IN THE HIGH COURT AT CALCUTTA
ORIGINAL SIDE

RESERVED ON: 01.09.2026
DELIVERED ON: 15.10.2026

PRESENT:

THE HON'BLE MR. JUSTICE GAURANG KANTH

AP 406 OF 2021

LEISURE COUNTRY CLUB AND RESORTS PRIVATE LIMITED
VS
ASIM KUMAR RAY AND ANR

Appearance: -

Mr. Mrinal Kanti Mukherjee, Adv.
Mr. Madhusudan Mukhopadhyay, Adv.
..... for the Petitioner

Mr. Indradeep Pal, Adv.
Mr. Sougata Pal, Adv.
Sk. Mustafi Rahaman, Adv.
..... for Respondents

JUDGMENT

Gaurang Kanth, J. :-

1. The petitioner, has filed the present application under Section 11(6) of the Arbitration and Conciliation Act, 1996, seeking appointment of a sole arbitrator to adjudicate the disputes arising out of an Agreement for Sale dated 23.07.2014, entered into between the petitioner and the respondent nos. 1 and 2 in respect of a plot of land forming part of a project known as "Mega City Plaza's Project Panchojannya".

2. The facts leading to the present case are as follows:

3. Under the Agreement for Sale dated 23.07.2014, the petitioner agreed to sell Plot No. B-42, measuring approximately 5 cottahs 5 chittacks 15 sq. ft., situated at Mouza Dharsa Moktarpur, District North 24 Parganas, to the respondent nos. 1 and 2 for a consideration of Rs. 42,50,000/-. A sum of Rs. 23,00,000/- was paid at the time of execution of the agreement, and the

balance consideration was payable in monthly instalments. The agreement contained a clause providing for refund of the deposited amount, subject to deduction of 40% towards service charges, and an arbitration clause providing for reference of disputes to arbitration, with the petitioner having the right to appoint the arbitrator.

4. Subsequently, disputes arose between the parties regarding the location of the agreed plot and its alleged inclusion within a Government declared planning area. The parties thereafter agreed to substitute the original plot with a plot situated at Mouza Jagadishpur, under R.S. and L.R. Dag No. 1106, measuring approximately 6 cottahs 6 chittacks 30 sq. ft., and the consideration was revised to Rs. 43,31,250/-. The petitioner claims that the substitution was made at the request of the respondents, whereas the respondents contend that the petitioner was unable to transfer the original plot and proposed the alternative plot.

5. According to the petitioner, the respondents paid the entire revised consideration of Rs. 43,31,250/- in instalments between July 2014 and November, 2017. In or about November 2018, after payment of the registration charges, the respondents declined to proceed with the transaction on the ground that the substituted plot was also situated within a Government declared planning area and sought a refund of the amount paid. The petitioner contends that it agreed to refund the amount in terms of the agreement. The respondents, however, allege that the petitioner informed them that its title to the substituted plot was doubtful and that it was unable to register the plot or deliver possession. They further contend that, by an email dated 09.11.2018, the petitioner unilaterally cancelled the agreement and offered to refund the entire amount in instalments.

6. The petitioner states that it refunded a sum of Rs. 19,90,250/- to the respondents between 09.11.2018 and 08.06.2020.

7. The respondents, in January 2020, initiated criminal proceedings by filing a complaint under Section 156(3) of the Code of Criminal Procedure, 1973, before the learned Chief Judicial Magistrate, Barasat, alleging offences under Sections 418, 420, 467, 468 and 120B of the Indian Penal Code. Pursuant thereto, Rajarhat Police Station Case No. 47 of 2020 dated 06.02.2020, was registered. The complaint, *inter alia*, alleged failure to register and hand over the plot, non-refund of the balance amount and that the land proposed to be transferred belonged to a third party. The petitioner disputes the allegations and contends that the criminal proceedings arose out of a civil dispute between the parties.

8. The accused directors thereafter approached this Court seeking anticipatory bail. By orders dated 18.08.2020 and 15.09.2020, interim protection was initially granted subject to deposit of Rs. 5,00,000/-, and anticipatory bail was subsequently granted upon compliance with the stipulated conditions.

9. By a letter dated 05.10.2020, the petitioner asserted that, upon deduction of 40% of the total consideration in terms of the agreement, the respondents were entitled to a refund of Rs. 25,98,750/-. After adjusting the sum of Rs. 19,90,250/- already refunded and the further sum of Rs. 5,00,000/- deposited in connection with the anticipatory bail proceedings, the petitioner claimed that a balance sum of Rs. 1,08,500/- remained payable. By the same letter, the petitioner invoked the arbitration clause and nominated Mr. Anjan Chakraborty, Advocate, as the sole arbitrator, calling upon the respondents to convey their consent to the appointment.

