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

COMMERCIAL ARBITRATION PETITION NO.527 OF 2019

Bombay Slum Redevelopment Corporation Limited, having its office at 603, Trade Centre, Bandra Kurla Complex, Bandra (E), Mumbai – 51,)
...Petitioner

....Versus....

Samir Narain Bhojwani Samir Complex, 1st Floor, St.Andrew's Road, Bandra (West), Mumbai – 400 050.)
...Respondent

Mr.Mahendra Ghelani with Mr.Anand Pai, Mr.Atman Mehta, Ms.Vaishali Shah and Ms.Parthvi Gotecha I/b M/s.Law Charter for the Petitioner.

Mr.Aspi Chinoy, Senior Counsel with Mr.Shyam Mehta, Senior Counsel, Mr.Rohan Cama, Mr.Parimal K. Shroff, Mr.D.V. Deokar, Mr.Sachin Pandey and Mr.Dhruvesh Parekh I/b M/s.Parimal K. Shroff & Co. for the Respondent.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 3RD JULY, 2019
PRONOUNCED ON : 13TH SEPTEMBER, 2019

JUDGMENT :-

1. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996 for short “Arbitration Act”), the petitioner has impugned the arbitral award dated 7th September, 2018 passed by the learned arbitrator allowing various claims made by the respondent and rejecting the counter claim filed by the petitioner. Some of the relevant facts for the purpose of deciding this petition are as under :

2. The petitioner herein was the original respondent in the arbitral proceedings, whereas the respondent herein was the original claimant. Andheri Kamgar Nagar Co-operative Housing Society Limited is entitled to leasehold piece or parcel of land or ground situate, at Versova Link Road, Taluka Andheri bearing survey no.139, city survey no.1319 (part) admeasuring 8892 sq. mtrs. The said property is a notified slum.

3. On 6th October, 1996, the said society entered into a development agreement with M/s.Aurora Properties & Investments. Under the said development agreement, the said M/s.Aurora Properties & Investments was under an obligation to construct 239 tenements and 40 tenements for project affected persons (PAP) free of charge and to develop and dispose of balance areas utilizing the F.S.I. as may be available on the said property for consideration on the terms as set out therein.

4. On 22nd September, 1999 the said M/s.Aurora Properties & Investments entered into an Agreement for Sub-Development with the petitioner herein with the consent of the said Andheri Kamgar Nagar Co-operative Housing Society Limited and transferred the benefits of the development rights in respect of the said property under the said development agreement dated 6th October, 1996 with an obligation to construct the buildings consisting of 240 tenements and to provide the PAP and also to construct buildings by utilizing

free sale F.S.I. after deducting 15,000 sq. ft. area retained by the said M/s.Aurora Properties & Investments.

5. On 10th March, 2003, the petitioner and the respondent entered into an Agreement For Development which agreement was registered along with the Deed of Confirmation dated 3rd July, 2004. Under the said Agreement For Development, the petitioner confirmed that the total area of the property described in the schedule to the said Agreement For Development would aggregate to 12,334 sq. mtrs. and the total F.S.I. which would be available for free sale component area permitted to be constructed on the said property would aggregate to 21,386.255 sq. mtrs. It was further agreed under the said agreement that the respondent would be entitled to 55% of the total area available for free sale buildings and car parking and the petitioner herein would be entitled to 45% of the total area available for consideration for free sale buildings and car parking by utilizing F.S.I. which may be available at the said property as per S.R.A. scheme. Clause 31 of the said agreement provided for an arbitration clause. The redevelopment of the said property was under Regulation 33(10) of the Development Control Regulation pursuant to the letter of intent no.1 dated 8th April, 1994 and the revised letter of intent no.2 dated 6th February, 2001.

6. It is the case of the respondent that the petitioner represented to the respondent that they had constructed rehab building no.1 comprising of ground and 7 upper floors for 97 members and on

obtaining the occupation certificate for that building on 10th May, 2002, the petitioner allegedly further represented to the respondent that the rehab building no.2 comprising of ground and 7 upper floors for 140 members was under construction for 137 slum dwellers occupying the said property and/or the members of the said society.

7. It is the case of the respondent that the petitioner represented to the respondent that at the relevant time, 40 PAP tenements admeasuring 20.0 sq. mtrs. / 225 sq. ft. (carpet) area) were required to be provided to S.R.A. and the petitioner would provide the same at some other location at their costs to avail additional F.S.I. including the area joining the said property, the ground area of the said property would aggregate to 12,334 sq. mtrs. and the total F.S.I. which would be available for free sale would aggregate to 21,386.255 sq. mtrs.

8. According to the respondent, the petitioner represented to the respondent that the tenements required to be provided towards 40 PAP on the said property would be provided by the petitioner on another property or alternate site outside the said property by the petitioner at its own costs and that the petitioner shall satisfy the respondent that the said tenements for PAPs would shift from the said property at the costs of the petitioner and the petitioner had complied with their obligation to provide alternate accommodation to the said PAPs.

9. It is the case of the respondent that the petitioner gave an undertaking to the respondent to obtain sanction of the S.R.A. for construction of the said property for utilizing 2.5 F.S.I. and to ensure that the sanctions and/or letters of intent granted by S.R.A. would not be revoked or cancelled and all costs, charges and expenses in respect thereof would be borne and paid by the petitioner alone. Under the said agreement for development, the respondent agreed to pay a sum of Rs.4.00 crores to the petitioner as interest free refundable deposit to be refunded by the petitioner to the respondent within a period of two months after the respondent obtaining the occupation certificate in respect of 45% area.

10. It is the case of the respondent that the petitioner obtained the sanction for construction of free sale building comprising of Wings "A" and "B" (basement + lower & upper stilt + RG floor + 22 floors) on 29th September, 2003. The petitioner thereafter obtained the commencement certificate upto plinth and re-endorsed on 23rd December, 2004 for Wings "A" and "B" on 6th July, 2004. The petitioner also obtained sanction of Wing "C" (comprising of basement + lower & upper stilt + RG floor + 8 floors) on 29th September, 2003 and obtained the commencement certificate upto plinth on 6th July, 2004 and re-endorsed on 23rd December, 2004. It is the case of the respondent that the respondent completed plinth of Wings "A" and "B" in November, 2005. The petitioner obtained the commencement certificate re-endorsed for Wing "A upto 22nd floor and Wing "B" upto 9th floor on 24th October, 2008. The petitioner

thereafter obtained further commencement certificate for Wings "A" and "B" on 11th March, 2010.

11. It is the case of the respondent that it has completed the construction of Wings "A" and "B". The petitioner obtained the occupation certificate for Wings "A" and "B" on 9th January, 2012. The plinth of Wings "A" "B" upto the top of basement was completed by the respondent in November, 2005. Further work could not be carried out for a period of three years for want of approval which were to be obtained by the petitioner.

12. It is the case of the respondent that the architect of the petitioner applied to the S.R.A. on 23rd June, 2004 for conversion of old SRD scheme into the SRA scheme. The petitioner also applied for clubbing the project on the said property of Andheri Kamgar Nagar Co-operative Housing Society Limited at Versova Link Road with scheme known as "Shiv Shakti Nagar Co-operative Housing Society Limited" on plot bearing CTS No.1110 (part), village Kandivali (West) under Regulation 33(10) of Development Control Regulation. The petitioner obtained the revised letter of intent no.3 dated 21st December, 2009 from S.R.A. on various conditions. Clause 4 of the said letter of intent allowed shifting of 107 PAP tenements in the said project of Andheri Kamgar Nagar Co-operative Housing Society Limited at Versova to the said "Shiv Shakti Co-operative Housing Society Limited" project at Kandivali.

13. On 28th December, 2005, the said M/s.Aurora Properties & Investments addressed a letter to the petitioner thereby terminating the agreement dated 22nd September, 1999 with the petitioner. It is the case of the respondent that the said property was affected by Coastal Regulation Zone and falling under CRZ-II category. Worli Hill Residents Association had filed a Public Interest Litigation bearing No.16 of 2006 against the State of Maharashtra and others challenging the F.S.I. / permission granted by the State Government in case of 9 slum project in CRZ-II area. The said project was one of the nine project mentioned in the said public interest litigation.

14. It is the case of the respondent that the petitioner, the respondent and said M/s.Aurora Properties & Investments entered into a Tripartite Agreement dated 11th September, 2009 in which there was a reference to the Development Agreement dated 6th October, 1996, Agreement dated 22nd September, 1999, letter of intent dated 6th February, 2001 issued by the Executive Engineer and letter of intent dated 21st November, 1995 by MHADA giving its NOC for implementing the slum rehabilitation scheme on the said property and the Agreement For Development dated 10th March, 2003 for the development to be carried out by the respondent on the said property.

15. It is the case of the respondent that under the said Tripartite Agreement M/s.Aurora Properties & Investments confirmed that they would be entitled to 22,500 sq. ft. constructed area instead of

15,000 sq. ft. area under the Agreement for Sub-Development dated 22nd September, 1999 and the same would be provided out of 45% area coming to the share of the petitioner. The said M/s.Aurora Properties & Investments agreed to pay to the petitioner the costs of construction at the rate of Rs.500/- per sq. ft. aggregating to Rs.1,12,50,000/- as per the progress of the work. M/s.Aurora Properties & Investments confirmed that they were aware of the Agreement for Development dated 10th March, 2003 between the petitioner and the respondent.

16. It is the case of the respondent that as a result of the revised letter of intent no.3 dated 21st December, 2009 obtained by the petitioner, the petitioner became entitled to shift 107 PAP tenements to be provided from the said property of Shiv Shakti Co-operative Housing Society Limited at Kandivali and obtained 255.95 sq. ft. free sale component additional area in the said project with the respondent.

17. It is the case of the respondent that subject to the petitioner obtaining revised letter of intent no.3 dated 21st December, 2009, building plans in respect of Wings "A", "B" and "C", were revised / amended on 21st October, 2010. The plans for Wing "C" were not proposed upto 22nd floors. The petitioner obtained commencement certificate of Wings "A" and "B" endorsed till 22nd floor and Wing "C" upto plinth level as per amended plan dated 21st October, 2010. The respondent commenced the construction of Wing "C" as per revised

plans upto 22nd floor and got designed RCC work for foundation of Wing "C" comprising of basement + lower and upper + stilt + RG floors fitness centres + 22upper floors.

18. It is the case of the respondent that he incurred the costs approximately of Rs.20.00 crores for constructing Wing "C" upto 5th floors which are only car parking places and free of F.S.I. according to the respondent. The said costs of Rs.20.00 crores was excluding further costs of Rs.10.00 crores approximately which the respondent has alleged to have incurred towards other overheads. The petitioner obtained the occupation certificate dated 9th January, 2012 in respect of the said Wings "A" and "B" from the S.R.A.

19. The respondent vide his letter dated 22nd March, 2012 alleged various delay and default alleged to have been committed by the petitioner. The respondent also referred to 107 PAPs required to be shifted by the petitioner to Shiv Shakti project as per letter of intent no.3 dated 21st December, 2009.

20. By the said letter dated 22nd March, 2012 addressed by him to the petitioner, the respondent had alleged delay and default on the part of the petitioner in providing 107 PAPs which resulted into no further commencement certificate for Wing "C" which had come upto 4th parking floor level and which had commencement certificate upto 5th parking floor level. The respondent also raised protest in respect of the Undertaking-cum-Indemnity Bond given by the petitioner on

23rd October, 2008 to SRA for CRZ-II matter without knowledge or consent of the respondent.

21. By letter dated 16th June, 2012, the respondent addressed to the petitioner, the respondent referred to two Power of Attorneys dated 7th July, 2005 one executed by the respondent in favour of the petitioner and another power of attorney executed by the petitioner in favour of the respondent whereunder, in the second schedule the details of the flats and car parking coming to the respective shares of the parties were mentioned.

22. By letter dated 14th August, 2012, addressed by the petitioner to the respondent, the petitioner offered to handover the possession of flats /premises in Wing "A" and "B" of the building "Bay View" to the petitioner. It is the case of the respondent that by the said letter the respondent brought to the notice of the petitioner various outstanding obligations to be complied with by the petitioner including shifting of 107 PAPs to Shivsakti Nagar, Kandivali Project as per the revised Letter of Intent dated 21st December, 2009.

23. By letter dated 20th August, 2012, the petitioner informed the respondent that the construction of PAPs will commence shortly. The petitioner thereafter obtained further revised Letter of Intent No.4 dated 7th March, 2012 from SRA, which was primarily to include area falling under 9.15 meters wide existing road into the redevelopment project of the said property. It is the case of the respondent that by

the said Letter of Intent No. 4, the area of the said property was taken to be 11,881 sq. meters instead of original 10,767 sq. meters and thereby increasing the area by 1,114 sq. meters on account of 9.15 meters wide existing road belonging to the Government to be included in the said property. It is further case of the respondent that by the said Letter of Intent No.4, free sale component area transferred from Shivshakti Nagar Project was further increased to 2856.22 sq. meters. The petitioner was required to submit Supplementary Annexure II and NOC from Planning Authority for land under 9.15 meters wide road before granting further commencement certificate to the addition of sale component in lieu of the said land and handover the said road free from encroachment with separate property card in the name of Mumbai Municipal Corporation, Greater Mumbai.

24. The petitioner by undated letter emailed on 25th August, 2012 to the respondent contended that plan for Wing "C" of free sale building was issued by SRA, consuming FSI of 5677.92 sq. meters and Wing "A" and "B" had the same occupation certificate for FSI of 15,393.18 sq. meters. The petitioner informed the respondent that as per Letter of Intent No.4 dated 7th March, 2012, the total free sale FSI available on the said property was 23,991.51 sq. meters and the plans were required to be amended to consume full FSI of 23,991.51 sq. meters. The petitioner stated in the said letter that the value of additional FSI would be more than Rs.100 crores when the flats are ready and the petitioner have spent a substantial cost for obtaining

FSI.

25. It is the case of the respondent that a meeting of the parties came to be held on 31st August, 2012. The respondent addressed a letter dated 21st November, 2012 to the petitioner contending that there was no meaning in the statement of the petitioner in the letter dated 20th August, 2012 that the construction of PAPs will commence shortly. It was contended by the respondent that the tenements for PAPs were required to be constructed by the petitioner around 9 years back to obtain FSI required for Wing "A", "B" and "C". The respondent also alleged various other breaches on the part of the petitioner under the Development Agreement dated 10th March, 2003 impugning the obligation to remove the hutment dwellers from the plots. The respondent contended in the said letter that unless outstanding issues, which were preventing/delaying issues of further commencement certificate for Wing "C", were resolved satisfactorily by the petitioner, it was futile to apply for amendment of plans of Wing "C" as desired by the petitioner.

26. On 28th November, 2012, the respondent issued a notice through his advocate to the petitioner and M/s. Aurora Properties, invoking arbitration under Agreement for Development, read with the Tripartite Agreement dated 11th September, 2009 between the petitioner, respondent and the said M/s. Aurora Properties.

