

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

APPEAL NO.425 OF 2015
IN
ARBITRATION PETITION NO.846 OF 2014
WITH
NOTICE OF MOTION NO.1359 OF 2015
IN
APPEAL NO.425 OF 2015
IN
ARBITRATION PETITION NO.846 OF 2014

Haresh Advani
Adult, R/o.101, Prabhu Kutir, Altamount Road,
Mumbai-400 026. Appellant

versus

Suraj Jagtiani
R/o.16, Palm Court, 152, M.Karve Road,
Churchgate, Mumbai-400 020. Respondent

Mr.Janak Dwarkadas, Senior Advocate, with Ankita Singhania,
Kunaal Shah, Anirudh Kapoor, Siddharth Ranade and Deepan Shah
i/by Kalpesh Joshi for Appellant.

Dr.Birendra Saraf with Mr.Akshay Patil, Mr.C.Rashmikant, Ms.Poojma
Kothari and Ms.Nikita Mishra i/by M/s.Federal & Rashmikant for
Respondent.

**CORAM : S.C.DHARMADHIKARI AND
PRAKASH D. NAIK, JJ.**

DATE : 21st and 22nd September 2017

ORAL JUDGMENT (Per - S.C.Dharmadhikari, J.) :-

1. This appeal challenges the judgment and order of learned Single Judge dated 24th April 2015 passed in Arbitration Petition No.846 of 2014.

2. Admit. Paper book dispensed with. The learned Advocate for respondent waives service. With the consent of parties, this appeal is disposed off finally by this judgment.

3. The short facts necessary to appreciate the arguments of learned Senior Advocate appearing for the appellant and that in reply of learned counsel appearing for the respondent, are set out in the following paragraphs.

4. The appellant before us was the original respondent before the arbitral tribunal. The respondent in this appeal is the claimant. We will prefer to refer to the parties by their nomenclature in the arbitral proceedings.

5. The award of the arbitrators came to be rendered on a dispute between the claimant and the respondent. M/s.Regency Hotels Private Limited (`Regency Hotels' for short) was the owner of a plot of land at Village Sahar, Taluka Andheri, Mumbai Suburban District. The issued share capital of Regency Hotels in the year 1995 was 24,500 shares of Rs.100/- each aggregating Rs.24.50 lakhs, of which 11,025 shares (45%) were held by claimant/respondent to this appeal and remaining 2,350 shares (10%) were held by Gul Kriplani. By an agreement dated 28th July 1996, three share holders agreed to sell 50% of their respective shareholding in this company to one Cherish Investment Private Limited. This agreement was subsequently terminated by the shareholders of the company.

6. On 6th July 1998, (and it would be better to refer to the parties now by their names; the respondent-claimant before us shall be

referred to as Suraj and the appellant-original respondent as Haresh Advani) Suraj entered into an agreement to transfer his 45% shares in Regency Hotels to Haresh Advani upon terms and conditions, more particularly set out in this agreement. The said Suraj agreed to sell his entire shareholding in the company for a consideration of Rs.5.8 crores payable in installments till 31st May 1999. Clause-4.1.1 of this agreement noted that in the event of failure or negligence on the part of Haresh Advani to pay the consideration in accordance with Clause-3 of the agreement, Suraj was entitled to terminate the said agreement and forfeit the amount paid by Haresh Advani, subject to maximum of Rs.1.20 crores. Under Clause-5 of the agreement, the parties appointed Mr.Mahesh Jethmalani as escrow holder and agreed to deposit a copy of this agreement along with shares and share transfer forms duly executed by Suraj in favour of Haresh Advani and also a power of attorney in favour of the escrow holder authorizing him to execute fresh transfer forms in favour of Haresh Advani on completion of transaction. By letter of 6th July 1998, further understanding between the parties was recorded and in relation to voting rights.

7. On that very day namely 6th July 1998, the parties entered into a supplementary agreement, inter alia, recording that Haresh Advani was aware of the Cherish agreement and had agreed to purchase the shareholding of respondent Suraj in the said company subject to benefit and burden of Cherish agreement. Then a letter was addressed to escrow holder and we are not required to refer to the same. Further, according to Suraj, during the period between 6th July 1998 and 12th January 1999, Haresh Advani paid to Suraj only first two installments payable under the aforesaid agreement along with

interest on account of delayed payment. On 12th January 1999, the parties entered into a supplementary agreement, inter alia, rescheduling the outstanding payments to be made by Haresh Advani to Suraj. Haresh Advani acknowledged that he has defaulted in making payment of the amount under the said agreement and agreed that balance sale consideration including interest amounting to Rs.2,71,90,000/- would be paid by Haresh Advani to Suraj in the manner set out in this supplementary agreement. There were certain consequential modifications. On 15th September 1999, Suraj terminated this agreement. The said Haresh Advani through his advocate's letter dated 13th September 1999 replied to the letter of termination and there some exchange of letters through advocates.

8. Thereafter on 15th November 2000, Suraj entered into an agreement with one M/s.Accumulate Investments Private Limited ('Accumulate Investments' for short). In the said agreement for sale and transfer of the shares, Suraj purported to sell to the said Accumulate Investments 1,225 shares of the said company namely Regency Hotels constituting 5% of its paid up shares @ Rs.2,040/- per share, aggregating to Rs.25 lakh. The respondent Suraj addressed a letter to Accumulate Investments enclosing a post dated cheque for Rs.25 lakh in favour of Accumulate Investments towards payment of the loan amount of Rs.25 lakhs and two other post dated cheques for Rs.2.25 lakh and Rs.1.50 lakh in favour of Accumulate Investments towards interest on the said loan. Suraj executed a demand promissory note in favour of Accumulate Investments in the sum of Rs.25 lakh and also executed an undertaking in its favour to honour the cheques of Rs.25 lakh. Suraj also executed a personal guarantee in favour of Accumulate Investments guaranteeing

repayment of loan along with interest. He acknowledged the receipt of two cheques of Rs.15 lakh and Rs.10 lakh respectively as and by way of loan.

9. Then what appears from the record is that between 12th January 1999 and 5th October 2001, Haresh Advani paid further amount of Rs.79,27,250/- pursuant to the supplementary agreement dated 12th January 1999. Thus, he paid Rs.2,87,27,250/- under the initial agreement inclusive of interest on delayed payment. However, according to Suraj, a sum of Rs.3,07,90,250/- was still outstanding and due and payable by Haresh Advani to Suraj. On 5th October 2001, they entered into an agreement whereby Suraj had agreed to pay Rs.2,87,27,250/- paid by Haresh Advani under the agreement as sale consideration towards purchase of 8,563 shares constituting approximately 35% of paid up share capital of the said company and to transfer these shares to Haresh Advani. Therefore, new escrow holder was appointed. The parties entered into a further agreement stating that the parties would instruct the new escrow holder M/s.Crawford Bayley & Co. to transfer the shares along with forms to Haresh Advani. On 6th October 2001, the parties entered into an agreement whereby Suraj agreed to sell to the said Haresh Advani remaining 2,436 shares in Regency Hotels @ Rs.12,506/ per share aggregating to Rs.3,07,90,250/-. Under this agreement, Suraj was given an option to acquire the shares of said company on the gross saleable area i.e. approximately 8.725% of gross saleable area of the said land or constituting 8.725% of gross saleable area without payment of development charges and net of all expenses or approximately 17,450 sq.ft. of gross saleable area of land or constituting 17.45% of gross saleable area with payment of

Rs.2,500/- per sq.ft. towards development charges to be made within 30 days of exercise of the option. Under this agreement, the parties agreed that 2,462 shares along with transfer form in respect thereof shall be kept deposited with the new escrow holder M/s.Crawford Bayley & Co. and the same shall be handed over to Haresh Advani after execution of the agreement, if so required, in writing. As a further agreement, it was stipulated that said Haresh Advani shall deposit with the escrow holder 6,193 shares of the said company constituting 25.1% of the issued and paid up share capital of the said company to be held in escrow in terms of clause-5 of the said agreement dated 6th October 2001.

10. There were thus various undated documents relating to this agreement which were exchanged and thereafter what transpires is that on or before 15th October 2001, the said company Regency Hotels and Golden Angel Hotel and Construction Company Limited entered into an agreement whereupon the Regency Hotels and the said Golden Angel Hotel and Construction Co. Ltd. agreed to develop the property of Regency Hotels on terms and conditions set out therein. During the period between 6th October 2001 and 7th November 2001, Haresh Advani secured possession of the entire shares of viz. 11,025 shares of Suraj in the said company and said shares were transferred in the name of Haresh Advani on 7th November 2001.

