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IN THE HIGH COURT AT CALCUTTA
ORIGINAL CIVIL JURISDICTION

BEFORE :-

THE HON'BLE JUSTICE SHAMPA SARKAR

A.P - 43 of 2024

Kamini Ferrous Limited

Vs.

Om Shiv Mangalam Builders
Private Limited & Anr.

For the Petitioner	:	Mr. Rudraman Bhattacharyya, Sr. Adv. Ms. Amrita Panja Moulick, Adv. Mr. Sourajit Dasgupta, Adv. Mr. Akash Munshi, Adv. Mr. Siddharth Banerjee, Adv. Ms. Shivangi Agarwal, Adv
For the Respondent	:	Mr. Aritra Basu, Adv. Mr. Ritoban Sarkar, Adv. Mr. Arka Banerjee, Adv. Ms. Surabita Biswas, Adv.
Hearing concluded on	:	04.08.2025
Judgment on	:	06.08.2025

Shampa Sarkar, J.

1. This is an application under section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act). The arbitration clause is contained in the agreement dated April 13, 2012. Clause 14 of the said agreement provides that any dispute or difference

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between the parties, relating to or arising out of the said agreement or any act, deed or proceeding done or to be done in pursuance of the said agreement, shall be referred to arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The arbitration shall be held at Kolkata and shall be in English language.

2. Mr. Rudraman Bhattacharya, learned senior Advocate for the petitioner submitted that the respondent no. 1 was a Company. The respondent no. 2 was the Director of the respondent no. 1. The respondents entered into a development agreement with the petitioner. A sum of Rs. 1 crore was the total consideration payable for two flats on the third floor of the proposed building along with two car parking spaces, as described in the Schedule of the said agreement. Although, the payment was made on April 13, 2012, no formal agreement was executed on the date of payment. The development agreement was executed on April 13, 2012. According to the agreement, the respondents were required to deliver the aforesaid flats and the parking spaces to the petitioner, within December 2013. The time for performance of the agreement was extended from time to time, as the respondents were unable to obtain the sanction plan from the concerned Municipal Corporation. The petitioner allegedly called upon the respondents on various occasions to either execute a deed of sale and deliver the possession of the two flats along with the car parking spaces or refund the entire consideration. It was contended that, the respondent no. 2 assured the petitioner that, the issue would be

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resolved. By a letter dated 15th December, 2020, the respondents informed the petitioner that they had decided to sell the land on which the project was to be constructed and return the due of Rs. 1 crore which had been advanced by the petitioner, along with Rs. 25 lakhs, as penalty. The petitioner was requested to provide the copy of the original agreement, so that the same could be handed over to the land buyer. Further request was made that, upon receipt of full payment of Rs. 1.25 crores, the petitioner should cancel the agreement dated April 13, 2012 and be a confirming party to the sale of the land.

3. In spite of offering to refund the money with penalty, the respondents neither prepared any deed of sale to third party buyers nor did the respondents refund the money as indicated in the aforementioned letter. Although, no progress had been made in the area of construction, the balance sheet of the respondent no. 1 continuously showed that the work was in progress. The Director of the petitioner received information from reliable sources and also came across copies of the balance sheet of the company of the respondent. Upon perusal of such documents, the petitioner became apprehensive that, the rightful claim of the petitioner would be denied and defeated in a clandestine manner. From the balance sheet for the financial year 2021 – 2022, it appeared that payment of Rs. 1.25 crores was made by the respondent no. 2 to the respondent no. 1, as advance against property. Part of the amount was used to refund the alleged advances to one of the Directors, namely, Mr. Rajesh Bhagat and

also for payment of liabilities towards Ritika Projects. Further, a sum of Rs. 1 crore was used to extend uncleared interest on loan, to some other entities. The auditors also expressed concern by stating that the payment of interest for loans and advances to corporate bodies, were prejudicial to the interest of the Company. The money paid by the petitioner was shown as costs towards work in progress, although no such work had been carried out. The respondents had not even shown whether any sanction had been obtained for the construction work from the appropriate authority. The petitioner claimed to be entitled to a sum of Rs. 1.25 crores along with interest at the rate of 24% per annum from December 2020. An application under section 9 of the Arbitration and Conciliation Act, 1996 was filed before the learned District Judge, South 24 Parganas, at Alipore, inter alia, for interim protection of the property in dispute. By an order dated July 13, 2023, the learned District Judge was pleased to direct the respondents not to encumber the property in question, to the extent of the value of Rs. 1.25 crores, till August 10, 2023. The said interim order had been extended from time to time and was still subsisting.

