

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION No. 35 of 2019.

Raymond Limited	..Petitioner.
Vs	
Akshaypat Singhania & Anr	..Respondents.

WITH

ARBITRATION PETITION No. 36 of 2019.

Raymond Limited	..Petitioner.
Vs	
Veenadevi Singhania & Ors	..Respondents.

Mr. Janak Dwarkadas, Senior Advocate a/with Mr. Gaurang Joshi, Mr. Chirag Ramdev, Mr. Dhawal Mehta, Mr. Suraj Juneja, Ms. Kaidokht Vasania, Mr. Shachi Udeshi, Mr. Aryan Srivastava i/by Wadia Ghandy & Co. for the petitioner in ARBP/35/2019.

Mr. Pravin Samdani, Senior Advocate a/with Chirag Kamdar, Mr. Dhawal Mehta, Mr. Suraj Juneja, Ms. Kaidokht Vasania, Ms. Sachi Udeshi, Mr. Aryan Srivastava i/y Wadia Ghandy & Co. for petitioner.

Dr. Birendra Saraf, Advocate, Mr. Naushad Engineer, Mr. Rohan Dakshini, Ms. Namrata M. Shah, Ms. Aakanksha Saxena and Mr. Bhavin Shah i/by M/s Rashmikant and Partners for Respondent No. 1 and 2 in ARBP No. 36/2019 and for Respondent No.1 in ARBP/35/2019.

CORAM : B. P. COLABAWALLA, J.

DATED :- 8th February, 2019.

ORAL JUDGEMENT:

1. These arbitration petitions have been filed under Section 37 of the Arbitration and Conciliation Act, 1996 (for short “**the Act**”) challenging the common order passed by the Arbitral Tribunal dated 3rd December, 2018 (for short “**the impugned order**”). The petitioner in both these Petitions was respondent No.1 before the Arbitral Tribunal. Respondent No.1 in Arbitration Petition No.35 of 2019 and respondent Nos.1 & 2 in Arbitration Petition No.36 of 2019 were the claimants before the Arbitral Tribunal. For the sake of convenience, I shall refer to the parties as they were arrayed before the Arbitral Tribunal.

2. The Arbitral Tribunal, vide the impugned order, directed respondent No.1 to permit the claimants' Architect and Valuer along with the claimants and/or his/her

representative and their Advocate in the presence of respondent No.1's representative and their Advocate, to visit and take inspection of the site in which the suit premises are situated as per the mutual convenience of both parties. The Arbitral Tribunal further directed that such exercise shall be undertaken within ten days from the date of the said order. It is this order that is assailed before me.

3. Before dealing with the rival submissions, it would be necessary to set out some bare facts. Considering that the facts in both the petitions are identical, I shall refer to the facts in Arbitration Petition No.35 of 2019.

4. The petitioner herein (respondent No.1 before the Arbitral Tribunal) is a company incorporated under the Companies Act whose shares are listed on the Bombay Stock Exchange and the National Stock Exchange. The petitioner (respondent No.1 before the Arbitral Tribunal) is the owner of a building called JK House situate at 59-A Bhulabhai Desai Road, opposite Breach Candy Hospital, Mumbai 400 026.

5. Respondent No.1 herein (claimant before the Tribunal) filed a claim against the petitioner herein and respondent No.2 herein seeking specific performance of a tripartite agreement dated 6th November, 2007. This agreement was entered into between the claimant, respondent No.1 and respondent No.2 in respect of a proposed duplex residential premises admeasuring approximately 5185 square feet (for convenience referred to hereinafter as the **“suit premises”**), situated in the newly reconstructed JK House premises. In the statement of claim filed before the Arbitral Tribunal, specific performance is sought of this tripartite agreement and the claimant has also sought compensation for shortfall in the area of the suit premises (and of which specific performance is sought). Alternatively, the claimant has also claimed compensation in lieu of specific performance, in the event the Arbitral Tribunal is of the opinion that specific performance cannot or ought not to be granted.

6. To this statement of claim, respondent No.1 filed

its statement of defence and thereafter the Arbitral Tribunal framed the points of determination. The parties then filed their compilation of documents and were directed to file their admission and denial of documents, which was accordingly done. Thereafter, time was fixed for filing their respective affidavits of evidence. This time was extended from time to time.

7. Be that as it may, on 5th November, 2018 respondent No.1 received a letter from the Advocate of the claimant inter alia stating that the Architect / Valuer appointed by the claimant was required to give evidence on their behalf, and for this purpose inspection of the redeveloped JK House building was required. The aforesaid letter was responded to by respondent No.1 through its Advocate's letter dated 14th November, 2018 inter alia pointing out that there was no legal basis for seeking such inspection and that too at such a belated stage. It is in these circumstances that the claimant filed an application dated 26th November, 2018 under Section 17 of the Act seeking directions against the respondents to permit the claimant's

valuer and architect (alongwith the claimant) to visit and inspect the site (i.e. the newly reconstructed JK House building) so as to enable the said valuer / architect to file their affidavit of evidence on behalf of the claimant.