11. On 12th January 2002, Accumulate Investments addressed a letter to Suraj regarding repayment of the loan of Rs.25 lakhs taken by Suraj from it. In the said letter the Accumulate Investments referred to the loan as well as the documents executed by Suraj in

favour of Accumulate Investments towards repayment of the loan with interest. The Accumulate Investments informed Suraj that they were presenting the post dated cheques for encashment. On 12th January 2002, the Accumulate Investments sent a letter to Suraj forwarding therewith a copy of agreement for sale and transfer of shares dated 15th November 2000 held by Suraj and Haresh Advani to Regency Hotels. It was alleged by said Accumulate Investments in this letter that Suraj had agreed to sell 1,225 fully paid up equity shares of Regency Hotels to it for a consideration free from all encumbrances, charges and lien @ Rs.2,040/- per share in total aggregating to Rs.25 lakh. It is in these circumstances that there is exchange of correspondence and in the month of May-2002 there was another writing. It appears from these documents that certain debts and obligations were extended and there was variation made to the initial agreement dated 6th October 2001. That is how on or about 30th November 2002, a supplemental agreement agreeing to vary the terms of the agreement dated 6th October 2001 was executed. The agreement was that notwithstanding anything to the contrary contained in the agreement dated 6th October 2001, it had been agreed between the parties that Suraj shall opt to acquire from Haresh Advani through Regency Hotels 8.725% of the gross salable area of the development referred to in clause 4.1(ii) of the said agreement. It was further agreed that in consideration of such option, Suraj waived all rights to receive a sum of Rs.3,07,90,250/- from Haresh Advani under clause 3.2 of the agreement dated 6th October 2001. Haresh Advani confirmed that he is principal shareholder of Regency Hotels and as such he would cause Regency Hotels to transfer to Suraj or his nominee the property. Suraj undertook to pay to Regency Hotels proportionate TDR charges.

12. There were certain disputes and one sole arbitrator was appointed. Suraj opted for space as per the agreement in letter dated 30th November 2002 and that would be provided by Regency Hotels to Suraj or his nominee. The method/modalities of such allotment would be worked out in due course. However, Suraj addressed a letter to the escrow holder forwarding copy of the supplemental agreement dated 30th November 2002 and informing that they may proceed with their commitment as stipulated in the agreement dated 6th October 2001. Then there was a letter from the new escrow holder and we are not concerned with the details of the same. Some time in the year 2003, Haresh Advani demanded Rs.30 lakh from Suraj towards his proportionate cost of TDR. Suraj in response to this demand, suggested that he would relinquish the part of area/space which was to be provided to him under the supplemental agreement, in lieu of payment of Rs.30 lakh. Thus, correspondence on this point continued and what is material for our purpose thereafter is that this did not bring about an end to certain issues.

13. Suraj was detained in China. Since there was no response, his brother Raju took certain steps with regard to the claim of Accumulate Investments but as far as appellant Haresh Advani is concerned, since there was, according to him, no clarity either from Suraj or his brother, he terminated the agreements dated 6th October 2001 and 30th November 2002 by letter dated 5th July 2005. He offered to return 10% shares of Regency Hotels to Suraj. We have on record thereafter certain letters from Accumulate Investments to Regency Hotels and their advocates. Thirteen months after

termination notice, Suraj's advocate replied that this termination was not valid and legal.

14. On 23rd August 2006, Arbitration Petition No.382 of 2006 was filed by Suraj under Section 9 of Arbitration & Conciliation Act, 1996 ('the Act of 1996') in this Court. The prayer, inter alia, was that Haresh Advani and Regency Hotels be directed to earmark an area of 8,447 sq.ft. area (approximately 8.725% of the gross area of development) out of the total area in occupation and possession of Haresh Advani and for an injunction restraining these parties from dealing with this area. Regency Hotels was made a party to this arbitration petition. By order dated 4th October 2006, this Court permitted Suraj to withdraw the arbitration petition with liberty to apply for the same reliefs before the arbitral tribunal.

15. On 4th October 2006, the matter was referred to arbitration comprising of Mr.Justice B.P.Jeevan Reddy (Chairman), Mr.Justice S.P.Bharucha and Mr.Justice B.N.Srikrishna. On 6th November 2007 Suraj filed statement of claims against both, Haresh Advani as also Regency Hotels, seeking specific performance of agreement dated 6th October 2001 and supplemental agreement dated 30th November 2002 by causing Regency Hotels to allot him area of 8,447 sq.ft. and alternatively to pay compensation. An application seeking interim reliefs under Section 17 was filed before the arbitral tribunal by Suraj. On 15th January 2008 Haresh Advani filed his written statement contending, inter alia, that Regency Hotels was admittedly not a party to the agreement dated 6th October 2001 and consequently not a party to the arbitration agreement and therefore, no reliefs can be claimed against Regency Hotels. He also filed reply

to the application under Section 17 and more or less on identical lines but also raising the issue of jurisdiction of the arbitral tribunal. Regency Hotels also filed its reply raising the same defence on 16th January 2008 and on this, the arbitral tribunal permitted Suraj to file his first amendment application to the statement of claims, inter alia, seeking reliefs in addition to the specific performance and asserting that Regency Hotels was a necessary party to the arbitration proceedings without which no reliefs could be granted.

16. Suraj also filed his rejoinder to the application u/s 17 of the Act of 1996. From the record it appears that first amendment application was not pressed. When the matter was adjourned before the arbitral tribunal to 6th September 2008, prior there to, Suraj filed a suit in this Court being Suit No.2280 of 2008 joining Haresh Advani and Regency Hotels as defendants and seeking relief of specific performance by way of allotment of aforesaid area. This relief was sought only against Regency Hotels and not against Haresh Advani. This suit is still pending. Thereafter Suraj filed Notice of Motion for interim relief in that suit and after this notice of motion was filed on 21st July 2008, he filed second application for amendment to the statement of claim before the arbitral tribunal stating that he wished to drop Regency Hotels in view of stand of Regency Hotels that there was no arbitration agreement between Regency Hotels and Suraj. This application was subsequently withdrawn on 8th September 2008. Prior thereto, Suraj attempted to seek interim relief in the suit pending in this Court but Notice of Motion No.2527 of 2008 in that behalf could not result in grant of any ad-interim relief.

17. On 28th August 2008, a third amendment application was filed by Suraj before the arbitral tribunal seeking to amend the statement of claims. In that, Suraj was seeking to drop Regency as a party to the arbitration. On 8th September 2008, Suraj appeared before the arbitral tribunal, withdrew his first amendment application dated 20th February 2008, second application dated 21st July 2008 as also the application for interim relief filed under Section 17. However, he pressed the third amendment application dated 20th August 2008, which was eventually allowed. The result of all this is that Regency Hotels was dropped from the arbitral proceedings. Thereafter Suraj filed an amendment application in the suit and deleted Haresh Advani as defendant no.2 from that suit. Suraj also then pressed his motion in the suit but we are not concerned with the outcome of the same.

18. On 24th October 2008, Suraj filed second application u/s 17 before the arbitral tribunal seeking relief only against Haresh Advani. From the record it further appears that this application was dismissed by the tribunal on 8th June 2009. Prior thereto, a chamber summons moved in the suit for deletion of Haresh Advani was allowed by this Court on 20th October 2008. We are referring to these dates and events for the simple reason that it is argued seriously before us that twists and turns and flipflop of Suraj through out dis-entitled him from the reliefs claimed before the arbitral tribunal. That is how even the award reads. In that process, what was highlighted before us was filing of a fifth application for amendment to the statement of claim seeking to incorporate a plea of waiver and acquiescence by Haresh Advani, of the defect in the title in the shares of Suraj by reason of purported claim made by

Accumulate Investments. This amendment application was allowed on 14th January 2010 after which additional written statement was also filed.

19. After the issues were framed on 27th June 2012, a sixth application for amendment to amend the prayers to his statement of claim was moved by Suraj seeking relief against Regency Hotels though Regency Hotels was earlier dropped from arbitral proceedings. The arbitral tribunal met on 27th August 2012 and allowed sixth application for amendment to include certain prayers in the statement of claim after which there was an additional written statement filed by Haresh Advani. He also filed an application to bring on record additional documents. Then, there were certain proceedings which resulted in the dismissal of the application of Haresh Advani and seeking to delete certain prayers from the written statement.

20. On 22nd March 2014, an award was made by two learned arbitrators and it is styled as majority award. The third arbitrator dissented and made a separate award.

