

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 31.10.2018

Judgment Delivered on : 30.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH

AND

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

O.S.A.No.39 of 2017

and

Cross Objection No.58 of 2017

and

C.M.P.Nos.3662 and 3714 of 2017

1. Mr.Prem Kumar Menon
2. Mr.Kishore Kumar Menon
3. Mr.Chirstopher Gladstone Menon

... Appellants in O.S.A.
and Respondents 1 to 3 in Cross Objection

Vs.

1. M/s.Lancor Holdings Limited,
Rep. by its Managing Director,
No.58, G.N.Chetty Road,
T.Nagar, Chennai-600 017.

... First Respondent in O.S.A. and
Cross Objector in Cross Objection

2. Hon'ble Mr.Justice K.P.Sivasubramanian,
No.47, Pulla Avenue,
Shenoy Nagar,
Chennai-600 030.

... Second Respondent in O.S.A.
and Fourth Respondent in Cross Objection

Original Side Appeal filed under Order 36 Rule 1 of the Original Side Rules of this Court, read with Clause 15 of the Letters Patent, against the order dated 23.12.2016 passed by the learned Single Judge in O.P.No.231 of 2016 on the file of this Court.

Cross Objection filed against the order dated 23.12.2016 passed by the learned Single Judge in O.P.No.231 of 2016 on the file of this Court.

For appellants in O.S.A. and
Respondents 1 to 3 in Cross Objection

: Mr.A.L.Somayaji, Senior Counsel
for M/s.Adithya Reddy

For first respondent in O.S.A.
and Cross Objector in Cross Objection

: Mr.P.S.Raman, Senior Counsel
for M/s.C.Seethapathy
for R-1 in O.S.A.
and
Mr.P.R.Raman, Senior Counsel
for M/s.C.Seethapathy for
Cross Objector in Cross Objection

JUDGMENT

R.SUBBIAH, J

This Original Side Appeal (O.S.A) has been filed against the order dated 23.12.2016 made in O.P.No.231 of 2016 passed by the learned Single Judge, setting aside the arbitral award, dated 16.03.2016 passed by the second respondent in the arbitral dispute between the first respondent and the appellants pursuant to Joint Development Agreement, dated 17.12.2004.

2. For the purpose of convenience, the parties are referred to as they are ranked in this O.S.A. Brief facts which are necessary to decide the issue involved in this appeal are as follows:

(a) The first respondent-Company (claimant) is engaged in the business of property development and construction. The respondents 1 to 3 in the Original Petition, who are the appellants herein, are brothers. They are absolute owners in possession of land bearing New Door No.165, Old No.110, St.Mary's Road, Alwarpet, Chennai-600 018, comprised in R.S.No.3925/8, 3926/5, 3927/6, Block No.86, Mylapore Division, Mylapore-Triplicane Taluk, Chennai, ad-measuring 20 grounds and 600 Sq.Ft. According to the first respondent-Company, the appellants had represented to the first respondent that they were seeking to develop their property and after several rounds of discussions and negotiations, it was agreed to develop the property jointly. While the appellants could contribute their land, the first respondent-Company would put up construction over the property of the appellants. In consideration of the first respondent-Company to put up construction over the said premises, the appellants agreed to convey 50% undivided share of the land to the first respondent-Company. To this effect, a Joint Development Agreement (JDA), dated 17.12.2004 was entered

into between the first respondent-Company and the appellants.

(b) As per the JDA, 50% of the undivided share in the subject property was to be conveyed to the first respondent-Company on condition that the first respondent delivers 50% of the constructed area to the appellants after the building is completed in all respects and is certified as being fit for occupation by the Project Architect. The first respondent-Company was to develop the subject property at their own costs. The following are the relevant clauses of the JDA:

"... ..

6. As security for the due performance of LG's obligations under this agreement, LG has this day given a refundable Interest-free deposit of Rs.3,57,00,000/- (Rupees Three Crores Fifty Seven Lakhs only) at the time of signing of this agreement, the receipt whereof by Pay Order in favour of Prem Kumar Menon - Manor Menon Account" for and on behalf of all the LAND-OWNERS, the LAND-OWNERS do hereby admit and acknowledge. LG promises to pay a further refundable interest-free deposit of Rs.25,00,000/- (Rupees Twenty-Five Lakhs only) within 6 months from this day. The said two Security Deposits (hereafter together referred to as "the said Security Deposits") shall be returned without interest to LG by the LAND-OWNERS within 15 (fifteen) days of the fulfilment of all of the following four conditions by LG:

a) LG completes the construction of the building in all respects, including the LAND-OWNERS CONSTRUCTED AREA fit for occupation and the Architects for the project certify to the LAND OWNERS that the building has been put up and completed according to the sanctioned plan and is fit for occupation.

b) LG has applied to the Chennai Metropolitan Development Authority for Completion Certificate in respect of the said building and

c) LG offers, in writing, to hand over the LAND-OWNERS CONSTRUCTED AREA to the LAND-OWNERS, after the conditions stipulated in clause (a) & (b) are fulfilled.

The date on which all the above conditions are fulfilled by LG is hereinafter referred to as "the said Handover Date".

It is expressly agreed between the parties hereto that, whether or not the LAND-OWNERS have taken delivery of the LAND-OWNERS CONSTRUCTED AREA, upon expiry of a period of 15 (fifteen) days from the said Handover Date, LG will be deemed to have fulfilled their

obligation to deliver the LAND-OWNERS CONSRUCTED AREA (whether or not physical possession of the LAND-OWNERS CONSRUCTED AREA has been taken by the LAND OWNERS from LG) and the said Security Deposit would be due and payable by the LAND-OWNERS on such date (i.e. 15 (fifteen) days after the said Handover Date.

It is further expressly agreed between the parties hereto that LG will not be required to hand over physical possession of the LAND-OWNERS CONSTRUCTED AREA to the LAND-OWNERS until the said Security Deposit, together with interest, if any, in terms of this Agreement, has been returned by the LAND-OWNER to LG.

7. If the LAND-OWNERS do not repay the said Security Deposit within 15 (fifteen) days from the said Handover Date, the LAND-OWNERS shall pay interest @ 12% per annum on the said Security Deposit from the said Handover Date till the date the said Security Deposit is refunded, together with interest, to LG.

8. In addition to the deposits detailed in Clause 6 above, LG has already paid to the LAND-OWNERS, a Refundable Interest-free Earnest Money Deposit of Rs.1,25,00,000/- (Rupees One Crore Twenty Five Lakhs only), the receipt whereof the LAND OWNERS do hereby admit and acknowledge. The said Earnest Money Deposit shall be returned by the Land Owners to LG within 30 days from the Handover Date.

9. In consideration of LG delivering the said LAND-OWNERS CONSTRUCTED AREA to the LAND-OWNERS per clause 4 supra, the LAND-OWNERS shall transfer/convey to LG or their nominee(s) an undivided 50% share in the Schedule Property (which 50% undivided share is hereinafter referred to as "LG's UNDIVIDED SHARE") in one or more sale deeds, in terms of this Agreement.

10. ...

11.1. It is agreed by and between the parties hereto as follows:

(b) LG shall, at their own cost and expenses, undertake and complete the development of the Schedule Property by way of construction of building as per sanctioned plans with internal and external services, amenities, lifts, facilities including but not limited to compound walls, staircases, lobbies, terraces, balconies, passages, covered and uncovered car parking spaces, basement, gardens, machine room, service room, recreational areas etc., and obtain the Completion Certificate from the concerned authorities in respect of such buildings and facilities (hereinafter referred to as "the said development") as hereinafter provided. The construction shall be in accordance with specifications contained in ANNEXURE I.

.. ..
11.2. If any additional construction is put up on the Schedule Property over and above the sanctioned plan, or because of favourable changes in the building bye-laws, the additional construction so put up shall also be shared in the ratio of 50% for LAND-OWNERS and 50% for LG. The spirit of this agreement being that whatever is built on the Schedule Property shall be shared in the ration of 50% for LAND-OWNERS and 50% for LG.

..
15.1. The LAND-OWNERS and LG shall take a decision as to whether the Schedule Property should be developed into a commercial or residential complex, within a period of 120 days from this day (hereinafter referred to as "the said Decision Date").

15.2.

15.3. a) LG shall obtain the necessary sanctions and permissions from the concerned authorities to undertake the said development (hereinafter referred to as "the said Sanctions") and in the event that the Schedule Property is to be developed into a commercial complex within a period of 12 (twelve) months from the said Decision Date.

15.4. ...

15.5. The LAND-OWNERS shall demolish the structures on the Schedule Property within 45 days from the said Sanctions and LG shall commence construction within 60 days from the said sanctions, subject to the land owners demolishing the structures (hereinafter referred to as, "the said Commencement Date").

15.6.

16. LG hereby undertakes to complete the construction of the project in all respects within 24 months from the said Commencement Date. Time shall be the essence of this agreement.

17. Should there be any delay in completion of the project beyond 24 months as aforesaid, LG shall pay to the LAND-OWNERS, for the entire LAND-OWNERS CONSTRUCTED AREA, as compensation: (a) a sum of Rs.8/- per sq.ft. of Super Built-up Area per month in case of residential complex and (b) a sum of Rs.15/- per sq.ft. of Super Built-up Area per month in case of commercial complex. If the completion of the project is delayed beyond the period of 36 months, LG shall pay an incremental penal compensation of 50% for every quarter beyond the 36th month.

18. It is made clear that in case LG fails to complete and hand over the LAND-OWNERS CONSTRUCTED AREA to the LAND-OWNERS within 42 (forty two) months from

the said Commencement Date, the LAND-OWNERS shall have the right to take over the project and complete the same at the cost of LG.

... ..

21. ...

g. The total amount of loans/credit facilities that LG may avail at any point of time, against the security of the title deeds pertaining to the Schedule Property, shall not exceed a sum of Rs.7,50,00,000/- (Rupees Seven Crores and Fifty Lakhs only).

22. LG shall periodically provide to the LAND-OWNERS a progress report, along with photographs showing the progress of the said development and the LAND-OWNERS shall have the right to inspect the progress of the development from time to time with due notice to LG.

23. The LAND-OWNERS shall be entitled to demolish the existing structures on the Schedule Property at their own cost and expenses and to appropriate the proceeds from such demolition. The Demolition approval charges payable to the Corporation of Chennai shall be borne by the LAND-OWNERS.

24. The name of the Building shall have the prefix "MENON". The said prefix shall appear equally prominently along with the rest of the name of the building in all places where the name of the building is displayed.

25. LG shall appoint the Architect for the said development after obtaining the consent of the LAND-OWNERS. Similarly, LG shall obtain the consent of the LAND-OWNERS for the design and plans for the said development. All other decisions with regard to the said development shall be solely taken by LG who shall however keep the LAND-OWNERS informed of the same as well as about the progress of work in the said development.

... ..

31. After LG has delivered, or is deemed to have delivered, the LAND-OWNERS CONSTRUCTED AREA to the LAND-OWNERS, LG shall be entitled to get conveyance of LG's UNDIVIDED SHARE in the Schedule Property in its favour or in favour of its nominee/s.

