

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CS(OS) 486/2011 & I.A. No.9067/2011**

Reserved on: 31.10.2018
Date of decision : 02.07.2019

SITAC PVT LTD Plaintiff
Through Mr.Amit Sibal, Sr. Adv. with
Mr.Vinay P.Tripathi and
Mr.Abhinav Jaganathan, Advs.

versus

BANWARI LAL SONS PVT LTD & ORS Defendants
Through Mr.Kamaldeep Dayal, Adv. for
D-1.
Mr.Sonal Sinha and Ms.Aastha
Vashistha, Advs. for D-2.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This suit/petition has been filed by the plaintiff/petitioner under Sections 14(2), 17 and 29 of the Arbitration Act, 1940 (hereinafter referred to as the 'Act') seeking a direction for the Arbitrator to file the Arbitral Record and the Arbitral Award dated 25.01.2011 before this Court and making the same a Rule of Court, alongwith decree against respondents awarding Rs.5,35,920/- paid by the petitioner to the Arbitrator as their share of fees as per order dated 21.12.2010.

2. Respondent no.1 has filed its objections to the Award under Section 30 and 33 of the Act in form of I.A. No.9067/2011. Respondent No.2 has also filed its objections to the Award.

3. The disputes between the parties are in relation to the Collaboration/Construction Agreement dated 21.08.1985 executed between the petitioner as “Builders”, respondent no.1 as “ Owners” and respondent nos.2 and 3 as “Confirmers”.

4. The respondent no.1 is the owner/lessee of property No.1 Aurangzeb Road, New Delhi (hereinafter referred to as the ‘said property’). Respondent no.2 is the tenant in the said property, while respondent no.3 is the occupier thereof.

5. The petitioner on the one hand and respondent nos.2 and 3 on the other, also executed an Agreement dated 07.08.1985 whereunder respondent nos.2 and 3 agreed to vacate the said property subject to certain conditions including that the petitioner shall, at its own cost, make available to respondent No.3 alternative accommodation of not less than three spacious bed rooms, drawing, dining, kitchen, servant’s quarter, garage in New Delhi in any decent locality, preferably in Sunder Nagar, Golf Links, Jor Bagh, Defence Colony and also provide 8% of the total built up constructed area free of cost in the proposed building to be raised at the said property in favour of respondent no.3 and 5% of the proposed total constructed area in favour of respondent no.2.

6. The disputes between the parties arose as the respondent no.1 cancelled the Collaboration Agreement vide its notice dated 14.06.1986.

7. The petitioner filed a petition under Section 20 of the Act seeking appointment of an Arbitrator and reference of disputes, being Suit

No.1638-A of 1986. This Court by its order dated 08.04.1991 appointed a Sole Arbitrator to adjudicate the claims of the petitioner.

8. The abovesaid order was challenged by the respondent no.1 and the respondent nos.2 and 3 by way of appeals, being FAO(OS) Nos.122/1991 and 123/1991 respectively, which were disposed of by the Division Bench of this Court vide its order dated 25.01.2007. A Review Application filed against the said order was also dismissed by the Division Bench vide its order dated 16.04.2007. The SLP filed by the respondents challenging the orders of the Division Bench was dismissed by the Supreme Court vide its order dated 09.07.2007.

9. The Arbitrator by the Impugned Award has held that the petitioner had carried out its obligations under the Collaboration Agreement and there was no justification for the respondent no.1 to cancel the Agreement as it purported to do by its notice dated 14.06.1986. The Arbitrator further held that the petitioner was entitled to enforce specific performance of the Agreements dated 07.08.1985 and 21.08.1985. The respondents were directed to give to the petitioner a fresh Power of Attorney on the same terms and conditions as given earlier. As the claim of the petitioner for specific performance had been granted, the Arbitrator did not consider the alternate prayer of the petitioner for award of Damages in lieu of specific performance. The Arbitrator further awarded the cost of Rs.5 lacs in favour of the petitioner, while rejecting the counter claims filed by the respondents.

10. The first point urged by the counsel for respondent no.2 in his challenge to the Award is that the Arbitrator has failed to consider that

the petitioner was in breach of the Agreement dated 07.08.1985 inasmuch as it had failed to provide alternate accommodation to the respondent nos.2 and 3. He submits that the Arbitrator having held that if accommodation was available in the preferred localities then the petitioner was under an obligation to provide the same, failed to consider various documents on record which clearly establish that accommodation was indeed available in the preferred localities, however, the petitioner failed to provide the same to the respondents on fallacious pleas.

11. In this regard, it would first be essential to quote the relevant provision in the Agreement dated 07.08.1985 executed between the petitioner and respondent nos.2 and 3

“THAT the OCCUPIERS agree to vacate the premises presently occupied by them for past long number of years on the condition that the BUILDERS undertake to provide space in the building/s which may be proposed to be raised at these premises and that the BUILDERS shall at their own cost make available to OCCUPIERS alternative accommodation not less than three spacious bed rooms, drawing, dining, kitchen, servants quarters, garage in New Delhi in any decent locality preferably in Sundar Nagar, Golf Links, Jorbagh, Defence Colony. All costs in this connection shall be borne by the BUILDERS and such alternative accommodation shall be available for use by the OCCUPIERS till such time as the Group Housing Project is ready and OCCUPIERS can shift back to such area in the building which falls to their share. The BUILDERS undertake to provide 8% (eight percent) of the total built up constructed area free of cost to the OCCUPIERS in the proposed building to be raised at 1, Aurangzeb Road, New Delhi in lieu of their relinquishing their right to occupy and remain in possession of the existing premises.”

12. The Arbitrator in answering the above contention of the respondents has relied upon the correspondence exchanged between the parties. The Arbitrator holds that the respondents were unable to show that any accommodation was available in the preferred localities. The Arbitrator further holds that the petitioner offered specific alternative accommodation to the respondents and even asked the respondents to discuss it with them, but to no avail. It was further held that it could not be denied by the respondents that the accommodation offered by the petitioner in other localities satisfied the condition of providing alternative accommodation by the petitioner. As far as the contention of the respondents that the Agreement required drawing room and dining room to be separate rooms, the Arbitrator held that so long as there is sufficient accommodation to provide drawing and dining room facilities, no valid objection could be raised by the respondents.

13. As noted above, the counsel for the respondent no.2 has submitted that the Arbitrator has failed to appreciate and take note of various correspondences exchanged between the parties. In this regard, he submits that the respondent no.1 vide letter dated 09.05.1986 had shown willingness to shift to one of the group's own house, which was rejected by the petitioner on the premise that the rent of Rs.25,000/- demanded was too high. He further places reliance on the letter dated 17.05.1986 addressed by the respondent no.1 enclosing therewith a letter from the property broker showing availability of houses in the preferred localities. He submits that therefore, the Arbitrator has erred in holding that the

respondents were unable to show availability of alternative accommodation in the preferred localities.

