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IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.672 OF 2012

MSRT Corporation,  
Vahatuk Bhavan,  
Dr.Anantrao Nari Marg, Mumbai- 7

...Petitioner

...Versus...

M/s.Navketan Properties Pvt. Ltd.  
301, Commerce House, 140,  
Nagindas Master Road,  
Fort, Mumbai – 400 023.

...Respondent

Mr.G.S. Hegde with Ms.P.M. Bhansali for the Petitioner.

Ms.Mamta Sadh with Mr.Ajay Panicker and Ms.Amreen Mansoori i/b  
Ajay Law Associates for the Respondent.

**CORAM : R.D. DHANUKA, J.**  
**RESERVED ON : 26TH FEBRUARY, 2015**  
**PRONOUNCED ON : 13TH MARCH, 2015.**

**JUDGMENT :-**

1. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996 (for short “the said Arbitration Act”), the petitioner has impugned the arbitral award dated 15<sup>th</sup> February, 2012 made by the learned arbitrator, allowing some of the claims made by the respondent. Some of the relevant facts for the purpose of deciding this petition are as under :

2. The petitioner herein was the original respondent in the

arbitral proceedings, whereas the respondent herein was the original claimant.

3. On 19<sup>th</sup> July, 1991, the respondent who was the owner of plot bearing CTS No.590, situated at the junction of Sayani Road and Gokhale Road at Parel admeasuring 1445.35 sq. mtrs. entered into a sale – cum – development agreement with the petitioner in respect of the said plot of land for a total amount of Rs.5.40 crores. Under the said agreement, the petitioner agreed to pay a sum of Rs.3.40 crores to the respondent towards the cost of land. The balance sum of Rs.2.00 crores was agreed to be paid towards the cost of development and construction of the ground plus 7 storey building on the said plot of land. Under the said agreement dated 19<sup>th</sup> July, 1991, the petitioner paid Rs.3.40 crores to the respondent. As per clause 11 of the said agreement, the respondent executed a deed of conveyance in favour of the petitioner in respect of the said plot of land on 14<sup>th</sup> October, 1991. It is the case of the petitioner that on payment of the said sum of Rs.3.40 crores, the petitioner was put in possession of the said land by the respondent.

4. Under the said agreement, the respondent was allowed to remain on the said property as the lessee of the petitioner for the purposes of developing the same and constructing building thereon for the use and benefit of the petitioner as part of the package deal transaction simultaneously with execution of the deed of conveyance. It was agreed that the said licence granted to the respondent shall not be revoked until the entire building was completed and the payment of the consideration amount in full was made and received by the respondent.

5. Under clause 11 of the said agreement, it was agreed that the parties shall simultaneously with execution of the conveyance enter into a building agreement containing detailing terms and conditions with regard to the development of the said property and construction of the building for the use and benefit of the purchaser. Such agreement was to be prepared by the advocates of the petitioner and to be approved by the advocates of the respondent.

6. Under clause 12 of the said agreement, it was agreed that the respondent shall appoint M/s.Chawla Architects & Consultants Pvt. Ltd. as architects approved by the petitioner for the purposes of submitting the plans, papers etc. and getting them sanctioned from various authorities and departments of the Municipal Corporation and any other authorities as may be required for the purposes of contract work. It was further provided that all costs and expenses incurred for preparing and submitting the plan / plans and obtaining sanctions / permissions from the Municipal Corporation or any other authorities shall be borne by the respondent alone. Permanent deposits however, required to be paid for the purposes of obtaining such permissions / sanctions was agreed to be paid initially by the respondent and was liable to be reimbursed by the petitioner on the respondent getting the deposits transferred in the petitioner's name. It was agreed that the building agreement to be executed by the parties shall contain the detailed specifications, items, amenities etc. Clause 20(A) provided for an irrevocable licence in favour of the respondent subject to certain conditions. The said clause 20(A) of the said agreement is extracted as under :-

“20(A). the appointment of Navketan Properties Pvt. Ltd. As irrevocable Contractor and the irrevocable licence to be granted under Clause 10 hereinabove are subject to :

- (i) terms and conditions of the building contract to be entered into between the parties hereto.
- (ii) the irrevocable appointment and licence mentioned above shall cease and terminate if the contract works are not completed within the period or extended period stipulated in the Building Contract Agreement and on the expiry of 30 (Thirty) days from the receipt of notice from MSRTC to Navketan Properties Pvt. Ltd. at their registered office in Bombay and/or at the work site in that behalf provided however that such termination will become operative and effective only upon the Purchaser paying to the Vendor an amount of Rs.2,00,00,000/- (Rupees Two Crores only) in respect of works completed to be arrived at after deducting the amounts in respect of the items of the work left incomplete as on the date of the termination and as shall be certified by the Purchaser's Architects in consultation with the Vendor's Architects which certificate shall be final and binding upon the Vendor and the Purchaser.
- (iii) The provisions of the Building Contract Agreement shall override and prevail upon such of the provisions of the Agreement for Sale Cum Development as exclusively related to the construction of the building and in the event of any inconsistency between such provisions relating to constructions in the said agreement and the Building Contract Agreement the provisions contained in the latter agreement shall prevail.”