27. Sometime in the year 2013, the said M/s. Aurora Properties

filed a Suit bearing No. 62 of 2013 in this Court against the petitioner and respondent for declaration that the Agreement for Development dated 22nd September, 1999 read with Tripartite Agreement dated 11th September, 2009 are valid, subsisting and binding upon the parties and prayed for specific performance and other reliefs. This Court by an order dated 3rd December, 2012, which was modified on 17th December, 2012, restrained the petitioner and the respondent from selling, disposing of alienating, encumbering parting with possession and/or creating third party rights in respect of 45 flats in Wing “A” and 3 flats in Wing “B”, which flats are already constructed and occupation certificate in respect thereof was obtained as also in respect of 4 flats in Wing “C” yet to be constructed.

28. The respondent invoked the arbitration agreement and issued a notice through his advocate for referring the dispute and differences to the arbitration. The respondent pointed out that under the said Development Agreement dated 10th March 2003, there was a provision for appointment of three arbitrators. The respondent appointed his nominee Arbitrator. The said M/s. Aurora Properties concurred with the name suggested by the respondent. Since, there was no response from the petitioner, the respondent filed Arbitration Application No. 86 of 2013 under Section 11 of the Arbitration Act in this Court. The respondent also filed a Notice of Motion No. 540 of 2013 in the Suit No. 62 of 2013 filed by M/s. Aurora Properties against the petitioner and the respondent under Section 8 of the Arbitration Act for referring the parties to Tripartite Agreement

arbitration. Vide order dated 30th September, 2014 passed by this Court in the Notice of Motion No. 540 of 2013 filed by the respondent along with Arbitration Application No. 86 of 2013 filed by the petitioner, this Court dismissed the said Notice of Motion filed by the respondent under Section 8 of the Arbitration Act. This Court held that the Tripartite Agreement dated 11th September, 2009 did not contain any Arbitration Agreement entered into between the parties.

29. The Hon'ble Supreme Court dismissed the Special Leave Petition filed by the respondent against the said order dated 30th September, 2014 contending that a composite reference of the dispute under the said two agreements of Arbitration between the petitioner, respondent and M/s. Aurora Properties be made. The respondent accordingly invoked Arbitration Agreement again on 27th January, 2016, contained in Agreement for Development dated 10th March 2003 and issued a notice to the petitioner for appointment of Arbitrator. The petitioner responded to the said letter by its advocate's letter dated 18th February, 2016 suggesting the name of Sole Arbitrator. The respondent agreed to the name suggested by the petitioner to be appointed as Sole Arbitrator by letter dated 22nd April, 2016. Pursuant to the directions issued by the learned Arbitrator, the respondent filed statement of claim before the learned Arbitrator for various reliefs including a relief for specific performance of the Agreement for Development dated 10th March, 2003 entered into between the parties, for various declaratory as well as monetary reliefs.

30. The petitioner herein filed a statement of defence and counter claim before the learned Arbitrator on 5th October, 2016. In the counter claim filed by the petitioner, the petitioner prayed for declaration that after 14th August, 2012, the respondent was not entitled to withheld the petitioner's keys to the outer doors of the subject flats and parkings to which the petitioner was entitled to in Wing "A" and "B" as per details set out in letter dated 16th June, 2012. Petitioner also prayed for permanent order of injunction against the respondent from obstructing and/or interfering and/or preventing the petitioner and/or its servants or agents from entering upon and/or remaining in and/or using and occupying the subject flats and parking and for completing the remaining works therein etc. The petitioner also prayed for an order and directions against the respondent to provide amended plans of Wing "C" including additional construction in consumption of FSI of 2605.25 sq. meters in Wing "C" for approval and also prayed for compensation in a sum of Rs.300 crores for the losses alleged to have been caused by the respondent to the petitioner by refusing to handover keys to the outer doors of said subject flats and parkings. The petitioner demanded various other monetary reliefs against the respondent.

31. On 20th January, 2017, the learned Arbitrator framed 23 points for determination. The learned Arbitrator subsequently re-framed some of the the existing issues and framed additional issues for determination. The parties laid the oral evidence before the learned

Arbitrator. On 7th September, 2018, the learned Arbitrator made an award declaring that Development Agreement dated 10th March, 2003 was valid for subsisting and binding upon the parties. The respondent was entitled to retain possession of 15 flats in Wing “A” and 0.63 flats in Wing “B” till the petitioner complies with all the directions being given in the said award. The petitioner is directed to construct at its own cost 107 PAPs tenements or any higher number as may be specified by SRA at Shivsakti Nagar, Kandivali, relatable to the Andheri Kamgar Nagar Cooperative Housing Society Scheme and to handover the same SRA within two months from the date of the said award.

32. The learned Arbitrator directed the petitioner to obtain from SRA, a certificate of discharge of the petitioner from its obligation of constructing 107 or any higher number of PAPs relatable to Andheri Kamgar Nagar Cooperative Housing Society Scheme and handing over the same to SRA within three months from the date of the said award. The learned Arbitrator directed the petitioner to obtain further commencement certificate for construction of 6th to 22nd floor on Wing “C” on the basis of sanctioned building plans dated 21st October, 2010 within four months from the date of the said award. The learned Arbitrator further directed the petitioner to comply with the said condition or direction, which may be required to be complied pursuant to any directions of SRA with any condition under any Letter of Intent or under any Regulation or Circular including payment of any premium, before issuance of further commencement certificate

for Wing "C" within one month from the date of the receipt of the communication from SRA.

33. The learned Arbitrator directed the respondent to carry out construction of 6th to 22nd floors of Wing "C" as per sanctioned building plans dated 21st October 2010 within 18 months from the date of further commencement certificate for Wing "C" and after completion of construction of Wing "C" to give intimation for applying to SRA for occupation certificate for Wing "C", the petitioner shall obtain from SRA occupation certificate for Wing "C" within two months from the date of receipt of intimation from the receipt. The petitioner was directed to comply with any condition under any Letter of Intent or any Regulation or Circular, including payment of any premium, before issuance of occupation certificate for Wing "C" with utmost expedition and within one month from the date of receipt of such communication from SRA.

34. The learned Arbitrator directed the petitioner to pay a sum of Rs.67 lakhs to the respondent and along with Rs.26 lakhs towards interest @ 18% p.a. from 19th July, 2016 till the date of the said award and further interest @ 18% p.a. from the date of the award till date of payment/realisation within three months from the date of the said award. The learned Arbitrator directed the petitioner to make further payment of Rs.53 crores as compensation for the period from 19th July, 2016 towards alleged delay on the part of the petitioner in not obtaining further commencement certificate for Wing "C" within four

months from the date of the said award.

35. The learned Arbitrator directed the petitioner to pay further sum of Rs.50 crores as compensation for delay in obtaining further commencement certificate for Wing "C" for the period of 24 months from the date of the award till issuance of occupation certificate for Wing "C" within four months from the date of issuance of occupation certificate for Wing "C". The learned Arbitrator directed the petitioner to remove all encroachments from 9.15 meters wide road to the south side of the property under the said project. The learned Arbitrator issued several other directions for taking various steps for obtaining various permissions from the authorities within the time prescribed in the said award. The learned Arbitrator rejected the counter claim filed by the petitioner. Being aggrieved by the arbitral award, the petitioner filed this arbitration petition on various grounds.

36. Mr.Ghelani, learned counsel for the petitioner invited my attention to some of the documents annexed to the petition, some of the averments made in the statement of claim filed by the respondent, statement of defence filed by the petitioner, written arguments filed by both parties before the learned arbitrator, part of the oral evidence led by the parties, the findings rendered by the learned arbitrator and the grounds raised in the arbitration petition.

37. Learned counsel invited my attention to some of the clauses of the Agreement For Development entered into between the petitioner

and the respondent dated 10th March, 2003 and would submit that the development rights were in respect of the 55% of the total area as per the letter of intent dated 6th February, 2001. The petitioner had retained 45% of the area whereas the respondent was allowed to retain 55% of the area. The respondent was sub-developer for 55% area to be constructed and was contractor for 45% area made available to the petitioner under the said development agreement. He pointed out the total FSI available on the said project under the said development agreement, total FSI consumed in Wings "A" and "B", additional FSI proposed by the petitioner above 5677.92 sq.mtrs.

38. Learned counsel invited my attention to the amendment application filed by the respondent *inter alia* praying for amendment to the statement of claim including the prayers. He also invited my attention to the issues framed by the learned arbitrator initially and the issues re-framed and/or additional issues reflected in the arbitral award and would submit that several issues were modified by the learned arbitrator himself without giving any opportunity to the petitioner to make its submission on the additional issues or on the modified issues unilaterally done by the learned arbitrator in the impugned award. In support of this submission, learned counsel tendered a chart showing the original issues framed by the learned arbitrator during the course of the arbitral proceedings and the issues framed by the learned arbitrator in the arbitral award.

39. It is submitted that the learned arbitrator could not have

unilaterally recast the issues or could not have added new issues without giving an opportunity to both the parties and that also for the first time in the arbitral award in violation of principles of natural justice. It is submitted that in respect of some of the issues, the entire character of the original issues came to be changed by the learned arbitrator unilaterally. The onus was shifted upon the petitioner in respect of some of the issues reflected in the impugned award for the first time.

40. Learned counsel for the petitioner placed reliance on clause 31 of the Development Agreement which recorded an arbitration agreement between the parties. He submits that under the said arbitration clause, the learned arbitrator could arbitrate upon the disputes and differences having arisen only between the parties thereto. The learned arbitrator could not have considered the dispute between the respondent and M/s.Aurora Properties & Investments, the allottees/purchasers of the flats from the petitioner or rights of financial institutions in respect of such flats or their claims against the purchasers of flats from petitioner and the rights and obligations between the petitioner and the Slum Rehabilitation Authority as regards Shivshakti scheme of the petitioner which parties were neither the parties to the arbitration agreement nor the subject matter of the arbitration which was referred to the learned arbitrator.

41. It is submitted by the learned counsel that the learned arbitrator however has travelled beyond the disputes referred to the learned

arbitrator by deciding and making declarations against third parties thereby affecting their rights. The learned arbitrator has issued various directions also in respect of the properties in respect of which M/s.Aurora Properties & Investments had claimed rights though such disputes were subject matter of independent proceedings. The learned arbitrator has declared the agreements between the petitioner and the third parties and also between such third parties and such financial institutions who had such rights as mortgagees in respect of flats of Wings "A" and "B" under registered deeds of mortgage as nullity.

42. It is submitted that the learned arbitrator could not have passed any order against the third parties and in respect of the transactions between the petitioner and those third parties. He submits that these parts of award are not separable and are interlinked with some of the other reliefs granted such as orders contained in Part I, in (K) and (L) of Part II and in (q) of Part (V) from rest of the award and thus the entire award deserves to be set aside on this ground alone.

43. It is submitted by the learned counsel that some of the flats though sold by the petitioner to the relatives and friends of the directors of the petitioner, those transactions were for valuable consideration and no award could be rendered by the learned arbitrator in respect of those transactions in view of those parties not being parties to the arbitral proceedings. The respondent had also sold some of the flats to his family members at half price. In respect

of some of the flats sold by the petitioner to the family members and the relatives of the directors of the petitioner, they had created mortgage in respect of those flats in favour of some financial institutions by way of registered mortgage. These facts were brought on record by the petitioner in the pleadings as well as in the oral evidence. The learned arbitrator thus could not have made any declaration against the third parties in respect of those transactions and the securities created by way of registered mortgage as nullity and not binding on the respondent. Learned counsel for the petitioner strongly placed reliance on the judgment of the Hon'ble Supreme Court in case of **State Bank of India vs. Ericsson India Private Limited and Ors., (2018) 16 SCC 617** and in particular paragraph (5) in support of his submission that the learned arbitrator had no jurisdiction to affect the rights and remedies of the third party-secured creditors in the course of determining disputes pending before it.

44. Learned counsel for the petitioner placed reliance on recitals R to W of the Agreement for Development and would submit that it was not the obligation on the part of the petitioner to bring in any free sale area except 961 sq.mtrs. from any of its other projects elsewhere and to provide benefits thereof to the respondent. The learned arbitrator however has completely overlooked this aspect and issued various directions beyond the scope of the agreement entered into between the parties. The learned arbitrator could not re-write the contract between the parties under the guise of interpretation. The impugned

award is totally contrary to clauses 3A, 3D, 4, 6(III), 7(C)(I), 7(D), 7(E), 8(A) and 21 of the agreement.

45. It is submitted by the learned counsel that the agreement entered into between the parties contemplated possibility of further FSI available for free sale competent which if permitted by Slum Rehabilitation Authority 21,386.255 sq.mtrs. The said agreement contemplated even further FSI competent beyond FSI available 21,386.255 sq.mtrs. Learned counsel however has re-written the contract by considering such possibility of additional FSI to an actual obligation of contract project.

46. It is submitted by the learned counsel that though agreement provided for obligation upon the petitioner to provide rehabilitation of 40 PAP tenaments either in situ or elsewhere and the agreement did not oblige the petitioner to bring in any free sale FSI from outside from any of its other projects or otherwise and the increase if any beyond 16,520.269 sq.mtrs., the learned arbitrator ignored such provision in the contract and rendered various perverse findings against the petitioner. The interpretation of the learned arbitrator is totally impossible interpretation and shows patent illegality. The learned arbitrator has read into the agreement an absolute obligation of the petitioner to construct 107 PAP tenaments in its other project and to restrict development of Wing "C" only as per the letter of intent of 21st December, 2009 and as per the sanctioned plans of 21st October, 2010, disregarding completely the letter of intents of 7th

March,2012 and 6th April,2017. It is submitted that the learned arbitrator has also totally overlooked that the respondent in his oral evidence had made claims even on the areas in excess of 21,386.255 sq.mtrs. contrary to the provisions of clauses 3(d) and 6(xxxi) of the agreement.

47. It is submitted by the learned counsel that though the provisions in the agreement provided for refund of Rs.4 crores two months after the petitioner would receive its entire 45% of the total construction which Wings "A", "B", "C", the learned arbitrator directed the petitioner to preferred the sum of Rs.3.90 crores on receipt of the keys of 16 flats only in Wing "B" contrary to the agreement.

48. It is submitted by the learned counsel that though the said suit filed by M/s.Aurora Properties & Investments is pending in this court, the learned arbitrator contrary to the terms of the contract, interfered with the jurisdiction of this court by giving a finding accepting the defence of the respondent in the suit filed by M/s.Aurora Properties & Investments and virtually prejudging the said suit and held that the flats required to be given to M/s.Aurora Properties & Investments were to come out of the 45% of the petitioner. M/s.Aurora Properties & Investments was not party to the arbitral proceedings. The award shows total perversity and patent illegality.

49. It is submitted by the learned counsel that the statement of

claim filed by the respondent did not contain any allegations, claims or contentions as regards the letters of allotment made by the petitioner of the flats of its entitlement to friends and relatives nor any relief was prayed for in respect thereof. The amended statement of claim also did not include any challenge to any letters of allotments or agreements stamped, executed or registered in pursuance thereof or seeking any relief there against. The learned arbitrator however granted such relief which were not prayed for in the statement of claim and has exceeded his jurisdiction.