10. The respondents did not consent to the proposed appointment. In their reply through their advocate, they denied having sought cancellation of the agreement and disputed the applicability of the 40% deduction, contending that the agreement had been cancelled unilaterally by the petitioner, which had offered to refund the entire amount. The petitioner maintains that, in view of the failure of the parties to agree upon the appointment of an arbitrator, recourse to Section 11(6) of the Arbitration and Conciliation Act, 1996, has become necessary.

11. In the above circumstances, the petitioner has approached this Court seeking appointment of a sole arbitrator to adjudicate the disputes arising out of the Agreement for Sale dated 23.07.2014, together with consequential reliefs.

12. It is pertinent to mention here that during the pendency of the present proceedings, the Respondent instituted C.C. No. 245 of 2022 before the District Consumer Disputes Redressal Commission, North 24 Parganas, Barasat. By its final ex-pate order dated 22.04.2025, the Commission found deficiency in service and unfair trade practice and directed the petitioner to refund the balance sum of Rs. 18,41,000/- with interest at the rate of 9% per annum, besides payment of Rs. 50,000/- as compensation and Rs. 5,000/- towards costs. The petitioner's application for review was rejected by a reasoned order dated 15.09.2025. The respondents' execution application, being DC 303/EA/30/2025, is pending before the Commission.

Submissions on behalf of the Petitioner

13. Mr. Mrinal Kanti Mukherjee, learned Advocate appearing for the petitioner, submits that the parties entered into an Agreement for Sale dated 23.07.2014, in respect of Plot No. B-42 at Mouza Dharsa Moktarpur, for a consideration of Rs. 42,50,000/-. Subsequently, at the instance of the respondents, the plot

was substituted and the consideration was revised to Rs. 43,31,250/-, which was paid by the respondents in instalments up to November, 2017. Learned counsel submits that, prior to execution of the agreement, the respondents were shown the WBHIDCO notification dated 12.11.2012, and proceeded with the transaction after satisfying themselves that the land was not within the Government declared planning area. The petitioner incurred additional expenditure in arranging the substituted plot and paid a sum of Rs. 9,49,300/- towards brokerage. It is further submitted that, after paying the registration charges, the respondents declined to proceed with the transaction on the ground that the substituted plot also fell within the planning area and sought a refund of the consideration. The petitioner agreed to refund the amount in terms of Clause 7 of the agreement, which provides for deduction of 40% towards service charges. The petitioner has already refunded Rs. 19,90,250/- to the respondents, and a further sum of Rs. 5,00,000/- was deposited in connection with the anticipatory bail proceedings before this Court, aggregating to Rs. 24,90,250/-. Upon deduction of 40% from the total consideration of Rs. 43,31,250/-, the respondents are entitled to Rs. 25,98,750/-, leaving a balance of Rs. 1,08,500/- payable by the petitioner. The respondents, however, continue to claim the entire consideration amount. According to learned counsel, the dispute essentially concerns the circumstances in which the agreement was cancelled and the amount refundable under Clause 7 thereof. The controversy is, therefore, contractual in nature, and the pendency of the criminal proceedings does not, by itself, exclude the disputes from the purview of arbitration.

14. Learned counsel further submits that Clause 18 of the agreement expressly provides for reference of disputes and differences arising thereunder to

arbitration in the event of failure of mutual settlement. By a letter dated 05.10.2020, the petitioner invoked the arbitration clause and nominated Mr. Anjan Chakraborty, Advocate, as the sole arbitrator, seeking the respondents' consent. The respondents disputed the petitioner's claim, contending that the agreement had been cancelled by the petitioner, and declined to consent to the proposed appointment. Learned counsel submits that the alleged cancellation of the agreement does not extinguish the arbitration agreement and that the circumstances surrounding such cancellation, as well as the parties' respective claims arising therefrom, are matters for adjudication by the arbitral tribunal.

