

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.09.2016

DELIVERED ON : 23.12.2016

Coram

The Honourable **Mr. Justice RAJIV SHAKDHER**

O.P.No.231 of 2016
and O.A.Nos.189 and 240 of 2016

M/s.Lancor Holdings Limited,
rep. by its Managing Director,
T.Nagar, Chennai - 600 017. ... Petitioner

Vs.

1. Mr.Prem Kumar Menon
2. Mr.Kishore Kumar Menon
3. Mr.Christopher Gladstone Menon
4. Hon'ble Mr.Justice K.P.Sivasubramanian,
No.47, Pulla Avenue,
Shenoy Nagar, Chennai - 600 030. .. Respondents

* * *

Prayer : Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Arbitral Award dated 16.03.2016 passed by the fourth respondent here in the Arbitration dispute between the Petitioner and Respondents 1 to 3 pursuant to the Joint Development Agreement dated 17.12.2004.

* * *

For Petitioner : Mr.P.S.Raman, Senior Counsel
for M/s.P.R.Raman

For Respondents : Mrs.Nalini Chidambaram,
No.1 and 2 Senior Counsel
for M/s.Uma

For Respondent : Mr.Sathish Parasaran,
No.3 Senior Counsel
for M/s.Adithya Reddy

O R D E R

PREFACE :

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short, 'the 1996 Act') to assail the award dated 16.03.2016.

2. Before I proceed further, it may be relevant to give a brief background as to how the dispute pertaining to the parties herein has reached this Court and who are the personae dramatis in the dispute.

2.1. The respondents herein are three siblings, who are members of the Menon family. The dispute, which presently pivots around the development of a property described as : New No.165, Old Door No.110, St. Mary's Road, Chennai - 600 018 (in short "the property"), was owned by one Mrs.Margaret Kalyani Balakrishna Menon ; the mother of the respondents herein.

2.2. Mrs.Margaret Kalyani Balakrishna Menon had eight children, which included the three respondents, who are arrayed as parties herein. During her life time, she had settled a part of the property described above, which, in all ad measured 20 grounds and 600 square feet, amongst the three respondents and their sister Mrs.Geeta Mani. The settlement took place on 31.01.1975 and 05.10.1979 via a registered instrument.

2.3. Mrs.Margaret Kalyani Balakrishna Menon expired on 13.05.1989. Soon after her demise, on 20.06.1992, her husband Dr.K.T.B.Menon also passed away.

2.4. Consequently, disputes arose between the eight siblings, which included three respondents. Disputes between the eight siblings were referred to arbitration. Before the learned Arbitrator, an oral family arrangement was arrived at on 10.11.2002, which was reduced to writing on 16.11.2002. Consequent thereto, the rights, *inter se*, the eight (8) siblings were re-arranged based on the family arrangement. The Arbitrator, appointed, passed an award dated 21.11.2002.

2.5. As per the said award, the property was divided in the following manner : respondent No.1 was allotted 8 grounds and 300 sq. ft. ; respondent No.2 was allotted 5

grounds and 150 sq. ft. ; respondent No.3 was allotted 5 grounds and 150 sq. ft. ; and, Mrs.Geeta Mani was allotted 2 grounds.

2.6. The other siblings, it appears, on being compensated, released their shares in favour of respondent No.1. Likewise, Mrs.Geeta Mani also released her share in favour of respondent No.1. Consequently, share of respondent No.1 stood enhanced to 10 grounds and 300 sq. ft.

2.7. The three respondents, it appears, agreed to develop the property. For this purpose, they interacted with one Ganshyam Sheth, who in turn, introduced them to, one, Mr.R.V. Shekar. It appears, R.V.Shekar, is the main cog, so to say, in the petitioner company. Consequently, a Joint Development Agreement dated 17.12.2004, (in short 'JDA') was entered into between the respondents and the petitioner company, albeit, in its earlier avatar, which went by the name : Lancor Gesco Properties Limited.

2.8. On 10.05.2015, the name of Lancor Gesco Properties Limited was changed to Lancor G:Corp Properties Limited. Thereupon, Lancor G:Corp Properties Limited was amalgamated with the petitioner company via a scheme sanctioned by this Court vide order dated 23.08.2007. Thus, all rights and obligations of Lancor Gesco Properties Limited stood vested

in the petitioner company.

2.9. The JDA required the petitioner company to develop the property and to construct thereupon a residential or, a commercial building at its own cost and expense, and to deliver, to the respondents free of cost and charges 50% of the total super built up area in the building so erected. This task was to be undertaken by the petitioner company in consideration of the respondents conveying to it free from all encumbrances undivided 50% share in the property with the freedom to seek transfer of its interest in the property, in favour of its nominee.

2.10. This, in essence, is, at the heart of the JDA, with appurtenant obligations thrown in qua each of the parties. The central theme of the JDA is that the parties herein will have 50% share in not only the subject building, which was to come up on the property, but also in the land beneath and all covered and open spaces and other common facilities, which would include the car parking area, the garden area and such other facilities, that were to be constructed on the property. In order to secure compliance with obligations, the JDA had the following important clauses incorporated in it :

".....

6. As security for the due performance of LG's obligations under this agreement, LG has this day given a refundable Interest-free deposit of Rs.3,57,00,000/- (Rupees Three Fifty Seven Lakhs only) at the time of signing of this agreement, the receipt whereof by Pay Order in favour of Prem Kumar Menon - Menon Menon Account" for and on behalf of all the LAND-OWNERS, the LAND-OWNERS do hereby admit and acknowledge. LG promises to pay a further refundable interest-free deposit of Rs.25,00,000/- (Rupees Twenty-Five Lakhs only) within 6 months from this day. The said two Security Deposits (hereafter together referred to as "the said **Security Deposit**") shall be returned without interest to LG by the LAND-OWNERS within 15 (fifteen) days of the fulfillment of all of the following four conditions by LG :

- a) LG completes the construction of the building in all respects, including the LAND-OWNERS CONSTRUCTED AREA fit for occupation and the Architects for the project certify to the LAND OWNERS that the building has been put up and completed according to the sanctioned plan and is fit for occupation.

- b) LG has applied to the Chennai Metropolitan Development Authority for Completion Certificate in respect of the said building and
- c) LG offers, in writing, to hand over the LAND-OWNERS CONSTRUCTED AREA to the LAND-OWNERS, after the conditions stipulated in clause (a) & (b) are fulfilled.

The date on which all the above conditions are fulfilled by LG is hereinafter referred to as **"the said Handover Date"**

It is expressly agreed between the parties hereto that, whether or not the LAND-OWNERS have taken delivery of the LAND-OWNERS CONSTRUCTED AREA, upon expiry of a period of 15 (fifteen) days from the said Handover Date, LG will be deemed to have fulfilled their obligation to deliver the LAND-OWNERS CONSTRUCTED AREA (whether or not physical possession of the LAND-OWNERS CONSTRUCTED AREA has been taken by the LAND OWNERS from LG) and the said Security Deposit would be due and payable by the LAND-OWNERS on such date (i.e. 15 {fifteen} days after the said Handover Date.

It is further expressly agreed between the parties hereto that LG will not be required to

hand over physical possession of the LAND-OWNERS CONSTRUCTED AREA to the LAND-OWNERS until the said Security Deposit, together with interest, if any, in terms of this Agreement, has been returned by the LAND-OWNERS to LG.

7. If the LAND-OWNERS do not repay the said Security Deposit within 15 (fifteen) days from the said Handover Date, the LAND-OWNERS shall pay interest @ 12% per annum on the said Security Deposit from the said Handover Date till the date the said Security Deposit is refunded, together with interest, to LG.

8. In addition to the deposits detailed in Clause 6 above, LG has already paid to the LAND-OWNERS, a Refundable Interest-free Earnest Money Deposit of Rs.1,25,00,000/- (Rupees One Crore Twenty Five Lakhs Only), the receipt whereof the LAND OWNERS do hereby admit and acknowledge. The said Earnest Money Deposit shall be returned by the Land Owners to LG within 30 days from the Handover Date.

9. In consideration of LG delivering the said LAND-OWNERS CONSTRUCTED AREA to the LAND-OWNERS as per clause 4 supra, the LAND-OWNERS shall transfer/convey to LG or their nominee (s) an undivided 50% share in the Schedule Property (which 50% undivided share is hereinafter referred to as **"LG's UNDIVIDED**

SHARE") in one or more sale deeds, in terms of this Agreement.

10.

11.1. It is agreed by and between the parties hereto as follows :

(b) LG shall, at their own cost and expense, undertake and complete the development of the Schedule Property by way of construction of building as per sanctioned plans with internal and external services, amenities, lifts, facilities including but not limited to compound walls, staircases, lobbies, terraces, balconies, passages, covered and uncovered car parking spaces, basement, gardens, machine room, service room, recreational areas etc., and obtain the Completion Certificate from the concerned authorities in respect of such buildings and facilities (hereinafter referred to as "**the said development**") as hereinafter provided. The construction shall be in accordance with specifications contained in ANNEXURE I.

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11.2. If any additional construction is put up on the Schedule Property over and above the sanctioned plan, or because of favorable changes in the building bye-laws, the additional construction so put up shall also

be shared in the ratio of 50% for LAND-OWNERS and 50% for LG. The spirit of this agreement being that whatever is built on the Schedule Property shall be shared in the ratio of 50% for LAND-OWNERS and 50% for LG.

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15.1. The LAND-OWNERS and LG shall take a decision as to whether the Schedule Property should be developed into a commercial or residential complex, within a period of 120 days from this day (hereinafter referred to as "**the said Decision Date**").

15.2.

15.3. a) LG shall obtain the necessary sanctions and permissions from the concerned authorities to undertake the said development (hereinafter referred to as "**the said Sanctions**") and in the event that the Schedule Property is to be developed into a commercial complex within a period of 12 (twelve) months from the said Decision Date.

15.4.

15.5. The LAND-OWNERS shall demolish the structures on the Schedule Property within 45 days from the said Sanctions and LG shall commence construction within 60 days from the said sanctions, subject to the land owners

demolishing the structures (hereinafter referred to as , **"the said Commencement Date"**) .

15.6.

16. LG hereby undertakes to complete the construction of the project in all respects within 24 months from the said Commencement Date. Time shall be the essence of this agreement.