50. It is submitted that though the respondent had made a composite claim of damages of Rs.100 crores on different counts, the learned arbitrator thought it fit to award compensation of Rs.103 crores comprising of two components of Rs.50 crores and Rs.53 crores without awarding any claim for compensation for alleged mental agony and hardship. The award shows patent illegality on this ground also.

51. Learned counsel for the petitioner invited my attention to paragraphs (53) and (54) of the arbitral award and would submit that on one hand, the learned arbitrator in the impugned award had made it clear that the arbitral tribunal had been constituted to adjudicate upon the dispute between the parties and that the tribunal did not have any jurisdiction to give direction to any authority nor was the tribunal supposed to substitute any direction given by the Slum Rehabilitation Authority or any other agency in respect of the

obligation to be carried out by the parties in relation to the Andheri Kamgar Nagar scheme at Andheri or with relation to the Shiv Shakti Nagar Scheme at Kandivali, the learned arbitrator issued various directions contrary thereto. The learned arbitrator directed the petitioner to obtain various permissions within the time prescribed in the award thereby directly or indirectly directing the authority to grant those permissions in favour of the petitioner. The award shows inconsistency and contradiction on the face of it and shows perversity. He submits that in respect of the undertaking given by the petitioner also, the learned arbitrator in paragraphs 125 (ii) and (iii) of the award has rendered such inconsistent and contradictory findings.

52. It is submitted by the learned counsel that though the respondent had expressly refused to perform the balance contract as it was an unilaterally stipulated additional preconditions and obligations imposed upon the petitioner, the learned arbitrator totally overlooked this crucial part of the pleadings and the evidence and still granted the relief of specific performance of the agreement of development in favour of the respondent. The learned arbitrator also rendered various perverse findings that the petitioner had not performed its obligation of complying with the terms and conditions of the letter of intent no.3 dated 28th December,2009 and its obligation to construct and handover 107 PAP tenaments to Slum Rehabilitation Authority. It is submitted by the learned counsel that the petitioner was not required to rehabilitate 107 PAP before completion certificate in Wing "C" was granted by the authority. The learned arbitrator thus

could not have treated this part of the obligation on the part of the petitioner as breach of the contract at pre-matured stage and could not have granted specific performance on this ground in favour of the respondent.

53. It is submitted that the learned arbitrator totally overlooked the fact that only in the affidavit of evidence filed by the respondent it was claimed that the structure of Wing "C" was not capable of taking load beyond 22 floors. The respondent in any event had failed to substantiate the said part of the deposition in the affidavit of evidence. He submits that the respondent has not approached the arbitral forum with clean hands. The respondent had failed to handover the keys of the flats of the entitlement of the petitioner which flats were to be handed over to M/s.Aurora Properties & Investments. Even after the order of this court, the respondent had refused to prepare plans for submissions of "C" Wing with the utilization of the additional FSI belonging to the petitioner. The respondent had denied the amendments to the draft undertaking to be submitted to the authority.

54. It is submitted by the learned counsel that since the respondent had not performed its reciprocal obligation to develop and construct the balance work in terms of the development agreement and in any event the development and construction was a matter which requires constant supervision and in ensuring that the same was being done in terms of the development agreement, the learned arbitrator could

not have awarded prayer for specific performance on this ground alone contrary to sections 10, 12, 14, 20 and 21 of the Specific Reliefs Act, 1963. The learned arbitrator has not only granted relief of specific performance in favour of the respondent but has also allowed the claim for damages in favour of the respondent in addition to the relief of the specific performance contrary to the provisions of Specific Reliefs Act, 1963.

55. It is submitted by the learned counsel that the learned arbitrator has issued various directions forming part of the award against the petitioner which would be in the nature of the directions to execute the arbitral award under section 36 of the Arbitration and Conciliation Act, 1996 which relief could not have been granted by the learned arbitrator in the arbitral award itself. The award shows patent illegality on this ground also. In support of this submission, learned counsel invited my attention to some of the directions issued by the learned arbitrator in the operative part of the arbitral award.

56. Learned counsel for the petitioner invited my attention to the ground (vi) raised by the petitioner in the arbitration petition and more particularly at pages 59 to 74 of the arbitration petition and would submit that the findings rendered by the learned arbitrator are *ex facie* perverse and contrary to the arbitration agreement and the record produced by the parties before the learned arbitrator.

57. It is submitted that the learned arbitrator has given various time

bound and specific directions to the petitioner with regard to carrying out construction in future, in respect of various certificates, sanctions and permissions to be obtained from the authorities in a time bound manner and to comply with not only the conditions prevailing in the context of the plans dated 21st October, 2010 but also with any condition under any letter of intent or under any regulation or circular including payment of any premium with utmost expedition and in a time bound manner. He submits that it was not within the control of the petitioner to obtain several of such permissions within the time prescribed under the arbitral award. He submits that such directions issued by the learned arbitrator which would operate the post award shows patent illegality and beyond the jurisdiction of the learned arbitrator. The proceedings before the learned arbitrator were not the proceedings before the court of law for the purpose of execution of the decree or arbitral award but were the original arbitration proceedings for adjudication of the dispute between the parties.

58. It is submitted by the learned counsel that the claim for damages awarded by the learned arbitrator is also totally arbitrary, untenable, contrary to the provisions of Specific Reliefs Act, 1963, Contract Act, 1872 and the Evidence Act. Learned counsel placed reliance on various portion of the oral evidence led by the parties and invited my attention to some of the paragraphs of the arbitral award dealing with the prayers of the grant of damages and would submit that the learned arbitrator has overlooked the oral evidence of the respondent himself and more particularly his cross examination while

dealing with the claim for damages. The reliefs are blindly granted by the learned arbitrator on the possibility of the future or further breach and has provided for non-fulfillment of the contingencies and for execution of the award. The learned arbitrator has exceeded all his powers somehow to grant relief in favour of the respondent.

59. It is submitted by the learned counsel that the learned arbitrator in paragraph (49) of the arbitral award has placed reliance on the report in the Times of India pertaining to some alleged event of some other project which was not part of any evidence nor referred to or relied upon by any party and of a date subsequent to the conclusion of the arguments while allowing the claim for specific performance and damages in favour of the respondent. The learned arbitrator at the same time refused to take into consideration the emergence of the knowledge of a very vital fact supported by the documentary evidence establishing serious breaches of the agreement and fraud committed by the respondent by registering a co-operative society on *ex facie* false representations and which fact came to the knowledge of the petitioner on or about 28th August, 2018 and was brought to the knowledge of the learned arbitrator along with copies of the relevant documents. He submits that the learned arbitrator refused to consider those documents produced by the petitioner on the ground that the same were not the part of the pleadings and were produced at belated stage. The learned arbitrator however, considered the report in the Times of India which was published much after conclusion of the argument and in any event was totally irrelevant.

60. It is submitted by the learned counsel that the learned arbitrator has acted bias against the petitioner and in favour of the respondent which was reflected during the course of the hearing of the arbitral proceedings. In support of this submission, learned counsel invited my attention to the observation of the learned arbitrator in paragraph 125(ii) of the arbitral award regarding alleged cash payment made by the respondent to the petitioner to the extent of Rs.2.4 crores and had allegedly spent Rs.3 crores for obtaining various permissions from authorities in cash.

61. It is submitted by the learned counsel for the petitioner that the learned arbitrator while determining the market value of the flats in the year 2012 and 2016 only has considered the report of the valuer Mr.Maniar and one stray statement of the witness of the petitioner as regards the offer having been received by him in 2012 at Rs.72,554/- per sq.ft. and in the year 2016 and Rs.63,489/- per sq.ft. in the year 2012. Though the petitioner had seriously challenged the report of Mr.Maniar by extensive cross examination which established that the said report and the conclusion were biased and totally unreliable, the learned arbitrator relied upon such report submitted by Mr.Maniar and allowed huge amount of damages in favour of the respondent. The learned arbitrator while allowing the claim for damages in favour of the respondent has totally overlooked the evidence produced by the petitioner and also various admissions of the witness examined by the respondent on the issue of valuation and also on the breaches of

the obligation on the part of the respondent.

62. It is submitted by the learned counsel that the learned arbitrator himself had asked several questions to the witness of the petitioner and had elicited statements/admissions in response thereto and had utilized the said statement in the award against the petitioner. He submits that even while relying upon such answers to the questions asked by the learned arbitrator himself, the learned arbitrator selected the reply of the said witness only to few questions asked by the learned arbitrator and not all the answers given by the said witness in response to the questions asked by the learned arbitrator. The learned arbitrator also overlooked the answers given by the respondent to question nos. 136, 67, 68, 69, 108, 109, 110, 171 and 227 in the impugned award. He submits that ignoring the vital document evidence in the arbitral award by the learned arbitrator would amount to patent illegality. The learned arbitrator could not have considered one stray statement of Mr.Kiran Hemani of having received offer of Rs.90,000/-. There were admissions of record as to the date on which the respondent had sold, the ready reckoner rates which evidence has been totally overlooked by the learned arbitrator without assigning any reasons.

63. It is submitted by the learned counsel that the learned arbitrator has drawn adverse inference against the petitioner on the basis of question no.253 overlooking and ignoring the answer to question no.255 by the petitioner. The learned arbitrator has selected few

portion of the evidence led by the parties and has totally ignored the other crucial part of the evidence which if would have been taken into consideration, none of the claims made by the respondent could have been awarded by the learned arbitrator. The award shows total non application of mind on the part of the learned arbitrator.

64. Learned counsel for the petitioner invited my attention to various submissions made by the petitioner in the written submissions filed by the petitioner before the learned arbitrator and also various averments in the written statement and the counter claim and would submit that the learned arbitrator has not bothered to deal with most of the submissions made by the petitioner in the impugned award.

65. It is submitted by the learned counsel that though the respondent had sold the flats at the rate of Rs.12,000/- per sq.ft. and the petitioner had sold the flats approximately at Rs.25,000/- per sq.ft. the learned arbitrator has considered the rate at Rs.72,000/- per sq.ft. based on no evidence. None of the parties had terminated the development agreement admittedly. No interpretation was sought by any of the parties in respect of the terms of the development agreement.

66. It is submitted by the learned counsel that the petitioner also was entitled to 45% share in the project construction which was to be completed by the respondent and thus the petitioner would not be

beneficiary of any alleged delay. The learned arbitrator has considered the alleged delay of the petitioner in other projects of the petitioner with bias and prejudiced mind. The alleged delay in other projects was neither subject matter of the adjudication nor was proved by the respondent. The learned arbitrator could not have drawn any adverse inference against the petitioner based on alleged delay of the petitioner in other projects of the petitioner. The petitioner had already completed 237 rehabilitation in situ within time provided. The learned arbitrator however did not consider this crucial aspect.

67. It is submitted by the learned counsel that the learned arbitrator could not have made any comment on the Shivshakti Nagar project handled by the petitioner in the impugned award. He submits that in any event, the delay explained by the petitioner has not been considered by the learned arbitrator. The alleged breaches in the Shivshakti Nagar project could not be linked with the Development Agreement under consideration.

68. It is submitted that the rights of the petitioner to have additional FSI is put to an end by the learned arbitrator on the ground that further commencement certificate would have jeopardized the existing construction. He submits that the arbitral award is totally contrary to the terms and conditions of the letter of intent and the development agreement entered into between the parties. It is submitted by the learned counsel that the directions issued by the learned arbitrator to pay stamp duty is contrary to clause 6(VIII) of the

development agreement and shows perversity.

69. It is submitted by the learned counsel that the petitioner was not liable to pay any interest on the interest free deposit made by the petitioner. The learned arbitrator however has contrary to the terms of the contract has allowed interest on the interest free deposit also which part of the award also shows patent illegality.

70. It is submitted by the learned counsel that the respondent had produced several unproved documents in box files before the learned arbitrator in support of its claim for damages. The petitioner had strongly disputed the admissibility of those documents by raising contention across the bar and also in writing before the learned arbitrator. The learned arbitrator took those documents contained in box files subject to the objection of the petitioner. However, the learned arbitrator while awarding the claim for damages at the rate of Rs.72,554/- per sq.ft. carpet area has considered those unproved documents. No evidence was led by the respondent to prove authenticity and contents of those documents executing those box files relying upon to prove the claim for damages.

71. The learned arbitrator did not consider the evidence of the petitioner that the respondent had sold the flats in the year 2012 at around Rs.12,000/- per sq.ft. The learned arbitrator also did not consider the ready reckoner rates at the relevant time which were at Rs.11,826.458 per sq.ft. He submits that even in the year 2016, the

ready reckoner rates prevailing in the locality of the suit property showed the prevailing rate of Rs.17,772.203 whereas the learned arbitrator has considered the rate of Rs. 72,554/- per sq.ft.

72. Learned counsel for the petitioner invited my attention to the evidence led by Mr.Manian who was examined by the respondent and would submit that the said valuer had considered only three documents. He had not produced any instances of the sale in the same property effected by the respondent itself. He relied upon the answers of the said witness examined by the respondent to questioner nos. 11 to 14, 16 to 19, 23 to 25, 27, 30, 31, 33, 34, 36, 38, 40 to 42, 45, 47 and 48 and would submit that the learned arbitrator has totally overlooked the cross examination of the witness examined by the respondent and allowed the substantial claim based on no evidence.

73. Learned counsel for the petitioner submits that the learned arbitrator has totally overlooked the evidence on record produced by the petitioner and has rejected the entire counter claim of the petitioner without any consideration of facts on record, the evidence produced by the petitioner and the applicable law. In support of this submission, learned counsel relied upon various documents forming part of compilation filed by the petitioner before this court including the correspondence exchanged between the parties, letters of intent dated 6th February,2001, 7th March,2012 and 6th April,2017 and various parts of evidence led by the parties. He submits that the

rejection of the counter claim filed by the petitioner in toto by the learned arbitrator overlooking vital evidence produced by the petitioner shows patent illegality.

74. Learned counsel for the petitioner submits that Slum Rehabilitation Authority was not bound by the schedule decided by the learned arbitrator. Various directions issued by the learned arbitrator against the petitioner to obtain various permissions and to get plan sanctioned within the time prescribed were in the nature of impossibility of performance. The award shows total perversity and patent illegality on this ground alone. He submits that the learned arbitrator has granted various reliefs in favour of the respondent while executing the award though there were no such stipulations in the agreement for development entered into between the parties nor in the contract for sale of the flats of the petitioner. Learned arbitrator did not have any inherent powers to grant protective reliefs based on the apprehension in execution of the award. The learned arbitrator has held that the respondent was entitled to retain in possession of 15 flats in Wings 'A' and 'B' till payment was made by the petitioner to the respondent. Learned arbitrator had also granted injunction against third party which was not permissible and beyond the scope of reference and powers of the learned arbitrator.

