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

Commercial Arbitration Petition NO. 260 OF 2018
With
Notice of Motion No.462 of 2018
In
Commercial Arbitration Petition NO. 260 OF 2018

Retnasamy Elango
And another ...Petitioners
Versus
Harsha A. Gudka
and another ...Respondents

WITH
Commercial Arbitration Petition NO. 261 OF 2018
With
Notice of Motion No.457 of 2018
In
Commercial Arbitration Petition NO. 261 OF 2018

Retnasamy Elango
And another ...Petitioners
Versus
Kantilal H Gudka
And another ...Respondents

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Mr. M.P. Rao, Senior Advocate a/w. Rakesh Kumar Singh, Advocate for the Petitioners.
Mr. Bhavin Manek a/w. Mr. Vishal Jathar i/b. MDP and Partners, for the Respondents.

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CORAM : R. G. KETKAR, J.

RESERVED ON : 27th JUNE, 2019

PRONOUNCED ON: 11th JULY, 2019

ORDER :

1. Heard Mr. M.P. Rao, learned Senior Counsel for the petitioners and Mr. Bhavin Manek, learned Counsel for the respondents in both the petitions, at length.

2. By these petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, 'Act'), the petitioners, hereinafter referred to as the 'vendors', have challenged the awards dated 29.11.2017 read with corrected award dated 6.12.2017 made by the Sole Arbitrator. By award dated 29.11.2017, the Arbitral Tribunal allowed the claim made by the respondents, hereinafter referred to as the 'purchasers'. The claim made by the purchasers was allowed and the vendors are directed to pay an amount of Rs.36,04,444/- along with interest @ Rs.9% per month from 7.8.2010 on amount of Rs.36,04,444/-. The vendors are directed to pay an amount of Rs.11,83,18,980/- within a period of 120 days from the date of communication of the award i.e. 29.11.2017, failing which they will be liable to pay simple interest @ 9% per annum on the amount of Rs.11,83,18,980/-. The vendors are also directed to pay costs quantified at Rs.26,91,334/- within a period of 120 days from the date of communication of award i.e. 29.11.2017, failing which they will be liable to pay simple interest @ 9% per annum thereon.

3. The award dated 29.11.2017 was corrected on 6.12.2017 on account of typographical errors as also computational error in the award. The Arbitral Tribunal noted that the agreed consideration of Rs.5,72,00,000/- remained to be deducted from the amount of Rs.11,83,18,980/-. The amount computed after deducting

Rs.5,72,00,000/- from Rs.11,83,18,980/- comes to Rs.6,11,18,980/-. The Arbitral Tribunal accordingly exercised the powers vested in it under Section 33(3) of the Act and directed the vendors to pay an amount of Rs.6,11,18,980/- within a period of 120 days from the date of communication of award i.e. 29.11.2017, failing which they will be liable to pay simple interest @ 9% per annum on the amount of Rs.6,11,18,980/-. The relevant and material facts giving rise to filing of present Arbitration Petition, briefly stated, are as under.

4. The disputes between the parties pertain to Flats No.601 & 602 (forming subject matter of Commercial Arbitration Petition No.261/2018) and Flats No.603 & 604 (forming subject matter of Commercial Arbitration Petition No.260/2018), 6th floor, Dosti Elite Tower-A, Dosti Elite Co-operative Housing Society Ltd., Road No.28, Scheme No.6, Metal Rolling Compound, Sion (East), Mumbai – 400 022 (for short hereinafter referred to as the 'suit property').

5. Memorandum of Understanding (MOU) was entered into on 16.3.2010 between the vendors on one hand and Kantilal H. Gudka and Ajaykiran K. Gudka (father and son respectively) on the other whereunder the vendors agreed to sell to the purchasers and the purchasers agreed to purchase and acquire from the vendors flats No.601 and 602 along with amenities described as also all their rights under the registered agreements

both dated 27.9.2004 at and for the total consideration of Rs.2,86,00,000/- in all for both the flats, subject to the terms and conditions set out therein. On the same day, identical MOU was executed between the vendors on one hand and Harsha A. Gudka, wife of Ajaykiran Gudka and Hansa K. Gudka, wife of Kantilal H. Gudka, whereunder the vendors agreed to sell to the purchasers and the purchasers agreed to purchase and acquire from the vendors flats No.603 and 604 along with amenities described as also all their rights under the registered agreements both dated 27.9.2004 at and for the total consideration of Rs.2,86,00,000/- in all for both the flats, subject to the terms and conditions set out therein.

6. Thus, the vendors agreed to sell flats No.601, 602, 603 and 604 (in all four flats) to the purchasers for total consideration of Rs.5,72,00,000/- (Rs.2,86,00,000/- + Rs.2,86,00,000/-).