15. Learned counsel also contends that the respondents cannot defeat the petitioner's right to invoke the agreed arbitral procedure by relying upon the order dated 22.04.2025, passed by the District Consumer Disputes Redressal Commission, North 24 Parganas, Barasat, in C.C. No. 245 of 2022. It is submitted that the present application under Section 11 was instituted in 2021 and that the respondents entered appearance and sought time to file their affidavit-in-opposition, as recorded in the order dated 09.12.2021. Thereafter, on 04.08.2022, the respondents instituted the consumer complaint without disclosing the pendency of the present application and obtained an order directing refund of Rs. 18,41,000/- with interest. According to learned counsel, the said order was passed *ex parte* and without consideration of Clauses 7 and 18 of the agreement. Learned counsel submits that the respondents' decision to approach another forum in respect of the same dispute, while the present application was pending, cannot defeat the petitioner's right to seek adjudication in accordance with the agreed procedure. Reliance is placed on the order dated 19.08.2026 passed by this

Court, wherein it was recorded that the respondents had not pursued their right to file the affidavit-in-opposition since 2021. The allegation that the petitioner failed to prosecute the present application is, therefore, disputed.

16. Learned counsel lastly submits that the parties have failed to agree upon the appointment of an arbitrator despite invocation of the arbitration clause, and the requirements for recourse to Section 11(6) of the Arbitration and Conciliation Act, 1996, stand satisfied. It is contended that the disputes concerning the alleged cancellation of the agreement, the applicability of the 40% deduction under Clause 7, and the amount, if any, refundable to the respondents arise directly out of the agreement dated 23.07.2014 and are matters to be adjudicated by the arbitral tribunal. Learned counsel accordingly prays that this Court appoint an independent arbitrator to adjudicate the disputes and differences between the parties arising out of the said agreement.

Submissions on behalf of the Respondents

17. Per contra, Mr. Indradeep Pal, learned Advocate appearing for the respondents, submits that the respondents, entered into an Agreement for Sale dated 23.07.2014, for a consideration of Rs. 42,50,000/-. The petitioner represented that it had absolute right and possession over the land. Subsequently, the plot was substituted with another land and the consideration was revised to Rs. 43,31,250/-, which was paid in full by the respondents, the last instalment having been paid on 01.11.2017. On the petitioner's advice, the respondents also deposited Rs. 5,98,475/- towards stamp duty and registration charges. Learned counsel submits that, despite repeated requests, the petitioner neither executed the deed of conveyance nor delivered possession of the land. On the contrary, by emails dated 18.11.2017,

09.11.2018, and 10.12.2018 the petitioner acknowledged its inability to register or hand over the plot and agreed to refund the entire amount with simple interest in seven monthly instalments. Particular reliance is placed on the email dated 09.11.2018, wherein the petitioner allegedly accepted cancellation of the agreement and undertook to refund the deposited amount with simple savings bank interest, without reserving any right to deduct 40% towards service charges. According to learned counsel, the petitioner's subsequent reliance on Clause 7 of the agreement is an afterthought. It is further submitted that, after refunding only a part of the amount, the petitioner discontinued further payments, compelling the respondents to approach the learned Chief Judicial Magistrate, Barasat, under Section 156(3) of the Code of Criminal Procedure, 1973. Pursuant thereto, Rajarhat Police Station Case No. 47 of 2020 was registered, and a charge-sheet has since been filed under Sections 418, 420, 467, 468 and 120B of the Indian Penal Code. The criminal proceedings are pending trial. Learned counsel submits that the petitioner invoked the arbitration clause for the first time by its letter dated 5th October, 2020, after initiation of the criminal proceedings, and the respondents declined the proposed appointment, maintaining that the dispute arose out of fraud and deficiency in service and was amenable to the statutory consumer remedy.

18. Learned counsel further submits that the respondents, in exercise of their statutory rights as consumers, instituted C.C. No. 245 of 2022 before the District Consumer Disputes Redressal Commission, North 24 Parganas, Barasat. Despite due service, the petitioner and its directors did not appear before the Commission. By its final order dated 22.04.2025, the Commission found deficiency in service and unfair trade practice and directed the

