

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.02.2019

CORAM

THE HONOURABLE MR. JUSTICE M. SUNDAR

O.P. No. 84 of 2018

M/s. DLF Home Developers Ltd.,
Formerly at "Chalam Towers",
III Floor, No.62/113,
Dr. Radhakrishnan Road,
Mylapore, Chennai - 600 004
and now at No.268, PH Road,
Kilpauk, Chennai 600 010.

..Petitioner

Vs.

1. Ms. Mahanthi Rangarajan
2. Mrs. R. Nagaswarna
3. Mr. Surya Narayanan, Advocate
Arbitrator,
New No.10, Old No. 241,
St. Marys Road,
Mandavelli,
Chennai - 600 028.

..Respondents

Prayer: Original Petition filed under Section 34 of the Arbitration and
Conciliation Act, 1996, to set aside the award dated 10.04.2018 passed by the
Sole Arbitrator.

For Petitioner

::

Mr.Jayesh Dolia for
M/s. Aiyar & Dolia

ORDER

There is a sole petitioner and there are three respondents in this original petition.

2. This Original Petition has been filed under Section 34 of The Arbitration and Conciliation Act, 1996 (26 of 1996), hereinafter referred to as 'A&C Act' for the sake of convenience and clarity laying a challenge to an award dated 10.04.2018 made by an Arbitral Tribunal constituted by a sole arbitrator. This award dated 10.04.2018 made by a sole arbitrator constituting the Arbitral Tribunal shall hereinafter be referred to as 'impugned award' for the sake of convenience and clarity. To be noted, sole arbitrator has been arrayed as respondent No.3 in this petition before me.

3. Before I proceed with this petition, it is deemed appropriate to mention at the outset that this petition being one under Section 34 of A&C Act is neither an appeal nor a revision, it is not a review and it is a mere challenge to an arbitral award. More importantly, minimum judicial intervention in Alternate Dispute Resolution mechanisms ('ADR' for brevity), in my considered opinion, is the salutary principle and sublime philosophy underlying the scheme of A&C Act and more particularly, Sections 34 and 37 of A&C Act. It is in this backdrop that this petition under Section 34 of A&C Act is being examined.

4. In the latter part of this order, I shall make further reference to the scope of a petition under Section 34 of A&C Act as elucidatively laid down, eruditely explained and amply articulated in recent pronouncements by the Honourable Supreme Court.

5. It may be necessary to set out a thumbnail sketch of facts for the limited purpose of appreciating this order considering the narrow scope of a petition under Section 34 of A&C Act.

6. Minimum facts are set out infra under the caption 'FACTUAL MATRIX IN A NUT-SHELL'.

7. FACTUAL MATRIX IN A NUT-SHELL:

(a) Petitioner before this Court, I am informed, is a Company engaged in real estate development business. It is also submitted that petitioner company in the course of its business promoted a project which goes by the name 'Commander's Court' at Ethiraj Salai, Egmore, Chennai - 600 008, which shall hereinafter be referred to as 'said project' for the sake of convenience and clarity. Petitioner shall also be referred to as 'builder' for the sake of convenience and clarity.

(b) Respondents 1 and 2, this Court is informed, are daughter and mother respectively. Respondents 1 and 2 shall collectively be referred to as 'proposed buyers' also for the sake of convenience and clarity.

(c) 3rd respondent shall be referred to as 'sole arbitrator' and/or 'arbitral tribunal'/learned arbitrator whichever it is deemed appropriate.

(d) Proposed buyers, with the intention of buying an apartment in the said project, signed a document captioned 'Application for allotment of luxury apartment in Commander's Court, Ethiraj Salai, Egmore, Chennai - 600 008'. The apartment which the proposed buyers intended to buy has been described in the said application as follows:

"1.1 In accordance with and subject to the other terms and conditions set out in this Agreement, the Company agrees to sell to the Allottee and the Allottee agrees to purchase, the said Apartment in the said building/said complex, as detailed below:

Said Apartment No: 4 Floor No. 01 Said Building/ Block No: D

Apartment Area (approx.): 290.14 sq.mtr (3123.06696 sq.ft.)