14. I am unable to agree with the submission made by the counsel for the respondent no.2. Apart from the fact that this Court is not exercising its jurisdiction as an Appellate Court, the letters sought to be relied upon by the respondents do not in any manner forward the case of the respondents. The petitioner vide its letter dated 17.05.1986 pointed out that the rent demanded for the group's owned house was unreasonable as compared to the market rent. On the same day, the respondent No.1 addressed the second letter dated 17.05.1986 enclosing therewith the list of properties from the property broker. The petitioner vide its letter dated 21.05.1986 replied to the above letter seeking confirmation from the respondents to the effect that they have seen those properties and found them acceptable as also to provide the complete address of these properties to the petitioner. The petitioner further stated as under:

“For the property acceptable to you we are on our part, prepared to meet the owners and discuss directly or through broker and should the owner agree to reasonable terms and rent, we shall certainly finalise necessary arrangements.”

15. The petitioner also forwarded a list of other properties which may be considered by the respondents as alternative accommodation, including one property in Defence Colony, which was one of the preferred locality.

16. The counsel for the respondent no.2 was unable to show any response given to this letter by the respondents. Therefore, the finding of

the Arbitrator that the petitioner was not in breach of the Agreement in respect of providing alternative accommodation to the respondents, cannot be faulted.

17. The learned counsel for the respondent no.2 has further argued that the petitioner was in breach of the Agreement by its failure to appoint an Architect as provided under Clause 3 of the Collaboration Agreement dated 21.08.1985. The counsel submits that the petitioner not only delayed approaching the Architects but also thereafter there was no clarity as to whether Jasbir Sachdeva of Sachdeva Eggleston, Architect was indeed appointed by the petitioner as an Architect.

18. Clause 3 of the Collaboration Agreement is reproduced hereinunder:

“3.The parties agree that the plans etc are to be got prepared from any of the undermentioned Architects/Engineers at the sole discretion of the Builders. However, in the event the Builders intend to appoint any other Architect and or Engineer apart from the list, this shall be with mutual consultation. All professional fee, charges, incidentals payable to the Architects and/or Engineers shall be paid by the Builders alone to the exclusion on the owners. However, it is clearly understood between parties that the concept planning of the building, landscaping and the final building plans shall be discussed and approved mutually by the parties hereto. All expenses for getting the clearances from the appropriate authorities be it Central, Local or State shall be borne by the Builders.

List of Architects:

- i) *Sengupta & Sengupta*
- ii) *Jasbir Sachdev*
- iii) *Bharadwaj & Bharadwaj.*”

19. A reading of the above clause would show that the parties had agreed on three names for any one of them to be appointed as an Architect for the preparation of plans etc. The permission under the The Urban Land (Ceiling & Regulation) Act, 1976 (ULCRA) was obtained on 23/25.04.1986. The petitioner approached two of the named architects vide letter dated 05.05.1986. It is also not disputed that the petitioner had made a payment of Rs.75,000/- to Mr.Jasbir Sachdeva on 22.05.1986/03.06.1986. Therefore, it cannot be said that the petitioner had defaulted in appointing an Architect in terms of the Agreement.

20. The Arbitrator has also discussed this issue at length and has held that the petitioner was not remiss in discharging its obligation and to the contrary, has acted with expedition. This finding of the Arbitrator cannot be faulted.

21. It is next submitted by the counsel for the respondent no.2 that the petitioner has also failed to obtain the permission and approval from the Competent Authority as contemplated under Clause 2 and 10 of the Collaboration Agreement. He submits that it was only with the efforts of the respondents that the permission had been obtained from the L& DO on 17.12.1985 and thereafter from Delhi Administration under Section 20 and 22 of the ULCRA on 25.04.1986. Even thereafter, the petitioner did not make the deposit of the charges demanded by the L&DO, thereby

committing breach of the Agreement. He submits that the Arbitrator has ignored various vital documents in the Award.

22. I have considered the submission made by the counsel for the respondent no.2, however, find no force in the same. Clause 2 of the Collaboration Agreement no doubt casts an obligation on the petitioner to obtain all clearance certificates from the concerned authorities. Clause 10 names such authorities as DDA, L&DO, Authorities under the ULCRA etc. Clause 10 further provides as under:

“In any event if clearance from any of these authorities is delayed, then this Agreement will automatically stand extended unless both parties agree to cancel it. In the event of this Agreement coming to end the Owners shall refund to the Builders the interest free earnest money deposited without incurring any other liability by the Owners.”

23. L&DO expressed its ‘no objection’ to the grant of exemption under Section 20 and 22 of ULCRA vide letter dated 17.12.1985. Merely because this letter is addressed to the respondent no.1, it cannot be inferred that it was not due to the efforts of the petitioner that the same was granted. This letter had to be addressed to the respondent no.1 as respondent no.1 was the owner of the land.

24. The Delhi Administration vide its letter dated 25.04.1986 granted exemption under the ULCRA to undertake group housing on the plot in question. This letter is again addressed in favour of the respondent no.1 as it is the owner of the land.

25. Much reliance has been placed by respondent no.2 on the letter dated 19.03.1986 addressed by the petitioner to the L&DO calling upon L& DO to keep the terms of grant of NOC dated 17.12.1985 in abeyance till exemption under ULCRA is granted, to contend that the petitioner was not interested in expediting the process of obtaining permission from the competent authority.

26. I do not consider this argument to be of any merit. The letter dated 17.12.1985 from the L&DO clearly mentioned that the same does not authorise the lessee to present its plans for redevelopment to NDMC for approval. The Arbitrator has found that the petitioner had deposited a sum of Rs.1.25 lacs with the L&DO on 26.12.1985. Thereafter, permissions from authorities under the ULCRA were required for the purposes of redevelopment of the property. Such permission was granted on 25.04.1986, however, the respondent no.1 by its letter dated 14.06.1986 purported to terminate the Agreement.

27. In view of the above, it cannot be said that the petitioner failed to obtain permission from the competent authorities in terms of the Collaboration Agreement.

28. Counsel for the respondent no.2 further challenged the competency/ authorization of Mr.Dilbagh Singh to execute the Agreement dated 07.08.1985 on behalf of the petitioner. He submits that that Mr.Dilbagh Singh was appointed as an Additional Director of petitioner's company only on 12.08.1985. He further submits that no reliance could have been placed on the purported resolution dated 13.07.1985 authorizing Mr.Dilbagh Singh to deal with the respondents as

the said document is a sham inasmuch as it records the presence of Mr.Dilbagh Singh as Chairman in the Board Meeting though he was not a Director on that date. He further submits that the Arbitrator has erred in holding that the petitioner company has, in any case, owned up all the action of Mr.Dilbagh Singh and therefore, the respondents cannot challenge his authority. He submits that there was no Board Resolution of petitioner's company filed on record ratifying all action taken by Mr.Dilbagh Singh and in absence thereof such presumption of the Arbitrator is incorrect.