21. Before we proceed further, it would be advantageous and at this stage itself to reproduce the operative part of majority award. That part appears under heading “final award” at pages 420 and 421 of the paper book.

“(1) The Tribunal is of the opinion that in all the facts and circumstances, the prayer of specific performance of the Agreement dated 6th October 2001 (being Ex.D hereto) as duly altered and/or amended and/or modified by Supplemental Agreement dated 30th November 2002

(Exh.G hereto) ought not to be granted to the Claimant and that the Claimant should be awarded compensation (damages) in lieu thereof inasmuch as the Tribunal has held that the Respondent is guilty of breach of the aforesaid Contracts /Agreements. Accordingly, the Tribunal hereby awards a sum of Rs.3,38,00,000/- (Rupees three crores thirty eight lakhs only) by way of compensation against the Respondent and payable to the Claimant. The Respondent is made liable to pay interest on the this amount of Rs.3,38,00,000/- (rupees three crores thirty eight lakhs only) at the rate of 18% pa from July, 2005 (date of breach) to February, 2014 i.e. till the pronouncement of this Award which comes to Rs.5,27,28,000/- (rupees five crores twenty seven lakhs and twenty eight thousands only). This means that the total amount of compensation payable by the Respondent to the Claimant is Rs.8,65,28,000/- (rupees eight crores sixty five lakhs and twenty eight thousands only) as at the end of February, 2014. It is further declared that the Claimant is also entitled to interest at the rate of 18% pa on the said amount of Rs.3,38,00,000/- (rupees three crores thirty eight lakhs only) with effect from the date of this Award till the date of payment. The Respondent is made liable to pay all the aforesaid amounts to the Claimant.”

22. The minority award is at page 423 of the paper book and being very short, we reproduce the contents thereof hereinbelow :

“ I agree with the majority view that the Claimant has made out a case entitling him to relief in terms of prayers (ba), (a) to (j) of the Statement of Claim and that he is not entitled to relief in terms of prayers (ba), (g) to (j) because the property in question belongs to a party which is not before the Tribunal. But I do not agree that, in these circumstances, the Claimant should be awarded compensation as set out in the majority award.

Section 20 of the Specific Relief Act states that the jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely

because it is lawful to do so. Section 21 sets out when the Court can award compensation in a suit for specific performance. It can do so in two circumstances, provided that there is an appropriate prayer in the plaint. The one circumstance, with which we are here concerned, is if the Court decides that specific performance ought not to be granted but that there is a contract between the parties which has been broken by the defendant and the plaintiff is entitled to compensation for such breach. The other circumstance, with which we are not here concerned, is if the Court decides that specific performance ought to be granted but that is not sufficient to satisfy the justice of the case.

What is important to note is that, in the first circumstance, the Court has to decide that specific performance ought not to be granted, which means that it has to come to the conclusion that the grant of specific performance would be lawful but, in its discretion, has declined to grant it.

In the present case, in the absence of the owner of the property before this Tribunal, it is not lawful for the Tribunal to grant specific performance, and this is recognized in the majority award. In the circumstances, in my view, the provisions of Section 21 do not apply and no compensation can be awarded to the Claimant.

I would, therefore, have made an award in favour of the Claimant in terms of prayer clauses (ba), (a) to (f) of the Statement of Claims.

Signed in Triplicate at Mumbai on 22nd March 2014.”

23. Haresh Advani challenged this majority award by filing a petition under Section 34 of the Act of 1996 (the subject petition on which the impugned order was passed) and by a detailed judgment and order dated 24th April 2015, the learned Single Judge dismissed the same. Hence this appeal.

24. Mr.Dwarkadas, learned Senior Advocate appearing for the appellant would submit that the order of learned Single Judge is erroneous and should be set aside. Mr.Dwarkadas would submit that learned Single Judge has grossly erred in law in upholding the majority award. The majority award is vitiated by a serious and apparent error of law. This error of law is apparent on the face of award. It can be noticed and seen from the award itself. The award has been made in arbitral proceedings initiated by Suraj. The arbitral tribunal was throughout aware that supplemental agreement dated 30th November 2002 and initial agreement dated 6th October 2001 referred to M/s.Regency Hotels and the immovable property is belonging to it. These agreements referred to both Haresh Advani and Suraj as shareholders. They being shareholders of Regency Hotels, the ownership of the immovable property vests in both shareholders Suraj and Haresh Advani. Therefore, throughout Suraj impleaded both, Haresh Advani and Regency Hotels, as parties to the proceedings before the arbitral tribunal. Mid way, Regency Hotels was dropped from the array of parties. Further, after the statement of claim was filed before the arbitral tribunal, a suit was filed in this Court by Suraj. This suit being Suit No.2204 of 2008 was filed seeking specific performance of the agreement and particularly about allotment of area of 8,447 sq.ft. This suit was filed on 3rd July 2008 and being fully aware that on 6th November 2007 Suraj filed his statement of claims in the arbitration proceedings seeking identical relief. In the suit as well, both, Haresh Advani and Regency Hotels had been impleaded as party defendants. Mid way, in the arbitration proceedings, by way of several amendment applications, Regency Hotels was deleted and thereafter Haresh Advani was deleted as

party defendant from the said suit. This flip flop and twists & turns adopted by Suraj had a vital bearing on the issues arising from the pleadings before the arbitral tribunal and the essential controversy.

25. The legal consequence of all this has not been understood by both, the arbitral tribunal in majority award and by learned Single Judge. Mr.Dwarkadas would submit that impact of all this is noted and very succinctly in the minority award. Learned Single Judge as also the majority award rendered inconsistent and contradictory findings. The findings and conclusions of both are that relief of specific performance cannot be granted. However, when they hold so, the claimant Suraj was clearly prohibited from invoking Section 21 of Specific Reliefs Act, 1963 ('Act of 1963'). Despite holding that specific performance cannot be granted and for good reasons, the tribunal as also learned Single Judge allowed Suraj to invoke Section 21 of the Act of 1963 and not only did they allow him to invoke this provision, but granted relief in terms of the same. It is despite the ingredients of Section 21 not being satisfied or attracted at all to this case. Thus, there is a contradiction in the findings and conclusions in the award on this point. It was observed that specific performance of the said contracts cannot be granted. That is because the subject matter of the agreements is an immovable property, which does not belong to Haresh Advani-appellant. The pre-requisite for applying Section 21 is that specific performance of the agreements ought not to be granted. It is that which would facilitate invoking of Section 21 of the Specific Relief Act 1963. This Court must, therefore, record an opinion as to whether the ultimate conclusion that specific performance of the agreements ought not be granted in the majority award, can be sustained by reconciling the same with earlier

observations and findings. Mr.Dwarkadas has invited our attention to four findings and especially to the one that if a party against whom this relief or against whom specific performance is sought is not before the Court or before the arbitral Tribunal, then, no relief can be granted. That means that the relief of specific performance cannot be granted is the conclusion reached and correctly.

26. Once that is reached, Section 21 of the Act of 1963 could not have been invoked by the claimant Suraj. This is a patent illegality. This illegality goes to the root of the award. The arbitral tribunal has not referred to the conditions of Sections 20 and 21 of the Act of 1963 at all and in the above backdrop and perspective. The learned Single Judge compounded the error in the majority award by virtually re-writing it. Learned Single Judge, according to Mr.Dwarkadas, proceeded to hold that arbitral tribunal was correct in granting specific performance of shares in the private limited company which was nobody's case. He further held erroneously that arbitral tribunal arrived at a categorical conclusion that specific performance ought not be granted. Mr.Dwarkadas has taken us through the majority award and the relevant portions of it, Section 21 of the Act of 1963 and to submit that once Section 21 is invoked, sub-section 2 of Section 21 of the Act of 1963 would indicate that claim for compensation and contemplated by Section 21, cannot be awarded as if it is a suit for damages for breach of contract. In the sense, Section 73 of Contract Act, 1892 is inapplicable. Mr.Dwarkadas would submit that words "the Court decided that specific performance ought not be granted" appearing in Section 21(2) must be read with illustrative cases mentioned in sub-section 2, clauses (a) to (c) of Section 20 of the Act of 1963. If the Court

comes to the conclusion that relief of specific performance itself cannot be granted, because of the facts and circumstances and material before it, then, the relief of compensation could not have been claimed and grant of it is out of question. Moreso, when Suraj has filed an independent suit seeking specific performance of the very contracts and that suit is pending. Hence, in the teeth of the events and developments noted above, Suraj was not entitled to specific performance. The question of permitting Suraj to seek compensation by resorting to Section 21, therefore, does not arise.