7. On 12.4.2010, the purchasers sent an email to the vendors attaching therewith draft agreement for sale. It is common ground between the parties that by email dated 14.4.2010 the vendors have approved the draft agreement. It is the case of the purchasers that two MOUs constituted complete contract between the parties in the both disputes. In the alternative, the purchasers claimed that the MOUs read with draft agreements for sale approved by the vendors consist of

concluded contract between the parties. It is an admitted position that an amount of Rs.22,04,444/- has been paid to the vendors under the said agreements. There is, however, dispute as to whether an amount of Rs.14 Lakhs is paid in cash by the purchasers to the vendors. The purchasers relying upon the receipt appended to the MOUs contend that Rs.7 Lakhs each is paid in pursuance of MOU in cash and the receipts are duly signed by the vendors. The vendors on the other hand disputed receipt of Rs.14 Lakhs in cash.

8. The purchasers came with the case that their family comprises of respective spouses Hansa Kantilal Gudka and Harsha Ajaykiran Gudka and children of Ajaykiran – Ms. Shreya Ajaykiran Gudka and Ms. Kairavi Ajaykiran Gudka and younger son of Kantilal and brother of Ajaykiran – Nayan and his wife Nehal and their child Master Rayansh. Kantilal along with his wife Hansa and the sons Ajaykiran and Nayan, all of them, were residing as a joint family for last thirty years. Due to space crunch in the existing residential property, sometime in the year 2006, Nayan purchased flats on the 7th floor i.e. Flat No.701 and 702 respectively in Dosti Elite 'A' Wing, the building where the suit property is situate. As the family of purchasers has always been a joint family and to date they are carrying on business of distributors of Fragrance Ingredients, Essential Oils & Resinoids in the name and style of "Ashapura Atromas Pvt. Ltd." from

Sion (East) and as they have been residing in Sion (West) for past thirty years, they were looking for the residential flats in the vicinity of Sion area so that the family members can stay close to each other as was the position before Nayan shifting to flats No.701 and 702 on 7th floor.

9. In March, 2010 the purchasers were introduced to the vendors by Real Estate Agent Mr.Suresh Manilal Chawda of Maganlal Estate Consultant and Mr. J.M. Rajani alias Bhopabhai who deal in residential and commercial properties in or around the locality of Sion, Mumbai. It was represented to them that the vendors are the owners of Flats No.601 to 604 on the 6th floor of the same building where Nayan is having two flats on 7th floor. The vendors had acquired all rights, title and interest from the developers M/s. Maitri Associates. Having regard to the fact that Nayan was occupying flats on the 7th floor and since the vendors were owners of flats on the 6th floor, the purchasers evinced interest in purchasing the suit property as the same would fulfill the requirement of their family.

10. The meetings were arranged for negotiating and finalizing the monetary consideration and for discussing other terms and conditions of sale. After discussions and negotiations the vendors agreed to sell and transfer all their rights, title and interest in the suit property to the purchasers for an agreed consideration of Rs.2,86,00,000/- in respect of

flats No.601 and 602 respectively. Similarly it was also agreed by another agreement of sale that the vendors shall sell and transfer all their rights, title and interest in Flats No.603 and 604 to Hansa K. Gudka and Harsha A. Gudka for an aggregate consideration of Rs.2,86,00,000/-. In pursuance of the representations and negotiations between the parties, two MOUs were executed between the parties on 16.3.2010 for flats No.601 & 602 (Exhibit C-1) and flats No.603 & 604 (Exhibit C-1/A).

11. The purchasers have come with the case that post execution of MOUs, the vendors informed that the original documents of the said flats are lying with their financial institution Dewan Housing Finance Corporation Ltd. (for short, 'DHFL'), hence same cannot be made available to the purchasers' Solicitors for inspection and verification.

12. On 22.3.2010, an email was sent by the purchasers to the vendors for arranging (1) NOC from the builder for transfer of the flats / share certificates, (2) letter of balance confirmation of loan with vendor's bank (DHFL) and a NOC from the bank for closure of the loan account and (3) agreement of understanding between Metal Rolling and Maitri Associates. These documents will help the purchasers to proceed for home loan process.

13. On 25.3.2010, the vendors sent an email to the purchasers expressing inability to obtain NOC from the builder for transferring suit

property till the loan amount of DHFL is settled and closure letter is provided to the developer. It was suggested that the parties could jointly visit the developers office for obtaining copy of the agreement between Metal Rolling and Maitri Associates as per the mutual convenience of both the parties.

14. By email dated 1.4.2010 the purchasers requested the vendors to obtain NOC from the society as they learnt that the developer handed over the charge of the building to the flat purchasers who formed a society, named as Dosti Elite Co-operative Housing Society Ltd. (for short, 'Society'). The purchasers also requested the vendors to obtain NOC from DHFL along with list of documents in their possession and custody for the mortgage created in their favour and the outstanding amount due from 8.4.2010 to 14.4.2010 to enable the purchasers' bank to calculate the exact amount of Pay Order on the day of disbursement. It was also agreed that the parties to jointly visit the developer's office on 2.4.2010 for obtaining copy of the agreements between Metal Rolling and developers.