32. After LG take, or cause to be taken, in favour of itself or its nominee/s, the conveyance of LG's UNDIVIDED SHARE in the Schedule Property within 12 months from the said Handover Date.

33. After LG gets conveyed to itself or to its nominees LG's UNDIVIDED SHARE in the Schedule Property, LG shall be entitled to sell or lease or rent or transfer by any other mode/nature or give for any other

usage the said LG's CONSTRUCTED AREA or any part or portion thereof to such person or persons or company or entity or body at such price and on such terms that LG may decide at its sole discretion.

....

36. The LAND-OWNERS will execute and register in favour of LG or its nominee(s) a specific Power of Attorney/S (hereinafter referred to as the FIRST POWER OF ATTORNEY or 1st POA) to carry out the said development and to obtain various approvals, sanctions and permissions relating to the said development and to enter into Agreement to Sell or Agreements to Lease or Mortgage, by way of deposit of title deeds, the LG's CONSTRUCTED AREA and the proportionate LG's UNDIVIDED SHARE in the Schedule Property.

37. The LAND-OWNERS have also this day executed another Power of Attorney (hereinafter referred to as the SECOND POWER OF ATTORNEY or 2nd POA). The said 2nd POA shall be kept in escrow with M/s.HDFC, who will deliver the same to LG on the said Handover Date in accordance with the terms of the Escrow Agreement between the parties as per the draft annexed hereto as Annexure V. The LAND-OWNERS shall also register the aforesaid 2nd POA simultaneously with taking delivery of the LAND-OWNERS CONSTRUCTED AREA. The said 2nd POA shall, inter alia, authorise and empower LG or their nominees to execute and register sale deeds in respect of LG's UNDIVIDED SHARE in the Schedule Property relatable to LG's CONSTRUCTED AREA. It is specifically declared by the LAND-OWNERS that this Power of Attorney shall be irrevocable. The said second Power of Attorney can be acted upon only after LG has delivered, or is deemed to have delivered, the LAND-OWNERS CONSTRUCTED AREA to the LAND-OWNERS.

38. The LAND-OWNERS shall not revoke the Power of Attorney(s), executed as above, provided however there is no breach of the terms contained herein to be performed/observed by LG.

....

43. If there is a breach or violation of the terms of this Agreement, the aggrieved party shall give written notice to the defaulting party, and such defaulting party shall rectify/remedy such breach within 30 days of receipt of such notice. The LAND-OWNERS will only be entitled to terminate this Agreement in the following situations:

(a) Failure of LG in completing the said development within the agreed time.

(b) Failure of LG in delivering the LAND-OWNERS CONSTRUCTED AREA within the stipulated

time without encumbrances.

(c) Permitting the change in ownership of the equity share capital in LG
Provided however that the LAND-OWNERS will be entitled to terminate this Agreement only if the LAND-OWNERS have not defaulted in any of their obligations under this Agreement.

44. In the event of this Agreement being terminated in terms of Clause 43 hereinabove, the LAND-OWNERS shall simultaneously with such termination refund to LG the said Security Deposit of Rs.3,82,00,000/- (Rupees Three Crores Eighty Two Lakhs only) paid by LG, after deducting the losses that the LAND-OWNERS may have suffered.

45. ...

46. Any structural defects in the Building, including the LAND-OWNERS CONSTRUCTED AREA shall be repaid by LG at their cost and expense upto a period of one year from the Handover Date.

...

52. All disputes, differences, claims and questions whatsoever which may arise during the continuance of this Agreement between the parties hereto touching these presents or the construction, meaning, effect or application thereof or any Clause or thing contained in this Agreement or in respect of any account or as to any act of omission of either party or as to any other matter in any way relating to or arising out of or touching this Agreement or the rights, duties and liabilities of either party under this Agreement shall be referred to arbitration in accordance with and subject to the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modifications or enactment thereof for the time being in force, each party nominating an arbitrator of the ranking of a retired High Court Judge residing at Chennai. The two arbitrators so appointed shall confer and nominate an umpire. The arbitration proceedings shall be held at Chennai and courts in Chennai alone shall have the jurisdiction.

....."

(c) Initially, the parties were vacillating between the residential building and commercial building and were uncertain

of this even at the time of signing the JDA. Hence, the JDA provided a period of 120 days for the parties to decide on the nature of structure to be put up. As per the terms of the JDA, the first respondent-Company, at the first instance, deposited with the appellants a sum of Rs.3.57 Crores towards refundable security deposit. On 29.03.2006, the parties entered into a Supplemental Agreement, whereby they decided to put up a Software Technology Park (STP) in the said property. This agreement was also reduced into writing. Besides this, the appellants executed a Power of Attorney of even date empowering the first respondent-Company to put up construction over the said property, apply for required sanction in this regard, execute agreements for sale for 50% of the said property and also enter into lease agreement pertaining to the first respondent-Company's share. The appellants also executed another Power of Attorney on 29.03.2006 empowering the first respondent-Company to convey 50% undivided share in the land in favour of its nominee or any other person. An Escrow Agreement was entered into on the same day between the first respondent-Company and the appellants and HDFC, Bangalore. Under the terms of the Escrow Agreement, HDFC was appointed as an Escrow Agent having custody of this Power of Attorney and was to act in the interest of both the parties. Under the terms of the Escrow Agreement, HDFC was obligated to hand over to the first respondent-Company the original Power of Attorney dated 29.03.2006 upon receipt of proof from the first respondent-Company that the construction was completed as per the terms of the JDA, which contemplated both delivery and deemed delivery. Further, a sum of Rs.25 lakhs was paid by the first respondent-Company towards further security deposit on 13.01.2005 at the request of the appellants.

(d) Another supplemental agreement dated 22.02.2007 was entered into between the parties, whereby the security deposit was enhanced by a further sum of Rs.3 crores and the total sum of Rs.6.82 crores was deposited with the appellants by the first respondent-Company. This amount being security deposit, is refundable by the appellants upon due performance by the first respondent-Company and contemporaneous to handing over vacant possession of their share of the constructed area.

(e) Clause 6 of the JDA provided that upon fulfilment of its obligations, the first respondent-Company shall offer to hand over to the appellants the areas constructed by it and such offer shall be made in writing. The date of such offer shall be reckoned as the "hand over date." On their failure to take delivery within 15 days from such date of hand over, it shall be deemed that the first respondent-Company has delivered possession by completing the obligations cast on the first respondent-Company under the JDA. All other provisions of the JDA revolving around the issue of the handing over date, include the possibility of deemed delivery.

(f) Changes were also brought about in Clauses 15.1 to 15.6 of the JDA, by incorporating fresh clauses which were numbered as 15.1, 15.2 and 15.3. The details of the areas and the allocation of spaces were reflected in Clause 6.1. As per the said clause, the second, third, fourth and fifth floors were to be allotted to the share of the first respondent-Company, while the sixth, seventh, eighth and ninth floors were allotted to the share of the appellants. The plinth area, common area and the super built up area, of each floor, was equally divided. Insofar as the tenth floor was concerned, the North Wing was allotted to the share of the first respondent-Company, while the South Wing was allotted to the share of the appellants. The terrace area was divided equally among the parties. The car parks, which were to be located in the basement, ground floor and first floor, and the open areas around the building, were also equally divided between the parties.

(g) The plan sanction was duly obtained and workers were engaged in different shifts to carry out the construction activities at commendable speed. First quality materials were used by the first respondent-Company being oblivious to the cost involved and elevation was given due importance, as the parties contemplated only a shell inside. The appellants and their representatives were in continuous supervision of the progress of work and actively participated in various discussions. They have also made many suggestions and requests for enhancements to the structure. According to the first respondent-Company, though these fell outside the ambit of the JDA, the first respondent-Company obliged merely to please the appellants. An extent of 1.86 lakhs square feet was erected and in excess of Rs.50 crores was spent on construction and related activities. The building has met the U.S. Green Building Council Norms and Standards and the Certification was under process. The specifications provided in the JDA were outshined and the first respondent-Company delivered much more than what was assured under the JDA. The property has been named "Menon Eternity".

(h) Having completed the construction as per the requirements, the first respondent-Company was ready to deliver to the appellants their share of the superstructure, which was sixth, seventh, eighth, ninth and Southern half of the tenth floor. The first respondent-Company was to retain the second, third, fourth, fifth and Northern half of the 10th floor for itself, as per the Supplemental Agreement, dated 29.03.2006. The basement, ground floor and first floor were allocated for car parking. Even while the construction activities were being wound up, the first respondent-Company had identified a tenant for the entire sixth floor of the appellants. The said tenant, M/s.Future Management and Consultancy Private Limited, had inspected the premises in and around August 2008 and after satisfying itself, offered to pay rent of Rs.88/- per Sq.Ft. per

month to the appellants. The said tenant also paid little over Rs.2 crores to the appellants towards advance for taking on lease the entire sixth floor of the property.

(i) Under Clause 25 of the JDA, the first respondent-Company was entitled to engage a Project Architect and had appointed one M/s.Natraj & Venkat as the Project Architect. The appellants were also aware of the same and even attended various meetings in their office to understand the interior specifications, materials used and understating the construction practices. The Project Architect issued a Certificate, dated 10.10.2008 stating that the building was fit for occupation, upon the Tamil Nadu Electricity Board (TNEB) giving power connection and CMWSSB providing water and sewerage connections to the property. It was specifically mentioned in the said Certificate that the same was being issued by them in the capacity of Project Architect. Similarly, the CMDA, after inspection of the premises and upon being satisfied that the structure has been constructed as per the sanctioned plan, issues a Completion Certificate certifying that the building is ready for occupation. The TNEB and the CMWSSB provide their respective services only after issuance of the Completion Certificate. With regard to the building, the first respondent-Company had applied for the Completion Certificate as early as on 29.07.2008. In fact, the JDA provided two limbs to ascertain fulfilment of obligations by the first respondent-Company, namely, (a) Certificate of Architect, and (b) Application to CMDA for Completion Certificate. Thus, fulfilment of the first respondent-Company's obligations did not include obtaining Completion Certificate from the CMDA, so also the electricity and sewerage Connections.

(j) In the meanwhile, there were further meetings and discussions between the first respondent-Company and the appellants. During the said meetings, various issues relating to the property were discussed. The appellants had alleged delay on the part of the first respondent-Company in completing the project. The Service Tax payable in respect of the project was another bone of contention which was discussed in detail. The first respondent-Company also placed on record that during the meetings, it was agreed between the parties that the entire construction was completed by the first respondent-Company and though entitled to exercise rights conferred under the Power of Attorney, the first respondent-Company sought execution of sale deed in their favour by the appellants directly. But the appellants had suggested that they would refund the security deposit only upon the first respondent-Company finding the tenants for the appellants' portion. This was not accepted by the first respondent-Company. It was further specifically stated that the additional works were also under way. However, such works were not within the scope of the JDA and hence, they did not require further discussion.