Super Area(approx.) 367.607 sq.mtr (3957 sq.ft)

Rate @:Rs.152309.3265/- per sq.mtr. (Rs. 14150/- per sq.ft) of the Super Area.

Basic Sale Price: Rs.5,59,91,550/- (Rupees Five Crore Fifty nine lakhs
ninety one thousand five hundred
fifty only)

PLC, if applicable:

: * @ Rs...../- per sq.mtr (Rs...../-per sq.ft)
of the Super Area for garden facing apartment aggregating to
(Rs...../- per sq.ft)
: * @ Rs...../-per sq.mtr (Rs.-/- per sq.ft)
of the Super Area for garden plus corner facing apartment
aggregating to Rs...../-)
: * @ Rs...../-per sq.mtr (Rs...../-per sq.ft)
of the Super Area for garden plus swimming pool facing apartment
aggregating to Rs...../-)
: * @ Rs...../-per sq.mtr (Rs...../-per sq.ft)
of the Super Area for south facing apartment aggregating to
Rs...../-)
: * @ Rs...../-per sq.mtr (Rs...../-per sq.ft)
of the Super Area for south facing plus corner facing apartment
aggregating to Rs...../-)
(*Delete whichever is not applicable)

Total PLC: Rs...../- (Rupeesonly)

FRC: Rs. 175 per floor for floor no. 01 (@ Rs.....
per sq.ft/mtr) of the Super Area of the said Apartment aggregating
to Rs.....(Rs.....only)

Parking Space(s) no:- (1) B/2/123 (2) B/2/127 (3)

Cost of Parking Space (s):Rs.11,00,000/- (Rupees Eleven Lakhs only)

Total Price payable for the Said Apartment: Rs. 57091550/-

(Rupees Five Crore Seventy Lakhs Ninety One thousand Five hundred fifty only)"

(e) The aforementioned application is dated 25.03.2012. Payment plan has been adumbrated by way of annexure to the said agreement and the same reads as follows:

PAYMENT PLAN (w.e.f. July 8'2011)

Unit Price (Rs. Per sq.ft)	As Applicable
Down Payment Rebate	10% on Total Price
Car Park	
Basement 1 st Level	Rs.600000/-each
Basement 2 nd Level	Rs.550000/-each
Basement 3 rd Level	Rs.500000/-each
Stilt	Rs.650000/-each
Open	Rs.300000/-each
Preferential Location Charges	As Applicable
Floor Rise charges	As Applicable

DOWN PAYMENT PLAN

On Application(Booking Amount)	Rs.8 Lacs for Saleable Area of 1550 sft – 1899 sft
	Rs.10 Lacs for Saleable Area of 1900 sft – 2500 sft.
	Rs.12 Lacs for Saleable Area of 2501 sft – 2650 sft.

	Rs.15 Lacs for Duplex
<u>Within 30 days of Booking</u>	<u>95% of the Total Price Less</u> <u>Booking Amount Less</u> <u>Down Payment Rebate</u>
On Notice of Possession	5% of Total price + Stamp Duty + Registration Charges & Other Charges + Taxes, as applicable."

**(Underlining made by Court to supply
emphasis and highlight)**

(f) It is not in dispute that the proposed buyers paid a sum of Rs.15,50,000/- (which includes Rs.50,000/- towards service tax) on the date of aforesaid application i.e., 25.03.2012. This sum of Rs.15,50,000/- was paid by proposed buyers to the builder. It is also submitted that total cost of the said apartment is Rs.5,33,58,846.84 (a little over Rs.5.33 crores). It is the case of builder that according to aforementioned Schedule of Payment, 95% of aforesaid total cost of said apartment less booking amount and down payment rebate should have been paid within 30 days from the date of booking. In other words, the same ought to have been paid on or before 24.04.2012. However, to be noted, Apartment Buyers' Agreement itself was entered into only on 26.04.2012.

