

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY AND ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION PETITION NO.37 OF 2017**

Caprihans India Limited

..Petitioner

Vs.

Hindoostan Mills Ltd

..Respondent

Mr. Fredun E DeVitre Senior Advocate a/w Mr. Darshit Jain Ms Bindi Dave, Mr. Ieshan Sinha, Ms Varada Balachandran Ms Aditi Chavan, Mr. Sumeet Tyagi and Mr. Pravin Dhage I/b Wadia Ghandy and Co. for Petitioners
Mr. Mustafa Doctor, Senior Advocate a/w Mr. Urvaksh Anklesaria, Mr. Ameet Hariani, Mr. Soura Subha Ghosh, Mr. Anirban Sen and Ms Parinaz Nagporwala-Dastur I/b Hariani and Co. for Respondent

CORAM : K. R. SHRIRAM, J.

RESERVED ON: 25.04.2019

PRONOUNCED ON: 03.06.2019

JUDGMENT :

1 Petitioner is impugning under Section 34 of the Arbitration and Conciliation Act 1996 (**the said Act**) part of the Majority Arbitral Award dated 20th October 2016 . Petitioner was claimant and respondent was respondent before the Arbitral Tribunal comprising of three Retired Judges.

2 Respondent owned several immovable properties, one of which was a plot of land admeasuring 6754.52 sq.mtrs at Byculla, Mumbai (the said land). Respondent wanted to develop the said land and therefore approached one Kalpataru Construction Overseas Private Limited (“**KCOPL**”) and entered into a Project Management Agreement dated 28th July 1993 (**PMA**). Under the PMA, KCOPL would function as a Project Management Consultant (**PMC**). Petitioner also forms part of the same

group to which KCOPL belonged. Respondent entered into a development agreement dated 29th October 1993 with Petitioner where under respondent granted the development rights of the said land to Petitioner. Under the development agreement, Petitioner was to pay a sum of Rs.19,89,12,000/- towards land value and also allot 23,365 sq.ft. of area subject to reimbursement of actual cost of construction. It is stated that Petitioner paid to respondent towards land cost an amount of Rs.18,14,16,200/-, while amount of Rs.1,47,95,800/- was still payable. Petitioner allotted 12 flats including one penthouse and two duplex flats having total area of 23,365 sq.ft. to respondent. Petitioner also gave 13 covered car-parking slots in the podium area.

According to Petitioner, actual cost of construction pro-rata for the area allotted was Rs.7,26,00,000/- and further a sum of Rs.30,85,898/- towards property tax and maintenance charges along with interest which it had to recover from respondent.

Respondent denied liability to pay any cost of construction and counter-claimed, inter alia, for a share of profits, claiming (a) the transaction between the parties was infact a joint venture arrangement for sharing profits equally and, (b) for refund of amounts paid as project management fees to KCOPL, group company of petitioner, in regard to the development of the said building. Alternatively, respondent claimed that it was liable to pay the pro-rata cost of construction only at the rate of

Rs.775/- per sq. ft. for the 23,365 sq. ft. allotted to it. Respondent counter claimed several amounts such as Rs.1,47,95,800/- towards balance consideration of land price alongwith interest, 50:50 profit, Rs.1,31,00,000/- as 50% wrongful compensation said to have been given by Petitioner to flat holders, 50% unsold car parking space or Rs.85,00,000/- towards the said claim, Rs.1,34,00,000/- with interest towards inflated project costs, Rs.2,19,35,500/- towards repairs and renovations which Petitioner failed to carry out and reimbursement of project management fees of Rs.3.33 crores that respondent had paid to KCOPL.

3 The Arbitral Tribunal framed 18 issues and answers thereto are as under :

ISSUES	FINDINGS
<i>1. Whether the Agreement alleged in letter dated 29th October 1993, relied upon by respondents in paragraph 3.7 of respondent's reply and in paragraph 3 of the set-off and counter-claim of respondents and item No.5 to the compilation of documents of respondents and not disclosed in 37-1 Form filed by the parties in against the public policy of India and/or contrary to the mandatory provision Chapter XXC of the Income Tax Act, 1960 and therefore, the claim arising thereunder cannot be considered ?</i>	<i>Side letter dated 29.10.1993 was given up.</i>
<i>2 Whether respondents' claims on the basis of the letter dated 29 October 1993 and/or the alleged joint venture between the parties and/or respondents' Set Off and Counter Claim are beyond scope of the arbitration agreement and/or the reference and/or jurisdiction of the Hon'ble Tribunal as</i>	<i>The Tribunal has jurisdiction.</i>

<i>contended by the Petitioners ?</i>	
3. If the answer to Issue No.2 is in the negating, (a) Whether the Agreement dated 29th October 1993 is a complete contract between the parties as contended by the Petitioners or (b) Whether the Agreement between the parties is contained in the Agreement dated 29th October 1993 and letter dated 29th October 1993 read together or whether the terms of Agreement dated 19 October 1993 stood modified to the extent they were inconsistent with the terms of the letter dated 29th October 1993 as contended by respondents ?	<i>Agreement dated 29.10.1993 is complete contract.</i>
4. If the answer to issue No.3(a) is in the negative and if the answer to the Issue No.3(b) is in the affirmative, then as contended by the Petitioners, (i) Whether the letter dated 29th October 1993 is not enforceable and/or is invalid ? (ii) Whether the letter dated 29th October 1993 was not to be acted upon and in fact was not acted upon ? (iii) There was or is no joint venture between the parties ? (iv) The alleged joint venture was abandoned by the parties ? (v) respondents are stopped from contending that there was a joint venture between the parties.	<i>Side Letter dated 29.10.1993 was not part of the agreement between the parties.</i>
5. If the answer to Issue No.3(a) is in the affirmative and if the answer to Issue No.3(b) is in the negative, whether as contended by respondents. (i) by the agreement dated 29th October 1993 there was a joint venture and the parties agreed that the surplus from the sale proceeds of the flats were to be shared equally between the parties ? (ii) by the agreement dated 29th October 1993 the parties agreed that respondents' contribution was in the form of land on which building was to be provided and Petitioners' contribution was to construct and develop the building and to undertake modalities of sale of flats thereon.	<i>Agreement dated 29.10.1993 was not in the nature of Joint Venture</i>

<i>(iii) by the agreement dated 29th October 1993 parties agreed that both building to the constructed and land would at all material times (prior to the transfer of flats to individual flat purchasers and execution of conveyance) belong to respondents.</i>	
<i>6. Whether the Petitioners are entitled to recover from respondents actual prorated costs of construction incurred and attributable to 12 flats allotted to respondents amounting to Rs.7.26 crores and interest as contended by the Petitioners ?</i>	<i>Petitioners are entitled to recover costs at the rate of Rs.775/- per sq.ft. From respondent. (Majority)</i>
<i>7. Whether the amount of Rs.1,47,95,800/- payable as the balance consideration of the development plot and the same is liable to be adjusted against actual pro rate cost of construction of Rs.7,26,00,000/- as contended by the Petitioners ?</i>	<i>Amount of Rs.1,47,95,800/- payable to respondent is liable to be adjusted towards cost of construction incurred by the Petitioner.</i>
<i>8. Whether respondents are bound and liable to pay to the Petitioners monthly property taxes, maintenance charges and other outgoings aggregating to Rs.30,85,898/- and interest as contended by the Petitioners ?</i>	<i>In the affirmative.</i>
<i>9. Whether respondents are entitled to Rs.4.62 crores and interest as claimed by respondents ?</i>	<i>Partly in the affirmative.</i>
<i>10. Whether respondents are entitled to claim 50% of the share in the net profits for reasons alleged in para 4.2 of respondents set-off and Counter-claim and. if so, whether respondents are entitled to Rs.12.46 crores or in the alternative Rs.12.58 crores and interest as contended by respondents ?</i>	<i>In the negative.</i>
<i>11. Whether the Petitioners paid any wrongful compensation / rebate to the flat holders and, if so whether respondents are entitled to claim Rs.1.31 crores and interest as contended by respondents ?</i>	<i>In the negative.</i>
<i>12. Whether respondents are entitled to claim 50% share in the unsold car parking spaces and, if so, whether respondents are entitled to Rs. 85 lakhs and interest as contended by respondents ?</i>	<i>In the negative.</i>

13. Whether there were any wrongful additions to the project costs by the Petitioners and, if so, whether respondents are entitled to Rs. 1.34 crores and interest as contended by respondents ?	<i>In the negative.</i>
14. Whether respondents are entitled to claim compensation with respect to repairs and renovations of existing structures, if so, whether the Respondents are entitled to Rs. 2.00 crores and interest as contended by respondents ?	<i>In the negative.</i>
15. Whether respondents are entitled to claim reimbursement of Project Management Fees and, if so, whether the Respondents are entitled to Rs.3.33 crores and interest as contended by respondents ?	<i>In the negative.</i>
16. Whether any part of respondents claims are barred by the law of limitation as contended by respondents ?	<i>In the negative. Respondent's claim are not barred by limitation.</i>
17. Whether even on the basis of facts alleged in respondents Set-off and Counter-claim, respondents are liable to pay to the Petitioner amounts as contended in further reply of the Petitioners dated 06.09.2003 ?	<i>As per final award.</i>
18. What reliefs ?	<i>As per final award.</i>

4 Thereafter, all three arbitrators unanimously agreed and concurred in deciding most of the issues in favour of petitioner, including (i) that the only agreement between the parties was the Development Agreement as claimed by petitioner; (ii) that the proposed joint venture arrangement had been given up by respondent and was not any part of the agreement between the parties; (iii) that respondent was liable and required to pay to petitioner the pro-rata cost of construction of the 23,365 sq. ft. in the building allotted to it, and (iv) that respondent's counter claims were

rejected and dismissed. This part of the Award is not challenged by either party and has been accepted by both the parties, i.e., petitioner as well as respondent to this petition.

It has to be noted that in the agreement entered into between KCOPL and respondent, it was mentioned that the cost of construction was envisaged to be Rs.775/- per sq.ft., based on the plan sanctioned as on that date and subject to variations or revision of building plans.

5 The Majority award has not awarded Rs.7,26,00,000/- as claimed by Petitioner, but has awarded cost of construction at Rs.775/- per sq.ft. for 23,365 sq.ft., subject to adjustment of Rs.1,47,95,800/- which was due and payable towards the land cost. The Majority award is silent on the claim for interest, in the sense it has neither allowed nor rejected. As regards cost, the Majority award has directed that each party should bear its own costs of the entire proceedings.