(k) While so, vide letter dated 20.10.2008, the first respondent-Company addressed the appellants informing them that the building was complete and ready and fit for occupation. As contemplated under Clause 6 of the JDA, the Certificate of the Project Architect and a copy of its application to the CMDA for Completion Certificate were enclosed with such documents. The appellants were also called upon to duly refund the security deposit and take possession of their share of the superstructure. It was categorically stated in the said letter that date of delivery shall be reckoned as the handing over date. Out of the entire sum of Rs.6.82 crores of security deposit, a sum of Rs.1 crore had already been refunded by the appellants from and out of the advance paid by the tenant identified by the first respondent-Company. The balance Rs.5.82 crores was demanded from the appellants. This amount was only in respect of the security deposit and other charges and the expenses to be shared by the appellants.

(l) While so, to the first respondent-Company's letter dated 20.10.2008, the first appellant, on behalf of all the appellants, addressed a reply, dated 28.10.2008 and through this letter, the appellant(s) refused to consider "20.10.2008" as the handing over date and alleged that the building was not complete in all respects. It was further contended that the Certificate of the Architect was not in accordance with Clause 6 of the JDA, as it is mentioned that the building would be fit for occupation only upon the electricity and sewerage connection being obtained. Basing that as the reason, the appellants contended that the Architect's Certificate could not be treated as certifying completion of the building, as electricity, water and sewerage connections were yet to be obtained. It was further alleged by the appellants that the obligation of the Project Architect extended to obtaining Occupancy Certificate and that the Project Architect was also obliged to certify that the first respondent-Company had submitted all the relevant documents to the CMDA as per the rules and regulations. It is the further case of the appellants that "20.10.2008" could not be deemed as the handing over date and called upon the first respondent-Company to withdraw the letter. However, it was unequivocally admitted by the appellant that they were holding a sum of Rs.5.82 crores re-payable to the first respondent-Company by the appellants.

(m) Shocked by the letter of the appellants, dated 28.10.2008, the first respondent-Company addressed a reply, dated 05.11.2008 and it was reiterated that the building was complete in all respects and ready and fit for occupation. While so, by letter dated 13.11.2008, the appellants addressed the Project Architect accusing the Architect of ineptness and lack of interest towards the project. Several rounds of discussions and meetings took place between the appellants and the first respondent-Company, and it became obvious and apparent that the

appellants had no intention to return the money re-payable to the first respondent-Company. Besides that, the appellants had also engaged themselves in a private dialogue with the Escrow Agent and several communications were exchanged between the appellants and the HDFC being the Escrow Agent. According to the first respondent-Company, the Escrow Agent, instead of acting as a Trustee of the interest of both the parties, had taken sides with the appellants. In the meanwhile, on 26.11.2008, the first respondent-Company addressed the appellants enclosing a Statement of Accounts showing the amounts due to the first respondent-Company from the appellants. The first respondent-Company had incurred heavy expenses and requested the appellants once again to refund the dues to them. By then, the Completion Certificate was also received from the CMDA. The appellants returned a further sum of Rs.1 crore to the first respondent-Company on 01.12.2008, reducing the balance of security deposit to Rs.4.82 crores.

(n) Thereafter, meetings were held between the parties and notices were also exchanged between them. While so, the appellants had moved this Court under Section 9 of the Arbitration and Conciliation Act and filed O.A.Nos.201 and 202 of 2009 and A.Nos.1143 to 1145 of 2009, praying for the following reliefs:

(i) interim injunction restraining the first respondent-Company from leasing out any portion of the property belonging to them;

(ii) restraining HDFC from releasing the original Power of Attorney;

(iii) restraining HDFC not to sanction any loans to the first respondent-Company against security of the rent payable in respect of the portions of the second appellant;

(iv) interim injunction restraining the first respondent-Company from interfering with the appellants' rights who have joint possession of the constructed portion of the building, and

(v) interim injunction restraining the registration of the balance 5400 Sq.Ft. undivided share in favour of the first respondent-Company.

Except A.No.202 of 2009, all the other applications were dismissed on merits by this Court on 21.04.2009 and in respect of A.No.202 of 2009 regarding the joint possession, the first respondent-Company had undertaken not to disturb or interfere with such joint possession and hence, the said application alone stood allowed. According to the first respondent-Company, the appellants had not exercised their right to nominate an

Arbitrator and hence, the first respondent-Company moved this Court under Section 11 of the Arbitration and Conciliation Act. In the meantime, the appellants had filed C.S.No.279 of 2009 praying for permanent injunction restraining the Sub-Registrar, Mylapore from registering the sale deed presented by the first respondent-Company in respect of 5400 Sq.Ft. undivided share over the said property; permanent injunction restraining the Sub-Registrar, Mylapore from registering lease deed or document or instrument presented by the first respondent in respect of the second, third, fourth, fifth and half of the tenth floor of the building "Menon Eternity" and for mandatory injunction directing the Sub-Registrar, Mylapore to initiate action against the first respondent-Company and its officials under Section 83 of the Indian Registration Act. The said application was dismissed on merits, and pending the said suit, the appellants had taken out interim applications.

(o) The appellants preferred Original Side Appeal (O.S.A) against the order of the learned Single Judge. However, no interim order had been granted in favour of the appellants. The appellants sought for appointment of an Advocate Commissioner to inspect the building which is constructed by the first respondent-Company, pursuant to which, an Advocate Commissioner was appointed, who had inspected the premises in the presence of the representatives of the first respondent-Company and the appellants and also their respective counsels. The Advocate Commissioner filed report mentioning the defects pointed out by the appellants' representative and remained silent on the explanation given by the first respondent-Company's representative. The grouting process that had already been done and the explanation given by the first respondent-Company, were also not noted by the Advocate Commissioner. The Advocate Commissioner, besides the dampness in the basement electrical room, also mentioned in his report about the patch work in the stair-ways and tiles being chiselled in the wash rooms. The Advocate Commissioner had also pointed out certain inconspicuous flaw in the seventh floor of the premises, which the first respondent-Company had duly set right and pursuant to the grouting process, the dampness had also been set right. These defects cannot be cited to hold that the building is not fit for occupation.

(p) According to the first respondent-Company, Clause 46 of the JDA provides that they shall rectify the structural defects, if any, in the building. The first respondent-Company shall be obliged to do so for a period of one year from the date of handing over of the possession. It is evident from the said Clause that completion of the building and handing over of the possession of the completed building, was clearly understood to be different from structural defects. The first respondent-Company had specifically undertaken to set right the defects, if any and being the owner of 50% share in the property, the first

respondent-Company is equally interested in protecting and maintaining the property in the best possible state and condition. According to the first respondent-Company, as a direct consequence of the appellants' failure to refund the first respondent-Company's security deposit and on their failing to pay the expenses incurred with respect to statutory charges, the first respondent-Company suffered severe loss.

3. In the above background, the parties proceeded to have their disputes adjudicated upon by an Arbitrator appointed by this Court. Since the appellants did not appoint their nominee in terms of the arbitration agreement, the first respondent-Company approached this Court by filing a petition under Section 11 of the Arbitration and Conciliation Act, 1996, which was numbered as O.P.No.137 of 2009 and this Court passed an order appointing the first respondent-Company's nominee as an Arbitrator.

4. In the arbitration proceedings, the first respondent-Company filed their Statement of Claim, claiming the following reliefs:

(a) to direct the appellants to jointly and severally pay the first respondent-Company a sum of Rs.5,92,83,923/- being the refundable security deposit together with interest at 12% per annum and future interest at 12% per annum on the sum of Rs.4,82,00,000/- from the date till the date of realisation.

(b) to direct the appellants to jointly and severally pay the first respondent-Company a sum of Rs.1,21,67,741/- towards rental deposit, caution deposit, OSR charges, demolition charges, together with interest at 12% p.a. and future interest at 12% p.a. on the sum of Rs.1,09,76,830/- from the date till the date of realisation.

(c) to direct the appellants to jointly and severally pay the first respondent-Company a sum of Rs.28,63,093/- being the statutory charges together with interest at 12% and future interest at 12% p.a. on the sum of Rs.25,82,870/- from that date till the date of realisation.

(d) to direct the appellants to jointly and severally pay the first respondent-Company a sum of Rs.37,87,641/- towards maintenance charges together with interest thereon at 12% p.a. and future interest at 12% p.a. on the sum of Rs.35,82,464/- from that date till the date of realisation.

(e) to direct the appellants to jointly and severally pay future maintenance charges at Rs.3.50 per Sq.Ft. per month from that date.

(f) to direct the appellants to jointly and severally pay the first respondent-Company a sum of Rs.4,86,906/- towards electricity consumption charges for common areas, together with interest thereon at 12% per annum and future interest at 12% p.a. on the sum of Rs.4,65,345/- from that date till the date of realisation.

(g) to direct the appellants to jointly and severally pay the future electricity consumption charges in respect of common areas as per actual meter reading.

(h) to direct that the appellants are liable to pay the Service Tax arising out of the transaction and consequently direct the appellants to jointly and severally pay a sum of Rs.82,40,000/- towards Service Tax.

(i) to direct the appellants to jointly and severally pay the first respondent-Company a sum of Rs.1,00,00,000/- towards damages for loss of reputation and goodwill.

(j) to direct the appellants to jointly and severally pay the first respondent-Company a sum of Rs.30,18,104/- towards property tax, fire insurance and IBMS cost.

(k) to direct that the first respondent-Company is entitled to the original of the Power of Attorney dated 29.03.2006 executed by the appellants in favour of the first respondent-Company and presently under the custody of the Escrow Agent, HDFC, Bangalore.

(l) to direct the appellants to pay the costs of the proceedings.

5. In response to the above claim made by the first respondent-Company, the appellants also filed their Statement of Defence, as also their counter claim. In the counter claim, the appellants claimed the following reliefs:

(a) to declare the various sale deeds, dated 19.12.2008 registered in the office of the SRO, Mylapore, Chennai, allegedly executed by the first respondent-Company through the alleged Power of Attorney as illegal, void and not binding on the appellants and to direct the first respondent-Company to deliver the sale deeds for being cancelled and authorising the appellants to execute appropriate cancellation deeds.

(b) to declare and adjudge that the lease deeds dated 10.11.2008 executed by the first respondent-Company in favour of BNP Paribas Global Securities Ltd., as illegal, void and not binding on the appellants and to direct the first respondent-Company to deliver the said lease deed for cancellation of the same by executing a cancellation deed.

(c) to declare all the acts, deeds and documents done by or executed on the basis of the five sale deeds dated 19.12.2008 and lease deed dated 10.11.2008 and to direct the first respondent-Company to pay the appellants all the moneies and benefits which the first respondent-Company had received or earned.

(d) to declare that the Certificates issued by the Project Architect dated 10.10.2008 in respect of the disputes property as illegal and void.

(e) to grant an order of permanent injunction restraining the claim from relying on the said Certificate, dated 10.10.2008.

(f) to appoint an independent Architect for joint inspection

of the building and for certifying the measurement and the quality of the constructed area.

(g) to direct the first respondent-Company to complete the building as per the agreed specifications in the JVA and obtain Completion Certificate from the independent Architect and furnish the same to the appellants.

(h) to direct the first respondent-Company to deliver to the appellants 50% of the constructed area upon the appellants paying to the first respondent-Company such sum of monies as the Arbitration Tribunal may determine.

(i) to direct the first respondent-Company to return all the original documents of title pertaining to the property to the appellants, to direct the first respondent-Company to deliver all the original/authenticated copies of drawings, plans, literatures, brochures etc. pertaining to all the devises, equipments and amenities, and to direct the first respondent-Company to display the name of the building "Menon Eternity" at a prominent place as may be chosen by the appellants.