(g) To be noted, the aforesaid application dated 25.03.2012 and the Apartment Buyers' Agreement dated 26.04.2012 have been marked as Ex.R2 & Ex.C1 respectively before the Arbitral Tribunal.

(h) Schedule of Payment drawn up has been annexed to Apartment Buyers' Agreement dated 26.04.2012 by way of one of the annexures, to be specific, Annexure III and the same reads as follows:

PAYMENT PLAN							
Inst.No.	Due Date	Description	BSP	PRK	MSE	STAX	Total
1.	26-Mar-12	On Application Booking Amount	1,500,000.00	0.00	0.00	38,625.00	1,538,625.00
1.		Down Payment Rebate	-5,599,155.00	-110,000.00	0.00	-175,654.16	-5,884,809.16
2.	26-Apr-12	Within 1 Month	51,691,972.00	1,045,000.00	0.00	1,629,574.00	54,366,546.50
3.		On Notice of Possession	2,799,577.50	55,000.00	395,700.00	88,207.00	3,338,484.50
Total			50,392,395.00	990,000.00	395,700.00	1,580,751.84	53,358,846.84

(i) It is the case of builder that proposed buyers defaulted and did not pay 95% balance as agreed and therefore, builder sent electronic mails to the proposed buyers in this regard. These electronic mails have been marked as Ex.C2 series before the Arbitral Tribunal.

(j) Ultimately, the builder terminated the agreement and invoked the forfeiture clause. This letter of termination is dated 06.07.2012. To be noted, it is Ex.R2 before the Arbitral Tribunal.

(k) This takes us to the forfeiture clause in the Apartment Buyers' Agreement dated 26.04.2012. The forfeiture clause is clause 53 and the relevant portion of the same reads as follows:

"53. Events of Defaults and Consequences:

Unless otherwise provided in this Agreement, upon the occurrence of any one or more of event(s) of default under this Agreement including but not limited to those specified above, the Company may, in its sole discretion, by notice to the Allottee, cancel this Agreement by giving in writing fifteen (15) days notice to rectify the default as specified in that notice. In default is not rectified within such 15 days, this Agreement shall stand cancelled and the Company shall forfeit the Earnest Money along with the Non Refundable Amounts. The Allottee acknowledges that upon such cancellation of this Agreement, the Allottee shall have no right or interest on the Said Apartment and the Company shall be discharged of all liabilities and obligations under

this Agreement and the Company shall have the right to sell or deal with the Said Apartment and the Parking Space(s) in the manner in which it may deem fit as if this Agreement had never been executed. The refund, if any, shall be refunded by the Company by registered post only after realizing the amount on further sale/resale to any other party and without any interest or compensation whatsoever to the Allottee. This will be without prejudice to any other remedies and rights of the Company to claim other liquidated damages which the Company might have suffered due to such breach committed by the Allottee."

(Underlining done by Court to supply emphasis and highlight.)

(l) A perusal of underlined portion in the extract supra reveals that earnest money forfeiture shall be done by the company. In other words, the clause says that company shall forfeit earnest money along with non-refundable amounts. Learned counsel submits that this is not happily worded and it should be construed as forfeiture by the proposed buyers. It may not be necessary to delve into those aspects of the matter, considering the narrow scope of a petition under Section 34 of A&C Act.

(m) Earnest Money has also been explained/described in the Apartment Buyers' Agreement in clause 4 and the same reads as follows:

"4. Earnest Money

The Allottee agrees and confirms that out of the amount(s) paid/payable by the Allottee for the Said Apartment and the Parking Spaces) the booking amount of Rs.15,00,000/- (Rupees Fifteen Lakhs only) shall be treated as Earnest Money for due fulfillment, by the Allottee, of the terms and conditions as contained in the Application and this Agreement. In the event the Allottee fails to perform any obligations or commit breach of any of the terms and conditions mentioned in the Application and/or this Agreement including but not limited to the occurrence of any event of default as stated in this Agreement or the failure of the Allottee to sign and return this Agreement in original to the Company within 30 days of this dispatch date then the Allottee agrees that then the Company shall have the right to forfeit without any notice to the Allottee the Earnest Money and the Non-Refundable Amounts. If the amount paid by the Allottee is less than the forfeitable amount then the Allottee undertakes to make good the shortfall of the forfeitable amount. This is in addition to any other remedy/right, which the Company may have. The Allottee agrees and understands that withdrawal of the Agreement by the Allottee is a breach of the terms and

conditions of the Agreement and the Company shall be entitled to retain the booking amount/Earnest money along with Non Refundable Amounts."

(n) It is also not in dispute that there is an arbitration agreement between builder and proposed buyers being an arbitration agreement within the meaning of Section 7 of A&C Act. This Arbitration Agreement within the meaning of Section 7 of A&C Act is in the form of a clause/covenant in the Apartment Buyers' Agreement dated 26.04.2012 and the relevant clause is clause 55, which reads as follows:

"55. *Dispute Resolution by Arbitration*

All or any disputes arising out of or relating to or concerning or touching this Agreement including the interpretation and validity of the terms thereof shall be referred by any party to a sole arbitrator who shall be appointed by the Company and whose decision shall be final and binding upon the party and the Allottee shall have no objection to this appointment even if the person so appointed, as the sole Arbitrator, is an employee or advocate of the Company or is otherwise connected to the Company. The arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996 or any statutory amendments/modifications thereof for the time being in force. The arbitration proceedings shall be held at an appropriate location to be decided by the sole arbitrator. The parties agree that no other person

shall have the power to appoint the sole arbitrator. The Courts at Chennai alone and the Madras High Court at Chennai shall have the jurisdiction."

(o) In the aforesaid backdrop, the proposed buyers contending that termination is improper and forfeiture is bad, issued a notice through counsel dated 22.08.2015 invoking the arbitration clause. A perusal of the arbitration clause would reveal that an arbitrator has to be appointed by the builder. In this notice dated 22.08.2015, proposed buyers have specifically referred to clause 55 and called upon the builder to nominate a sole arbitrator in accordance with clause 55. There is no dispute or disagreement before this Court that this notice was duly received by the builder on 24.08.2015, but the builder did not nominate an arbitrator in accordance with clause 55, which is in the arbitration agreement between the parties within the meaning of Section 7 of A&C Act.

(p) Owing to this, left with no other option, the proposed buyers approached this Court by way of a petition under Section 11 of A&C Act vide O.P. No. 559 of 2016, which was listed before Honourable Chief Justice Sanjay Kishan Kaul (as his Lordship then was). In and by order dated 04.11.2016, then Honourable Chief Justice of this Court, appointed the 3rd respondent before me

(a learned member of this bar) as the Sole Arbitrator to enter upon reference and arbitrate the dispute/s between the parties.

(q) Pursuant to the appointment made by then Honourable Chief Justice of this Court, respondent No.3, a learned member of this bar, entered upon reference and conducted arbitration.

(r) In the arbitration, both sides participated and as many as 10 documents, on the side of the proposed buyers, were marked as Exs.C1 to C10. As many as 5 documents were marked on behalf of the builder,i.e, Exs.R1 to R5. To be noted, proposed buyers, who are respondents 1 and 2 before me were claimants 1 and 2 respectively before the Arbitral Tribunal (3rd respondent) and builder, which is the petitioner before me, was the sole respondent before the Arbitral Tribunal.

(s) I shall continue to refer to the parties in the manner which I have already set out supra.

(t) Learned Sole Arbitrator i.e, Arbitral Tribunal ultimately passed the impugned award dated 10.04.2018. To be noted,claim of proposed buyers before the Arbitral Tribunal included refund of aforesaid sum of Rs.15,50,000/-

and a likesum towards damages. Learned Arbitrator/Arbitral Tribunal vide impugned award acceded to the claim of refund of Rs.15,50,000/- with interest @ 9% per annum on the said amount from the date of claim till the date of award and future interest @ 18% per annum from the date of award till the date of realisation. The claim for damages for a likesum was negatived completely. This Court is informed that the proposed buyers have not assailed the impugned award with regard to their claim for damages being negatived. To be noted, costs of the proceedings were also directed to be paid by the builder to the proposed buyers.