75. Learned counsel for the petitioner submits that though some of documents with the respondent were admitted in reply to question nos.255 and 256 as deposed in the cross-examination of the

petitioner's witness, there was no question of withholding the documents and also those documents being within a public domain, learned arbitrator could not have drawn an adverse inference under Section 114(g) of the Evidence Act.

76. It is submitted that the finding of the learned arbitrator in paragraph 197 of the impugned award directing that in the event of the petitioner not making payment of Rs.54.03 crores within four months from the date of the award, two flats of family members of the petitioner would be sold is totally perverse and without jurisdiction. Family members of the petitioner were not even parties to the arbitration agreement or even the arbitral proceedings. Learned arbitrator has acted totally without jurisdiction.

77. It is submitted by the learned counsel that the learned arbitrator issued further directions to sell 15 flats of the petitioner in wing 'A' and another 3 flats in the event of the petitioner not paying Rs.209 crores to the respondent with interest @12% p.a. within four months from the date of the award. He submits that this part of the award is totally perverse, without jurisdiction and shows patent illegality. No such directions could be issued by the learned arbitrator for execution of the award at this stage. Similarly, the directions issued by the learned arbitrator for sale of 0.63 flats in case of default and for other monetary claim are also perverse, without jurisdiction and shows patent illegality. Learned arbitrator pierced the corporate veil of the petitioner which part of the award is totally perverse and

without jurisdiction. Neither there was any prayer in the petition filed by the respondent nor any submission made by the respondent nor the learned arbitrator could pierce the corporate veil of the petitioner.

78. It is submitted that prayer (b) pleaded by the petitioner is beyond the terms of the Agreement For Development entered into parties. Though there was prayer for Letter of Intent dated 7th March 2012 in the statement of claim, learned arbitrator has granted relief in respect of Letter of Intent issued by the Slum Rehabilitation Authority in the year 2010. It is submitted by the learned counsel that it was not the case of the respondent that plinth of wing 'C' was not capable of being additional load beyond 22 floor. In the agreement entered into between the respondent and the flat purchasers of the respondent, the respondent had made a representation that wing 'C' was likely to be constructed with additional FSI. The petitioner in the written statement and counter claim made an averment that additional FSI is possible and can be consumed in wing 'C.' He submits that in the rejoinder filed by the respondent to the written statement and the counter claim, respondent had not contended that beyond 22 floor, additional load was not possible.

79. Learned counsel for the petitioner invited my attention to the reply of the witness of the petitioner to question no.263 admitting that some of flats were mortgaged in favour of Kotak Mahindra Prime Ltd. by the flat purchasers of the petitioner. Learned arbitrator had also asked question i.e. question no.265 in this regard when the said

witness deposed that there was no mortgage of 3 flats out of 31 flats.

80. Learned counsel for the petitioner invited my attention to the cross-examination of the respondent by the petitioner and more particularly question nos.89, 90, 205 to 227, 261, 263 and 384 and would submit that learned arbitrator did not consider the fact that the respondent had not started construction of wing 'C' on 6th July 2004 and had refused to perform its part of the obligation.

81. Learned counsel for the petitioner invited my attention to the cross-examination of the respondent to question nos.120 to 123, 136, 94, 117, 264 & 306 and would submit that the respondent had admitted the breach of clause 7(d) of the agreement for development in his cross-examination. It was admitted that both the parties had sold the flats as per ready reckoner rates. Learned arbitrator however, did not consider the said rates while considering the huge claim for damages claimed by the respondent. He submits that rates derived by the learned arbitrator by computing the claim for damages is totally overlooking the evidence on record and shows patent illegality.

82. Mr.Ghelani, learned counsel for the petitioner placed reliance on the following judgments in support of his aforesaid submissions :-

(i) Judgment of this Court in the case of **M/s.ONGC Ltd. Vs.**

- M/s.Interocean (Shipping) Pvt. Ltd.**, delivered on 9th June 2017 in Arbitration Petition No.549 of 2013 (paragraph 47) ;
- (ii) **Associate Builders Vs. Delhi Development Authority, (2015) 3 SCC 49**, (paragraphs 28, 37, 39, 40 & 42.3);
- (iii) **Ssangyong Engineering & Construction Co. Ltd. Vs. National Highways Authority of India, 2019 SCC OnLine SC 677** (paragraphs 15, 16, 20, 21, 22, 28, 35, 37, 38, 39, 41 & 42);
- (iv) **Kailashnath Associates Vs. Delhi Development Authority, (2015) 4 SCC 136** (paragraph 43.6);
- (v) **Santosh Singh Vs. Union of India, 1992 (1) SCC 492** ;
- (vi) **Avadh Kishore Vs. Ram Gopal, 1979 (4) SCC 790**, (paragraph 24);
- (vii) **R.S. Jiwani (M/s.), Mumbai Vs. Ircon International Ltd., Mumbai, 2010 (1) Mh.L.J. 547**, (paragraph 18);
- (viii) **Bharat Coking Coal Ltd. Vs. L.K.Ahuja, 2004 (5) SCC 109**, (paragraph 24);
- (ix) **Union of India Vs. Baijnath Madan Lull, AIR (38) 1951 Patna 219**, (paragraph 5);
- (x) **Dudh Nath Pandey Vs. Suresh Chandra Bhattasali, AIR 1986 3 SCC 360**, (paragraph 6);
- (xi) **N.P. Thirugnanam Vs. R.Jagan Mohan Rao & Ors., (1995) 5 SCC 115**, (paragraphs 5 & 6);
- (xii) **Laxman Tatyabakankate Vs. Taramati Harishchandra Dhatrak, (2010) 7 SCC 717**, (paragraphs 19 to 22);
- (xiii) **Bal Krishna Vs. Bhagwan Das, (2008) 12 SCC 145**,

- (paragraph 14);
- (xiv) **Zarina Siddiqui Vs. A.Ramalingam, (2015) 1 SCC 705,**
(paragraphs 24 to 28, 32 & 33);
- (xv) **His Holiness Acharya Swami Ganesh Dassji Vs. Sita Ram Thaper, (1996) 4 SC 526,** (paragraphs 2 & 3);
- (xvi) **Jaswinder Kaur (deceased) through her L. Rs. & Ors. Vs. Gurmeet Singh & Ors., (2017) 12 SCC 810,**
(paragraphs 7 to 16);
- (xvii) **H.P. Pyarejan Vs. Dasappa (Dead) by Lrs. & Ors., (2006) 2 SCC 496,** (paragraphs 13 & 14);
- (xviii) **Bharat Barrel & Drum Mfg. Co. Pvt. Ltd. Vs. Hindustan Petroleum Corporation Ltd. & Ors., (1988) SCC OnLine Bom 200,** (paragraph 16);
- (xix) **Aniglase Yohanan Vs. Ramlatha & Ors., 2005 (7) SCC 534;**
- (xx) **ONGC Ltd. Vs. Off Shore Enterprises Inc., 2011 (14) SCC 147,** (paragraphs 12 & 13);
- (xxi) **Bhagwati Prasad Vs. Chandramaul, 1966 (2) SCR 286,**
(paragraph 10);
- (xxii) **Ram Sarup Gupta (Dead) by L.Rs. Vs. Bishun Narain Inter College & Ors., 1987 (2) SCC 555,** (paragraph 6);
- (xxiii) **Vastu Invest & Holdings Pvt. Ltd., Mumbai Vs. Gujarat Lease Financing Ltd., Mumbai, 2001 (2) Mh.L.J. 565,**
(paragraph 17).

83. Mr.Ghelani, learned counsel for the petitioner tenders a chart in support of the submission that various submissions made before this Court are already raised by way of grounds in detail in arbitration petition in various paragraphs. Copy of such chart is already handed over to the learned senior counsel for the respondent.

84. Mr.Chinoy, learned senior counsel for the respondent, on the other hand, invited my attention to some of the pleadings, documents, part of the evidence led by the parties and the findings rendered by the learned arbitrator in the impugned award. Learned senior counsel tenders a list of dates and events and also propositions of law sought to be advanced before this Court.

85. It is submitted by the learned senior counsel that the arbitrator is the sole judge of the quality and quantity of evidence and the same cannot be re-appreciated by the Court under Section 34 of the Arbitration Act. If any error of fact is committed by the learned arbitrator, the same cannot be a ground for interference with the arbitral award under Section 34 of the Arbitration Act. He submits that the finding of fact being a mixed question of law & fact of the learned arbitrator cannot be re-appreciated by this Court under Section 34 of the Arbitration Act under the guise of perversity in the impugned award.

86. It is submitted that even if the interpretation of contract by the learned arbitrator is a plausible or possible interpretation, the same

cannot be substituted by another possible interpretation by this Court. The Court can interfere with the impugned award only if no reasonable person could take that view. It is submitted by the learned senior counsel that only if the award sets out a proposition of law which is incorrect or a legal proposition necessarily flows from the award shows patent illegality, no interference in the arbitral award is permissible under Section 34 of the Arbitration Act.

87. Learned senior counsel placed reliance on the Letter of Intent dated 20th October 2009 and would submit that due to change of scheme by the petitioner from SRD to SRA, 40 numbers of PAPs in SRD scheme were substituted by 107 numbers of PAPs. Such 107 numbers of PAPs tenaments were required to be generated to achieve minimum tenaments density as per clause 3.12 of Appendix-IV of Regulation 33(10) of Development Control Regulations, 1991. The said 107 PAPs were to be shifted from Andheri to Kandivali. He submits that the petitioner had taken additional benefits due to such conversion of scheme and was entitled to additional FSI subject to the compliance of various other requirements. The petitioner had called upon the respondent to amend the plan above 22 floor. However, due to structural viability, additional floors above 22 floor was not possible.

88. It is submitted by the learned senior counsel that even till today, the petitioner has not constructed more than 38 PAPs tenaments. On the other hand, in the month of November 2017, the petitioner

had sold all 31 flats allotted by the respondent to the family members and relatives of the petitioner. He submits that at that stage, there was no injunction granted against the petitioner from selling those flats. The respondent had already invested more than Rs.20 crores in construction of part of the building upto 5th floor.

89. Learned senior counsel for the respondent strongly placed reliance on clause 6(iii) of the agreement for development and would submit that under the said provision, the petitioner was obliged to satisfy the respondent that the petitioner had complied with all its obligation under the Letter of Intent issued by the Slum Rehabilitation Authority and only upon such satisfaction of the respondent, the respondent was under an obligation to proceed with the construction of work.

90. In so far as the submission of the learned senior counsel for the petitioner that the learned arbitrator has granted relief against third party including the financial institution and the same was beyond the scope of reference or the jurisdiction of the learned arbitrator is concerned, it is submitted by the learned senior counsel that no such ground is raised by the petitioner in the arbitration petition. He relied upon the order of interim measures passed by the learned arbitrator on 12th October 2016 to the effect that the petitioner was not entitled to deal with 15 flats. He submits that the learned arbitrator has rightly rendered a finding in the said order that the petitioner had allotted various flats to the family members. In

support of this submission, learned senior counsel invited my attention to the findings on pages 191 to 196 and would submit that the learned arbitrator has rightly held that the agreement entered into between the petitioner in favour of the family members or directors were sham and bogus.

91. Learned senior counsel invited my attention to prayer clause (h) of the statement of claim and would submit that his client had prayed for a declaration that his client had right to sell those 15 flats to the petitioner. He submits that the agreements entered into between the petitioner in respect of various family members or directors of the petitioner and other relatives were disclosed only during the course of cross-examination of the witness examined by the petitioner. He submits that the learned arbitrator has rendered a finding that those agreements were not executed in favour of third party cannot be interfered with by this Court in this petition. He submits that those parties were initially allotted the flats on payment of token amount. It was the case of the petitioner itself that those flats could not be sold in open market. Those allottees were either nominees of the petitioner or the persons claiming through the petitioner. He relied upon the statement made by the petitioner in paragraph 185 at page 227 of the compilation of documents.

92. Learned senior counsel strongly placed reliance on Section 35 of the Arbitration Act and would submit that since those allottees of the flats were claiming through the petitioner, the arbitral award is

binding on them also. In support of this submission, learned senior counsel placed reliance on the judgment of the Supreme Court in the case of **Cheran Properties Limited vs. Kasturi and Sons Limited & Ors., (2018) 16 SCC 413** and in particular paragraphs 2, 5 to 7, 11.1, 12.1, 29, 31 and 35 thereof. He submits that the Supreme Court considered the similar facts in the said judgment and thus the said judgment would apply to the facts of this case.

93. Learned senior counsel invited my attention to the order dated 12th October 2016 passed by the learned arbitrator under Section 17 of the Arbitration Act in the application filed by the respondent for interim measures and would submit that the petitioner was directed to refund the deposit of Rs.3,90,00,000/- within two months of getting keys and possession of 16 flats in wing 'B' for which the petitioner rendered an undertaking to the learned arbitrator within two weeks from the date of the said order. He submits that by an order dated 21st November 2016 passed by this Court in Commercial Arbitration Petition No.118 of 2016 filed by the respondent, this Court refused to interfere with the said order passed by the learned arbitrator. He submits that the Hon'ble Supreme Court by an order dated 14th December 2016 passed in Special Leave to Appeal (C) No.35563 of 2016 filed by the respondent herein rejected the said special leave petition. The Hon'ble Supreme Court, however, made it clear that any observations made by the learned arbitrator or by the High Court in the order shall not stand in the way in deciding the matter finally between the parties.

94. Learned senior counsel strongly placed reliance on Clause 6(iii) of the Agreement for Development dated 10th March 2003 between the parties and would submit that under the said clause, it was an obligation on the part of the petitioner to satisfy the respondent that the petitioner would comply with the obligation to provide tenements for 40 PAPs in the another property or alternate site outside the suit property at its own costs and that those tenements for PAPs had been shifted from the suit plot in another property or alternate site outside the said suit property.

95. It is submitted by the learned senior counsel that the learned arbitrator has not acted beyond the terms of the contract. Admittedly, the petitioner had not shifted those 40 PAPs or 107 PAPs from the suit property to another property or alternate site outside the suit property even till today. He submits that the learned arbitrator has rendered a finding that the said Agreement For Development contemplated construction of free sale buildings with total built-up area of 21,386.255 sq.mtrs. as a composite project. It is submitted that the petitioner has brought FSI after obtaining LOI No.3 and as a result thereof, area of 12,334 sq.mtrs. would be increased to 21,386.55 sq.mtrs. The petitioner has obtained commencement certificate only up to 5th floor. He submits that both the parties had acted upon the terms of agreement for development. All plans also were got sanctioned by the petitioner upto 22nd floor for an area admeasuring 21,386.255 sq.mtrs.

96. Learned senior counsel submits that provision for shifting 40 PAPs was got amended by the petitioner by 107 numbers of PAPs because of change of scheme from SRD to SRA and as a result thereof, the petitioner got additional FSI and was to get plan sanctioned from free sale area of 21386.255 sq.mtrs. The SRA also approved free sale area upto 21,386 sq.mtrs. It is submitted that though the petitioner wanted to avail additional FSI under the Agreement For Development by change of scheme from SRD to SRA, the petitioner did not comply with its obligation to shift 107 PAPs from the suit property to any other plot outside the suit plot. Learned arbitrator has taken a sound commercial view in the matter by interpreting the terms of the contract which is the correct interpretation.