4. Mr. Bhattacharya contended that there were live disputes and differences between the parties, arising out of the agreement dated April 13, 2023. The agreement contained an arbitration clause. The disputes were covered by the arbitration clause. By a notice dated August 7, 2023, the arbitration clause was invoked. The notice was received by the

respondents on August 9, 2023. The respondents replied through their learned Advocate's letter dated August 28, 2023 and denied that there was a valid arbitration agreement between the parties. The respondents refused to accede to the request for reference of the dispute to arbitration. Thus, it was prayed before this court that the application should be allowed and disputes between the parties should be referred to the arbitration, of a sole arbitrator. Mr. Bhattacharya further submitted that as the respondents did not obtain the sanction for the building plan, time was no longer the essence of the contract. Moreover, in construction contracts time could never be the essence.

5. Learned Advocate relied upon the decision of ***Panchanan Dhara and Others vs. Monmatha Nath Maity (Dead) Through LRS. And Another*** reported in ***(2006) 5 SCC 340,*** in support of the contention that the extension of time for performance of the contract between the parties, could also be gathered from conduct of the parties and attending circumstances. Such extension may not always be explicit, but could be inferred from the way the parties behaved and conducted themselves.

6. Mr. Aritra Basu, learned Advocate for the respondents submitted that the application was misconceived and the prayer could not be allowed as the claim and the invocation of the arbitration clause, were hopelessly barred by limitation. Not only was the application belated, but the relief for specific performance of a unregistered agreement for sale of the flats with the car parking space dated April 13, 2012, was ex facie barred by

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limitation. According to Mr. Basu, the petitioner had suppressed and distorted material facts in order to mislead the Court. Neither was the building constructed nor were the concerned flats handed over by the respondent no. 2. Such failure amounted to refusal to perform the contract. The agreement provided that, the new building and the units were to be constructed and completed in accordance with the sanctioned plan and the developer should deliver the said units to the purchasers, within December 13, 2013. The petitioner invoked arbitration on August 7, 2023 i.e. after more than 10 years from the time prescribed for delivery of the constructed unit. By letters dated July 11, 2016 and August 4, 2016, the petitioner alleged failure on the part of the respondents to construct the building on the premise and deliver possession of the flats. Thus, the petitioner was well aware of the refusal on the part of the respondents in fulfilling their obligation under the contract. By letters dated July 11, 2016 and August, 9, 2017 issued by the learned Advocate for the petitioner, specific performance of the agreement was demanded. The learned Advocate for the petitioner asked for refund of the amount of Rs. 1 crore along with the interest at the rate of 33% per annum. The petitioner issued a demand notice under section 8 of the Insolvency and Bankruptcy Code, 2016 (in short 'IBC') on January 30, 2018 alleging that there had been default in payment of the dues of the petitioner with effect from January 1, 2014. According to the petitioner, the debt became due to the petitioner on January 1, 2014. The money claim of Rs. 1.25

crores along with interest was thus ex facie time barred and 'dead wood', as three years had expired from the date when the money became payable. Between July, 2016 and November 2020, no steps were taken by the petitioner. Even though it was alleged that, there had been breach on the part of the respondents to either construct and deliver the flats and / or refund the amount advanced by the petitioner, the letter dated December 15, 2020, was issued by the respondents, beyond the period of three years from the date when the debt became due and/or when specific performance of the agreement was refused. Thus, the period of limitation would not be enlarged on the basis of the letter dated December 15, 2020. The acknowledgement of the debt was beyond a period of three years and the advantage of section 18 of the Limitation Act would not be available to the petitioner. A demand notice was issued on July 23, 2021, by the petitioner. After issuance of the demand notice, the petitioner also moved the Calcutta District Consumer Disputes Redressal Commission for the following reliefs :-

> "*a) To direct the Opposite Parties – Developer- Owner to execute and register a Deed of Conveyance pertaining to the Second Schedule flats and car parking spaces, in favour of the complainant;*
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> *b) To direct the Opposite Party –Owner-Developer to hand over the Second Schedule flat and car parking space to the complainant;*
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> *c) To pass necessary order against the Opposite Party-Owner-Developer to pay compensation of Rs. 20,00,000/- to the Complainant for harassment, loss and mental agony for the period of eight year and Rs. 10,00,000/- for unfair trade practice;*
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> *d) Cost of Rs. 5,00,000/- for proceeding;*
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> *e) To pass an order of injunction till the disposal of the suit restraining the defendants jointly and/or severally and/or each of them and/or their associates not to alienate and not to transfers and*

not to sell the landed property or portion thereof to any third party or parties in any manner;

f) And pass such order or orders as Your Lordship may deem fit and proper."