(j) to grant an order of permanent injunction from using the name "Lancor" anywhere in the building.

(k) to direct the first respondent-Company to pay the appellants a sum of Rs.80,60,456/- as compensation for the delay in the completion of the building and future interest at 12% p.a. from the date of the counter claim.

(l) to direct the first respondent-Company to pay the appellants a sum of Rs.12,41,36,609/- as compensation towards loss of previous rent along with future interest at 12% p.a. from the date of counter claim.

(m) to direct the first respondent-Company to pay the appellants a sum of Rs.39,59,220/- towards compensation for loss of rent in respect of car park area with interest at 12% p.a. calculated from the date of the counter claim.

(n) to direct the first respondent-Company to pay a sum of Rs.1,29,63,727/- towards compensation of loss of interest on the advance rent with 12% p.a. from the date of counter claim.

(o) to direct the first respondent-Company to pay the appellants a sum of Rs.31,75,37,342/- towards loss of future rents with interest at 12% p.a. from the date of counter claim.

(p) to direct the first respondent-Company to pay the appellants a sum of Rs.5 crores as damages for slandering the title of the appellants to their share of the constructed area with interest at 12% p.a. from the date of the counter claim.

(q) to direct the first respondent-Company to pay to each of the 3 appellants a sum of Rs.3 crores each as damages for having defamed their fair name and reputation.

(r) to direct the first respondent-Company to tender an unconditional apology and withdraw the public notice published on 17.07.2009 in "The Hindu" and prominently publish the unconditional apology in the same newspaper.

(s) to direct the first respondent-Company to pay the

appellants the prematurely repaid deposit of Rs.2 crores and interest thereon amounting to Rs.2,31,00,000/- along with future interest at 12% p.a. from the date of counter claim.

(t) to direct the first respondent-Company to appoint an independent agency accepted by both parties for maintenance of the common areas and amenities.

(u) to direct the first respondent-Company to discharge the loan obtained from HDFC and to obtain the original title deeds and documents in respect of the subject property from HDFC and to return the same to the appellants, and

(v) to direct the first respondent-Company to pay the appellants cost of the arbitral proceedings.

6. Based on the pleadings of both parties, the learned Arbitrator framed the following issues for consideration:

(i) Whether there was any delay on the part of the appellants in handing over the property after demolition ?

(ii) Whether the first respondent-Company have discharged their obligations and completed the construction of the building within the stipulated time as required under the JDA and the supplemental agreement ?

(iii) Whether the Certificate of the Architect dated 10.10.2008 is valid and binding on the parties and whether the availment of the electricity and water connection was a pre-condition for the completion ?

(iv) Whether there should be an appointment of an Architect afresh ?

(v) Whether the first respondent-Company had complied with the terms of clause 6 of the JDA ?

(vi) Whether 20.10.2008 can be construed as the deemed date of handing over ?

(vii) Whether the terms of the Escrow Agreement is relevant for the Arbitral proceedings and if so, whether the first respondent-Company had complied with, more particularly Clause 7 ?

(viii) Whether the sale deeds, dated 19.12.2008 is supported by good and valid consideration ?

(ix) Whether the first respondent-Company is entitled to the various claims as prayed for ?

(x) Whether the appellants are entitled to the claims made under their counter claim ?

(xi) Whether the parties are entitled to the cost of the proceedings ?

(xii) Whether the first respondent-Company was entitled to premature return of the deposits from the appellants ? and

(xiii) To what other reliefs the parties are entitled to ?

7. Before the learned Arbitrator, on the side of the first respondent-Company, one Mr.R.V.Sekar was examined as C.W.1 and Exs.C-1 to C-58 were marked. On the side of the appellants,

Mr.Prem Kumar Menon was examined as R.W.1 and Exs.R-1 to R-81 were marked. One Velu, Engineer and Krishna Bhagavan Bhat, Engineer were examined as independent witnesses A.W.1 and A.W.2 and report of the independent Engineer was marked as Ex.A-1.

8. While answering the issues, the learned Arbitrator answered the Issue Nos.1 to 3 and 5 to 8 in favour of the appellants. Insofar as Issue No.4 was concerned, the learned Arbitrator has dealt with the report of the Independent Engineer appointed by him and rendered a finding and came to the conclusion that in a major construction, there are bound to be certain defects like seepage here and there, broken glass-panes, etc., which have to be ignored and the Engineers themselves have mentioned them as tolerable and had also suggested rectification. However, the learned Arbitrator observed that few defects are major and are bound to be taken note of as unsatisfactory execution of work. The learned Arbitrator has noted the major defects based on the Engineer's Report and also considered the evidence of the Independent Engineer.

9. So far as Issue No.8 is concerned, the learned Arbitrator has answered the same in favour of the appellants and against the first respondent-Company and came to the conclusion that the sale deeds executed in favour of the first respondent-Company are invalid and illegal and no further relief could be granted and it was left to both parties to work out their remedy in accordance with law by approaching the competent forum either before the Civil Court or under the provisions of the Arbitration and Conciliation Act, 1996 (needless to say by another Arbitrator) by putting forth appropriate pleadings.

10. So far as Issue Nos.9 and 10 are concerned, the learned Arbitrator came to the conclusion that in respect of the various claims made by the first respondent-Company, in view of the finding that the sales in favour of the first respondent-Company are vitiated by illegality and inconsistency with the terms of agreement, JDA and Escrow Agreement, there is a fundamental breach by the first respondent-Company and hence, the various claims as put forth in the claim statement cannot be gone into. The learned Arbitrator found that the above observation is however subject to the right of the first respondent-Company to raise such claims before the appropriate forum and there cannot be a bar for the first respondent-Company to do so, inasmuch as the learned Arbitrator had not adjudicated on the said claims on their merits and hence, he has rejected the claim(s).

11. As far as Issue No.11 is concerned, the learned Arbitrator found that the parties would bear their own costs. As far as Issue No.12 is concerned, the learned Arbitrator observed that no further finding was required to be made, as it had already worked itself out.

12. In sum and substance, the learned Arbitrator, after analysing the entire evidence, held as follows:

(i) Contrary to the first respondent-Company's contentions

that the defects in the building were all minor, the evidence on record showed that the building was incomplete in all material respects.

(ii) The Architect's Certificate relied on by the first respondent-Company is not the Certificate envisaged in the JDA.

(iii) The first respondent-Company had no authority to register the sale deeds with a photocopy of the Power of Attorney, dated 29.03.2006 in violation of the Escrow Agreement, dated 29.03.2006.

(iv) The sale deeds in favour of the first respondent-Company were set aside and the parties were directed to approach the appropriate forum with respect to the other compensatory reliefs.

(v) The conveyance deeds executed on 19.12.2008 are vitiated by lack of bona-fides.

(vi) The learned Arbitrator in detail considered the question of granting alternative relief on setting aside the sale deeds executed by the first respondent-Company in its own favour on 19.12.2008 and the specific finding of the learned Arbitrator is that the first respondent-Company has not asked for any alternative relief and there was no claim seeking alternative relief for awarding damages, if the sale deeds were set aside and the learned Arbitrator held that he cannot travel beyond the disputes in question or grant relief in equity not contemplated or sought for by the parties.

13. Aggrieved by the above Award of the learned Arbitrator, the first respondent-Company has preferred O.P.No.231 of 2016 before this Court and by order dated 23.12.2016, the learned Single Judge upheld the findings of the learned Arbitrator, except to the extent that before cancellation of the sale deeds, the learned Arbitrator should have considered the possibility of directing the first respondent-Company to make reparations/pay damages for regularising the sale and on this view, the learned Single Judge held that the learned Arbitrator's decision holding the sale deeds to be invalid, was not correct. The learned Single Judge further held that though the first respondent-Company has not pleaded any alternative relief in the event of the sale deeds being set aside, the learned Arbitrator should have directed the parties to amend the pleadings and lead evidence for the alternative relief of regularisation of sale transaction or direct the owners to compensate the first respondent-Company for the amount incurred for the construction. Thus, the learned Single Judge had partially set aside the impugned Award of the learned Arbitrator. Since the cancellation of the sale deeds was set aside by the learned Single Judge, challenging the order passed by the learned Single Judge, the present Original Side Appeal (OSA) has been filed by the appellants.

14. The first respondent-Company has preferred Cross Objection No.58 of 2017 with regard to the observations of the

learned Single Judge that further disputes would be subject to the decision of an adjudicator. In this regard, it would be appropriate to extract the relevant observations made by the learned Single Judge as follows:

"42. Thus, for the foregoing reasons, I am inclined to set aside the impugned award, albeit, partially. In other words, while the finding with respect to failure by the petitioner company to comply with the conditions stipulated in Clause 6(a) of the JDA is sustained, along with all those attendant findings which are necessary to reach this conclusion - I am disinclined, for the present, to axiomatically proceed to invalidate the sale deeds, as much would depend on the course of action, which the concerned Adjudicator would take hereafter. The Adjudicator could very well permit the petitioner Company to seek title to their half-share of the subject Building and the appurtenant rights, as envisaged in the JDA and the supplemental agreements, if it were to pay damages as may be judicially determined by an appropriate forum or, in the alternative could declare the sale deeds as invalid and allow for payment of only cost of construction to the petitioner company. While taking recourse to this alternative the concerned Adjudicator will have to bear in mind, in my opinion, the terms of the JDA and the nature of the arrangement arrived at between the parties, and then, perhaps, rule on the best very forward."

Hence, the Cross Objection has been filed stating that after partially setting aside the award of the learned Arbitrator, the learned Single Judge ought not to have stated that the further dispute would be subject to the decision of an adjudicator, in view of the judgments of the Supreme Court and such a course of action will not be permitted under Section 34 of the Arbitration and Conciliation Act. The learned Single Judge could have only set aside the findings of the learned Arbitrator to the extent that was necessary. Thus, the O.S.A. and the Cross Objection are together taken up for hearing before this Court.

15. Learned Senior Counsel appearing for the appellants submitted that the appellants are the land owners of the property of an extent of 20 grounds and 600 Sq.Ft. in Door No.165, St.Mary's Road, Chennai. They have entered into JDA with the first respondent-Company on 17.12.2004. Under this JDA, the first respondent-Company deposited Rs.6.82 crores as

refundable deposit with the appellants. The first respondent-Company is entitled to 50% of the undivided share in the property as consideration for constructing superstructure over the premises. In order to get the refund of the security deposit, the first respondent-Company has to fulfil three conditions, namely: (i) The first respondent-Company should complete the construction in all respects and Architect to certify that building has been put up and completed according to the sanction plan and fit for occupation, (ii) The first respondent-Company shall apply for Completion Certificate, and (iii) The first respondent-Company shall offer the appellants their share in the constructed portion. Further, the day on which the first respondent-Company completes the formalities, will be deemed as the 'hand over date'. If the appellants do not refund the security deposit within 15 days, then the first respondent-Company shall be deemed to have delivered possession. In this regard, learned Senior Counsel appearing for the appellants has invited the attention of this Court to Clause 6 of the JDA. Thereafter, on 29.03.2006, supplemental agreement was entered into between the appellants and the first respondent-Company to put up Software Technology Park (STP). On the very same day, an irrevocable Power of Attorney was executed by the land owners and also an Escrow Agreement was also executed on the same date with HDFC. In terms of the Escrow Agreement, the Power of Attorney authorising the developer to convey 50% of the undivided share in land to prospective purchaser, will be handed over to the developer on HDFC being satisfied that the developer has delivered or deemed to be delivered 50% of the constructed area and also that the developer has fulfilled all the conditions in Clause 6 of the JDA.