97. It is submitted that the learned arbitrator has thus not re-written the contract as sought to be canvassed by the petitioner. Learned senior counsel submits that even if the interpretation of the learned arbitrator is considered as a possible interpretation, the same cannot be substituted by another possible interpretation under Section 34 of the Arbitration and Conciliation Act, 1996.

98. It is submitted by the learned senior counsel that the learned arbitrator has looked at Letters of Intent of 2012 and 2017 dated 16th April 2017 and has rejected those Letters of Intent rightly. Learned senior counsel invited my attention to paragraphs 46 to 48

and 67 to 70 of the arbitral award and would submit that the learned arbitrator has rendered various findings of facts on these issues while rejecting the Letter of Intent dated 16th April 2017 and rightly granted specific performance considering the Letter of Intent dated 21st December 2009.

99. It is submitted by the learned senior counsel that the petitioner has not complied with its obligation under clause 6(iii) of the Agreement For Development by satisfying the respondent that the petitioner had shifted 107 PAPs outside the suit property under any other scheme or other plot outside the suit property and had in fact not constructed those 107 PAPs tenements for shifting those PAPs, the respondent was not required to continue with the construction without petitioner first completing construction for shifting those 107 PAPs to some other plots outside the suit property. The respondent was not required to spend additional amount on construction of remaining tenements after already spending more than Rs.20 crores on construction of part of Wing 'C'. Learned senior counsel invited my attention to the cross-examination of the said witness admitting that within 12 months period, the petitioner would shift 107 PAPs to some other plot. He submits that till today, the petitioner has not shifted those 107 PAPs on some other plots.

100. Learned senior counsel invited my attention to some of the submissions forming part of the written arguments filed by his client before the learned arbitrator and would submit that the learned

arbitrator has rendered a commercial interpretation of the Agreement For Development. He also placed reliance on the order passed by the Supreme Court in Civil Appeal No.7079 of 2018. He submits that none of the findings rendered by the learned arbitrator is perverse and thus cannot be interfered with by this Court.

101. Learned senior counsel for the respondent invited my attention to paragraph 30.16 of the arbitral award and would submit that M/s.Aurora Properties & Investments who were claiming through the petitioner, their rights are not affected by the impugned award. He submits that out of 31.63 flats which were allotted to the petitioner in Wings "A" and "B", 8 flats were reserved for M/s.Aurora Properties & Investments. Learned senior counsel also invited my attention to paragraph 206 of the arbitral tribunal and would submit that the learned arbitrator in the said paragraph had made it clear that the said award did not deal with any of the five flats in Wing "A" and three flats in Wing "B" and four flats in Wing "C" earmarked for M/s.Aurora Properties & Investments. He submits that the learned arbitrator in the arbitral award has thus not dealt with any flats which were claimed by M/s.Aurora Properties & Investments, who has filed the suit against the petitioner and the respondent in this Court and the same is pending.

102. Insofar as the submission of the learned counsel for the petitioner that the learned arbitrator has granted various reliefs which were not even prayed in the statement of claim by the respondent

and more particularly there being no challenge to the letter of intent issued by the Slum Rehabilitation Authority is concerned, learned senior counsel placed reliance on prayer clause (h) of the statement of claim and would submit that the respondent had claimed rights in the flats allotted to the petitioner in the said prayer. For deciding the said prayer, learned arbitrator rightly declared the said Letter of Intent as sham and bogus. Learned arbitrator has thus not granted any reliefs which were not claimed in the statement of claim by the respondent.

103. Insofar as the submission of the learned counsel for the petitioner that the learned arbitrator had rendered various inconsistent findings in the impugned arbitral award is concerned, it is submitted by the learned senior counsel that the findings of fact and evidence appreciated by the learned arbitrator cannot be re-appreciated and cannot be interfered with by this Court under section 34 of the Arbitration Act. He submits that there is no inconsistency in any of the findings rendered by the learned arbitrator.

104. It is submitted by the learned senior counsel that the learned arbitrator has issued various directions against the petitioner for ensuring recovery of the fruits arising out of the arbitral award in favour of the respondent. He submits that in any event there is nothing in the arbitral award which is executable *per-se*. The respondent will have to file an execution application in the event of the respondent succeeding in this arbitration petition. There is thus

no perversity in the impugned award insofar this issue is concerned as sought to be canvassed by the petitioner.

105. Insofar as the directions issued by the learned arbitrator for constructing 107 tenements for shifting PAP is concerned, it is submitted by the learned senior counsel that the petitioner had not complied with its obligation to construct and shift those 107 PAP for more than six years. Learned arbitrator was thus justified in issuing reasonable directions while granting prayer for specific performance of the agreement for development entered into between the petitioner and the respondent. Learned arbitrator is empowered to decide time frame within which such reliefs of specific performance granted by the learned arbitrator has to be performed and the obligations of both the parties under the said relief of specific performance to be performed within the time prescribed in the arbitral award.

106. Insofar as the submission of the learned counsel for the petitioner that various findings rendered by the learned arbitrator are perverse, learned senior counsel invited my attention to the grounds (yy) to (vvv) raised by in the arbitration petition and would submit that the petitioner has impugned various findings of fact rendered by the learned arbitrator in those grounds cannot be interfered with by this Court.

107. Insofar as the submission of the learned counsel for the petitioner that the petitioner was under an obligation to construct the

tenements and shift 107 PAP only against the occupation certificate is concerned, it is submitted by the learned senior counsel that the learned arbitrator has rightly interpreted clause 6.3 of the contract entered into between the parties and the interpretation of the learned arbitrator being possible interpretation, cannot be interfered with by this Court under section 34 of the Arbitration Act.

108. Insofar as the submission of the learned counsel for the petitioner that the learned arbitrator had placed reliance upon an article in the Times of India in paragraph 49 of the arbitral award is concerned, learned arbitrator had already rendered findings against the petitioner based on various other evidence already available on record and considered in earlier paragraphs. He submits that there was enough material on record to sustain the arbitral award justified by apprehension in the mind of the learned arbitrator in the later part of award based on the article in Times of India cannot vitiate the arbitral award on that ground. He submits that various findings recorded by the learned arbitrator are not based on such newspaper article. In support of this submission, the learned senior counsel placed reliance on the judgment of the Supreme Court in case of **Madhya Pradesh Housing Board vs. Progressive Writers & Publishers, (2009) 5 SCC 678** and in particular paragraphs 43 to 45.

109. Insofar as the submission of the learned counsel for the petitioner that the learned arbitrator could not have considered any of the documents which were compiled in the box files as the same

allegedly were not proved by the respondent is concerned, it is submitted by the learned senior counsel that part of the evidence was available on record before the learned arbitrator. Learned arbitrator having considered the said evidence, cannot be re-appreciated by this Court under section 34 of the Arbitration Act. Learned arbitrator has while allowing the claim for damages, has relied upon the statements made in the evidence of the witness relied upon by the petitioner. Learned senior counsel invited my attention to the finding of the learned arbitrator in paragraph 154(ii) and would submit that the learned arbitrator rightly considered the market value of the flats in Wing "C" as Rs.72,000/- per sq. ft. carpet area after considering the evidence on record specifically dealt with in the said paragraph.

110. It is submitted by the learned senior counsel that though the said documents forming part of the box file were taken on record subject to the objection, the fact remains that the petitioner had estimated the cost of construction between Rs.12.00 crores to Rs.13.00 crores, whereas it was the case of the respondent that the respondent had spent about Rs.20.00 crores. He submits that the learned arbitrator has considered the cost of construction carried on by the respondent upto 5th floor as Rs.20.00 crores. There was no adverse impact of liability of the petitioner and on the contrary the amount considered by the learned arbitrator as cost of construction was beneficial to the petitioner and not against the petitioner.

111. Insofar as interest awarded by the learned arbitrator at the rate of 18% p.a. is concerned, it is submitted by the learned senior counsel that the the learned arbitrator has awarded interest at the rate of 12% p.a. and not 18% p.a. Interest in respect of one claim awarded by the learned arbitrator in case of repayment of access payment by the respondent to the petitioner, the learned arbitrator awarded interest at the rate of 18% p.a. This Court cannot interfere with that part of the award. Learned arbitrator is empowered to award interest under section 31(7)(a) of the Arbitration Act at such rate as the learned arbitrator thinks fit and for such period as he deems fit.

112. Insofar as the submission of the learned counsel for the petitioner whether the undertaking submitted by the petitioner was a cloud on title of the suit property or not is concerned, it is submitted by the learned senior counsel that the learned arbitrator has not awarded any claim based on such undertaking.

113. Insofar as rejection of the counter claim filed by the petitioner is concerned, it is submitted that the learned arbitrator has rendered various findings of fact and has specifically held that the petitioner was solely responsible for not complying with various parts of obligations and as a result thereof, the project was delayed. It is also held by the learned arbitrator that the construction above 22 floors was not feasible and thus was justified in rejecting the counter claim filed by the petitioner. The counter claim was based on the premise that the respondent was bound to carry out construction about 22

floors.

114. Insofar as the submission of the learned counsel for the petitioner that the learned arbitrator could not have held that the T.D.R. purchased by the petitioner, if any, could have been sold in the market by the petitioner is concerned, it is submitted by the learned senior counsel that the LOI no.4 obtained by the petitioner was conditional. The petitioner was not capable of fulfilling any conditions prescribed under the said LOI no.4. Learned arbitrator thus has rightly taken into consideration the totality of the circumstances and has rendered well reasoned award. There is neither any perversity in any of the findings rendered by the learned arbitrator nor the award shows any patent illegality.

115. Mr.Mahendra Ghelani, learned counsel appearing for the petitioner in rejoinder placed reliance on section 34 (2) (b) (ii) of the Arbitration Act and would submit that this case would fall under the ground of public policy, patent illegality and various other grounds prescribed under section 34 of the Arbitration Act. Learned counsel once again strongly placed reliance on the judgment of the Supreme Court in case of **Ssangyong Engineering and Constructions Limited** (supra) and in particular paragraphs 37, 41 and 42. He also placed reliance on the judgment of the Supreme Court in case of **Associated Builders** (supra) and in particular paragraphs 18, 19, 27, 31 to 34, 36, 40 and 42.

116. It is submitted that several judgments relied upon by the petitioner in support of the plea that no prayer for specific performance could be considered by the learned arbitrator have not been dealt with by the learned arbitrator in the impugned award. It is submitted that the petitioner has not prayed for re-appreciation of evidence led before the learned arbitrator but has urged before this Court that vital evidence of the petitioner is totally ignored by the learned arbitrator which amounts to patent illegality.

117. Insofar as the judgment of the Supreme Court in case of **Cheran Properties Limited** (supra) relied upon by Mr.Chinoy, learned senior counsel for the respondent is concerned, learned counsel for the petitioner invited my attention to paragraphs 32, 35, 38 and 42 of the said judgment and would submit that the arbitration clause considered by the Supreme Court in the said judgment was totally different. Under the clause considered by the Supreme Court, even the nominees of the parties to the arbitration agreement had agreed to abide by the terms of the contract. The Supreme Court had rendered a finding that the purchase of the shares was made on behalf of the nominees. He submits that there is no such clause in any part of the agreement for development entered into between the parties. The view taken by the Supreme Court was in the facts of that case and is clearly distinguishable.

118. It is submitted by the learned counsel that merely because certain flats were sold to the family members of the Directors of the

petitioner, all such transactions were independent. The law of contract does not prohibit transfer in favour of the family members. The respondent also had entered into several agreements in favour of the family members. The transaction entered into between the petitioner and those purchasers were on principle to principle basis. There was no question of any agency involved in those transactions. The respondent did not lead any evidence before the learned arbitrator to show that the transfer of various flats made by the petitioner was in favour of the nominees. Facts before the Supreme Court in case of **Cheran Properties Limited** (supra) were totally different. Learned counsel for the petitioner strongly placed reliance on the order passed by the Supreme Court in Special Leave Petition filed by the respondent and in particular paragraph 33 thereof in support of his submission that it was made clear by the Supreme Court that the observations made by the trial Court were not to be considered while deciding the matter finally.

119. It is submitted by the learned counsel that the area of 21386.255 sq. mtrs. sanctioned in the letter of intent was subject to the approval of the Slum Rehabilitation Authority. The petitioner was not supposed to bring the F.S.I. derived from Shiv Shakti Nagar Project now which was the subject matter of the agreement for development entered into between the parties. He submits that no specific performance could be granted by the learned arbitrator on the basis of the letter of intent issued in respect of Shiv Shakti Nagar Project. He submits that both the parties had taken advantage of the

increased members of PAP from 40 to 107.

120. Learned counsel for the petitioner invited my attention to condition "C" of the circular annexed at page 2007 of Volume – X and would submit that the learned arbitrator has acted beyond the terms of the contract. Insofar as prayer clause (h) relied upon by the learned senior counsel for the respondent in the statement of claim is concerned, it is submitted by the learned counsel for the petitioner that by granting such prayer, the claim of the financial institutions in respect of some of those flats which were mortgaged in favour of such financial institutions by the purchasers of those flats from the petitioner would be seriously affected. Those financial institution/bank were not parties before the learned arbitrator. There was no provision for deficit or surplus made in the agreement for development between the parties and thus no such relief could be at all considered by the learned arbitrator.

121. It is submitted by the learned counsel that the title of both the parties had emanated from M/s.Aurora Properties & Investments. Both the parties were required to give the flats to M/s.Aurora Properties & Investments. Learned arbitrator however, gave a finding against M/s.Aurora Properties & Investments in the impugned arbitral award and has accepted the case of the respondent in the said suit filed by M/s.Aurora Properties & Investments though the said party was not a party before the learned arbitrator.

122. Learned counsel for the petitioner invited my attention to the particulars of claim at Exhibit "A" at page 358 of Volume – II and would submit that the respondent had not prayed for Rs.43.00 crores. There was no delay on the part of the petitioner in obtaining further commencement certificate.

123. Insofar as prayer clause (i) awarded by the learned arbitrator is concerned, learned counsel for the petitioner submits that the said prayer was also outside the contract entered into between the parties. No charge on the properties of the petitioner could be created by awarding the said prayer. The charge can be created either by operation of law or by agreement of parties. He submits that even otherwise no such charge was proved by the respondent before the learned arbitrator. The said prayer granted by the learned arbitrator is beyond the jurisdiction of the learned arbitrator. There is no finding rendered by the learned arbitrator that any such charge was created by the petitioner in favour of the respondent in respect of those flats. The directions issued by the learned arbitrator to enforce the charge on the flats of the petitioner is illegal and shows patent illegality.

124. It is submitted by the learned counsel that since no part of arbitral award can be severed from the other part of the award and the award shows patent illegality, the entire arbitral award deserves to be set aside.