27. Mr.Dwarkadas brought to our notice several instances where Court can come to the conclusion that relief of specific performance cannot be granted. If it cannot be granted, say for example, because plaintiff failed to prove readiness and willingness to comply with his part of the contract; once such a finding is noted, then, the plaintiff cannot be granted compensation in addition to or in substitution of the relief of specific performance. Equally, a plaintiff as in this case, who seeks relief of specific performance from a defendant in one proceedings and seeks specific performance from another defendant in another proceedings, then, he cannot seek compensation in lieu of specific performance against any defendants in his proceedings. Elaborating this submission he would contend that although Suraj submitted before the arbitral tribunal that Haresh Advani and Regency Hotels are one and the same entities and Suraj is entitled to compel Haresh Advani to cause Regency Hotels to transfer the property to him, but having deleted Regency Hotels from the proceedings, filing a substantive suit against Regency Hotels and Haresh Advani in this Court, deleting Haresh Advani from the suit, means as held by the arbitral tribunal, an effective award cannot be

passed. All this means that eventually a meaningless award would be passed once Suraj was dis-entitled to specific performance and cannot be granted that relief. That relief cannot be granted against a party not before the tribunal in respect of the property of such party (third party). Thus, Mr.Dwarkadas would submit that the acts of Suraj resulted in the conclusion that specific performance of the agreements/contracts claimed by him cannot be granted. By his acts, Suraj is deemed to have abandoned this relief against Haresh Advani. Suraj chose to pursue arbitration proceedings against Haresh Advani knowing fully well that immovable property does not belong to Haresh Advani but to Regency Hotels, a third party, which is not before the arbitral tribunal. This is, therefore, a situation in which Section 21 of the Specific Relief Act would not and cannot be attracted. The intent of the law makers, therefore, has been defeated in the arbitral tribunal making an award contrary to the plain language of the provision. The minority award rightly concludes that it is only when the Court has decided that grant of specific performance would be lawful but that ought not be granted, then, in its discretion it can award the compensation in terms of above legal provision and not otherwise.

28. Looked at from any angle, according to Mr.Dwarkadas, the award was vitiated and should have been set aside. The error committed by the learned Single Judge in not setting aside the award should be corrected by us. Alternatively, Mr.Dwarkadas would submit that what the arbitral tribunal has done is to allow Suraj to split the cause of action. This splitting up of cause of action in the scheme of the Act of 1996 is impermissible. If the company Regency Hotels had stated that Suraj has claimed same reliefs against both

the parties in two different proceedings, and if one of the defences of the Regency Hotels was to succeed, it would mean that there is no breach of the agreements and which is another requirement of Section 21 of the Act of 1963 and particularly sub-section 2 thereof. Still, the arbitral tribunal awarded compensation in lieu of specific performance to Suraj on the footing that Haresh Advani had committed breach of the very same agreements of which Suraj claims specific performance against Regency alone in the High Court suit. This has consequence of splitting of the cause of action in the arbitration proceedings, which is against an individual and the suit which is against the Regency Hotels. The consequence would be that a finding of breach of the contract by Haresh Advani and compensation to be paid by him, in lieu of specific performance is now rendered. A finding of no breach of agreement by Regency Hotels in the suit, if rendered by this Court, would automatically result in dis-entitling Suraj to claim either relief. Now, by splitting the cause of action and relieving Haresh Advani from specifically performing the agreements, the claimant Suraj having dis-entitling himself from invoking Section 21(2) of the Act of 1963, is assisted in a manner contrary to law.

29. In support of his contentions, Mr.Dwarkadas has relied upon following judgments :

- (i) **Ardeshir H. Mama Vs. Flora Sassoon -**
The Bombay Law Reporter-Vol.XXX-Page 1242;
- (ii) **Gopi Nath Sen and others Vs. Bahadurmul Dulichand and others -** AIR-1979-Calcutta-203;
- (iii) **Shri Umakant B. Kenkre and another Vs. Shri Yeshwant P Shirodkar & others -**
1999(3)-Bom.C.R.-611;

- (iv) **Appeal No.658 of 2006 in Arbitration Petition No.295 of 2006 -**
Hemant D. Shah and others Vs. Chittaranjan D. Shah & others, decided on 5th September 2006;
- (v) **Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya & anr. - 2003-Vol.105(3)-Bom.L.R.147 (SC)**

30. On the other hand, Dr.Saraf appearing for the respondent would submit that we must be mindful of Section 34 of the Act of 1996. Eventually the arbitral tribunal comprising of the arbitrators chosen by the parties, has performed its task and rendered an award, may be not unanimously, but by a majority. It is that award which is against Haresh Advani and it is that award which is challenged by filing an arbitration petition. Haresh Advani ought to be aware that a petition under Section 34 of the Act of 1996 is not a proceeding in the nature of appeal against an award. The majority award could have been interfered with only on legal permissible grounds and particularly enumerated in the sub-sections of Section 34 of the Act of 1996. Outside this provision, there is no power to set aside an award. If the recourse to set aside an award is only under Section 34 of the Act of 1996, then, the appellant Haresh Advani must establish and prove that the award suffers from such illegality which is not only patent but which goes to the root of the case. It is in this regard, Haresh Advani has hopelessly failed. He has not established and proved that there is patent illegality in the award which goes to the root of the case.

31. It is only improper and incorrect reading of the award which results in building up of the above legal submissions. Dr.Saraf

cautions this Court against entertaining the submissions of the appellant for the first time, as none of such submissions were canvassed before the learned Single Judge. None of the grounds in the arbitration petition raised such challenge and it is now for the first time that they are raised. If such arguments are canvassed for the first time by seeking to interpret the legal provisions, then, this Court should not entertain these contentions, for, that would take the respondent Suraj by surprise. This is not, therefore, a permissible course. This will alter the challenge as even the arbitral tribunal was not persuaded to frame the above issue. Therefore, we must not allow Mr.Dwarkadas to raise these contentions.

32. Assuming without admitting that such contentions can be raised, still according to Dr.Saraf, there is complete answer to the same. The award should be read completely as a whole, and not by picking and choosing some sentences from the same. If the award is read as a whole and not in parts, then, it is evident that the arbitral tribunal has come to a conclusion that the relief of specific performance ought not be granted. One cannot read these words as “cannot be granted” when the whole conclusion is that this relief ought not be granted. Dr.Saraf invited our attention to the award and issue-wise. He would submit that each of the issues that were framed for consideration of the tribunal, at the end of consideration thereof, have been specifically answered. They have been answered on a cogent and proper reasoning, finding and conclusion. Firstly, that the notice/letter of termination dated 5th July 2005 is ineffective, invalid and unsustainable in the facts and circumstances of the case and can in no manner affect the rights of the claimant Suraj under two agreements dated 6th October 2001 and 30th

November 2002. The majority award holds that once this termination is ineffective and invalid, then, it must follow that Suraj is entitled to specific performance as asked for by him. However, the tribunal found that there has been an objection raised on Suraj's understanding that the property in respect of which specific performance is sought by him is belonging to Regency Hotels and not Haresh Advani. Since Regency Hotels is not a party to the proceedings, the relief of specific performance cannot be granted.

33. Dr.Saraf would submit that this is not the conclusion of the tribunal but an argument of respondent Haresh Advani before the tribunal that specific performance cannot be granted given this understanding of Suraj. However, according to Dr.Saraf, the tribunal's conclusion is that relief of specific performance ought not be granted. And all this, therefore, is clear and moreso if one peruses the findings or the issue-wise answers. As far as issue no.1 is concerned, Suraj is held not entitled to specific performance of the agreement as altered/amended/modified by supplementary agreement for the reason that in the opinion of the arbitral tribunal, such a relief ought not be granted in the facts and circumstances of this case. Dr.Saraf would, therefore, submit that there is no ambiguity much less any error of law and which would vitiate the award to such an extent that same shocks the judicial conscience of this Court. This is not a patent illegality of a nature enabling this Court to interfere in the order under challenge. Dr.Saraf would, therefore, submit that the appeal be dismissed. Dr.Saraf relies upon following judgments :

- (i) **Jagdish Singh Vs. Natthu Singh**
(1992)1-SCC-647;

- (ii) **Gujarat Water Supply and Sewerage Board Vs. Unique Erectors (Gujarat) (P) Ltd. and another** (1989)1-SCC-532;
- (iii) **S.K.Construction Co. Vs. DDA -**
A judgment of High Court of Delhi in CS (OS) No.1657A and I.A.No.9653/1996, decided on 15th February 2006;
- (iv) **Associate Builders Vs. Delhi Development Authority** (2015)3-SCC-49

34. Dr.Saraf also seeks to distinguish the judgments and essentially that of the Privy Council heavily relied upon by Mr.Dwarkadas.