The Minority award has allowed (a) the claim of petitioner in the sum of Rs.7,26,00,000/-; (b) the claim for interest @ 9% p.a. on the said amount after deducting Rs.1,47,97,800/- payable towards the land cost to respondent for the period from the date of invocation of arbitral clause, i.e., 5th June 2000 until payment /realisation and (c) a sum of Rs.5 crores as cost against respondent.

Respondent has accepted the award. Petitioner has come to this court aggrieved by the Majority award not granting petitioner's claim for

Rs.7.26 crores as cost of construction, interest thereon and legal costs.

6 Dealing with the claim for Rs.7.26 crores as cost of construction, the contents of the Majority Award are very crisp and it would be useful to reproduce the discussions on this issue and the conclusions:-

ISSUE NO.6: RECOVERY OF CONSTRUCTION COST

It is the case of the Petitioner that it has to recover from respondent rembursement of actual pro rata cost of construction incurred amounting to Rs,7.26 crores and interest thereon.

It is also the case of the Petitioner that respondent had admitted its liability and had confirmed its obligation to pay actual cost of construction. It was only in 2002 for the first time that respondent disputed its liability to pay such cost.

In the statement of claim, the Petitioner has stated that it required to pay to respondent an amount of Rs.19,89,12,000/- towards value of land, out of which an amount of Rs.18,41,16,200/- had already been paid by the Petitioner to respondent, while the remaining amount of Rs.01,47,95,800/- was due and unpaid. A Prayer was, therefore, made by the Petitioner to direct to respondent to pay an amount of Rs.5,78,04,200/- (Rs.7,26,00,000/- - Rs.1,47,95,800/-) to the Petitioner towards the cost of construction. A prayer was also made for payment of interest on the said amount.

The prayer of the Petitioner was strongly opposed by respondent. Referring to Project Agreement dated 28.07.1993 entered into between KCOPL (Kalpataru Construction Overseas Pvt. Ltd.) and respondent, respondent contended that the said Agreement envisaged the cost of construction to be about Rs.775/- per sq.ft.

In reply to what was stated by respondent in the Statement of Defence, the Petitioner in the rejoinder contended that it was true that the cost of construction was estimated as Rs.775/- per sq.ft. Approximately on the day Project Agreement was executed. It was, however, stated that originally proposed building was to be 17 stores, while finally it was to be 39 storeys. Sale realization was to be rs.42.50 crores was also increased to Rs.86.35 crores, with added facilities and amenities. It was also stated that respondent was aware that the cost of construction would be much higher than Rs.775/- per sq.ft. Hence, respondent is bound to pay actual costs to the Petitioner.

We have heard the learned Advocates on both the sides. We have also gone through the relevant evidence on record – documentary as well as oral.

An agreement entered into between respondent and KCOPL (Exh.C-1) dated 28.07.1993 stated that the Project Managers (KCOPL) had agreed to provide to the owner (Respondent - Hindoostan Spinning and Weaving Mills) professional services for execution of multi-storied building. Based on, sanctioned plans, the cost of construction was estimated to be about Rs.775/- per sq.ft. and projected sale realization was estimated as to Rs.42,50,00,000/-. It was also stated, "However, the estimates are subject to variation on revision of the building plans."

On 29.10.1993, Memorandum of Understanding (MOU) was entered into between the Petitioner and respondent (Ex.C-2)

Clause 20 of MOU made respondent liable to pay actual project cost to the Petitioner.

It may be mentioned here that on 12.08.1993 (Exh.R-1), there was a meeting between Sudhir Thackersey of respondent and Mofatraj Munot of the Petitioner, wherein broad terms of agreement had been arrived at. A handwritten note prepared by Sudhir Thackersey was shown to Mr. Munot to "cost of development" and the figure was changed from Rs.750/- per sq.ft. To Rs.900/- per sq.ft. It also clearly contemplated sharing of profit on 50 : 50 basis after deducting expenses.

We have already held in the earlier part of the aware that the case put forward by respondent that the parties agreed to Joint Venture and sharing of profit on 50:50 basis could not be accepted and on the facts of the case, the only agreement which formed binding nature of the contract was Development Agreement (Exh.C-2) dated 29.10.1993 and the rights and liabilities of the parties are to be adjudicated as per terms and conditions in the Development Agreement.

It is the case of respondent that the cost of construction was rs.775/- per sq.ft. Approximately as mentioned in Agreement Exhibit C-1. Sudhir Thackersey has also stated in his evidence in lieu of examination-in-chief that respondent was evaluating two offers made by (i) Rahejas of Rs.750/- per sq.ft. And (ii) Kalpataru of Rs.775/- per sq.ft. This fact is proved from admitted document, Ex-R-1.

The learned advocate for respondent submitted that on the facts and in the circumstances, the Petitioner is entitled to cost of construction at the rate of rs.775/- per sq.ft. Only. It was also stated that respondent is yet not paid an amount of Rs.1,47,95,800/- towards price of land. Hence, the said amount requires to be adjusted from the amount payable by respondent to the Petitioner towards the cost of construction.

On behalf of the Petitioner, however, it was submitted that respondent agreed to reimburse cost of construction. In this connection, heavy reliance was placed by the learned Advocate for the Petitioner on the letter dated 30.06.1999 (Ex.C-23), wherein respondent stated that it agreed and undertook to reimburse Rs.6.77 crores being actual costs of construction

incurred by the Petitioner. Reference was also made to a communication by respondent to its Chartered Accountants (C.C. Chokshi & Co.) dated 30.01.2002 (Exh. R-24) wherein, respondent had stated that an amount of Rs.15.38 crores was due and payable to respondent by the Petitioner while an amount of Rs.7.26 crores was payable by respondent to the Petitioner.

Now, it is the say of respondent that the letter dated 30.06.1999 was to be destroyed. For this attention of the Tribunal was invited to a letter dated 13.07.1999 written by Ms Janki Rege on behalf of respondent to Mr. Lodha of the Petitioner. The entire set of the papers may be destroyed at your end.” (Exh.R-52).

Again, the fact that certain Letters / documents were not to be acted upon is apparent from the fact that they did not reflect correct state of affairs, at the time when they were executed. For, instance, the declaration dated 26.07.2001 (Exh. C-39) states in para 3 the following statement ;

“The company has received full monetary consideration of Rs.19,89,12,000/- from the Caprihans (emphasis supplied)”

Now, it is an admitted fact that on that day, i.e. on 26.07.2001, neither respondent had paid nor the Petitioner had received full monetary consideration of Rs.19,89,12,000/-. In the Statement of Claim which was filed by the Petitioner before this Tribunal on 31.08.2002, it was stated in para 3 as under;

“The Petitioner paid to respondent by diverse instalments spread over to period a total sum of Rs.18,41,16,200/- upto date towards the monetary consideration leaving thereby balance sum of Rs.1,47,95,800/- payable by the Petitioner to Respondent (emphasis supplied).

In the prayer clause in para 9 of the statement of claim also, the Petitioner has prayed for passing an award of net principal sum of Rs.5,78,04,000/- as under:

Project Cost	:	Rs.7,26,00,000/-
Less Balance Land		
Consideration	:	Rs.1,47,95,800/-

Net Principal due	:	Rs.5,78,04,200/-

		(emphasis supplied)

The fact that full payment of price of land (RS.19,89,12,000/-) was not made by the Petitioner to respondent is also admitted by CW-2 – Narendra Lodha (Ex.C-39).

In our opinion, the learned Advocate for respondent appears to be right when he submitted that if the question of cost of construction was over and respondent had admitted its liability on the basis of the case put forward by

the Petitioner, there was no necessity or occasion for the Petitioner to submit to C.C.Chokshi & Co., Chartered Accountant of respondent for cost of construction.

In any case, in our view, the submission of respondent is well-founded when it was urged that respondent was evaluating alternative offers, one by Rahejas (Rs.750/-) and the other by Kalpatary-Petitioner (Rs.775/-)

Finally, no evidence or material has been placed on record by the Petitioner as to on what basis the figure of Rs.7,26,00,000/- has been arrived at by the Petitioner. Thus, considering the totality of facts and circumstances, we hold that the Petitioners are entitled to recover cost of construction from the respondent at the rate of Rs.775/- pe sq.ft. Subject to adjustment of Rs.1,47,95,800/- which has remained due and payable by the Petitioner to respondent.

Issue No.6 is answered accordingly.”

7 Therefore, what the Majority award has held is that Petitioner did not place any evidence or material on record as to on what basis the figure of Rs,7,26,00,000/- had been arrived at and therefore Petitioner is entitled to recover cost of construction from respondent at Rs.775/- per sq.ft.

8 Mr.DeVitre for petitioner submitted as under :-

(a) Having unanimously held and deciding most of the issues in favour of petitioner, the majority award, completely and contrary to the express terms of the Development Agreement – clause 20, which admittedly required payment of actual construction cost of prorata basis, awarded the prorata cost of construction to petitioner at Rs.775/- per sq.ft. for 23665 sq.ft. which was admittedly the estimated cost of construction stated in the PMA between respondent and KCOPL.

(b) The majority view also did not consider the claim for payment of interest pre-Award on the amount awarded and rejected petitioner's claim for costs of the arbitration. The rejection of interest pre-Award is without any reasons and perverse and arbitrary. The finding that each party bear its own costs, is also perverse and based on an incorrect factual foundation.

(c) It is thus these parts of the majority Award that petitioner seeks to set aside ("Impugned Part of the Award"). Respondent has accepted the said Award in toto and in fact tendered the amount awarded, which was declined by petitioner. There is no serious dispute in regard to the award for payment of property taxes, maintenance and other outgoings of Rs.30,85,898/- to be paid by respondent for 12 flats.

(d) The minority arbitrator awarded the actual cost of construction on a pro rata basis, as claimed (at Rs.3,100/- per sq. ft. for 23,365 sq. ft.) and also awarded interest and costs to petitioner.

(e) It is not in dispute that petitioner was liable to pay respondent a sum of Rs.19,89,12,000/- as the cost of the land. It must be noted that petitioner had, from the outset, in its Statement of Claim itself and in prior correspondence, accepted that out of that sum it had paid a sum of Rs 18,41,16,200/-, leaving a balance of Rs 1,47,95,800/-, which it claimed was adjusted against the amount payable by respondent for the cost of construction on pro-rata basis for 23,365 sq. ft. All three arbitrators unanimously directed such adjustment to be made from the respective

amounts held to be payable to petitioner.

