to adjudicate the dispute between the parties arising out of a development agreement dated September 14, 2018. The agreement had been entered into between the predecessor in interest of the petitioners late Biswanath Bhattacharjee and the respondent No. 1, for development and construction of building units at LR Dag No. 2708 pertaining to LR Khatian No. 1296 of Mouza- Ghuni, JL No. 23, under Jyangra Hatiara Gram Panchayat No. 2, District North 24, Parganas. Biswanath Bhattacharjee died on June 22, 2020. The petitioner No. 1 is the widow, the petitioner No. 2 is daughter and the petitioner No. 3 is the son of deceased Biswanath Bhattacharjee.

2. The case run by the petitioners in this application was that, upon the death of Biswanath Bhattacharjee, they came to learn that the respondent No. 2, the elder son of the deceased, had filed an application being PLA 128 of 2020, for grant of probate of a Will executed by the deceased on April 12, 2018. The petitioners had reason to believe that the Will was a product of fraud and undue influence practiced by the respondent No. 2 upon Biswanath Bhattacharjee, who was severely ill and unfit to execute the Will. That, Biswanath Bhattacharjee was also visually impaired and incapable of comprehending the purport and meaning of the document. He was unable to read and write on his own. Thus, the petitioners contested the probate proceeding. Upon receipt of an application being GA No. 4 of 2021, filed in the testamentary proceedings, the petitioners came to learn that the

deceased had executed the subject development agreement on September 14, 2018. On the basis thereof, the respondent No. 1 was permitted to develop and construct building units on the concerned premises. A power of attorney was also executed on September 25, 2018.

3. According to the petitioner, the respondent No. 2 had full control over the deceased and by taking advantage of the physical and mental incapacitation, Biswanath Bhattacharjee created the development agreement by practicing fraud, undue influence and misrepresentation, collusively with the respondent no. 1. The fraudulent nature of the development agreement was apparent on a plain reading of the said agreement. Under no circumstances could the owner agree to the allocation of only 20,000 sq. ft. of the total super built-up area, thereby allowing the developer to retain major part of the construction.

4. From the perusal of the sanction plan, the petitioners came to know that around 189 units/flats encompassing an area of 1,93,000 sq. ft. had been sanctioned and the value of the land and car parking spaces aggregated to more than Rs. 90 crores. Whereas, the ratio of the developed area between the allocation of the owner and the developer was 20:189, which was grossly disproportionate. No reasonable man with minimum business prudence would have agreed to such a ratio. Thus, the petitioners believed that the respondent No. 2 had fraudulently entered into the development agreement in collusion with the developer, by taking advantage of the fading health of the deceased. The respondent No. 2 filed an application under Section 9 of the said Act, before the Commercial Court at Rajarhat, impleading the developer as a party, alleging delay in handing over

the owner's allocation and praying for enforcement of the development agreement.

5. On July 19, 2021, the learned Court passed an order of injunction, restraining the developer from making any further construction in the property. Aggrieved by the aforementioned order, the developer preferred an appeal being FMAT No. 458 of 2021 before the High Court. The petitioners intervened in the matter. However, the respondent Nos. 1 and 2 came to a collusive agreement, with regard to the allocation of flats in the building before the Hon'ble Division Bench and the respondent No. 2 agreed to abide by the ratio of allocation mentioned in the development agreement. The appeal was accordingly disposed of. Thereafter, the petitioners filed an application for review of the said order, which was dismissed. The petitioners filed a Special Leave Petition which was disposed of, inter alia, in favour of the petitioners on February 1, 2023. Prior to the decision of the Hon'ble Apex Court, the respondent No. 1 issued a notice under Section 21 of the said Act upon the respondent No. 2 invoking the arbitration clause in the development agreement. The respondent No. 2 filed an application under Section 11 of the said Act and by an order dated September 9, 2022, a learned Senior Advocate was appointed as an arbitrator.

6. Mr. Sakya Sen, learned Advocate, appeared on behalf of the petitioners and submitted that this was a fit case for appointment of an arbitrator to adjudicate the dispute between the petitioners on the one hand, with the respondent Nos. 1 and 2. The petitioners were the legal heirs of late Biswanath Bhattacharjee. Their predecessor (since deceased) had executed the development agreement with the respondent No. 1. The arbitration

clause in the development agreement could be invoked by the heirs, under Section 40 of the said Act and thus, the application should be allowed.

7. The petitioners alleged that the respondents had started creating third party interest by executing instruments in respect of the residential units at the building complex. The conduct of the said respondents were unlawful and contrary to the interest of the estate of the deceased. The sale of the properties were effected without any permission from the probate court in spite of the fact that the probate proceedings were still pending. The petitioners, as the legal heirs of the deceased, were entitled to benefits arising out of the said agreement and entitled to 50% of the built up area, which in terms of money would be more than Rs 45 crores. An additional amount of Rs 86,62,500/-, being the value of the two brick-built structures which stood on the said premises as on September 14, 2018 were also payable to them. The petitioners relied on the observations of the Hon'ble Apex Court in the order dated February 1, 2023, allowing the petitioners to intervene in the arbitration proceeding which was already pending.