petitioner to refund the balance sum of Rs. 18,41,000/- with interest at the rate of 9% per annum, besides payment of Rs. 50,000/- as compensation and Rs. 5,000/- towards costs. The petitioner's application for review was rejected by a reasoned order dated 15.09.2025, which, according to learned counsel, recorded the petitioner's failure to explain the delay. The respondents' execution application, being DC 303/EA/30/2025, is pending before the Commission. Learned counsel contends that the dispute has already been adjudicated by a competent statutory forum and that only execution of the order remains. The petitioner, if aggrieved by the decision of the Commission, ought to have pursued the statutory appellate remedy under the Consumer Protection Act and cannot seek to reopen the adjudicated dispute through the present application under Section 11 of the Arbitration and Conciliation Act, 1996. In support of such contention, learned counsel relies on ***Cicily Kallarackal v. Vehicle Factory,*** reported as ***(2012) 8 SCC 524***. It is further submitted that the existence of an arbitration clause does not oust the jurisdiction of the consumer fora. Reliance is placed on ***T.K.A. Padmanabhan v. Abhiyan Cooperative Group Housing Society Ltd.,*** reported as ***2026 SCC OnLine SC 1160***, following ***Emaar MGF Land Ltd. v. Aftab Singh,*** reported as ***(2019) 12 SCC 751***, for the proposition that the consumer remedy is statutory, additional to other remedies and available notwithstanding an arbitration agreement. Learned counsel also relies on ***Citicorp Finance (India) Ltd. v. Snehasis Nanda,*** reported as ***2025 SCC OnLine SC 594***, read with ***M. Hemalatha Devi v. B. Udayasri,*** reported as ***(2024) 4 SCC 255***, to contend that consumer disputes are assigned to public fora as a matter of public policy and that the choice to pursue arbitration or the consumer remedy rests with the consumer. According to learned counsel,

the respondents have consistently declined arbitration and elected to pursue the statutory consumer remedy, and the petitioner, as developer, cannot compel them to arbitrate. Reliance is also placed on ***Harcharan Dass Gupta v. Union of India***, reported as ***2025 SCC OnLine SC 1111***, in support of the submission that a private agreement cannot override a special statutory mechanism once the same has been invoked.

19. Learned counsel lastly submits that the petitioner has approached this Court without disclosing material facts and has failed to prosecute the present application for approximately five years after its institution. According to learned counsel, the petitioner sought to revive the application only after its review application was rejected by the District Commission, with the object of avoiding compliance with the final order dated 22.04.2025, and delaying payment of the amount directed to be refunded. It is contended that the petitioner, having received the entire consideration without executing the conveyance, thereafter discontinued the refunds promised by it and cannot now seek to reopen a dispute already adjudicated by the competent consumer forum. Learned counsel accordingly submits that no arbitrable dispute survives for reference and prays for dismissal of the application under Section 11 of the Arbitration and Conciliation Act, 1996.

Legal Analysis

20. This Court has heard learned counsel for the parties and has examined the pleadings, the documents on record and the judgments cited at the Bar.

21. A perusal of the record shows that the execution of the Agreement for Sale dated 23.07.2014, and the arbitration clause contained in Clause 18 thereof, are not in dispute. The Respondents have themselves annexed the agreement to their affidavit-in-opposition and rely on it. The question that therefore

arises for consideration is whether, in an application under Section 11 of the Arbitration and Conciliation Act, 1996, this Court can refuse to appoint an arbitrator on the ground that the Respondents, as consumers, have pursued their remedy before the District Consumer Disputes Redressal Commission and obtained a final order there.

22. Before addressing the question in issue, it is necessary to examine the scope of the referral court's jurisdiction under Section 11 of the Act.

23. Section 11(6A) of the Act, inserted by Act 3 of 2016 with effect from 23.10.2015, provides that the Supreme Court or the High Court, while considering an application under sub-section (4), (5) or (6), shall, notwithstanding any judgment, decree or order of any court, confine itself to the examination of the existence of an arbitration agreement. The provision gives effect to Section 16, under which the arbitral tribunal may rule on its own jurisdiction.

24. In ***Vidya Drolia v. Durga Trading Corporation,*** reported as ***(2021) 2 SCC 1***, a three-Judge Bench of the Hon'ble Supreme Court held that the referral court's examination under Sections 8 and 11 is a *prima facie* review. It also held that the court could, in exceptional cases, decline reference where the dispute was manifestly and *ex facie* non-arbitrable, so as to "cut off the deadwood".