7. On 21<sup>st</sup> October, 1993 the Municipal Corporation issued intimation of its approval (IOD) in respect of the said plot. On 29<sup>th</sup>

March, 1994, the advocate of the petitioner furnished the draft of the building agreement to the respondents stating that if the full FSI was not utilized, the construction cost of Rs.500/- per sq. ft. would be deducted for the less consumption of the FSI. On 23<sup>rd</sup> October, 1994 the respondent forwarded a corrected draft agreement to the petitioner.

8. On 6<sup>th</sup> October, 1994 the respondent requested the petitioner to fix up a date for final execution of the building agreement. On 20<sup>th</sup> October, 1994, the respondent sent reminder to the petitioner for execution of the building agreement and also asked for release of mobilization advance and for renewal of IOD. The respondent again sent reminder on 10<sup>th</sup> November, 1994, 2<sup>nd</sup> January, 1995 and 11<sup>th</sup> January, 1995. The respondent also requested to release mobilization charges.

9. On 30<sup>th</sup> January, 1995 the petitioner stated that full FSI was not shown in the plan and therefore, the cost of the FSI not fully utilized should be deducted. On 30<sup>th</sup> January, 1995, the respondent replied that the commercial use of 10% free balcony FSI was not allowed under the Development Control Regulation and plan was sanctioned by the Corporation as per rules.

10. On 3<sup>rd</sup> March, 1995, the respondent once again sent reminder to the petitioner for execution of the building agreement. On 19<sup>th</sup> July, 1996, the petitioner sent a draft building agreement to the respondent. On 3<sup>rd</sup> August, 1996, the respondent approved the draft agreement with corrections in red.

11. On 28<sup>th</sup> November, 1997, the project architect Mr.Chawla informed the petitioner that the revised plans were sanctioned by the Corporation and requested to comply with the conditions of IOD. On 5<sup>th</sup> January, 1998, the respondent once again sent the reminder to the petitioner to execute the building agreement.

12. On 14<sup>th</sup> March, 1998, the advocates of the petitioner sent an engrossed copy of the building agreement with altered terms without consent of the respondent. On 21<sup>st</sup> March, 1998 the respondent informed the petitioner about the alterations made by the petitioner and asked to modify it as per the agreement between the parties.

13. By letters dated 23<sup>rd</sup> March, 1998, 11<sup>th</sup> April, 1998 and 14<sup>th</sup> May, 1998, the respondent brought it to the notice of the petitioner that it was package deal project and if the petitioner was not executing the agreement, the respondent would have no option but to call for balance amount of the package deal agreement after deducting the cost of construction.

14. By a letter dated 2<sup>nd</sup> July, 1998 the petitioner through their advocate admitted about the alterations suggested by the petitioner and asked for holding the meetings and discussions. On 12<sup>th</sup> February, 1999 and 24<sup>th</sup> February, 1999 the petitioner suggested further alterations / modifications in the building agreement.

15. On 29<sup>th</sup> January, 2000, the petitioner sent old draft of the building agreement. On 10<sup>th</sup> February, 2000, the respondent recorded that the draft agreement sent by the petitioner did not

contain changes, corrections as pointed out by the respondent in their letter dated 21<sup>st</sup> March, 1998, which was confirmed by M/s.Little & Co., advocates vide their letter dated 2<sup>nd</sup> July, 1998.

16. On 31<sup>st</sup> May, 2000, the respondent once again sent a reminder to the petitioner for execution of the building agreement and made it clear that in case of failure on the part of the petitioner to execute the building agreement, the petitioner would pay balance package amount.

17. By a letter dated 7<sup>th</sup> June, 2000, the petitioner admitted that because of some administrative changes in their organization it had resulted in delay in execution of the building agreement. By a letter dated 20<sup>th</sup> June, 2000, the respondent sent a reminder to the petitioner to execute the building agreement to avoid action for recovery of balance package amount.

18. On 3<sup>rd</sup> July, 2000, the petitioner informed the respondent that the issue regarding execution of the building agreement and payment of mobilization advance had been put up for approval. On 7<sup>th</sup> July, 2000, the respondent demanded the balance package deal amount after deducting the construction cost.

19. By a letter dated 1<sup>st</sup> August, 2000, the petitioner through their advocate confirmed that the petitioner would pay to the respondents mobilization advance of Rs.20.00 lakhs on signing the building agreement and that all changes and alterations suggested by both the parties would be incorporated in the draft agreement which would be furnished to the respondent. The petitioner

contended that the termination was not acceptable and thus the question of payment of any balance amount of package deal amount after deducting the construction cost did not arise.