17. Should there be any delay in completion of the project beyond 24 months as aforesaid, LG shall pay to the LAND-OWNERS, for the entire LAND-OWNERS CONSTRUCTED AREA, as compensation : (a) a sum of Rs.8/- per sq.ft. of Super Built-up Area per month in case of residential complex and (b) a sum of Rs.15/- per sq.ft. of Super Built-up Area per month in case of commercial complex. If the completion of the project is delayed beyond the period of 36 months, LG shall pay an incremental penal compensation of 50% for every quarter beyond the 36th month.

18. It is made clear that in case LG fails to complete and hand over the LAND-OWNERS CONSTRUCTED AREA to the LAND-OWNERS within 42 (forty two) months from the said Commencement Date, the LAND-OWNERS shall have the right to take over the project and complete the same at

the cost of LG.

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21.

g. The total amount of loans/credit facilities that LG may avail at any point of time, against the security of the title deeds pertaining to the Schedule Property, shall not exceed a sum of Rs.7,50,00,000/- (Rupees Seven Crores and Fifty Lakhs only).

22. LG shall periodically provide to the LAND-OWNERS a progress report, along with photographs showing the progress of the said development and the LAND-OWNERS shall have the right to inspect the progress of the development from time to time with due notice to LG.

23. The LAND-OWNERS shall be entitled to demolish the existing structures on the Schedule Property at their own cost and expenses and to appropriate the proceeds from such demolition. The Demolition approval charges payable to the Corporation of Chennai shall be borne by the LAND-OWNERS.

24. The name of the Building shall have the prefix "MENON". The said prefix shall appear equally prominently along with the rest of the name of the building in all places where the

name of the building is displayed.

25. LG shall appoint the Architect for the said development after obtaining the consent of the LAND-OWNERS. Similarly, LG shall obtain the consent of the LAND-OWNERS for the design and plans for the said development. All other decisions with regard to the said development shall be solely taken by LG who shall however keep the LAND-OWNERS informed of the same as well as about the progress of work in the said development.

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31. After LG has delivered, or is deemed to have delivered, the LAND-OWNERS CONSTRUCTED AREA to the LAND-OWNERS, LG shall be entitled to get conveyance of LG's UNDIVIDED SHARE in the Schedule Property in its favour or in favour of its nominee/s.

32. After LG take, or cause to be taken, in favour of itself or its nominee/s, the conveyance of LG's UNDIVIDED SHARE in the Schedule Property within 12 months from the said Handover Date.

33. After LG gets conveyed to itself or to its nominees LG's UNDIVIDED SHARE in the Schedule Property, LG shall be entitled to sell or lease or rent or transfer by any other mode/nature or give for any other usage the

said LG's CONSTRUCTED AREA or any part or portion thereof to such person or persons or company or entiry or body at such price and on such terms that LG may decide at its sole discretion.

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36. The LAND-OWNERS will execute and register in favour of LG or its nominee(s) a specific Power of Attorney/s (hereinafter referred to as the FIRST POWER OF ATTORNEY or 1st POA) to carry out the said development and to obtain various approvals, sanctions and permissions relating to the said development and to enter into Agreements to Sell or Agreements to Lease or Mortgage, by way of deposit of title deeds, the LG's CONSTRUCTED AREA and the proportionate LG's UNDIVIDED SHARE in the Schedule Property.

37. The LAND-OWNERS have also this day executed another Power of Attorney (hereinafter referred to as the SECOND POWER OF ATTORNEY or 2nd POA). The said 2nd POA shall be kept in escrow with M/s.HDFC, who will deliver the same to LG on the said Handover Date in accordance with the terms of the Escrow Agreement between the parties as per the draft annexed hereto as Annexure V. The LAND-OWNERS shall also register the aforesaid 2nd POA simultaneously with taking delivery of the LAND-OWNERS CONSTRUCTED AREA. The said 2nd

POA shall, inter alia, authorize and empower LG or their nominees to execute and register sale deeds in respect of LG's UNDIVIDED SHARE in the Schedule Property relatable to LG's CONSTRUCTED AREA. It is specifically declared by the LAND-OWNERS that this Power of Attorney shall be irrevocable. The said second Power of Attorney can be acted upon only after LG has delivered, or is deemed to have delivered, the LAND-OWNERS CONSTRUCTED AREA to the LAND-OWNERS.

38. The LAND-OWNERS shall not revoke the Power of Attorney(s), executed as above, provided however there is no breach of the terms contained herein to be performed/observed by LG.

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43. If there is a breach or violation of the terms of this Agreement, the aggrieved party shall give written notice to the defaulting party, and such defaulting party shall rectify/remedy such breach within 30 days of receipt of such notice. The LAND-OWNERS will only be entitled to terminate this Agreement in the following situations :

- a) Failure of LG in completing the said development within the agreed time.
- b) Failure of LG in delivering the LAND-OWNERS CONSTRUCTED AREA within the stipulated time without encumbrances.

c) Permitting the change in ownership of the equity share capital in LG

Provided however that the LAND-OWNERS will be entitled to terminate this Agreement only if the LAND-OWNERS have not defaulted in any of their obligations under this Agreement.

44. In the event of this Agreement being terminated in terms of Clause 43 hereinabove, the LAND-OWNERS shall simultaneously with such termination refund to LG the said Security Deposit of Rs.3,82,00,000/- (Rupees Three Crore Eighty Town Lakhs only) paid by LG, after deducting the losses that the LAND-OWNERS may have suffered.

45.

46. Any structural defects in the Building, including the LAND-OWNERS CONSTRUCTED AREA shall be repaired by LG at their cost and expense upto a period of one year from the Handover Date.

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52. All disputes, differences, claims and questions whatsoever which may arise during the continuance of this Agreement between the parties hereto touching these presents or the construction, meaning, effect or application thereof or any Clause or thing contained in this Agreement or in respect of any account or as to any act of omission of either party or

as to any other matter in any way relating to or arising out of or touching this Agreement or the rights, duties and liabilities of either party under this Agreement shall be referred to arbitration in accordance with and subject to the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modifications or enactment thereof for the time being in force, each party nominating an arbitrator of the ranking of a retired High Court Judge residing at Chennai. The two arbitrators so appointed shall confer and nominate an umpire. The arbitration proceedings shall be held at Chennai and courts in Chennai alone shall have the jurisdiction.
....."

3. Right after the execution of the JDA, a Supplemental Agreement dated 17/18.12.2004 was executed between the parties herein, whereby, it was agreed that till the Handover Date, as defined in Clause No.6 of the JDA, is reached, the proceeds received by the petitioner company in connection with the sale of its "Constructed Area", as defined in Clause No.5 of the JDA, along with the proportionate undivided share, as defined in Clause No.9 of the JDA, would be deposited in a separate bank account of

the petitioner company, and that, the said amount would be used only for the purposes of : financing the cost of the said development ; repayment of loan/s taken by the petitioner company for the said development ; payment of interest on loan/s taken by the petitioner company to fund the said development ; and payment of any taxes including Income Tax relating to the said development.

4. Furthermore, a second Supplemental Agreement dated 29.03.2006 was also executed between the parties, whereby, the parties agreed on the appointment of M/s.Nataraj & Venkat Associates, as Project Architects (in short "PA") for development of the property, as envisaged in the JDA. The said supplemental agreement also recorded that the parties had agreed to construct a multi storied Software Technology Park Building (in short "STP") on the basis of the floor plans, the pictures and the specifications detailed out in Annexures to the said agreement.

4.1. The relevant changes in the JDA were brought about, in particular, in Clause 17 of the JDA. The changes brought about were recorded in Clause 3 of the said supplemental agreement, which reads as follows :

"3.0. In clause 17, the following are deleted :

"as compensation : (a) a sum of Rs.8/- per sq.ft. of super built-up area per month in case of residential complex and (b) a sum of Rs.15/- per sq.ft. of super built-up area per month in case of commercial complex" and in their place the following are incorporated :

"as compensation a sum of Rs.15/- per sq.ft. of super built-up area per month."

4.2. Furthermore, changes were also brought about in Clauses 15.1 to 15.6 of the JDA, by incorporating fresh clauses which were numbered as : 15.1, 15.2 and 15.3. The details of the areas and the allocation of spaces were reflected in clause 6.1. As per the said clause, second, third, fourth and fifth floors were to be allotted, and thus, fell to the share of the petitioner company, while the sixth, seventh, eighth and ninth floors fell to the share of the respondents herein. The plinth area, common area and the super built up area, of each floor, was equally divided. Insofar as the tenth floor was concerned, the North wing was to fall to the share of the petitioner company, while the South wing was to fall to the share of the respondents. The terrace area was divided equally among the parties. The car parks, which were to be located in the basement, ground

floor and first floor, and the open areas around the building were also equally divided between the parties. The parties, were also agreed, that the building would be named "Menon Eternity".

4.3. The said supplemental agreement records that the respondents acknowledge the receipt of an additional sum of Rs.25,00,000/- (Rupees twenty five laksh only) towards security deposit. There were other amendments also brought about, such as, increase in rent for alternative accommodation from Rs.1,00,000/- to Rs.1,10,000/- in term of Clause 10.

4.4. Clauses 12 and 13 of the supplemental agreement, which recorded that a second Power of Attorney (in short "POA") had been executed by the respondents, provided for, it being kept in escrow with Housing Development Finance Corporation Limited (in short "HDFC"), with the right bestowed on the petitioner company to seek its delivery on the Handover Date, in terms of the JDA. The said clause also reflected the fact that the POA was not revocable. For the sake of convenience, the relevant clauses are extracted hereinbelow :

"12. The LAND OWNERS have also this day executed another Power of Attorney (hereinafter referred to as SECOND POWER OF ATTORNEY or 2nd POA). The said 2nd POA shall be kept in escrow with M/s.HDFC, who will deliver the same to LG on the said Handover Date in accordance with the terms of the Escrow Agreement between the parties. The LAND OWNERS shall also register the aforesaid 2nd POA simultaneously with taking delivery of the LAND OWNERS CONSTRUCTED AREA. The said 2nd POA shall, inter alia, authorize and empower LG or their nominees to execute and register sale deeds in respect of LG's UNDIVIDED SHARE in the Schedule Property relatable to LG's CONSTRUCTED AREA. It is specifically declared by the LAND OWNERS that this Power of Attorney shall be irrevocable. The said second Power of Attorney can be acted upon only after LG has delivered, or, is deemed to have delivered, the LAND OWNERS CONSTRUCTED AREA to the LAND OWNERS. The LAND OWNERS have cancelled the previous Power of Attorney dated 17th December 2004 and the same has been returned to the LAND OWNERS.