125. Mr.Chinoy, learned senior counsel for the respondent submits that the claim for compensation of Rs.209.00 crores plus Rs.53.00 crores is granted in lieu of specific performance. If specific performance is complied with by the petitioner, the petitioner is directed to pay compensation for Rs.50.00 crores plus Rs.53.00 crores only. If Wing "C" would have been constructed even the petitioner would have got some flats in the said building. He submits that if the petitioner fails to obtain the permission from the authority as directed by the learned arbitrator, the relief of specific performance granted by the learned arbitrator in that event would not apply. In that event, the respondent would be entitled to recover damages only.

REASONS AND CONCLUSION :

126. I shall first decide the issue raised by the petitioner whether the learned arbitrator has granted any reliefs against the third parties and if granted whether such relief could be granted or not.

127. I shall first highlight the directions / reliefs granted by the learned arbitrator which according to the petitioner are against the third parties and thus the learned arbitrator has exceeded his jurisdiction.

128. In paragraphs 180 to 196 of the arbitral award, the learned arbitrator has dealt with the submissions made by both the parties in

respect of some of the reliefs insofar as possession of 15 flats in Wing “A” and 0.63 flats in Wing “B” and in paragraph 203 (b) and (q) to w) of the arbitral award are concerned. In paragraph 203(b) of the arbitral award, the learned arbitrator has declared that the respondent (original claimant) is entitled to retain the possession of 15 flats in Wing “A” and 0.63 flats in Wing “B” till the petitioner complies with all the directions given in the said award. In paragraph 203 (q) to (w) of the arbitral award, the learned arbitrator has directed that till the occupation certificate is received for Wing “C” and till the petitioner complies with the other directions given in paragraph (II) of the operative portion of the said award, the petitioner and the persons claiming through it would not sell, re-sell or in any other manner dispose of or encumber or create any third party rights in any of the 15 flats in Wing “A” and parking spaces related thereof.

129. The learned arbitrator has declared the letters of allotment purportedly issued by the petitioner in respect of 31 flats in Wings “A” and “B” which were earmarked for the petitioner as sham, bogus, illegal and null and *void-ab-initio* and not binding on the respondent. Learned arbitrator has declared that the agreements for sale of 15 flats in Wing “A” which were earmarked for the petitioner purportedly executed by the petitioner in favour of the Managing Director and the Directors of the petitioner company and their family members are also sham, bogus, illegal and null and *void-ab-initio* and not binding on the respondent. Learned arbitrator has further directed that in

case within four months from the date of the said award the petitioner does not pay the respondent an amount of Rs.54.03 crores or does not surrender 3.63 flats in Wing “B” out of those earmarked for the petitioner, the respondent shall be entitled to sell 0.63 flats out of four flats on the first floor and three flats in Wing “B”, out of nine flats i.e. two flats purportedly transferred by the petitioner to Mr.Kiran H. Hemani – M.D. of the respondent and seven flats purportedly transferred by the petitioner to Mr.Priyank K. Hemani, Director of the petitioner.

130. Learned arbitrator has further granted an injunction against the petitioner and the persons claiming through the petitioner from selling, re-selling or in any other manner disposing of or encumbering or parting with possession of or creating any third party rights on the flats in Wing “B” purportedly transferred by the petitioner to Mr.Kiran H. Hemani and Mr.Priyank K. Hemani till identification and intimation of three flats out of those nine flats in Wing “B” is conveyed by the petitioner to the respondent for the purpose of being available for sale by the respondent for recovery of Rs.54.03 crores as directed in paragraphs (h), (i) and (r) of the arbitral award. Learned arbitrator directed that in case the petitioner does not obtain further completion certificate for Wing “C” within four months from the date of the said award, the respondent shall be entitled to sell 15 flats in Wing “A” which were earmarked for the petitioner and adjust the sale proceeds thereof against the loss of profit from Wing “C”.

131. Learned arbitrator further directed that in case the petitioner wishes further completion certificate for Wing "C" and also obtain the occupation certificate for Wing "C" within the time limit stipulated in the award but the petitioner does not pay the respondent Rs.50 crores as directed in paragraph (j) within four months from the date of obtaining the occupation certificate for Wing "C" or does not surrender 3.37 flats to the respondent and parking space relating thereto, within the same period, the respondent shall be entitled to sell off 3.37 flats earmarked for the petitioner in Wing "C" and parking space relating thereto.

132. It is not in dispute that the only parties to the arbitration agreement were the petitioner and the respondent. Under the arbitration agreement entered into between the parties, all the disputes between the parties under the agreement entered into between the parties were required to be referred to arbitration for adjudication. In paragraph 192 of the arbitral award, learned arbitrator has given the names of all the parties and has held that the alleged allottees for 31 flats out of 28 flats are either Mr.Kiran Hemani, M.D. or his close family members which is clear from the chart certifying the details of the flats with the names and flat numbers. It is not in dispute that none of those parties whose names are mentioned in the said list were parties to the arbitration agreement.

133. In paragraphs 180 to 196 of the arbitral award, the learned

arbitrator has held that the petitioner was called upon by the respondent to produce / give particulars with reference to the list produced by the petitioner at Exhibit R-69 i.e. relating to 31 letters of allotment. In paragraph 186 of the arbitral award, the learned arbitrator recorded the submission made by the petitioner that the parties to 31 agreements for sale were not before the learned arbitrator and also the validity or otherwise of the said agreements was not the subject matter and thus not within the scope of arbitration and was beyond the jurisdiction of the learned arbitrator. The petitioner had also contended that the respondent was not entitled to seek any relief which would in any manner prejudicially affect the rights of any third parties with whom the said registered agreements were entered into.

134. Learned arbitrator held that the petitioner had not considered the alleged allotment letters of the year 2012-2013 in favour of those 31 persons with cheque numbers and dates of the cheques by which the alleged payments of Rs.50,000/- / Rs.1,00,000/- / Rs.1,25,000/- / Rs.1,35,000/- / Rs.1,75,000/- / Rs.3,00,000/- were made. Learned arbitrator held that even if such payments were actually made as alleged, they could be booked for the flats in other projects of the petitioner. It is held that it has already come on record that the petitioner had several on going construction projects for last 15 to 20 years. In paragraph 193 of the arbitral award, it is held by the learned arbitrator that the execution and registration of 15 agreements were duly done with *malafide* intention to create

evidence. They were executed *malafide* to defeat and frustrate the fruits of the award likely to be made in favour of the respondent as the petitioner also must have known that there was no substance in its defences regarding the breaches committed by the petitioner.

135. It is held that it is clear that there are no third parties outside the circle of the directors of the petitioner and they are the family members and closed relatives, no credence can be given either to the said letters of allotment or to the said agreements for sale. Learned arbitrator accordingly declared the letters of allotment and registration of the agreements executed by the petitioner for 31 flats in Wings "A" and "B" in favour of the Managing Director i.e. Mr.Kiran Hemani and his closed family members and in favour of other directors and their closed family members as sham, bogus, illegal and null and *void-ab-initio* and not binding on the respondent.

136. A perusal of the record indicates that even the respondent had sold some of the flats coming to his share under the development agreement to his relatives. Insofar as the petitioner is concerned, the petitioner is a limited company. The petitioner had examined the witness who was cross-examined by the respondent's counsel. The witness examined by the petitioner was asked in question no.249 whether the petitioner had any right or authority to enter into any agreement / registered document in respect of 15 flats at serial nos.1 to 15 mentioned in Exhibit R-69, the said witness in the cross-examination deposed that since the allotment of 31 flats had been

done in the year 2012 and token amount also was received from the flat buyers and the money was deposited in Kotak Bank escrow account since the flats were mortgaged with Kotak Bank, those agreements for 31 flats were executed and registered.

137. The said witness examined by the petitioner was asked a question recorded in question no.263 that whether it was true that none of the mortgagees i.e. Kotak Mahindra Bank Limited, Kotak Mahindra Prime Limited or India Infoline or in their registered Indentures of Mortgage in respect the said 31 flats, the petitioner had referred to in the alleged letters of allotment in respect of said 31 flats or given any notice of any such alleged allotment to any of the mortgagees. The counsel for the petitioner had objected to the question on the ground that there was no foundation led for such question. After such objection was recorded by the learned arbitrator, the learned arbitrator himself asked question to the witness examined by the petitioner 'whether he was disputing the fact whether those flats were mortgaged by him with the banks / financial institutions?' In response to the said question asked by the learned arbitrator, the said witness deposed that he was not disputing the fact that the flats were mortgaged but between 2012 and 2017, the mortgages were being redeemed and the flats were again being mortgaged with other banks / financial institutions. From January, 2017 onwards, there is no mortgage of 31 flats and the said three flats had been resold. The witness further deposed that the petitioner had informed the concerned mortgagee bank / financial institution at

the relevant time about the sale of the flats. The agreements for sale also refers to the flats being under mortgage and the payments were required to be deposited in the escrow account with the concerned bank / financial institution.

138. In question no.264, the said witness was asked to specify whether after each purported letters of allotment of 31 flats, the petitioner informed to the bank / financial institution of the letter of allotment and deposited any money received under the purported letters of allotment with any bank / financial institution. The said witness deposed that in the year 2012- 2013, at the time of allotment of flats the money was deposited in the escrow account of the respective financial institutions with which the concerned flats were mortgaged. The flats which were not mortgaged, advance amounts received in respect thereof were deposited in the bank account of the petitioner.

139. A perusal of the aforesaid part of evidence led by the petitioner and more particularly the cross-examination of the petitioner's witness by the respondent and partly also by the learned arbitrator, indicates that the respondent was fully aware of the letter of allotment, agreement for sale executed in favour of various parties in respect of 31 flats, about the mortgage of those flats in favour of various banks and the financial institutions. Though the petitioner had admitted the factum of issuance of the letter of allotment, execution of the agreement for sale, receipt of various consideration amount,

creation of mortgage which was existing on the date of arguments made before the learned arbitrator, the learned arbitrator not only declared those 31 agreements as sham, bogus, illegal and null and *void-ab-initio* and not binding on the respondent, but has also permitted the respondent to sell some of those flats in the event of the petitioner not paying the amount awarded in favour of the respondent.

140. Though specific ground was raised by the petitioner before the learned arbitrator challenging the jurisdiction of the learned arbitrator to pass order against those third parties who were not the parties before the learned arbitrator and were not parties to the arbitration agreement and were not the subject matter of the arbitral proceedings, the learned arbitrator without dealing with the said specific objection of the petitioner declared the entire transaction under those 31 agreements for sale as sham, bogus, illegal and null and *void-ab-initio* and not binding on the respondent. The only reason recorded by the learned arbitrator that all the 31 letters of allotment were in favour of Mr.Kiran Hemani, M.D. and his close family members or other directors of the petitioner and their family members. Learned arbitrator drew adverse inference that even if the payments were actually made by those 31 parties for purchase of those 31 flats, they could be for booking the flats in other ongoing construction projects of the petitioner on hand which were going on for last 15 to 20 years. It is held by the learned arbitrator that they are not third parties at the out set.

141. It is held by the learned arbitrator that all the directors of the petitioner and their close family members were the allottees and thus no credence could be given either to the said letter of allotment or for the said agreement for sale. In my view, since the petitioner being a separate legal entity, the agreement for sale entered into between the petitioner and those 31 flat purchasers even if they were in favour of the directors of the petitioner or their close relatives could not have been declared as sham, bogus, illegal and null and *void-ab-initio* and not binding on the respondent in view of the fact that none of those parties were the parties to the arbitration agreement nor were the parties to the arbitral proceedings. Learned arbitrator has no power to lift the corporate veil and to draw an inference that those transactions carried out by the petitioner were sham, bogus, illegal and null and *void-ab-initio* and not binding on the respondent.

142. Learned arbitrator has totally overlooked the crucial aspect in the matter that it was an admitted position that all those 31 flats were already mortgaged in favour of various banks or financial institutions. The respondent as well as the learned arbitrator had asked various questions to the witness examined by the petitioner relating to the mortgage of those flats in favour of the banks or financial institutions. Those 31 flats were secured in favour of those banks or financial institutions for the loans advanced to the petitioner. Those banks or the financial institutions were also not the parties either to the arbitration agreement or before the learned arbitrator.

143. In my view, even if those third parties would have been impleaded as the parties before the learned arbitrator, since they were not the parties to the arbitration agreement, no such order could be passed against such third parties by the learned arbitrator. By virtue of such directions issued by the learned arbitrator, in the impugned award declaring the agreements as sham, bogus, illegal and null and *void-ab-initio*, learned arbitrator has declared the security in favour of those banks or the financial institutions as nullity, sham, bogus and *void-ab-initio*. The rights accrued in favour of those flat purchasers are also declared as sham, bogus, illegal and null and *void-ab-initio* in their absence. Learned arbitrator has also granted power of sale of those flats which were not even the subject matter of the arbitral proceedings. The Supreme Court in case of **State Bank of India** (supra) has held that the arbitral tribunal has no jurisdiction to affect the rights and remedies of the third parties as the secured creditors in course of determining disputes before it.

144. In the said matter before the Supreme Court, the Supreme Court has considered a situation where the arbitral tribunal had passed an order under section 17 of the Arbitration & Conciliation Act, 1996 restraining the claimants and its heirs from alienating or encumbering, transferring any of his assets without the permission of the arbitral tribunal. The said order passed by the arbitral tribunal was confirmed by the High Court under section 37 of the Arbitration & Conciliation Act, 1996. The Supreme Court was pleased to set aside

the order passed by the High Court and the learned arbitrator holding that the arbitral tribunal had no jurisdiction to affect rights and remedies of the third party secured creditors in the course of determining disputes pending before it. The principles laid down by the Supreme Court in case of **State Bank of India** (supra) squarely applies to the facts of this case. I am respectfully bound by the said judgment.

145. In my view, the learned arbitrator has exceeded his jurisdiction by granting the reliefs against the third parties, who were not the parties to the arbitral proceedings and also to the arbitration agreement. This part of the award *ex-facie* demonstrates perversity and patent illegality.

146. Learned arbitrator has drawn an adverse inference against the petitioner and those third parties that the payments even if made would have been for the booking flats in the other projects of the petitioner. It was neither pleaded nor proved before the learned arbitrator that those payments were relating to the bookings made in the other projects of the petitioner. There was neither any such declaration sought by the respondent in the statement of claim claiming any rights in those 31 flats nor could be sought that those agreements with those 31 flat purchasers were sham, bogus, illegal and null and *void-ab-initio*. The dispute between the parties under the Agreement For Development & Supplemental Agreement was not in respect of 31 flats. The reliefs thus granted by the learned arbitrator

against the third parties in respect of those 31 flats is *ex-facie* without jurisdiction. Learned arbitrator has exceeded his jurisdiction by travelling beyond the terms of the arbitration agreement. The award thus shows patent illegality.