8. The petitioners had already invoked arbitration by issuing a notice dated October 30, 2022, which had been duly received through e-mail. In the said notice, the petitioners expressed the apprehension that the premises may be wasted or portions of the building complex may be wrongfully sold. The petitioners also raised an alternative claim of Rs 45 crores against the respondent No. 1. Thereafter, the petitioners filed an application on October 31, 2022, under Section 9 of the said Act, before the Commercial Court at Rajarhat, seeking interim relief. The said application was registered as Misc. Case (A.R.B.) No. 78 of 2022. The petitioners prayed

for an order restraining the respondents and their men and agents from making any further construction over the said premises mentioned in Schedule A and from alienating, wasting, selling or creating third-party rights or interests in respect of the premises mentioned in Schedule A. Further prayer was to restrain the respondents and their men and agents from accepting any bookings from the customers and from entering into agreements or mortgaging the properties or encumbering the same in any manner whatsoever. The developer filed an application challenging the maintainability of the application before the Commercial Court at Rajarhat.

9. The petitioners sought to intervene in the arbitration proceedings, as per the leave granted by the Hon'ble Apex Court for protection of their rights and filed an application under Section 16 of the said Act, challenging the jurisdiction of the arbitrator to proceed with the reference without adding the petitioners as parties. Although such application was filed on March 15, 2023, the petitioners were unable to impress upon the learned arbitrator, the urgency in impleading the petitioners. It was urged by Mr. Sen that the said application was pending for an indefinite period. The respondents contested the said application by filing their respective affidavits-in-opposition. The manner in which the proceedings were conducted would clearly indicate that the executor and the developer were in collusion and they were not interested to allow the petitioner's application to be heard and disposed of. It was alleged that the learned arbitrator was not proceeding with the application of the petitioners, in spite of the direction of the Hon'ble Apex Court.

10. The petitioners sought an independent reference by invoking the arbitration clause in the development agreement vide notice dated October 30, 2022, during the pendency of the application under Section 16 of the said Act, which had not been decided by the learned arbitrator. In the meeting held on July 4, 2023, the respondent No. 2 filed an application praying for termination of the mandate of the learned arbitrator on the ground that the statement of claim (SOC) had not been filed by the respondent No. 1, despite various opportunities. It was urged that, after the expiry of the time contemplated under the law, the arbitrator should not have allowed the respondent No. 1 to file the SOC. In the minutes dated 4th July, 2023, which had not been circulated, the learned arbitrator had recorded that the application for termination of mandate should be heard and disposed of first, as it was in the nature of a demurer. The learned arbitrator thus, fixed the hearing of the demurer application upon exchange of affidavits on August 10, 2023. Thereafter, the petitioners, filed this application with an averment that they undertook to withdraw the application under Section 16 which was already pending before the learned arbitrator. The petitioners prayed for reference of the disputes pending between the petitioners and the respondents for adjudication by another arbitrator, as the petitioners firmly believed that the proceeding between the respondent Nos. 1 and 2 were collusive.

11. The petitioners' cause of action as enumerated in the notice under Section 21 issued on October 30, 2022, were not in conflict with the pending arbitration proceeding and were distinct and separate from the disputes between the respondent No. 1 and the respondent No. 2. Therefore, the

question in controversy in the arbitration proceedings between the respondent Nos. 1 and 2 were not directly or substantially in issue with the claims of the petitioners against both the respondents. Under such circumstances, it was urged by Mr. Sen that, another arbitrator should be appointed on the basis of the development agreement executed between the deceased and the developer. The heirs of the deceased could always invoke the arbitration clause.

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12. The legal heirs and representatives of late Biswanath Bhattacharjee filed this application seeking termination of the mandate of the learned arbitrator who was appointed by the High Court, to arbitrate upon the dispute between the respondent Nos. 1 and 2. The petitioners further prayed for substitution of the arbitrator by a proper person upon recording termination of mandate. In the meantime, stay of the proceedings were prayed for. The facts pleaded in the said application were similar to those in the application for appointment of an another arbitrator. As the issues involved in both the applications were similar, the applications were heard together.

13. In order to avoid any repetition of the facts, the same are not discussed. The question to be determined in such a situation is whether the mandate of the learned arbitrator should be terminated and the disputes be referred to another arbitrator.

14. Mr. Sen, learned Senior Advocate appearing on behalf of the petitioners submitted that, the application for termination of the mandate had been filed, after the petitioners were impleaded in the arbitral

proceeding. The specific contention of Mr. Sen was that, this application would not be barred under Section 42 of the said Act, inasmuch as, the question of jurisdiction of the commercial court at Rajarhat to entertain applications arising out of the subject agreement had not been finally and conclusively decided in any proceeding. Although, the petitioners had filed an application under Section 9 of the said Act, before the learned Commercial Court at Rajarhat, the respondent No. 1 had raised an objection with regard to the maintainability of the said application on the ground of jurisdiction. Once such question of jurisdiction was raised before the learned Commercial Court at Rajarhat, the respondents could not turn around and pray for rejection of this application on the ground that the prayer for termination of mandate should have been filed before the learned Judge Commercial Court at Rajarhat, which was the Court under Section 2(1)(e) of the said Act.