8. This application was contested by the respondents by filing their reply on 28th November, 2018. It was contended that (i) the application was without any merit, baseless and unjustified in fact and in law; (ii) the assessment of the claim for damages does not involve or require inspection of the premises; (iii) the application moved under the provisions of Section 17 of the Act was not maintainable; and (iv) the same was moved with an ulterior motive to somehow enter upon and get access to the newly reconstructed JK House building only with a view to harass the respondents. It was also contended that there was no need or purpose for valuation as the said information was not only available with claimant but was also freely available in the public domain and easily accessible to the architect/valuer, appointed by the claimant. It was on all these grounds that the application filed by the claimant for

inspection of the newly redeveloped JK House building was opposed. This application was thereafter heard by the Arbitral Tribunal on 28th November, 2018 and the impugned order was passed on 3rd December, 2018 in terms of what I have already stated above. Being aggrieved by this order of the Arbitral Tribunal (dated 3rd December, 2018) the present petitions have been filed seeking to challenge the said order.

9. In this factual backdrop, Mr. Dwarkadas, learned Senior Counsel appearing on behalf of the petitioner in Arbitration Petition No.35 of 2019 (respondent No.1 before the Arbitral Tribunal), firstly submitted that the reliefs granted by the Arbitral Tribunal were beyond the scope of Section 17 of the Act. In this regard, he brought to my attention the provisions of Section 17 and submitted that the Arbitral Tribunal can only pass an order under Section 17 for an interim measure of protection in respect of any of the matters as more particularly described in sub-clauses (a) to (e) of Section 17 (1) (ii) of the Act. He submitted that if one looks at the impugned order, the

directions sought and given by the Arbitral Tribunal were not in the nature for granting any interim measure of protection in relation to the suit premises and hence the directions passed were clearly beyond the scope of Section 17. Mr. Dwarkadas submitted that the Arbitral Tribunal failed to appreciate that one of the powers conferred under Section 17 are for the purposes of the detention, preservation or inspection of any property that is the subject-matter of the dispute in arbitration but only with a view to provide an interim measure of protection in relation thereto. According to Mr. Dwarkadas, the Section 17 application, as filed, was not for the purposes of securing protection or preservation of the suit premises but was in the nature of gathering evidence and therefore beyond the purview of Section 17 of the Act. Mr. Dwarkadas submitted that the Arbitral Tribunal was not supposed to gather evidence for claimant. In these circumstances, Mr. Dwarkadas submitted that the impugned order be set aside on this ground alone.

10. Mr. Dwarkadas then submitted that even

otherwise the Arbitral Tribunal was not justified in passing the directions that it did. He submitted that vide the impugned order, the Arbitral Tribunal directed respondent No.1 to permit the claimant's Valuer and Architect to inspect the site in which the suit premises were situated. According to Mr. Dwarkadas, the directions regarding inspection were wholly unnecessary in view of the fact that the claimant was fully aware about the alleged shortfall, if any in the area of the suit premises. In this regard, he brought to my attention the averments in paragraph 41 of the statement of claim wherein it is stated that *"the apartment on the 21st and 22nd floors are single apartments and not a duplex apartment. Even more significantly, the apartments on the 21st and 22nd floors admeasure only 226.70 sq. meters each, which is equivalent to 2440.17 sq. ft. each, that too built up area. The duplex apartments on the 23rd and 24th floors jointly admeasure 358.41 sq. meters, which is equivalent to 3858 sq. ft., that too built up area. The said apartments on the 21st, 22nd, 23rd, and 24th floors were stated to be two apartments each of 5185 sq. ft. and each apartment was a duplex apartment."* This being the case, according to Mr. Dwarkadas, there was absolutely no necessity for

appointing an architect to inspect the property for the purposes of calculating what is the exact area of the suit premises, especially considering that they themselves were fully aware as to what the shortfall was.

11. As far as appointment of the valuer is concerned, Mr. Dwarkadas submitted that for the purposes of valuing the property there was no need to appoint a valuer as that could easily be determined by taking into account comparable sale instances in neighbouring buildings and the value could be arrived at after taking such evidence on record. This being the case, he submitted that even on the merits of the application, the Tribunal was not justified in passing the directions that it did. Mr. Dwarkadas submitted that looking to the nature of the application itself it was quite clear that the application was preferred only with an ulterior motive and which has now become clear, if one reads the letter dated 3rd December, 2018 addressed by the Advocates for the claimant to the Advocates for respondent No.1. In particular, Mr. Dwarkadas brought to my attention paragraph 3 of the said

letter which inter-alia states that the Architect shall require one day [approximately 5-6 hours] to inspect the premises. Further, the architect / his representative shall require a few days [for approximately 6-8 hours per day] to value the premises. Mr Dwarkadas submitted that this letter clearly indicates that the purpose of this application was not to seek inspection but was for other ulterior motives, namely, to enter upon/get access to the newly redeveloped JK House building and to harass respondent No.1.