25. Subsequently, a seven-Judge Constitution Bench of the Hon'ble Supreme Court, in ***In re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899,*** reported as ***(2024) 6 SCC 1***, held that the examination under Section 11(6A) is confined to the existence of an arbitration agreement, and that all other questions are to be left to the arbitral tribunal, in keeping with the principle of

minimal judicial interference. Applying that principle, a three-Judge Bench of the Hon'ble Supreme Court, in ***SBI General Insurance Co. Ltd. v. Krish Spinning,*** reported as ***2024 INSC 532***, held that the referral court's enquiry is limited to the *prima facie* existence of the arbitration agreement, and further held as follows:

(a) the referral court should examine whether the Section 11 application itself is within time, but whether the underlying claims are time-barred should ordinarily be left to the arbitrator;

(b) the observations in ***Vidya Drolia*** *(supra)* and ***NTPC Ltd. v. SPML Infra Ltd.,*** reported as ***(2023) 9 SCC 385***, permitting the referral court to weed out *ex facie* non-arbitrable and frivolous disputes, would not continue to apply after *Interplay*, since such tests require the referral court to examine contested facts and appreciate evidence; and

(c) a plea of accord and satisfaction is to be decided by the arbitral tribunal, not by the referral court.

26. The legal position after ***Interplay*** *(supra)* and ***Krish Spinning*** *(supra)* is, therefore, that the referral court must confine itself to examining whether an arbitration agreement exists, and whether the application under Section 11 has been filed within the period of limitation applicable to it. All other questions, including the arbitrability of the disputes, are ordinarily to be left to the arbitral tribunal under Section 16 of the Act.

27. Having noticed the limited scope of the examination under Section 11, this Court now proceeds to consider whether the Respondents' recourse to the consumer forum has any bearing on the appointment of an arbitrator.

28. In ***Emaar MGF Land Ltd*** *(supra)*, the Supreme Court held that the amended Section 8 did not oblige a consumer forum to refer a consumer complaint to arbitration. It held that the amendment cannot be given an expansive meaning so as to inundate the regime of special legislation where such disputes were held not to be arbitrable. At paragraph 63, it added:

> *"63. We may, however, hasten to add that in the event a person entitled to seek an additional special remedy provided under the statutes does not opt for the additional/special remedy and he is a party to an arbitration agreement, there is no inhibition in disputes being proceeded in arbitration. It is only the case where specific/special remedies are provided for and which are opted by an aggrieved person that judicial authority can refuse to relegate the parties to the arbitration."*

29. In *Hemalatha Devi (supra)*, the builder had filed a Section 11 application, and the buyer had then filed a consumer complaint. The High Court dismissed the Section 11 application, granting liberty to apply under Section 8 before the District Forum, and the Supreme Court upheld that order and held that:

a. consumer disputes are, by necessary implication, non-arbitrable, unless both parties willingly opt for arbitration;

b. the choice of forum belongs to the consumer, and not to the builder, and the question is one of election rather than of which party approached a court first and

c. the reasoning in *Emaar MGF Land Ltd (supra)* applies equally to Section 11, because Sections 8 and 11 are complementary.

30. In ***Citicorp*** *(supra),* decided on 20.03.2025, after ***Interplay*** *(supra)* and ***Krish Spinning*** *(supra)*, the Hon'ble Supreme Court allowed an appeal against an order of the National Consumer Disputes Redressal Commission on the ground that the complainant had no privity of contract with the appellant and was, therefore, not a "consumer". In doing so, the Hon'ble Supreme Court restated the principle of the consumer's election. Referring to ***Emaar MGF Land Ltd.*** *(supra)* and ***M. Hemalatha Devi*** *(supra),* it observed that, even in a consumer dispute under the Consumer Protection Act, 1986 or the Consumer Protection Act, 2019, arbitration provided for in the relevant agreement may be resorted to, but only at the exclusive choice of the consumer. The Hon'ble Supreme Court, however, found it unnecessary to examine the question further, since the complainant before it was not a consumer within the meaning of the Act and the existence of the tripartite

agreement was itself doubtful. However, the said decision did not concern a consumer dispute, and did not consider the scope of the referral court's examination after ***Interplay*** *(supra)* and ***Krish Spinning*** *(supra)*.

31. Recently in ***T.K.A. Padmanabhan*** *(supra)*, a District Forum had admitted a consumer complaint and then, on an application under Section 8, referred the parties to arbitration. The Supreme Court set aside that reference and restored the complaint for decision on merits. It relied on Section 3 and the proviso to Section 12(4) of the Consumer Protection Act, 1986, which bars the transfer of an admitted complaint to any other court, tribunal or authority. It held that:

> *"21. … Once that mechanism is validly invoked and the complaint is admitted, the consumer cannot be driven out of that forum merely because the agreement between the parties contains an arbitration clause. A private contractual clause cannot be permitted to defeat the continued operation of a statutory remedy which Parliament has expressly made additional to other remedies under Section 3 of the 1986 Act."*

32. The principle in ***T.K.A Padmanabhan*** *(supra)* protects a consumer against being driven out of the consumer forum once the complaint is admitted. That protection is not in issue here. The Respondents' complaint was admitted, heard and decided by the District Commission, and nothing in this order transfers it, diverts it or affects the decision on it.