8. Having set out the factual matrix as well as the trajectory of proceedings thus far (including proceedings before the Arbitral Tribunal) which has culminated in the instant petition before me, it is deemed appropriate to set out the submissions made and consideration of the same which I shall do under the caption "DISCUSSION and DISPOSITIVE REASONING" infra.

9. DISCUSSION AND DISPOSITIVE REASONING:

(a) This petition was listed under the caption 'FOR ADMISSION' yesterday, i.e, 05.02.2019 and yesterday's proceedings reads as follows:

" Heard in detail.

Elaborate submissions made by Mr.V.P. Mohammed Moin of M/s. Aiyar

& Dolia.

List under the caption 'FOR ORDERS' on 06.02.2019."

(b) Pursuant to yesterday's proceedings, this matter was listed under the caption 'FOR ORDERS' today. Today, Mr. Jayesh Dolia, learned counsel of M/s. Aiyar and Dolia assisted by Mr. V.P. Mohammed Moin and Mr. K.P. Hemant Kumar made further submissions. I am considering all the submissions made before me together.

(c) In sum and substance, case of the petitioner, which is protagonist of this petition under Section 34 of A&C Act, is that this petition is predicated essentially under Section 34(2-A) of A&C Act. I deem it appropriate to extract Section 34(2-A) of A&C Act and the same reads as follows:

"34. Application for setting aside arbitral award:-

(1) ...

(2) ...

(2-A) An arbitral award arising out of arbitration other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

[Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence]"

(d) Learned counsel for petitioner/builder submitted that there are two points which arise for consideration and these two points will go to show that the impugned award is vitiated by the vice of patent illegality appearing on the face of the same. It was submitted that the first point is that the claim before the Arbitral Tribunal is barred by limitation and learned Arbitrator/Arbitral Tribunal has not considered or adverted to this aspect of limitation. The second point is with regard to forfeiture.

(e) According to learned counsel for petitioner, the moment, proposed buyers did not pay balance 95% as per the agreed schedule, there will be forfeiture in accordance with clause 53, the relevant portion of which has already been extracted and alluded to supra. Learned Arbitrator has lost sight of the fact that forfeiture is virtually automatic, is learned counsel's say.

(f) To buttress the aforesaid submission *Shree Hanuman Cotton Mills and Others V. Tata Air Craft Limited* reported in 1969 (3) SCC 522, was pressed into service and paragraph No.21 was referred to, which reads as follows:

"21. From a review of the decision cited above, the following principles emerge regarding "earnest":

(1) It must be given at the moment at which the contract is

concluded.

(2) *It represents a guarantee that the contract will be fulfilled or, in other words, "earnest" is given to bind the contract.*

(3) *It is part of the purchase price when the transaction is carried out.*

(4) *It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.*

(5) *Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest."*

(g) For the same principle relating to Earnest Money Deposit and to show that Earnest Money Deposit is part of purchase price when the transaction goes forward and it stands forfeited when the transaction does not go through, a Privy Council judgment rendered in *Kunwar Chiranjit Singh V. Har Swarup* reported in 1926 XXIII L.W. 172 was placed before me. The relevant paragraph therein reads as follows:

"Earnest Money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee."

Aforesaid two case laws relating to principles pertaining to Earnest Money Deposits do not help the petitioner in the instant case as this is an issue where ordering of forfeiture was tested. However, considering the limited and

narrow scope of Section 34 of A & C Act, reappreciation of findings in this regard (in contradistinction to a regular first appeal under Section 96 of The Code of Civil Procedure, 1908) is impermissible. To be noted, in any event, this Court does not find the findings returned by the Arbitral Tribunal regarding forfeiture to be illegal or incorrect.