20. The respondent by their letter dated 22<sup>nd</sup> August, 2000, recorded that the fresh draft of the building agreement was not received by the respondent and clarified that the mobilization advance was already agreed by the Managing Director of the petitioner in the joint meeting held in the month of January, 2000.

21. On 15<sup>th</sup> September, 2000, the petitioner furnished a fresh draft of building agreement to the Project Architect Mr.Chawla. By a letter dated 6<sup>th</sup> December, 2000, the respondent recorded that they had not yet received the final corrected copy of the agreement.

22. By a letter dated 8<sup>th</sup> December, 2000, the respondent clarified that since the amount of consideration fixed was in lump-sum package deal, the petitioner should not deduct any amount of tax and further as the petitioner was delaying the execution of the agreement, the petitioner should pay the balance amount of package deal after deducting the construction cost.

23. By a letter dated 12<sup>th</sup> December, 2000, the petitioner requested the respondent to return the duly approved draft agreement for making final draft agreement.

24. By a letter dated 16<sup>th</sup> December, 2000, the respondent clarified that the draft agreement received by the Project Architect was discussed with the officer of the petitioner Shri Bhingarde and he

had already taken note of all the corrections and modifications and had agreed to send final fresh agreement based thereon to the respondent.

25. By a letter dated 19<sup>th</sup> January, 2001, the respondent sent a reminder to the petitioner for execution of the building agreement. On 10<sup>th</sup> April, 2001, the respondent issued a legal notice and called upon the petitioner to pay the damages of Rs.50.00 lakhs and balance package deal amount after deducting the construction amount. By a letter dated 20<sup>th</sup> April, 2001, the petitioner through their advocate's reply to the said notice dated 10<sup>th</sup> April, 2001 denied the requisitions of the respondent.

26. The respondent vide their advocate's letter dated 19<sup>th</sup> May, 2001 and 14<sup>th</sup> August, 2001 asked the petitioner to refer to the dispute to arbitration.

27. By a letter dated 29<sup>th</sup> August, 2001, the petitioner through their advocates called upon the respondent to deliver vacant possession of the plot to the petitioner. It is the case of the respondent that on 24<sup>th</sup> December, 2003, the staff of the petitioner trespassed into the said plot and unlawfully took possession of the property by throwing the watchman of the respondent out of the plot.

28. Some time in the year 2004, the respondent herein filed a Suit (No.903 of 2004) *inter-alia*, praying for specific performance of the agreement against the petitioner. By an order dated 23<sup>rd</sup> December, 2004, this Court disposed of the said suit and referred the dispute to sole arbitration of a former Judge of this Court. This Court

directed the petitioner to hand over possession within a period of two weeks to the respondent. It is the case of the respondent that since the petitioner did not hand over possession of the said plot to the respondent, the respondent filed Contempt Petition (No.35 of 2005) against the petitioner. On 29<sup>th</sup> April, 2005, the said contempt petition appeared before this Court, when the petitioner agreed to reconstruct the structure which was demolished at a different place and took time to file affidavit.

29. Pursuant to the liberty granted by the learned arbitrator, the respondent filed statement of claim *inter-alia* praying for specific performance of the agreement or in the alternative for damages. On 2<sup>nd</sup> July, 2005, the petitioner handed over physical possession of property to the respondent under possession receipt dated 2<sup>nd</sup> July, 2005. The respondent thereafter withdrew the said contempt petition on 8<sup>th</sup> July, 2005. On 15<sup>th</sup> July, 2005, the petitioner filed their statement of defence cum counter claim against the respondent. The learned arbitrator framed the issues in the matter. The erstwhile former Judge of this Court appointed by this Court came to be substituted by an order dated 18<sup>th</sup> December, 2008 by this Court in Arbitration Petition No.420 of 2008 by another former Judge of this Court.

30. Before the learned arbitrator, the respondent examined three witnesses, including the architect Mr.Ram Chawla. The petitioner examined two witnesses on their behalf.

31. By an arbitral award dated 15<sup>th</sup> February, 2012, the learned arbitrator did not grant prayer for specific performance of the

agreement dated 19<sup>th</sup> July, 1991, however, directed the petitioner to pay Rs.86.00 lakhs to the respondent by way of compensation towards the loss of profit with simple interest at the rate of 15% p.a. from 1<sup>st</sup> January, 1995 till filing of the statement of claim and thereafter with simple interest at the rate of 10% p.a. on the award amount from the date of filing of the statement of claim till the date of award and thereafter on the final amount with interest at the rate of 18% p.a. from the date of award till payment and/or realization. The learned arbitrator also directed the petitioner to pay a sum of Rs.5.00 lakhs by way of arbitration costs. The learned arbitrator rejected the counter claim made by the petitioner. The said arbitral award dated 15<sup>th</sup> February, 2012 has been impugned by the petitioner in this petition filed under section 34 of the Arbitration Act on various grounds.