35. For properly appreciating the rival contentions, we must know as to how the matter was taken to arbitration. The arbitration was initiated so as to decide as to whether Suraj is entitled to specific performance of two agreements and the alternate relief. After setting out the facts in brief, the award proceeds to refer to the pleadings of both sides. In the pleadings the stand of Haresh Advani in controverting the statements made in the statement of claim, are that termination of the agreements is justified. It is valid and legal. Suraj took no steps to clear Accumulate Investments claim as assured by him. Suraj failed to deliver a clear and marketable title of the shares agreed to be sold. Haresh Advani stated that certain portions of the building have been given to two different parties under leave and license agreement. Several legal and factual objections were raised as to why no reliefs should be granted. In the light of the pleadings, the arbitral tribunal framed following issues :

“1. Whether the Claimant is entitled to specific performance of the agreements dated 6th October, 2001, duly altered ad/or amended and/or modified by the

Supplemental Agreement dated 30th November, 2002 as contended by the Claimant ?

2. Whether the claim for specific performance is not maintainable and is liable to be dismissed for non-joinder of necessary parties, namely, Regency Hotels Private Limited and Accumulate Investments Private Limited as contended by the Respondent;

3. Whether the said agreement has been wrongfully terminated by the Respondent vide his letter dated 5th July 2005 as contended by the Claimant ?

4. Assuming that the Claimant is entitled to any space whatsoever, whether the Claimant is liable to make payment of its contribution to stamp duty on the TDR purchased by Regency Hotels Private Limited; all applicable taxes payable by Regency Hotels Private Limited; and the stamp duty and all other expenses relating to the transfer as contended by the Respondent ?

5. Whether the Respondent is liable to pay the Claimant an amount of Rs.1,56,26,950/- or any other amount by way of loss of compensation as claimed in Exhibit "P-1" of the Statement of Claim in addition to the directions for specific performance of the agreement as contended by the Claimant;

6. In the event of specific performance of the said agreement not being granted, whether the Respondent is liable to pay the Claimant damages of Rs.19,41,15,800/- together with interest thereon as claimed in Exhibit "O" of the Statement of Claim or any other amount whatsoever as contended by the Claimant ?

7. Whether the claim for alleged loss of compensation (Exhibit "P-1" to the Statement of Claim) is time barred as contended by the Respondent ?

8. Whether the present Claimant has filed and is pursuing Suit No.2204 of 2008 in the High Court for specific performance of the same agreements as contended by the Respondent ?"

36. The parties tendered documents. There was no dispute between them about the contents and interpretation or meaning thereof. There was oral evidence led. Suraj examined himself as also one Sujit Joglekar by way of expert evidence. The nature of this expert evidence is also referred to by the tribunal. Incidentally Haresh Advani did not opt to examine himself but examined another expert Mr.Sam Rao. Then Suraj's counsel argued that the agreements are not in dispute, refusal of Suraj to abide by the terms of these agreements in the light of and on account of Accumulate Investments claim is totally unacceptable; besides being unjustified and unfair. It is a mere excuse and put forward to wriggle out the binding obligations under the agreements. Haresh Advani became fully aware of the Accumulate Investments claim, whereafter he took steps to affirm these agreements and the chronology of the events submitted before the Tribunal would demonstrate that this could not have been the cause or the reason for terminating or rescinding these agreements. Haresh Advani has been seeking to take unfair advantage of Suraj which fact is also established. The refusal of Haresh Advani to step into the witness box ought to be adversely considered and against him. It is in these circumstances and when the shares agreed to be sold under the agreements have been indeed transferred in the name of Suraj, he is in possession thereof, then, the portion of the immovable property, the consideration for which are the shares, ought to be transferred and conveyed to him. Haresh Advani is resiling from his contractual obligations and by his conduct, he is deemed to have waived his right to terminate the agreements. These and other contentions in support of the claim of specific performance have been extensively recorded.

37. On the other hand, Haresh Advani argued that there is a possibility of conflicting decisions. The claimant Suraj has been putting forward inconsistent and contradictory explanations from time to time with respect to the true nature of Accumulate Investments agreement and that shows that his plea is not acceptable. There is not even any allegation made by Suraj that he had repaid the loan to Accumulate Investments. As a matter of fact, the claimant Suraj's assurance that shares transferred to Haresh Advani were free from all encumbrances, is false to his knowledge. Therefore, it is not Haresh Advani who has wrongly rescinded the contract but it is Suraj who has dis-entitled himself from seeking a performance thereof. In such circumstances, the termination by notice dated 5th July 2005 is perfectly valid and justified. The claimant Suraj has failed to pay the stamp duty on TDR and he has also failed to pay the tax on transfer. There are certain additional arguments which have been canvassed and even on the point of damages.

38. After noting all of them, the tribunal at page 31 of the 54 page award considered the principal issues. The first amongst them was that whether notice of termination issued by Haresh Advani to Suraj is valid, effective and contractually tenable. The award devotes major portion of the reasoning of the majority to this factual issue. The award proceeds to record an opinion that the ground of termination is not genuine, it would not be available to Haresh Advani because of his conduct and subsequent to coming to know about Accumulate Investments agreement. That clearly proves that notwithstanding the knowledge of Accumulate Investments

agreement and its contents, Haresh Advani took several steps affirming these agreements and each of these steps thereafter are enumerated and with dates. Each of the documents in relation thereto have been referred as produced by the parties including the letter from Regency Hotels dated 2nd September 2004 addressed to Accumulate Investments. On 27th October 2004, another mail was addressed by Haresh Advani calling upon Suraj to arrange and sent Rs.1.50 lakh towards stamp duty. This letter is referred to show that even after Accumulate Investments sent a second letter dated 27th July 2004 reiterating its claim, Haresh Advani not only reiterated his promise but took no steps to act upon the agreements between the parties. Thereafter certain developments of November-2004 have been referred to.

39. The tribunal concludes in majority award that even the facts speak for themselves. With full knowledge of the Accumulate Investments claim and the contents of the agreement between Accumulate Investments and Suraj, Haresh Advani took a number of steps affirming these agreements, and rather he entered into a supplementary agreement. There is a total rejection of the claim of claimant Suraj by Regency Hotels by letter dated 2nd September 2004. The change in the attitude of Haresh Advani is evident and that is only after detention of Suraj at China. The majority award holds that by his conduct, Haresh Advani had waived the objections, if any he could have, because of Accumulate Investments claim and that cannot be made a ground for termination of the agreements. Moreso, after the events mentioned by the Tribunal. The Tribunal in the majority award, therefore, holds that the notice/letter of termination dated 5th July 2005 is ineffective, invalid and

unsustainable in the facts and circumstances of the case and can in no manner affect the rights of Suraj under these two agreements.

40. On a careful perusal of this portion of the award and the discussion in relation thereto, we have no hesitation in concluding that this is a possible inference and conclusion. The Tribunal, therefore, in the peculiar facts and circumstances of the claim and evidence tendered before it, could have arrived at this finding and conclusion. It is clear that termination is, therefore, invalid, unjustified and unsustainable and requires no interference. This Court is not a Court of appeal and we cannot reappraise and re-appreciate any factual conclusions. We find that the conclusions are consistent with the materials placed on record. The appreciation and appraisal of these materials cannot be termed as perverse or vitiated by any error of law patent on the face of the award. We find that there is no serious dispute insofar as such a conclusion is concerned. The real issue before us and which we are aware, does not arise from arguments before the learned Single Judge. To be fair to him, the learned Single Judge had no occasion to consider these submissions. We are not in agreement with Dr.Saraf that Mr.Dwarkadas should not be allowed to argue as above in the light of the further conclusions of the Tribunal to which we shall make a brief reference. Section 21 of the Act of 1963 could not have been permitted to be invoked by Suraj. We think that Mr.Dwarkadas has based his arguments on the contents of the award and on a reading thereof. Besides what is recorded in the award, Mr.Dwarkadas has not said anything nor has he referred to any documents except to the pleadings before the tribunal. That also was for a limited purpose so as to invite our attention to the prayers and reliefs in the claim. Hence, we do not

think that we should foreclose the arguments of Mr.Dwarkadas on the objections raised by Dr.Saraf. Moreso, when Dr.Saraf has sought to meet the said arguments even on merits.