13. The LAND OWNERS shall not revoke the Power of Attorney(s), executed as above, provided however there is no breach of the terms contained herein to be performed/observed by LG."

4.5. Consequent thereto, on the very same date, three sets of documents were executed. These were : two Power of Attorneys of even date, i.e., 29.03.2006, and the Escrow Agent Agreement, dated 29.03.2006.

5. Briefly, by virtue of the first (1st) POA, the petitioner company was given the right to carry out all such acts and activities, which were necessary to develop the property while, by way of the second (2nd) POA, the respondents herein gave the right to the petitioner company to sign and execute on their behalf sale deeds conveying, the petitioner company's 50% super built up area in the building so constructed and the relatable 50% of the undivided share in the property, either in whole or in part or in an undivided manner in favour of the prospective purchaser or purchasers by way of one or more sale deed or sale deeds, and to handover possession thereof to the purchasers. A further right was also given to the petitioner company to admit to execution and to present on behalf of the respondents, sale deeds so executed in respect of the constructed portion (50% of the super built up area) and the proportionate land underneath, which fell to the share of

the petitioner company, to the concerned registration authorities.

6. The other document, which was executed between the parties, as indicated above, was the Escrow Agent Agreement dated 29.03.2006. By virtue of this agreement, HDFC was appointed as the Escrow Agent (in short "EA"). The said document recognises the fact that vide the POA, the petitioner company was given the right to get the conveyance in its own favour or in favour of its nominee, that is, 50% of the share in the constructed area along with land underneath.

6.1. The document also recognised the fact that EA/HDFC would hold the said POA as a depository, and that, it would handover the POA to the petitioner company only on or after the petitioner company had reached the Hand over Date, as defined in Clause 6 of the JDA.

6.2. For this purpose, EA/HDFC was to reach satisfaction (in terms of Clause 7 of the Escrow Agent Agreement), with regard to the following : (i) that the petitioner company had delivered or was deemed to have delivered to the respondents their constructed area ; and (ii) the petitioner company had fulfilled all the

conditions, as stipulated in Clause 6 of the JDA and the supplemental agreement.

6.3. The clauses, which are relevant in the said Escrow Agreement, are extracted hereinbelow, as well, for the sake of convenience :

"4. The LAND OWNERS have delivered to HDFC the original power of attorney dated 29th March 2006 (such original power of attorney is hereinafter referred to as "**the said POA**") executed by the LAND OWNERS in favour of LG empowering LG to convey in its own favour or in favour of its nominees LG's UNDIVIDED SHARE viz., 50% undivided share in the Schedule Property relatable to LG's CONSTRUCTED AREA viz., 50% constructed area in the building to be put up on the Schedule Property.

5.

6. HDFC shall hold the said POA as a depository.

7. HDFC agrees to hand over the said POA to LG on or after the Handover Date as defined in clause 6 of the said JDA, after HDFC have satisfied themselves that (i) LG has delivered or deemed to have delivered the LAND OWNERS CONSTRUCTED AREA to the LAND OWNERS and (ii) LG has performed and fulfilled all the conditions stipulated in

clause (6) of the said JDA, and the said Supplemental Agreement.

8. HDFC shall only be liable to hand over the said POA received by HDFC in terms of the said JDA and the said Supplemental Agreement

9. It is expressly understood by all the parties hereto that even if one or more of the conditions stipulated in clause (6) of the JDA are not fulfilled by LG, HDFC shall not deliver the said POA to LG.

10.

11. HDFC further agrees to hand over the said POA to LG only upon LG performing its obligations stipulated in clause (6) of the said JDA, and LG produces written acknowledgement or postal acknowledgement of the LAND OWNERS in respect of LG's offer in writing, to hand over the LAND OWNERS CONSTRUCTED AREA to the LAND OWNERS referred to in Clause 6e of the JDA.

12.

13.सत्यमेव जयते

14. HDFC for the purpose of implementing the terms of this agreement may take expertise of professionals and the cost of consulting such professionals shall be borne by LG."

7. To be noted, that a third supplemental agreement was executed on 22.02.2007. The highlight of this agreement was that by virtue of the said agreement, the petitioner company, *inter alia*, agreed to pay to the respondents, on or before 15.03.2007, an additional interest free security deposit of Rs.3,00,00,000/- (Rupees three crores only), in addition to, what was agreed to, in terms of Clause 6 of the JDA.

7.1. It was made clear that this additional security deposit would be subject to the same terms and conditions as was applicable to the Security Deposit, referred to, in Clause 6 of the JDA.

7.2. There was also reference to rights and obligations, *inter se*, the parties with regard to deposit of caution money with the Chennai Metropolitan Development Authority (CMDA).

8. The aforesaid facts would delineate the broad contours of the various agreements reached between the parties for development of the subject property.

9. The record would, thus, show that the core dispute between the parties was whether or not the construction of

the subject building had taken place as per the agreed terms. It is, this dispute which led to eruption of a concomitant dispute, that is, the execution of the impugned sale deeds by the petitioner company in its favour by using copies of POA, while the original was still in the possession of the EA, i.e., HDFC. The refusal of the respondents to refund Security Deposit (in short "SD") was the sticking point between the parties. It was the respondents case that the building had not been completed as agreed, and therefore, the hand over date had not been reached to enable EA/HDFC to give custody of the POA. The POA, in turn, was crucial for execution of the sale deeds. The fact that the POA was not being handed over by EA/HDFC, when, according to the petitioner company, the subject building was complete, compelled it to seek execution of the sale deeds based on copies, and thus, go on to trigger the arbitration proceedings.

10. The record would show that the first point of inflection, in the relationship obtaining between the parties came about qua aspects concerning handing over of the vacant land by the respondents to the petitioner company. This was essential, as the date of handing over of

vacant possession of the subject property was to determine, in turn, the commencement date for completion of the project.

10.1. Under clause 16 of the JDA, the petitioner company had been granted twenty four (24) months for completion of the construction from the commencement date.

10.2. The other point of inflection came about, when, diametrically opposite stands were taken by the parties with respect to whether or not the building stood constructed, as per the terms agreed to between them.

10.3. The completion of construction of the subject building was one, amongst other two conditions, provided in clause 6 of the JDA.

10.4. It was, in fact, a crucial condition for triggering the obligation placed on the respondents to return the SD, albeit, without interest to the petitioner company.

10.5. The remaining conditions, which the petitioner company was required to fulfill were: first, to apply to CMDA for a Completion Certificate. Second, to offer to respondents, in writing, to handover the subject building. This condition was, though, dependent on fulfillment of previous two conditions, that is, completion of the subject

building and to apply to CMDA to issue a Completion Certificate.

11. The record shows that the petitioner company took the stand that the subject building stood constructed and, was thus, complete, as early as, on 29.07.2008, that is, when, it had applied for a completion certificate.

11.1. The record would also show that the PA had issued a certificate dated 10.10.2008 to the effect that the subject building was constructed, subject though to, the petitioner company, obtaining an electricity connection from Tamil Nadu Electricity Board (in short 'TNEB'), and water and sewerage connection from the Chennai Metropolitan Water Supply and Sewerage Board (in short "CMWSSB").

11.2. The record would indicate that the petitioner company had obtained a completion certificate from the CMDA, which is dated 14.11.2008.

11.3. In this behalf, it must be said that there are two other documents on record, on which, reliance was placed by the petitioner company, to demonstrate, that the subject building was complete. These are : letter dated 22.07.2008, issued by an entity going by the name, Future Management and

Consultancy Private Limited (in short "FMCPL") to respondent No.1, i.e., Mr.Prem Kumar Menon. By virtue of this letter, a cheque in the sum of Rs.1,00,00,000/- (Rupees one crore only) was dispatched to respondent No.1 in the form of EMD for the purpose of execution of a formal lease agreement, subject to statutory clearances being obtained, with respect to the 6th Floor of the subject building. The cheque in the sum of Rs.1,00,00,000/- (Rupees one crore only) was, though, drawn in favour of respondent No.2.

11.4. The other document is a lease deed dated 10.11.2008, executed between the petitioner company and, an entity going by the name, BNP Paribas Global Securities Market Operations Private Limited (in short 'BNP Paribas'). By virtue of this lease deed, an aggregate super built up area ad measuring 20,878 sq. ft., on the second and third floor of the subject building, along with right to use common areas, was given on lease to BNP Paribas. The total tenure of the lease was nine (9) years, with the first three (3) years being, the lock-in period. Under the lease deed, BNP Paribas was required to pay a fixed rent calculated on the basis of per square foot area; which varied from Rs.86 per sq.ft. in the first year and, gradually, increased over the tenure of the lease; which, as indicated above was 9

years. Accordingly, in the last year, i.e., the 9th year, the rent was payable at Rs.137.07 per sq.ft.

11.5. This apart, the petitioner company also placed reliance upon the following compliances made and approvals obtained to buttress its point of view that the building stood completed :

- (i).Water and sewerage connection received from CMWSSB on 22.11.2008.
- (ii).Completion Certificate dated 21.08.2008, issued by the Corporation of Chennai.
- (iii).Compliance Certificate dated 23.09.2008, issued by the Director of Fire and Rescue Services.
- (iv).Compliance Certificate dated 25.09.2008, issued by the Police (Traffic) Department.
- (v).Compliance Certificate dated 30.10.2008, issued by the Electronics Corporation of Tamil Nadu (in short ELCOT).
- (v) (a) This compliance certificate was required, as parties, as indicated above, had finally agreed to construct a STP.

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12. Despite the petitioner company, having obtained such approvals and compliances, the respondents were not satisfied that the building had been completed in accordance with the terms and conditions set out in the JDA.

12.1. This led to a spate of correspondence being exchanged between the petitioner company and the respondents. While the communications are many in number, I would be referring only to some of those, which are significant from the point of view of the instant petition.

12.2. The first of these exchanges is an e-mail dated 25.09.2008, issued by respondent No.1's wife to the Managing Director of the petitioner company, i.e., Mr.R.V.Shekar. In this e-mail, respondent No.1's wife detailed out, *inter alia*, what, according to the respondents, were the outstanding works, which required to be attended by the petitioner company.