32. Mr.Hegde, learned counsel for the petitioner invited my attention to various correspondence entered into between the parties, terms of the agreement dated 19<sup>th</sup> July, 1991 and also various parts of the evidence led by both the parties and submits that the impugned award directing the petitioner to pay compensation of Rs.86.00 lakhs with interest is contrary to clause 20 of the agreement dated 19<sup>th</sup> July, 1991. He submits that the contract was terminated by the respondent and not by the petitioner. Even if the petitioner would have terminated the said agreement dated 19<sup>th</sup> July, 1991, the respondent would at the most be entitled to recover the amount of Rs.2.00 crores minus cost of the work not done. Learned counsel submits that since the respondent did not carry out any work at all, the question of payment of any compensation under clause 20 to the respondent did not arise.

33. Learned counsel submits that in any event, the respondent had not proved the claim for loss of profit before the learned arbitrator and the amount awarded by the learned arbitrator is thus based on no evidence. He submits that the respondent had applied for approval of plan to the Municipal Corporation without obtaining any approval and/consent of the petitioner. The respondent had not considered utilization of the entire FSI for development on the the said plot in the plan got sanctioned by the respondent which was causing financial loss to the petitioner and was not in accordance with the agreement entered into between the parties. The respondent did not obtain IOD for a period of six years though the corrected plan was received from the architect.

34. Learned counsel submits that since the respondent had obtained IOD even without execution of the building agreement by the parties, the respondent could not have insisted for execution of the building agreement before commencement of the development of the plot in question. He submits that though there was no provision for mobilization advance and all deposits with the Municipal Corporation and other authorities were to be made by the respondent at the first instance and were to be reimbursed by the petitioner once such deposits were transferred in the name of the petitioner, the respondent was insisting for payment of mobilization advance and for payment of various deposits to be made to the Municipal Corporation and other authorities directly which was contrary to the terms of the agreement. The petitioner was thus not at fault in not executing the building agreement. The respondent was responsible for not carrying out construction on the plot in question for several years, thus no

claim even for compensation could be made by the respondent.

35. Learned counsel submits that since the respondent could not have been awarded the relief by way of specific performance, the learned arbitrator could not have granted the relief by way of compensation in lieu of the relief of specific performance in favour of the respondent. He submits that the respondent did not take any steps for specific performance for several years and had given up the said plea by demanding damages from time to time.

36. Learned counsel for the petitioner submits that since the parties had agreed for compensation as per clause 20(ii) of the agreement, the learned arbitrator had no power to award any amount beyond compensation agreed under the said agreement. The learned arbitrator could not have awarded any damages under section 73 of the Indian Contract Act since the parties had agreed to specific compensation, as recorded under clause 20(ii) of the said agreement. He submits that since no work was carried out by the respondent at all, the question of allowing any claim for loss of profit whether under clause 20(ii) of the agreement or under any other provisions of law did not arise. It is submitted that the respondent obtained the said plan sanctioned in the name of the respondent though the same was objected to by the petitioner.

37. Learned counsel for the petitioner submits that the cost of construction considered at Rs.500/- per sq. ft. by the learned arbitrator based on a letter dated 29<sup>th</sup> March, 1994, addressed by the advocate of the petitioner was not conclusive. The award is thus based on no evidence.

38. Learned counsel submits that though the petitioner was not liable to make any payment of mobilization advance under any of the provisions of the agreement, since the respondent was insisting for the payment of the mobilization advance, the petitioner had agreed to pay Rs.20.00 lakhs by way of mobilization advance. Insofar the payment of construction cost is concerned, the same was payable by the petitioner to the respondent in installment in accordance with the provisions of the said agreement.

39. Learned counsel for the petitioner then submits that since the learned arbitrator has rejected the prayer of the respondent for specific performance of the agreement, the learned arbitrator could not have awarded damages in lieu of specific performance. He submits that the award is contrary to sections 20 and 21 of the Specific Relief Act, 1963 and the award thus deserves to be set aside on that ground alone.

40. Learned counsel for the petitioner has invited my attention to the affidavits of the witnesses examined by the petitioner and also evidence of the respondent, including their cross-examination and would submit that the respondent had failed to prove their entitlement of the claim of loss of profit and also quantification in respect thereof.

41. Per contra Ms.Sadh, learned counsel for the respondent invited my attention to various provisions of the agreement dated 19<sup>th</sup> July, 1991 and more particularly recitals "J", "K", "L", clauses 1, 3, 10, 11, 12 and 20 and submits that the respondent was the owner of the plot in question. There was a package deal transaction entered into

between the parties under the said agreement under which the petitioner had agreed to pay the total consideration of Rs.5.40 crores to the respondent. The consideration however, was shown in two parts, i.e. a sum of Rs.3.40 crores towards the cost of land and Rs.2.00 crores towards the cost of development thereof and cost of the building to be constructed on the said plot. The said sum of Rs.2.00 crores was liable to be paid as per the progress of the construction work and as per the payment schedule mentioned in the second schedule of the said agreement.