(h) *R.M. Cylinders Private Limited V. Hindustan Petroleum Corporation Limited*, being a judgment rendered by a learned Single Judge of Bombay High Court reported in 2013(4) Mh.L.J 67 and *Food Corporation of India and Others V. Gopal Chandra Mukherjee*, being a judgment rendered by a Division Bench of Calcutta High Court reported in 2003 SCC Online Cal 107 were pressed into service for the proposition that Earnest Money Deposit is in the nature of liquidated damages. Paragraph No.15 of *R.M. Cylinders case* and Paragraph No.16 of *Food Corporation of India case* were referred to. As the principle is only with regard to Earnest Money Deposit being in the nature of liquidated damages, these case laws, being of persuasive value, viewed in the light of the fact that this is an order being made in a petition made under Section 34 of A&C Act, this Court refrains from extracting those paragraphs.

(i) Learned counsel also submitted that limitation goes to the root of

the matter and therefore, learned Arbitrator ought to have dismissed the claim as being barred by limitation.

(j) On limitation, it was submitted that termination letter is dated 06.07.2012 and it was served on the same day on proposed buyers. According to learned counsel for petitioner, limitation for the claim had expired on 22.08.2015 when the notice invoking arbitration clause (alluded to supra) was issued whereas the claim was made only on 25.02.2017.

(k) In my considered opinion, in the light of the language in which Section 21 of A&C Act is couched, arbitration did not commence on 22.08.2015, but on 24.08.2015 when the notice invoking arbitration clause was received by the builder/petitioner, who is the noticee therein. Therefore, 24.08.2015 is the reckoning date.

(l) As mentioned supra, notwithstanding receipt of notice invoking arbitration clause on 24.08.2015, petitioner/builder did not nominate an Arbitrator in accordance with clause 55, which is in the arbitration agreement between the parties forcing the proposed buyers to file a petition under Section 11 of A&C Act before then Honourable Chief Justice of this Court. The then Honourable Chief Justice of this Court, as mentioned supra, had

appointed the 3rd respondent, a learned member of this bar, as the Sole Arbitrator, on 04.11.2016 and he entered upon reference but the Arbitral Tribunal has not considered and brushed aside the limitation plea is learned counsel's say.

(m) Be that as it may, a mere perusal of the impugned award, particularly, paragraph No.29 of the impugned award reveals that learned Arbitrator has infact considered the limitation issue and has returned a finding. A closer perusal of the impugned award reveals that learned Arbitrator has formulated as many as 4 issues and issue No.3 is ' Whether the claim made is within time?' . Issue No.3 has been answered in paragraph No.29 of the impugned award as follows:

"29. Issue No.3: To sum up, the arbitration tribunal feels that the limitation for the claim can be taken from 18/10/2012, the date on which the respondent finally informed that there is no amount refundable as the agreement has been cancelled and all the amounts had been forfeited and the notice invoking the arbitration was sent on 22/08/2015 and received by the respondent, invocation of arbitration is well within the period of limitation and therefore the claim is within time and is not

barred by limitation. It is also relevant to quote Section 21 of the Act "unless otherwise agreed by the parties, the arbitratl proceedings in respect of a particular dispute commons on the day on which a request for the dispute to be referred to the arbitration is received by the respondent". In the present case, the respondent received requested to arbitration on 24/08/2015 as admitted by them. It is also contended that the notice of unsecured creditor issued in 19/08/2015 will enure to limitation. Under such circumstances, the arbitration is invoked on 24/08/2015 within 3 years from 18/10/2012 and therefore, is not barred by limitation."