12.3. The petitioner company, in its response, dated 11.10.2008, accepted that certain minor works were still outstanding which required attention. In respect of other issues as well, broadly, it gave its version as to how it would resolve the outstanding concerns of the respondents.

12.4. More importantly, by this communication, the petitioner company indicated to the respondents that instead of the petitioner company using the POA to register the subject property in its favour, the respondents should present themselves in Chennai to have their share of the constructed area registered, so that, thereafter, the

respondents could receive the original title deeds, which, otherwise were evidently, lying with the EA, i.e., HDFC.

12.5. The petitioner company also took the stand that the refund of SD by the respondents was not linked to tenants being found by it, for their share of constructed portion of the subject building. The petitioner company, however, did indicate in the very same communication that they were otherwise committed to finding tenants for the respondents' share of the subject property; but, because, the market conditions were bad, and on account of melt down in the global economy, the respondents would have to be patient in that behalf.

12.6. Notably, within nine days of the aforementioned letter, vide letter dated 20.10.2008, addressed by R.V.Shekar, the Managing Director of the petitioner company to the respondent No.1, the petitioner company took a stand that it had fulfilled its obligations under the JDA, in particular, obligations stipulated in clauses 6(a) to 6(c), and therefore, the said date should be reckoned, as the hand over date. In consonance with the stand taken in the said communication, the petitioner company, called upon the respondents to refund the SD held by them, which at that

point in time, was a sum equivalent to Rs.5.82 Crores.

12.7. In response to this communication, respondent No.2 issued a letter dated 28.10.2008, wherein, he refuted the stand taken by the petitioner company, which was that, 20.10.2008, should be considered as the hand over date, in terms of clause 6 of the JDA. It was, *inter alia*, sought to be emphasised that clause 6(a) of the JDA required completion of the subject building in all respects, which included, the respondents' share of the constructed area. In this context, the PA's letter dated 10.10.2008 was adverted to. Briefly, the suggestion made was that the PA had not carried out his duty, as envisaged under the terms of its engagement.

12.8. Furthermore, it was pointed out that the very fact that the PA had indicated in its certificate dated 10.10.2008, that the subject building was fit for occupation, subject to the petitioner company obtaining power and sewerage connection, according to respondent No.2, was suggestive of the fact that the subject building was not complete in all respects.

12.9. In sum, it was stated by respondent No.2 that the letter dated 20.10.2008, was premature, since, the

conditions obtaining in clause 6(a) and (b) of the JDA had not been fulfilled, and thus, the hand over dated had not been reached. In other words, conditions contained in clause 6(c) of the JDA could not get triggered till obligations provided for in clause 6(a) and clause 6(b) were not fulfilled.

13. Evidently, the photographs indicating the state of the subject building were also forwarded by respondent No.2 to the petitioner company, on 28.10.2008.

13.1. On 05.11.2008, the petitioner company, once again, sent its response with respect to the letter dated 28.10.2008 sent by respondent No.2. By this letter, the petitioner company, *inter alia*, indicated that they should move towards resolving *inter se* disputes as such an approach would work to the benefit of both the parties.

13.2. Unfortunately, the chasm between the parties widened with each passing day. The relationship got worse, when, a letter dated 20.11.2008, was received by respondent No.1's wife from the EA/HDFC. This letter disrupted whatever remained of the relationship, as by virtue of the said letter EA/HDFC brought to the notice of the addressee, i.e., respondents, that it had been approached by the petitioner

company to seek release of the POA on the ground that they had completed the subject building and discharged its obligation under the JDA.

13.3. In response, with due alacrity, respondent No.1's wife, via, letter dated 22.11.2008, immediately, informed the EA/HDFC that the petitioner company had not fulfilled its obligations under the JDA, and therefore, its demand for release of documents held in escrow, was both, premature and not proper. It was emphasized that EA/HDFC should not hand over the POA or, any other related document held in its custody, till such time, it was brought to its notice that the petitioner company had fulfilled all its obligations under the JDA.

13.4. I must, at this juncture, also advert to one other aspect, which is that, via an earlier communication dated 13.11.2008, respondent No.2 had taken umbrage to the factum of issuance of a completion certificate by the PA.

13.5. The fact remains that the respondents emphatically conveyed to the EA/HDFC that handing over of the POA and other related documents was unwarranted, till a joint inspection was conducted, which included, *inter alia*, the respondents, the representatives of the petitioner company, the PA and their consultant, and upon satisfaction

being reached that the entire building had been completed as per the terms of the JDA. This stand was communicated by the respondents to the EA/HDFC vide letter dated 13.12.2008.

14. The interesting aspect was that while parties were sparring qua the issue of completion of the subject building, on 01.12.2008, the respondents had refunded a sum of Rs.1 Crore towards SD. This sum was paid, in addition to a sum of Rs.1 Crores remitted by the respondents on 28.07.2008 towards refund of SD. Thus, the SD of Rs.6.82 Crores, which had been made over by the petitioner company in favour of the respondents, got reduced, at that point in time, to a sum of Rs.4.82 crores.

15. It appears that, at this juncture, the petitioner company formed a view that the respondents would not facilitate the release of POA held in escrow by the EA/HDFC in order to enable it to execute the sale deeds in its favour with respect to the floors, which had come to its share.

15.1. Apparently, this approach propelled the petitioner company to make an inadvisable move of having

five sale deeds of even date, i.e., 19.12.2008, executed in its favour (hereafter, collectively referred to as "the sale deeds").

16. According to the respondents, this fact got revealed via letter dated 12.02.2009, addressed by the Managing Director of the petitioner company to respondent No.1. By this letter, qua the registration of the subject floors in its favour, the petitioner company made the following assertions :

".... We have registered one half of the property under the authority given to us by the Power of Attorney executed by you on 29th March 2006, left in the hands of the Escrow Agent."

17. This assertion, according to the respondents, alerted them to the fact that the petitioner company had already executed sale deeds qua its share under the JDA without even informing the respondents. The fact that the petitioner company had asserted that they had got the sale deeds registered, by using the POA, which was in the custody of EA/HDFC, propelled the respondents to write to the EA/HDFC on 14.02.2009.

17.1. The respondents, by the said communication, had called upon EA/HDFC to confirm that the POA has not been released in favour of the petitioner company.

17.2. The EA/HDFC by a return communication of even date, i.e., 14.02.2009 confirmed to the respondents that they are holding the original POA, which had been deposited with them under the escrow agreement, dated 29.03.2006.

18. It appears that in the interregnum, i.e., on 05.01.2009, the petitioner company triggered the arbitration clause contained in the JDA, by appointing Hon'ble Mr. Justice K.P. Sivasubramanian, a former Judge of this Court, as its nominee.

18.1. Interestingly, by a return letter dated 27.01.2009 issued by the Advocates of the respondents, the respondents communicated that they had been advised by a Senior Advocate engaged in their behalf to resolve the matter, without having the disputes referred to arbitration.

19. Unfortunately, the parties could not resolve their disputes and, I suspect, the reason for the same was the receipt of information by the respondents that the petitioner company had gone ahead and unilaterally executed

sale deeds in its favour on 19.12.2008; an information which, they received only on 12.02.2009.

20. The consequences of this nonchalant action of the petitioner company, was that, the respondents approached this Court by way of applications, instituted under Section 9 of the 1996 Act. It appears that five (5) applications were filed for seeking various reliefs. Evidently, all applications were dismissed (except one being : O.A.No.202 of 2009, which related to joint possession of the subject property) by a common order dated 21.04.2009. It appears that in O.A.No.202 of 2009, the petitioner company gave an undertaking to the Court that they would not disturb and/or interfere with joint possession of the subject property by the respondents, and accordingly, the said application was allowed.

20.1. Against this order, appeals were preferred to the Division Bench, which were numbered as : O.S.A.No.206 to 208 of 2009. These appeals were dismissed vide order dated 30.11.2009, as according to the Division Bench, there was no apparent infirmity or error in the order passed by the learned Single Judge.

20.2. In the interregnum, even while no interim order

was granted by the Division Bench during the pendency of the appeals, based on a request made, the Court proceeded to appoint an Advocate Commissioner. Accordingly, the Advocate Commissioner inspected the subject building on 08.08.2009, and thereafter, filed a report dated 14.08.2009, with respect to the status of the building.

20.3. The petitioner company, on the other hand, filed its objections to the Advocate Commissioner's report. These objections are dated 01.09.2009.

20.4. The Division Bench, though, indicated that since, the Arbitrator had entered upon reference, orders with regard to the interim measures could be obtained by making an appropriate application under Section 17 of the 1996 Act.

21. In the meanwhile, the respondents had also instituted a Civil Suit in this Court being : C.S.No.279 of 2009. In the suit, the respondents sought reliefs of permanent and mandatory injunction. Permanent injunction was sought qua the Sub Registrar, Mylapore, restraining him from registering the sale deeds presented by the petitioner company with respect to its share in the subject property to the extent of 5400 sq.ft. and, for an order of restraint qua registration of lease deeds presented by the petitioner

company vis-a-vis floors in the subject building, which would fall to its share.

21.1. Furthermore, as indicated above, mandatory injunction was sought qua the Sub Registrar, Mylapore, to initiate action against the petitioner company under Section 83 of the Indian Registration Act.

21.2. Pertinently, this suit is pending adjudication and stands transferred to the City Civil Court.

22. It is, broadly, in this background, the parties proceeded to have their disputes adjudicated upon by an Arbitrator appointed by this Court.

22.1. Since, respondents did not appoint their nominee in terms of the arbitration agreement, the petitioner company approached this Court by way of a petition under Section 11 of the 1996 Act. The said petition was numbered as : O.P.No.137 of 2009 and, ultimately, this Court passed an order, whereby, ultimately, the petitioner company's nominee was appointed as an Arbitrator.