15. On 12.4.2010 the purchasers forwarded draft agreements for sale to the vendors (Exhibit C-6 and Exhibit C-7) for approval. On the same day i.e. 12.4.2010 the vendors sent email to the purchasers attaching therewith letter dated 5.4.2007 of Maitri Associates in regard to modifications carried out in Flats No.603 and 604. In this letter the

developer set out that the children bed-room has been converted into bath-Tub bathroom.

16. By email dated 14.4.2010 (Exhibit C-11) the vendors approved the draft agreements forwarded by the purchasers on 12.4.2010.

17. On 27.4.2010, the society finally issued NOC. On 29.4.2010 home loan agreement was executed between the purchasers and their bankers Standard Chartered Bank (for short, 'SCB').

18. On 29.4.2010, an email was sent by the vendors to the purchasers to conclude the deal in one day and make all payments and enter into agreements and get them registered and simultaneously take possession. This was replied by the purchasers by email dated 30.4.2010 stating that their entire payment is ready by way of loan sanctioned by SCB and sanction letter of SCB was attached. Request was also made for executing and registering the agreement of sale so as to get loan disbursement. The draft agreements were forwarded by separate email for approvals. The correspondence was exchanged through emails between the parties. Subsequently the purchasers invoked arbitration and filed proceedings under Sections 9 and 11 leading to constitution of the Arbitral Tribunal.

19. The purchasers sought declaration that the MOUs dated 16.3.2010 constitute a concluded contract between the purchasers and the

vendors and is valid, subsisting and binding on the vendors; in the alternative sought declaration that the MOUs dated 16.3.2010 read with draft agreements for sale approved by the vendors on 14.4.2010 constitute a concluded contract between the purchasers and the vendors and is valid, subsisting and binding on the vendors. The purchasers also claimed specific performance of the contract of MOUs dated 16.3.2010 read with draft agreements for sale approved by the vendors on 14.4.2010. Without prejudice and in the alternative, if the Arbitral Tribunal comes to the conclusion that specific performance cannot be granted, for an award directing the vendors to pay an amount of Rs.6,83,65,197/- as per the Particulars of Claim set out at Exhibit-Q as compensation for the loss suffered by the purchasers along with compound interest @ 18% per annum from the date of filing of Statement of Claim till payment and/or realisation, among other prayers.

20. The vendors filed written statement and counter claim. The vendors contended that the MOUs dated 16.3.2010 are not concluded contracts and their performance is dependent on further execution of proper deed of conveyance. MOUs contained arbitration clause. The agreements of sale approved on 14.4.2010 do not contain arbitration clause. The draft agreements of sale is not a concluded contract and, therefore, the Tribunal has no jurisdiction to entertain and try the claim of

the purchasers.

21. The vendors further contended that the claim is liable to be dismissed on the ground of suppression of material facts. The agreements of sale approved on 14.4.2010 by vendors were unilaterally superseded by a second and revised draft agreement for sale forwarded by email dated 30.4.2010 by the purchasers. The revised agreements are in complete variance with the earlier agreements of sale approved by the parties. It was further contended that the purchasers are not entitled to damages as they have changed the terms and conditions of the MOUs and draft agreements of sale approved on 14.4.2010. The purchasers are responsible for delay and laches as there is delay of five years in appointment of the Arbitrator. It was further contended tha time was essence of the contract. Apart from payment of Rs.22,04,444/- nothing was paid by the purchasers to the vendors. The vendors further contended that the purchasers were entitled to custody of documents only upon making payment and not otherwise. The purchasers have committed breaches of the understanding arrived at between the parties and are not entitled to any reliefs. The vendors contended that it was in terms agreed between the parties that the purchasers will pay the vendors and DHFL through their bankers i.e. SCB and thereafter DHFL will release the original documents in favour of SCB who will hold the original documents as security towards the repayment of

loan. It was agreed between the parties that the transaction was to be completed by 15.4.2010. The purchasers, however, went on changing the contract and essentially rewrote the contract.

22. At no point of time the sale price was arrived at Rs.2 Crores for two flats. The price agreed between the parties was Rs.2.86 Crores for two flats. The vendors further contended that the purchasers have unilaterally changed the sale price to Rs.2 Crores and sanctioned letter issued by SCB was for loan amount of Rs.3.78 Crores although the agreed sale price was Rs.5.72 Crores.

23. The vendors also have set up counter claim for declaration that the agreements are incapable of specific performance and are rendered invalid. Further declaration is sought that the purchasers have defaulted in performance of MOUs dated 16.3.2010 on account of unilateral change of terms and sought award of Rs.14,60,67,159/- on account of the losses sustained by them as set out in paragraph-84.