15. It was contended that the learned Arbitrator had become *de jure* and also *de facto* unable to perform. He had failed to act without undue delay. In order to demonstrate how the learned Arbitrator had become *de jure* and *de facto* unable to perform his functions, various instances of inordinate delay and failure of the arbitrator in proceeding in a just and fair manner were cited.

16. It was stated that, on September 22, 2022, the first sitting of arbitration was held when directions were given for filing of the SOC within 1st December, 2022. Neither any SOC was filed within the said period nor any prayer was made for extension of time to file Statement of Claim.

17. On December 1, 2022, the petitioners filed an application under Section 16 before the Learned Arbitrator.

18. On January 20, 2023 the Learned Tribunal extended the time to file SOC within 20th February, 2023 and also issued directions to file affidavits in the said Section 16 application.

19. On February 20, 2023 the claimant/developer did not file Statement of Claim nor any extension was sought.

20. On March 15, 2023 the hearing of the application under Section 16 continued. No SOC was filed by the claimant.

21. On March 30, 2023 the time to complete the pleadings as required under Section 23(4) of the said Act expired. Under Section 25(a) of the Arbitration Act, a statutory mandate has been conferred upon the Arbitral Tribunal to terminate the Arbitration proceedings upon failure of the claimant to either communicate the SOC or show sufficient cause as to why the SOC could not be filed within time.

22. In the instant case, as revealed from the sequence of dates mentioned above, the claimant has admittedly failed to file SOC even as on 30th March, 2023 when the period of six (6) months from the date of the first meeting of the reference expired. By such date, extension was however granted twice by the Arbitrator for filing of the SOC, without any sufficient cause being shown by the claimant.

23. It was urged that, although the Hon'ble Apex Court held that, the petitioners, as heirs of the deceased Biswanath Bhattacharjee, would be at liberty to approach the learned Arbitrator already appointed at the instance of the developer and the learned Arbitrator should consider the objections,

claims and cross claims in accordance with law, without being influenced by the observations or findings of the High Court in the order impugned before the Apex Court, the learned arbitrator showed no inclination to dispose of the said application.

24. It was contended by Mr. Sen that, the minutes were not circulated on time. The application under Section 16 of the said Act was dragged for days together, although the Hon'ble Apex Court had mandated the learned Arbitrator to decide all claims, cross claims and objections of the parties including the heirs of the petitioners. The developer did not file the SOC within the time stipulated under Section 23(4) of the said Act. Section 25(a) of the said Act, mandated termination of the arbitral proceeding upon failure of the claimant to communicate the SOC. No prayer for extension upon showing sufficient cause had been made before the learned Arbitrator, but the arbitrator extended the time period for filing of the SOC, even after the period of six months as stipulated under Section 23(4) of the said Act had expired. Section 25 of the said Act did not vest any power upon the arbitrator to suo moto grant extension of time to file and or complete the pleadings, treating the expression 'shall' in Section 23(4) as directory. Moreover, if the expression 'shall' in Section 23(4) was to be read as directory, then the provisions of Section 29 A would be rendered otiose. Under Section 29 A, the period within which the arbitrator was required to conclude the proceedings was one year from completion of the pleadings under Section 23(4). The legislative intent behind incorporation of Section 29 A, would be frustrated in the event the starting point of Section 29 A was not determinable. Thus, reading 'shall' in Section 23(4) as a directory, would

frustrate the provision for mandatory conclusion of an arbitral proceeding in a time bound manner.

25. Distinguishing the decision of this court in ***Yashovardhan Sinha HUF and Anr. vs Satyatej Vyapaar Pvt. Ltd.*** reported in **2024 SCC Online Cal 5386**, it was submitted that the consequence of treating “shall” as “may” would result in rendering Section 29 A, which was brought in by the amendment, wholly nugatory. Moreover, in the instant case, sufficient cause was not shown by the claimant/developer as to why the SOC could not be filed within the time extended earlier by the learned arbitrator. Without sufficient cause being shown, the learned arbitrator had wrongly allowed the extension, thereby, asking the developer to file the Statement of Claim within the further extended period. It was submitted that Clause 22.2 of the development agreement vested the courts within the ordinary original civil jurisdiction of the Calcutta High Court and those having territorial jurisdiction over the subject matter of the property, with the jurisdiction to try and determine all disputes and proceedings arising out of the subject agreement. Therefore, according to Mr. Sen, the High Court at Calcutta had the jurisdiction to entertain the application seeking termination of the mandate..