23. In the arbitration proceeding, the petitioner company filed its statement of claim, in which, it claimed the following reliefs :

"a) Directing the respondents to jointly and severally pay the claimant a sum of Rs.5,92,83,923/- being the refundable security deposit together with interest at 12% per annum and future interest at 12% p.a. on the sum of Rs.4,82,00,000/- from the date till date of realization.

b) Directing the respondents to jointly and severally pay the claimant a sum of Rs.1,21,67,741/- towards rental deposit, caution deposit, OSR Charges, demolition charges, together with interest at 12% p.a. and future interest at 12% pa. on the sum of Rs.1,09,76,830/- from the date till date of realization.

c) Directing the respondents to jointly and severally to pay the claimant a sum of Rs.28,63,093/- being the statutory charges together with interest 12% and future interest at 12% p.a. on the sum of Rs.25,82,870/- from this date till date of realization.

d) Directing the respondents to jointly and severally to pay the claimant a sum of Rs.37,87,641/- towards maintenance charges together with interest thereon at 12% p.a. and future interest @ 12% p.a. on the sum of Rs.35,82,464/- from this date till date of realization.

e) Directing the respondents to jointly and severally pay future maintenance charges at Rs.3.50 per sq.ft. per month from this date.

f) Directing the respondents to joint and severally pay the claimant a sum of Rs.4,86,906/-

towards electricity consumption charges for common areas, together with interest thereon at 12% per annum and future interest at 12% p.a. on the sum of Rs.4,65,345/- from this date till date of realization.

g) Directing the respondents to joint and severally pay the future electricity consumption charges in respect of common areas as per actual meter reading.

h) Directing that the respondents are liable to pay the service tax arising out of the transaction and consequently directing the respondents to jointly and severally pay a sum of Rs.82,40,000/- towards service tax.

i) Directing the respondents to joint and severally pay the claimant a sum of Rs.1,00,00,000/- towards damages for loss of reputation and goodwill.

j) Directing the respondents to jointly and severally pay the claimant a sum of Rs.30,18,104/- towards property tax, fire insurance and IBMS cost.

k) Directing that the claimant is entitled to the original of the power of attorney dated 29.03.2006 executed by the respondents in favour of the claimant and presently under the custody of the escrow agent HDFC, Bangalore.

l) Directing the respondents to pay the costs of the proceedings."

24. In response to the same, the respondents filed their statement of defence, as also, their counter claims. In the counter claim, the respondents claimed the following

reliefs, as noted in the impugned order :

1. "To declare the various sale deeds dated 19.12.2008 registered in the office of the SRO, Mylapore, Chennai, allegedly executed by the claimant through the alleged power of attorney as illegal, void and not binding on the respondents and to direct the claimant to deliver the sale deeds for being cancelled and authorizing the respondents to execute appropriate cancellation deeds.
2. The declare and adjudge that the lease deeds dated 10.11.2008 executed by the claimant in favour of BNP Paribas Global Securities Ltd., as illegal, void and not binding on the respondents and to direct the claimant to deliver the said lease deed for cancellation of the same by executing a cancellation deed.
3. Declaring all the acts, deeds and documents done by or executed on the basis of the five sale deeds dated 19.12.2008 and lease deed dated 10.11.2008 and to direct the claimant to pay the respondents all the moneys and benefits which the claimant had received or earned.
4. Declare that the certificates issued by the Project Architect dated 10.10.2008 in respect of the disputes property as illegal and void.
5. Grant an order of permanent injunction restraining the claim from relying on the said certificate dated 10.10.2008.
6. Appoint an independent Architect for joint inspection of the building and for certifying the

measurement and the quality of the constructed area.

7. Direct the claimant to complete the building as per the agreed specifications in the JVA and obtain completion certificate from the independent architect and furnish the same to the respondents.
8. Direct the claimant to deliver to the respondents 50% of the constructed area upon the respondents paying to the claimant such sum of moneys as the Arbitration Tribunal may determine.
9. Direct the claimant to return all the original documents of title pertaining to the property to the respondents. Direct the claimant to deliver all the original / authenticated copies of drawings, plans, literatures, brochures etc., pertaining to all the devises, equipments and amenities, Direct the claimant to display the name of the building "Menon Eternity" at a prominent place as may be chosen by the respondents.
10. Grant an order of permanent injunction from using the name "Lancor" anywhere in the building.
11. Direct the claimant to pay to the respondents a sum of Rs.80,60,456/- as compensation for the delay in the completion of the building and future interest at 12% p.a. from the date of the counter claim.
12. Direct the claimant to pay the respondents a sum of Rs.12,41,36,609/- as compensation towards loss of previous rent along with future interest at 12%

p.a. from the date of counter claim.

13. Direct the claimant to pay to the respondents a sum of Rs.39,59,220/- towards compensation for loss of rent in respect of car park area with interest at 12% p.a. calculated from the date of the counter claim.
14. Direct the claimant to pay a sum of Rs.1,29,63,727/- towards compensation of loss of interest on the advance rent with 12% p.a. From the date of counter claim.
15. Direct the claimant to (sic 'pay to') the respondents a sum of Rs.31,75,37,342/- as compensation towards loss of future rents with interest at 12% p.a. from the date of counter claim.
16. Direct the claimant to pay the respondents a sum of Rs.5 Crores as damages for slandering the title of the respondent to their share of the constructed area with interest at 12% p.a. from the date of the counter claim.
17. Direct the claimant to pay to each of the 3 respondents a sum of Rs.3 Crore each as damages for having defame their fair name and reputation.
18. Direct the claimant to tender an unconditional apology and withdraw the public notice published on 17.7.2009 in The Hindu and prominently publish the unconditional apology in the same newspaper.
19. Direct the claimant to pay to the respondent the prematurely repaid deposit of Rs.2 Crores and interest thereon amount to Rs.2,31,00,000/- along with future interest at 12% p.a. from the date of

counter claim.

20. Direct the claimant to appoint an independent agency accepted by both parties for maintenance of the common areas and amenities.

21. Direct the claimant to discharge the loan obtained from HDFC and to obtain the original title deeds and documents in respect of the subject property from HDFC and to return the same to respondents.

22. Direct the claimant to pay to the respondents cost of the arbitration proceedings."

25. Based on the pleadings filed before the learned Arbitrator, the following issues were framed in the matter :

1. Whether there was any delay on the part of the respondents in handing over the property after demolition ?
2. Whether the claimant have discharged their obligations and completed the construction of the building within the stipulated time as required under the joint development agreement and the supplemental agreement ?
3. Whether the certificate of the Architect dated 10.10.2008 is valid and binding on the parties and whether the availment of the electricity and water connection was a pre condition for the completion ?
4. Whether there should be an appointment of an Architect afresh ?

5. Whether the Claimant had complied with the terms of clause 6 of the Joint Development Agreement ?
6. Whether 20.10.2008 can be construed as the deemed date of handing over ?
7. Whether the terms of the escrow agreement is relevant for this Arbitral proceedings and if so whether the Claimant had complied with more particularly clause 7 ?
8. Whether the sale deeds dated 19.12.2008 is supported by good and valid considerations ?
9. Whether the claimant is entitled to the various claims as prayed for ?
10. Whether the respondents are entitled to the claims made under their counter claim ?
11. Whether the parties are entitled to the cost of the proceedings ?
12. Whether the Claimant was entitled to premature return of the deposits from the respondents ?
13. To what other reliefs the parties are entitled to ?”

Synopsis of the Findings returned by the Arbitrator :

26. The learned Arbitrator, after having heard the parties and appreciated the material placed before him, returned the following findings of fact :

- (i). That the handing over of site by the respondents was effective as on 01.07.2006 and not in October 2006, as claimed by the petitioner company. Accordingly, issue

No.1 was decided against the petitioner company.

(ii).That the period of completion for construction of the building, which was twenty four (24) months, would commence from 01.07.2006, or, in any event, from 04.07.2006, when, the petitioner company wrote to the respondents that all obstructions had been removed enabling it to move forward in having the subject building constructed.

(iii).That the subject building was not complete as on 10.10.2008, when the PA issued the certificate, as even according to him, on that date, the power, water and sewerage connections had not been made.

(iv).That the certificate dated 10.10.2008, issued by the PA, was not a valid certificate, as the requirements stipulated under clause 6(a) of the JDA had not been complied with.

(v).The PA had not acted in an independent manner, and that, he had himself disowned his status as a PA.

(v) (a) Accordingly, it was held that 20.10.2008, could not be held to be the hand over date, or, deemed hand over date, as was projected by the petitioner company.

(v) (b) There were major defects noticed in the construction of the subject building, as late as March

2011, by independent Engineers, i.e., M/s.Velu Associates, appointed by the Arbitrator, which, supported the contention, that the subject building was not complete and the certificate issued by the PA was not valid in terms of the requirements stipulated in the JDA.

(vi).That mere issuance of a certificate by the PA was not the only factor, which had to be taken into account while, releasing the POA, held in its custody by the EA/HDFC, and that, the EA/HDFC was obliged to satisfy itself as to whether all conditions obtaining under the agreement executed between the parties had been fulfilled.

(vi)(a) The discretion, in this behalf, to satisfy itself was vested in the EA/HDFC under Clause 7 and 8 of the Escrow Agreement.

(vi)(b) Under clause 11 of the Escrow Agreement, the EA was obliged to hand over the documents not only upon the petitioner company performing its obligations, but also upon the petitioner company receiving an acknowledgment from the respondents to that effect.

(vi)(c) Thus, in effect, it was a mandatory duty cast upon the EA/HDFC to fully and independently satisfy

itself with regard to the performance of the mutual obligations undertaken by both the parties, and, if required, to seek assistance of a consultant, whose costs were required to be borne by the petitioner company.

(vii).That having regard to the material placed before him, the EA could not be held to be in error in not hand overing the POA to the petitioner company.

(viii).The fact that the respondents had already executed a lease deed with FMCPL in respect of the sixth floor of the subject building, and also, the fact, that the lease deed, dated 10.11.2008, had been executed in favour of BNP Paribas prior to the execution of the impugned sale deeds, would not establish that the subject building stood completed, as these actions of the parties could be attributed to their anxiety to seek an early return on their respective investments in the project.

(ix).The stand of the respondents that the building was not complete was not motivated by their inability to refund the SD.

(x).That the EA/HDFC was well within its right to refuse to part with the POA. In case, the petitioner company

found that the action of the EA/HDFC in refusing to release the POA was unjustified, the petitioner company ought to have approached either the Arbitrator, or the civil Court, and not taken the law in its own hands, by declaring that the EA/HDFC was not justified in refusing to hand over the POA.