12. Lastly, Mr. Dwarkadas submitted that the reasoning of the Arbitral Tribunal for passing the impugned order can only be found in one paragraph of the said order. He submitted that the reasons furnished by the Tribunal are wholly inadequate to pass such drastic directions. For all the aforesaid reasons, Mr. Dwarkadas submitted that interference was called for under Section 37 of the Arbitration and Conciliation Act, 1996.

13. Mr. Samdani, learned Senior Counsel appearing on behalf of the petitioner in Arbitration Petition No. 36 of

2019 (respondent No.1 before the Arbitral Tribunal) did not repeat, but adopted the arguments of Mr. Dwarkadas. Mr. Samdani additionally submitted that what the Arbitral Tribunal has done and the reasoning given by it for passing the directions, was only in light of the alternative prayer of the claimant for payment of compensation in case their prayer for specific performance was not granted. The claimant, in the statement of claim filed before the Tribunal, had quantified the compensation at Rs.82,05,56,250/-. This being the case, there was absolutely no need for the Arbitral Tribunal to order inspection of the site as prayed for by the claimant. It was wholly beyond the scope of the arbitral proceedings, was the submission. The corollary to this argument was that the claimant would have to prove the loss as contemplated under Section 73 of the Contract Act, 1872 and for which no inspection of the property was necessary. In support of the aforesaid propositions, learned Senior Counsels relied upon the following decisions:-

- 1) **Md. Army Welfare Housing Organisation Vs. Sumangal Services (P) Ltd. [(2004) 9 Supreme Court Cases 619].**
- 2) **Adhunik Steels Ltd. V. Orissa**

**Manganese and Minerals (P) Ltd. [(2007)
7 Supreme Court Cases 125].**

**3) M/s Shakti International Private Limited
v. M/s Excel Metal Processors Private
Limited [2017 SCC OnLine Bom 321].**

14. On the other hand, Dr. Saraf, learned Counsel appearing on behalf of the claimants (respondent No.1 in Arbitration Petition No.35 of 2019 & respondent Nos.1 and 2 in Arbitration Petition No.36 of 2019), submitted that there was no merit in the arguments canvassed by Mr. Dwarkadas and Mr. Samdani. On the issue regarding the maintainability of the application filed by the claimants under Section 17 and whether the arbitral tribunal had powers to pass the directions it did, Dr. Saraf brought to my attention the provisions of Section 17 of the Act and more particularly, Section 17 (1) (ii) (c) thereof. Relying upon the aforesaid provisions, Dr. Saraf submitted that the Arbitral Tribunal under Section 17 was empowered to pass an order for an interim measure of protection in respect of any of the matters described in sub-clause (a) to (e) of Section 17 (1) (ii) of the Act. Sub-clause (c) clearly empowers the Arbitral Tribunal to pass an order for the detention, preservation or

inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to any question which may arise therein, and authorising for any of the aforesaid purposes, any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence. He submitted that, in fact, prior to the amendment of Section 17 there were conflicting views of different High Courts whilst interpreting Section 17 and the scope and the power of the Arbitral Tribunal thereunder. For instance, the Delhi High Court had taken a very narrow view whereas this Court had taken a far wider view regarding the powers that could be exercised by the Arbitral Tribunal under Section 17 of the Act. To obviate this confusion, the legislature stepped in and amended the Act with retrospective effect from 23rd October, 2015. He submitted that Section 17 is now almost identical to Section 9 of the Act and the powers that could be exercised by the Court under Section 9 can now also be exercised by the

Arbitral Tribunal under Section 17 of the Act. He therefore submitted that looking at the clear language and the provisions of Section 17 it was clear that the Arbitral Tribunal was very much within its power in passing the directions that it did as it is clearly contemplated under Section 17 (1) (ii) (c) of the Act. Dr. Saraf also relied upon Section 17 (1) (ii) (e) to contend that the legislature now, after the amendment, has given very wide powers to the Arbitral Tribunal to pass orders for interim measures of protection as may appear to the Arbitral Tribunal to be just and convenient. In other words, Dr. Saraf submitted that a very wide discretion is granted to the Tribunal to pass interim orders to ensure that the cause of justice is subserved. He submitted that when one looks at the scheme of the Act as a whole it is clear that the purpose of the Act is to promote speedy arbitration and interference by the court is restricted. It is for this very reason that the legislature amended Section 17 and brought it virtually on par with Section 9 of the Act. He therefore submitted that the arguments canvassed on behalf of respondent No.1 that the directions passed by the Tribunal were beyond the scope of

Section 17 of the Act or that the reliefs sought for by the claimants could not have been granted exercising powers under Section 17, are without any substance.