29. I again do not find any merit in the said submission. Mr.Dilbagh Singh had been appointed as an Additional Director of petitioner's company on 27.05.1985. By the Board Resolution dated 13.07.1985 he was authorised to negotiate and finalise terms with the respondents regarding redevelopment of the property in question. In the meeting of the Board of Directors of the petitioner company held on 31.07.1985, while accepting the resignation of Mr.Dilbagh Singh from Directorship, it was resolved that notwithstanding his resignation, he shall continue to act in pursuance of the Board Resolution dated 13.07.1985 for finalising and concluding the agreement with the respondents. In fact, he was reappointed as an Additional Director on 12.08.1985. From the above sequence, it cannot be said that Mr.Dilbagh Singh had executed the Agreement without proper authority from the petitioner. In any case, the petitioner till date claims that the said Agreements were executed with its due authorization. The Arbitrator has also negated the submissions of

respondent no.2 in this regard relying upon Section 46 of the Companies Act, 1956.

30. In *Panchanan Dhera & Ors. v. Monmatha Nath Maity (Dead) Through LRs & Anr.*, (2006) 5 SCC 340, the Supreme Court held that where the Company never denied or disputed the terms of the agreement nor raised any plea that the agreement was not binding on the company or the same was illegal and as long as the act of the Directors was not ultra vires and no issue of public policy was involved, the Company would still be liable (in the present case entitled) under the contract even in absence of a seal of the Company.

31. I, therefore, see no reason to interfere with the finding of the Arbitrator on this issue.

32. It is next contended by the counsel for the respondent no.2 that the Agreements in question were void in view of Section 5(3) of the Delhi Rent Control Act, 1958 (DRC Act). He submits that in lieu of surrender of tenancy rights and in consideration thereof, the Agreements provided for built up property to be given to respondent nos.2 and 3, therefore, the same would be liable to be declared unlawful under Section 5(3) of the DRC Act.

33. I am unable to agree with the said submission of the learned counsel for the respondent No.2. Section 5(3) of DRC Act is reproduced hereinunder:

“5. Unlawful changes not to be claimed or received. -

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(3) It shall not be lawful for the tenant or any other person acting or purporting to act on behalf of the tenant or a sub-tenant to claim or receive any payment in consideration of the relinquishment, transfer or assignment of his tenancy or sub-tenancy, as the case may be, of any premises.”

34. In the present case, promise to allot certain extent of the built up property upon redevelopment cannot be said to be a payment made in consideration of the relinquishment of the tenancy right. In ***Hans Raj Shiv v. Nirmaljit Arora***, 67 (1997) DLT 379, this Court has held that in order to attract the provision of Section 5(3) of the DRC Act, the payment has to be in cash or in form of money paid by the landlord to the tenant in order to allure him to relinquish his rights in tenancy. In the present case, there was no such payment being made by the petitioner to respondent nos.2 and 3.

35. Learned counsels for respondents have further submitted that the petitioner infact lacked funds to perform the Contract. They submit that the petitioner failed to produce any document to show availability of funds with it to perform the Contract. On the other hand, it was established on record that the petitioner had an Authorized Share Capital of only Rs.1 lac and Subscribed and Paid up Capital of only Rs.2000/- and did not even have a bank account on the date of entering into the Agreement. They submit that even the amount of Rs.1.25 lac stated to have been deposited with the L&DO was infact paid by Mr.R.Ganguly and not by the petitioner. They submit that therefore, the petitioner was neither ready nor willing to perform its obligation under the Agreement. In this regard they have placed reliance on the following judgments:

1. ***His Holiness Acharya Swami Ganesh Dassji v. Sita Ram Thapar***, (1996) 4 SCC 526.
2. ***Biswanath Ghose & Ors. v. Gobinda Ghose & Ors.***, (2014) 11 SCC 605
3. ***Pushparani S.Sundaram & Ors. v. Pauline Manomani James & Ors.***, (2002) 9 SCC 582

36. As far as the lack of funds is concerned, the Arbitrator has rejected the contention of the respondents holding as under:

“There is then the objection that the Claimant did not possess sufficient funds. This is a plea which is too vague and could not in general be of any validity. This plea was not supported by the Counsel for the Respondent on the ground that any activity or any action to be taken by the Claimant in pursuance of the contract was delayed or withheld because of any shortage of funds with the Claimant. There is the payment of Rs.15 lakhs by the Claimant to the Respondent at the time of execution of deed. It had also paid Rs.1.25 lakhs to L&DO by 26/12/1985 and Rs.75,000/- to the Architect Sachdeva by May 21st May 1986. The claimants on 6th May 1986 protested to the respondents that they along with Ranjit Ganguly were trying to throw claimant out and made it clear that it was committed to the project and will not give up this project. There was also an offer on 21st June, 1986 to Respondents to clear the site in terms of Clause 19 and to receive balance deposit of Rs.35 lakhs.

Thus the lack of funds plea by the Counsel for the respondent is of no significance because nothing has been shown that any funds or deposit to be made by the parties in order to get permission and the same was not within the reach of the Claimant. Whether claimant had total funds required for the whole project at the time of agreement is not of any relevance and is against commercial commonsense. No one holds such a huge

amount in deposit at one time. Funds are raised along with the working of the contract. Nothing is shown by the respondents that the credit of claimant was doubted by any institution or lending agency, except for making a grievance though not substantiated that the Claimant had sought to talk to some people about allotting accommodation to them probably with a view to obtain funds from them and this was a breach and showed that he did not have funds; Malvinder Singh in his evidence has denied this charge. No such agreement has been produced by the respondent. Even if it was suggested that claimant was taking of allotting areas which fell to the Claimant's share, it is not the case of the Respondent that the portion of the area which has to be given to the respondent was in any way breached, So, this plea for cancelling the contract cannot stand scrutiny.

In this connection the respondents sought to suggest that Rs.1,25,000 which had to be paid to L &DO was not paid by the claimant. But this stands refuted by the receipt (X/1 Pg.163 A) produced by the claimant of money being deposited. The fact that the receipt was made out was in the name of respondents is natural because property stands in-its name. Respondents have not shown any document to prove that the said amount was not transferred from the accounts of the claimant.”

37. The Arbitrator has also placed reliance on the correspondence exchanged between the parties to hold that the petitioner was infact eager to go ahead with the work and this itself shows its readiness and willingness to perform the Contract. I have no reason to disagree with the said finding of the Arbitrator. The above being a finding of fact by the Arbitrator, the same cannot be interfered with by this Court unless it is found to be perverse or unreasonable. In the present case, the inference

drawn by the Arbitrator from the evidence led by the parties cannot be said to be unreasonable or perverse, warranting any interference from this Court.

38. In *His Holiness Acharya Swami Ganesh Dassji* (supra), the Supreme Court after holding that the factum of readiness and willingness to perform is to be adjudged with reference to the conduct of the parties and the attending circumstances, on the facts of that case, found that the plaintiff therein was not ready nor had the capacity to perform his part of the contract. The said judgment, therefore, is not applicable to the facts of the present case, especially on the factual finding of the Arbitrator.