41. The argument of Mr.Dwarkadas is that in the further portions of the award, the Tribunal has totally contradicted itself. It could not have allowed Suraj to take assistance or seek relief in terms of Section 21 of the Act of 1963 and that is totally misread and misinterpreted by the Tribunal. Alternatively, even if the understanding of the Tribunal is correct, insofar as interpretation of Section 21 is concerned, still it seriously erred in law in relying on it, for, it has concluded that specific performance of the contract/agreements in question cannot be granted. The conclusion of the Tribunal is that it cannot be granted and ought not be granted. To appreciate this argument, we referred to internal page 37, running page 405 of the paper book. There, the award proceeds to hold that the letter of termination being declared as invalid and ineffective, it must follow that Suraj is entitled to specific performance. However, an objection was raised by Haresh Advani contending that the immovable property in respect of which specific performance is sought by Suraj, is belonging to Regency Hotels and not to Haresh Advani. Since Regency Hotels is not a party to the proceedings, the relief of specific performance cannot be granted, inasmuch as it would amount to granting relief against a party who is not before the Tribunal. We think that this is not a conclusion but a noting of the arguments of Haresh Advani and his objection. This objection, according to the Tribunal, presented a curious situation. When Suraj initiated arbitration proceedings, he impleaded both, Haresh Advani and Regency Hotels, as respondents. When a

question arose as to how arbitration proceedings are maintainable against Regency Hotels, inasmuch as it is not a party to the agreement dated 6th October 2001 and not even to the supplementary agreement dated 30th November 2002, Regency Hotels was dropped from the array of respondents. That amendment/deletion was allowed. Therefore, the respondent Haresh Advani argued that Regency Hotels not being before the Tribunal, the relief of specific performance cannot be granted. Once again this is the reiteration of Haresh Advani's arguments.

42. Then what follows is the Tribunal noting pendency of Suit No.2204 of 2008 in this Court. That is a suit filed against both, Haresh Advani and Regency Hotels. In view of the fact that arbitration proceedings for similar reliefs, as were claimed in suit, were already pending, Suraj dropped and deleted Haresh Advani from the array of defendants in the said suit, at a later stage of the suit. That is how the Tribunal held that it appears to be a case of a person falling between two stools. Then, what follows is the Arbitral Tribunal's opinion about inadequacy of the Act of 1996. We do not advert to the same, for, we have not called upon to decide any larger question based on such inadequacy. What is material for us is that Suraj invited attention of the Tribunal to the supplementary agreement and its clauses so also the commitment of Haresh Advani in writing. Suraj argued that he is entitled to enforce this obligation/undertaking and compel Haresh Advani, who owns almost all the shares of Regency Hotels (except four shares out of 24,500 shares) to "cause" Regency Hotels to transfer its property to Suraj. The Tribunal opines that this argument is not irrelevant but significant. Further argument of Suraj was that there is no

distinction between Haresh Advani and Regency Hotels and that they are really speaking one and the same. However, the peculiar wording of the prayer clauses and the objection raised by Haresh Advani on dropping of Regency Hotels from the arbitral proceedings, compelled the Tribunal to conclude that given such an objection, but the undertaking by Haresh Advani at the foot of supplementary agreement, enables Suraj to claim compensation within the meaning of sub-section (2) of Section 21 of the Act of 1963, inasmuch as breach of the contractual obligations by Haresh Advani is clearly established. That opinion is then recorded at internal page 40 and running page 408 of the award. The Tribunal has specifically held that relief of specific performance ought not be granted to Suraj and he must be held entitled to the relief of compensation within the meaning of sub-section 2 of Section 21 of the Act of 1963, inasmuch as breach of contracts by Haresh Advani is clearly established in this case. The word “ought” is expressing advisability or prudence and understood thus “ought not be granted” means it would not be advisable and prudent to grant the relief of specific performance in this case. The minority mistook the conclusion to be “cannot” which means not permitted in law to grant that relief.

43. We are, therefore, of the firm opinion that the Tribunal's conclusion is that specific performance of the contracts ought not be granted. It is not a conclusion that specific performance cannot be granted. Once this is apparent from a reading of the relevant paragraphs of the award, then, we see no merit in the contentions of Mr.Dwarkadas that the award suffers from a patent illegality which goes to the root of the case.

44. The Tribunal's opinion that if it grants reliefs and as prayed in sub-clauses (a) to (f) in sub-paragraph (ba) of paragraph 33 of the statement of claim, then the reliefs in sub-clauses (g) to (j) of the said sub-paragraph should be refused, means that it would pass a meaningless award. We have carefully perused paragraph 33 of the statement of claim and sub-para (ba) and sub-clauses thereof, as also sub-clauses (g) and (j) thereof. The Tribunal's view was that because specific performance in this case is liable to be granted, but granting it and in the form prayed, would not bring an end to the litigation. The dropping of Regency Hotels from the arbitral proceedings and dropping of Haresh Advani from the suit, means there is flip flop, twist & turn in this case and Suraj is responsible for it. Therefore, another round of litigation may be necessary and in such circumstances specific performance ought not be granted. At the same time, it could not pass an ineffectual and meaningless award. That is why it considered the alternate and without prejudice relief claimed by Suraj. It reproduced Section 21 of the Act of 1963, understood the prayer for alternate relief viz. grant of compensation in that perspective and held that all the ingredients of Section 21 are satisfied. Section 21 of Specific Reliefs Act, 1963 follows Section 20. There is a sub-heading above Section 20 and on most occasions it is missed. It is styled as "Discretion and Powers of the Court". There is a discretion as to granting the relief of specific performance specifically carved out by Section 20(1), but sub-section (2) thereof states that there are cases and enumerated in clauses (a) to (c) of sub-section 2 of Section 20 of the Act of 1963, in which the Court may properly exercise discretion not to decree specific performance. There are explanations below this sub-section. Before us it is not disputed that these are not exhaustive but illustrative cases. Then

follows Section 21 of the Act of 1963, which confers power to award compensation in certain cases. True it is that in a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to or in substitution of such reliefs. By sub-section 2 of Section 21, if the Court decides in any such suit namely a suit for specific performance of a contract in which the plaintiff may also claim compensation for its breach either in addition to or in substitution of such performance, that specific performance ought not be granted, but there is a contract between the parties which has been broken by other side namely the defendant and that the plaintiff is entitled to compensation for that breach, the Court shall award him such a compensation accordingly.

45. There is no dispute and from the reasoning and conclusion in the award itself that the arbitral Tribunal reached this conclusion that there is a contract between the parties and that has been broken by Haresh Advani. The Tribunal concluded as above that specific performance of such contract ought not be granted to Suraj. However, this contract having been broken by Haresh Advani and after the conclusion that its termination is not valid and effective, Suraj must be entitled to compensation in lieu thereof. Pertinently, we do not think that such relief prayed by Suraj, has been granted contrary to sub-section (2) of Section 21. That is not even an argument before us.

46. All that has been done by Suraj is to invite attention of this Court to the explanation to Section 21. It states that in the circumstance that contract has become incapable of being specifically performed, does not preclude a Court from exercising jurisdiction

conferred by this section. We do not see that in the facts and circumstances of the case the explanation has any relevance. This is a case where the Tribunal concluded by majority and rightly that the relief of specific performance ought not be granted.

47. Since heavy reliance is placed by Mr.Dwarkadas on the judgment of the Privy Council in case of **Ardeshir H. Mama Vs. Flora Sassoon**, we must make a reference to the same in some details.

There, the Privy Council noted that a suit was filed in the High Court of Judicature at Bombay and in its inception, it was a simple action by a purchaser for the specific performance of a contract for the sale of certain valuable hereditaments on Malbar Hill in Bombay with claims for damages additional or alternative all in terms of Section 19 of the Specific Relief Act, 1877. The defences to the suit were that there never had been any concluded contract for the sale of the property. If there had been such a contract, it had been entered into on behalf of the defendant by an agent, with no authority to bind the defendant to its term. There is in the defendant's written statement no suggestion that the plaintiff's right was not a right to specific relief, if any existent contract binding upon the defendant was established. And the case, indeed, was one in which upon proof by the plaintiff of the facts alleged by him, he became entitled as of right under Section 12(c) of the Act to the specific relief which he sought. But that right of the plaintiff would be dependent upon his having been himself up to the date of decree ready and willing to perform the contract on his part and, therefore, Privy Council had an occasion to advert to the subsequent events. It

noted that on 19th March 1924, nine months or more before the trial, the plaintiff's solicitors formally notified the defendant to the effect that the plaintiff had decided to abandon his claim for specific performance, that he would instead, at the trial, claim damages against the defendant for her breach of contract, and that he assessed these damages at Rs.7 lacs. The Privy Council held on facts that by then, the plaintiff had found it inconvenient any longer to retain in readiness, for completion of the purchase, the money payable under the contract, and this was the explanation of his decision to convert his claim against the defendant into one of a character which could be successfully maintained without further financial strain upon himself.