(xi).The Escrow Agreement was very much relevant for deciding the rights obtaining between the parties, and that, since, conditions contained in clause 6(a) of the JDA had not been complied with, the EA/HDFC, was justified in refusing to hand over the POA to the petitioner company.

(xii).Since, the conditions obtaining in clause 6(a) of the JDA, and those, contained in the Escrow Agreement were not fulfilled, the petitioner company could not act as a judge in its own cause, and have the sale deeds executed in its favour, based on the copies of the POA.

(xiii).The respondents were not informed about the execution of the impugned sale deeds dated 19.12.2008, till 12.02.2009.

(xiii)(a) The petitioner company had made false and incorrect statements in the communication dated

12.02.2009 that the registration of the sale deeds had been brought about by use of the POA placed in the hands of EA/HDFC.

(xiv).The registration of the sale deeds by the petitioner company not only suffered from legal infirmities, on account of: non-compliance with the terms of the JDA and the supplemental agreement, reliance on the certificate of the PA, which was otherwise invalid, and due to the reason that registration of sale deeds had been obtained, without taking recourse to the original POA lying escrow with EA/HDFC - but also, lacked *bona fides* as information, with regard to the factum of registration of sale deeds, was given neither before the registration nor within a reasonable time thereafter.

27. Based on these findings, the Arbitrator, in effect, found Issues No.1 to 3 and 5 to 8 in favour of the respondents.

27.1. Insofar as issue No.4 was concerned, no decision was required to be taken, on account of the fact that it had worked itself out, since, the Arbitrator, as indicated above, during the course of the proceedings held before him,

had appointed M/s.Velu Associates, as independent Engineers, in respect of the subject building and had got placed before himself the report generated by them.

27.2. The record shows that the Arbitrator, in fact, had permitted cross-examination of the Engineer, who conducted the inspection, under his aegis, and thereupon, returned a finding of fact, with regard to state of completion of subject building.

27.3. However, when, it came to returning the findings qua the remaining issues, specifically, issues No.9 and 10, which related to reliefs sought by the petitioner company, and the respondents respectively, quite inexplicably, the learned Arbitrator, after having found that the sale deeds executed in favour of the petitioner company were not valid in the eyes of law, chose not to take the matter further and, resolve the disputes one way or other to the full satisfaction of the contesting parties.

27.4. The learned Arbitrator appears to have recognised the fact that, while, execution and the registration of the sale deeds by the petitioner company was not valid, the subject building had indeed been constructed at the expense of the petitioner company, and that, if the sale deeds were to be set aside, then, the petitioner company, in the very

least, would be entitled to reimbursement of the expenses incurred by it, on the construction of the building.

27.5. The Arbitrator, also, appears to have recognised the fact that the petitioner company in the alternative could seek regularisation of the sale transactions, *albeit*, upon payment of suitable compensation to the respondents.

27.6. While the Arbitrator, in the impugned award set forth various ways, in which, final relief could be moulded, he seemed to have stopped short of firming up the final relief in the matter, with regard to compensation to be paid either way, that is, if, the sale was set aside, as was finally done or, in the alternative, if, the sale transactions were regularised.

27.7. The observations made, in this regard, are set out in paragraphs 126 to 136 of the impugned award.

27.8. What compounded the problem is the observation made by the learned Arbitrator that the parties could seek their remedies by taking recourse to a civil court or, by accessing the provisions of the 1996 Act, with a caveat, though, that they could not avail of his services. In effect, the learned Arbitrator has shut the door on this Court of a remedy of remand in the matter by exercising

power under the provisions of Section 34(4) of the 1996 Act, whereby, possibly the learned Arbitrator could have been called upon to, perhaps, rule on the undecided issues.

27.9. In support of this reasoning, the learned Arbitrator made a telling observation, which was that, none of the parties had either come forth with the requisite pleadings, much less, proof of actual compensation, which, according to him, would necessarily become payable to the petitioner company, upon the sale being held invalid.

28. It is, in this context, that the learned Arbitrator, chose not to decide issues No.9 and 10, which, as alluded to above, related to the reliefs that the petitioner company and the respondents had sought via their respective claims and counter-claims.

28.1. I may only record here that the learned Arbitrator while, concluding, noticed two aspects of the matter. First, that the relief sought by the petitioner company with respect to the return of SD had become redundant by the time it came to pronouncement of the award, as during the pendency of the proceedings before him, on 20.10.2010, he had passed an interlocutory order, whereby, respondents were given possession of their share of the

subject property, upon having them refund the principal sum of SD retained by them, at that point in time, which was, an amount equivalent to Rs.4.82 Crores, and furnishing a Bank Guarantee in the sum of Rs.1.56 Crores, to cover the possible liability, towards claim for interest on the SD retained by the respondents.

28.2. It is, for this reason, that no further funding was required to be returned qua Issue No.12, as it had already worked itself out. In so far as Issue No.11 was concerned, the learned Arbitrator ruled that parties would bear their own costs.

28.3. The other aspect, which the learned Arbitrator had noticed, was that, the petitioner company had sought a direction qua the payment of Rs.1,21,67,741/- towards rental deposits, caution deposits, OSR charges and demolition charges with interest at the rate of 12% per annum, which got reduced, on account of CMDA refunding caution deposit, by an amount equivalent to Rs.72,87,500/-. Resultantly, upon an amendment application being moved by the petitioner company under Section 23(3) of the 1996 Act, the prayer in clause 32(b) of the statement of claim was permitted to be amended by the learned Arbitrator vide order dated 11.02.2016. In effect, in respect of the very same claim,

the petitioner company sought a reduced sum as against the original claim. In other words, against a claim of Rs.1,21,67,741/-, the petitioner company modified its claim to a sum of Rs.48,80,241/- along with interest.

29. Thus, while, rejecting the claims of the petitioner company, the Arbitrator indicated that the rejection was subject to the right of the petitioner company to raise such claims, as it may deemed fit, before the appropriate forum.

29.1. The learned Arbitrator, explicitly, indicated that the rejection of the monetary claims would not be a bar to their adjudication before the appropriate forum, as he had not dealt with the same on merits.

29.2. Similarly, in so far as the counter claims are concerned, the learned Arbitrator made the following observations :

"150. However, on the basis of the findings rendered above, the following counter claims are dealt with as a consequence of the discussions and findings recorded above :

Prayer No.1: Allowed subject to specific observations below.

Prayer No.2: Need not be gone into as a result of the lease period in favour of the lessees having already come to an end as contended by the Claimant and however

subject to the specific observations below.

Prayer No.3: Allowed subject to specific observations below.

Prayer No.4: Allowed subject to specific observations below.

Prayer Nos.5 to 8: Not necessary in the circumstances of the case.

Prayer Nos.9 to 23 : Left open to be raised before the appropriate forum."

29.3. Thus, in effect, in the operative part of the award, the learned Arbitrator ruled as follows :

"I. The five sale deeds dated 19.12.2008 registered as Nos.2890, 2891, 2892, 2893 and 2894 of 2008 in the office of the Sub Registrar, Mylapore, Chennai, are declared as 'illegal' and not binding on the respondents and respondents are entitled to execute appropriate cancellation deeds.

II. No declaration is necessary in respect of the Lease Deeds mentioned under para 2 of the counter claim in view of the Arbitrator having been informed that the lease period under the said leases are already over and fresh leases have to be executed only after April, 2016. It is declared that in view of the findings that

the sale deeds in favour of the Claimants are illegal and not binding on the respondent, the claimant shall not have any right to lease any portion allotted towards their 50% share in the property.

III. All the acts done and deeds executed on the basis of 5 sale deeds dated 19.12.2008 are declared as non-est and illegal and the respondent shall be entitled to receive all the consequential benefits acquired by the claimant thereon.

IV. The Project Architect certificate dated 10.10.2008 of M/s.Matraj and Venkat is declared as illegal, non-est, violative of the terms of agreement and not binding on the respondent.

V. Prayer Nos.5 to 8 are rejected as unnecessary.

VI. All the individual items of claim under the claim statement as put forth by the claimant and the individual items of counter claims under Prayer No.9 to 23, and other additional claims made by both parties, are not considered by the Arbitrator in view of the observations made above. Such claims, counter claims, additional claims are left open to both

parties to take appropriate further proceedings in accordance with law.

VII. There will no order as to cost and both parties to bear their respective costs."

(emphasis is mine)

30. Notably, the impugned award is assailed only by the petitioner company.

Submissions of Counsels :

31. On behalf of the petitioner company, arguments were advanced by Mr.P.S.Raman, Senior Advocate, assisted by M/s.P.R.Raman, C.Seethapathy, A.Umasankar and S.P.Arthi, while on behalf of respondents No.1 and 2, submissions were made by Mrs.Nalini Chidambaram, Senior Advocate, assisted by M/s.Arun Natarajan and C.Uma. Respondent No.3 was represented by Mr.Sathish Parasaran, Senior Advocate, assisted by M/s.Adithya Reddy.

32. Briefly, Mr.Raman's arguments can be paraphrased as follows :

32.1. The award was contrary to the public policy, as

the learned Arbitrator had failed to take into consideration the relevant material, which, unarguably, according to him, demonstrated that the petitioner company had, in fact, substantially completed the subject building, and that, defects, if any, were minor in nature.

32.2. In support of this contention, Mr.Raman submitted that any of the following four dates could be taken, as the dates on which, the subject building could be taken, as having been substantially completed. The first date cited by him, in this behalf, was, when, the petitioner company was, according to him, in a position to physically hand over the subject building, i.e., 20.10.2008. The second milestone, as it were, was when, CMDA had issued a Completion Certificate, i.e., 14.11.2008. The third date supplied was, 19.12.2008, when electricity, power and sewerage connection was provided to the subject building. The last milestone was reached, so to say, when, in fact, on 20.10.2010, physical possession of the subject building was taken over by the respondents.

32.3. It was Mr.Raman's submission that the learned Arbitrator had lost sight of the fact that there were, even according to the report of the independent Engineers, only three defects in the subject building, which, of-course, according to him, were minor in nature and in any event

could have been compensated and/or cured.

32.4. These defects along with miniscule sub heads, according to the learned counsel, pertained to the following:

(i) First: non-provisioning of Kota Stone in the fire escape stair way; the use of granite, both for the treads and risers in respect of the main stair case as well as the fire escape stair way (i.e., the emergency stair case); the damage to some portion of the granite; and lastly, the repaired stair way, according to the Independent Engineers, presented an unseemly sight.