39. In *Biswanath Ghose* (supra), the Supreme Court held that for compliance of Section 16(c) of the Specific Relief Act, it is not necessary for the plaintiff to aver in the same words used in the section. Absence of the specific words in the plaint would not result in dismissal of the suit if sufficient facts and evidences are brought on record to satisfy the Courts of the readiness and willingness to perform his part of the contract. This judgement, therefore, is of no help to the respondent.

40. In *Pushparani S.Sundaram* (supra), the Court found that the plaintiff had not only failed to prove that he had performed his obligation under the contract, but also that he was ready and willing to perform the contract. The said judgement, therefore, has no application to the facts of the present case.

41. The learned counsel for respondent no. 1 submits that in the present case the Arbitrator should have exercised his discretion and not

directed specific performance of the Agreement. He submits that specific performance being discretionary, as the petitioner had itself claimed damages as an alternate relief, the Arbitrator should have exercised discretion by awarding damages instead of directing specific performance. He places reliance on the judgment of the Supreme Court in ***Kanshi Ram v. Om Prakash Jawal***, AIR 1996 SC 2150.

42. I am unable to agree with the submission made by the counsel for respondent no. 1. Even assuming that directing specific performance of an Agreement is at the discretion of the Court, Section 20 of the Specific Relief Act, 1963 before amendment itself states that such discretion is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal. In terms of the un-amended Section 21 of the Specific Relief Act, the plaintiff may also claim compensation for the breach of the contract, either in addition to or in substitution of specific performance. Therefore, merely because the plaintiff had claimed damages as an alternate relief, it cannot be denied the benefit of specific performance of the Agreement on that ground alone.

43. This takes me to the further submission of the learned counsel for respondent no. 1 wherein he submits that in the present case, Section 10 of the Specific Relief Act before amendment would not be applicable as the present is not a case of a contract to transfer immovable property. He submits that for the purposes of falling under Section 10 of the Act, the immovable property has to be sufficiently identifiable. Relying upon Clause 3, 11 and 12 of the Collaboration Agreement, he submits that the parties were yet to agree on the plans for construction and only the ratio

as per which such constructed portion is to be divided amongst the parties had been determined. He submits that the description of the property is therefore vague and incapable of being identified. He places reliance on the judgment of the Supreme Court in **Nahar Singh v. Harnak Singh and Others**, (1996) 6 SCC 699 to submit that the Supreme Court has held that unless the property in question for which the relief of specific performance has been sought for is identifiable, no decree of specific performance can be granted in respect of the same. He also places reliance on the judgment of the Allahabad High Court in **Nagar Mahapalika, Kanpur v. Punjab Association**, 1980 SCC OnLine All 554, to submit that a contract dependant on personal volition of parties, such as preparation of a building plan by mutual agreement as in present case, cannot be specifically enforced.

44. As far as enforceability of Collaboration Agreement is concerned, he places reliance on the judgment of this Court in **Vijay Dixit v. Sheila Khanna**, 1996 (36) DRJ 476 to submit that where in a Collaboration Agreement the builder is allotted certain portion of the newly constructed building, the Agreement is only one of construction and as the cost of such construction was to be borne by the builder, the other terms had been agreed only to reimburse the builder for the expenses he was to incur in such construction. He also places reliance on the judgment of the Supreme Court in **Vinod Seth v. Devinder Bajaj and Another**, (2010) 8 SCC 1, wherein again the Supreme Court had refused to grant specific performance of a Collaboration Agreement holding that the same does not amount to an Agreement for sale/transfer of an immovable property but is a Contract which requires consensus, decisions or further

agreement on several minute details which would involve performance of continuous duty by the builder, which the Court will not be able to supervise.

45. The learned counsel for the respondent no. 1 has also placed reliance on the judgment of this Court in **MM Builders v. SK Bajaj & Ors.**, 2017 SCC OnLine Del 8693 and **Prem Kumar Bansal v. Ambrish Garg**, 230 (2016) DLT 360 (DB) in support of his arguments.

46. On the other hand, the learned senior counsel for the petitioner submits that these grounds were never urged before the Arbitrator and therefore, the respondents cannot be allowed to assail the Award on these grounds. He submits that in any case, the property is not only clearly identified in the Agreement but also an interest has been created therein in favour of the petitioner. He relies upon the following Clauses of the Agreement:-

“WHEREAS the Owners are holders of perpetual lease hold rights of property known as 1, Aurangzeb Road, New Delhi situated at the junction of Aurangzeb Road and Prithvi Raj Road and bound by the property of Raja Jubbal on the other side have acquired the same in terms of deed registered as documents No. 3042 additional book No. 1 volume 457 at page 217 to 296 on the first day of May, 1959 with Sub-Registrar, Delhi. The Owners acquired all rights and interest in the property vested with original lease holders in whose favour Secretary of State, Council of India, executed perpetual leases detailed below.

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“11. It is agreed between parties hereto that 45% of the total built up area shall be available to the owners and 55% with the Builders. The Builders shall arrange with Bhanamal

Gulzarimal Private Limited and Bal Krishna Das & Sons the tenants and occupiers of the premises at present on such terms as the Builders may settle with these parties.

12. *After the plans are sanctioned, in case, there be any change in the bye-laws whereby additional floor area ratio is increased/or determined and any further construction is permitted, the same shall be got done by the Builders for which the Builders shall have the right as if it is available at the time of execution of this Agreement which addition shall also be shared in the ratio appearing hereunder.”*

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14. *It is agreed between the parties that on execution of the Agreement the Builders shall be entitled to enter into Agreement with prospective flat buyers offering them the areas as finally fallen to the share of the Builders and marked in the plans at the time of submission. The Builders, however agree that no liability for this shall fasten on the Owners and agree and undertake to keep the Owners harmless and indemnified of such agreements so entered into by the Builder with the prospective buyers. The builders shall deal with those buyers at their own expenses and risk. On completion of the project, the Owners undertake that they shall pass on sub titles to the prospective buyers of the flats as be permitted to ensure the peaceful, heritable enjoyment of flats/apartments, shall take as necessary Income-Tax and other clearances be required by law, shall also, if permitted, present the deeds for registration giving rights to prospective buyers subject to the expenses being incurred by the buyers. It is however clearly understood that the Owners shall act in such manner at the instance and express request of the Builder in writing as the transactions clearly concern the Builders commercially and the Owners shall act in his behalf to complete and legalise the transfer of flats which fall to the share of Builders under this arrangement. The responsibility of the Owners will be limited only to this extent and they are not involved in such transaction(s) in any other manner whatsoever. Provided further if L&DO or any other*

authority require execution of tripartite agreement between the Owners, flat-buyers and concerned authority the Owners undertake to execute such agreement. The impartable areas such as roads, parks etc shall be enjoyed by flat owners without any let or hindrance or preference of any kind. The parties hereto undertake that the Builders shall ensure that the buildings are raised in two blocks to enable the equitable distribution of Built up areas and open space which shall be decided mutually prior to plans being finalized and submitted to sanctioning authority. The Builders undertake to make plans in such manner that the maximum permissible built up area is covered and utilized. The entire covered area shall have basement also of the largest size permissible. The Builders and Owners agree that entire constructed area and open space shall be shared in the ratio herein specified.