24. On the basis of the pleadings of the parties, the Arbitral Tribunal framed the necessary issues. The parties adduced evidence. After considering the evidence on record, the Arbitral Tribunal made the awards on 29.11.2017 and thereafter corrected the awards on 6.12.2017. It is against these awards, the vendors have instituted present petitions.

25. In support of these petitions, Mr. Rao contended that the

MOUs dated 16.3.2010 and the draft agreements for sale approved by the vendors on 14.4.2010 do not constitute concluded contract. The purchasers, therefore, cannot claim specific performance of these contracts. He submitted that the purchasers have suppressed material facts from the Tribunal. He contended that the Statement of Claim filed by the purchasers is totally silent as regards the revised agreement forwarded by email dated 30.4.2010. In this agreement, the purchasers have changed the conditions of MOUs and draft agreement approved on 14.4.2010. By this agreement, the purchasers brought down the consideration amount of Rs.2.86 Crores in respect of two flats to Rs.2,00,02,222/-. They also raised the issue of two car-parkings. Thus, the agreement forwarded by email dated 30.4.2010 novated the MOUs dated 16.3.2010 as also the draft agreements approved on 14.4.2010. Though the Arbitral Tribunal was justified in declining the relief of specific performance of contract, it was not justified in awarding damages on the premise that the MOUs dated 16.3.2010 and the draft agreements approved on 14.4.2010 constituted concluded contract. He further submitted that the purchasers agreed firstly to pay dues to DHFL and thereafter pay the balance amount to the vendors. Secondly, the purchasers committed breach of the terms and conditions of MOUs and agreements of sale approved on 14.4.2010. He submitted that since beginning the purchasers were aware of dues of

DHFL. He submitted that a perusal of the draft agreement sent by the purchasers through email dated 12.4.2010 shows that there are various blanks. Even otherwise, the MOUs dated 16.3.2010 and the draft agreements of sale approved on 14.4.2010 do not constitute concluded contract. He submitted that time was the essence of the contract and entire transaction was to be completed by 15.4.2010. The purchasers were not ready and willing to perform their part of contract by paying the balance consideration.

26. Insofar as the award of damages made by the Arbitral Tribunal is concerned, he submitted that the award is vitiated by patent illegality appearing on the face of the award as contemplated by Sub-section (2-A) of Section 34 of the Act. The award is also liable to be set aside as it is in conflict with Public Policy in India as laid down under Section 34(2)(b)(ii) of the Act.

27. Mr. Rao submitted that the purchasers have not produced any material substantiating the claim of damages. The purchasers even have caused considerable delay in the matter. Elaborating the submission as regards the purchasers causing delay in the matter, Mr. Rao submitted that on 28.9.2010 the purchasers filed arbitration applications along with arbitration petition under Section 9 of the Act. For seven months, the Arbitration Applications were pending without removing office objections.

On 19.4.2011 objections were removed. On 10.6.2011, the Arbitration Applications were dismissed for default. Instead of applying for restoration of these Arbitration Applications, the purchasers filed another applications under Section 11 of the Act. The matters appeared on board on 2.12.2011 and 8.12.2011. On 16.12.2011, the purchasers withdrew the earlier Arbitration Applications No.209/2011 & 210/2011. The purchasers filed Notices of Motion for restoration of Arbitration Application No.90/2011 on 15.2.2012. The purchasers did not move the matter and on 18.7.2014 the Notice of Motion was allowed and Arbitration Applications No.90/2011 and 91/2011 were restored. Even after restoration, the purchasers did not move this Court and it is only on 28.1.2016, Arbitral Tribunal was constituted. He relied upon the decision of **Kailash Nath Associates Vs. Delhi Development Authority, (2015) 4 SCC 136** and in particular paragraph-43 where the Apex Court has clarified the law of compensation for breach of contract under Section 74 of the Indian Contract Act, 1872. He, therefore, submitted that the petitions require consideration.

28. On the other hand, Mr. Manek supported the impugned awards. He submitted that the vendors had suppressed encumbrance of DHFL when the negotiations and discussions took place between the parties and MOUS were executed on 16.3.2010. He submitted that in the

MOUs the vendors represented that the title to the suit property is clear and marketable. They further represented that they will produce the original title deeds before the purchasers for verification. They further confirmed that in the event any claims are received pursuant to the public notices or otherwise they shall clear the same and make their title clear and marketable within seven days of receipt of such objection. Clause-9 of the MOUs provided that in the event of any dispute or differences arising out of the interpretation or implementation of the MOU, the same shall be referred to a Sole Arbitrator. Thus there is arbitration clause in the MOUs. That apart, the vendors have acknowledged receipt of Rs.14 Lakhs only in cash under two MOUs. He submitted that the vendors never doubted the financial capacity of the purchasers.