33. The principle is that orders of consumer fora are to be challenged only through the remedies provided by the consumer legislation. This Court, under Section 11, neither sits in appeal over the order of the District Commission nor is asked to set it aside. The decision does, however, underline two things: nothing in this order can affect that order or its execution, and an arbitral reference cannot be used as a substitute for the statutory appeal.

34. This Court is bound by ***M. Hemalatha Devi*** (*supra)* and has considered it with care, together with the decisions discussed above. The following aspects must be noticed:

> *(a)* ***M. Hemalatha Devi*** *(supra) arose on comparable facts to the present case. The developer applied under Section 11, and the purchaser thereafter approached the consumer forum. The Hon'ble Supreme Court upheld the dismissal of the Section 11 application. It held that consumer disputes are, by necessary implication, not arbitrable unless the consumer chooses arbitration; that the choice of forum belongs to the consumer and not to the developer; and that it is immaterial which party approached a forum first. It further held that the reasoning in* ***Emaar MGF Land Ltd.*** *(supra) applies equally to Section 11, since Sections 8 and 11 are complementary. The protection of the consumer's election, therefore, operates before the referral court under Section 11, and not only before the consumer forum.*
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> *(b)* ***Citicorp (supra)****, decided after* ***Interplay*** *(supra) and* ***Krish Spinning (supra)****, reaffirmed, with reference to* ***Emaar MGF Land Ltd.*** *(supra) and* ***M. Hemalatha Devi*** *(supra), that arbitration in a consumer dispute may be resorted to only at the exclusive choice of the consumer. The principle of the consumer's election has thus been restated by the Hon'ble Supreme Court after the decisions on which the Petitioner relies.*

35. The principle laid down in ***M. Hemalatha Devi*** *(supra)* must, however, be understood in the light of the dispute to which it was applied. The decisions in ***Emaar MGF Land Ltd.*** *(supra)*, ***M. Hemalatha Devi*** *(supra)* and ***Citicorp*** *(supra)* rest on the same foundation. Parliament has conferred on a consumer an additional statutory remedy for his grievance, and that remedy cannot be defeated by an arbitration agreement. ***Emaar MGF Land Ltd****. (supra)* itself, in the paragraph extracted above, speaks of "a person entitled to seek an additional special remedy" who opts for that remedy. The right of election rests with the consumer. What is rendered non-arbitrable by necessary implication is, accordingly, a consumer dispute, namely, the grievance which the consumer is entitled to agitate before the consumer forum.

36. The Petitioner is a developer, not a consumer. It cannot institute a complaint under the consumer legislation. Nor can it seek relief against the Respondents by way of a counter-claim before the consumer forum, since the consumer legislation makes no provision for one. Before that forum, the Petitioner can only resist the complaint by contending that there was no deficiency in service or unfair trade practice. Even if it succeeds in that defence, its own claims against the Respondents arising under the Agreement remain undetermined, as the consumer forum has no jurisdiction to grant it relief. Such claims are not consumer disputes. They do not fall within the class of disputes which the consumer legislation withdraws from arbitration, and the Respondents' election of the consumer forum does not extend to them.

37. A contrary view would lead to an anomalous result. If a consumer's election of the statutory forum were to render the arbitration agreement unenforceable in respect of every dispute under the contract, the agreement would bind only the developer, and the developer alone would be deprived of the forum to which both parties had agreed for the determination of its own claims. Neither the consumer legislation nor the decisions noticed above contemplate that an arbitration agreement should be converted into a unilateral one. The consumer's statutory protection is a shield for the consumer's claims. It does not immunise the consumer against independent claims of the other party which no consumer forum can adjudicate.