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20. Subject to all said hereabove the Owners have agreed to grant Builders irrevocable licence and make available the clear site to the Builders, their agents and servants and workmen to enter upon the premises for making construction in accordance with sanctioned plans. The Owners have agreed to permit the Builders to establish their site office in outhouse building adjoining the main house to facilitate furtherance of this Agreement but this would be done only after the full amount of Rs. Fifty Lacs interest free has been deposited with them. The irrevocable licence, being for consideration, so granted shall in no manner be revoked and/revocable by the owners till the covenants of this deed remain in force.”

47. The learned senior counsel for the petitioner further places reliance on the judgment of the Bombay High Court in ***Pradeep Shankar Walvekar & Ors. v. Anil Narsinha Annachhatre & Ors.***, MANU/MN/1227/2017 to submit that the Development Agreement can be specifically enforced.

48. Placing reliance on the judgment of the Calcutta High Court in ***Jaichandlal Ashok Kumar and Co. Pvt. Ltd. v. Nawab Yossuf and Anr.***, MANU/WB/0546/2013, he submits that here again the Court modified the Arbitral Award to grant specific performance of a Collaboration/Development Agreement. He submits that in the present case not only was the property identified, the plans had to be prepared by any of the three named architects and the nature of construction is fully specified in form of Annexure A to the Agreement.

49. Relying upon the judgment of the Karnataka High Court in ***Robert D'Silva v. Roshini Enterprises and Another***, 1986 SCC OnLine Kar 3, he submits that the bar to enforcement of contracts based on volition of parties contained in Section 14(1)(b) of the Specific Relief Act before amendment only applies to Contracts of personal services and merely because a party refuses to perform its obligation under the Contract, it cannot be said that the Agreement would become unenforceable as being dependent on the volition of the parties. In this regard the learned senior counsel for the petitioner has placed reliance on the judgment of the Calcutta High Court in ***Vijaya Minerals Pvt. Ltd. v. Bikash Chandra Deb***, 1995 SCC OnLine Cal 181 and of the Delhi High Court in ***Old World Hospitality Pvt. Ltd. v. India Habitat Centre***, 73 (1998) DLT 374.

50. I have considered the submissions made by the counsels for the parties.

51. Before the Arbitrator issue nos. 6 and 7 were framed in the following terms:-

“6. Whether the Claimant is entitled to specific performance of the Agreement dated 21.8.1985 and if so, what directions are required to be given in this regard?

7. In case specific performance cannot, for any reason be granted, whether the Claimant is entitled to damages/compensation as claimed in Part III of the Statement of Claim?”

52. The Arbitrator considered the said issues and held that the petitioner is entitled to specifically enforce the Collaboration Agreement and held as under:-

“Issue No. 6

Counsel had sought to urge that the claimant had only been appointed agent to carry out, assignment and orders as may be given by the respondent, and this was in the nature of personal service and such an agreement cannot be specifically enforced. I cannot agree. The agreement did not appoint the claimant as a mere contractor to build - rather, it was for sharing the portion as owner of the complete Group Housing Complex in the ratio of 42% to the claimant with the additional right to undertake construction. The agreement in fact created an interest in the buildings once they were built and to deal with them as the respondent liked (of course his own share) subject of course to the overall conditions agreed to in the agreement of 21/08/1985. Such an agreement can be specifically enforced - in fact once it is found, as I do, that the respondents action in cancelling the agreement was void, it must consequently follow that there should be an order that the claimant is entitled to specifically enforce the agreement, and I do so order accordingly.

I thus find that the claimant is entitled to specifically enforce the contract.

Counsel for the claimant had argued that in case, specific performance is ordered, further directions be issued on some further points.

a) *So far as Power of Attorney is concerned, I have already held that the cancellation was illegal and a fresh Power of Attorney, in the same terms and conditions should be given by the respondents to the claimant, as mentioned above.*

The agreement in clause 3 provides that concept plans prepared by the Architects from the extended list would be the basis for mutual discussion and approved mutually by the parties hereto. The claimant had urged that I should issue a direction that if one of three concept plans prepared by the architect is not approved by the respondents within 3 months, failing which the plans should be deemed to be approved, Counsel also urged that direction be given by me regarding sum to be allocated for rent for houses so as to carry out the obligation to give alternative accommodation to the respondents and also specifying the time for vacating the site by the respondents, I can not agree.

The reason is that all these directions relate to the events arising post award period. After I have given the award, I have no jurisdiction to give further directions. That jurisdiction would lie with the Hon'ble High Court, because there may be various factual matters which may have to be considered and that can only be done by the Hon'ble High Court at that particular time.

Obviously concept plans would have to be submitted, what if any objection there are would have to be sorted out. I can not give any directions to accept the plan submitted in future by the claimant without even having seen it. Similarly I have held that the Respondents are entitled to alternative accommodation to be provided by the claimant as mentioned in the Agreement; I have also held that if the accommodation is not available in the preferred areas and if the Respondents cannot indicate any such accommodation in the preferred areas, they can be offered alternative accommodation in other reasonably decent areas as they had been offered earlier. I, for obvious reasons, after giving the award cannot supervise the activities; of the parties namely, whether suitable accommodation has been given to them or whether the Respondents are justified or not in rejecting the same.

In that view, this is a matter which will have to be either worked out by the parties in an amicable manner or the courts intervention for supervision may have to be invoked.

Similar is the situation where Claimant urge that time should be specified for clearing the site. This again will depend on the question of alternative accommodation having been sorted out. If the parties are not able to clear it among themselves, evidently they have to move the courts for necessary directions and it is thereupon that the various terms mentioned in Clause 20 of the Agreement dated 21st August, 1985 between the parties can be worked out. All these prayers are post Award and evidently I am not competent to give any directions in the matters and courts alone have to be moved for these situations which may arise in carrying out the directions given in the award.

Issue No.7

This issue claims the alternative prayer that if specific performance cannot be granted then the Claimant should be given compensation. The Claimant has purported to give losses which they have suffered which according to them, had the project gone through they would have made a profit of Rs.4,31,84,402/-. This on calculation they purport to do on the apparently plausible basis of 42% of their share and say it is reasonable because the respondents in its turn had himself mentioned that they would have earned a profit of Rs.10 crores from the 58% of their share. I am not going into this aspect for the reasons that I have already held that the Claimants are entitled to the specific performance of the contract. This follows finding that the Respondents were not justified in cancelling the Agreement. The claimant, are claiming specific performance in the first instance, and I have so held in their favour on this aspect. I therefore see no reason to work out the loss of profits for which no specific evidence was produced by either party.”

53. Before proceeding further I would also like to note that the petitioner itself before the Arbitrator sought further directions in case specific performance was ordered by the Arbitrator. These, *inter alia*, included the direction to the respondents to approve one of the concept plans prepared by the architect and allocation of the specific sum as rent for houses to be given as alternative accommodation to respondent nos. 2 and 3.