7. In paragraph 8 of the said application, the petitioner specifically contended that the respondents were required to complete the process of execution of the deed of sale by delivering the units agreed to be sold, within December, 2013. The date of alleged breach, according to the petitioner, was January, 2014. Article 54 of the Limitation Act provided that a suit for specific performance of a contract should be filed within three years from refusal to perform. Here, the petitioner's case was that the breach occurred on and from January 4, 2014. As per the petitioner's own admission, the cause of action arose in January 14, 2014. The period of limitation started to run from January 2014 and expired in December 2017. The application under section 7 of the IBC was withdrawn from the National Company Law Tribunal, Calcutta Bench on May 12, 2022. The series of events and the averments made by the petitioner in different proceedings before different forum, would clearly indicate that the petitioner's case was that, the cause of action arose on and from January, 2014. Only because the petitioner was successful in obtaining an ex parte interim order against the respondents in the application under section 9 of the said Act, the same would not be an adequate reason for this Court to refer an ex facie time barred dispute to arbitration. The definition of default under IBC, 2016 was non-payment

of debt when whole or any part or instalment of the amount of the debt had become due and payable and was not repaid by the debtor or the corporate debtor, as the case may be. The petitioner disclosed a ledger in Form 3 showing that it was entitled to an aggregate sum of Rs. 3,24,51,916/- along with interest calculated at 33% per annum. In such ledger, the petitioner levied interest on and from January 1, 2024, as the default and/or breach of the respondents occurred from January 1, 2024. The petitioner had mentioned the aforesaid date as the date of default.

8. On the issue of the claim being ex facie barred, reference was made to the decision of ***Aslam Ismail Khan Deshmukh vs. Asap Fluids Private Limited and Another;*** reported in ***(2025) 1 SCC 502***. It was contented that, the Hon'ble Apex Court took judicial notice of the fact that some parties might take undue advantage of the limited scope of judicial interference by a referral court and force other parties to the agreement to participate in a time consuming and costly arbitration process. Such instance generally included either ex facie time barred claims or claims which had been discharged through accord and satisfaction. Thus, despite the limited scope of interference by a referral court, an ex facie inadmissible claim should not be referred to arbitration. Referring to ***Arif Azim Company Limited vs. Aptech Limited*** reported in ***(2024) 5 SCC 313***, Mr. Basu submitted that, although, limitation was an admissibility issue, yet it was the duty of the referral court to, prima facie, examine

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and reject non-arbitrable or dead claims, so as to protect the other party from being drawn into a protracted and expensive process. Reference was further made to the decision of ***Reliance Asset Reconstruction Company Limited vs. Hotel Poonja International,*** reported in ***(2021) 7 SCC 352,*** in support of the contention that a right to sue accrued when a default occurred and if the default had occurred three years prior to the filing of an application under section 7 of the IBC, the application would be barred under Article 137 of the Limitation Act. Similarly, the acknowledgement of liability in writing, within the prescribed period of limitation to file a suit and / or application, would lead to computation of limitation afresh, i.e., from the time when the acknowledgement was so signed. In this case, the respondents had not signed any acknowledgement in writing after 2014. The acknowledgement was made in 2020, which was way beyond the period of limitation. Under such circumstances, the application should be dismissed as the claim had become barred by limitation.

9. Having heard the learned advocates for the respective parties, this Court finds that the dispute involved, is covered by the clause 14 of the agreement. Clause 14 is quoted below :-

> "*14. Any disputes and differences by and between the parties hereto relating to or arising out of this agreement or any act deed or thing done or to be done in pursuance hereof shall be referred to arbitration in accordance with provisions of the Arbitration and Conciliation Act, 1996, as modified from time to time. The Arbitration shall be held at Kolkata and shall be in English, Language."*

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10. The above clause is a binding arbitration agreement. The disputes arose due to failure on the part of the respondents to construct and handover possession of the flats and car parking spaces which were agreed to be sold to the petitioner under the agreement dated April 13, 2012. Thereafter, the respondents undertook to refund the money advanced by the petitioner upon sale of the land upon acknowledging that the contract could not be performed. The description of the unit proposed to be sold is quoted below :-