(f) It is in these circumstances that petitioner contends that the Impugned Part of the Award is liable to be set aside under section 34 (2)(b) (ii) and section 34 (2-A) of the said Act, only insofar as it rejects petitioner's claims towards :-

- (i) actual pro rata project cost of construction with respect to the 12 flats (23,365 sq. ft.) allotted to respondent as specifically agreed in clause 20 of the Development Agreement;*
- (ii) interest on the above claim as also on payment of property taxes, maintenance and other outgoings owed by respondent to petitioner in respect of the 12 flats (23,365 sq. ft.) allotted to respondent; and*
- (iii) costs of the arbitration between petitioner and respondent.*

(g) The Impugned Part of the Award is clearly perverse, arbitrary and in violation of law. In regard to Issue Nos. 6 and 7, the majority arbitrators rejected petitioner's claim for recovery of the actual pro rata cost of construction (at Rs.3,100/- per sq. ft. for 23,365 sq. ft. allotted to respondent), omitting all consideration of vital, crucial and critical material on the record of the arbitration, which material, if considered, would 'tilt the scales' in favour of an Award of the actual cost of construction.

(h) The present challenge does not involve any exercise of re-appreciating the evidence or of this Hon'ble Court sitting in appeal over the majority award findings, in any manner. The challenge to the award is on the ground of utter perversity. The Apex Court has settled the law by

stating in *Associate Builders vs Delhi Development Authority*¹ that “... where an arbitral tribunal ignores vital evidence in arriving at its decision, such decision would necessarily be perverse....”

(i) In the arbitration proceedings, respondent raised an alternate plea that if cost of construction was to be awarded, it should be at Rs.775/- per sq. ft. pro rata to the 23,365 sq. ft. allotted to respondent. The majority accepted this plea. Petitioner contended that the actual cost of construction was Rs.3,100/- per sq. ft. pro rata for the 23,365 sq. ft. allotted to respondent. The majority award rejected this plea. In doing so, it totally and completely ignored and omitted from consideration vital material.

(j) The material not taken into consideration by the majority is not trivial or incidental. It is vital, critical and crucial. The majority arbitrators completely ignored and did not consider that respondent had, in diverse representations to the Income Tax authorities, throughout accepted its obligation to pay the cost of construction to petitioner and accepted that the correct cost of construction (pro rata) was Rs.3,100/- per sq. ft. Respondent derived benefits in taxation by such representations. On the basis of such representations, the Income Tax authorities passed orders.

(k) In particular, the majority Award completely ignored and totally disregarded the following vital material viz.:-

(i) Respondent's Chartered Accountant's letter dated 30th December 1999 to the Commissioner of Income Tax in response to notice u/s. 148 of the

1. (2015) 3 SCC 49

Income Tax Act stating inter alia that "... the company is liable to pay to the developer the project cost of the flat ..."

(ii) The Assessment Order dated 27th March 2000 (for A.Y.1994-95) recording respondent's representation that as per Clause 20 of the Development Agreement, respondent is liable to pay to petitioner the actual project cost of these flats and that the average cost of contraction was then Rs. 2,250/- per sq ft.

(iii) Respondent's Appeal dated 25th April 2000 against the above Order, stating that the allotment of the flats was not a benefit or perquisite to respondent since respondent was liable to pay the actual construction cost for the area allotted to it.

(iv) Respondent's Chartered Accountant's letter dated 17th January 2001 to the Joint CIT representing that as per Clause 20 of the Development Agreement, respondent was to bear the actual project cost of development.

(v) Respondent's letter dated 17th May 2001 to the Appropriate Authority (Income Tax Dept) representing that "Cost of construction is to be determined in pursuance of the agreement with the developer and to be finalised on settlement of the accounts in accordance with the said agreement. However, according to the developer, the cost of acquisition is Rs. 3100/- per sq ft."

(vi) Respondent's letter dated 19th June 2001 to the Appropriate Authority (Income Tax Dept) correcting its earlier representation and stating that in the previous representation, the words 'according to the developer' be deleted and it be read as "...Cost of construction of the subject Flat at the rate of Rs. 3100/- per square feet is Rs. 15,91,100/-."

(1) The Impugned Part of the Award also completely ignores and does not consider other vital and critical evidence in this regard. It is not in dispute that under clause 4 of the PMA, respondent agreed to pay and paid to the Project Manager, KCOPL a management fee comprising two elements: (i) 5% of the cost of development of the proposed building and (ii) 2% of the gross sales proceeds. Of the total amount paid to KCOPL, Rs.1.86 Crores was towards the 5% cost of development. This amount was admittedly worked out and paid on the basis of Rs.3,100/- per sq ft.

Respondent counter-claimed for this amount to be paid back to it. The counter-claim was rejected unanimously by the three arbitrators. This is a 'clinger' in terms of establishing respondent's acceptance of the cost of

construction of Rs.3,100/- per sq. ft. as claimed. Yet, there is no consideration of this vital and critical material and evidence at all in the majority Award whilst deciding Issue No.6. In the submission of petitioner, this is a fatal omission.

(m) There is yet another fatal omission to consider vital and crucial material and evidence. Admittedly, the rate of the cost of construction of Rs.775/- per sq. ft. as set out in clause 3 of the Project management Agreement was only an “estimate” as of 28th July 1993. The Agreement expressly provided that the estimate was subject to variation on revision of the building plans. Admittedly, the building plans were revised. The number of floors increased from 14 to 39 (including two basements, podium, terrace garden, etc). The sales realisations, previously estimated at Rs.42.50 Crores, increased to Rs.86.35 Crores. A full-fledged swimming pool and club-house was also added. These material variations are merely noted as part of petitioner’s submissions. Yet, this vital material and admitted evidence is totally excluded from all consideration by the majority arbitrators in the Impugned Part of the Award whilst giving reasons for answering Issue No. 6.

(n) These are inexcusable and a fatal flaws which renders the Impugned Part of the Award perverse.

9 Mr.Doctor for respondents, per contra, submitted as under :-

(a) It has been respondent’s consistent case that the Development

Agreement read with the Side Letter constituted the complete agreement between the parties. When petitioner made a claim against respondent in the arbitration for a sum of Rs. 7,26,00,000/- by calculating the cost of construction at Rs. 3100/- per square feet, respondent in their defense relied on the side letter and the agreement for equal sharing of profits. This was the principal and fundamental defense of respondent to petitioner's case with regard to its claim for construction cost at the rate of Rs. 3,107/- per square feet. The Arbitral Tribunal rejected the aforesaid defense, and came to the conclusion that petitioner was entitled to cost of construction at the rate of Rs. 775/- per square foot only. The aforesaid finding of the Arbitral Tribunal was based on a complete consideration of the entire evidence placed before it. What seems to have weighed with the Arbitral Tribunal in arriving at the conclusion that the cost of construction was fixed at Rs. 775/- by the parties, is the fact that respondent was evaluating alternative offers of the Rahejas and Kalpataru of Rs. 750/- and Rs. 775/-, respectively. This is borne out from the following finding in the Award "... *Sudhir Thackersey has also stated in his evidence in lieu of examination -in-chief that respondent was evaluating two offers made by (i) Rahejas of Rs. 750/- per sq. ft.; and (ii) Kalpataru of Rs. 775/ sq. ft. This fact is proved from the admitted document, Ex. R-1.*" and "In any case, in our view, the submission of respondent is well founded when it was urged that respondent was evaluating alternative offers, one by Rahejas (Rs. 750/-) and the other by

Kalpataru – Petitioner (Rs. 775/-)”.

(b) The Arbitral Tribunal has in the aforesaid circumstances after appreciating the evidence on record held as under:-

“...Thus considering the totality of the facts and circumstances we hold that the Petitioners are entitled to recover cost of construction from respondent at the rate of Rs. 775/- per square feet subject to adjustment of Rs. 1,47,95,800/- which has remained due and payable by the Petitioner to respondent.”

(c) Assuming whilst denying that the actual cost of construction had increased beyond Rs. 775/- per sq.ft., the same is totally irrelevant as petitioner and respondent had from the very inception agreed that the cost of construction with respect to the 23,365 square feet of area allotted to respondent would be restricted to Rs. 775/- per square foot. Furthermore, even assuming without admitting that the project management fees paid by respondent to KCOPL were a percentage of the cost of construction of the building Kalpataru Heights, the same is of no relevance as it was always agreed between petitioner and respondent that the cost of construction payable by respondent to petitioner with respect to the 23,365 sq. ft. of area is Rs. 775/- per sq. ft. In any event, and without prejudice, this was a matter purely within the scope and jurisdiction of the Arbitral Tribunal to decide, particularly in view of the fact that the finding in this regard is based on an interpretation of the contract and a consideration of the relevant evidence. The finding of the Arbitral Tribunal in this regard certainly does not warrant interference under Section 34 of the said Act.

(d) Furthermore, the Arbitral Tribunal's finding is based on a consideration of all the evidence placed before it by both parties and is a possible view of the matter. This is clear on the face of the Award.

(e) It is well settled that the Court hearing a challenge to the Award under Section 34 of the said Act, is exercising supervisory jurisdiction and is not required to re-appreciate and reassess the evidence. In this regard ;

(i) In *Associate Builders v Delhi Development Authority* (supra) the Hon'ble Supreme Court of India has explained the scope of "public policy" with respect to Section 34 of the said Act and has held that,

"32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312] , it was held: (SCC p. 317, para 7)

"7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

In Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429], it was held: (SCC p. 14, para 10)

"10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts."(emphasis supplied)

(ii) Following the law laid down by the Hon'ble Supreme Court

in *Associate Builders* (supra) this Court in **Fermenta Biotech Limited v K.R. Patel** ² had clarified that for a case to be made out that an Arbitral Award suffers from patent illegality, “it must be shown that the award contravenes (a) the substantive law of India on an aspect which goes to the root of the matter and which is not of a trivial nature or (b) the Arbitration and Conciliation Act, 1996 itself or (c) the contract between the parties, as explained in *Associate Builders* case. It must further be shown that such illegality appears on the face of the award. The illegality, in other words, must be so self evident and plain as not to admit of any dichotomy of opinions; it should not be necessary to, firstly, refer to any document or matter which is not made part of the award to assess such illegality and, secondly, it should be obvious and not require any elaborate or intricate explanation. Lastly, it is important to remember that it is not good enough to say that the Arbitrator has wrongly applied the law or has not properly appreciated the evidence. If the arbitrator notes or acts on a correct principle or provision of law, but makes a mistake in applying it to the facts of the case, such error is not amenable to a challenge under Section 34. That is now clarified by the explanation to sub-section (2A) of Section 34 of the Act.