(Underlining made by Court to supply emphasis and highlight)

(n) A perusal of aforesaid paragraph No.29 of the impugned award reveals that learned Arbitrator has infact considered the limitation issue and has returned a finding. With regard to the basis for learned Arbitrator returning a finding that arbitration is not barred by limitation, 18.10.2012 has been taken as the reckoning date by the learned Arbitrator. In other words, learned Arbitrator has negated the plea of the builder/petitioner that 06.07.2012 (termination notice) should be taken as the reckoning date. Learned Arbitrator has referred to the electronic mails exchanged between the parties and those electronic mails have been marked as Ex.C8 series before

learned Arbitrator. After scrutiny of electronic mails which have been marked as Ex.C8 series, i.e., after appreciation of documentary evidence before him, learned Arbitrator has come to the conclusion and returned a clear finding that this Ex.C8 series is dated 18.12.2012 and that should be the reckoning date as it is in these communications that the petitioner/builder finally informed the proposed buyers that there is no amount refundable. In my considered view, this finding of learned arbitrator cannot be faulted with.

(o) Further to be noted, in this case limitation is a mixed question of fact and law. Limitation being a mixed question of fact and law, this finding returned by the learned Arbitrator with regard to issue No.3 which has been answered in paragraph No.29, is clearly a question that turns on facts. In this regard, this Court considers it appropriate to respectfully follow the ratio laid down by Honourable Supreme Court in *Associate Builders V. Delhi Development Authority*. To be noted, *Associate Builders'* case has been reported in 2015 3 SCC Pg. 49. It is also reported in 2014 13 Scale Pg. 226. In *Associate Builders case*, on facts, was a case where a contractor, who was awarded a contract by Delhi Development Authority ('DDA' for brevity) made a claim towards work done. This was part of a project of DDA wherein about 7000 houses were being constructed by DDA in Trilok Puri, a Trans-Yamuna area. As

many as 15 claims were made by the contractor and Delhi High Court appointed a Sole Arbitrator. The Sole Arbitrator entered upon reference and passed an award which was called in question. A learned Single Judge of Delhi High Court refused to intervene qua the award, but a Division Bench of Delhi High Court, in an appeal under Section 37 of A&C Act, stepped in to set aside the view of the learned Single Judge. In other words, the claims of contractor which were acceded to by the Arbitral Tribunal (which learned Single Judge refused to set aside) were reversed/negatived. Besides this, two claims were also scaled down. This order of the Division Bench of Delhi High Court was called in question before the Honourable Supreme Court. In this backdrop, Honourable Supreme Court in *Associate Builders' case* held that the expression 'justice' when it comes to setting aside an award under Section 34, can only mean that it should be an award, which is such that it shocks the conscience of the Court. It was also lucidly explained with erudition by the Honourable Supreme Court that it cannot possibly include what the Court thinks is unjust on the facts of a case for which it then seeks to substitute its views for the Arbitrator's views and does what it considers to be justice. The Honourable Supreme Court has also held in categorical terms that findings of facts made by the Arbitrator cannot be interfered with as it was clearly laid down that the Arbitrator is the sole Judge of the quantity and quality of evidence before him.

Though *Associate Builders'* case was rendered prior to 23.10.2015, these principles can be applied considering the nature of changes brought in by 23.10.2015 amendments.

(p) Therefore, the question of limitation being a mixed question of fact and law in this case, any interference with the award of the Arbitral Tribunal, in this regard, would amount to interfering with the quality and quantity of evidence before him. When the learned Arbitrator has clearly returned a finding that 06.07.2012 is not the reckoning date and only 18.10.2012 is the reckoning date after careful analysis and appreciation of Ex.R2, termination notice and Ex.C8 series, being electronic mail communications exchanged between the parties, re-appreciation of evidence is impermissible.

(q) This takes us to forfeiture of Earnest Money Deposit aspect.

(r) Learned Arbitrator, on careful analysis of the evidence before him and on facts, has come to the conclusion that signing of Apartment Buyers' Agreement, i.e, Ex.C1 and conduct of parties clearly shows that the petitioner/builder has taken recourse to clause 39 of Ex.C1, which is captioned 'Waiver not a limitation to enforce'. This is articulated very pithily in

paragraph No.13 of the impugned award, which reads as follows:

"13. When the respondent choose to exercise Clause 39(1) whereby they choose to charge interest on the claimant, it amounts to waiver of act of breach as per the agreement between the parties."