42. Learned counsel invited my attention to the correspondence entered into between the parties which are highlighted in the earlier paragraphs of the judgment and would submit that though under the said agreement dated 19<sup>th</sup> July, 1991, the petitioner had agreed to execute the building agreement with the respondent simultaneously with execution of the deed of conveyance containing detailed terms and conditions with regard to the development of the said property, for several years, the petitioner did not execute the said agreement though the respondent had repeatedly called upon the petitioner to execute the same due to various reasons attributable to the petitioner. The respondent had on the contrary taken steps to obtain various permissions from the Municipal Corporation and had incurred various expenditure thereof.

43. Learned counsel submits that the petitioner was liable to pay the mobilization advance to the respondent for the purpose of commencement of the construction and for the purposes of making payments to the Municipal Corporation and other authorities out of the same for obtaining various permissions. The petitioner was liable

to reimburse the said amount towards deposits, if any, made by the respondent with the Municipal Corporation and other authorities. The petitioner had after gross delay agreed to pay some amount towards mobilization advance to the respondent and that also was not paid. The petitioner had also forcibly dispossessed the respondent from the possession of the land in question. The respondent was required to file the contempt petition against the petitioner. The petitioner thereafter handed over possession of the plot to the respondent.

44. Learned counsel submits that the petitioner has not denied any of the contents of the correspondence addressed by the respondent alleging delay on the part of the petitioner. The learned arbitrator has rendered a finding of gross delay against the petitioner in execution of the building agreement and from taking other steps. The petitioner has not made out any ground under section 34 of the Arbitration Act for warranting interference with the impugned arbitral award. This Court cannot re-appreciate the evidence and cannot interfere with the findings of fact rendered by the learned arbitrator under section 34 of the Arbitration Act.

45. It is submitted by the learned counsel that the respondent had called upon the petitioner repeatedly for complying with their part of performance. The respondent had prayed for specific performance before the learned arbitrator. Since the learned arbitrator has held that the specific performance ought not to have been granted in favour of the respondent and having rendered various findings of breaches and delay against the petitioner, the learned arbitrator has rightly directed the petitioner to pay compensation to the respondent. The impugned award is thus in compliance with and in exercise of

discretion under sections 20 and 21 of the Specific Relief Act and not contrary thereto as canvassed by the petitioner.

46. Learned counsel submits that clause 20(ii) of the agreement would apply if the building agreement would have been entered into between the parties as contemplated under clause 20(i) of the agreement. She submits that clause 20(ii) of the said agreement does not provide for any liquidated damages. She submits that the petitioner did not terminate the agreement but accepted the withdrawal of the agreement by the respondent. Learned counsel submits that section 73 of the Indian Contract Act, 1873 would squarely apply to the facts of this case and the claim awarded by the learned arbitrator under section 73 of the Indian Contract Act is in accordance with law and does not warrant any interference.

47. Learned counsel submits that the respondent was always ready and willing to comply with their part of their obligation and had repeatedly called upon the petitioner to execute the building agreement which the petitioner failed and neglected to execute. The learned arbitrator has considered the documentary as well as oral evidence on record and has rightly rendered the finding of readiness and willingness on the part of the respondent. Such finding of fact cannot be interfered with by this Court under section 34 of the Arbitration Act.

48. Insofar as quantification of the claim of loss of profit is concerned, learned counsel submits that the respondent had examined Project Consultant Mr.Chawla, whose appointment was

approved by the petitioner. The said witness was an independent witness, who deposed that the cost of construction was about Rs.500/- to Rs.600/- per sq. ft. at the relevant time. Learned counsel invited my attention to the cross-examination of the said Mr.Chawla by learned counsel for the petitioner and submits that except putting few suggestion to the said witness by the petitioner, there was no other cross-examination on the deposition on the quantification of loss of profit. The said witness has thus duly proved that the cost of construction at the relevant time which was in the range of Rs.500/- to Rs.600/- per sq. ft. She submits that though the petitioner examined the witness in support of their plea and more particularly after completion of evidence of the witness examined by the respondent, the petitioner did not prove that the cost of construction was more than Rs.500/- or Rs.600/- per sq. ft. at the relevant time. She submits that the learned arbitrator was thus justified in evaluating the evidence led by the parties and has rightly come to the conclusion that the respondent had proved the quantification insofar as the claim for loss of profit is concerned. The learned arbitrator has also rightly rendered a finding that the petitioner could not prove that the cost of construction was more than Rs.500/- or Rs.600/- per sq. ft at the relevant time.