26. It was submitted that, as on March 30, 2023, no application for extension of time at the instance of the developer to file the SOC was pending. The arbitral proceedings stood terminated on March 30, 2023 and the arbitrator became *de jure* unable to perform his functions thereafter. On the issue that the learned arbitrator had failed to act without undue delay, it was submitted that the hearing of the application under Section 16

commenced on January 20, 2023. The petitioners concluded their arguments on April 4, 2023. The respondent No. 2 commenced the arguments on May 1, 2022, and the respondent continued up to May 4, 2023. The developer commenced arguments on June 6, 2023 and thereafter repeated adjournments were prayed for. Ultimately on February 12, 2024, the order was passed. Thus, the application under Section 16 was kept pending for more than a year, without valid cause. The Statement of Defense was directed to be filed within March 26, 2024. Time was extended on June 11, 2024, 15 July, 2024 and on August 8, 2024 as a last chance. By an email dated September 3, 2024, further extensions were sought.

27. According to Mr. Sen, repeated adjournments and extensions which were allowed to the parties for submission of their proceedings, resulted in undue delay in the proceeding and Section 14 of the said Act empowered this court to record termination of the mandate of the learned arbitrator and appoint a substitute arbitrator, on the ground that the learned arbitrator had failed to act without undue delay. Section 14(2) permitted the petitioners to apply before the court for a decision on the termination of the mandate.

28. Mr. Abhrajit Mitra, learned Senior Advocate, appeared on behalf of the Respondent No. 1 and submitted that the petitioners filed an application under Section 9 of the said Act, before the learned Commercial Court at Rajarhat. According to the petitioners, the said court was the principal civil court having original jurisdiction to try all disputes arising out of the subject property. The property was situated within its territorial jurisdiction. A demurrer application was filed by the respondent No. 1 before the

Commercial Court at Rajarhat, on the ground that the petitioners did not have the locus standi to prefer the application under Section 9, as the development agreement was between late Biswanath Bhattacharjee and the respondent No.1. The Respondent No. 2 as the executor of the Will of late Biswanath Bhattacharjee, alone, had the locus to invoke arbitration. Only the executor could represent the estate of the deceased. The dispute was not a commercial dispute. As an arbitrator was already appointed on the basis of the arbitration agreement, the application was barred under Section 9(3) of the said Act.

29. No ground of demurrer regarding territorial jurisdiction was ever taken in the said application. In the written objection filed by the petitioners to the application filed by the Respondent No.1 in Misc. ARB Case No. 78 of 2022, the petitioners had specifically pleaded that the principal civil court of original jurisdiction was empowered to receive, try and determine the disputes between the parties, since the same arose out of disputes, relating to infrastructural contract. The petitioners were thus precluded from taking contrary stands before the two courts on the point of jurisdiction.

30. The Hon'ble Apex Court had disposed of the special leave petition, granting liberty to the petitioners to approach the arbitrator already appointed at the instance of the developer. The delay of the respondent No. 1 in filing the SOC was due to the pendency of the application under Section 16 of the said Act. The claimant waited to ascertain whether the petitioners would be included in the application or not. The SOC would be filed on such basis. The respondent No. 2 filed an application under Section 25(a) seeking termination of the mandate of the arbitrator on the ground of non-filing of

the SOC within the period of 6 months. It was decided by the learned Arbitrator that the application under Section 16 could not be heard unless the application for termination of mandate of the learned Arbitrator was decided first. The petitioners were present at the said sitting and during the hearing of the said application, the petitioners objected to the prayer seeking termination of the mandate of the learned Arbitrator. By an order dated September 19, 2023, passed in Misc. ARB Case No. 78 of 2022, the Commercial Court at Rajarhat had dismissed the application of the petitioners on the ground that, an arbitrator had already been appointed and the petitioners' remedy would be before the learned arbitrator.

31. The petitioners challenged the said order before the Division Bench of this Court in FMAT (A.R.B.) No. 48 of 2023. The order dated September 19, 2023 passed by the Learned Commercial Court at Rajarhat, was set aside. The parties were relegated to the said court for a hearing on merits. The Division Bench recorded that the application for interim protection should be heard. The Division Bench was pleased to direct the arbitrator to dispose of the application under Section 16 of the said Act within January 15, 2024. Such order was passed at the behest of the petitioners. The SOC was filed by the respondent No. 1 on December 20, 2023 and by order dated January 8, 2024, the learned arbitrator dismissed the application of the respondent No. 2 filed under section 25 (a) of the said Act. On February 7, 2024, the learned arbitrator allowed the application filed by the petitioners, thereby, adding them as parties. On March 5, 2024, the amended SOC was filed by the respondent No. 1, upon the petitioners being added in the proceeding.

32. Referring to various dates, it was contended by Mr. Mitra that, after being added as a party to the proceeding, the petitioners had sought for adjournments on various dates on account of pendency of the instant applications before this court. A date-wise chart was prepared by Mr. Mitra in support of such contention.