15. As far as the merits of the matter is concerned, Dr. Saraf submitted that the Arbitral Tribunal was fully justified in passing the directions that it did. Dr. Saraf was at pains to point out that it was the specific case of the claimant that they were seeking specific performance of the tripartite agreement dated 6th November, 2007. Under that agreement, in clause (b), it was stated that the claimant was occupying a duplex flat on the fifth and sixth floors of the building known as “J.K.House” as tenants. This flat was admeasuring 5185 square feet (carpet area) and described in the said agreement as *“the said existing premises”*. Clause 3 of the said agreement contemplates that once the old building was demolished and the newly constructed JK House was built, respondent No.1 shall offer to sell to the tenants, an apartment which will be more or less of the same carpet area as the said existing premises in the new structure at the rate specified in Clause 6 of the agreement.

Clause 6 of the agreement stipulates the rate at Rs.9000/- per square foot (carpet).

16. Dr. Saraf pointed out that prior to invocation of the arbitration, the claimant had filed a petition before this court under Section 9 of the Act, being Arbitration Petition (Lodging) Nos. 196 and 197 of 2017. In that petition, a statement was made on behalf of respondent No.1 that till further orders they will not create any third party rights, alienate, encumber or part with possession of two apartments, each of 5185 square feet on the 21st, 22nd, 23rd and 24th floors of the newly constructed JK House. It was clarified by respondent No.1 that each apartment is a split-level or duplex apartment and, therefore, the two apartments are spread across four floors (two floors each). It now transpires that the said statement was false as the flats on the 21st and 22nd floor is not one duplex apartment but two different flats, albeit one on top of the other with no internal connection to make it a duplex apartment. He submitted that this was clearly in breach of the statement made to this Court on 12th April, 2017 and therefore, to

ascertain the actual position on site, the Arbitral Tribunal was fully justified in passing the directions it did, namely for inspection and valuation.

17. Dr. Saraf submitted that in any event, under Section 17 (1) (ii) (c), the Arbitral Tribunal has the power to order inspection of any property, which may be necessary or expedient, for the purpose of obtaining full information or evidence. He submitted that in the facts of the present case, the claimant wanted to examine his architect and valuer to ascertain whether the premises that were to be allotted to the claimant was in accordance with the tripartite agreement. For this purpose, it was necessary that the architect and valuer visit and inspect the duplex apartments that were to be allotted to the claimants. This, according to Dr. Saraf, would clearly fall within Section 17(1)(ii)(c) of the Act and therefore, the Tribunal was fully justified in passing the impugned order.

18. Dr. Saraf lastly submitted that even assuming for the sake of argument that this Court was to take a

different view from that of the Tribunal, the same would not entitle this Court to set aside the impugned order. He submitted that as long as the view taken by the Tribunal was a plausible view, merely because this Court is of a different view, would be no ground to interfere with the order passed by the Tribunal. He submitted that the Arbitration and Conciliation Act, 1996 contemplates minimal interference by the Court and which is clear from Section 5 of the Arbitration and Conciliation Act, 1996. It is not, as if this is a first appeal, where this Court would go into every aspect of the facts and law and substitute its own opinion in place of that of the Arbitral tribunal. To put it differently, Dr. Saraf submitted that what this Court has to look into, is whether the order passed by the Tribunal was one that was a plausible view and once this test is satisfied, no interference is called for in the impugned order. In support of this proposition, Dr. Saraf relied upon a decision of the Delhi High Court in the case of **Chirawa Investment Limited & Ors Vs. Indiabulls Financial Services Ltd. [2009 (113) DRJ 109]** and a decision of this Court in the case of **Wallstreet Hospitality vs. Evertop Apartments**

Co-operative Housing Society Ltd. & Ors [Commercial Arbitration Petition (Lodging) No. 278 of 2017 decided on 29th June, 2017]. Dr. Saraf submitted that in the facts of the present case, the view taken by the Arbitral Tribunal and/or the discretion exercised by it in issuing the directions for inspection of property certainly did not suffer from any vice of perversity that would require interference under section 37 of the Act. In these circumstances, he submitted that both these petitions have no merit and ought to be dismissed.