49. Learned counsel for the respondent placed reliance on the judgment of the Supreme Court in the case of *McDermott International INC vs. Burn Standard Co. Ltd. & Ors.*, reported in (2006) 11 SCC 181 and in particular paragraphs 59, 60 and 61 and would submit that the scope of section 34 of the Arbitration Act is very limited and public policy violation should be so unfair and unreasonable as to shock the conscience of the court. Learned

counsel submits that the finding of fact cannot be interfered with by this Court under section 34 of the Arbitration Act unless such finding are perverse. Paragraphs 59, 60 and 61 of the judgment of the Supreme Court in *McDermott International INC vs. Burn Standard Co. Ltd. & Ors.*(supra) reads as under :-

**“59.** Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merits of the matter.

**60.** What would constitute public policy is a matter dependent upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government. (See *State of Rajasthan v. Basant Nahata.*)

**61.** In *ONGC* this Court observed: (SCC pp. 727-28, para 31)

“31. Therefore, in our view, the phrase ‘public policy of India’ used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time.

However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in *Renusagar* case it is required to be held that the award could be set aside if it is patently illegal. The result would be—award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

50. Learned counsel for the respondent also placed reliance on the judgment of the Madras High Court in the case of The Chairman, Guindy Industrial Estate Infrastructure Upgradation Company vs. Gurumurthy Engineering Enterprises, Civil Engineering Contractors & Ors., reported in 2012(4) Arb.L.R. 185 and in particular paragraphs 11, 13 and 17 on the issue that the power of the Court under section 34 of the Arbitration Act is very limited. The Court cannot enter into the factual matrix.

51. In rejoinder, learned counsel for the petitioner submits that since the learned arbitrator had exceeded the jurisdiction by allowing the claim of loss of profit and has proceeded beyond the terms of the agreement as contemplated under clause 20(ii) of the agreement, the award is in conflict with the public policy and deserves to be set aside. He submits that the licence granted in favour of the respondent for the purpose of construction was not in perpetuity. Learned counsel submits that the finding of the learned arbitrator that the petitioner has not disputed the rate of construction at Rs.500/- and Rs.600/- per sq. ft. is contrary to the record. In support of this submission, learned counsel invited my attention to the cross-examination of the architect Mr.Chawla, who was examined by the respondent and in particular questions 30, 33 and 34 by which the said witness was put a suggestion that the cost of construction was not Rs.500/- or Rs.600/- per sq. ft. He submits that the said architect had agreed in the cross-examination that the cost of construction would depend upon the nature of construction.

**REASONS AND CONCLUSIONS :-**

52. There is no dispute that under the agreement for sale – cum – development dated 19<sup>th</sup> July, 1991 entered into between the parties, the respondent had agreed to sell the plot in question to the petitioner for a consideration mentioned in the said agreement. The petitioner has already paid Rs.3.40 crores towards the cost of the land to the respondent. The respondent has executed the deed of conveyance in favour of the petitioner upon receipt of the said consideration amount. Under the said agreement, the parties had agreed that simultaneously with execution of conveyance, the parties would enter into a building agreement containing the detailed terms

and conditions with regard to the development of the said property and for construction of the building for the use and benefit of the purchaser. It is also not in dispute that the petitioner and the respondent have not entered into any such building agreement as contemplated under the said agreement dated 19<sup>th</sup> July, 1991.

53. A perusal of the correspondence placed on record by the parties clearly indicates that the respondent had written large number of letters to the petitioner for executing the building agreement as contemplated under the said agreement dated 19<sup>th</sup> July, 1991. The petitioner on one or other ground did not finalize the building agreement and did not execute the said agreement with the respondent for more than eight years. The record also indicates that the respondent had taken steps pursuant to the said agreement dated 19<sup>th</sup> July, 1991 by making an application for IOD to the Municipal Corporation and also took various other steps to the knowledge of the petitioner. It was one of the grievance of the petitioner that the respondent had however, got the plan sanctioned in favour of the respondent and not the petitioner. It was also the case of the petitioner that the respondent did not make any provision for consumption of the entire FSI in the sanctioned plan from the Municipal Corporation. The respondent had clarified this aspect from time to time to the petitioner.

54. A perusal of the building agreement dated 19<sup>th</sup> July, 1991 indicates that the respondent was entitled to claim mobilization advance from the petitioner. The respondent was demanding the said mobilization advance from the petitioner. The petitioner had belatedly proposed to pay a sum of Rs.20.00 lakhs by way of mobilization

advance to the respondent. Since the petitioner was not releasing any payment towards the mobilization advance, the respondent had requested the petitioner to release the payment towards deposits to be made to the Municipal Corporation and other authorities directly. The petitioner however, did not make any such deposit to the Municipal Corporation or with other authorities.