54. The Arbitrator refused to grant such additional directions and held as under:-

“The reason is that all these directions relate to the events arising post award period. After I have given the award, I have no jurisdiction to give further directions. That jurisdiction would lie with the Hon'ble High Court, because there may be various factual matters which may have to be considered and that can only be done by the Hon'ble High Court at that particular time.

Obviously concept plans would have to be submitted, what if any objection there are would have to be sorted out. I can not give any directions to accept the plan submitted in future by the claimant without even having seen it. Similarly I have held that the Respondents are entitled to alternative accommodation to be provided by the claimant as mentioned in the Agreement; I have also held that if the accommodation is not available in the preferred areas and if the Respondents cannot indicate any such accommodation in the preferred areas, they can be offered alternative accommodation in other reasonably decent areas as they had been offered earlier. I, for obvious reasons, after giving the award cannot supervise the activities; of the parties namely, whether suitable accommodation has been given to them or whether the Respondents are justified or not in rejecting the same, in that view, this is a matter which will have to be either worked out by

the, parties in an amicable manner or the courts intervention for supervision may have to be invoked.

Similar is the situation where Claimant urge that time should be specified for clearing the site. This again will depend on the question of alternative accommodation having been sorted out. If the parties are not able to clear it among themselves, evidently they have to move the courts for necessary directions and it is thereupon that the various terms mentioned in Clause 20 of the Agreement dated 21st August, 1985 between the parties can be worked out. All these prayers are post Award and evidently I am not competent to give any directions in the matters and courts alone have to be moved for these situations which may arise in carrying out the directions given in the award.”

55. Section 10 of the Specific Relief Act, 1963 before amendment spells out the cases in which Specific Performance of Contract may be granted at the discretion of the Court. The same is quoted hereinbelow:-

“10. Cases in which specific performance of contract enforceable. -Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced-

(a) when there exists no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done; or

(b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

Explanation.- Unless and until the contrary is proved, the court shall presume-

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and

(ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases:-

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

(b) where the property is held by the defendant as the agent or trustee of the plaintiff.”

56. A reading of the above provision shows that a breach of a Contract to transfer immovable property will be presumed by the Court as one which cannot be adequately relieved by compensation in money.

57. Sub Section 1 of Section 14 prior to amendments is also relevant and is quoted hereinbelow:-

“14. Contracts not specifically enforceable.- (1) The following contracts cannot be specifically enforced, namely:-

(a) a contract for the non-performance of which compensation in money is an adequate relief;

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;

(c) a contract which is in its nature determinable;

(d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.”

58. A reading of the above provision clearly establishes that where the non-performance of a Contract can be compensated in terms of money or where a Contract runs into such minute or numerous details or otherwise the contract is of such a nature that the Court cannot enforce specific

performance of its material terms or involves performance of a continuous duty which the Court cannot supervise, such Contracts cannot be specifically enforced/unamended.

59. Section 14(3)(c), however, carves out an exception in case of a Contract for construction of any building, subject to the fulfillment of the conditions mentioned therein. The same is reproduced herein below:-

“14. Contracts not specifically enforceable.-

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(3) Notwithstanding anything contained in clause (a) or clause (c) or clause (d) of sub-section (1), the court may enforce specific performance in the following cases:

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(c) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land:

PROVIDED that the following conditions are fulfilled, namely:-

(i) the building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the building or work;

(ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and

(iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.”

60. The Supreme Court recently in ***Sushil Kumar Agarwal v. Meenakshi Sadhu***, 2018 SCC OnLine SC 1840, had the occasion to

consider Section 14(3) (c) of the Specific Relief Act. The Supreme Court held as under:

“18. When a pure construction contract is entered into, the contractor has no interest in either the land or the construction which is carried out. But in various other categories of development agreements, the developer may have acquired a valuable right either in the property or in the constructed area. The terms of the agreement are crucial in determining whether any interest has been created in the land or in respect of rights in the land in favour of the developer and if so, the nature and extent of the rights.

19. In a construction contract, the contractor has no interest in either the land or the construction carried out on the land. But, in other species of development agreements, the developer may have acquired a valuable right either in the property or the constructed area. There are various incidents of ownership in respect of an immovable property. Primarily, ownership imports the right of exclusive possession and the enjoyment of the thing owned. The owner in possession of the thing has the right to exclude all others from its possession and enjoyment. The right to ownership of a property carries with it the right to its enjoyment, right to its access and to other beneficial enjoyments incidental to it. (B. Gangadhar v. B.G. Rajalingam (1995) 5 SCC 238, para 6) Ownership denotes the relationship between a person and an object forming the subject-matter of the ownership. It consists of a complex of rights, all of which are rights in rem, being good against the world and not merely against specific persons. There are various rights or incidents of ownership all of which need not necessarily be present in every case. They may include a right to possess, use and enjoy the thing owned; and a right to consume, destroy or alienate it. (Swadesh Ranjan Sinha v. Haradeb Banerjee (1991) 4 SCC 572). An essential incident of ownership of land is the right to exploit the development, potential to construct and to deal with the constructed area. In some situations, under a development agreement, an owner may part with such rights to a developer.

This in essence is a parting of some of the incidents of ownership of the immovable property. There could be situations where pursuant to the grant of such rights, the developer has incurred a substantial investment, altered the state of the property and even created third-party rights in the property or the construction to be carried out. There could be situations where it is the developer who by his efforts has rendered a property developable by taking steps in law. In development agreements of this nature, where an interest is created in the land or in the development in favour of the developer, it may be difficult to hold that the agreement is not capable of being specifically performed. For example, the developer may have evicted or settled with occupants, got land which was agricultural converted into non-agricultural use, carried out a partial development of the property and pursuant to the rights conferred under the agreement, created third-party rights in favour of flat purchasers in the proposed building. In such a situation, if for no fault of the developer, the owner seeks to resile from the agreement and terminates the development agreement, it may be difficult to hold that the developer is not entitled to enforce his rights. This of course is dependent on the terms of the agreement in each case. There cannot be a uniform formula for determining whether an agreement granting development rights can be specifically enforced and it would depend on the nature of the agreement in each case and the rights created under it.

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24. Various High Courts have interpreted the requirements under Section 14(3)(c) of the Act and opined on the maintainability of a suit by the developer for specific performance against the owner of the property for a breach in the conditions of the development agreement. A common thread that runs through the analysis in decided cases is the following:

24.1 The courts do not normally order specific performance of a contract to build or repair. But this rule is subject to important exceptions, and a decree for specific

performance of a contract to build will be made only upon meeting the requirements under law;

24.2 The discretion to grant specific performance is not arbitrary or capricious but judicious; it is to be exercised on settled principles; the conduct of the plaintiff, such as delay, acquiescence, breach or some other circumstances outside the contract, may render it inequitable to enforce it;

24.3 In order to determine the exact nature of the agreement signed between the parties, the intent of the parties has to be construed by reading the agreement as a whole in order to determine whether it is an agreement simpliciter for construction or an agreement that also creates an interest for the builder in the property. Where under a development agreement, the developer has an interest in land, it would be difficult to hold that such an agreement is not capable of being specifically enforced; and

24.4 A decree for specific performance of a contract to build will be made if the following conditions are fulfilled:

24.4.1 the work of construction should be described in the contract in a sufficiently precise manner in order for the court to determine the exact nature of the building or work;

24.4.2 the plaintiff must have a substantial interest in the performance of the contract and the interest should be of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and

24.4.3 the defendant should have, by virtue of the agreement, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.