16. Learned Senior Counsel appearing for the appellants further submitted that 04.07.2006 is the commencement date for construction in terms of the JDA. Even while the construction was going on during August 2008, the first respondent-Company identified the tenants. On 10.10.2008, the Architect's Certificate was produced by the first respondent-Company, stating that the building is fit for occupation as soon as the TNEB gives power connection and the water and sewerage Board gives the necessary connection as required. Further, on 20/22.10.2008, the first respondent-Company sent a letter informing the appellants that the building was complete and fit for occupation and asked for refund of security deposit. But by letter dated 28.10.2008, the appellants refused to consider the said letter dated 20/22.10.2008 as the handing over date and also disputed the fact that the building was complete by showing photographs of the building enclosed with the letter. On 05.11.2008, the first respondent-Company wrote to the appellants admitting that certain issues were pending in respect of the building, which are in the nature of primary specifications in

the agreement, which can only be completed after receipt of the Completion Certificate and voluntary enhancements to the appearance and utility of the building which the first respondent-Company was planning to carry out. In those circumstances, on 10.11.2008, the first respondent-Company, without even informing the appellants and without getting any title over the property, proceeded to lease out the portions of the building to third parties as if they are seized and possessed of the land as owner.

17. Learned Senior Counsel appearing for the appellants also contended that as per Escrow Agreement, the HDFC agreed to hand over the Power of Attorney to the first respondent-Company on or after the hand over date as defined in Clause 6 of the JDA, after HDFC have satisfied themselves that the first respondent-Company had delivered or deemed to have delivered the land owners constructed area to the land owners and also that the first respondent-Company has performed and fulfilled all the conditions stipulated in Clause 6 of the JDA and the supplemental agreement. But the appellants disputed the handing over date. At this juncture, on 20.11.2008, the Escrow Agent informed the appellants that they had received a letter from the first respondent-Company seeking release of the original Power of Attorney for registration of 50% of the property in its favour. On 22.11.2008, the appellants strongly objected to the request of the first respondent-Company for release of the Power of Attorney and ask the Escrow Agent to refrain from doing the same. Further, on 13.12.2008, again the Escrow Agent informed the appellants of another request from the first respondent-Company to release the Power of Attorney. Moreover, on 19.12.2008 and 20.12.2008, the appellants wrote to the first respondent-Company directly reiterating that the building was not complete and that 50% of the property could not be conveyed until the building is fit for occupation. On 19.12.2008, even during the pendency of the disputes regarding completion of the building, the first respondent-Company proceeded to execute five sale deeds conveying 50% of the property to themselves without informing the appellants, while the original Power of Attorney was lying with the Escrow Agent. On 29.12.2008, the appellants again reiterated that the building was incomplete.

18. Learned Senior Counsel appearing for the appellants further contended that on 05.01.2009, the first respondent-Company issued notice to the appellants referring the dispute to arbitration and also for refund of security deposit, to take possession of the premises and comply with the terms of the JDA in all respects. Unaware of the registration of the sale deeds, the appellants wrote to the Escrow Agent on 12.01.2009 stating that since the first respondent-Company has referred the dispute to arbitration, any decision regarding the release of original Power of Attorney will be taken by the learned Arbitrator. At this juncture, on 12.02.2009, the first respondent-Company

informed the appellants of registration of the sale deeds on 19.12.2008 for the first time. Shocked by the news of registration of the sale deeds, the appellants wrote to the Escrow Agent to verify whether the original Power of Attorney had been released. The appellants moved this Court and filed applications under Section 9 of the Arbitration and Conciliation Act in O.A.Nos.201 and 202 of 2009 and A.No.1143 to 1145 of 2009 for interim injunction restraining the first respondent-Company from leasing out any portion of the property belonging to them, restraining the HDFC from releasing the original Power of Attorney, etc. Except O.A.No.202 of 2009, all the other applications were dismissed on merits by this Court on 21.04.2009 and in respect of O.A.No.202 of 2009 regarding the joint possession, the first respondent-Company had undertaken not to disturb or interfere with such joint possession and hence, the said application alone stood allowed.

19. Learned Senior Counsel appearing for the appellants further submitted that according to the first respondent-Company, the appellants had not exercised their right to nominate an Arbitrator and hence, the first respondent-Company moved this Court under Section 11 of the Arbitration and Conciliation Act. In the meantime, the appellants had filed C.S.No.279 of 2009 praying for permanent injunction restraining the Sub-Registrar, Mylapore from registering the sale deed presented by the first respondent-Company in respect of 5400 Sq.Ft. undivided share over the said property; permanent injunction restraining the Sub-Registrar, Mylapore from registering lease deed or document or instrument presented by the first respondent in respect of the second, third, fourth, fifth and half of the tenth floor of the building "Menon Eternity" and for mandatory injunction directing the Sub-Registrar, Mylapore to initiate action against the first respondent-Company and its officials under Section 83 of the Registration Act. The said application was dismissed on merits, and pending the said suit, the appellants had taken out interim applications. The appellants preferred Original Side Appeal (O.S.A) against the order of the learned Single Judge. However, no interim order had been granted in favour of the appellants.

20. Learned Senior Counsel appearing for the appellants further contended that Advocate Commissioner was appointed by this Court, who inspected the building, in which various defects were pointed out, which would show that the building was not completed. As per the Escrow Agreement, the HDFC agreed to hand over the Power of Attorney to the first respondent-Company on or after the hand over date as mentioned in Clause 6 of the JDA, after the HDFC have satisfied themselves that the first respondent-Company has delivered or deemed to have delivered the land owners constructed area to the land owners. In the instant case, when everything is in dispute, and when the Power of Attorney was not handed over by the Escrow Agent, the first

respondent-Company has chosen to execute the sale deeds for themselves. The first respondent filed claim petition before the learned Arbitrator for refund of security deposit and other monetary claims. The appellants filed counter claim seeking declaration that the sale deeds, dated 19.12.2008 are void and therefore, the same have to be set aside. In the meanwhile, the first respondent-Company continued to enjoy the rental income by renting half of the building during the pendency of the arbitration proceedings. During October 2010, the appellants also entered into the property and occupied 50% of the building pursuant to the interim order of the learned Arbitrator. In fact, the learned Arbitrator had appointed an Independent Engineer, who filed report pointing out the defects in the building. On 16.03.2016, the learned Arbitrator passed an Award holding that contrary to the contention of the first respondent-Company that the defects in the building were all minor, the evidence on record showed that the building was incomplete in all material respects. The learned Arbitrator held that the Architect's Certificate relied on by the first respondent-Company is not the Certificate as envisaged in the JDA. The learned Arbitrator further observed that the first respondent-Company had no authority to register the sale deeds with a photocopy of the Power of Attorney, dated 29.03.2006 in violation of the Escrow Agreement, dated 29.03.2006. Thus, the learned Arbitrator set aside the sale deeds executed in favour of the first respondent-Company and directed the parties to approach the appropriate forum with respect to the other compensatory reliefs.

21. In the above context, learned Senior Counsel appearing for the appellants submitted that the learned Arbitrator, in detail, considered the question of granting alternative relief on setting aside the sale deeds executed by the first respondent-Company in its own favour on 19.12.2008. A specific finding was rendered by the Arbitrator that the first respondent-Company had not asked for any alternative relief and there was no claim seeking alternative relief for awarding damages, if the sale deeds are set aside. Hence, the learned Arbitrator held that he cannot travel beyond the disputes in questions or grant the relief in equity not contemplated or sought for by the parties.

22. Aggrieved by the above findings of the learned Arbitrator, the first respondent-Company filed O.P.No.231 of 2016 before the learned Single Judge, under Section 34 of the Arbitration and Conciliation Act. By the impugned order dated 23.12.2016 passed in the said O.P., the learned Single Judge upheld the findings of the learned Arbitrator, except to the extent that before the cancellation of sale deeds, the learned Arbitrator should have considered the possibility of directing the first respondent-Company to make reparations/pay damages for regularising the sale and on this view, the learned Single Judge

held that the learned Arbitrator's decision holding the sale deeds to be invalid, is not correct. The learned Single Judge had held that though the first respondent-Company had not pleaded any alternative relief in the event of the sale deeds being set aside, the learned Arbitrator should have directed the parties to amend the pleadings and lead evidence for the alternative relief of regularisation of sale transaction or direct the owners to compensate the first respondent-Company for the amount incurred for the construction. Attacking the said finding of the learned Single Judge, the learned Senior Counsel appearing for the appellants submitted that the learned Single Judge has not considered the reasonings of the learned Arbitrator regarding the lack of bona-fides on the part of the first respondent-Company in registering the sale deeds. Learned Senior Counsel appearing for the appellants also submitted that the learned Single Judge ought to have seen that if the finding of the learned Arbitrator regarding the invalidity of the sale deeds, is set aside, the appellants are being deprived of any relief arising out of the arbitral proceedings, despite successfully establishing all the factual issues in their favour.

23. Learned Senior Counsel appearing for the appellants further contended that the grounds on which the Award of the learned Arbitrator can be challenged, have been specifically codified under Section 34 of the Arbitration and Conciliation Act, 1996 and this provision had been specifically amended in the year 2015, making the scope of judicial interference even narrower. He further submitted that under Section 34 of the said Act, the learned Single Judge can only either set aside or uphold the Award and the learned Single Judge has no power to direct the parties to go for "fresh adjudication". In this regard, the learned Senior Counsel appearing for the appellants relied on the following decisions:

- (i) 2006 (11) SCC 181 (McDermott International Inc. Vs. Burn Standard Co. Ltd).
- (ii) 2008 (13) SCC 80 (DDA VS. R.S.Sharma & Co).
- (iii) 2015 (3) SCC 49 (Associate Builders Vs. DDA).
- (iv) 2017 (5) CTC 420 (Division Bench of Madras High Court) (V.S.ekambaram Vs. Sri Krishna Tiles and Potteries (Madras) Pvt. Ltd).

24. Learned Senior Counsel appearing for the appellants also submitted that having agreed to all the basic factual findings of the learned Arbitrator, the learned Single Judge could not have interfered with the Award. The learned Single Judge could not have found fault with the learned Arbitrator's finding that the sale deeds are invalid, on the pretext that the learned Arbitrator should have explored other options by calling upon the parties to amend the pleadings. The learned Arbitrator has no power to grant any relief that goes beyond the reliefs prayed

for by either parties. In this context, the learned Senior Counsel appearing for the appellants relied on the following decisions:

(i) 2010 (1) SCC 234 (Bharat Amratlal Kothari Vs. Dosukhan Samadkhan Sindhi).

(ii) 2011 (3) SCC 436 (State of Orissa Vs. Mamata Mohanty).