147. Insofar as the judgment of the Supreme Court in case of **Cheran Properties Limited** (supra) relied upon by Mr.Chinoy, learned senior counsel appearing for the respondent is concerned, the Supreme Court had considered a clause of the agreement whereby one of the party to the arbitration agreement had recognized the right of another party to the arbitration agreement and / his nominees to sell or transfer their holdings in the company to any other person of their choice, provided the proposed transferees accept the terms and conditions mentioned in the said agreement for management of that company and related financial aspects covered by the said agreement. The parties in whose favour the transfers were to be registered were described as the group companies. The Supreme Court considered that while one of the party was entitled to transfer his shareholdings, that was expressly subject to the condition of acceptance by the transferee of the terms and conditions of the agreement, the transferees were thus claiming through the parties to the arbitration agreement.

148. In my view, Mr.Ghelani, learned counsel for the petitioner is right in his submission that the arbitration clause considered by the Supreme Court in the said judgment i.e. in case of **Cheran**

Properties Limited (supra) was totally different. Under the said clause considered by the Supreme Court, even the nominees of the parties to the arbitration agreement had agreed to abide by the terms of the contract entered into by the parties. The Supreme Court has held that Court has to consider whether the text embodied in Section 35 is not so as to bind a third party made on behalf of the nominees, who had agreed to abide by the terms of the contract between the main parties. None of these 31 flat purchasers were the parties to the Agreement For Development or Supplement Agreement. The petitioner was entitled to sell the flats coming to its share to any party of its choice. None of these 31 flat purchasers were either nominees of the petitioner or claiming through them under the said Agreement For Development or Supplement Agreement or had purchased those flats as nominees of the petitioner.

149. The judgment of the Supreme Court in case of **Cheran Properties Limited** (supra) is thus clearly distinguishable in the facts of this case and would not assist the case of the petitioner. Section 35 of the Arbitration & Conciliation Act, 1996 thus pressed in service by the learned senior counsel for the respondent is misplaced. Learned arbitrator thus could not have rendered a perverse finding that those parties to whom 31 flats were sold were the nominees of the petitioner or were claiming through the petitioner. Learned arbitrator has overlooked the crucial oral evidence led by the petitioner on this issue. The award on this issue thus show patent illegality.

150. In my view since this part of the award is intertwined with other parts of the award and since it is not possible to segregate this part of the award with other reliefs granted by the learned arbitrator in favour of the respondent, in my view, Mr.Ghelani, learned counsel for the petitioner is right in his submission that the entire award deserves to be set aside on this ground also.

151. Be that as it may, this Court shall now consider the other grounds raised by the petitioner in respect of the other reliefs granted by the learned arbitrator independently of the reliefs granted against the third parties by the learned arbitrator in the later part of this judgment.

152. A perusal of the arbitral award indicates that the learned arbitrator has declared a charge on some of the flats of the petitioner in the arbitral award and has directed that the petitioner would not be able to sell some of those flats until the monetary claim awarded by the learned arbitrator in favour of the respondent were paid by the petitioner. A perusal of the record including the Agreement For Development and Supplementary Agreement entered into between the parties clearly indicates that no such charge on the assets of the petitioner was created by the petitioner in favour of the respondent. In my view, charge of any property could be either created by operation of law or by agreement of parties. In the pleadings filed by the respondent before the learned arbitrator neither any such charge was

pleaded nor proved by the respondent. The grant of such relief by the learned arbitrator was thus *ex-facie* beyond his jurisdiction. The learned arbitrator has not rendered any finding that the petitioner had created charge in respect of any of the flats in favour of the respondent but has granted the reliefs by way of declaration of charge on some of the flats of the petitioner. This part of the award also shows patent illegality and thus deserves to be quashed and set aside on this ground also. There is no substance in the submission of the learned Senior Counsel for the respondent that such directions were given by the learned arbitrator, in view of prayer clause (h) of the statement of claim.

153. A perusal of the arbitral award and more particularly the reliefs granted in paragraphs 203 (c) to (l), (m) to (q), (t), (u) and (v) indicates that these reliefs granted by the learned arbitrator are granted in execution of the arbitral award rendered by the learned arbitrator in the arbitral award itself on the belief that the arbitral award was final and was not capable of being challenged. The learned arbitrator could not have issued such directions to execute the award as part of the arbitral award itself. In my view, the learned arbitrator has exceeded his powers by granting such reliefs, which could be granted only by the executing Court in the event of the challenge to the arbitral award having failed and not in anticipation of the arbitral award would attain finality after rejection to such challenge of the arbitral award. The award shows patent illegality on this ground also. There is no substance in the submission of learned

Senior Counsel for the respondent that the award cannot be set aside on this ground since the respondent will have to file an application for execution of the arbitral award in future. The learned Senior Counsel however could not oppose the submissions of the learned Counsel for the petitioner that several of such directions referred to aforesaid were granted to execute the arbitral award in anticipation and that such reliefs could be granted only by the executing Court after the arbitral award would have attained finality.

154. A perusal of the arbitral award and more particularly the directions issued in paragraphs 203 (c) to (l) and (m) to (q) clearly indicates that the learned arbitrator has directed the petitioner to carry out various acts, to obtain various permissions from the authorities within the time prescribed and based on such compliance further directions issued for execution of various documents, payment of stamp duty, etc. The authorities from whom the petitioner was directed to obtain various permissions were admittedly not the parties to the arbitral proceedings. The learned arbitrator has also directed the respondent to carry out construction of 6th to 22nd Floor on Wing 'C' as per the sanctioned building's plan dated 21st October, 2010, once the petitioner obtains further commencement certificate for Wing 'C', as directed in the said award. The learned arbitrator issued various such directions against the petitioner and indirectly against the authorities for granting various permission in implementation of the reliefs of specific performance granted by the learned arbitrator. The learned arbitrator has directed the respondent

to carry out construction within 18 months from the date of receiving further commencement certificate for Wing 'C' and to apply to the Slum Rehabilitation Authority for occupation certificate for Wing 'C'.

155. In my view, in view of Section 10, 12, 14, 20 and 21 of the Specific Relief Act, 1963, the directions issued by the learned arbitrator for carrying out various acts summarized aforesaid requires continuous supervision by the Court with minute details. In view of these circumstances, the prayer for specific performance being a discretionary relief ought not to have been granted by the learned arbitrator. The prayers for specific performance thus granted by the learned arbitrator are *ex-facie* contrary to the Section 10, 12, 14, 20 and 21 of the Specific Relief Act, 1963.

156. A perusal of the record further indicates that though in prayer clause (b) of the statement of claim filed by the respondent, the respondent had prayed for specific performance based on the Letter of Intent dated 7th March, 2012, the learned arbitrator has granted reliefs of specific performance in favour of the respondent based on Letter of Intent of 2010. In my view, the learned arbitrator has thus acted beyond the terms of the Agreement for Development and Supplementary Agreement entered into between the parties and has also travelled beyond the reliefs prayed by the respondent. The learned arbitrator did not appreciate the fact that the respondent also had not started construction on 6th July, 2004 and had refused to perform its part of the obligation. The petitioner had not complied with

its part of obligation to shift 107 PAPs. The obligation of the petitioner to shift 107 PAPs was on the SRA granting completion certificate in respect of Wing 'C'.

157. The learned Arbitrator has however granted specific performances in favour of the respondent on the ground that the respondent was not expected to commence the construction and incur to additional costs for carrying out further construction beyond 5th Floor though the petitioner had not made any arrangement for shifting 107 PAPs to the other projects of the petitioner. The learned arbitrator totally overlooked the pleadings, documents produced by the petitioner, evidence led by the petitioner in support of his plea that the respondent had not complied with his part of obligation under the said Agreement For Development and Supplementary Agreement.

158. The learned arbitrator/Court cannot supervise whether the petitioner would be able to shift those 107 PAPs in the other projects of the petitioner or not. The specific performance of the Agreement For Development and Supplementary Agreement in the facts and circumstances of this case was dependent upon various uncertain eventualities, which could not be foreseen or contemplated by the parties or by the learned arbitrator. The specific performance of the agreement with a direction to construct 6th to 22nd Floors could be complete only upon completion of entire chain of events such as permissions to be obtained, shifting of PAPs, expenditure of huge amount, etc. In the event of failure of even one event or step from

such chain of events, the direction to complete the construction of the building as directed by the learned arbitrator cannot be complied with.

159. Under Section 14 of the Specific Relief Act, 1963, a contract cannot be specifically enforceable, if the performance of such contract involves the performance of a continuous duty and supervision, which the Court cannot supervise. The relief of specific performance granted by the learned arbitrator in this case is for construction of a building from 6th to 22nd Floor. Construction of various floors would be preceded by several permissions to be obtained from the authorities within the time prescribed by the petitioner and to be implemented by the respondent while carrying out construction of the balance portion of the building. The petitioner has been also asked to shift the PAPs to some other plot.

160. A perusal of the record further indicates that the respondent also was not ready and willing to comply with its part of obligation under the provisions of said agreements and had imposed various counter conditions before commencement of a construction of 6th to 22nd Floor. It was thus clear that the respondent was also not ready and willing to perform his part of the obligation under those two agreements and in any event all throughout. On this ground also the learned arbitrator could not have granted prayer for specific performance of the contract. The conduct of the respondent also was relevant to be considered by the learned arbitrator while granting

prayer for specific performance.

161. Supreme Court in cases **N.P. Thirugnanam vs. R. Jagan Mohan Rao and Others (1995) 5 SCC 115** and in particular paragraphs 5 and 6, **Laxman Tatyaba Kankate vs. Taramati Harishchandra Dhatrak (2010) 7 SCC 717** and in particular paragraphs 19 to 22, **Bal Krishna vs. Bhagwan Das (2008) 12 SCC 145** and in particular paragraph 14, **Zarina Siddiqui vs. A. Ramalingam (2015) 1 SCC 705** and in particular paragraphs 24 to 28, 32 and 33, **His Holiness Acharya Swami Ganesh Dassji vs. Sita Ram Thaper (1996) 4 SCC 526** and in particular paragraphs 2 and 3, **Jaswinder Kaur (Now Deceased) Through her Legal Representatives & Ors. vs. Gurmeet Singh & Ors. (2017) 12 SCC 810** and in particular paragraphs 7 to 16 and **Aniglase Yohanan vs. Ramlatha & Ors. 2005 (7) SCC 534** and in particular paragraphs 12 to 14, has laid down the guidelines for exercising the powers of Court to grant specific performance of an agreement.

162. The following principles of law can be culled out from the aforesaid Judgments:-

- a) Remedy for specific performance is an equitable remedy and is at the discretion of the Court, which discretionary powers are required to be exercised according to settled principles of law and not arbitrarily as adumbrated under Section 20 of the Specific Relief Act, 1963. Under Section 20, the Court is not bound to grant the relief just because

there was a valid agreement of sale. The plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. The Court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances.

- b) It is duty of the Court while exercising discretionary jurisdiction, to take care to see that process of the Court is not used as an instrument of oppression giving an unfair advantage to the plaintiff as opposed to the defendant. The discretion of the Court has to be exercised as per the settled judicial principles.
- c) The specific performance of the contract cannot be enforced in favour of a person who fails to aver and prove his readiness and willingness to perform the essential terms of the contract. The compliance with the requirement of Section 16 (c) of the Specific Relief Act, 1963 is mandatory and in the absence of proof of the same, the suit cannot succeed.

- d) Relief of part performance cannot be granted where inability to perform arises because of the plaintiff's conduct.

163. A perusal of the record in this case clearly indicates that the respondent had not proved his readiness and willingness to perform his part of the obligation and has imposed counter conditions against the petitioner contrary to the terms of the Agreement For Development and Supplementary Agreement before proceeding with the construction of the building under those two agreements. The learned arbitrator thus ought to have taken into consideration the conduct on the part of the respondent also while granting prayer for specific performance in favour of the respondent.

164. I am not inclined to accept the submission of Mr. Chinoy, learned Senior Counsel for the respondent that unless the petitioner would have fully satisfied the respondent that he had made appropriate provision for shifting 107 PAPs to some other plot, the respondent was not required to proceed with the construction of building. The interpretation of clause 6 (iii) of the Agreement For Development by the learned arbitrator strongly relied upon by the learned Senior Counsel for the respondent in support of this submission is not a possible interpretation. The respondent in anticipation of the failure of any obligation on the part of the petitioner to comply with could not have refused to comply with his part of obligation and to proceed with the construction of work. The petitioner

was also entitled to a share in the flats to be constructed by the respondent in the said building under those two agreements.

165. The learned arbitrator has awarded damages in the sum of Rs.53 crores as compensation for the period from 19th July, 2016 till the date of award for the alleged delay on the part of the petitioner in not obtaining further C.C. for Wing 'C' and if not obtained within 4 months from the date of the award. The learned arbitrator has awarded further compensation in the sum of Rs.50 crores for alleged delay in obtaining further C.C. for Wing 'C' for the period of 24 months from the date of the award till issuance of occupation certificate for Wing 'C' within 4 months from the date of issuance of occupation certificate for Wing 'C'. These reliefs for compensation have been awarded by the learned arbitrator in addition to the prayer for specific performance in favour of the respondent.

166. The learned arbitrator while granting such prayer for compensation in favour of the respondent in addition to the prayer for specific performance has totally overlooked various parts of the evidence led by the petitioner. A perusal of the record further indicates that the learned arbitrator himself was cross-examining the witness examined by the petitioner number of times. In the impugned award, the learned arbitrator has selected some of the answers given by the witness examined by the petitioner in response to the questions asked by the learned arbitrator and overlooked the other part of the evidence while awarding claim for compensation in favour

of the respondent. A perusal of the record clearly indicates that the answers given by the witness to question no. 1, 36, 67, 69, 108 to 110, 136, 171 and 227 have been totally overlooked by the learned arbitrator, which part of the evidence was crucial for the purpose of deciding the claim for damages. The learned arbitrator also overlooked the admitted fact that both the parties had sold some of the flats at ready reckoner rates rates, which rates were much lesser than the rate considered by the learned arbitrator while awarding claim for damages in lieu of specific performance. The right of the petitioner to obtain further FSI is also jeopardized by the learned arbitrator while granting prayer for specific performance and rejecting counter claim filed by the petitioner.

167. A perusal of the record further indicates that the learned arbitrator while granting prayer for specific performance and awarding claim for damages has also considered the alleged delay in the other projects of the petitioner and has drawn adverse inference against the petitioner based on such alleged delay. The alleged delay on the part of the petitioner in the other projects of the petitioner were neither pleaded nor proved nor was the subject matter of consideration before the learned arbitrator. Since none of the parties were concerned with the alleged delay on the part of the petitioner in other projects, even if there was any delay in the other projects on the part of the petitioner, the same could not be a ground for granting specific performance in favour of the respondent or awarding compensation in lieu of specific performance.

168. A perusal of the record further indicates that after conclusion of arguments, the learned arbitrator also placed reliance on a news report in Times of India pertaining to some other alleged event of some other project of some other developers, which was neither part of any record nor referred or relied upon by any party and was of the date subsequent to the conclusion of arguments while allowing the claim for specific performance and damages in favour of the respondent. The petitioner also had brought on record certain documents after conclusion of the arguments for consideration of the learned arbitrator. The learned arbitrator however refused to consider the those documents produced by the petitioner on the ground that the same were not part of pleadings and were produced at belated stage.