33. Mr. Mitra urged that, although this was not a case for termination of the mandate of the learned Arbitrator in view of the factual background as narrated herein above, the adjudication of this application should not be taken up by this court. The application ought to have been filed before the principal civil court or the court under Section 2(1)(e) of the said Act. The respondent No. 2 had filed an application against the respondent No. 1 before the Commercial Court at Rajarhat being Misc. ARB Case No. 39 of 2021. An ex-parte ad interim order of injunction was passed against the respondent No. 1, restraining the said respondent from alienating or creating any third party interest in respect of the property which formed the subject matter of the development agreement. The respondent No. 1 challenged the ex-parte ad interim order of injunction by filing FMAT 458 of 2021.

34. On August 12, 2021, the FMAT was disposed of along with the application under Section 9. The petitioners sought to intervene in the said proceeding and a review application was filed which was dismissed. The petitioners challenged the order dated August 12, 2021, passed by the Division Bench disposing of FMAT 458 of 2021, as also the application under Section 9 of the said Act before the Hon'ble Apex Court by filing a Special Leave Petition. The Hon'ble Apex Court granted the petitioners

liberty to approach the learned arbitrator. Thus, when one proceeding arising out of the self-same development agreement had already been instituted before the learned commercial court at Rajarhat by the respondent No. 2 and especially when the petitioners themselves had approached the said court by filing another application under section 9 of the said Act, considering the same to be the principal civil court having jurisdiction to decide the subject matter of the dispute arising out of the said arbitration agreement, the question of this court entertaining the present application for termination of mandate did not arise. The instant application was filed under Part 1 of the said Act and only the Commercial Court at Rajarhat would have jurisdiction to entertain the same. Section 42 of the said Act was a mandatory provision. No other court, excluding the Commercial Court at Rajarhat had jurisdiction to entertain any application made under Part 1 in relation to the agreement dated September 14, 2018. The petitioners had already submitted and admitted to the exclusive jurisdiction of the learned Commercial Court at Rajarhat, treating the said Court to be the principal civil court.

35. The petitioners were indulging in forum shopping by approaching different courts on the self-same issue. Clause 22.2 of the development agreement provided that two courts shall have jurisdiction to try, entertain and adjudicate disputes between the parties, that is, the High Court at Calcutta and the court within whose jurisdiction the subject matter of the property was located. The property was located within the territorial jurisdiction of the Commercial Court at Rajarhat. Thus, once an application was already filed before the Commercial Court at Rajarhat, all subsequent

applications were to be filed before the said Court irrespective of the jurisdiction clause. The statutory provision under Section 42 would override the contract between the parties. In any event, as two courts had jurisdiction to try the dispute arising out of the subject contract, the parties had chosen the jurisdiction of one court to espouse their grievances, that is, the Commercial Court at Rajarhat.

36. The claim of the petitioners indicated that the proceeding to be instituted would be in the nature of a suit for land. The property being situated within the jurisdiction of the commercial court at Rajarhat, the present proceedings should have been initiated before the said court. Irrespective of the demurrer application filed in Misc. ARB Case No. 78 of 2022, by the respondent No. 1, as the first application under Section 9 of the said Act was filed by the respondent No. 2 being Misc. ARB Case No. 39 of 2021 before the learned Commercial Court at Rajarat, all applications under Part 1 of the said Act had to be filed before the said court, by application of Section 42 of the said Act. The tipping point for consideration of the provisions of Section 42 was the arbitration agreement itself and not any other consideration. Further contention was that no undue delay could be attributable to the learned arbitrator. The arbitral proceedings commenced on February 29, 2022. The petitioners filed the application under Section 16 of the said Act on January 20, 2023. On July 4, 2023, the respondent No. 2 filed an application under Section 25(a) of the said Act seeking termination of the mandate. The respondents duly contested the application under Section 16 and affidavits were exchanged. The respondent No. 1 could not file the SOC, as the said respondent was not aware whether

or not the petitioners would be added as parties to the arbitral proceeding. The respondent No. 2 contested the application under Section 16 on the ground that the said respondent being the executor of the last Will of Biswanath Bhattacharjee was alone entitled to represent the estate before the arbitrator. During the hearing of the application under Section 16, the respondent No. 2 filed an application seeking termination of the mandate as the Statement of Claim was not filed within the stipulated period. The learned tribunal rightly proceeded to decide the question of termination of the mandate first. The application under Section 25(a) read with Section 32 was disposed of on January 8, 2024 upon completion of pleadings. The petitioners themselves objected to the prayer seeking termination of the mandate of the arbitrator. Such submissions were duly recorded in the 13th sitting held on August 30, 2023. Therefore, the petitioners showed all inclination to proceed before the learned arbitrator.

37. After the petitioners were added in the reference, by the learned arbitrator, vide order dated February 7, 2024, this application for termination of the mandate was filed before this court on May 17, 2024. The petitioners did not cooperate with the learned arbitrator. It was also urged that the provisions of Section 23(4) was not mandatory but directory. The issue of termination of the mandate of the learned arbitrator on the ground that, the respondent No. 1 had not filed the SOC within March 30, 2023, was already decided by the learned arbitrator. The arbitrator was not de jure incapacitated from performing. The arbitrator was not disqualified under Section 12(5) of the said Act.