19. I have heard learned Counsel for the parties at length and have perused the papers and proceedings in the arbitration petitions as well as the impugned order. I have also gone through the statement of claim that was filed before the Arbitral Tribunal. The final reliefs sought for before the Arbitral Tribunal can be found at Paragraph 63 of the statement of claim and read thus:-

“63. The Claimant therefore prays--

(a) that this Hon'ble Tribunal be please to award and declare that the purported repudiation of the Tripartite Agreement by the Respondents is

unlawful and of no legal effect or consequence whatsoever;

- (b) that this Hon'ble Tribunal be please to award and declare that the Tripartite Agreement dated 6th November 2007 is a valid, binding and subsisting Agreement;*
- (c) that this Hon'ble Tribunal be pleased to award, order and direct the Respondents to specifically perform the said Tripartite Agreement dated 6th November, 2007;*
- (d) Without prejudice to prayer clauses (b) and (c) this Hon'ble Tribunal be pleased to hold and declare that on exercise of the option by the Claimant on 13th January, 2017 a valid, binding and subsisting Agreement came into existence by which the Claimant is entitled to the Apartment admeasuring approximately 5185 sq.ft. carpet area on the terms and conditions set out in the Tripartite Agreement;*
- (e) Without prejudice to prayer clauses (b) and (c) this Hon'ble Tribunal be pleased to award, order and direct the Respondents to specifically perform the Agreement which came into existence on the Claimant exercising his option vide their letter dated 13th January 2017 by which the Claimant is entitled to the Apartment admeasuring approximately 5185 sq. ft. carpet area on the terms and conditions set out in the Tripartite Agreement.*
- (f) In the alternative to prayer (c) and (e), assuming that the apartments that have to be provided to the Claimant, do not admeasure approximately 5185 sq. feet carpet area, then in that event, the Hon'ble Arbitral Tribunal be pleased to direct the Respondents to provide an apartment having as similar an area as possible to the Claimant's entitlement and to compensate the Claimant at the rate of not less than Rs.1,50,000/- per sq. foot (carpet) to the extent of the shortfall in the area actually provided to the Claimant.*

- (g) *that the Hon'ble Tribunal be pleased to award, order and direct the Respondents to do all such things and to execute all agreements, conveyances, writings, applications, letters and declaration as may be necessary to effectively carry out and implement the Tripartite Agreement dated 6th November, 2007 and/or the said 2017 Agreement, including by putting the Claimant in possession of the said Apartment;*
- (h) *in the alternative to the prayers (c) to (g) above and only in the event this Hon'ble Tribunal holds for any reason whatsoever that the Claimant is not entitled for specific performance, then the Claimant submits that the Respondents be ordered and directed to pay to the Claimant a sum of not less than Rs.82,05,56,250/- being the estimated loss and damage suffered by the Claimant in view of the breach committed by the Respondents along with interest on the said sum at such rate as this Hon'ble Tribunal may deem fit from the date of this Statement of Claim till its payment and/or realisation thereof as per the particulars of claim annexed hereto and marked as Exhibit '35';*
- (i) *that this Hon'ble Tribunal be pleased to award and declare that the Claimant has a charge and/or lien over the Apartment for its monetary claim as set out hereinabove and the Apartment is liable to be sold for enforcement of the said charge and realisation of the Claimant's monetary claim against the Respondents and that the sale proceeds be paid over to the Claimant."*

20. As can be seen from the statement of claim, the claimant basically seeks a declaration that the tripartite agreement dated 6th November, 2007 is a valid, binding and

subsisting agreement and for specific performance thereof. In the alternative to prayer clauses (c) and (e), the claimant also seeks a direction from the Arbitral Tribunal that if for any reason the Tribunal comes to the conclusion that the apartments to be allotted to the claimant do not admeasure 5185 square feet carpet area, (and which was the area of the premises that were originally occupied by the claimant), then in that event, the respondents be directed to provide an apartment having as similar an area as possible to the claimant's entitlement and to compensate the claimant at the rate of not less than Rs.1,50,000/- per square foot (carpet) to the extent of the shortfall in the area actually provided to the claimant. In the alternative, the claimant has also prayed that in the event the Tribunal holds that for any reason whatsoever the claimant is not entitled for the specific performance, then the respondents be ordered and directed to pay to the claimant a sum of not less than Rs.82,05,56,250/- being estimated loss suffered by the claimant together with interest thereon at such rate as the Tribunal may deem fit. On going through all these prayer clauses, it is quite clear that the claim made before

the Arbitral Tribunal is one of specific performance and/or in aid thereof. The claim made in prayer clause (h) and which is in the alternative, is a monetary claim of Rs.82,05,56,250/-. This claim is made as per the provisions of Section 21 of the Specific Relief Act, 1963. It is not in dispute that the claimant has no access to the suit premises though it is already constructed. It is in furtherance of the prayers that are sought in the statement of claim that the application dated 26th November, 2018 was filed by the claimant seeking directions to permit the claimant's valuer and architect to inspect the site on any date the Tribunal considers appropriate and as may be mutually convenient. I am in full agreement with Dr. Saraf that the Arbitral Tribunal certainly has the power to pass the impugned order under which it directed respondent No.1 to give inspection of the property. This is absolutely clear from Section 17 of the Act which reads thus:-

“17. Interim measures ordered by arbitral tribunal.—

(1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal—

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the Court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.”