(iii) 2012 (12) SCC 581 (State of Goa Vs. Praveen Enterprises).

(iv) 2013 (4) SCC 690 (Rajesh Kumar Vs. State of Bihar).

25. Learned Senior Counsel appearing for the appellants further submitted that, in fact, the learned Arbitrator has considered all the options judiciously before declaring the sale deeds illegal and he has not cancelled the JDA nor has he divested the first respondent-Company of its rights under the JDA. Having found that the sale deeds were invalid, the learned Arbitrator specifically recognises that either party may be entitled to consequential reliefs, namely the first respondent-Company can be put back in possession of the property upon payment of compensation to the appellants, or the appellants can be directed to pay the first respondent-Company the compensation for the latter's permanent relinquishment of any rights over the property. This shows that the learned Arbitrator has preserved and kept in-tact the rights of the parties under the JDA and under law for further remedies. Moreover, the Award of the learned Arbitrator is not perverse and only if the Award is perverse, this Court can interfere with the same. For all these reasons, the learned Senior Counsel appearing for the appellants prayed for setting aside the impugned order passed by the learned Single Judge.

26. Countering the above submissions, learned Senior Counsel appearing for the first respondent-Company submitted that by setting aside the sale deeds, the learned Arbitrator has virtually terminated the agreement between the parties. In fact, there was no prayer made by the appellants to terminate the agreement and no relief was sought for to take possession of the first respondent-Company's share either by paying compensation or otherwise. The learned Arbitrator has held that the first respondent-Company will have to compensate the appellants, if they chose to retain their share of the property, or the other option would be to declare the appellants to be the owners of the share of the first respondent-Company upon payment of compensation. In the Award, the learned Arbitrator has found that either the appellants have to pay the first respondent-Company for the entire works done/value of the assets to be taken over by them, or the first respondent-Company has to be directed to compensate the appellants for having taken over the assets by virtue of an illegal conveyance to themselves. The consequence of declaring the sale deeds invalid and unenforceable, had been found to be the ejectment of the first

respondent-Company from the property. The learned Arbitrator has further observed that there is no provision in the JDA for liquidated damages that would cover the situation where the sale deeds were being set aside and that neither party has come forward with the pleading on actual compensation to the first respondent-Company. In paragraph 132 of the Award, the learned Arbitrator has recorded that the appellants are satisfied by raising a contention, rightly of course, that the sales in favour of the first respondent are invalid, but no solution/relief is suggested to fulfil the requirement to which the first respondent-Company will be entitled to under Section 70 of the Indian Contract Act and that they have not pleaded for any relief to themselves in the event of the sales being set aside. Learned Senior Counsel appearing for the first respondent-Company further contended that the learned Arbitrator committed grave error in paragraph 132 of the Award by stating that the Arbitrator may be empowered to order recession of the contract where the contract has become voidable. Thus, the learned Arbitrator has addressed himself to try to solve a problem arising from the consequence of merely declaring the sale deeds to be unenforceable and the agreement to be treated as void or voidable, while it was not contemplated by the parties at all.

27. Learned Senior Counsel appearing for the first respondent-Company further made his submission that the learned Arbitrator found that the building was unfit for occupation and therefore, setting aside the sale deeds was ex-facie perverse, when in fact both the Advocate Commissioner appointed by this Court as well as the Independent Engineer appointed by the learned Arbitrator observed that only there are three defects/non-compliance, namely, dampness in the basement, patch-work on the staircase in the upper floors and absence of a canopy in the terrace. In fact, the learned Single Judge has correctly pointed out that the learned Arbitrator has failed to address as to whether the above defects are curable and if they are not curable, reparation/damages could be awarded to the appellants.

28. The learned Senior Counsel appearing for the first respondent-Company further pointed out that the learned Arbitrator has directed the first respondent-Company to pay back almost over Rs.60 crores received as rent for their share of the building and also to surrender the entire 93,051 Sq.Ft. back to the appellants, a property worth over Rs.150 crores. Therefore, the Award of the learned Arbitrator certainly suffers from violating the Doctrine of Proportionality.

29. It is the further contention of the learned Senior Counsel appearing for the first respondent-Company that the scope of Section 37 of the Arbitration and Conciliation Act is even more limited than the scope of Section 34 of the said Act. The observations of the learned Single Judge that the focus of

the learned Arbitrator ought to have been on the damages which the appellants may have been entitled to, cannot be set aside under Section 37 of the said Act, more so, when the factual findings of the learned Arbitrator had not been interfered with. The jurisdiction exercised under Section 34 of the said Act had therefore been limited to restoring the title of the first respondent-Company which had completed the building, half of which is in possession and enjoyment of the appellants. While doing so, the learned Single Judge has also observed that he had no jurisdiction to decide anything further, since there can be no substitution of the relief nor grant of any fresh relief under Section 34 of the said Act, as held by the Supreme Court. In fact, the learned Arbitrator has left several issues unanswered. What has not been decided by the learned Arbitrator, has to remain as it is, and that itself would be a ground for setting aside the Award. Under Section 37 of the said Act, this Court may not sit in appeal over the findings of the learned Single Judge, unless the disputes not decided by the learned Arbitrator are going to be re-appreciated and adjudicated in these proceedings.

30. Learned Senior Counsel appearing for the first respondent-Company further contended that if the order of the learned Single Judge is set aside, the result would be that the appellants would enjoy windfall profits having neither contributed to the cost of the building, nor ever having contemplated complete ownership of the entire superstructure, even during the arbitral process. In this regard, the learned Arbitrator had directed payment of benefits accruing to the first respondent-Company as a result of the invalidity of the sale deeds to be made over to the appellants, and the consequence of declaring the sale deeds invalid, would result in dispossessing the first respondent-Company from their share of the building. Therefore, the learned Arbitrator had not merely terminated the contract and deprived the first respondent-Company of their share of the building as well as the income derived by them, but also restored on the appellants the entire building even without any claim made in that regard.

31. So far as the Cross Objection filed by the first respondent-Company/Cross Objector, is concerned, learned Senior Counsel appearing for the first respondent-Company submitted that the only ground raised in the Cross Objection with regard to the observations of the learned Single Judge that further disputes would be subject to the decision of an adjudicator, but as per the judgment of the Supreme Court, such a course of action would not be permitted under Section 34 of the Arbitration and Conciliation Act, and the learned Single Judge could have only set aside the findings of the learned Arbitrator to the extent that was necessary. In support of his submissions, learned Senior Counsel appearing for the first respondent-Company relied on the following decisions:

- (i) 2006 (11) SCC 181 (Mc.Dermott International Inc. Vs. Burn Standard Co. Ltd).
- (ii) 2006 (1) SCC 86 (State of Rajasthan Vs. Navbhaat Construction Co).
- (iii) 2003 (5) SCC 705 (ONGC Vs. Saw Pipes Ltd).
- (iv) 2008 (13) SCC 80 (DDA Vs. R.S.Sharma & Co).
- (v) 2015 (3) SCC 49 (Associate Builders Vs. DDA).

32. Heard the submissions of the learned Senior Counsels appearing for both parties and given our anxious consideration to the submissions made on either side and perused the materials available on record. Though very many contentions have been raised, the only question that has to be decided in this appeal and Cross Objection is as to whether the interference made by the learned Single Judge in the Award of the learned Arbitrator, in exercise of jurisdiction under Section 34 of the Arbitration and Conciliation Act, is legally sustainable.

33. As we have dealt with the factual matrix of the case in detail as above, we are refraining ourselves from reiterating the same any further in this appeal and Cross Objection. However, for the purpose of disposal of this appeal and Cross Objection, certain facts which are absolutely germane and necessary alone are reiterated hereunder.

34. As contended by the learned Senior Counsel appearing for the appellants, the learned Single Judge, while upholding the findings of the learned Arbitrator, except to the extent that before the cancellation of sale deeds, the learned Arbitrator should have considered the possibility of directing the first respondent-Company to make reparations/pay damages for regularising the sale and on this view, held that the learned Arbitrator's decision holding the sale deeds invalid, is not correct. The learned Single Judge erred in holding that though the first respondent-Company has not pleaded any alternative relief in the event of the sale deeds being set aside, the learned Arbitrator should have directed the parties to amend the pleadings and lead evidence for the alternative relief of regularisation of sale transaction or direct the owners to compensate the first respondent-Company for the amount incurred for the construction. The relevant portion from the impugned order passed by the learned Single Judge reads as follows:

"37.1. To my mind, the alternative of seeking regularisation of the sale transaction, as well as the other alternative, which, the learned Arbitrator adverted to, which was, that having declared the concerned sale deeds invalid, the respondents would necessarily have to compensate the petitioner Company for the amount expended by it to construct the subject building, could have been taken to

its logical conclusion by calling upon the parties to lead evidence in the matter and, if necessary, to amend the pleadings, accordingly."

"42. Thus, for the foregoing reasons, I am inclined to set aside the impugned award, albeit, partially. In other words, while, the finding with respect to failure by the petitioner company to comply with the conditions stipulated in clause 6(a) of the JDA is sustained, along with all those attendant findings which are necessary to reach this conclusion - I am disinclined, for the present, to axiomatically proceed to invalidate the sale deeds, as much would depend on the course of action, which the concerned Adjudicator would take hereafter. The Adjudicator could very well permit the petitioner company to seek title to their half-share of the subject Building and the appurtenant rights, as envisaged in the JDA and the supplemental agreements, if it were to pay damages as may be judicially determined by an appropriate forum or, in the alternative, could declare the sale deeds as invalid and allow for payment of only cost of construction to the petitioner company. While taking recourse to this alternative the concerned Adjudicator will have to bear in mind, in my opinion, the terms of the JDA and the nature of the arrangement arrived at between the parties, and then, perhaps, rule on the best way forward."

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35. As stated above, the core question to be decided in this appeal and Cross Objection is as to whether the setting aside of the Award of the learned Arbitrator by the learned Single Judge, is legally sustainable or not. To answer this question, first of all we have to analyse the scope of Section 37 of the Arbitration and Conciliation Act, which reads as follows:

"Section 37: Appealable orders.--(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-

(a) refusing to refer the parties to

arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34;

(2) An appeal shall also lie to a Court from an order of the arbitral tribunal--

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

36. In the instant case, absolutely we do not find any perversity in the Award of the learned Arbitrator. It is incorrect to state that under Section 37 of the Act, the Court ought not to sit in appeal over the findings of the learned Single Judge and what has to be decided is as to whether the interference made by the learned Single Judge in the Award of the learned Arbitrator, will fall within the scope of Section 34 of the Arbitration and Conciliation Act. In the instant case, the learned Single Judge has set aside the Award of the learned Arbitrator directing the first respondent-Company to amend the pleadings and adduce evidence. The learned Single Judge has set aside the Award of the learned Arbitrator mainly on the ground that the sale deeds are invalid and that the learned Arbitrator's finding that the sale deeds are invalid on the pretext that the learned Arbitrator should have explored other options by calling upon the parties to amend the pleadings. Such a reasoning given by the learned Single Judge will not be a ground for setting aside the Arbitration Award, though partially.