29. Mr.Manek submitted that the alleged revised agreement forwarded by email dated 30.4.2010 is not signed by the parties. The contention of the vendors that there is novation of MOUs dated 16.3.2010 and draft agreements for sale approved on 14.4.2010 is, therefore, wholly misconceived. He submitted that at the time of entering into MOUs on 16.3.2010, the vendors suppressed that the suit property is mortgaged to DHFL. In fact during pendency of the arbitration proceedings, contrary to order dated 14.7.2011 passed by this Court (Coram: S.J. Vazifdar, J., as the learned Chief Justice of Punjab and Haryana High Court then was) in

Arbitration Petition (Lodging) No.712/2011, the vendors have transferred the loan account of DHFL to Indian Bank.

30. Mr. Manek submitted that in paragraph-6 of the written statement-cum-counter claim the vendors contended that “the Claimant (purchasers) themselves admit that the agreed consideration was Rs.2.86 Crores as on 16th March, 2010 and now it is Rs.6 Crores (as per Particulars of Claim Exh-Q to Statement of Claim dated 5th March, 2016) which clearly shows that the prices have appreciated 100% in these last 5 years.”.

31. Mr. Manek submitted that Ajaykiran Gudka in paragraph-31 of the affidavit-in-lieu of oral examination-in-chief deposed that under the MOUs the aggregate consideration amount of Rs.2.86 Crores for the sale of subject flats was clearly mentioned. In the draft agreement of sale dated 12.4.2010 approved by the vendors on 14.4.2010 the entire consideration was not mentioned. This is because the vendors desired to show an aggregate consideration amount of Rs.2,00,02,222/- for the sale of two flats and requested the purchasers to make the payment of the balance consideration separately to them. As per the understanding of the parties, the entire consideration of Rs.2.86/- Crores was not shown in the draft agreement for sale dated 12.4.2010 duly approved by the vendors at the request of the vendors. He submitted that based on the understanding

while obtaining home loan the purchasers applied for loan amount of Rs.4 Crores from SCB as per the agreed value for Rs.4 Crores for all the four flats. As the purchasers had already paid their contribution of Rs. 22 Lakhs in cheques to the vendors under the MOUs, the loan amount was sanctioned for Rs. 3.78 Crores by SCB.

32. Mr. Manek further submitted that the vendors also suppressed that they had carried out unauthorized additions and alterations in flats No.603 & 604 and said fact came to the light of the purchasers only when the vendors sent an email dated 12.4.2010 attaching therewith letter dated 5.4.2007 of Maitri Associates. He submitted that the Tribunal declined to grant specific performance of contract as firstly, the vendors had already encumbered suit property in favour of Indian Bank which was contrary to the order dated 14.7.2011 passed by this Court (Coram: S.J. Vazifdar, J., as the learned Chief Justice of Punjab and Haryana High Court then was) in Arbitration Petition (Lodging) No.712/2011, and secondly, grant of specific performance is based upon the principles enshrined in Section 20 of the Specific Relief Act, 1963. Thirdly, the Arbitral Tribunal also considered reliance placed by the purchasers on Section 13 of the Specific Relief Act so that the vendors could perfect their title. The Arbitral Tribunal was of the view that this will

lead to another round of litigation involving Indian Bank. He submitted that the Arbitral Tribunal, therefore, declined to grant relief of specific performance, however, awarded compensation of Rs.6,11,18,980/-.

33. Mr. Manek submitted that it cannot be said that the award is vitiated by patent illegality appearing on the face of award as contemplated by Sub-Section (2-A) of Section 34 of the Act or that the arbitral award is in conflict with Public Policy in India as laid down under Section 34(2)(b)(ii) of the Act. He, therefore, submitted that no case is made out for interfering with the impugned awards.

34. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. The vendors have contended that though the arbitration clause is included in the MOUs, the arbitration clause is not forming part of agreement for sale approved on 14.4.2010. The Arbitral Tribunal has, therefore, no jurisdiction to entertain and try the claim made by the purchasers. The vendors further contended that MOUs dated 16.3.2010 and the agreements for sale approved on 14.4.2010 do not constitute concluded contract. The Arbitral Tribunal has considered this aspect at length in paragraph-26 of the award. The Arbitral Tribunal noted that on 16.3.2010, two MOUs were executed (Exhibit C-1 & C-1/A). It is an

admitted position that the draft agreement for sale sent by the purchasers on 12.4.2010 were approved by the vendors on 14.4.2010. It is undisputed that the MOU contained an arbitral clause, namely, clause No.9. The MOUs essentially provided for :

- an aggregate consideration of Rs.5.72 crores for the suit property;
- the vendors were in possession of the original title deeds and that the same would be made available to the purchaser's Solicitors for verification;
- the vendors were to obtain No Objection Certificate (NOC) and permission from the developers M/s. Maitri Associates;
- the entire consideration was to be made by 15.4.2010 by executing a sale deed;
- the MOUs have a clause indicating receipts of earnest money by cheque and cash;
- the MOUs further contemplated simultaneous execution of the sale deeds upon payment of the balance consideration and the vendors simultaneously handing over original documents wih the possession of the suit property.