(emphasis supplied)

21. What this section inter alia provides is that a party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the Arbitral Tribunal, inter alia for the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes, any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence. This is clear from the provisions of Section 17 (1) (ii) (c) of the Arbitration and Conciliation Act, 1996. It is not in dispute that the suit premises of which inspection is granted by the Arbitral Tribunal is the subject-matter of the arbitration. This being the case, I do not think that Mr. Dwarkadas is correct in his submission that the order passed by the Arbitral Tribunal was beyond the purview and scope of Section 17 of the

Act. One must not lose sight of the fact that Section 17, prior to its amendment was restricted in its nature. There was quite a lot of debate as to what were the powers of the Arbitral Tribunal under Section 17. It is, to put that debate to rest that the legislature stepped in and amended Section 17 of the Act to bring it virtually on par with Section 9 which empowers the Court to grant interim measures pending the arbitral proceedings. This, in fact, has been taken note of by this Court in the case of **M/s Shakti International Private Limited vs. M/s Excel Metal Processors Private Limited (supra)**.

Paragraphs 48 to 58 of this decision read thus:-

“48. Even after the enactment of the 1996 Act, as pointed out by Mr. Jagtiani, different Courts took different views and approaches on the scope of the arbitral tribunals' power to grant interim reliefs or 'interim measures of protection' under Section 17 of the 1996 Act. For instance, in the case of Intertoll ICS Cecons O & M Co. Pvt. Ltd. v. National Highways Authority of India (supra), the Delhi High Court at paragraphs 15-18 on pages 1026-1027 dealt with the scope of powers under Sections 9 and 17 of the Act. In brief, the Court expressed the view that the powers of an arbitral tribunal under Section 17 of the 1996 Act are much narrower than that of a Court under Section 9 of the Act, although there may be some overlap. The Court in Intertoll(supra), held that an arbitral tribunal can only protect the subject matter of the dispute, which must be tangible property, and therefore it cannot order the furnishing of a security for securing a money claim.

49. As against this, this Court in Baker Hughes Singapore Pte. v. Shiv-Vani Oil and Gas Exploration Services Ltd. (supra) took a broader view (at paragraphs 40, 50-51) of the arbitral

tribunals powers under Section 17 of the 1996 Act. This Court also distinguished the Judgment in the case of Intertoll (supra). This Court held, in Baker Hughes (supra), that an arbitral tribunal can, in a given case, make an appropriate order of security.

50. A perusal of these decisions is helpful because it brings into focus the reason why Section 17 as amended, was enacted.

51. Under the 1940 Act, the position was, as stated by the Hon'ble Supreme Court in MD, Army Welfare Housing Organization (supra), that an arbitral tribunal is not a Court of law and its orders are not judicial orders and its functions are not judicial functions.

52. This position changed under the 1996 Act, but in relation to Section 17 of the 1996 Act, the same Judgment of Army Welfare (supra), says that the power is a limited one, and that the arbitral tribunal has no power to enforce its own order nor is it made judicially enforceable.

53. Even though different Courts may have taken different views on the scope of the powers under Section 17 of the 1996 Act, it is very clear that the powers were narrower than Section 9 of the 1996 Act. Ex facie, Section 17 of the 1996 Act did not provide for any power for the appointment of a Receiver. Also, as noted by the Hon'ble Supreme Court, there were difficulties in matters relating to the enforcement of order passed by an arbitral tribunal under Section 17 of the Act.

54. Whereas Section 9 of the 1996 Act expressly provided for various interim orders that a Court could pass, Section 17 of the 1996 used the expression 'any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute'. Therefore, it was always necessary for a party applying for interim relief before an arbitral tribunal to show that a specific interim orders, covered by the express provisions of Section 9, was also covered by the limited language of Section 17 of the 1996 Act. These challenges and difficulties perhaps led to parties applying for interim measures to a Court under Section 9 of the 1996 Act, even after a tribunal had been constituted.

55. It is in this background that Section 17 of the Amended Act obviously came to be enacted. Section 17 of the Amended Act is now in para materia or very similar in content to the provisions

of Section 9 of the Amended Act. The powers to make different types of interim orders of protection are now enumerated in Section 17 of the Amended Act, as they are under Section 9 of the Amended Act.

56. The powers, of an arbitral tribunal, to make orders is put on par with that of a court. The language appearing after Section 17(1)(ii)(e) of the Amended Act makes this clear. It states “and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceeding before it.”

57. The issue of enforceability of such orders is now expressly addressed by Section 17(2) of the Amended Act, which provides that such orders of the arbitral tribunal, “... shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.”

58. In light of the enhanced powers and efficacy of recourse under Section 17 of the Amended Act, there have been corresponding changes to Section 9 of the Amended Act as well. Section 9(3) of the Amended Act states that, “once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.”