25. The issue before this Court is whether Section 14(3)(c)(iii) is a bar to a suit by a developer for specific performance of a development agreement between himself and the owner of the property. The condition under Section 14(3)(c)(iii) is that the defendant has, by virtue of the agreement, obtained possession of the whole or any part of the

land on which the building is to be constructed or other work is to be executed. If the rule of literal interpretation is adopted to interpret Section 14(3)(c)(iii), it would lead to a situation where a suit for specific performance can only be instituted at the behest of the owner against a developer, denying the benefit of the provision to the developer despite an interest in the property having been created. This anomaly is created by the use of the words “the defendant has, by virtue of the agreement, obtained possession of the whole or any part of the land” in Section 14(3)(c)(iii). Under a development agreement, an interest in the property may have been created in favour of the developer. If the developer is the plaintiff and the suit is against the owner, strictly applied, clause (iii) would require that the defendant should have obtained possession under the agreement. In such a case if the developer files a suit for specific performance against the owner, and the owner is in possession of the land by virtue of a lawful title, the defendant (i.e. the owner) cannot be said to have obtained possession of the land by way of the agreement. This would lead to an anomalous situation where the condition in Section 14(3)(c)(iii) would not be fulfilled in the case of a suit by a developer. Application of the literal rule of interpretation to Section 14(3)(c)(iii), would lead to an absurdity and would be inconsistent with the intent of the Act.

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27. By giving a purposive interpretation to Section 14(3)(c)(iii), the anomaly and absurdity created by the third condition will have no applicability in a situation where the developer who has an interest in the property, brings a suit for specific performance against the owner. The developer will have to satisfy the two conditions laid out in sub-clauses (i) and (ii) of Section 14(3)(c), for the suit for specific performance to be maintainable against the owner. This will ensure that both owners and developers can avail of the remedy of specific performance under the Act. A suit for specific performance filed by the developer would then be maintainable. Whether specific

performance should in the facts of a case be granted is a separate matter, bearing on the discretion of the court.”

61. In ***Shri Pradeep Shankar Walveka*** (supra), the Bombay High Court held as under:

“11. Sub-section (2) of Section 14 deals with the contract to refer disputes of arbitration, Sub-section (3) is in two parts, the first part deals with suits for enforcement of a contract to execute a mortgage or furnish any other security for securing the repayment of the loan and to take up and pay for any debentures of a company. Sub-section (3) is an exception to sub-section (1) of Section 14. The clause (b) of sub-section (3) deals with suits for execution of formal deed of partnership and the clause (c) deals with enforcement of a contract for the construction of any building or the execution of any other work on land. Thus, Clause (c) deals with pure and simple building contracts under which a person appoints any other person to carry on construction of a building or to carry on execution of a particular work on a land. Clause (c) provides that such contract can be specifically enforced provided that, (i) the building or other work in the contract is described sufficiently to enable the Court to determine the exact nature of the building or work, (ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in terms of money for non - performance of the contract is not an adequate relief, and (iii) the defendant has, in pursuance of the contract, has obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed. Therefore, even in the case a of pure and simple building contract, in certain cases, the contract is specifically enforceable. Section 15 deals with a person who may obtain specific performance. Section 16 deals with personal bars to relief of specific performance. Section 17 deals with contract to sell or let property by one who has no title. Section 18 deals with non-enforcement except with variation. The person against whom a contract can be enforced are set out in Section

19. It must be noted here that though under the aforesaid sections, a contract may be specifically enforceable, the relief of specific performance being a discretionary and equitable relief, the Court retains discretionary power to refuse a decree for specific performance. The said discretionary power is found in Section 20 of the Act of 1963. On plain reading of provisions of Chapter II, it cannot be laid down as a matter of law that a development agreement is not specifically enforceable. Such a contract is enforceable if it falls within the clauses (a) or (b) of Section 10 provided such contract does not fall in any of the prohibited categories under Section 14. On plain reading of provisions of Chapter II, it can be said that they do not support an argument that only an agreement for sale of immovable property is enforceable and an agreement for development is not specifically enforceable.

12. The Transfer of Property Act, 1882 recognizes an agreement for sale. However, the concept of the development agreement is a broad and flexible concept. There can be different categories of development agreements. One category of development agreement can be, where the developer proposes to subject the property subject matter of contract either to the provisions of The Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to as the MOFA) or to the provisions of The Maharashtra Apartment Ownership Act, 1970 (hereinafter referred to as the said Act of 1970). If the property is to be developed in accordance with the said enactment, several obligations are created under the said statutes. The said two statutes create rights in favour of the flat purchasers and also create corresponding obligations which are required to be performed by a developer. Under the MOFA, the breach of provisions by a developer/promoter leads to prosecution of the developer. In all such cases, the owner invariably executes an irrevocable general power of attorney empowering the developer to sell the land with building or to execute a lease in respect of the same. Such power of attorney creates irrevocable agency. The second

category of development agreement can be where the developer does not subject the property either to the MOFA or the said Act of 1970, but agrees to execute the sale deed in favour of flat purchasers in respect of their respective flats along with proportionate undivided right, title and interest in the land on which the building is constructed. There can be another category of development agreement where a developer is supposed to construct building at his own cost and recover the cost of construction by leasing out some of the premises in the newly constructed building. In such a case, there cannot be any clause regarding execution of any sale deed or lease in respect of the land as the title is to be retained by the owner of the property. These are only illustrations. The development agreements can be in some other forms also. In case of breach of certain contracts of development, the monetary compensation cannot be adequate relief and it may not be possible to ascertain actual damage caused by non-performance. The first category of development agreement where the developer proposes to subject the property either to the provisions of MOFA or the said Act of 1970 may be a category of agreement which may be specifically enforceable.

13. Therefore, the answer to the question whether an agreement which is styled as a development agreement is specifically enforceable under the said Act of 1963 depends upon the nature of the agreement. The said question is required to be decided by applying relevant statutory provisions in Chapter II and especially Section 10 and 14 of the Act of 1963. As we have narrated earlier, Section 10 lays down as to which contracts are enforceable and Section 14 lays down that certain contracts are not enforceable. Therefore, it cannot be laid down as a proposition of law that an agreement styled as a development agreement is not specifically enforceable under the said Act of 1963. The aspect of enforceability depends on facts of each case.