This Court in *Fermenta Biotech* (supra) had further held in paragraph No. 10 as stated below;

“As much as a conclusion of fact, even a conclusion of law, where two views are possible, is not open to challenge on the ground of either contravention of fundamental policy or the very basic notions of justice and morality, as understood above.

(f) Even otherwise and assuming whilst denying that the Arbitral Tribunal has omitted to consider some of the documentary evidence placed before it, the same does not necessarily vitiate the Arbitral Award. The test laid down by the Hon’ble Supreme Court in *Associate Builders* (supra) and followed by this Court in the case of *Fermenta* (supra) does not require the Arbitral Tribunal to consider and deal with each and every document that forms part of the record of the Arbitral proceedings.

2. Arbitration Petition No.545 of 2017 (unreported) dated 11th October 2018

(g) Even in **Schwebel v Schwebel**³, the Queen's Bench Division of the High Court of England and Wales, whilst dealing with a challenge to an arbitral award under Section 68 of the (English) Arbitration Act, 1996, on the ground that the Arbitral Tribunal had ignored evidence, had held that an award cannot be vitiated on the ground that the Arbitral Tribunal had failed to consider each item of evidence whether contentious or not. Section 68 provides for a right to challenge an arbitral award in a court on the ground of a serious irregularity affecting the tribunal, the proceedings and the award. Section 68 is similar to Section 34 of the Arbitration and Conciliation Act, 1996 of India. The (English) Arbitration Act, 1996 is similar to the Arbitration and Conciliation Act, 1996, of India and prescribes for limited interference of courts with arbitral awards.

(h) Similarly, in **UMS Holding Ltd. and others v Great Station Properties SA and another**⁴ the Queen's Bench Division of the High Court of England and Wales had, after referring to various judgments of English Courts on a similar issue (including the judgment in *Schwebel v Schwebel*), re-iterated the position that an Arbitral Tribunal need not deal with and consider every piece of evidence forming part of the record of the arbitral proceedings.

(i) In **Bhagawati Oxygen Ltd. v Hindustan Copper Ltd.**⁵, the Hon'ble Supreme Court of India, in a case where the Single Judge under

3 [2012] Bus LR Digest D21

4 (2018) Bus LR 650)

5. (2005) 6 SCC 462

Section 30 of the Arbitration Act, 1940 had set-aside an arbitral award on the ground that the arbitrator had failed to consider certain evidence had held that;

“34. The learned single Judge virtually re-appreciated the evidence by referring to several letters and observed that the Arbitrator had not considered those letters and there was misconduct on his part. According to the learned single Judge, HCL informed BOL about the grievance and quantity and quality of oxygen supplied by BOL, about the 'risk purchase agreement' and also about its need, necessity and completion of purchase of oxygen gas from other sources. The learned single Judge also has referred to some of those letters in which the said fact was referred by HCL.

35. In our opinion, however, the learned counsel for BOL is justified in submitting that really it was in realm of appreciation and re-appreciation of evidence. At the most all those letters go to show that HCL had some complaint against BOL and it had also disclosed its intention to purchase oxygen gas from other sources but as observed by the Arbitrator, it was not proved that HCL had in fact purchased oxygen from other sources under Clause 10.4. If in the light of such evidence, the Arbitrator did not think it fit to allow counter claim, it could not be said to a case of misconduct covered by Section 30 of the Act. ...”

The Hon’ble Supreme Court had accordingly held that in view of its above findings, the Single Judge and the Division Bench were not justified in setting aside the award of the arbitrator on the ground that the arbitrator had disregarded certain evidence.

(j) Furthermore, this Court by an order passed in **M/s Shree Ram Urban Infrastructure Ltd. v Kalpataru Properties Pvt. Ltd.**⁶ had dismissed an application under Section 34 of the said Act, where the award was challenged on the ground *interalia* that the arbitral tribunal had overlooked certain evidence. This Hon’ble Court had *interalia* held that;

6. Commercial Arbitration Petition No.166 of 2016 dated 14th and 17th July, 2017

“10. The impugned award, in the first place, does not suggest that any relevant material was actually disregarded by the arbitrators. In fact, the material referred to in this behalf by learned Counsel for SRL was very much alluded to by the arbitrators. It is quite clear that the conclusions in the award were arrived at after noting all this material. At the most, one may say that the reasons stated by the arbitrators for arriving at their conclusions do not specifically indicate any actual analysis of this material. If that is the criticism, to sustain a challenge based on it, SRL/VIT must establish that this in effect amounts to want of reasons for the award. I am afraid that cannot be said to be the case. The reasons, as they are indicated, are adequate and comply with the requirement of a reasoned award.”

This Court, after referring to the judgment of the Hon’ble Supreme Court of India in *Associate Builders (supra)* had further held that for evidence to be within the scope of “vital evidence” it must be evidence that may “turn the scales whilst deciding the issue in question, and not anything and everything which may simply be admissible in evidence”; “The evidence disregarded by the arbitrator must be of such a nature that a reasonable man would have decided the issue otherwise had such evidence been considered. Only then it is possible to set aside an award on the ground of perversity, where some relevant material is disregarded”.

(k) In the facts of the present case, there was uncontroverted evidence that the parties had prepared a number of documents that were not intended to be acted upon, and which were in fact intended to be destroyed. It was also petitioner’s own case that an audit was conducted by M/s. C.C. Chokshi & Co., to ascertain the cost of construction payable by respondent to petitioner. This is notwithstanding the representations made by respondent to the income tax authorities, of which petitioner was aware.

It is in this context that this court is required to view the fact that the Award does not refer to each and every piece of evidence. The fact that the letters/statements of respondent to the income tax authorities were considered by the Arbitral Tribunal is apparent from the findings contained in the minority opinion/ view. The Award states that it has considered all the evidence. It is not necessary for the Arbitral Tribunal to specifically refer to each piece of evidence and to deal with the same. It cannot by any stretch of imagination be contended that the Award is based on no evidence. The Arbitral Tribunal has specifically referred to the evidence that has weighed with it in arriving at its decision. Based on the evidence referred to by the Arbitral Tribunal, there can be no manner of doubt that the view that the Arbitral Tribunal has arrived at is a possible view. It is not for the Court under Section 34 of the said Act to decide whether one particular piece of evidence is more important than another. This is a matter purely within the scope and domain of the Arbitral Tribunal. The fact that the finding of the Arbitral Tribunal was based on cogent evidence and is supported by reasons for relying on such evidence is apparent.

(1) Petitioner had relied on certain letters dated 30th June, 1999 which were addressed by respondent to petitioner, to show that respondent had admitted its liability to pay cost of construction to petitioner. Respondent had pleaded and proved that the parties had agreed that the said letters were not to be acted and were meant only for certain internal

purposes of petitioner.

(m) The Arbitral Tribunal had considered the various documents by way of which respondent had allegedly admitted its liability to pay cost of construction to petitioner including the letters/ correspondence to the Income Tax Authority. This is established by the Arbitral Tribunal's finding that *"In our opinion, the learned Advocate for respondent appears to be right when he submitted that if the question of cost of construction was over and respondent had admitted its liability on the basis of the case put forward by the Petitioner, there was no necessity or occasion for the Petitioner to submit to C.C. Chokshi & Co., Chartered Accountants of respondent for cost of construction"*.

(n) It is undisputed that in or around February/ March 2001, an audit was undertaken of the project by M/s. C.C. Chokshi & Co., the erstwhile Chartered Accountant of respondent. According to petitioner, the audit was undertaken for the purpose of ascertaining and determining the cost of construction allegedly payable by respondent to petitioner. However, it is respondent's case that the audit was undertaken to determine the net profit of the project which was to be distributed equally between both parties. Respondent had categorically submitted to the Arbitral Tribunal, that petitioner's contention that the audit was undertaken for the purpose of determining the actual project cost allegedly payable by respondent, goes to show that letters/documents relied upon by petitioner

in the form of the correspondence between the parties and the letters/ correspondence to the Income Tax Department, were not to be acted upon, were not conclusive and were not binding upon the parties.

(o) The Arbitral Tribunal after considering all the evidence on record, has accepted respondent's above contention. The above finding/ view taken by the Arbitral Tribunal is a possible, plausible and reasonable view and cannot be interfered with by this Hon'ble Court in its limited jurisdiction under Section 34 of the said Act.

(p) In the above facts and circumstances on a full evaluation of all the evidence before it, the Arbitral Tribunal had arrived at the finding that the cost of construction was restricted to Rs. 775/- per square foot. It cannot be disputed that this finding is a possible view of the matter. Petitioner's contention that the letters referred to them are a vital piece of evidence which the Arbitrators have failed to consider, does not meet the test of perversity as laid down by the Hon'ble Supreme Court in the case of *Associate Builders (surpa)*. The very fact that the documents in question were referred to in the minority view suggest that the Arbitral Tribunal as a whole have taken into consideration the aforesaid documents while arriving at their conclusions. It is for the Arbitral Tribunal to decide what weight is to be given to each piece of evidence placed before it. This is not a matter which calls for any interference by any Court under the provisions of Section 34.

Severability of the Award

10 Mr. DeVitre submitted that the award is severable and part of the award can be set aside.

11 Mr. Doctor submitted:-

(a) that respondent does not dispute that it is now well settled that the Court under Section 34 of the said Act, is entitled to sever an Award and set aside an Award only in part. This is, however, in respect of claims that are severable from other claims. This is not so in the facts of the present case. Petitioner in the present case is seeking orders of this Hon'ble Court to sever the Award in such a way that respondent would be deprived of its very defense to petitioner's case for being compensated for cost of construction at the rate of Rs. 3,100/- per square feet. The law does not contemplate the severing of an award issue wise.

(b) What can be severed are independent individual claims and not the findings in respect of matters which constitute a defense to the very claim that will be adjudicated in a subsequent arbitration, in the event that the award is set aside. Such a result would cause grave injustice to respondent, as it would deprive it of its fundamental defense to the claim raised by petitioner.

(c) Respondent's contention that the agreement between the parties was found in the Development Agreement read with side letter formed the essence and was at the core of respondent's case before the Arbitral

Tribunal. The fact respondent did not challenge the award cannot be held against it in deciding the question of severability of the Award. Respondent did not challenge the award in view of the fact that the Arbitral Tribunal had awarded the cost of construction only at the rate of Rs. 775/- per square foot. Petitioner, however, has chosen not to accept the aforesaid finding of the Tribunal. In this view of the matter, in the event that there is a fresh reference to arbitration, respondent must be entitled to place its entire defense before the Arbitral Tribunal.