(s) Besides this, issue No.2 reads as follows:

"2. Whether the respondent is justified in forfeiting the amount on cancellation of the agreement?"

While answering this, there is copious reference in the impugned award, inter alia, to recourse being taken to clause 39(1). It would suffice to extract a small portion of the same, which is articulated in paragraph No.30 wherein issues Nos. 1 & 2 have been answered together. Relevant portion of paragraph No.30 reads as follows:

"30. Issue No. 1 & 2: In the present case, the respondent having invoked clause 39(1), had waived the breach committed by the claimant and therefore the cancellation of the agreement and consequent forfeiture of the advance amount is not proper and justified..."

(t) To be noted, though there are other grounds contained in the petition, the points which have been alluded to supra were argued before me

as grounds of challenge on which this petition is predicated.

(u) Before parting with this case, it may be necessary to refer to two very recent judgments of the Honourable Supreme Court being *State of Bihar V. Bihar Rajya Bhumi Vikas Bank Samiti* rendered on 30.07.2018 and *Emkay Global Financial Services Limited V. Girdhar Sondhi* rendered on 20.08.2018. To be noted, while *Bihar Rajya Bhumi Vikas Bank Samiti's case* has been reported in 2018 9 SCC 472, the equivalent being AIR 2018 SC 3862, *Emkay Global Financial Services Limited case* has been reported in AIR 2018 SC 3894. Though *Bihar Rajya Bhumi Vikas Bank Samiti's case* is one that turns on interpretation of sub-section (5) of Section 34 of A&C Act and as to whether the pre-notice contemplated therein is directory or mandatory, in paragraph No.26, Honourable Supreme Court has held that it shall be the endeavour of every Court in which Section 34 petition is filed to stick to the timelimit of one year which has been set out in sub-section (6) of Section 34 of A&C Act. Likewise, in *Emkay Global Financial Services Limited case*, while reiterating Fiza Developers principle that Section 34 is a summary procedure warranting expeditious disposal, aforesaid paragraph No. 26 of *Bihar Rajya Bhumi Vikas Bank Samiti's case* was reiterated. I deem it appropriate to extract paragraph No.26 of *Bihar Rajya Bhumi Vikas Bank Samiti's case* and the same reads as

follows:

"26. We are of the opinion that the view propounded by the High Courts of Bombay and Calcutta represents the correct state of the law. However, we may add that it shall be the endeavour of every court in which a Section 34 application is filed, to stick to the time-limit of one year from the date of service of notice to the opposite party by the applicant, or by the Court, as the case may be. In case the Court issues notice after the period mentioned in Section 34(3) has elapsed, every court shall endeavour to dispose of the Section 34 application within a period of one year from the date of filing of the said application, similar to what has been provided in Section 14 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. This will give effect to the object sought to be achieved by adding Section 13(6) by the 2015 Amendment Act."

(v) It is not in dispute before me that the said apartment in the said project has been completed and sold to another third party. It may not be necessary to go into those aspects considering the narrow scope of Section 34 of A&C Act, but a passing reference to the same is made only in terms of equities of the matter which have also been noticed.

10. CONCLUSION

In the light of the narrative supra, particularly, "Discussion and Dispositive Reasoning", this Court is convinced that this petition under Section 34 of A&C Act which according to petitioner's counsel is predicated under Rule 2-A of Section 34 of A&C Act is bereft of merits and does not warrant judicial intervention qua the impugned award. As a necessary sequitur, instant petition is liable to be dismissed. However, considering the fair submissions that have been made at the bar, this Court refrains from imposing costs.

11. DECISION

O.P. No. 84 of 2018 is dismissed.

06.02.2019

nv

Index: Yes/No

Internet: Yes/No

Speaking Order/Non-Speaking Order

M. SUNDAR,J.

nv



O.P. No. 84 of 2019

WEB COPY

06.02.2019