35. The Arbitral Tribunal noted that the MOUs did not suggest that the suit property was encumbered. On the contrary, there is an express stipulation that the title of the vendors to the suit property is clear and marketable.

36. Insofar as the draft agreement for sale approved by the vendors on 14.4.2010 is concerned, the Arbitral Tribunal noted that the draft indicated that the obligation of the vendors was

- to obtain a no objection letter from the developers M/s. Maitri Associates;
- the payments which were to be made by the purchasers were to be distributed between monies payable to DHFL and monies payable to the vendors;
- the quantum of monies paid by cheque to the vendors which are reflected in the MOUs were also reflected in the draft agreements;
- said agreements also reflected that the purchasers would be obtaining a loan from a financial institution or bank for the purpose of making disbursal of monies to DHFL and the vendors;
- clause-2 of the draft agreements provided that upon execution of the draft agreements, the vendors would hand over vacant and peaceful possession of the suit property;

- clause-2 will have to be read with clause-9 which provided that upon execution the vendors were to sign and execute a letter addressed to DHFL along with the cheque for foreclosure of the loan account and the original documents were to be handed over to the purchaser's banker upon receipt of said amount;
- clause-10 provided for registration and laid down that the vendors will cooperate with the purchasers for completing registration.

37. The Arbitral Tribunal concluded that the MOUs contained all the trapping of a concluded contract, namely, identity of property, consideration, the broad manner of execution of the transaction. In the draft agreements there is a reference to the purchasers, vendors, DHFL and the proposed banker of the purchasers. The draft agreement which was approved by the vendors shows that the essential thread appeared to be simultaneous execution of the transaction so that the dues of DHFL could be cleared and DHFL would hand over the deposited title documents of the suit property to the purchasers' banker as a condition for disbursal of amounts to the vendors and DHFL. Simultaneously the sale-deeds between the purchasers and the vendors were to be executed. The draft agreement would thus be implemented only when all the aforesaid four entities participated at/on the execution of the final sale deeds. The purchasers

had to arrange for the balance consideration, the vendors had to ensure the title documents lying with DHFL are ready for being handed over to the purchasers' bankers or purchasers for that matter against execution of the sale deeds and handing over of possession of the suit property.

38. The Arbitral Tribunal concluded that handing over of title documents from DHFL was a key ingredient of passing over clear and marketable title to the purchasers which the vendors had committed to do in the MOUs and the draft agreements. Upon considering the MOUs and the draft agreements, the Arbitral Tribunal held that the MOUs provided the essential terms and meeting of minds of the parties to the dispute and the draft agreement provided for the manner in which the transaction is to be implemented. The MOUs and the draft agreements do not indicate that the purchasers had purchased the suit property subject to first clearing the encumbrance of DHFL. The total consideration was agreed upon from which the payment would be made to DHFL and balance to the vendors. Clause-9 of MOUs dealing with arbitration is widely worded clause. The MOUs will have to be read along with the draft agreements as they provide for how the MOUs are to be implemented. The Arbitral Tribunal, therefore, concluded that clause-9 of the MOUs gave jurisdiction to the Arbitral Tribunal in respect of the disputes arising from the subject MOUs and the draft agreements which provide for the modalities of the

transaction would be structured.

39. For the reasons recorded by the Arbitral Tribunal, I do not find that the Arbitral Tribunal committed any error in holding :

(i) that the Arbitral Tribunal had jurisdiction to entertain and try the dispute between the parties, and

(ii) that the MOUs dated 16.3.2010 and the draft agreements approved by the vendors on 14.4.2010 did not constitute concluded contract.

40. The vendors contended that the purchasers had suppressed material facts, namely, revised agreement forwarded vide email dated 30.4.2010. The revised agreements forwarded vide email dated 30.4.2010 also novated the MOUs dated 16.3.2010 and the draft agreements approved on 14.4.2010. Mr. Rao contended that by revised agreement forwarded vide email dated 30.4.2010, the purchasers brought down the purchase amount from Rs.2.86 Crores in respect of two flats to Rs.2,00,02,222/-. They also raised the issue of two car parkings.

41. Section 62 of the Indian Contract Act, 1872 reads thus :

> "**62. Effect of novation, rescission, and alteration of contract.** –- If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. "

42. A perusal of the above provision shows that if the parties agreed to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. The question is whether in the facts and circumstances of the present case, novation was effected by consent of the parties. The Arbitral Tribunal observed that this agreement was admittedly not acted upon nor agreed between the parties and hence it cannot be held that there was novation as alleged. It is also an admitted position that the said agreement is not signed by the parties.