A comment is made by Their Lordships of the Privy Council on this aspect. But we need not go into the same. The Privy Council found that before the trial, the plaintiff did not make application to amend the pleadings. In his view, he could maintain his new claim for damages on his plaint as it stood. But on an objection taken at the trial that this was not possible, the plaintiff's counsel sought leave to and was permitted to amend. That effectively converted the suit into one for damages, for breach of the contract only. It was upon that footing that the trial proceeded and learned Judge being ultimately of opinion that there did exist a concluded contract for sale duly authorized by, and accordingly binding upon the defendant, and that the contract had been repudiated by the defendant, he made a decree dated 22nd January 1925 by which he ordered the defendant to return the deposit paid by the plaintiff. He further awarded the plaintiff a sum of Rs.7 lacs as damages for the defendant's breach of contract.

The defendant appealed to High Court in its appellate jurisdiction and succeeded. That Court held that the defendant's agent had not been shown to have had authority to bind her by the contract alleged, and by decree dated 5th October 1925, it discharged with the costs of appeal the order of the Trial Judge except as to the return of the deposit, leaving each party to bear his or her costs of suit in the Court of first instance. From such a decree, it is the plaintiff who appealed to the Privy Council.

The argument was that the contract was binding and it was permissible in the circumstances to restore the decree for damages. Then Their Lordships referred to the scheme of Specific Relief Act, 1877 and in particular Part II, Chapter-2, which deals with the specific performance of contracts. It also referred to the principles of law in the England and the only legal right which arose upon the non performance of a contract in favour of party injured by its breach was a claim for damages. The principles were then extensively referred to and what the Privy Council found that in a suit for specific performance, the plaintiff and the Court had to treat the contract as still subsisting and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. The Court treated that contract is still subsisting. Failure to make good that averment brought with it the inevitable dismissal of his suit. Then the Court referred to the principle of election to treat the contract as at an end and therefore no action for specific performance could have been maintained by the aggrieved plaintiff. That was because he elected and precluded himself by such an

election even from making an averment. The effect upon an action for damages for breach of a previous suit for specific performance, will be apparent after the question of the competence of the Court itself to award damages in such a suit has been touched upon. Then, following observations have been made :

“Whether or not the Court of Chancery ever assumed jurisdiction in the matter it was not in accordance with its practice to award damages for breach of contract. That was, as Lord Eldon said, “purely at law”. But experience showed that cases from time to time occurred in which, although the contract was one of which specific performance might, quite consistently with principle be decreed, damages were the more adequate remedy, and it became obviously expedient that in such a case the Court should not be compelled to send the plaintiff to law, but should be permitted itself to dispose of the same.

Accordingly in 1858, Lord Cairns' Act was passed. It is convenient to cite its second section, for it is important to note the correspondence of the words of that section as judicially interpreted with the provisions of S.19 of the Specific Relief Act upon which so much now turns. The words, so far as here relevant are these :-

‘In all cases in which the Court of Chancery has jurisdiction to entertain an application for ... the specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, if it shall think fit, to award Damages to the party injured, either in addition to or in substitution for such ... specific performance, and such damages may be assessed ... as the Court shall direct.’

The limited effect of the section was not long left in doubt, wide as are apparently its terms. In a series of decisions it was consistently held that just as its power to give damages additional was to be exercised in a suit in which the Court had granted specific performance, so the power to give damages as an alternative to specific

performance did not extend to a case in which the plaintiff had debarred himself from claiming that form of relief, nor to a case in which that relief had become impossible. In the present instance, their Lordships are disposing of a case in which the plaintiff had debarred himself from asking at the hearing for specific performance and in such circumstances, notwithstanding Lord Cairns' Act, the result still was that with no award of damages - the Court could award none - the order would be one dismissing the suit with no reservation of any liberty to proceed at law for damages. See per Lord Selborne, *Hipgrave V. Case*. In other words, the plaintiff's rights in respect of the contract were at an end.

Although so far as the Act is concerned, there is no express statement that the averment of readiness and willingness is in an Indian suit for specific performance as necessary as it always was in England (s.24 [b] is the nearest), it seems invariably to have been recognised, and, on principle, their Lordships think rightly that the Indian and the English, requirements in this matter are the same. See, e.g. *Karsandas Vs. Chhotalal*. And with this fact in view, s.19 of the Act becomes in the present investigation all important. The section is as follows :-

'... ..'

If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

Compensation awarded under this section may be assessed in such manner as the Court may direct.

Explanation.- The circumstance that the contract has become incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section.

*Now the close correspondence of the terms of this section with those of s.2 of Lord Cairns' Act, coupled with the presence in the Act of s.24(a) and s.29 already noted, indicating that the old distinction in case of breach of contract between the equitable and the legal form of remedy is still maintained and that the old conditions under which each could be asked for are being preserved, lead their Lordships to the conclusion that, except as to the case provided for in the explanation - as to which there is introduced an express divergence from Lord Cairns' Act, as expounded in England - see *Ferguson Vs. Wilson*, the section embodies the same principle as Lord Cairns' Act, and does not any more than did the English Statute enable the Court in a specific performance suit to award "compensation for its breach" where at the hearing the plaintiff has debarred himself by his own action from asking for a specific decree.*

It follows that in their Lordship's judgment there was after the letter of March 19, 1924, no power left in the trial Judge, without an apt and sufficient amendment of the plaint to award the plaintiff at the hearing any relief at all. And they are further of opinion, that the amendment in the plaint, as actually then made, did not, on its true construction, make any difference in this respect. For that amendment properly construed, did not, as it should have done to be effective, operate to convert the suit into one for the recovery of damages for breach of contract. The retention of paragraph 9 of the original plaint, with its allegation that the plaintiff "is as he has been throughout ready and willing to perform his said contract," coupled with the retention also of the claim for specific performance seems to their Lordships to involve that conclusion. Accordingly, even on the claim, as actually amended, there was, in their view, no power left in the trial Judge to award damages."

48. Mr.Dwarkadas has heavily relied upon these observations and the further observations relied upon by Dr.Saraf. On a reading of these observations it is apparent that they have been made in the backdrop of the facts noted above. The Hon'ble Privy Council was of the clear opinion that after the letter of March-1924, which letter was written nine months or more before the trial by the plaintiff's solicitor in the suit, formally informing the defendant the fact that he had decided to abandon his claim and would instead, at the trial, claim damages against the defendant for her breach of the contract, he may have assessed the damages to the extent of Rs.7 lacs, however, in the opinion of Their Lordships of the Privy Council, once this letter was on record, there was no power left for the Trial Court without any sufficient amendment in the plaint to award at the hearing to the plaintiff any relief at all. That the amendment in the plaint actually made did not by its true construction make any difference in this respect. An amendment should have been proper, effective but what happened is that it did not as it should have converted the suit into one for recovery of damages for the breach of contract. The retention of paragraph 9 of the plaint with its allegation that the plaintiff "is as he has been throughout ready and willing to perform his said contract" coupled with the retention also of the claim for specific performance seemed to Their Lordships enough to reach that conclusion. Therefore, there was no power left with the learned Trial Judge to award damages. Thus, the Privy Council case and as rightly understood even by the Division Bench of the Calcutta High Court turned upon the abandonment of the claim for specific performance and conversion of the suit without proper amendments. That, therefore, enabled Their Lordships of the Privy

Council to sustain the finding of the High Court of reversal of the decree of the Trial Court.

49. In **Gopi Nath Sen and others Vs. Bahadurmul Dulichand and others**, i.e. Calcutta High Court case as well, we find that the principle is that damages under Section 73 of the Contract Act is a different claim from the award of compensation in lieu of specific performance. In the case of damages in lieu of specific performance, the same does not result directly or consequentially from out of a breach of the contract, as is the case under Section 73 of the Contract Act. There might be circumstances when the plaintiff might be entitled for specific performance, but the Court in its discretion might find that in the facts of that case, the plaintiff should not be awarded specific performance of the contract but if damages could be awarded in lieu of or in substitution thereof, then, that would amount to granting suitable relief. In Calcutta case also, the question was that the plaintiff in a suit for specific performance must be ready and willing to perform his part of the contract, not only up to the date of trial but at least up to the date of completion of trial. In Calcutta case as well, the Trial Judge had awarded damages to the extent of Rs.25,000/- in lieu of specific performance. The Appeal Court was of the view that this was an error. The learned Judge failed to consider the evidence before the Court and could not have reached such a conclusion after exercising his discretion. It was noted clearly that the suit after amendment of the assertion of readiness and willingness and deletion of the claim for specific performance, was for damages simplicitor. Therefore, different considerations arise on allowing of such amendment.