(d) Respondent's case with respect to the side letter is intrinsic and inextricably connected to petitioner's case for recovery of cost of construction amounting to Rs. 7,26,00,000/-. Setting aside of the impugned portions of the Arbitral Award and rendering respondent defenseless with respect to petitioner's case for recovery of cost of construction, would be most unfair, inequitable and unjust. In the event that this Court is of the view that the impugned portions of the Arbitral Award are unsustainable, then this Hon'ble Court ought to set- aside the entire Award. This would meet the ends of justice as respondent would not be deprived of its principal defense to petitioner's claim for re-imbursement of cost of construction.

12 In my view, the issue on severability is well settled. Under Section 34 of the Act, this Court is empowered to sever the impugned part of the Award and set aside that part, from the non-impugned parts, to which there

is no challenge by any party and which have been accepted as correct by both the parties. In ***J. G. Engineers Private Limited versus Union of India***⁷ the Hon'ble Supreme Court of India held as follows –

“24. The arbitrator had considered and dealt with Claims (1), (2, 4 and 5), (6), (7 and 8), (9) and (11) separately and distinctly. The High Court found that the award in regard to items 1, 3, 5 and 11 were liable to be set aside. The High Court did not find any error in regard to the awards on claims 2, 4, 6, 7, 8 and 9, but nevertheless chose to set aside the award in regard to these six items, only on the ground that in the event of counter claims 1 to 4 were to be allowed by the arbitrator on reconsideration, respondents would have been entitled to adjust the amounts awarded in regard to claims 2, 4, 6, 7, 8 and 9 towards the amounts that may be awarded in respect of counter claims 1 to 4; and that as the award on counter claims 1 to 4 was set aside by it and remanded for fresh decision, the award in regard to claim Nos. 2, 4, 6, 7, 8 and 9 were also liable to be set aside.

25. It is now well- settled that if an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent. As the awards on items 2, 4, 6, 7, 8 and 9 were upheld by the civil court and as the High Court in appeal did not find any infirmity in regard to the award on those claims, the judgment of the High Court setting aside the award in regard to claims 2,4,6,7,8 and 9 of the appellant, cannot be sustained. The judgment to that extent is liable to be set aside and the award has to be upheld in regard to claims 2, 4, 6, 7, 8 and 9.” (emphasis supplied)

13 In ***R.S. Jiwani (M/s.), Mumbai v. Ircon International Ltd., Mumbai***⁸ a Full Bench of this Court extensively dealt with this aspect and held as follows-

“[18] In the event the arbitration agreement between the parties is not valid means where it is unlawful or void, the whole award will have to be set aside as the very root of the matter suffers from a defect of law and is not valid under the law for the time being in force. Severability is an established concept. It is largely applicable to various branches of civil jurisprudence. Where it is possible to sever the bad part from the good part, the good part of the contract can always be enforced and partial relief can be granted. Doctrine of severability has been applied to law of Contract since time

7. 2011(5)SCC 758

8. 2010(1) MhLJ 547

immemorial. ...

[20] The cases would be different where it is not possible or permissible to sever the award. In other words, where the bad part of the award was intermingled and interdependent upon the good part of the award there it is practically not possible to sever the award as the illegality may affect the award as a whole. In such cases, it may not be possible to set aside the award partially. However, there appears to be no bar in law in applying the doctrine of severability to the awards which are severable.

[24] Now a further question that falls for consideration of this court is as to whether there is anything contained in 1996 Act which prohibits in law the court from adopting the approach applicable under the 1940 Act or prohibits applicability of principle of severability to the awards under 1996 Act. We are unable to see any prohibition much less an absolute bar in the provisions of section 34 of 1996 Act to that effect. There could be instances falling under section 34(2)(a), subsections (iii) and (v) where the principle of severability can safely be applied. These provisions do not specifically or impliedly convey legislative intent which prohibits the courts from applying this principle to the awards under the 1996 Act. Again for example, an Arbitral Tribunal might have adopted a procedure at a particular stage of proceeding which may be held to be violative of principles of natural justice or impermissible in law or the procedure was not in accordance with the agreement between the parties but the parties waived such an objection and participate in the arbitration proceedings without protest, in that event it will be difficult for the court to hold that the good part of the award cannot be segregated from the bad part.

[25] Section 4 of the 1996 Act has been enacted by the Legislature to control the conduct of the parties during the arbitral proceedings. The purpose appears to be that unnecessary technical objections with regard to the continuation or otherwise of the arbitration proceedings and challenge to an award on that ground at a subsequent stage should be discouraged. This itself is indicative of the legislative intent not to unnecessarily prolong the litigation on such believable objection which may be waived. The language of section 34(2) does not use any specific language which debars the court from exercising its discretion otherwise vested in it by virtue of its very creation to set aside the award wholly or partially as the case may be.

[28] These are distinct terms. Normally, the power to do an act would include an ancillary power to do that act purposefully, unless a specific language has been used in the provisions of the Statute so as to lead to an irresistible conclusion expressly or by necessary implication that such an act is prohibited or is barred.

.....It will be unjust and unfair to deny statutory rights accrued to the parties even by not applying the doctrine of severability if some part of the award is unsustainable and where other part of the award is found to be good and enforceable in law by the Court in exercise of its powers vested under Section 34 of the Act.

[30] If the principles of severability can be applied to a contract on one hand and even to a statute on the other hand, we fail to see any reason why it cannot be applied to a judgment or an award containing resolution of the disputes of the parties providing them such relief as they may be entitled to in the facts of the case. It will be more so, when there is no statutory prohibition to apply principle of severability. We are unable to contribute to the view that the power vested in the Court under Section 34(1) and (2) should be construed rigidly and restrictedly so that the Court would have no power to set aside an award partially. The word "set aside" cannot be construed as to 'only to set aside an award wholly', as it will neither be permissible nor proper for the Court to add these words to the language of Section which had vested discretion in the Court. Absence of a specific language further supported by the fact that the very purpose and object of the Act is expeditious disposal of the arbitration cases by not delaying the proceedings before the Court would support our view otherwise the object of Arbitration Act would stand defeated and frustrated.

[31]There is nothing in the proviso or in the language of section 34 which has an impact or effect to restrict the power of the court as contemplated under section 34(1) read with the opening words of subsections (2) and (4) of section 34 the Act. Est boni judicis ampliare jurisdictionem is a settled canon of law courts should expand and amplify jurisdiction to achieve the ends of justice and not unnecessarily restrict its discretion particularly when the later approach would lead to frustrate the very object of the Act.

[32] The cases or illustrations indicated in the proviso in fact, should be read to construe that in such other cases where it is so necessary the court should exercise its discretion and apply the principle of severability rather than compel the parties to undergo the entire arbitration proceedings all over again or be satisfied with the rejection of their claim despite the fact that the Arbitral Tribunal has upon due appreciation of evidence and in accordance with law has granted relief to them. It will not only be appropriate but even permissible to read the proviso to add to the discretion and power of the court vested in it by the Legislature by using the expression "may".

14 On the basis of the pleadings, the Arbitral Tribunal framed Issue Nos. 1 to 5 to ascertain the 'contractual relationship of the parties', i.e., whether the relationship was governed by the joint-venture arrangement or whether it was only under the Development Agreement. These issues dealt with the parties' liability to pay amounts. So also, issues 9 – 17 were framed in relation to the counter-claims of respondent which were all based on

respondent's case that the parties' rights and liabilities were governed by the joint venture arrangement. This case was rejected by the arbitrators unanimously after considering the relevant evidence and for proper reasons (which have not been challenged by respondent).

15 The matters dealt with in Issue Nos. 6 and 7 are separate and distinct. These related solely to the 'quantum' of the cost of development payable by respondent to petitioner and the admitted amount to be admittedly adjusted against such payment for the balance price of the land. Thus, issues of 'liability' to pay were clearly distinct from issues of 'quantum' of the amount payable after liability was decided. They are, therefore, severable.

16 With respect to the 'contractual relationship of parties', the Arbitral Tribunal considered Issues Nos. 1 to 5 collectively and unanimously held that the arrangement between the parties is to be found only in the Development Agreement and respondent's case of a 'joint venture' arrangement is unequivocally rejected. The decisions of the Arbitral Tribunal on Issues Nos. 1 to 5 and the consequent rejection of respondent's counter-claims have not been challenged by respondent. Neither party has sought interference with these findings and the rejection of the counter-claims, which are final as between the parties.

17 In these circumstances, this Court can set aside the impugned part of the Award only and not the entire Award (as urged by respondent in the alternative). It would cause grave injustice to accede to respondent's plea to re-open in a fresh arbitration the entire dispute, including the core question of which agreement governed the rights and liabilities between the parties and whether disputes under the side letter could legally be referred to arbitration, which has been decided unanimously by the arbitral tribunal and not challenged by any party.

18 Respondent's submission that that the Arbitral Award was one intrinsic whole and that the findings are merely on issues, and not decisions on claims, is untenable. It is clear from the record that respondent raised the 'joint venture arrangement' plea as a defence to petitioner's claims and to deny liability to pay any construction costs to petitioner, on the basis of their contention that the said arrangement involved an equal profit sharing. This plea, as noted above, has been unequivocally and unanimously rejected by the tribunal. The defence of 'joint venture arrangement' was not and could not have been a defence to the claim for the quantum or amount that was to be awarded as the cost of construction – whether the initially estimated cost or the actual cost. These matters are separate and distinct. The Award is thus not liable to be and need not be set aside in its entirety, to avoid the 'devastating effect' that the Full Bench noted in *R.S. Jiwani*

(*supra*).

19 Respondent's attempt to set the clock back several years and to re-agitate the other issues of liability and contractual relationship between the parties, has to be rejected, particularly since these separate and distinct matters and claims have already been unanimously decided by the arbitrators and which have not been contested or challenged by respondent.