43. Insofar as the contention that the purchasers had suppressed this agreement is concerned, in the written statement-cum-reply of the purchasers to the counter claim set up by the vendors, in paragraph-14 the purchasers had dealt with this aspect. The purchasers contended that the draft agreement for sale, as proposed and forwarded by them on 30.4.2010 was never replied to or approved by the vendors. Hence, there is no agreement in the eyes of law between the parties. As there is no agreement, the purchasers did not refer the same in the Statement of Claim nor sought any specific performance of the same. The purchasers further contended that the vendors never informed until commencement of arbitral proceedings that it was mainly due to the reduced consideration amount mentioned in the said said agreement for sale forwarded on 30.4.2010 and, therefore, the vendors refused to perform. The vendors

referred to the revised agreement for the first time only after commencement of the arbitral proceedings.

44. Insofar as the contention of Mr. Rao that the consideration of two flats from Rs.2.86 Crores in respect of two flats to Rs.2,00,02,222/- is concerned, in paragraph-31 of the affidavit in lieu of examination-in-chief, CW-1 Ajaykiran deposed that under the MOUs the aggregate consideration amount of Rs.2.86 Crores for the sale of two flats was clearly mentioned. In the draft agreement of sale dated 12.4.2010 approved by the vendors on 14.4.2010 the entire consideration was not mentioned. This was because the vendors desired to show an aggregate consideration amount of Rs.2,00,02,222/- for the sale of two flats and requested the purchasers to make the payment of the balance consideration separately to them. As per the understanding of the parties, the entire consideration of Rs.2.86/- Crores was not shown at the request of the vendors even in the draft agreement for sale dated 12.4.2010 duly approved by the vendors on 14.4.2010. In fact on the basis of this understanding, the purchasers applied for loan amount of Rs.4 Crores from SCB and that as they had already paid their contribution of Rs. 22 Lakhs in cheques to the vendors under the MOUs, the loan amount was sanctioned for Rs. 3.78 Crores by SCB.

45. In view thereof, I do not find any merit in the submission of

the vendors that the MOUs dated 16.3.2010 and the draft agreement for sale approved on 14.4.2010 were novated by subsequent revised agreement forwarded by email on 30.4.2010.

46. Mr. Rao contended that the purchasers committed breaches of the terms of the contract. The purchasers were supposed to pay entire consideration by 15.4.2010. The time was essence of the contract. The purchasers were and are not ready and willing to perform their part of the contract. The Arbitral Tribunal noted that in paragraph-24 of the Statement of Claim and paragraph-39 of the written statement to the counter claim set up by the vendors, the purchasers averred regarding the process of obtaining loan from SCB and the factum of the loan being sanctioned. The purchasers led evidence to establish that it has been ready and willing to perform its obligations. A perusal of the MOUs revealed that the only obligation on the purchasers was to make payment of the balance consideration. The purchasers contended that the monies required under the transaction were ready and available with them. In paragraph-32 of affidavit of evidence CW-1 deposed that the purchasers had applied for a loan of Rs.4 Crores and balance consideration was to be arranged from their own sources. The statement of the purchasers in the affidavit of evidence remained unchallenged in the cross-examination. The Arbitral Tribunal relied upon the decision in **Muddasani Venkata Narsaiah**

(deceased) through L.Rs. Vs. Muddasani Sarojana, (2016) 12 SCC 288. The Arbitral Tribunal also noted that the vendors never questioned as to the financial capability of the purchasers to honour the transaction by making payment of monies. The purchasers had received sanction for the loan of Rs.4 Crores as is evident from Exhibit C-30. The Arbitral Tribunal also referred to the cross-examination of RW-1. Question No.96 was posed to RW-1 as to whether the vendors ever questioned the purchasers financial capability to honour the transaction for purchase of the suit property, to which he replied in the negative.

47. The Arbitral Tribunal also noted that it is the purchasers who ultimately obtained NOC from the society. The Arbitral Tribunal concluded that the purchasers were ready and willing to perform their obligations.

48. Insofar as the contention that time was essence of the contract and that the consideration was to be paid on or before 15.4.2010 is concerned, it has come on record that the suit property was encumbered and this fact was not disclosed by the vendors at the time of execution of MOUs dated 16.3.2010. After this fact was brought to the notice of the purchasers, the draft agreement of sale dated 12.4.2010 was forwarded to the vendors. The vendors approved it on 14.4.2010. The Arbitral Tribunal held that the MOUs and the draft agreements do not indicate that the

purchasers had purchased the suit property subject to first clearing the encumbrance of DHFL. The total consideration was to be paid to DHFL who in turn will hand over original title deeds to the purchasers' bankers for security for the loan advanced to the purchasers and the balance amount was to be paid to the vendors. Thus though the vendors represented in the MOUs that they have clear and marketable title the fact was otherwise. It, therefore, cannot be said that time was essence of the contract and as the purchasers failed to pay the balance consideration on or before 15.4.2010 they committed breach of the terms of the contract.