50. We do not have a case of this nature before us. True it is that at the end of the arguments, Dr.Saraf invited our attention to the order of Division Bench of this Court in this appeal dated 29th September 2015. Dr.Saraf invited our attention to the following portion :

“14. After having heard both parties at length, we find some substance in the submissions made by learned Senior counsel appearing on behalf of respondent. It is well settled position in law that after petition is decided under Section 34 of the Arbitration Act an appeal is filed under Section 37. The principle underlying Order XLI Rule 1(3) and (5) would apply to such award where monetary claim has been upheld. The question regarding correctness or otherwise of the appeal can be decided at the time of final hearing of the appeal. However, till the said appeal is heard and decided, the claimant is entitled to secure the monetary claim which has been granted in his favour. The learned counsel appearing on behalf of respondent during the course of his argument after taking instructions has made a statement that in the event decree in this award is satisfied, he will withdraw the suit filed by him for specific performance.”

51. During the course of his arguments and on oral instructions, Dr.Saraf made a further statement that Suraj would not press his suit on the Original Side and which is pending, as undertaken to this Court. Mr.Dwarkadas got up to object and to submit that today a statement may be made on instructions by Dr.Saraf, but on 29th September 2015, the position was otherwise. Once Haresh Advani is dropped from the array of defendants from the suit and claim of specific performance not awarded by the arbitral tribunal, there is no question of that suit now being withdrawn, because in that suit the averment and essential ingredient that Suraj was ready and willing and is ready and willing to perform his part of the contract, can

never be said to be established and proved. Hence, now the claimant Suraj should not be permitted to resile from the statement and correctly recorded by the Division Bench. Once again we do not wish to enter into this controversy. We are not required to consider as to what would happen to the suit. The only question was, having dropped Haresh Advani from the array of defendants in that suit, and Regency Hotels from the array of respondents in the arbitration proceedings, was the arbitral Tribunal still correct in awarding compensation in lieu of specific performance. Further, is the award contrary to the requirements under Section 21 of the Act of 1963 and to that extent whether the award suffers, from a patent illegality going to the root of the case. It was this objection of Haresh Advani throughout his arguments through counsel before us and controverted by Suraj's counsel, that our judgment was required. Beyond this, we do not make any comment on the statements that have been recorded in the order dated 29th September 2015. They would have their own effect and bearing on the suit, if pending and its future.

52. We find that Mr.Dwarkadas has relied upon some observations from the judgment of a learned Single Judge of this Court in case of **Shri Umakant B. Kenkre and another Vs. Yeshwant P. Shirodkar and others**, {1993(3)-Bom.C.R.-611 (Panaji Bench). The learned Single Judge was concerned with the correctness of an order passed by the Civil Court on a suit. The Civil Court allowed application for amendment filed by respondent-original plaintiff. Two separate civil revision applications were filed by two sets of defendants in the suit. Since the Court found that there is a distinction in law and by obtaining the relief under Section 21 of the Act of 1963, the plaintiff

is not dis-entitled from seeking alternate relief of damages for breach of contract under Section 73 of Contract Act and such amendment can be granted by the Trial Court. This order to that effect does not suffer from any illegality or material irregularity. However, the order under challenge before the learned Single Judge was interfered with on other point.

53. We do not find that the observations and which have been relied upon from paragraphs 6 and 9 of the judgment of learned Single Judge of Panaji Bench of this Court, Mr.Dwarkadas can derive any assistance. The principles which are salutary have been referred and reiterated. The remedy of seeking damages under general law of contract is still available and despite abandonment of claim of specific performance. It is only the claim for compensation under Section 21 that may fall to the ground on abandonment of specific relief. But the claim for damages for breach of contract under Section 73 of the Contract Act would still survive. We do not think that this judgment is of any assistance to the appellant before us.

54. Equally, the order of Division Bench in Appeal No.658 of 2006 In Arbitration Petition No.295 of 2006, dated 5th September 2006 is of no assistance. There, the learned Single Judge set aside an order of the arbitral tribunal. Learned Single Judge held that an interim order under Section 17 can be made by arbitral tribunal against the other party to the arbitration proceedings, but not against a party who is not party to the arbitration proceedings or for that matter to the relief claimed. Such an order was under challenge before the Court and the Division Bench referred to the factual position which was not in dispute. It, therefore, framed a question that if in a

dispute between two parties to the arbitration agreement, if the property belonging to a third party is brought in, can such property belonging to third party, be said to be subject property between the parties to the arbitration agreement. The answer rendered was in negative.

55. We do not think that any reliance can be placed on this judgment for the simple reason that though specific performance of contract ought not to have been granted in favour of Suraj, the tribunal felt in its discretion that other relief can be granted. If that was the conclusion, then Section 21 of the Act of 1963 was available to be invoked and that is the other conclusion of the tribunal. We have sustained rather the later conclusion which was under challenge. In deciding such an issue, we do not think that we have to refer to any principles, much less the one carved out in the order of Division Bench relied upon by Mr.Dwarkadas. Even that is distinguishable on facts.

56. Once we take the above view, it is not necessary to refer to other judgments relied upon by Mr.Dwarkadas and on the splitting up of the causes of action. In **Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and another** {2003-Vol.105(3)-Bom.L.R.147 (SC)} relied upon by Mr.Dwarkadas, it was a case where the Hon'ble Supreme Court pointed out on facts that first respondent before it filed a Suit being Suit No.1991 of 2000 in this Court for dissolution of partnership firm and accounts and, inter alia, challenging a conveyance deed executed by the firm in favour of M/s.West End Gymkhana Ltd. The first respondent moved a motion for various interim reliefs in such suit. The appellant Sukanya Holdings Pvt.Ltd.

filed an application under Section 8 of the Act of 1996 and which application was heard along with motion. This Court rejected that application after holding that in the suit apart from the relief of dissolution and accounts, there are various other reliefs. All the defendants to the suit are not parties or partners in the partnership firm and the terms of partnership deed including arbitration clause are not binding on them. Only part of the subject matter could at best be referred to arbitration and there is no power in the Court to split the claim like this. This order was challenged before Hon'ble Supreme Court and all the observations made in paragraphs 13 to 17 should be seen in the context of the factual backdrop noted above.

57. We do not have to decide this aspect because the arbitral tribunal was not prohibited in considering the claim of Suraj even though he had decided to file a suit for some what similar relief as claimed before the tribunal in this Court. However, to that suit all the parties before the arbitral tribunal were not the defendants any longer and the objection before the tribunal was that after dropping one of the defendant Regency Hotels from the array of the respondents before the tribunal, the tribunal could not have awarded specific performance. Despite such deletions/amendments, the tribunal did not think that it is prohibited in awarding the relief of specific performance but in its discretion it ought not be granted. For such a conclusion being assailed, we are not required to refer to Sukanya Holdings Pvt. Ltd. (supra) any longer.

58. In the view that we have taken, we do not think that we should refer to the judgments relied upon by Dr.Saraf. We have not deviated from any principles which would unable the Court to

interfere with the award in exercise of its power under Section 34 of the Act of 1996 nor have we deviated from the wording of Section 21 of the Act of 1963. The judgments relied upon by Dr.Saraf really turn on the interpretation of the explanation to Section 21, which is not the case before us.

59. As a result of the above discussion, the appeal fails and stands dismissed. The order of the learned Single Judge upholding the majority award requires no interference. There will be no order as to costs. In view of the dismissal of the appeal, Notice of Motion (L) No.1359 of 2015 does not survive and stands disposed of as such.

60. After the dictation of this judgment was completed, the learned senior counsel Mr. Janak Dwarkadas appearing for the appellant as also Dr. Saraf appearing for the respondent, on our suggestion, requested that we should not sign this judgment for some time as the parties will explore the possibility of an amicable settlement. We acceded to the request of both and, though the judgment was ready for signature, we waited for the response. Eventually, M/s. Federal & Rashmikant, the advocates for the respondent addressed a communication to the Registrar on the Original Side stating therein that there is no possibility of settlement and the judgment may now be signed. That is how we have signed this judgment and made the copies available to the parties.

(PRAKASH D. NAIK, J.)

(S.C.DHARMADHIKARI, J.)

MST