20 Therefore, issue nos.6 and 7 that go together are severable.

My Conclusions on Majority award on issue nos.6 and 7

21 At the cost of some repetition, I set out a brief conspectus of the important facts in the matter:

(a) respondent was the owner of a plot of land admeasuring approximately 6754.52 sq. mts., situated on Dr. Anandrao L. Nair Marg, Mumbai 400 011 and bearing C.S. No.1903 (Part) and 1904 (Part) of Byculla Division, Byculla, Mumbai (the said land). Respondent was desirous of developing the said Land through a reputed developer. Accordingly, respondent got building plans approved for an area of 99,456 sq. ft. 14-storeyed building ;

(b) Respondent entered into a Project Management Agreement dated 28th July 1993 appointing KCOPL as the Management-cum-Sales Consultant with reference to the development of the said Land ("PMA"). KCOPL is a group concern of petitioner. Based on the sanctioned plans for development and completion of the project, the said PMA provided an estimate of the cost of construction of the building to be Rs.775/- per sq. ft. It was also specified that the said estimates were, however, subject to variation or revision of building plans. The remuneration agreed to be paid to KCOPL was fixed *inter alia* at 5% on the actual costs of development of the proposed building.

(c) On August 16, 1993, petitioner and respondent executed a

Memorandum of Understanding (“MOU”) for development of the said Land as per the sanctioned plans, agreeing that petitioner will be the developer and under the terms of which, respondent was entitled to :-

(i) An aggregate amount of Rs.19,89,12,000/- as cost of the said Land (clause 1);

(ii) Aggregate built-up area of 23,000 sq. ft. for which respondent agreed to contribute/ reimburse the pro-rata cost of development of the said area to petitioner (clause 4).

(d) Respondent and petitioner executed a Development Agreement dated 29th October 1993 (Development Agreement) whereby respondent granted development rights in respect of the said Land to petitioner for the consideration and the terms and conditions set out therein. Under Clause 19, petitioner was entitled to sell all flats (except the 23000 sq. ft. allotted to respondent). Under Clause 20, respondent was allotted a built-up area admeasuring 23,000 sq. ft. and agreed to pay/ reimburse to petitioner the actual project cost of development on pro-rata basis. The claim of petitioner was made under this Agreement which also contained an arbitration clause.

(e) Petitioner and respondent also signed a Side Letter providing for a joint venture on equal sharing basis. The 3 Arbitrators unanimously hold in the Award after a detailed analysis that the joint venture/equal sharing arrangement was given up and that the rights and liabilities were governed under the Development Agreement alone.

(f) On November 11, 1993, the requisite Form No.37-I was filed with the income tax authorities on the basis only of the Development Agreement with no reference to any joint venture arrangement. The proposal contained in the Side Letter was given up, as Mr. Sudhir Thackersey, Chairman of respondent consciously decided to go forward with the Development Agreement alone.

(g) In accordance with the Development Agreement petitioner allotted to respondent 23,365 sq. ft. (12 flats) in the building. Additionally, the Project was successfully completed by 7th July 1999.

(h) Contrary to the Development Agreement, however, respondent

refused to pay the actual pro rata project cost of development.

(i) Consequently, petitioner through its advocates addressed a legal notice dated 26th March, 2002 calling upon respondent to pay Rs.7.26 cr. towards cost of construction with interest at 18% p.a. till date of payment.

(j) Since, respondent failed to comply with the aforesaid legal notice, Petitioner's Advocate addressed letter dated 07th May, 2002 invoking arbitration under clause 28 of the Development Agreement.

22 In my view, the Arbitrators in majority have gone totally wrong and their conclusion on issue nos.6 and 7 is an incorrect conclusion which, with due respect, suffers from perversity. There were so many evidences available on record, which have been not considered / dealt with.

The reason, I am saying this is because the Arbitrator in minority has considered all the evidences and material that were placed on record and came to a conclusion that the cost of construction should be Rs.3100/- per sq.ft. and not Rs.775/- per sq.ft. The Arbitrator in minority came to a conclusion that respondent has not made out a case that the cost of construction was Rs.775/- per sq.ft. as stipulated in the PMA dated 28th July 1993. Respondent and the Arbitrator in majority relied upon clauses (3) and (4) of PMA between KCOPL and respondent, which was not subject matter of arbitration. Clauses (3) and (4) of the said PMA read as under:

“(3) The project Managers, based on the sanctioned plans for the development and completion of the project, have estimated the cost of construction of the building to be about Rs.775/- per square foot and also projected minimum sales realization on sales of premises and saleable area comprising such building to be about Rs.42,50,00,000/- An aggregate on completion of the project. However, the estimates are subject to variation

on revision of the building plans.

(4) In consideration of the services agreed to be rendered by the Project Managers, the Owner agrees to pay to the Project Managers remuneration calculated @ 5 (five) percent on all costs of development of the proposed building (excluding cost of land, interest and finance charges) and 2% on gross sales proceeds that may be realised on sale of premises and other saleable areas comprising such building

(emphasis supplied)

23 Admittedly, on record in the arbitral proceeding are the following documents which establish respondent's obligation to reimburse actual pro-rata cost of construction in relation to the area allotted to it by petitioner:

(i) Form 37-I dated November 11, 1993 submitted by the parties to the Income-tax Authorities;

(ii) Debit notes raised by KCOPL on respondent in respect of project management fees payable by respondent to KCOPL under the PMA, from March 1995 onwards until 1999, details whereof are set out in Exh. D to respondent's Set-off and Counter Claim;

(iii) Respondent's letter of June 30, 1999 wherein it specifically recorded its liability and undertaking to reimburse to petitioner, the amount of Rs.6.77 Crore, being the actual pro-rata cost of construction incurred by petitioner as of that date;

(iv) Letter dated December 30, 1999 addressed by respondent's auditors to the Commissioner of Income Tax in respect of respondent's proceedings which clearly records that respondent is liable to pay to petitioner, the cost of construction in respect of flats allotted to it;

(v) Assessment Order dated March 27, 2000 in respect of respondent's return for the year 1994-95 under Section 143(3) of the Income-tax Act, 1961, wherein the Income-tax Officer specifically recorded, basis petitioner's letter dated March 26, 1998, that the cost of construction incurred by petitioner was Rs. 2,250/- per sq. ft.;

(vi) Letter dated May 20, 2000 addressed by KCOPL to

respondent which is in response to respondent's auditors query and records that the cost of construction is yet to be finalized but that the same was estimated to be Rs.3,250/-;

(vii) Letter dated January 17, 2001 addressed by respondent's auditors to the Joint Commissioner of Income-tax, in connection with respondent's concerned Assessment Order which again sets out that respondent is liable to pay the actual cost of construction in respect of flats aggregating to 23,000 sq. ft.

(viii) Declaration-cum-Indemnity dated February 7, 2001 executed by respondent wherein respondent has expressly confirmed that the cost of construction payable by respondent to petitioner would be ascertained, agreed to and settled within two months from the date thereof;

(ix) Respondent's letter dated May 17, 2001 addressed to the Appropriate Authority, Income-tax Department inter-alia categorically stating that the actual cost of construction would be finalized on settlement of accounts in accordance with the DA and that the same was estimated to be Rs. 3,100/- per sq. ft.;

(x) Respondent's letter dated June 19, 2001 addressed to the Income-tax Department wherein respondent has clearly stated that the cost of construction of the subject flat was Rs.3,100/- per sq. ft.;

(xi) Respondent's auditors' letter dated October 18, 2001 addressed to petitioner, whereby the said auditors sought information from petitioner on the total cost of construction and the amount due and recoverable from respondent;

(xii) Petitioner's letters of December 1, 2001 and January 3, 2002 both addressed to respondent's auditors, which record the cost of construction recoverable from respondent to be Rs.3,106/- per sq. ft.;

(xiii) Memo of Appeal dated 25th April, 2000 filed by respondent before the Commissioner of Income-tax (Appeals) – I, Mumbai inter-alia recording its liability to reimburse the pro-rata cost of construction incurred by petitioner;”

24 Majority award has not even dealt with or considered any of these documents. Just stating “.....*We have gone through the pleadings of the parties. We have perused the documents on record and oral evidence adduced by both the sides. We have heard the learned counsel for the parties. We have also gone through written submissions forwarded to all the Arbitrators. On the basis of overall evidence and materials produced, our findings on the above issues are as under*” OR “.....*We have heard the learned Advocates on both the sides. We have also gone through the relevant evidence on record – documentary as well as oral.....*” OR“.....*Thus considering the totality of the facts and circumstances we hold that the Petitioners are entitled to*” in my view can not be accepted as considering all evidence. That would also not amount to giving reasons. It is not the case where in the majority award the arbitrators have considered the documents and come to a conclusion, notwithstanding those documents the rate payable was Rs.775/- per sq.ft. In a letter dated 20th May 2000, addressed by KCOPL to respondent, in response to respondent's auditors query, Respondent records that the cost of construction was yet to be finalised but the same was estimated to be Rs.3250/-. In respondent's letter dated 17th May 2001 read with letter dated 19th June 2001 addressed to Income Tax Department, respondent has clearly stated that cost of construction was Rs.3,100/- per sq.ft. These were argued before the Learned Arbitral Tribunal as can be seen from the Minority Award but the Majority Award have simply brushed

aside the whole thing by stating that no evidence or material has been placed on record to prove Rs.3100/- per sq. feet as construction cost or as to on what basis the figure of Rs.7,26,00,000/- had been arrived at by petitioner. Moreover, under the agreement, petitioner was to be paid actual construction cost. Clause (3) of the PMA gives the figure of Rs.775/- per sq.ft. as estimated cost of construction based on sanctioned plan for the development and completion of the project as on that date and the estimates are subject to variations on the revision of the building plans. Admittedly and as recorded in the majority award, the original proposed building was to be of 14 floors and finally was made into 39 storied building. Therefore, the estimate of Rs.775/- given in the PMA will also undergo a major change. Arbitrators in the majority have noted this submission of petitioner but have not dealt with in the award. In the Majority award, the arbitrators, have, therefore, grossly erred in accepting the estimated figure of Rs.775/- mentioned in the PMA which is not the rate under the Development Agreement and which also was not a subject matter of the arbitration as the final rate agreed between the parties/cost of construction by ignoring all other evidences.

25 Another point which has to be noted is, under the PMA, KCOPL was to be paid by respondent as noted in clause (4) quoted above, project managers remuneration calculated at 5% of the cost of development of the proposed building. The amount paid by respondent to KCOPL as project

managers remuneration has been calculated @ Rs.3100/- per sq.ft. All these evidences were available and in the Majority award the arbitrators have not even considered the same. As held in *Associate Builders(supra)* where Arbitral Tribunal ignores vital evidence in arriving at its decision, such a decision would necessarily be perverse. If a finding of fact is arrived at by ignoring or excluding relevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in law.

26 In my view, the evidence disregarded by the majority arbitrators are of such a nature that a reasonable man might have decided the issue otherwise had they considered these material.