169. In my view, the learned arbitrator could not have considered the evidence not produced by the parties and also more particularly after conclusion of the arguments without giving an opportunity to the parties to deal with such additional material in the impugned award, which the learned arbitrator himself had come across while granting prayer for specific performance and claim for damages. The impugned award clearly indicates that the learned arbitrator has committed violation of principles of natural justice by relying upon such material not forming part of the evidence produced by the parties. Such additional material cannot be considered even a part of evidence. By that as it may, the learned arbitrator has not treated

both the parties equally while considering the additional documents after conclusion of the arguments. The learned arbitrator has applied different yardstick to the evidence produced by both the parties.

170. I am not inclined to accept the submission of the learned Senior Counsel for the respondent that before considering the said report published in Times of India in paragraph 49 of the arbitral award, the learned arbitrator had already rendered various findings against the petitioner, which were sufficient for the purpose of granting prayer for specific performance and damages in favour of the respondent. Reliance thus placed by the learned Senior Counsel on the Judgment of Supreme Court in case of **Madhya Pradesh Housing Board** (supra) is misplaced and is even otherwise clearly distinguishable in the facts of this case.

171. In so far the claim for damages awarded by the learned arbitrator in favour of the respondent is concerned, there is no dispute that the respondent had relied upon various documents contained in box files before the learned arbitrator. The petitioner had specifically raised objection about admissibility of such disputed documents most of which were third party documents before the learned arbitrator. The learned arbitrator had taken those documents contained in those box files on record, subject to objection of the petitioner. A perusal of the entire award clearly indicates that the learned arbitrator however did not decide the admissibility of those disputed documents raised by the petitioner while awarding the claim

for damages @ Rs.72,000/- per sq. ft., carpet area and placed reliance on those unproved documents in the arbitral award. The respondent did not lead any evidence to prove the existence and contents of those unproved documents before the learned arbitrator.

172. Though, the arbitral tribunal is not bound by the provisions of the Evidence Act, principles of natural justice applies even in the arbitral proceedings. The learned arbitrator cannot consider an unproved documents, which is inadmissible in evidence. This Court in case of **M/s. ONGC Ltd.** (supra) after adverting to the judgment of Supreme Court in case of **M/s. Bareilly Electricity Supply Co Ltd. Vs. The Workmen & Ors. - (1971) 2 SCC 617**, judgment of Supreme Court in case of **Narbada Devi Gupta Vs. Birendra Kumar Jaiswal – (2003) 8 SCC 745** and judgment of Division Bench of this Court in case of **Bi-Water Penstocks Ltd. Vs. Municipal Corporation of Gr. Bombay – 2011 (3) Mh.L.J. 706** has held that though the arbitral tribunal is not bound by the Civil Procedure Code, 1908 and Indian Evidence Act, 1872, the arbitral tribunal is still bound by the principles of Indian Evidence Act, 1872 and Code of Civil Procedure, 1908 and also the principles of natural justice. The principles of law laid down by this Court in case of **M/s.ONGC Limited** (supra) and the aforesaid three judgments referred to and relied upon by this Court, squarely apply to the facts of this case. In my view, the learned arbitrator by relying upon the unproved disputed documents has committed a gross violation of principles of natural justice and principles of Indian Evidence Act and thus the claim for damages awarded by the learned

arbitrator based on those unproved disputed documents deserves to be set aside on this ground also.

173. Be that as it may, the learned arbitrator totally overlooked the evidence on record that the respondent had also sold the flats in the year 2012 at around Rs.12,000/- per sq. ft. Both the parties had sold flats at the ready reckoner rates. It was placed on record that even in the year 2016, the ready reckoner rates prevailing in the locality of the suit property showed Rs.17,772.203. However, the learned arbitrator has considered the rate of Rs.72,554/- per sq. ft. while awarding the claim for damages in favour of the respondent.

174. A perusal of the record further indicates that the petitioner had cross-examined Mr. Maniar, who was examined by the respondent, who had considered only three documents in the valuation report. The said valuer had not considered any instances of the sale of flats in the other wings in the same property effected by the respondent himself. The said witness examined by the respondent had admitted this fact in the cross-examination.

175. The Supreme Court in case of **Kailashnath Associates** (supra) has held that where it is possible to prove actual damages or losses, such proof is not dispensed with. In my view, the respondent had failed to prove the damages suffered if any before the learned arbitrator and thus no such claim for damages could have been awarded by the learned arbitrator in favour of the respondent. The

Supreme Court in case of ***Bharat Coking Coal Limited*** (supra) has held that it is not unusual for the contracts to claim loss of profit arising out of diminution in turnover on account of delay in the matter of completion of the work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted. It is held that in the absence of any evidence, the arbitrator could not have awarded such claim.

176. In the facts of this case also the respondent did not commence the construction of 6th floors onwards admittedly. It was the case of the petitioner that though the petitioner had obtained the requisite permission from the authority, the respondent did not commence the construction of 6th and above floors. In these circumstances, the learned arbitrator could not have awarded claim for damages unless the same was actually proved by the respondent. The learned arbitrator in this case has not only granted relief of specific performance but has also awarded compensation of a substantial amount in addition to claim for specific performance. The principles laid down by the Supreme Court in ***Bharat Coking Coal Limited*** (supra) would apply to the facts of this case. I am respectfully bound by the said Judgment.

177. Patna High Court in case of ***Union of India Vs. Bajinath***

Madan Lull (supra) has held that Section 73 of Indian Contract Act makes it mandatory that damage or loss must be proved. The measure of loss is the difference between the market price on the due date and the price actually obtained by the sale of goods. The entire award passed by the learned arbitrator awarding huge amount of claim of damages is contrary to the principles laid down by the aforesaid Judgments including the Judgment of Patna High Court in case of **Union of India Vs. Bajinath Madan Lull** (supra).

178. In so far as the submission of learned Senior Counsel for the respondent that the learned arbitrator has rightly considered the market value of the flats in Wing 'C' as Rs.72,000/- per sq. ft. carpet area after considering the evidence on record is concerned, in my view there is no merit in this submission of the learned Senior Counsel for the respondent. Learned arbitrator has totally overlooked the evidence led by the petitioner and also the cross-examination of the respondent by the petitioner's counsel.

179. There is no substance in the submission of the learned Senior Counsel that though the learned arbitrator had considered the cost of construction carried on by the respondent upto 5th floor as Rs.20 Crores, there was no adverse impact on liability of the petitioner or on the contrary the amount considered by the learned arbitrator as cost of construction was beneficial to the petitioner and not against the petitioner. The cost of construction considered by the learned arbitrator is without any evidence on record. In my view incorrect

amount of estimate of cost of construction would have bearing on the computation of damages i.e. difference between expected sale price and estimated cost of construction.

180. In so far as the rejection of counter claim by the learned arbitrator made by the petitioner is concerned, the learned arbitrator rejected the counter claim mainly on the ground that there was no load bearing capacity beyond 22 floors. The respondent had neither pleaded that there was no load bearing capacity beyond 22 floors nor had proved. The learned arbitrator has taken a casual approach in so far as adjudication of the counter claim made by the petitioner in the arbitral award is concerned.

181. The learned arbitrator in paras 53 and 54 of the arbitral award made it clear that the Tribunal was constituted to adjudicate upon the disputes between the parties and thus he did not have jurisdiction to give directions to any authority nor was suppose to substitute any directions even by the Slum Rehabilitation Authority or any other agency in respect of the obligation to be carried by the parties in relation to the Andheri Kamgar Nagar Cooperative Housing Society Scheme or in relation to Shivsakti Nagar, Kandivali Project. Learned arbitrator however issued various directions to the petitioner and indirectly against the authorities contrary to such finding in those two paragraphs. The arbitral award clearly shows inconsistencies and contradictions on the face of the arbitral award and shows perversity.

182. In my view, Mr. Ghelani, learned Counsel for the petitioner is right in his submission that though under the provisions of the Agreement For Development, the petitioner was liable to refund Rs.4 Crores to the respondent 2 months after the petitioner would receive entire 45% of the total construction in Wing 'A', 'B' and 'C', contrary to the said provision of the Agreement, the learned arbitrator directed the petitioner to refund a sum of Rs.3.90 Crores on receipt of the keys of the 16 flats only in Wing 'B'. The learned arbitrator has thus acted contrary to the terms of the contract and has re-written the contract, which is not permissible. Similarly, the direction issued by the learned arbitrator to the petitioner to pay stamp duty is also contrary to Clause 6 (iii) of the Agreement For Development. This part of the award also thus deserves to be set aside on this ground.

183. The learned arbitrator has also awarded payment of interest on interest free deposit against the petitioner, which part of the award is also contrary to the terms of the contract and shows patent illegality. In my view, the award rendered by the learned arbitrator is totally one sided and is without considering the number of submissions made by the petitioner, which were recorded in the written arguments filed by the petitioner before the learned arbitrator.

184. In so far as the submission of the learned Counsel for the petitioner that the learned arbitrator could not have arbitrate upon the disputes and differences between the petitioner and M/s. Aurora Properties & Investments or between the respondent and the said

M/s. Aurora Properties & Investments and has granted reliefs against the said M/s. Aurora Properties & Investments though the said party was not a party to the arbitration agreement or in the arbitral proceedings is concerned, learned arbitrator in the para 206 of the arbitral award has clarified that the said arbitral award does not deal with any of the five flats in Wing 'A', three flats in Wing 'B' and four flats in Wing 'C' earmarked for M/s. Aurora Properties & Investments. The learned arbitrator however has accepted the defence raised by the respondent in the pending proceedings between the petitioner, respondent and M/s. Aurora Properties & Investments without jurisdiction.

185. In so far as the submission of the learned Counsel for the petitioner that the learned arbitrator had recast the issues directly in the award without giving an opportunity to the petitioner is concerned, a perusal of the record indicates that though the learned arbitrator had recast various issues in the arbitral award directly, none of those issues recast by the learned arbitrator would cause any prejudice to the case of the petitioner. I am thus not inclined to accept this submission made by the learned Counsel for the petitioner.

186. In so far as the allegations of bias made by the petitioner against the learned arbitrator in the arbitration petition is concerned, it is not in dispute that no application under Section 13 of the Arbitration Act was made by the petitioner before the learned arbitrator or no such case of alleged bias has been made out by the petitioner

against the learned arbitrator. There is thus no merit in this submission of the learned Counsel for the petitioner.

187. The Supreme Court in case of **Associate Builders** (supra) has held that if the finding rendered by the arbitral tribunal is based on no evidence or an arbitral tribunal takes into account something irrelevant to the decision which it arrives at or ignores vital evidence in arriving at its decision, such decision would necessarily be perverse. The Supreme Court in the said Judgment has also dealt with the concept of “patent illegality” and held that such illegality must go to the root of the matter and cannot of a trivial nature. It is held that an arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. It is held that the correspondence exchanged by the parties are required to be taken into consideration for the purpose of construction of the contract.

188. Supreme Court in case of **Ssangyong Engineering & Construction Co. Ltd.** (supra) after adverting to several judgments of Supreme Court including the Judgment in case of **Associate Builders** (supra) has held that the decision which is perverse and understood in paragraph 31 and 32 of the **Associate Builders** (supra) while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no

evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence in as much as such decision is not based on evidence led by the parties and therefore would also have to be characterised as perverse. It is held that if the construction of the contract by the arbitrator is not even a possible interpretation to take and if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2A) of the Arbitration Act.

189. The learned arbitrator in this case has totally overlooked the evidence led by the petitioner and also the cross-examination of the respondent by the petitioner's counsel while allowing various claims made by the respondent and rejecting the counter claim made by the petitioner. The interpretation of the provision of contract by the learned arbitrator is not a possible interpretation and shows patent illegality. Learned arbitrator has clearly wandered outside the contract and has dealt with the matters not subject matter of Agreement For Development and Supplementary Agreement. The principles laid down by the Supreme Court in case of **Ssangyong Engineering & Construction Co. Ltd.** (supra) and in case of **Associate Builders** (supra) would clearly apply to the facts of this case. I am respectfully bound by those principles laid down by the Supreme Court.

190. In my view, there is no substance in the submission of the learned Senior Counsel for the respondent that the learned arbitrator having rendered findings of fact, this Court cannot interfere with those findings of fact in the facts of this case. In my view, since the findings of fact rendered by the learned arbitrator are contrary to the principles laid down by the Supreme Court in case of **Ssangyong Engineering & Construction Co. Ltd.** (supra) and in case of **Associate Builders** (supra) overlooking the evidence led by the petitioner which were crucial for the purpose of adjudicating the dispute between the parties, this Court has ample power to interfere with such perverse finding of fact while exercising the powers under Section 34 of the Arbitration Act.

191. In so far as the order dated 12th October, 2016 passed by the learned arbitrator under Section 17 of the Arbitration Act in the application filed by the respondent for interim measures is concerned, the Supreme Court by an order dated 14th December, 2016 passed in Special Leave to Appeal (C) No. 35563 of 2016 has made it clear that any observations made by the learned arbitrator or this Court in the appeal arising out of the order passed by the learned arbitrator in Appeal under Section 37 of the Arbitration Act, shall not come in the way in deciding the matter finally between the parties.

192. In so far as the submission of the learned Senior Counsel for the respondent that the petitioner was under an obligation to satisfy

the respondent under Clause 6(iii) of the Agreement For Development that the petitioner would comply with the obligation to provide tenements for PAPs in another property or on alternate site and since the petitioner had not satisfied the respondent about compliance of such obligation, the respondent was not bound to start construction for 6th and upper floors is concerned, in my view there is no merit in the submission of the learned Senior Counsel for the respondent. The obligation of the petitioner to shift those PAPs was only after issuance of completion certificate by the Slum Rehabilitation Authority and not prior thereof. It is thus clear that the respondent was not ready and willing to comply with his part of the obligation all throughout and thus on this ground, the learned arbitrator could not have granted relief of specific performance in favour of the respondent.

193. In so far as the submission of the learned Counsel for the petitioner that the learned arbitrator has awarded different rate of interest on different claims is concerned, since the entire award rendered by the learned arbitrator shows patently illegality and deserves to be set aside on that ground, the direction to pay interest in favour of the respondent also deserves to be set aside.

194. The learned arbitrator in the facts and circumstances of this case could not have awarded cost of Rs.1,50,00,000/- to the respondent in view of the claim filed by the respondent itself could not have been awarded by the learned arbitrator. The award in

respect of payment of cost also is set aside.

195. I therefore pass the following order:-

- a) Arbitral Award dated 7th September, 2018 passed by the learned arbitrator is set aside.
- b) Commercial Arbitration Petition No. 527 of 2019 is allowed in terms of prayer (a).
- c) No order as to costs.

(R.D. DHANUKA. J.)