37. In the above context, we extract the relevant portion of the impugned order passed by the learned Single Judge regarding the facts and his findings:

"36. Having heard the learned Senior Advocate for the parties and perused the record, what does emerge is as follows:

(i) That the work qua the subject building commenced in or about 04.07.2006.

(ii) That the period of twenty four (24) months for completion of the contract would have, in the ordinary course, come to an end

on 04.07.2008.

(iii) That the PA's Certificate dated 10.10.2008, was not validly obtained, as the condition that the subject building was complete and fit for occupation, as provided in clause 6(a) of the JDA, was not complied with, and therefore, 20.10.2008, was neither the 'hand over date' nor, could it be treated as deemed hand over date, as was suggested by the petitioner company.

(iv) That the EA/HDFC was right in refusing to hand over the POA to the petitioner company.

(v) That the defects in the building were, basically, three in number. The first defect related to the usage of granite for the fire escape (emergency stair case). The second defect pertained to wetness found in the basement, more particularly, in the electrical room. The third defect pertained to the failure to provide a canopy.

(vi) That the CMDA had issued a completion certificate dated 14.11.2008. The said completion certificate issued by the CMDA was based on the other approvals obtained by the petitioner company, namely Completion Certificate dated 21.08.2008, issued by the Corporation of Chennai; Compliance Certificate issued by the Director of Fire and Rescue Service, dated 23.09.2008, Compliance Certificate issued by the Police Department (Traffic), dated 25.09.2008; and the Compliance Certificate, issued by the ELCOT, dated 30.10.2008.

(vii) That the respondents were in physical possession of their 50% share of the subject building, and likewise, the petitioner company was in possession of its 50% share of the subject building.

(viii) The petitioner company had been refunded the entire SD, albeit, without interest.

(ix) There were no lease deeds in operation, and that, the tenure of the subsisting leases had expired.

(x) The JDA and the supplemental agreements were intact. The EA/HDFC was still in possession of the original POA.

(xa) In respect of this aspect, I may only note that none of the counsels

argued to the contrary, i.e. that the EA/HDFC was not in possession of the original POA.

(xi) Lastly, that the petitioner company was in possession of its share of 50% of the building without title, on account of the concerned sale deeds, having been declared invalid by the learned Arbitrator.

37. Insofar as these findings of facts are concerned, I am in agreement with the counsel for the respondents that these were based on the learned Arbitrator's appreciation of evidence put before him and none of them were perverse, save and except to the extent that the defects, which were pointed out by the Independent Engineers, i.e. M/s.Velu Associates, while deliberating on the issue of completion of the subject building were termed as major defects without elaborating whether or not they were curable. Therefore, what emerges from the record i.e. while it could be stated in favour of the respondents that they were right in contending that the subject building was not fully complete, and therefore, in that sense, not fit for occupation from a contractual point of view but the consequences to which, the petitioner company was put to, which was, cancellation of the concerned sale deeds, without being given a chance for making over reparations and/or, damages to the respondents was an aspect which the learned Arbitrator ought to have dealt with. The fact that the learned Arbitrator chose not to deal with this aspect of the matter, even, while he dabbled with thought that the petitioner company could seek regularisation of sale transaction by compensating the respondents for the loss caused to them, rendered the award susceptible to interference. The learned Arbitrator's exhortation to parties to agitate their remaining rights before an appropriate forum, that is, a civil court or via an Arbitrator is a suggestion which is wholly unworkable both in law and on facts.

37.1. To my mind, the alternative of seeking regularisation of the sale transaction, as well as the other

alternative, which, the learned Arbitrator adverted to, which was, that having declared the concerned sale deeds invalid, the respondents would necessarily have to compensate the petitioner Company for the amount expended by it to construct the subject building, could have been taken to its logical conclusion by calling upon the parties to lead evidence in the matter and, if necessary, to amend the pleadings, accordingly."

37.2. This is an aspect, which should, have with all humility, at my commend, crossed the mind of the learned Arbitrator, at the stage of framing of the issues, if not earlier. In that respect, framing of issues in any litigation is a crucial stage when, the concerned Adjudicator takes into account the pleadings and the material placed before him, and then, takes a decision as to what issues obtain between the parties.

38. In my opinion, the learned Arbitrator should have been cognizant of the fact that the JDA had not been terminated by the respondents, despite the alleged breach by the petitioner company, and that, the allegations, with regard to breach were confined, largely, to the delay in completion of construction and, with respect to certain quality aspects, to which, I have made a reference above."

38. It is well settled law that the Arbitrator has no power to grant any relief that goes beyond the relief prayed for by either parties. It is the obligation of the concerned party to make the necessary pleadings and prayers. In this regard, it is useful to refer the following decisions of the Supreme Court, relied on by the learned Senior Counsel appearing for the appellants:

(i) 2010 (1) SCC 234 (Bharat Amratlal Kothari Vs. Dosukhan Samadkhan Sindh):

"29. The approach of the High Court in granting relief not prayed for cannot be approved by this Court. Every petition under Article 226 of the Constitution must contain a relief clause. Whenever the petitioner is entitled to or is claiming more than one relief, he must pray for all the reliefs. Under the provisions of the Code of Civil Procedure, 1908, if the plaintiff omits,

except with the leave of the Court, to sue for any particular relief which he is entitled to get, he will not afterwards be allowed to sue in respect of the portion so omitted or relinquished.

30. Though the provisions of the Code are not made applicable to the proceedings under Article 226 of the Constitution, the general principles made in the Civil Procedure Code will apply even to writ petitions. It is, therefore, incumbent on the petitioner to claim all reliefs he seeks from the court. Normally, the court will grant only those reliefs specifically prayed for by the petitioner. Though the court has very wide discretion in granting relief, the court, however, cannot, ignoring and keeping aside the norms and principles governing grant of relief, grant a relief not even prayed for by the petitioner."

(ii) 2011 (3) SCC 436 (State of Orissa Vs. Mamata Mohanty):

"Relief not claimed-cannot be granted:

55. Pleadings and particulars are required to enable the court to decide the rights of the parties in the trial. Thus, the pleadings are more to help the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted". Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (vide Sri Mahant Govind Rao Vs. Sita Ram Kesho (1897-98 (25) IA 195 (PC)), Trojan & Co. Vs. Nagappa Chettiar (AIR 1953 SC 235), Ishwar Dutt Vs. Collector (LA) (2005 (7) SCC 190 : AIR 2005 SC 3165) and State of Maharashtra Vs. Hindustan Construction Co. Ltd (2010 (4) SCC 518 : 2010 (2) SCC (Civ) 207) ").

(iii) 2012 (12) SCC 581 (State of Goa VS. Praveen Enterprises):

"11. Reference to arbitration can be in respect of all disputes between the parties or all disputes regarding a contract or in respect of specific enumerated disputes. Where "all disputes" are referred, the arbitrator has the jurisdiction to decide all disputes raised in the pleadings (both claims and counter claims) subject to any limitations placed by the arbitration agreement. Where the arbitration agreement provides that all disputes shall be settled by arbitration but excludes certain matters from arbitration, then, the arbitrator will exclude the excepted matter and decide only those disputes which are arbitrable. But where the reference to the arbitrator is to decide specific disputes enumerated by the parties/court/appointing authority, the arbitrator's jurisdiction is circumscribed by the specific reference and the arbitrator can decide only those specific disputes.

12. Though an arbitration agreement generally provides for settlement of future disputes by reference to arbitration, there can be "ad hoc" arbitrations relating to existing disputes. In such cases, there is no prior arbitration agreement to refer future disputes to arbitration. After a dispute arises between the parties, they enter into an arbitration agreement to refer that specific dispute to arbitration. In such an arbitration, the arbitrator cannot enlarge the scope of arbitration by permitting either the claimant to modify or add to the claim or the respondent to make a counter claim. The arbitrator can only decide the dispute referred to him, unless the parties again agree to refer the additional disputes/counter claims to arbitration and authorise the arbitrator to decide them."

(iv) 2013 (4) SCC 690 (Rajesh Kumar Vs. State of Bihar):

"14. Appearing for the appellants, Mr.P.P.Rao, learned Senior Counsel argued that the High Court had committed an error in

quashing the entire selection process even when the petitioners had not made any prayer to that effect. Mr. Rao was at pains to argue that a relief which was not even prayed for by the writ petitioners could not be granted by the Court whatever may have been the compulsion of equity, justice and good conscience. Reliance in support of that proposition was placed by him upon *Bhart Amratlal Kothari Vs. Dosukhan Samadkhan Sindhi* (2010 (1) SCC 234 : 2010 (1) SCC (Cri) 757) and *State of Orissa Vs. Mamata Mohanty* (2011 (3) SCC 436: 2011 (2) SCC (L & S) 83."

39. Therefore, on a reading of the above judgments of the Supreme Court, it is clear that the relief not founded on the plaint, could not be granted. Therefore, we are not in agreement with the findings rendered by the learned Single Judge in that regard.

40. It is the submission of the learned Senior Counsel appearing for the first respondent-Company that by invalidating the sale deeds, the learned Arbitrator had terminated the JDA. We find that the first respondent's case is that only after accepting the 'hand over date' by the appellants, the Power of Attorney has to be released by the Escrow Agent to enable the first respondent-Company to execute the sale deeds. But even without the knowledge of the appellants and without release of the Power of Attorney, the first respondent-Company has executed the sale deeds by themselves. Therefore, the learned Arbitrator has found that the sale deeds dated 19.12.2008 are illegal and the learned Arbitrator has assigned valid reasons in support of his findings.

41. Learned Senior Counsel appearing for the first respondent-Company submitted that the agreement between the parties contemplated penalty on the first respondent-Company, i.e. huge security deposit amount was paid by the first respondent-Company for due performance of the agreement, and the same was quantified at Rs.6.82 crores, which was lying with the appellants almost till the building was fit for occupation. A sum of Rs.2 crores was paid back by the appellants in two instalments of Rs.1 crore each on 22.07.2008 and 01.12.2008 and a sum of Rs.4.82 crores was paid during the arbitral proceedings on 20.10.2010 when the possession was taken. Irrespective of whether or not the said sum of Rs.6.82 crores was paid back to the first respondent-Company, the sum clearly represented what the parties contemplated, as an amount that could be forfeited on account of the default committed by the first respondent-Company. But, as contended by the learned Senior Counsel appearing for the appellants, Clause 17 of the JDA which deals

with liquidated compensation in case of delay in construction, cannot be the basis for grant of remedy for the illegality committed by the first respondent-Company. The learned Arbitrator did not hold that the sale deeds are illegal due to delay. Therefore, the compensation under Clause 17 of the JDA could not have been granted as a substitute for cancellation of sale deeds. But the learned Single Judge has not considered these aspects properly.

42. Further, we find that the appellants had specifically asked for a prayer in the counter claim in prayer No.(1) to declare the sale deeds executed by the first respondent-Company to themselves on 19.12.2008 as null and void. Under such circumstances, the first respondent-Company should have sought for any alternative prayer in the event that the prayer sought for by the appellants is allowed. Notwithstanding the specific relief asked for by the appellants to cancel the sale deeds, the first respondent-Company took the risk of not seeking alternative prayer in the counter claim. Hence, the learned Arbitrator cannot be found fault with for failing to give the relief to the first respondent-Company after declaring the sale deeds as illegal. Therefore, the findings of the learned Single Judge that the learned Arbitrator ought to have called upon the parties to lead evidence, if necessary, and to amend the pleadings, is not legally sustainable.