27 It was open to the majority tribunal to have considered these material and still come to a conclusion that they arrived at. They could have reasoned why despite respondent informing IT authorities that the cost of construction was Rs.3100/- sq.ft. and paying commission to KCOPL at Rs.3100/- per sq.ft. still the construction cost should be only Rs.775/- per sq.ft., which they have not. To that extent the majority award can also be considered as an unreasoned award.

28 The Majority Award on construction cost is contrary to respondent's admission of liability to pay actual proportionate cost of construction and the admissions as contained in series of documents as quoted above. While

rejecting the claim for actual construction cost in the sum of Rs.7,26,00,000/-, in my view, the view expressed in Majority award, with due respect, shows clear non consideration of vital evidence. I say this because there is evidence and material on record placed by Petitioner as to the basis on which they were claiming Rs.7,26,00,000/-. The Arbitrator in Minority has observed as under:

“For a moment let us not consider the documents exchanged between the parties. However, let us consider the documents of the Public Authorities, namely, the Income Tax Authorities. From these documents it would be clear that as of 1994-95 the cost of construction was Rs.2,250/- and when respondent sold the allotted flat the cost of construction was Rs.3,100/- per sq.ft. Nowhere in the arguments either oral or in the written submissions have respondent explained as to why these documents should not be considered. In my opinion, if this evidence which is an admission by respondent's Witness is considered, then the cost of construction of 23,365 sq.ft. at the rate of Rs.3100/- would be Rs.7,24,31,500/- “

29 The arbitrators in the Majority award have also ignored the provisions of clause (20) of the Development Agreement, which binds respondent to pay and/or reimburse Petitioner's actual cost of construction on a prorata basis. Clause (20) is reproduced for ease of reference:

20. The owner shall also be entitled to allotment by the Developers flats and/or apartments of the aggregate built up area of 23000 square feet (Built up area as mutually earmarked means built-up area of the flat including balconies and proportionate common areas I.e lift, staircase, lobbies, servant toilets, entrance etc.) In the proposed new building to be constructed on the development plot and the Owner shall also pay and/or reimburse to the Developers actual project cost of development on pro rata basis therefor. Such actual project cost shall be exclusive of the cost of land. The Owner shall have the absolute cost of land. The Owner shall have the absolute authority to deal with and dispose of such flats or tenements allotted as aforesaid for such price or consideration and to such intending purchasers as the owner may deem fit and to appropriate to itself the sale proceeds on sale of said premises, and the developers shall not raise any objection or obstruction in that behalf nor shall the developers have any claim in respect thereof. Thus in respect of the said 23000 square feet

the entire activity shall be to the account of the owner.”
(emphasis supplied)

30 If the rate of Rs.775/- per sq.ft., which is estimated, as given in the PMA, was supposed to be the actual cost of construction, parties would have stipulated that amount in the Development Agreement as well. The Minority Award clearly sets out most of the documents referred to and relied upon by petitioner through which they claim for actual cost of construction to be Rs.3100/- sq.ft.. The Minority award then sets out the documents of/to public authorities and goes on to hold that those documents indicate that respondent has informed the Income Tax Authorities that the cost of construction was Rs.3100/- per sq.ft.

31 Another point which requires to be noted is that respondent had paid KCOPL project management fees which is the percentage of construction cost. Respondent had filed counter claim for seeking revision/reimbursement of the fees paid under the PMA to KCOPL, but Arbitral Tribunal unanimously rejected the counter claim. Once the Arbitral Tribunal accepts that the project management fees was rightly paid under the PMA (fees paid were percentile of construction cost of Rs.3100/- sq.ft.) it would not be open to the Arbitrators in majority to say that there was no evidence or material placed on record. I have to state, though at the cost of repetition, that the original building was to be of 14 floors whereas what was constructed was 39 storied building with 2 large podiums with terrace

garden, 1 stilt, two flats per floor with cross ventilation, swimming pool and club house. The building plan, from the time when cost was estimated to be Rs.775/-, had undergone drastic and several major changes. The figure of Rs.775/- per sq.ft. was absolutely unrealistic and incorrect.

MODIFICATION:-

32 Mr.DeVitre submitted that the Court exercising jurisdiction under Section 34 of the said Act has the power to modify the award. He submitted that in the peculiar facts of the present case, in the event this Court sets aside the impugned part of the Award, the justice of the case warrants that this Court should modify the majority Award to grant the reliefs declined by the majority arbitrators by granting the reliefs as allowed in the minority Award on Issues 6 and 7.

33 Mr. DeVitre further submitted that it is correct that ordinarily, on an Award being set aside, the parties would be left to their remedies, including to pursue their claims in a fresh arbitration, if so advised. In the facts of the present case, however, that course would entail huge further delay. The principal question to be considered would be the amount of the cost of construction payable pro rata by respondent to petitioner. The question of adjustment of Rs.1,47,95,800/- (balance cost of land) has never been in dispute. In these circumstances, the court be pleased to exercise its powers to modify the majority Award in regard to Issue Nos. 6 and 7.

34 Mr. DeVitre added the expeditious disposal of the *lis* in accordance with law is the dominant object of the Indian arbitration law. The present arbitral proceedings stretched to about 14 years before Award. In these circumstances, this court ought to settle the *lis* finally at this stage on the admitted material before the arbitrators, by adopting the reliefs granted by the minority Award. In the facts of the present case, relegating the parties to further and fresh arbitration proceedings would defeat the object and purpose of expeditious and speedy disposal of disputes.

35 Mr. DeVitre further submitted that the debate as to whether an Award can be severed and set aside partly or whether the Court was bound to set aside the Award in its entirety (even where it found no fault with parts of the Award) was settled in favour of the former proposition by the Full Bench of the Bombay High Court in *Jiwani* (supra). In doing so, the Full Bench held that the observation in para 52 of the judgment of the Supreme Court in *McDermott International Inc vs Burn Standard Co Ltd*⁹ did not come in the way of the Section 34 Court doing justice between the parties by only partly setting aside the Award. Mr. DeVitre submitted that such partial setting aside of the severable part of an Award itself amounts to modification of the Award. In so holding, the Full Bench has acknowledged that to hold otherwise, would have ‘devastating’ effects and the same reasoning applies in the matter of modifying the Award as sought

9. (2006) 11 SCC 181

in the present case.

36 Mr. DeVitre also stated that an identical view is taken by the learned single Judge of the Madras High Court in its judgment in ***Gayatri Balaswamy v ISG Novasoft Technologies Ltd.***¹⁰ wherein the Hon'ble Madras High Court has extensively discussed this issue and held that Hon'ble Court exercising power under s 34 of the Act is empowered to modify an Award.

37 Mr. DeVitre relied upon ***State of Orissa v Samantary Constructions Pvt. Ltd.***,¹¹ and submitted that the Supreme Court modified a part of the impugned award instead of relegating parties to a fresh arbitration, “on the suggestion of counsel” to undo the perversity therein.

38 Mr. DeVitre also submitted that though two Single Judges of this court in ***IFIN Commodities Ltd. Limited v Ayesha Madgavkar & Ors.***,¹² and (d) ***Kaberi Mondal v BMA Commodities Private Limited***¹³ held that an award cannot be modified and disputes that were decided by the majority award must have to be referred afresh to arbitration, both these Judgments, did not consider the relevant and binding observations of the Full Bench judgment in *R.S.Jiwani (supra)*, which expressly considers para 52 of *McDermott* and holds that the said Judgment did not consider the question of whether the Award could be partly set aside and did not

10. 2014(6)CTC 602

11. 2015(6) AWC 5441

12. (2015) 5 Bom CR 421

13. 2015 SCC online Bom 3353

prevent the court hearing a petition under Section 34 from doing justice between the parties, as to hold otherwise, would have devastating effects.

39 Mr. Doctor's opposition to the above submission, primarily, is based almost solely on the observation of the Supreme Court in para 52 of *McDermott (supra)*. All the judgments cited by respondent rely on para 52 of *McDermott (supra)* in taking the view that under Section 34 Court has no power to modify the Award. These include the following judgments:

(a) Puri Construction Pvt. Ltd. v. Larsen and Toubro Ltd.¹⁴

(b) Angel Broking Ltd v Sharda Kapoor¹⁵

(c) IFIN Commodities (supra)

(d) Kaberi Mondal (supra)

40 In reply to prayer for modification, Mr.Doctor submitted that:-

(a) there is no prayer in the arbitration petition seeking a modification of the Arbitral Award and petitioner had urged that the Award be modified only in the course of its oral submissions before this Hon'ble Court. In view thereof, this Court ought to reject petitioner's above request/ submission on this ground alone.

(b) this Hon'ble Court in its limited jurisdiction under Section 34 of the said Act, can only set-aside an arbitral award either wholly or partially (as the case may be) and cannot modify/correct an arbitral award. This

14. 2015 SCC Online Del 9126

15. FAO No.435 /2016 dated 9th May 2017 (unreported)

Hon'ble Court cannot grant/award a claim that was rejected by the Arbitral Tribunal.

(c) The judgments relied upon by petitioner have no applicability in the facts of the present case and the same is contrary to the law laid down by the Hon'ble Supreme Court of India in *Mcdermott International Inc. (supra)* wherein the Hon'ble Supreme Court had categorically stated that "... *The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired.*" Furthermore, the judgment in the case of *Gayatri Balaswamy(surpa)*, is per incurium, having failed to take into account two previous judgments passed by two Division Benches of the same court viz., **Chairman and Managing Director, Tamil Nadu Civil Supplies Corporation Limited and Anr. Vs L. Helen, T.T.N. and Sons and Anr.**¹⁶ and in **Central Warehousing Corporation v A.S.A. Transport**¹⁷ Both these judgements clearly state that power of the court under Section 34 is restricted to setting aside the award and that the court under Section 34 cannot grant any consequential reliefs.

(d) By two subsequent judgments in the case of *Kaberi Mondal (supra)* and *IFIN Commodities Limited (supra)* two Single judges of this Hon'ble Court, have referred to paragraph 52 of *Mcdermott International Inc. (supra)* to come to the conclusion that a court under Section 34 of the

16. 2008(2)Arb LR 166 (Madras) (DB) 166

17. (2008) 3 MLJ 382.

said Act, has no power to modify the award and cannot grant a claim which had been rejected by the Arbitral Tribunal. Paragraph 52 of *Mcdermott International* reads as follows:-

“52. ... The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired”.