38. Mr. Sayantan Bose, learned advocate for the respondent No. 2 submitted that the application was hit by the provisions of Section 42 of the said Act as the first application under Part 1 of the said Act was carried by the respondent No. 2 before the learned Commercial Court at Rajarhat. The jurisdiction of the learned Commercial Court at Rajarhat found approval of the Division Bench when the injunction application filed by the petitioners was sent back to the said court for re-adjudication.

39. Considered the submissions of the learned advocates for the respective parties.

40. The factual background has been narrated in great detail. The development agreement dated September 14, 2018 was executed between late Biswanath Bhattacharjee and the respondent No. 1. On April 12, 2018, Biswanath Bhattacharjee executed his last Will and testament and appointed the respondent No. 2 as the executor and beneficiary in respect of the subject property. On June 22, 2020, Biswanath Bhattacharjee died. After the death of Biswanath Bhattacharjee, certain disputes arose between the respondent No. 1 and No. 2 in relation to the development agreement dated September 14, 2018. The respondent No. 2 as an executor filed a probate application before the High Court being PLA 128 of 2020 and the same was being contested as a testamentary suit, which was registered as TS 8 of 2022. The respondent No. 1 is not a party to PLA 128 of 2020. On July 15, 2021, the respondent No. 2 invoked arbitration under Section 21 of the said Act, against the respondent No. 1. The respondent No. 2 filed an application under Section 9 of the Arbitration under the said Act before the learned Commercial Court at Rajarhat on July 19, 2021, being Misc. ARB

Case No. 39 of 2021. An ex parte ad interim order of injunction was passed against the respondent No. 1 which was challenged in an appeal before the High Court by the respondent No. 1. The appeal and the application for injunction were disposed of by the Division Bench of the High Court, by passing the following order:-

“Today what is before this Court on appeal is a Section 9 application arising out of a development agreement in which the deceased Biswanath Bhattacharjee was a party. As long as the Will is not declared invalid, in our opinion, the executor has the ostensible authority to represent the estate.

Furthermore, this determination, in our opinion, is not necessary, at this point of time.

We are concerned with proper execution of the development agreement, in the interest of the legatee or the heirs of the deceased on intestacy even if the will fails.

This is so because the developer, the appellant has to know at this point of time which part of the property is to be retained for the heirs of Biswanath, as the owners’ share and which part he is at liberty to dispose of as the developers’ share.

* * *

* * *

Subject to the above conditions the other part of the subject property may be disposed of by the appellant in terms of the development agreement.

As far as the above owners’ allocation is concerned, if any of the parties intend to exert any right with regard to the said Will, title to the property or its possession, they have to establish the same in a civil court.

Any observation or finding made by us in this order should not be taken to be touching those areas of dispute between the parties.

The impugned judgement and order is set aside and substituted by this order.

The application under section 9 of the Arbitration and Conciliation Act, 1996 before the learned Court below is also disposed of.

The parties are to take appropriate steps in that Court to record its disposal.

The appeal and the connected application (CAN 1 of 2021) are disposed of.”

41. The petitioners sought to intervene and file a review application which was dismissed. In the meantime, an application was filed by the respondent No. 1 for appointment of an arbitrator, for adjudication of the dispute

between the respondent No. 1 and No. 2 being AP No. 584 of 2022. The Chief Justice of the Calcutta High Court disposed of the said application by appointing a learned Advocate as the learned Arbitrator.

42. The petitioners challenged the order passed by the Division Bench disposing of the said appeal and the application for injunction before the Apex Court. The Special Leave Petition was disposed of by the Hon'ble Apex Court by passing the following order.

“We have heard learned counsel for the petitioner and learned Senior counsel for the respondent – Developer at a considerable length and carefully perused the material available on record.

In our considered opinion, no interference with the impugned Orders dated 06-04-2022 & 12-08-2021 passed by the High Court at Calcutta is required, except to clarify the following:-

(i) The objections filed by the petitioner (Sanjib Bhattacharya) in Probate Case No. TS/8/2021 shall be decided on merits and in accordance with law, without being influenced by any observation made in the impugned Orders of the High Court;

(ii) Similarly, other legal heirs of deceased Biswanath Bhattacharya shall be entitled to pursue their remedies as may be available or already availed by them under law.

(iii) The petitioner or other legal heirs of deceased Biswanath Bhattacharya shall also be at liberty to approach the Arbitrator already appointed at the instance of the developer. Learned Arbitrator shall consider the objections/claims/cross-claims in accordance with law and without being influenced by the observations/findings returned by the High Court in the impugned Orders.

The Special Leave Petitions are disposed of in the above- terms.

All pending applications also stand disposed of.”

43. The petitioners approached the learned arbitrator by filing an application under section 16 of the said Act, inter alia, contending that the arbitral proceeding should not continue until the petitioners were impleaded as parties. Although, the proceeding continued for some time on account of the application filed by the respondent No. 2 seeking termination of the mandate of the learned Arbitrator, ultimately by an order dated February 7, 2024, the petitioners were impleaded in the arbitral proceedings. The

application for appointment of an arbitrator was filed during the pendency of the application under Section 16 of the said Act, at a time when the petitioners contended that the application was kept pending for a long time and as such nothing precluded the petitioners from approaching this court for appointment of another arbitrator to adjudicate the dispute between the petitioners and the respondent No. 1 and 2.