55. After waiting for last several years, the respondent ultimately called upon the petitioner to comply with their part of obligation or to pay the balance consideration of Rs.2.00 crores minus cost of construction which could have been incurred on the construction of the building on the said plot. It is the case of the respondent that the respondent could claim such amount under section 73 of the Indian Contract Act, 1872.

56. A perusal of the oral evidence led by the respondent and also the petitioner clearly indicates that the respondent had led evidence not only on the issue of breaches alleged to have been committed by the petitioner but also on the quantification of the claim for claim of loss of profit. A perusal of the impugned award clearly indicates that the learned arbitrator has summarized the submissions of both the parties in the impugned award and has dealt with the same at length by rendering reasons. A perusal of the said award indicates that the learned arbitrator has rendered a finding that the petitioner could not produce any document to show that the revised plan got approved by the architect was not in accordance with the understanding with the petitioner.

57. Insofar as the issue of consumption of the entire FSI

raised by the petitioner is concerned, it is held by the learned arbitrator that the Municipal Corporation had approved the plan only for 20767 sq. ft. The respondent had clarified this arrangement by their letter dated 11<sup>th</sup> November, 1993 that the Municipal Corporation had approved the plan according to law only in respect of 20767 sq. ft. and had further clarified that 10% free balcony FSI was only for residential building. Since ground plus first floor of the proposed building was commercial, the said balcony FSI was not available. The learned arbitrator also considered the effect of the letter addressed by the petitioner's advocate on 29<sup>th</sup> March, 1994 stating that if the full FSI was not utilized then the cost of FSI at the rate of Rs.500/- per sq. ft. would be deducted in respect of less FSI. The learned arbitrator has rendered a finding that if according to the petitioner there was less consumption of FSI, the petitioner could have deducted the construction cost from the consideration payable to the respondent. The learned arbitrator has rendered a finding that the petitioner could not produce any evidence to show that the respondent was deriving any benefit and was initially trying to show less FSI in the building plan.

58. Insofar the submission of learned counsel for the petitioner that the signature of the petitioner was not obtained for making a proposal for development by the respondent is concerned, the learned arbitrator has rendered a finding that as per D.C. Regulations, development proposal and plans should be submitted by the person or his authorized representative in the name of the person in whose name the property was appearing in the revenue records and property card. The learned arbitrator held that in this case even before the property was purchased by the petitioner, the

development proposal and the plan had already been submitted and were sanctioned vide IOD dated 29<sup>th</sup> June, 1987. The petitioner however, did not take any steps to get their name mutated in the records. The learned arbitrator also held that the petitioner could have expected all those acts from the respondents towards the construction of building only after the petitioner would have signed the building agreement simultaneously with the deed of conveyance as stipulated in clause 11 of the sale – cum – development agreement dated 19<sup>th</sup> July, 1991.

59. Insofar as the submission of the petitioner that the respondent could not have demanded the mobilization advance or other payments to be made to the Municipal Corporation is concerned, a perusal of the award indicates that the learned arbitrator has considered the second schedule of the agreement dated 19<sup>th</sup> July, 1991 and has come to the conclusion that the mobilization advance of 10% of the consideration of Rs.2.00 crores would come to Rs.20.00 lakhs. The petitioner was liable to make payment of 10% of the mobilization advance to the respondent on signing of the building agreement. It took more than five years for the petitioner to accept the fact that they had to release the mobilization advance on signing of the agreement, which they finally did by their advocate's letter dated 1<sup>st</sup> August, 2000 stating that the mobilization advance of Rs.20.00 lakhs would be paid to the respondents on signing the agreement. In the mean time the respondent was already incurring various expenses for obtaining various permissions for developing the said property. The learned arbitrator, in my view, has interpreted the terms of the said agreement and has rightly rendered a finding that the petitioner was liable to make payment of 10%

mobilization advance on signing of the agreement to enable the respondent to meet all the obligations in law.

60. A perusal of the award also indicates that the petitioner neither terminated the package deal agreement nor accepted the agreement sought by the respondent and their total stand of approbation and reprobation was with an intention to avoid their part of performance under the agreement. The learned arbitrator has considered the entire evidence on record and has rendered a finding that there was gross delay on the part of the petitioner in executing the building agreement with the respondent.

61. A perusal of the award also indicates that insofar as the claim for loss of profit is concerned, the learned arbitrator has referred to various correspondence exchanged between the parties. The respondent had time and again called upon the petitioner to deduct the construction cost and to pay the balance amount of Rs.2.00 crores. The learned arbitrator also referred to the letter addressed by learned advocate of the petitioner stating that if the FSI was not utilized then Rs.500/- per sq. ft. towards the cost of construction would be deducted for less FSI. The learned arbitrator has also considered oral evidence led by the architect Mr.Chawla whose appointment was approved by the petitioner.