49. Finally Mr. Rao submitted that the Arbitral Tribunal rendered perverse findings as regards payment of damages. The Arbitral Tribunal held that though the contract is valid, the purchasers are not entitled to specific performance of the contract firstly on the ground that the vendors had already encumbered the suit property in favour of Indian Bank. Said action was contrary to the order dated 14.7.2011 passed by this Court in Arbitration Petition (Lodging) No.712/2011. Secondly, grant of relief for specific performance is discretionary as per Section 20 of the Specific Relief Act, 1963. Thirdly, the Arbitral Tribunal also considered Section 13 of the Specific Relief Act which requires the vendors to perfect their title. The Arbitral Tribunal, therefore, held that this will lead to another round of litigation involving Indian Bank. The Arbitral Tribunal after declining

to grant relief of specific performance, proceeded to consider whether the purchasers are entitled to damages and compensation.

50. The Arbitral Tribunal noted that the purchasers have examined the Valuers who produced valuation report at Exhibit C-38. The valuation of the suit property as on date of filing of the Statement of Claim was Rs.11,83,18,980/-. The vendors did not produce their Valuers' report to indicate the current price of the suit property. The Arbitral Tribunal noted that the questions in cross-examination to the Valuer did not impeach the evidential value of Exhibit C-38.

51. It is material to note that in paragraph-6 of the written statement-cum-counter claim, the vendors contended that, “the Claimants (purchasers) themselves admit that the agreed consideration was Rs.2.86 Crores as on 16th March, 2010 and now it is Rs.6 Crores (as per Particulars of Claim Exh-Q to Statement of Claim dated 5th March, 2016) which clearly shows that the prices have appreciated 100% in these last 5 years.”. As mentioned earlier, by award dated 29.11.2017, the Arbitral Tribunal directed the vendors to pay an amount of Rs.11,83,18,980/-. The award was corrected on 6.12.2017. The Arbitral Tribunal noted that the agreed consideration of Rs.5,72,00,000/- remained to be deducted from the amount of Rs.11,83,18,980/-. The Arbitral Tribunal, therefore, directed the vendors to pay Rs.6,11,18,980/-.

52. The Arbitral Tribunal further noted that the receipt below the MOUs indicate that the monies in the form of cash to the tune of Rs.14 Lakhs was given. The signature below the receipt clause was admitted. Thus the purchasers had paid Rs.22,04,444/- + Rs.14,00,000/- in cash. The Arbitral Tribunal, therefore, directed the vendors to refund Rs.36,04,444/-.

53. In view thereof, I do not find any merit in the submission of Mr. Rao that the Arbitral Tribunal was not justified in awarding damages. The reliance placed on the decision of **Kailash Nath Associates** (supra) does not advance the case of the vendors.

54. In the case of **Associate Builders Vs. DDA, (2015) 3 SCC 49,** the Apex Court held that when any of the heads / sub-heads of test of 'public policy' is applied to an arbitral award, court does not act as court of appeal. Interference is permissible only when findings of arbitrator are arbitrary, capricious or perverse, or when conscience of Court is shocked, or when illegality is not trivial but goes to root of the matter. Arbitrator is ultimate master of quantity and quality of evidence while drawing arbitral award. The award based on little evidence or on evidence which does not measure up in quality to a trained legal mind cannot be held invalid. Once it is found that arbitrator's approach is neither arbitrary nor capricious, the Court cannot interfere on facts. The Apex Court further held that the

award can be said to against fundamental policy of Indian Law when it is: (i) not in compliance with statutes or judicial precedents, or (ii) violates the principle of judicial approach, or (iii) not in compliance with principles of natural justice, or (iv) violates the principle of Wednesbury reasonableness i.e. the award is perverse. The Apex Court also explained in detail when the award can be said to be patently illegal. The Apex Court held that the award can be said to be patently illegal when it contravenes the Act itself, contravenes terms of contract, etc.

55. In the case of **Mcdermott International INC. Vs. Burn Standard Co. Ltd., (2006) 11 SCC 181**, the Apex Court held that interference on the ground of patent illegality is permissible only if the same goes to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in making the award by taking into consideration the conduct of the parties. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. Once it is held that the arbitrator has the jurisdiction, no further question can be raised and the Court will not exercise its

jurisdiction unless it is found that there exists any bar on the face of the award.

56. Applying the principles laid down by the Apex Court in the above decisions to the facts of the present case, I do not find that the arbitral award made by the Arbitrator is vitiated by patent illegality appearing on the face of the award as contemplated by Sub-section (2-A) of Section 34 of the Act or that the arbitral award is in conflict with the Public Policy in India as contemplated by Section 34(2)(b)(ii) of the Act. Hence, Commercial Arbitration Petitions fail and same are dismissed. In view of dismissal of Commercial Arbitration Petitions, nothing survive in Notice of Motions No.457/2018 & 462/2018 taken out by the petitioners for staying the impugned awards and same stand disposed of as such. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)