(ii) Second: water seepage in the basement, especially, in the electrical room.

(ii)(a) This defect, according to the learned Senior Advocate, had been taken remedied, even according to the independent Engineers, by firstly, providing extra base concrete, and thereby, raising the floor level; secondly, by constructing a sump in the basement to collect water; thirdly, by installing submersible pump to drain out any water, that may collect in the basement panel room; and lastly, by water proofing the flooring to prevent seepage of sub-soil water.

(ii)(b) Furthermore, the measures recommended by the

independent Engineers, that is, provisioning of surface proofing in the basement floor and the walls by utilizing the services of the specialists and making way for ventilation, according to the learned senior counsel, could have been worked out.

(iii) Third: the failure to provide a canopy.

32.5. In other words, it was Mr.Raman's contention that the learned Arbitrator, notwithstanding the report of the independent Engineers, qua the subject building, which, according to them, had major defects, ought to have looked at the nature of the defects and, then, concluded whether or not the subject building was complete, as required under clause 6(a) of the JDA.

32.6. Furthermore, learned Senior Advocate submitted that the approach adopted by the learned Arbitrator in dealing with the disputes, referred to him, had left, in a sense, both the parties dissatisfied, as there was no closure, even after parties had been in litigation, for the past six (6) years. In this connection, it was submitted that the learned Arbitrator, while holding that the sale deeds were not validly executed, failed to pay heed to the fact that the JDA was still intact and had not been

terminated by the respondents.

32.7. According to the learned Senior Advocate, in the JDA, a provision stood incorporated for claiming compensation for delay in completion of the subject building. It was, thus, the learned Senior Advocate's submission that given the fact that the parties were in occupation of their respective 50% of the share of the building, the learned Arbitrator should have concluded that, substantially, the building stood completed, and further, that, the rights of parties and injuries, if any, caused to them, could be worked out by awarding suitable compensation in terms of the agreement obtaining between them. In this behalf, Clause 17 of the JDA was relied upon to contend that damages, if at all, could have been calculated at the rate of Rs.15 per sq.ft.

32.8. In other words, according to the learned counsel, the failure on the part of the learned Arbitrator to rule as to what would be the best way forward, even if, he were to hold that the sale deeds were invalidly executed, has rendered the award unsustainable in the eyes of law.

32.9. Furthermore, Mr.Raman emphasised the point that given the fact that the decision in the arbitration proceedings was reserved in July, 2012, the pronouncement of

award after four (4) years, on 16.03.2016, did impact the final outcome of the proceedings. The contention was that the impugned award should be set aside on the short ground alone. In this behalf, reliance was placed on judgement of the Delhi High Court in **Union of India V. Niko Resources Ltd., (2012) 191 DLT 668.**

33. I may only indicate here that it was the stand of Mr.Raman, that the aforesaid submission on quantification of damages was made, *de hors*, the stand taken by the petitioner company that the EA/HDFC had acted unfairly in refusing to hand over the original POA at the say so of the respondents, and therefore, the petitioner company was well within its rights to seek execution and registration of the sale deeds.

34. On the other hand, Mrs.Nalini Chidambaram and Mr.Sathish Parasaran, learned Senior Advocates, largely, relied upon the impugned award, in rebuttal to the submissions advanced by Mr.Raman.

34.1. The learned Senior Advocates took me through the record to demonstrate that not only had the petitioner company not completed construction of the subject building

in terms of the JDA, but had also, acted fraudulently coupled with undue haste in having the concerned sale deeds registered in its favour; firstly, by influencing the PA to furnish an invalid certificate; and secondly, by having the impugned sale deeds executed and registered in its favour without the original POA in hand.

34.2. In other words, according to the learned Senior Advocates, the actions of the petitioner company, were both, fraudulent and high handed. Thus, according to the learned counsels, since, the petitioner company had committed a fraudulent act, it could only have been dealt with in the manner as indicated in the award, that is, by setting at naught the concerned sale deeds. In other words, according to the learned counsels, the civil consequences to which, the petitioner company was exposed to, was proportionate to the infraction committed by it.

34.3. Mr.Sathish Parasaran, learned Senior Advocate, who appeared for respondent No.3, however, did concede that the JDA had not been terminated.

34.4. On being queried, though, as to whether the impugned award had left both parties dissatisfied to the extent that there was no final resolution of the disputes at the level of the Arbitrator, Mr.Sathish Parasaran, conveyed

to me, that this Court, should leave the parties to their own devices to agitate their outstanding disputes before an appropriate forum, without disturbing the findings returned by the learned Arbitrator.

35. I must record, though, that during the course of the hearings, I had, in fact, indicated to the learned counsels for the parties that in view of the peculiarity of the award, if, parties were to agree, the impugned award could be set aside, and thereafter, referred to an agreed Arbitrator, who could, then, take up the proceedings *de novo*, based on the record, presently available, which would include the pleadings and the evidence led by the parties - so that, a finding could be returned qua the remaining unanswered issues.

35.1. Unfortunately, the parties could not reach a consensus on the suggestion made during the course of the hearing. The point of difference, briefly, was, that, while, Mr.Raman wanted the award to be set aside and the matter, referred to an agreed Arbitrator to be adjudicated upon *de novo*, the learned Senior Advocates appearing for the respondents, i.e., Mrs.Nalini Chidambaram and Mr.Sathish Parasaran, wanted the agreed Arbitrator to rule only upon

those issues, which had been left undecided, while leaving the findings, which had already been returned in the impugned award, untouched.

35.2. These of course, were without prejudice submissions of counsels for both sides.

35.3. I must also record, at this juncture, that Mr.Sathish Parasaran, on behalf of respondent No.3, had raised a submission, in the context of what is stated hereinabove, that the impugned award should be treated as a partial or an interim award, and that, therefore, it could not be set aside on the ground that the learned Arbitrator had failed to decide all issues. The argument being, as alluded to above, that this Court should sever the unacceptable part of the award, and thus, in exercise of its powers under Section 34 of the 1996 Act, remit the matter, if not, to the same Arbitrator, to a different Arbitrator.

35.4. Furthermore, in the written submissions filed on behalf of respondent No.3, under the heading "scope of review under Section 34", submissions have been made, with regard to the applicability of the amended provisions of Section 34 of the 1996 Act. In addition, under the very same heading, a submission is made that, since, respondent

No.3, i.e., Mr.Christopher Gladstone Menon is a foreign citizen, the arbitration, in the instant case, would be classified as an international commercial arbitration, as defined under Section 2(1)(f) of the 1996 Act, and therefore, the scope of review by this Court would be narrow.

35.5. I would be failing in my duty, if I were not to indicate at this juncture that none of these submissions adverted in paragraph 35.4 were advanced before me during the course of oral arguments. Therefore, I do not deem it fit to discuss these submissions, as it would, then, amount to entertaining an argument, which was not put to the other side, i.e., the petitioner company.

35.6. Notwithstanding the aforesaid, I must indicate herein, which is something which would be discernible upon perusing the reasons, that follow hereafter qua the conclusion I have reached in the matter, that, however, narrow, one were to keep the scope of review, the sheer unworkability of the award by virtue of failure to decide all issues at one go has made it susceptible to interference.

35.7. Insofar as delay in pronouncement of the award was concerned, Mr.Sathish Parasaran, submitted that it had

not prejudiced the interest of the petitioner company, since, in the meanwhile, it had benefited not only by receiving rents qua the portion of the building in its possession, but also, by enjoying the other fruits of the rights acquired via execution of the concerned sale deeds. It was, thus, submitted that delay per se, could not be cited as a ground for setting aside the impugned award, unless it could be shown that it had caused prejudice to the affected party. Reliance in this behalf was placed on the following judgements : **ONGC V. SAW Pipes Ltd., (2003) 5 SCC 705 ; and Union of India V. Niko Resources Ltd., (2012) 191 DLT 668 (Del) .**

Reasons :

36. Having heard the learned Senior Advocates for the parties and perused the record, what does emerge is as follows:

(i).That the work qua the subject building commenced in or about 04.07.2006.

(ii).That the period of twenty four (24) months for completion of the contract would have, in the ordinary course, come to an end on 04.07.2008.

- (iii).That the PA's certificate dated 10.10.2008, was not validly obtained, as the condition that the subject building was complete and fit for occupation, as provided in clause 6(a) of the JDA, was not complied with, and therefore, 20.10.2008, was neither the 'hand over date' nor, could it be treated as deemed handover date, as was suggested by the petitioner company.
- (iv).That the EA/HDFC was right in refusing to hand over the POA to the petitioner company.
- (v).That the defects in the building were, basically, three in number. The first defect related to the usage of granite for the fire escape (emergency stair case). The second defect pertained to wetness found in the basement, more particularly, in the electrical room. The third defect pertained to the failure to provide a canopy.
- (vi).That the CMDA had issued a completion certificate dated 14.11.2008. The said completion certificate issued by the CMDA was based on the other approvals obtained by the petitioner company, namely, Completion Certificate dated 21.08.2008, issued by the Corporation of Chennai;

Compliance Certificate issued by the Director of Fire and Rescue Service, dated 23.09.2008; Compliance Certificate issued by the Police Department (Traffic), dated 25.09.2008; and the Compliance Certificate, issued by the ELCOT, dated 30.10.2008.

(vii). That the respondents were in physical possession of their 50% share of the subject building, and likewise, the petitioner company was in possession of its 50% share of the subject building.

(viii). The petitioner company had been refunded the entire SD, albeit, without interest.

(ix). There were no lease deeds in operation, and that, the tenure of the subsisting leases had expired.

(x). The JDA and the supplemental agreements were intact. The EA/HDFC was still in possession of the original POA.

(x) (a) In respect of this aspect, I may only note that none of the counsels argued to the contrary, i.e., that the EA/HDFC was not in possession of the original POA.

(xi).Lastly, that the petitioner company was in possession of its share of 50% of the building without title, on account of the concerned sale deeds, having been declared invalid by the learned Arbitrator.