38. In ***M. Hemalatha Devi*** *(supra),* the developer terminated the agreement in 2020 and thereafter applied under Section 11 for the appointment of an arbitrator. The purchaser complained to the District

Consumer Forum, which held that very termination to be a deficiency in service and an unfair trade practice. The dispute which the developer sought to refer was, thus, the purchaser's grievance viewed from the developer's side. The question before the Hon'ble Supreme Court was whether that dispute was arbitrable once the consumer had availed the remedy before the public forum. No claim of the developer independent of the consumer's grievance was raised or considered. The observation in para 22 that the option of choosing between the consumer forum and arbitration "is not available to the builder, as they are not 'consumers'" must be read in that context. It concerns the forum for the consumer's dispute. In the same paragraph, the Hon'ble Supreme Court emphasised that it is "the nature of the dispute" which determines the forum for its redressal. The holding in para 51 that the Section 11 application was "not maintainable in the present case" was, accordingly, a holding on a dispute which was itself a consumer dispute. That principle binds this Court, and nothing in this order permits the Respondents' grievances to be adjudicated in arbitration. ***M. Hemalatha Devi*** *(supra)* is not, however, an authority for the proposition that claims of a developer which are not consumer disputes, and which no consumer forum can adjudicate, cease to be arbitrable. ***Citicorp*** *(supra)* is to the same effect. It speaks of arbitration in "a consumer dispute" being resorted to at the exclusive choice of the consumer.

39. It follows that the disputes arising under the Agreement fall into two classes:

(i) consumer disputes, comprising the Respondents' grievances which they were entitled to and did agitate before the District Commission; and

(ii) claims of the Petitioner which are not consumer disputes.

40. The former cannot be referred to arbitration at the Petitioner's instance. The latter can. Which of the disputes raised by the Petitioner fall into which class, and how far they overlap with what the District Commission has decided, cannot be determined on the material presently before this Court. No claim has yet been filed before any arbitrator, and the precise scope of the Petitioner's claims is yet to be crystallised. Drawing the line between the two classes requires an examination of the pleadings, the findings of the District Commission and the nature of each claim.

41. That is precisely the kind of enquiry which, after ***Interplay*** *(supra)* and ***Krish Spinning*** *(supra),* a referral court cannot undertake. The power recognised in ***Vidya Drolia*** *(supra)* to weed out *ex facie* non-arbitrable disputes at the referral stage no longer survives, since its exercise requires the referral court to examine contested facts and appreciate evidence. The question of which disputes are consumer disputes falling within the Respondents' election, and which are claims of the Petitioner that may be arbitrated, is a question of arbitrability. It must be decided by the arbitral tribunal under Section 16 of the Act. The tribunal, in deciding it, is bound by the principle in ***Emaar MGF Land Ltd.*** *(supra),* ***M. Hemalatha Devi*** *(supra)* and ***Citicorp*** *(supra),* and shall not adjudicate any consumer dispute falling within the Respondents' election.

42. The approach adopted by this Court is also consistent with ***T.K.A. Padmanabhan*** (supra) and ***Cicily Kallarackal*** *(supra).* The Respondents are not being driven out of the forum of their choice. Their complaint has been heard and decided by the District Commission, and nothing in this order transfers, diverts or affects that adjudication. Nor can the arbitral reference serve as a substitute for the statutory appeal against the Final Order dated 22.04.2025. Whether, and to what extent, that order binds the parties in the arbitral proceedings, by way of *res judicata*, issue estoppel or otherwise, is again a matter for the tribunal.

43. ***Harcharan Dass Gupta*** *(supra),* on which the Respondents rely, does not assist them. That decision turned on the non obstante clauses in Sections 18(1), 18(4) and 24 of the Micro, Small and Medium Enterprises Development Act, 2006, which expressly override any other law and any agreement. The consumer legislation is differently framed. Under Section 3 of the Consumer Protection Act, 1986, and the corresponding Section 100 of the Consumer Protection Act, 2019, the remedy it provides is in addition to and not in derogation of other remedies. It does not override the arbitration agreement as regards disputes which are not consumer disputes.

44. The legal position may, therefore, be stated thus:

a. Under Section 11(6A), as explained in ***Interplay*** *(supra)* and ***Krish Spinning*** *(supra),* the referral court confines itself to the *prima facie* existence of the arbitration agreement and to whether the application is within time.

b. Consumer disputes are not arbitrable at the instance of the developer where the consumer has elected the statutory remedy **(*Emaar MGF Land Ltd.*, *M. Hemalatha Devi*** and ***Citicorp*,** (*supra).* This protection extends to the consumer's claims. It does not extend to claims of the developer which are not consumer disputes and which the consumer forum has no jurisdiction to adjudicate.

c. Whether a particular dispute is a consumer dispute falling within the consumer's election, or a claim of the developer which may be arbitrated, is a question of arbitrability for the arbitral tribunal under Section 16. So are objections that the claims have been settled, are time-barred, or are barred by *res judicata* or by the adjudication of a statutory forum.

d. Nothing done in arbitration can affect an order of a consumer forum, which may be challenged or enforced only under the consumer legislation. Any award remains subject to Section 34 of the Act.