22. Considering that now wider powers have been conferred upon the Arbitral Tribunal to grant interim measures of protection under section 17 of the Act, I do not think that Mr. Dwarkadas or Mr. Samdani are correct in their submissions that the directions passed by the Tribunal under section 17 were beyond the scope or the authority of the Arbitral Tribunal. This argument, therefore, would have to be rejected.

23. As far as the decisions of the Supreme Court relied upon Mr. Dwarkadas and Mr. Samdani are concerned, I find that the same are wholly inapplicable to the facts of the present case. In the decision of the Supreme Court in the case of **MD Army Welfare Housing Organisation (supra)**, the Supreme Court was actually considering the provisions of Section 41 (b) of the Arbitration Act, 1940. This has been set out from paragraph 48 onwards of this decision. Thereafter, from Paragraph 57 onwards the Supreme Court considered the unamended provisions of Section 17 of the Arbitration and Conciliation Act, 1996. It is whilst considering the unamended provisions of Section 17 that the Supreme Court opined that the power of the Arbitrator under Section 17 is a limited one. This is for the simple reason that prior to its amendment, Section 17 stipulated that unless otherwise agreed by the parties, the Arbitral Tribunal may at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. It is while interpreting this provision that the Supreme Court came to the conclusion that

the power of the Arbitrator under section 17 was a limited one. I fail to see how this decision, in any way advances or supports the arguments canvassed on behalf of respondent no.1, especially considering that after this decision, Section 17 has been substantially amended and has been brought virtually on par with Section 9 which deals with the powers of the Court to grant interim measures pending the arbitration proceedings.

24. Similarly, in the case of **Adhunik Steels Ltd. (supra)**, the Supreme Court was considering whether the principles that governed the grant of interim injunction under Order 39 would be applicable to the court granting interim measures of protection under section 9 of the Act. The Supreme Court held that the well recognized principles applicable to exercise general power of granting interim relief including under the Specific Relief Act, would be applicable to exercise of powers under Section 9 also. The Supreme Court also opined that the same is the position regarding the appointment of a receiver as well. There cannot be any quarrel with the aforesaid proposition. However, I fail to understand how this decision in any way advances or supports the case of

respondent no.1. It is wholly inapplicable to the facts of the present case. In fact, Order 39 Rule 7 of the CPC gives the same power to the court regarding inspection of property as section 17(ii)(c) of the Arbitration and Conciliation Act, 1996. This being the case, I find that even this decision, in light of the factual situation before me is of no assistance to respondent no.1.

25. As far as the merits of the matter are concerned, I find that the order passed by the Tribunal especially in the facts of the present case was fully justified. As mentioned earlier, the claim made before the Arbitral Tribunal was that of specific performance of the tripartite agreement dated 6th November, 2007. As per this agreement, the claimant was to be allotted 5185 square feet (carpet area) in the newly constructed JK House. In fact, in the Section 9 petition filed before this Court, the respondents categorically made a statement that till further orders they will not create any third party rights, alienate, encumber or part with possession of two apartments, each of 5185 square feet on the 21st, 22nd, 23rd and 24th floors of the newly constructed JK House. It was further

stated and clarified that each Apartment is a split-level or duplex apartment and, therefore, the two apartments are spread across four floors (two floors each). In order to determine whether or not there is any shortfall in the area that is supposed to be allotted to the claimant (subject, of course, to the fact that they succeed in getting a decree for specific performance), the Arbitral Tribunal was fully justified in ordering inspection of the property. It is to ensure that full information and evidence comes before the Tribunal (and as contemplated under Section 17 (1) (ii) (c) of the Act) that the impugned order has been passed by the Arbitral Tribunal. I do not think that this order suffers from any perversity that requires any interference under Section 37 of the Act. I am unable to accept the argument of Mr. Dwarkadas that merely because the claimant has stated in the statement of claim the area, which according to it, is the area of shortfall, that the present order was unnecessary and unjustified. It is not as if respondent No.1 has accepted the said area of shortfall to be true and correct. This being the case, I do not think that the Tribunal was unjustified in passing the impugned order.