43. It is yet another submission of the learned Senior Counsel appearing for the first respondent-Company that certain issues were not decided by the learned Arbitrator, and therefore, it would serve as a ground for setting aside the Award of the learned Arbitrator. In this context, regarding the scope of Section 34 of the Arbitration and Conciliation Act, learned Senior Counsel appearing for the appellants relied on the following decisions, relevant portions of which are extracted hereunder:

(i) 2017 (5) CTC 420 (Division Bench of Madras High Court) (V.S.Ekambaram Vs. Sri Krishna Tiles and Potteries (Madras) Pvt. Ltd):

"6(viii). From a perusal of the Order of the learned Single Judge, we find no reason to disagree, as the learned Judge has proceeded on the well settled legal principle that in a Petition under Section 34 of the A & C Act, there can be no re-appreciation of evidence. ...

6(x). With regard to the Application being A.No.2913 of 2016, which has been taken out by 'E', the same was negatived by the learned Single Judge on the pivotal principle that there cannot be re-appreciation of

evidence in a Section 34 Petition ...

6(xii). We have no hesitation or difficulty in holding that the learned Single Judge was right in negating the prayer. The principle is a Petition under Section 34 of the A & C Act is not a traditional Appeal against an Arbitral Award. Law as it is obtaining today, is very clear that a Petition under Section 34 of the A & C Act is only a challenge to an Award (on limited grounds adumbrated in Section 34) and not an Appeal, Review or Revision."

(ii) 2018 (2) CTC 593 (Division Bench of Madras High Court) (Project Director, Tamil Nadu Road Sector Project-II Vs. RNS Infrastructure Ltd.-GPL (JC):

"20. The scope for interference to an Arbitration award is very limited. Unless and until the applicant satisfies the requirements of Section 34 of the Act, the Arbitration Award cannot be set aside by this Court.

21. The scope of interference under Section 34 of the Arbitration and Conciliation Act 1996, to an Arbitral Award is covered by the decisions of Hon'ble Supreme Court in --

(a) Oil & Natural Gas Corporation Ltd., Vs Saw Pipes Limited, 2003 (2) CTC 282 (SC): 2003 (5) SCC 705, wherein it was held that the Court can set aside an award, if -

(1) it is contrary to:-

(a) fundamental policy of Indian law; (or) (b) Interest of India; (or)

(c) Justice and morality.

(2) it is patently illegal

(3) it is so unfair and unreasonable that it shocks the conscience of the Court.

(b) McDermott International Tnc., Vs. Burn Standard Co., Ltd and others, 2006 (11) SCC 181, which followed the decision in Oil & Natural Gas Corporation Ltd., Vs. Saw Pipes Limited, referred to supra and the Hon'ble Supreme Court explained the term patent illegality and observed that patent

illegality must go to the root of the matter. Public policy violation should be so unfair and unreasonable as to shock the conscience of the Court. The supervisory role of the Court under section 34 is to be kept a minimum level and interference is envisaged only in case of fraud or bias, violation of the Natural Justice, etc. If the Arbitrator has gone contrary to or beyond the express law of the contract or granted relief in the matter not in dispute, that would come within the purview of Section 34 of the Arbitration and Conciliation Act 1996.

22. According to the said decision, what would constitute Public Policy is a matter dependent upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the Court to judge what is in public good or Public interest, or otherwise would be injurious to the Public good at the relevant point. The Supreme Court in its latest decision in the case of Associated Builders Vs. DDA., 2015 (3) SCC 49, has also followed the decision rendered in Oil & Natural Gas Corporation Ltd., Vs. Saw Pipes Limited, reported in 2003 (5) SCC 705 and McDermott International Tnc., Vs Burn Standard Co., Ltd and others, 2006 (11) SCC 181.

23. The Division Bench of the Delhi High Court in its recent decision dated 25.09.2017 in the case of Ogene Systems India Pvt., Ltd., Vs. Technology Development Board, 2017 SCC Online DL 11136, delineated the following propositions after considering all the decisions of the Hon'ble Supreme Court relating to the scope of Section 34 of the Arbitration and Conciliation Act right from Renusagar Power Company Ltd Vs. General Electric Company, 1994 Supp (1) SCC 644, to the recent Associated Builders Vs. DDA, 2015 (3) SCC 49:

(i) The four reasons motivating the legislation of the Act, in 1996, were:-

(a) to provide for a fair and efficient Arbitral procedure,

(b) to provide for the passing of reasoned Awards,

(c) to ensure that the Arbitrator does not transgress his jurisdiction, and

(d) to minimize supervision, by courts, in the Arbitral process.

(ii) The merits of the award are required to be examined only in certain specified circumstances, for examining whether the Award is in conflict with the Public policy of India.

(iii) An award would be regarded as conflicting with the Public policy of India if:-

(a) it is contrary to the fundamental policy of Indian law, or

(b) it is contrary to the interests of India,

(c) it is contrary to justice or morality,

(d) it is patently illegal, or

(e) it is so perverse, irrational, unfair or unreasonable that it shocks the conscience of the court.

(iv) An award would be liable to be regarded as contrary to the fundamental policy of Indian law, for example, if:

(a) it disregards orders passed by superior Courts, or the binding effect thereof, or

(b) it is patently violative of Statutory provisions, or

(c) it is not in Public interest, or

(d) the Arbitrator has not adopted a "judicial approach", i.e. has not acted in a fair, reasonable and

objective approach, or has acted arbitrarily, capriciously or whimsically, or

(e) the Arbitrator has failed to draw an inference which, on the face of the facts, ought to have been drawn, or

(f) the Arbitrator has drawn an inference, from the facts, which, on the face of it, is unreasonable, or

(g) the Principles of Natural Justice have been violated.

(v) The "patent illegality" has to go to the root of the matter. Trivial illegalities were inconsequential.

(vi) Additionally, an Award could be set aside if--

(a) either party was under some incapacity, or

(b) the Arbitration Agreement is invalid under the law, or

(c) the Applicant was not given proper notice of appointment of the Arbitrator, or of the arbitral proceedings, or was otherwise unable to present his case, or

(d) the Award deals with a dispute not submitted to Arbitration, or decides issues outside the scope of the dispute submitted to Arbitration, or

(e) the composition of the Arbitral Tribunal was not in accordance with the Agreement of the parties, or in accordance with Part I of the Act, or

(f) the Arbitral procedure was not in accordance with the Agreement of the parties, or in accordance with Part I of the Act, or

(g) the Award contravenes the Act, or

(h) the Award is contrary to the contract between the parties.

(vii) "Perversity", as a ground for setting aside an Arbitral award, has to be examined on the touchstone of the Wednesbury Principle of Reasonableness. It would include a case in which--

(a) the findings, in the Award, are based on no evidence, or

(b) the Arbitral Tribunal takes into account something irrelevant to the decision arrived at, or

(c) the Arbitral Tribunal ignores vital evidence in arriving at its decision.

(viii) At the same time,--

(a) a decision which is founded on some evidence, which could be relied upon, howsoever compendious, cannot be treated as "perverse",

(b) if the view adopted by the Arbitrator is a plausible view, it has to

pass muster,

(c) neither quantity, nor quality, of evidence is open to re-assessment in Judicial Review over the award.

(ix) "Morality" would imply enforceability, of the agreement, given the prevailing mores of the day. "Immorality", however, can constitute a ground for interfering with an Arbitral Award only if it shocks the judicial conscience.

(x) For examining the above aspects, the pleadings of the parties and materials brought on record would be relevant."

44. Unless there is perversity, the Court cannot make any interference with the Award of the learned Arbitrator. At this juncture, it is useful to refer a decision of the Supreme Court in the case of K.Sugumar and another Vs. Hindustan Petroleum Corporation Limited and another, in Civil Appeal No.419 of 2018 (arising out of S.L.P.(C).No.31532 of 2010), dated 16.01.2018, wherein, the Apex Court observed as follows:

"3. The contours of the power of the Court under Section 34 of the Act are too well established to require any reiteration. Even a bare reading of Section 34 of the Act indicates the highly constricted power of the Civil Court to interfere with an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the Court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator.

5. The jurisdiction of the High Court in appeal under Section 37 of the Act would naturally be limited to what has been conferred under Section 34 of the Act insofar as an appeal against an order setting aside or refusing to set aside the award is concerned.

6. A reading of the materials placed on record, including the award and the order

passed under Section 34 of the Act, would disclose that the view taken by the arbitrator is on a consideration of the evidence and materials placed before him and the conclusion that the respondents are liable to compensate the appellants is a possible and reasonable conclusion. This is precisely what has been held by the Court while exercising jurisdiction under Section 34 of the Act. It that is so, we do not see how in an appeal under Section 37 of the Act, the High Court could have reappreciated the evidence to come to a contrary finding. The High Court was not sitting in appeal over the award of the arbitrator but it is the order passed under Section 34 of the Act, which was the subject matter of challenge before the High Court. The High Court seems to have missed the subtle difference between the two jurisdictions and thereby committed an error which would require to be corrected in this appeal."

45. In the instant case, we do not find any legal perversity in the Award of the learned Arbitrator. On the whole, we find that the learned Single Judge concurred with the findings of the learned Arbitrator and has set aside the Award of the learned Arbitrator only on the ground that in the absence of any alternative relief, the learned Arbitrator ought to have called upon the parties to lead evidence and to amend the pleadings, if any. In our view, the above observation of the learned Single Judge cannot be a ground to interfere with the Award passed by the learned Arbitrator and set aside the Award and substitute the view of the learned Arbitrator.

46. For all the above reasons, the impugned order of the learned Single Judge is liable to be set aside. Accordingly, the same is set aside. The award of the arbitrator is restored. Resultantly, O.S.A. is allowed and the Cross Objection is dismissed. No costs. Consequently, C.M.Ps. are closed

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30/01/2019

This matter having been heard through video conferencing today (ie) on 6/2/2019 under the Caption for "Clarification" pursuant to the order of this Court dated 30.01.2019 and made herein in one presence of the afore said counsels, the Court made the following Order;

This matter is heard through Video-conferencing today (06.02.2019) and the O.S.A. is listed "for clarification".

2. Learned Senior Counsel appearing for the appellants submitted that the appellants will not implement the judgment dated 30.01.2019 passed in this appeal, for a period of three weeks. This submission is recorded.

3. The order dated 30.01.2019 is clarified accordingly.

Cs

06/02/2019

Sd/-
Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

cs

TO

- 1.The Sub Assistant Registrar(O.S)
High Court, Madras.
2. Honourable Mr.Justice K.P.Sivasubramanian,
No. 47, Pulla Avenue,
Shenoy Nagar,
Chennai 600 090.

+1cc to Mr.Adithya Reddy, Advocate, S.R.No. 7739
+1cc to M/S.C.Seethapathy, Advocate Sr.10359

सत्यमेव जयते

O.S.A.No.39 of 2017
and
Cross Objection No.58 of 2017

PPA (CO)
GN (07/02/2019)
srg 11/02/2019

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