Moreover, in *R.S. Jiwani (supra)* the Full Bench of this Hon’ble Court had also by referring to the Hon’ble Supreme Court of India in *Mcdermott International Inc. (supra)* confirmed the legal position that a court under Section 34 cannot correct errors of the arbitral tribunal and has stated as under:-

“35. The Supreme Court was primarily stating the principles which have been kept in mind by the Courts while interfering with the award of the Arbitral Tribunal that it was to outline the supervisory role of the Courts within the ambit and scope of Section 34. It is true that the Court like a Court of appeal cannot correct the errors of arbitrator. ...”

(emphasis supplied)

(e) A Division Bench of the Delhi High Court in the case of *Puri Constructions Pvt. Ltd (surpa)* has considered all the relevant judgments on the question of the power of a court to modify an award under Section 34 and had come to the conclusion that such modification is not possible in view of the express “*dictat of McDermott International*”, which in the opinion of the Hon’ble Delhi High Court was “*determinative of the Court’s approach in an enquiry under Section 34 of the Act.*”

(f) In *Angel Broking Ltd.(supra)* a Single Judge of the Hon’ble Delhi Court had by following the law laid down in *Puri Constructions Pvt. Ltd*

(*supra*), held that the issue as to whether a court under Section 34 has power to grant the claim that was rejected by an arbitrator was “no longer *res integra*” and that “It is therefore clear that the court below while passing the impugned judgment could not have granted interest and compensation which was granted inasmuch as this would result on the court modifying the Award by granting reliefs which were not granted by the Award. In view of the ratio in the case of *Puri Construction P. Ltd.* (*supra*) the Award could only be set aside and the parties thereafter had to invoke arbitration proceedings for seeking reliefs which were denied but held by the court hearing objections under Section 34 of the Act to be wrongly denied. ...” (emphasis supplied)

(g) Even assuming that the Hon’ble Supreme Court of India in *Mcdermott International Inc.* (*supra*) was not dealing with a specific issue of a courts power to modify an award or grant a claim under Section 34, the said observation of the Hon’ble Supreme Court would operate as an *Obiter Dictum*, which in any event is binding upon all courts inferior to the Hon’ble Supreme Court of India. The Hon’ble Supreme Court had in **Municipal Committee, Amritsar v Hazara Singh**¹⁸ held that “*Judicial propriety, dignity and decorum demand that being the highest judicial tribunal in the country even obiter dictum of the Supreme Court should be accepted as binding. Declaration of law by that Court even if it be only by the way has to be respected.*”

18. (1975) 1 SCC 794

(h) Therefore, there can be no question of this Hon'ble Court having any power to modify an award under Section 34 of the said Act and or grant a claim that was rejected by the Arbitral Tribunal.

41 After the arguments were concluded petitioner along with the written submissions also relied (though it was referred to during the arguments) upon a judgment in the case of ***Oil & Natural Gas Corporation Ltd. Vs. Schlumberger Asia Services Ltd***¹⁹. to submit that the Court can under Section 34 of the said Act, set aside the majority award and uphold the minority award.

42 All these submissions on modification or replacing majority award with minority award has been settled once again by a recent judgment of the Apex Court in ***Ssangyong Engineering & Construction Co. Ltd. Vs. National Highways Authority of India (NHAI)***²⁰, wherein the Apex Court reiterated the judgment of the Apex Court in *Mcdermott International Inc. (supra)* that even if the majority award is set aside, under the scheme of section 34 of the said Act, the disputes that were decided by the majority award would have to be referred afresh to another arbitration. Of course, in *Ssangyong Engineering (supra)* the Apex Court invoking its power under Article 142 of the Constitution of India upheld the minority award and stated that it is the minority award together with interest that will be executed between the parties. This Court does not have any power similar

19. 2006 (91) DRJ 370

20. Civil Appeal No.4779 of 2019 decided on 8.5.2019 (yet to be reported)

to Article 142 of the Constitution of India, though I agree with the view taken in the minority award on the issue of cost of construction.

Claim for interest :-

43 Mr.DeVitre submitted as under :-

(a) Petitioner claimed interest on the net sum sought as construction cost for the 12 flats allotted to respondent, at 18% p.a. from 7th July 1999, being the date of receipt of the Occupation Certificate in respect of the said building till final payment thereof.

(b) The majority arbitrators did not consider the said claim in the Award. There is no mention in the impugned part of the Award to the grant of any interest pre-award. This part of the Award is unreasoned and in breach of s. 31 of the Act.

(c) The Minority Award allows interest at the rate of 9% p.a. to petitioner for the reason that petitioner's claim for reimbursement of actual cost of construction was allowed.

(d) In the event that the Impugned Part of the Award is set aside, as prayed, the matter regarding interest will also have to be decided in the same manner as may be directed for the fresh determination of the amount of construction costs payable to petitioner by respondent.

(e) In this regard the judgment in *Indian Hume Pipe Co Ltd V/S State of Rajasthan*²¹ is relevant. In the said case, the Hon'ble Supreme

21. 2009 (10) SCC 187

Court set aside an Award, inter alia, for non-grant of interest and in doing so, observed that:-

“On a conspectus of aforementioned decisions, the following principles emerge:

(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator.

...

(iv) Arbitrators are bound to make the award in accordance with law and if there is no embargo or legal hurdle in awarding interest for the aforesaid three stages mentioned hereinabove then there cannot be any justifiable reason to deny the same.

44 Mr.Doctor, in response, submitted as under :-

(a) It is purely within the jurisdiction of the Arbitral Tribunal as per the provisions of Section 31 (7) (a) of the said Act, to decide whether or not to grant interest on the sum for which the Award is made, and on such rate as it deems reasonable. The finding in this regard, ex-facie falls outside the scope of the provisions of Section 34 of the said Act. This court is being called upon to sit in appeal over the Arbitral Tribunal's findings in this regard, which is legally impermissible.

(b) It is clear from the terms of the Award that the Arbitral Tribunal has not granted interest to petitioner in view of the fact that the Arbitral Tribunal has directed in Issue No. 7 (Adjustment of balance land price against cost of development) that petitioner is liable to adjust the amount of Rs. 1,47,95,800/- payable by petitioner to respondent towards the

balance cost of land with the amount of Rs. 1,81,07,875/- as the cost of construction payable by respondent to petitioner. The Arbitral Tribunal was conscious of the fact that petitioner had the benefit of the amount of Rs. 1,47,95,800/- from the time the said amount was due. The Arbitral Tribunal had accordingly, in its commercial wisdom and discretion decided not to grant petitioner any interest on the amounts claimed by petitioner.

(c) The judgments relied upon by petitioner in the course of its oral submissions to this Hon'ble Court, with respect to the grant of interest by the Arbitral Tribunal are not relevant and do not apply to the facts of the present case. Furthermore, the said judgments were passed in the context of the provisions of the Arbitration Act, 1940 and are therefore also not applicable to the facts of the present case.

(d) In any event if this court is of the view that the Award fails to clearly disclose the reasons for not granting interest, it is always open to this Hon'ble Court under the provisions of Section 34(4) of the said Act, to adjourn the present proceedings in order to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action in the opinion of the Arbitral Tribunal will eliminate the ground for challenge viz., in this case the failure to disclose reasons.

45 As regards interest, the Majority Award is totally silent. Admittedly and as recorded in the award itself, there has been a claim by Petitioner for Rs.7,26,00,000/- with interest. The Arbitrators in majority by not even

discussing interest has in fact rejected the claim of interest without giving any reasons. Section 31(3) of the Arbitration and Conciliation Act 1996, provides that the Arbitral Award shall state reasons upon which it is based, unless parties have agreed that no reasons are to be given or the award is arbitral award on agreed terms under Section 30(settlement). This is not an award under Section 30 and therefore, the Arbitrators in majority were duty bound to state reasons why it has not considered the claim for interest. On this ground also the majority award suffer from perversity.

46 As noted earlier, I am setting aside the majority award on issue no.6. It would also serve no purpose to direct the Arbitral Tribunal to give reasons for interest by adjourning this hearing under Section 34(4) of the said Act. Since the majority award has not perhaps granted interest in view of the fact that it has directed in issue no.7, adjustment of balance land costs against cost of development of Rs.1,81,03,875/- (under issue no.6), and the majority award as regards construction cost being set aside, in my view, it will be open to petitioner to claim once again interest on cost of construction as and when the cost of construction claim is referred afresh to another arbitration.

Costs :-

47 Mr.DeVitre submitted that the impugned part of the majority Award holds that each party must bear its costs of the arbitration. The sole reason

given is that both parties have succeeded on some issues. This is patently incorrect from a bare perusal of the record. Petitioner has succeeded on the majority of the 17 issues (except two). The only reasonable exercise of discretion in such a case by an arbitral tribunal would have been to follow the rule of 'costs follow the event' and to have awarded costs of the arbitration to petitioner, who is the 'successful' party and as a natural, lawful and legal corollary, was entitled to costs.

48 Mr.Doctor in response submitted (i) petitioner has claimed exorbitant costs of Rs. 8,40,53,324/- in respect of the arbitration. The Arbitral Tribunal has rejected the claim for costs.

49 The reasons given by the Arbitral Tribunal for rejecting the claim was that *"Since the Tribunal has decided the dispute now and has adjudicated rights and liabilities of the parties by the Final Award, and since both the parties have partly succeeded, we are of the view that both the parties should bear their own costs of the entire proceedings. We order accordingly."*

50 It is settled law that this court is not sitting in Appeal and it is also settled law that where the Arbitrators have passed a discretionary order, which they were entitled to, it cannot be interfered with, unless there was perversity. I find none.

51 In my view, the arbitral Tribunal is the best judge whether a party before it had succeeded or not. In my view refusal to grant costs can never

be a matter of public policy or perversity on the basis of which the Court can exercise its jurisdiction to interfere with the award under the provisions of section 34 of the said Act. This ground of challenge to the award is therefore, rejected.

52 In the circumstances, I conclude as under:-

(a) The petition partly succeeds.

(b) The majority award rejecting petitioner's claim for cost of construction at Rs.3100/- per sq.ft., is set aside (issue no.6).

(c) As regards the challenge to the non awarding of interest by the majority tribunal, it will be open to petitioner to claim interest on cost of construction as and when the cost of construction claim is referred afresh to another arbitration.

(d) As regards the challenge to non awarding of cost by the majority tribunal, the same being discretionary order and the arbitrators having given reasons, I do not wish to interfere. At the same time, it will be open for petitioner to claim cost of fresh arbitration, if so advised and the Arbitrators may consider the same.

53 Petition accordingly disposed.

(K.R. SHRIRAM, J.)