> *"ALL THAT two flats, (the aggregate super built-up area whereof shall not be less than 3000 square feet) on the third floor of the proposed building at the said premises No. 9A Gobindo Addy Road, Kolkata fully described in the FIRST SCHEDULE hereinabove written Together with two covered car parking spaces on the ground floor of the new building at the said premises TOGETHER WITH proportionate undivided share in the land comprised in the said premises attributable to the said Units and proportionate undivided share in the Common Areas and Installations in and for the building and the said premises attributable to the said Units."*

11. Clause 13 of the agreement provides for refund, and is quoted below :-

> *"In case the Developer fails to deliver the possession of the said Units within the period stipulated above and in the manner hereunder then the Purchaser shall be at liberty to rescind the contract placed hereunder and in such event, the Developer shall forthwith refund the entire consideration made by the Purchasers hereto with Interest thereon @ 33% per annum until the refund is made in full or in the alternative to sue the Developer for specific performance of the contract and/or damages."*

12. Although, clauses 3 and 4 provide that the construction was to be completed by the developer in accordance with the sanctioned building

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plan and the developer should hand over the possession latest by December, 2013, it appears that in 2020, the respondents had admitted their inability to make the construction as per the agreement and promised to refund Rs. 1.25 crores, being the consideration money and penalty respectively. The petitioner was asked to cancel the agreement upon receipt of the said amount and be a confirming party for sale of the land. Thus, if Mr. Basu's contention that the claim is ex facie time barred is accepted, in that event, the petitioner will be deprived from proving its claim by adducing evidence in support of the contention that, in due course, the parties had negotiated further, which resulted in the issuance of the letter dated December, 2020 and that even though the petitioner had initiated proceedings before the NCLT, Kolkata and the Consumer Forum, the parties continued to negotiate with each other and ultimately the time for performance had been extended. As already decided by the Hon'ble Apex Court, extension of time to perform a contract can also be inferred from attending circumstances and conduct of the parties. The letter dated December 15, 2020, prima facie, gives rise to a presumption that there must have been some kind of an assurance from the respondents or an acquiescence from the petitioner to allow the respondents more time to complete the work within further extended time. The respondents regretted for not being able to fulfill their obligations under the contract due to various unforeseen circumstances. The respondents decided to sell the land and return 1.25 crores to the

petitioner. The petitioner was requested to cancel the agreement after receipt of the money, and be a confirming party for the sale of land. The very fact that the respondents requested the petitioner to cancel the agreement upon receipt of the money, indicates that the agreement was alive. At least, the parties considered the same to be alive. Moreover, the petitioner submits that specific performance of the contract can be claimed from accrual of the cause of action, i.e., the letter dated December 15, 2020, as the time for performance had been extended and the first refusal came with the said letter. Further, the amount as promised under the letter dated December 15, 2020, along with interest, had not been paid. This may also give rise to a fresh cause of action. Whether the petitioner shall be entitled to specific performance or refund of the money as promised in the letter dated December 15, 2020, are matters to be decided by the learned Arbitrator. It has been often held that in case of construction contracts, time is never of the essence. Even if the petitioner's cause of action for specific performance of the contract was barred, the issue still remains as to whether the petitioner's claim for refund of 1 crores towards the consideration money and 25 lakhs as penalty, as promised by the respondents in the letter dated December 15, 2020, can give rise to a fresh claim and a fresh cause of action. As the referral court, this Court prima facie, finds that the dispute does not appear to be ex facie 'dead wood'. The petitioner ought to be given a chance to prove that the parties agreed or understood that the

performance should be extended and the parties had behaved accordingly, on such understanding. The issuance of the letter dated December 15, 2020, gives rise to a, prima facie, presumption that an attempt was made to resolve the dispute by extending the time for performance of the agreement. The decision in ***M/s N C Construction vs. Union of India and Ors., AP-COM/ 120/ 2025,*** which has been cited by Mr. Basu, was rendered on a different footing. The claim was manifestly 'dead wood'. The conduct of the petitioner in the said case and the documents before the court, convinced the court that the claim was ex facie time barred. The right to sue accrued in 2010 when the bills were not paid. There was nothing on record to show that the respondents had acknowledged even a part of the claim. The first demand letter was sent six years after the bills were submitted. Under such circumstances, the court held that the claim was "dead wood". In the present case, the dispute continued from 2016 and the petitioner approached different fora for rederssal. The proceedings before the NCLT was withdrawn. According to the petitioner, the parties mutually extended the time and it was only on December 15, 2020, when the first refusal came from the respondents' side, the cause of action arose. There are no letters of refusal on any earlier occasion.