62. After considering oral evidence led by the witness examined by the respondent and also evidence led by the petitioner through their witness, the learned arbitrator came to the conclusion that the respondent would be entitled to recover a sum of Rs.86.00 lakhs towards the cost of profit with interest. The learned arbitrator

has considered the cost of construction at Rs.500/- per sq. ft. as proved by the architect examined by the respondent. A perusal of the record clearly indicates that except putting few suggestions to the said witness examined by the respondent on the issue of construction cost, there was no other cross-examination of the said architect by the petitioner. Though the petitioner had put some suggestions to the witness disputing the cost of construction of Rs.500/- to Rs.600/- per sq. ft. and though the petitioner examined the witness after closure of evidence of the witnesses examined by the respondent, the petitioner did not produce any independent evidence to show that the cost of construction would have been more than Rs.500/- per sq. ft. The learned arbitrator has considered all these parts of evidence at greater length in the impugned award and has rightly come to the conclusion that the petitioner was solely responsible for termination of the agreement and was solely responsible for gross delay in not executing the building agreement in favour of the respondent for last several years though the respondent had repeatedly called upon the petitioner to execute such agreement.

63. Insofar the submission of learned counsel that since the respondent was not granted specific performance of the agreement, the learned arbitrator could not grant compensation in lieu of the relief of specific performance is concerned, in my view there is no merit in this submission of learned counsel for the petitioner. Since the learned arbitrator after considering gross delay on the part of the petitioner in complying with their part of obligation and in view of the increase in the cost of construction, held that specific performance in such circumstances ought not to have been granted, the learned

arbitrator, in my view, was right in exercising his discretion under section 21 of the Specific Relief Act, 1963. In my view, the award does not suffer from any infirmity as canvassed by learned counsel for the petitioner.

64. Insofar as the submission of learned counsel for the petitioner that since the parties had agreed for compensation as per clause 20(ii) of the agreement and thus no compensation beyond what was agreed could be awarded by the learned arbitrator under section 73 of the Indian Contract Act is concerned, in my view there is no merit in this submission of learned counsel for the petitioner. The parties have not admittedly executed the building agreement. Be that as it may, the learned arbitrator having rendered a finding of fact against the petitioner on non-compliance of their obligation, the respondent was entitled to be awarded compensation. The learned arbitrator has interpreted the terms of the said agreement. The learned arbitrator has in any event considered the compensation on the same basis what was contemplated under clause 20(ii) of the agreement while awarding compensation by deducting the cost of construction from the balance amount of consideration. The respondent had proved cost of construction by leading appropriate evidence. Consideration of Rs.2.00 crores was already agreed under the agreement. The learned arbitrator has simply deducted the cost of construction proved by oral evidence from the consideration payable to the respondent.

65. A perusal of the agreement dated 19<sup>th</sup> July, 1991 and in particular recitals "I" and "L" and clause (1) clearly indicate that the respondent who was admittedly the owner of the said plot had

agreed to sell the said plot as and by way package deal. The total consideration of Rs.5.90 crores was shown in two parts i.e. Rs.3.40 crores towards cost of land and Rs.2.00 crores towards cost of development thereof. The petitioner could not dispute that it was package deal entered into between the petitioner and the respondent for sale of land and for development thereon. Since the petitioner did not enter into the building agreement with the respondent and did not comply with their part of obligation, the respondent could not carry out any construction on the said plot. The claim for compensation thus made by the respondent against the petitioner for such breach committed by the petitioner was justified and has been rightly allowed by the learned arbitrator. I am not inclined to accept the submission made by learned counsel for the petitioner that since no work was carried out by the respondent, no amount could have been awarded as and by way of compensation to the respondent.

66. If the petitioner would have complied with their part of obligation, the respondent would have constructed the building on the said plot and would have earned profit which would have been computed by deducting cost of construction from the consideration payable to the respondent. In my view, the findings rendered by the learned arbitrator are not perverse and thus no interference with such finding of fact can be warranted under section 34 of the Arbitration & Conciliation Act, 1996. In my view, the submission of learned counsel for the respondent that the learned arbitrator has rendered a finding of fact on various issues raised by the petitioner and such findings are not perverse and thus no interference is warranted under section 34 of the Arbitration & Conciliation Act, 1996 deserve acceptance. I am bound by the law laid down by the Supreme Court in the case of

*McDermott International INC* (supra) relied upon by learned counsel for the respondent. I do not find any infirmity in the impugned award rendered by the learned arbitrator. No part of the award is contrary to the terms of the agreement, nor the same is in conflict with the public policy. No grounds are made out by the petitioner under section 34 of the Arbitration & Conciliation Act, 1996. I am therefore, of the view that the petition is devoid of merits. I therefore, pass the following order :-

- (a). Arbitration Petition No.672 of 2012 is dismissed.
- (b). There shall be no order as to costs.

**(R.D. DHANUKA, J.)**