45. The Agreement for Sale dated 23.07.2014 was executed between the Petitioner, as First Party, and the Respondents, as Second Party. The Respondents do not dispute its execution and have annexed it as Annexure 'A' to their affidavit-in-opposition. By its Advocate's letter dated 05.10.2020, the Petitioner invoked Clause 18 and proposed an arbitrator, seeking the Respondents' consent. By their Advocate's reply dated 05.11.2020, the Respondents declined to concur in the proposed appointment. The invocation of the arbitration clause and the failure of the parties to agree on an arbitrator thus stand admitted. The present application was filed in 2021, well within three years of the invocation and the Respondents' refusal, and is within time. The rival contentions as to the delay in prosecution of this application do not

affect this conclusion. The application was instituted within time, and the order dated 19.08.2026 records that the Respondents themselves did not file their affidavit-in-opposition for several years after entering appearance.

46. The Respondents oppose the application on four grounds:

(i) the disputes were settled by the e-mails dated 18.11.2017, 09.11.2018 and 10.12.2018;

(ii) the District Commission has adjudicated the dispute by its Final Order dated 22.04.2025 in C.C. No. 245 of 2022, the Petitioner's review was rejected on 15.09.2025, and execution proceedings are pending;

(iii) the Respondents, being consumers, have elected the consumer forum, and the disputes are therefore not arbitrable; and

(iv) a criminal case arising out of the same transaction is pending.

47. Ground (i) is a plea of accord and satisfaction, which, under ***Krish Spinning*** *(supra),* is to be decided by the arbitral tribunal. Grounds (ii) and (iii) have been considered above. They do not render the arbitration agreement non-existent. They are matters which the tribunal must examine in determining which disputes are consumer disputes within the Respondents' election and whether any claim of the Petitioner is barred by the Final Order dated 22.04.2025.

48. As to ground (iv), the pendency of criminal proceedings arising out of the same transaction does not by itself oust arbitration of civil disputes under the contract. The arbitration agreement in Clause 18 is not itself alleged to have been procured by fraud.

49. Clause 18 confers on the First Party, the Petitioner, the right to appoint the arbitrator. A clause permitting one party to appoint a sole arbitrator

unilaterally cannot be given effect in view of ***Perkins Eastman Architects DPC v. HSCC (India) Ltd.,*** reported as ***(2020) 20 SCC 760*** and ***Central Organisation for Railway Electrification*** *v.* ***ECI-SPIC-SMO-MCML (JV),*** reported as ***2024 INSC 857***. The invalidity of the appointment mechanism does not, however, affect the arbitration agreement itself. The appointment must therefore be made by this Court under Section 11(6).

50. In view of the above, this Court holds that an arbitration agreement exists between the parties and has been validly invoked; the parties have failed to agree on an arbitrator; the application is within time; and the Respondents' objections, insofar as they go beyond the existence of the arbitration agreement, are matters for the arbitral tribunal and do not justify refusal of the appointment under Section 11(6).

51. Accordingly, Mr. Sankar Prashad Dalapati, Adv. (Mob. No. 9836074135) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties (other than Consumer disputes) arising out of the Agreement for Sale dated 23.07.2014.

52. The learned Sole Arbitrator shall enter upon the reference after making the disclosure in terms of Section 12(1) of the Act and subject to the provisions of Section 12(5) thereof.

53. The learned Sole Arbitrator shall fix his remuneration in terms of the Fourth Schedule of the Act or as may be agreed between the parties.

54. It is clarified that all questions relating to the merits of the claims and counterclaims, including limitation, quantum, liability and any claim relating to the Agreement for Sale dated 23.07.2014, are left open to be decided by the learned Arbitrator in accordance with law.

55. Nothing in this order shall suspend, dilute or affect the Final Order dated 22.04.2025 passed by the District Consumer Disputes Redressal Commission, North 24 Parganas, Barasat, the Petitioner's obligations under it, or the execution proceedings pending before the Commission. Nor shall this order be construed as an expression of opinion on the merits of the criminal proceedings arising out of Rajarhat Police Station Case No. 47 of 2020.

56. The application, being AP 406 of 2021, is allowed in the above terms. There shall be no order as to costs.

(GAURANG KANTH, J.)

SAKIL AMED (P.A)

High Court Calcutta