26. In any event, I find substance in the argument of Dr. Saraf that the view of the Tribunal is certainly a plausible view and does not suffer from any perversity requiring interference under section 37 of the Arbitration and Conciliation Act, 1996. It is now quite well settled that the Arbitration and Conciliation Act, 1996 contemplates minimal interference by the Court and which is clear from Section 5 of the Act. It is not as if this Court, either to a challenge to an Award under Section 34, or to a challenge to an interim order under Section 37, can go into the facts and law on every aspect and substitute its own opinion in place of that of the Arbitral Tribunal. To put it differently, what this Court has to look into, is whether the order passed by the Tribunal was one that was a plausible view and once this test is satisfied, no interference is called for in the impugned order. This has been held by a Division Bench of the Delhi High in the case of **NHAI vs. M/s BSC-RBM-Patil Joint Venture [2018 SCC OnLine Del 6780]**. This decision of the Delhi High Court has in fact been followed by this Court in the case of **Artha Vruddhi Securities Ltd. Vs. Mahavir Prasad Gujjar [Arbitration Petition No. 547 of 2018 decided on 25th January, 2019]**. Paragraph 26 of the decision in Artha

Vruddhi Securities Ltd. reads thus:-

“26. On going through the impugned order, I do find that the view taken by the Arbitral Tribunal is certainly a plausible view. I do not find that the order suffers from any perversity that would require my interference in appeal as held by the Delhi High Court in the case of NHI Vs. M/s BSC-RBM-Patil Joint Venture (supra). The position that emerges from the law, as it stands crystallized today, is clearly, that findings, of fact as well as of law, of the Arbitrator/Arbitral Tribunal are ordinarily not amenable to interference either under Section 34 or Section 37 of the Act. It is only where the finding is either contrary to the terms of the contract between the parties, or, ex facie, perverse, that interference, by the Court, is necessary. The Arbitrator/ Arbitral Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity do not merit interference under Sections 34 or 37 of the Act. Paragraph 66 of this decision culls out the aforesaid proposition and reads thus:-

“66. We have already highlighted, herein above, the limited arena of the jurisdiction of this Court, in the matter of interference with arbitral awards, under Sections 34 and 37 of the Act. The position that emerges from the law, as it stands crystallized today, is, clearly, that findings, of fact as well as of law, of the arbitrator/Arbitral Tribunal are ordinarily not amenable to interference either under Sections 34 or Section 37 of the Act. It is only where the finding is either contrary to the terms of the contract between the parties, or, ex facie, perverse, that interference, by this Court, is necessary. The arbitrator/Arbitral Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act. Insofar as the ultimate view of

the learned arbitrator/ Arbitral Tribunal, on any issue is concerned, so long as the view is plausible, and not merely possible, this Court would be loath to interfere therewith. We may usefully make reference, in this regard, to the following postscript, entered by this Court in its judgment in P.C.L Suncon (JV) v N.H.A.I.:-

“As a postscript, this Court believes that it is imperative to sound a word of caution. Notwithstanding the considerable jurisprudence advising the Courts to remain circumspect in denying the enforcement of arbitral awards, interference with the awards challenged in the petition before them has become a matter of routine, imperceptibly but surely erasing the distinction between arbitral tribunals and courts. Section 34 jurisdiction calls for judicial restraint and an awareness that the process is removed from appellate review. Arbitration as a form of alternate dispute resolution, running parallel to the judicial system, attempts to avoid the prolix and lengthy process of the courts and presupposes parties consciously agreeing to submit a potential dispute to arbitration with the object of actively avoiding a confrontation in the precincts of the judicial system. If a court is allowed to review the decision of the arbitral tribunal on the law or on the merits, the speed and, above all, the efficacy of the arbitral process is lost”.

27. This being the position in law and I being of the opinion that the view taken by the Tribunal is certainly a

plausible view and which suffers from no perversity, no interference is called for in the impugned order.

28. Having said this, I am of the view that to obviate any apprehension on the part of respondent No.1 (the petitioner in both Arbitration Petitions) that this application has been preferred only to somehow gain access and enter upon the newly constructed JK House, I think it would be in the fitness of things if the interim order is modified to a very limited extent. In these circumstances, the following order is passed:-

- (i) The Respondents before the Arbitral Tribunal are directed to permit the claimant's (respondent No.1 in ARBP No.35 of 2019 and Respondent Nos. 1 and 2 in ARBP No. 36 of 2019) Valuer and Architect to visit and inspect the premises situated on 21st, 22nd, 23rd and 24th floors in the newly constructed JK House building in the presence of Mr. Atul Daga, an Advocate of this Court. The said

Architect and Valuer shall also be entitled to inspect the lobby and the grounds of the said newly constructed JK House building, in addition to the inspection of the 21st, 22nd, 23rd and 24th floors.

- (ii) This inspection shall be carried out on a date mutually agreed to between the respondents before the Arbitral Tribunal and the claimants (respondent No.1 in Arbitration Petition No.35 of 2019 and respondent Nos.1 & 2 in Arbitration Petition No.36 of 2019) but in any event on or before 17th February, 2019.
- (iii) It is clarified that the claimants shall not be present at the time when inspection is taken by their Architect and Valuer.

29. The impugned order is therefore modified to this limited extent and both the Arbitration Petitions are disposed of in the aforesaid terms. However, there shall be

no order as to costs.

30. Considering that this order has been dictated in open Court, all parties are expected to act as per this order without waiting for a copy to be uploaded on the High Court server.

(B.P. COLABAWALLA, J.)