44. It was contended that the application would not be a bar in view of the fact that the subject matter of dispute between the petitioners and the respondent No. 1 and 2 were totally different and operated in a separate distinct field. There would be no overlapping of the issues in the two proceedings. The pending reference before the learned arbitrator was restricted to those between the respondent No. 1 and 2, whereas, the petitioners as the legal heirs of the deceased had claims against both the respondent No. 1 and 2.

45. In my view, as the Hon'ble Apex Court refused to interfere with the order dated August 12, 2021 passed by the Division Bench in FMAT 458 of 2021, but granted liberty to the petitioners and all other legal heirs of the deceased to pursue their remedies as available in law by approaching the learned arbitrator already appointed at the instance of the developer to ventilate their grievances, the question of appointing another arbitrator does not arise. The Hon'ble Apex Court directed that the learned arbitrator so appointed shall consider the objections/claims/cross-claims in accordance with law and without being influenced by the observations of the High Court. Thus, the Hon'ble Apex Court widened the scope of reference by directing the learned arbitrator to consider all objections, claims and cross

claims of the petitioners. Under such circumstances, multiplicity of proceedings cannot be permitted. The petitioners were already impleaded as parties to the proceeding during the pendency of AP(COM) 359 of 2024 and as such the cause of action in the application does not survive.

46. AP COM 359 of 2024 is accordingly disposed of.

47. With regard to the application for termination of mandate, this court finds that the first application arising out of the dispute which is the subject matter of the arbitration was filed by the respondent No. 2 against the respondent No. 1 before the learned Commercial Court at Rajarhat Vide Misc. ARB Case No. 39 of 2021. An order of ad interim injunction was passed against the respondent No. 1 which was carried in appeal before to the High Court and the High Court by an order dated August 12, 2021, disposed of the appeal and the application for injunction. The petitioners also filed an application under Section 9 of the said Act before the learned Commercial Court at Rajarhat, inter alia, contending that the said court was the principal civil court of original jurisdiction. In the objection to the demurrer application, the petitioners contended as follows:-

“v) This principal Civil Court of Original jurisdiction is empowered to, receive, try and determine the disputes between the parties since, the same arises out of disputes relating to infrastructural contracts, amongst others, contending an arbitration agreement.”

48. Thus, it is abundantly clear that not only was the first application under Part 1 of the said Act filed before the learned commercial court at Rajarhat, the petitioners also admitted and submitted to the jurisdiction of the said Court and filed an application under Section 9 of the said Act. The petitioners' application was dismissed and the petitioners carried an appeal.

The ground for dismissal was that, as an arbitrator had already been appointed, all interim prayers should be made before the learned arbitrator. The appeal court set aside the order and remanded the parties to the Commercial Court at Rajarhat, upon noticing that the petitioners' application for being added as parties to the arbitration proceeding was still pending. The Division Bench also directed the learned arbitrator to dispose of the application under Section 16 of the said Act. Thus, the jurisdiction of the Commercial Court at Rajarhat has been noted and the application for injunction was remanded for a hearing on merits by the Division Bench. Thus, the petitioners cannot turn around and challenge the jurisdiction of the said Court to take up the application for termination of mandate.

49. The jurisdiction clause in the development agreement is quoted below, which gives jurisdiction to both courts, that is the High Court at Calcutta and the Commercial Court at Rajarhat to entertain disputes arising out of the said agreement. The parties already chose to approach the Commercial Court at Rajarhat as the principal Civil Court. The respondent no. 2 and the petitioner, filed their respective applications for interim protections under Section 9 of the said Act.

“Clause 22.2 JURISDICTION : Only the Courts within the Ordinary Original Civil Jurisdiction of the Calcutta High Court and those having territorial jurisdiction over the subject property shall have the jurisdiction to entertain try and determine all actions and proceedings between the parties hereto relating to or arising out of or under this Agreement or connected therewith including the arbitration as provided hereinabove.”

Section 42 of the said Act, provides as follows:-

“42. Jurisdiction.- Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part

has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.”

50. With regard to the contention of the petitioners that, erroneous orders were passed by the learned Arbitrator by granting extension of time to file the SOC, upon holding that the provision of Section 23(4) was directory and not mandatory, the petitioners had a remedy against such order before the appropriate forum. The application being AP(COM) 607 of 2024 is not maintainable before this court as the same is barred under Section 42 of the said Act.

51. Reliance is placed to the decision of ***Gammon Engineers and Contractors Pvt. Ltd vs State of West Bengal*** reported in **2023 SCC Online Cal 2326**, this Court held as follows:-

“**14.** The respondent has raised the issue of maintainability and challenged the jurisdiction of this court to entertain the instant application under Section 14, 15 read with Section 11 of the Act. Therefore, before alluding to other aspects of the dispute, it is imperative that I first decide upon the maintainability of the application.