13. At this stage, only because the petitioner had mentioned the date of default in the notice under section 8 of the IBC as January 1, 2014, this application cannot be dismissed on that ground alone. Cause of action is

a bundle of facts. In the decision of ***Arif Azim (Supra)***, the Hon'ble Apex Court held that while considering the issue of limitation in relation to a petition under section 11(6) of the 1996 Act, 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 was barred by limitation and secondly, whether the claims sought to be arbitrated were ex facie dead claims. This court, at this stage, cannot reject the application and the learned Arbitrator will be the appropriate forum to decide the issue of limitation and also whether the cause of action in this case accrued on and from December 15, 2020 or not. In ***Aslam Khan Deshmukh (Supra)***, the Apex Court held that in order to balance the limited scope of judicial interference under section 11(6) of the said Act and the interest of the parties who might be constrained to participate in the arbitration proceedings, the Arbitral Tribunal may direct that costs of the arbitration shall be borne by the party found by Tribunal to have abused the process of law and caused unnecessary harassment to the other party in the arbitration. Here, the existence of the arbitration clause is not in dispute. The fact that there is a dispute between the parties since long, is available. Under such circumstances, when the learned arbitrator has the authority to decide on the arbitrability and admissibility of the dispute, including whether the claim is time barred or not, even as a preliminary issue, it will not be just and proper for this court to reject the

application without allowing the petitioner an opportunity to adduce evidence in support of the claims.

14. Relevant portions of the decision in ***Aslam Khan Deshmukh (Supra),*** are quoted below:-

> "**43.** Therefore, while determining the issue of limitation in the exercise of powers under Section 11(6) of the 1996 Act, the referral Court must only conduct a limited enquiry for the purpose of examining whether the Section 11(6) application has been filed within the limitation period of three years or not. At this stage, it would not be proper for the referral Court to indulge in an intricate evidentiary enquiry into the question of whether the claims raised by the petitioner are time-barred. Such a determination must be left to the decision of the arbitrator.
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> **44.** After all, in a scenario where the referral Court is able to discern the frivolity in the litigation on the basis of bare minimum pleadings, it would be incorrect to assume or doubt that the Arbitral Tribunal would not be able to arrive at the same inference, especially when they are equipped with the power to undertake an extensive examination of the pleadings and evidence adduced before them.
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> **45.** As observed by us in Krish Spg. [SBI General Insurance Co. Ltd. v. Krish Spg., (2024) 12 SCC 1 : 2024 SCC OnLine SC 1754] , the power of the referral Court under Section 11 must essentially be seen in light of the fact that the parties do not have the right of appeal against any order passed by the referral Court under Section 11, be it for either appointing or refusing to appoint an arbitrator. Therefore, if the referral Court delves into the domain of the Arbitral Tribunal at the Section 11 stage and rejects the application of the claimant, we run a serious risk of leaving the claimant remediless for the adjudication of their claims.
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> **46.** Moreover, the courts are vested with the power of subsequent review in which the award passed by the arbitrator may be subjected to challenge by any party to the arbitration. Therefore, the courts may take a second look at the adjudication done by the Arbitral Tribunal at a later stage, if considered necessary and appropriate in the circumstances.
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> **47.** In view of the above discussion, we must restrict ourselves to examining whether the Section 11 petitions made before us are within limitation. The petitioner herein issued a notice invoking

> arbitration on 23-1-2017 and the same was delivered to both the respondents on 24-1-2017. However, the respondents failed to reply to the said notice within a period of 30 days i.e. within 23-2-2017. Therefore, the period of limitation of three years, for the purposes of a Section 11(6) petition, would begin to run from 23-2-2017 i.e. the date of failure or refusal by the other party to comply with the requirements mentioned in the notice invoking arbitration. The present petitions under Section 11(6) were filed on 9-4-2019. Even including the period during which the parties proceeded before the Bombay High Court which ultimately held that the applications before it were not maintainable i.e. 3-3-2017 to 22-2-2019, these petitions are well within the bounds of limitation."

15. Under such circumstances, the application is allowed. The respondents can also raise the issue of limitation as a preliminary issue before the learned arbitrator.

16. Mr. Suddhasatva Banerjee, learned Advocate Bar Library Club, is appointed as the sole arbitrator to arbitrate upon the disputes between the parties.

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

(**Shampa Sarkar, J.**)