37. Insofar as these findings of facts are concerned, I am in agreement with the counsel for the respondents that these were based on the learned Arbitrator's appreciation of evidence put before him and none of them were perverse, save and except to the extent that the defects, which were pointed out by the Independent Engineers, i.e., M/s.Velu Associates, while deliberating on the issue of completion of the subject building were termed as major defects without elaborating whether or not they were curable. Therefore, what emerges from the record is, while it could be stated in favour of the respondents that they were right in contending that the subject building was not fully complete, and therefore, in that sense, not fit for occupation from a contractual point of view but the consequences to which, the petitioner company was put to, which was, cancellation of the concerned sale deeds, without being given a chance for

making over reparations and/or, damages to the respondents was an aspect which the learned Arbitrator ought to have dealt with. The fact that the learned Arbitrator chose not to deal with this aspect of the matter, even, while he dabbled with thought that the petitioner company could seek regularization of sale transaction by compensating the respondents for the loss caused to them, rendered the award susceptible to interference. The learned Arbitrator's exhortation to parties to agitate their remaining rights before an appropriate forum, that is, a civil court or via an Arbitrator is a suggestion which is wholly unworkable both in law and on facts.

37.1. To my mind, the alternative of seeking regularisation of the sale transaction, as well as the other alternative, which, the learned Arbitrator adverted to, which was, that having declared the concerned sale deeds invalid, the respondents would necessarily have to compensate the petitioner company for the amount expended by it to construct the subject building, could have been taken to its logical conclusion by calling upon the parties to lead evidence in the matter and, if necessary, to amend the pleadings, accordingly.

37.2. This is an aspect, which should, have with all

humility, at my command, crossed the mind of the learned Arbitrator, at the stage of framing of the issues, if not earlier. In that respect, framing of issues in any litigation is a crucial stage when, the concerned Adjudicator takes into account the pleadings and the material placed before him, and then, takes a decision as to what issues obtain between the parties.

38. In my opinion, the learned Arbitrator should have been cognizant of the fact that the JDA had not been terminated by the respondents, despite the alleged breach by the petitioner company, and that, the allegations, with regard to breach were confined, largely, to the delay in completion of construction and, with respect to certain quality aspects, to which, I have made a reference above.

39. Therefore, compensation for the delay caused and the cost required to cure the defects in the subject building should have been the focal point of the adjudication by the Arbitrator.

39.1. In that sense, the arbitration proceedings are inchoate, and have, thus given rise to, only an another round of litigation at heavy cost to the parties, which are,

both tangible and intangible. Intangible, in the sense, that the parties are not able to bring about a closure qua the disputes obtaining between them, and hence, suffer the stress and strain of litigation. Therefore, if, the learned Arbitrator was of the view that one of the parties, i.e., the petitioner company or the respondents needed to be compensated (depending on which of the two alternative were to be adopted), then, in my opinion, the learned Arbitrator ought to have logically proceeded further on one of the two courses set forth by him.

39.2. The rationale put forth by the learned Arbitrator that he could not rule on issues No.9 and 10, because necessary pleading were not in place, to my mind, cannot be the correct approach. The learned Arbitrator in law had to rule one way or the other, so that, at his end, there was closure for the parties. It was incumbent on the learned Arbitrator to decide all issues. Failure to decide all issues has rendered the award bad in law, as it has caused grave prejudice to parties. (See **Union of India V. Punjab Communications Ltd.**, 2003 (2) Arb LR 604 (HP) and **Associate Builders V. Delhi Development Authority**, (2015) 3 SCC 49.

39.3. Notably, in **Associate Builders case**, the Court recognized the principle of prejudice to parties, based on

which, an award could be challenged, as set forth in its earlier judgement in the case of **DDA Vs. R.S.Sharma and Co.,**

(2008) 13 SCC 80 :

"In DDA VS. R.S.Sharma and Co., (2008) 13 SCC 80, the Court summarized the law thus:

"21. From the above decisions, the following principles emerge:

- (a) An award, which is
 - (i) contrary to substantive provisions of law; or
 - (ii) the provisions of the Arbitration and Conciliation Act, 1996; or
 - (iii) against the terms of the respective contract; or
 - (iv) patently illegal; or
 - (v) prejudicial to the rights of the parties;
- is open to interference by the court under Section 32(2) of the Act.

(b) The 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.

(c) The award could also be set aside

if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

With these principles and statutory provisions, particularly, Section 32(2) of the Act, let us consider whether the arbitrator as well as the Division Bench of the High Court were justified in granting the award in respect of Claims 1 to 3 and Additional Claims 1 to 3 of the claimant or the appellant DDA has made out a case for setting aside the award in respect of those claims with reference to the terms of the agreement duly executed by both parties."

(emphasis is mine)

40. Given these circumstances, I may have left to myself proceeded to decide the matter by taking recourse to one of the two alternatives. However, the difficulty with the 1996 Act is that, while the Court can set aside, and/or demolish an award, it cannot repair the same and, in a sense, supplant the relief awarded by the learned Arbitrator, with its own relief. (See **McDermott**

International Inc. V. Burn Standard Co., Ltd., (2006) 2 Arb LR 498)

40.1. There is another reason why I would not embark on this exercise at the Section 34 stage. The reason being that parties, in my view, would have to lead evidence, with regard to possible reparations, and/or, damages that would have to be paid depending on the course of action, which is followed hereafter by the Adjudicator.

40.2. It is, for this very same reason, that I am unable to persuade myself to accede to the submission of Mr.Sathish Parasaran, that this Court while sustaining the finding of the learned Arbitrator that the execution of the sale deeds was brought about illegally, and hence, their execution was invalid, should close the door on the petitioner company to assert that if, it were to pay damages, (as may be quantified by an Adjudicator, with regard to the injury caused to the respondents, on account of delay and defects, in the subject Building,) - it could seek a direction for regularisation of the concerned sale deeds.

40.3. The reason, I am persuaded to come to this conclusion, is on account of the fact that the JDA is not like a rate contract, whereby, the petitioner company could

be expected to receive consideration against actual quantum of work executed. The JDA, envisaged, development of a vacant land. The consideration for development was the acquisition of ownership rights in one-half of the subject Building along with proportionate rights in the Undivided Share in the land beneath, as also, the common areas. The JDA and appurtenant Supplemental agreements, having remained intact, the petitioner company's rights to seek its entitlements cannot be foreclosed, completely, if it is willing to pay, judicially determined reparations and/or, damages qua the loss, if any, caused to the respondents.

40.4. Therefore, the submission of Mr.Sathish Parasaran, that the impugned award should be treated as a partial or interim award cannot be accepted. The finding in the impugned award that the conditions stipulated in clause 6(a) of the JDA had not been complied with by the petitioner company is inextricably linked with the manner, in which, the final relief in the award is requited to be fashioned.

40.5. In this context, I may indicate that the 1996 Act does not define the terms "partial award" or "interim award". The 1996 Act only defines an arbitral award. Section 2(1)(c) of the 1996 Act defines arbitral award as one which includes an interim award. In most jurisdictions the

terms "partial award" and "interim award" are used interchangeably.

40.6. Therefore, a partial or an interim award, in my opinion, would be one which decides, albeit, finally a claim or, a part of a claim and not issues arising between contesting parties. In the facts and circumstances of the case, the finding of the learned Arbitrator that the petitioner company had not completed the subject building, is linked in a manner of speech, like Siamese twins with the issues, such as, whether or not regularization of sale transactions should be ordered. If so, the mode and manner of compensation to be paid to the respondents. Furthermore, if, *quantum meruit* principle is to be applied, as suggested in the impugned award, the quantum of compensation to be paid to the petitioner company would have to be ascertained. The parties could not have intended at the time of execution of the JDA that the petitioner company would construct the subject building gratuitously.

40.7. Furthermore, to my mind, a partial/interim award, is a one, which is, executable on its own strength. The impugned award is not executable in its present form because of its inextricable linkage with the final relief to be

accorded in the matter, and therefore, in my opinion, it cannot be treated as a partial or interim award. Thus, this submission advanced on behalf of respondent No.3 will have to be rejected.

40.8. Last but not the least, even the learned Arbitrator has not treated the impugned award as a partial or an interim award. In fact, there is no pleading made in this behalf in the counter-affidavit filed on behalf of respondents No.1 and 2. The record shows that respondent No.3, unlike respondents No.1 and 2, chose not to file a counter-affidavit.

40.9. I may note though that there is a point of view espoused by some learned Commentators that partial award and interim award cannot be equated. While partial award deals with monetary claims, as alluded to above by me, interim award could deal with aspects pertaining to jurisdiction, bias, etc. (see "The Law and Practice of Arbitration and Conciliation" (Second Edition - 2006, Page 145, O.P.Malhotra and Indu Malhotra). In my opinion though, there would be more in the nature of interim orders. Decision on a Issue by an Arbitrator may lead to a situation, where one party may plead issue estoppel against the other in a subsequent litigation but it may not necessarily morph such an order

into an interim award.

41. The other point raised by Mr.Sathish Parasaran that since, respondent No.3 was a foreign citizen, the arbitration proceedings would be categorised as an international commercial arbitration, to my mind, does not take the case of the respondents any further, as it is not even, the stand of the learned counsel for the petitioner that the provisions of Section 34 of the 1996 Act would not be available to the petitioner company to assail the award, which is based on such a premise.

42. Thus, for the foregoing reasons, I am inclined to set aside the impugned award, albeit, partially. In other words, while, the finding with respect to failure by the petitioner company to comply with the conditions stipulated in clause 6(a) of the JDA is sustained, along with all those attendant findings which are necessary to reach this conclusion¹ - I am disinclined, for the present, to axiomatically proceed to invalidate the sale deeds, as much would depend on the course of action, which the concerned Adjudicator would take hereafter. The Adjudicator could very well permit the petitioner company to seek title to their half-share of the subject Building and the appurtenant rights, as envisaged in the JDA and the supplemental

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agreements, if it were to pay damages as may be judicially determined by an appropriate forum or, in the alternative, could declare the sale deeds as invalid and allow for payment of only cost of construction to the petitioner company. While taking recourse to this alternative the concerned Adjudicator will have to bear in mind, in my opinion, the terms of the JDA and the nature of the arrangement arrived at between the parties, and then, perhaps, rule on the best way forward.

43. The captioned petition is, accordingly, disposed of, in the aforesaid terms, leaving the parties to bear their own costs.

44. Resultantly, connected applications shall stand closed, as well.

sd/.R.S.A.J
23.12.2016

//Certified to be a true copy//

Dated this the day of सत्यमेव जयते 2017

R.s/22.02.2017

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.