15. Owing to a prior Section 9 application being filed before the learned District Judge at Jalpaiguri, the respondent contends that the instant application must be made before the same ‘court’, as per the mandate of Section 42 of the Act. The said Section is reproduced hereinbelow:—

‘42. Jurisdiction - Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.’

16. In *State of West Bengal v. Associated Contractors*, (2015) 1 SCC 32, the Supreme Court laid down the law vis-a-vis Section 9 and 42 of the Act. The relevant paragraph is delineated below:—

'12. Part I of the Arbitration Act, 1996, contemplates various applications being made with respect to arbitration agreements. For example, an application under Section 8 can be made before a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement. It is obvious that applications made under Section 8 need not be to courts, and for that reason alone, such applications would be outside the scope of Section 42. It was held in P. Anand Gajapathi Raju v. P.V.G. Raju [(2000) 4 SCC 539], SCC at pp. 542-43, para 8 that applications under Section 8 would be outside the ken of Section 42. We respectfully agree, but for the reason that such applications are made before "judicial authorities" and not "courts" as defined. Also, a party who applies under Section 8 does not apply as dominus litis, but has to go wherever the 'action' may have been filed. Thus, an application under Section 8 is parasitical in nature-it has to be filed only before the judicial authority before whom a proceeding is filed by someone else. Further, the "judicial authority" may or may not be a court. And a court before which an action may be brought may not be a Principal Civil Court of Original Jurisdiction or a High Court exercising original jurisdiction. This brings us then to the definition of "court" under Section 2(1)(e) of the Act.

16. Similar is the position with regard to applications made under Section 11 of the Arbitration Act. In Rodemadan India Ltd. v. International Trade Expo Centre Ltd. [(2006) 11 SCC 651], a Designated Judge of this Hon'ble Court following the seven-Judge Bench in SBP and Co. v. Patel Engg. Ltd. [(2005) 8 SCC 618], held that instead of the court, the power to appoint arbitrators contained in Section 11 is conferred on the Chief Justice or his delegate. In fact, the seven-Judge Bench held: (SBP and Co. case [(2005) 8 SCC 618], SCC pp. 644-45 & 648, paras 13 & 18)

It is obvious that Section 11 applications are not to be moved before the "court" as defined but before the Chief Justice either of the High Court or of the Supreme Court, as the case may be, or their delegates. This is despite the fact that the Chief Justice or his delegate have now to decide judicially and not administratively. Again, Section 42 would not apply to applications made before the Chief Justice or his delegate for the simple reason that the Chief Justice or his delegate is not "court" as defined by Section 2(1)(e). The said view was reiterated somewhat differently in Pandey & Co. Builders (P) Ltd. v. State of Bihar [(2007) 1 SCC 467], SCC at pp. 470 & 473, Paras 9 & 23-26.

18. In contrast with applications moved under Section 8 and 11 of the Act, applications moved under Section 9 are to the "court" as defined for the passing of interim orders before or during arbitral

proceedings or at any time after the making of the arbitral award but before its enforcement. In case an application is made, as has been made in the present case, before a particular court, Section 42 will apply to preclude the making of all subsequent applications under Part I to any court except the court to which an application has been made under Section 9 of the Act.

25. Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as “court” for the purpose of Part I of the Arbitration Act, 1996.

(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.’

17. The understanding of ‘court’ under Section 42 is indisputably in terms of Section 2(1)(e) of the Act. The application under Section 9 is also made to a ‘court’ as understood under Section 2(1)(e) of the Act. Once such an application to a ‘court’ as understood under Section 2(1)(e) of the Act is made, all further applications under Part I to a ‘court’ must be to the ‘court’ to which the prior application has been made. This is the mandate of Section 42 of the Act. For the purpose of convenience, Section 2(1)(e) is replicated below:—

*‘2. Definitions.-(1) In this Part, unless the context otherwise requires,-
[(e) “Court” means-*

(i) in the case of an arbitration other than international commercial arbitration, the principal civil court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal civil court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;]”

52. In the decision of ***Ravi Ranjan Developers Pvt. Ltd. vs Aditya Kumar Chatterjee*** reported in ***2022 SCC Online SC 568***, the Hon'ble Apex Court held as follows:-

“**31.** There could be no doubt, as argued by Mr. Sinha, that Section 42 of the A&C Act is mandatory. The Section has obviously been enacted to prevent the parties from being dragged into proceedings in different Courts, when more than one Court has jurisdiction. Where with respect to any arbitration agreement, any application under Part I of the A&C Act has been made in a Court, that Court alone would have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement, and the arbitral proceedings, would have to be made in that Court and in no other Court, unless, of course, the Court in which the first application had been instituted, inherently lacked jurisdiction to entertain that application. The Section which starts with a non obstante clause, is binding irrespective of any other law for the time being in force, and irrespective of any other provision in Part I of the A&C Act.”

53. The applications under consideration are accordingly disposed of.

Urgent Photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfilment of requisite formalities.

(Shampa Sarkar, J.)