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18. *On plain reading of the provisions of Chapter II of the said Act of 1963, we reiterated that it cannot be laid down as a proposition of law that every agreement which is styled as a development agreement is not specifically enforceable. We may also note here that Chapter II does not indicate that only an agreement for sale of immovable property is specifically enforceable under which the vendor agrees to convey the immovable property to the purchaser. Chapter II applies to various types of Agreements. The answer to question whether a development agreement is enforceable in law will ultimately depend upon facts of each case.”*

62. The Calcutta High Court in ***Jaichandlal Ashok Kumar*** (supra) set aside an Arbitral Award which, in spite of holding that the developer was entitled to specific performance, had denied such relief to the developer.

63. From the reading of the above judgments it is clear that a Development Agreement is to be distinguished from a pure construction contract. In a pure construction contract, the contractor has no interest in either the land or the construction which is carried out. The Supreme Court in ***Sushil Kumar Agarwal*** (supra) has given instances of Development Agreement where the developer would be entitled to seek specific performance of the Development Agreement. These include where the developer may have evicted or settled with the occupants; got land which was agricultural converted into nonagricultural use; carried out a partial development of the property or created third party rights in favour of flat purchases in the proposed building.

64. In the present case, in terms of clause 11 of the Collaboration Agreement, the petitioner, as a builder, was to get 55% of the total built-up area, whereas, the respondent no.1, as the owner, was to get 45% of

the total built-up area of the new construction. In terms of clause 12 of the Collaboration Agreement, the petitioner was also entitled to any additional area that may become available in the same proportion. In terms of clause 14 of the Collaboration Agreement, the petitioner was entitled to enter into agreements with prospective buyers for the area that falls within the share of the petitioner in the plans submitted with the authorities.

65. By another contract, the petitioner had offered 5% and 8% of the total built-up area to the respondent no.2 and respondent no.3 who are the occupants/tenants in the building in existence. The petitioner also offered them an alternate accommodation during the period of construction.

66. The above terms clearly indicate that under the Collaboration Agreement a right in the property was created in favour of the petitioner and the agreement in question was not a pure construction contract.

67. However, the issue is whether this contract, in spite of it being a Development Agreement, is specifically enforceable. For answering this question few Clauses of the agreement need to be revisited.

68. As noted hereinabove, in terms of the agreement the plaintiff is to provide “a suitable alternate accommodation” to the respondent no. 2 and 3 in the preferred localities. It is already noticed hereinabove that there was a major dispute between the parties with respect to the availability of such suitable alternate accommodation. In any case, what such suitable alternate accommodation would be is a matter of subjective satisfaction dependent on one’s personal taste and satisfaction.

69. Clause 3 of the agreement further provides that though the builder shall appoint one of the named architects or any other architect with mutual consultation with the respondent no.1, the concept plan of the building, landscaping and the final building plans shall be discussed and approved mutually by parties to the agreement. In the present case, admittedly before the disputes had started, the building plans had not been agreed upon between the parties, leave alone been sanctioned by the competent authorities. Therefore, what these building plans should be is today a matter of conjecture and supposition.

70. Clause 8 of the agreement provides that the building to be raised by the plaintiff shall be of the best workmanship using first-class quality material as per ISI specifications. General specifications have been attached to the agreement as Annexure A. Annexure A itself states that these are general specifications and details may be mutually agreed between the parties. Clause 8 further provides that the parties may mutually decide or settle further details of building specifications and terms and conditions regarding the same. Therefore, there is not much certainty provided in the agreement itself as to the quality of the construction and the material to be used therein. These were matters left to be discussed and mutually agreed-upon during the execution of the construction work.

71. Though the agreement defines the share of the parties in the constructed portion of the building, as the plans are yet to be agreed upon and sanctioned by the competent authority, what these exact shares will look like is again a matter of conjecture and supposition. In this regard,

clause 14 of the agreement gains significance in as much as though the plaintiff was entitled to enter into agreement with prospective flat buyers offering them the areas that may finally fall in its share, the building was to be raised in two blocks to enable the equitable distribution of the built-up areas and open spaces. Such distribution was to be decided mutually prior to plans being finalised and submitted to the sanctioning authorities. Such agreements were also stated to be not binding on the owners till the completion of the project.

72. In terms of clause 15, the plaintiff was to phase the construction in such a manner that the portions allotted to the owners and builders are constructed simultaneously.

73. What is most important is that in terms of clause 22 of the agreement, the plaintiff was granted a license to enter upon the land only for the purpose of raising construction. The agreement clearly provided that this would only be a license and the legal possession of the plot shall remain with the owners.

74. The Power of Attorney that was to be executed along with the Collaboration Agreement was only for the purposes of construction activity and no further.

75. In ***Vinod Seth*** (Supra), specific performance was being sought of an oral Agreement which also provided for transfer of ground floor of a building to be constructed in favour of the builder upon such construction. The Supreme Court refused to grant such relief to the plaintiff therein and held as under:-

“13. The agreement alleged by the appellant is termed by him as a commercial collaboration agreement for development of a residential property of the respondents. Under the alleged agreement, the obligations of the respondents are limited, that is, to apply to DDA for conversion of the property from leasehold to freehold, to submit the construction plan to the authority concerned for sanction, and to deliver vacant possession of the suit property to the appellant for development. But the appellant-plaintiff has several obligations to perform when the property is delivered, that is, to demolish the existing building, to construct a three-storeyed building within one year in accordance with the agreed plan, deliver the first and second floors to the respondents and also pay a token cash consideration of Rs. 3,71,000. The performance of these obligations by the appellant is dependent upon his personal qualifications and volition.

14. If the court should decree the suit as prayed by the appellant (the detailed prayer is extracted in para 5 above) and direct specific performance of the “collaboration agreement” by the respondents, it will not be practical or possible for the court to ensure that the appellant will perform his part of the obligations, that is, demolish the existing structure, construct a three-storeyed building as per the agreed specifications within one year, and deliver free of cost, the two upper floors to the respondents. Certain other questions also will arise for consideration. What will happen if DDA refuses to convert the property from leasehold to freehold? What will happen if the construction plan is not sanctioned in the manner said to have been agreed between the parties and the respondents are not agreeable to any other plans of construction? Who will decide the specifications and who will ensure the quality of the construction by the appellant?

15. The alleged agreement being vague and incomplete, requires consensus, decisions or further agreement on several minute details. It would also involve performance of a continuous duty by the appellant which the court will not be

able to supervise. The performance of the obligations of a developer/builder under a collaboration agreement cannot be compared to the statutory liability of a landlord to reconstruct and deliver a shop premises to a tenant under a rent control legislation, which is enforceable under the statutory provisions of the special law. A collaboration agreement of the nature alleged by the appellant is not one that could be specifically enforced. Further, as the appellant has not made an alternative prayer for compensation for breach, there is also a bar in regard to award of any compensation under Section 21 of the Specific Relief Act.”

76. Reliance can also be made to the judgment of the Supreme Court in **Nahar Singh** (Supra) and of the Allahabad High Court in **Nagar Mahapalika** (Supra) and of this Court in **M.M. Builders** (Supra) and **Prem Kumar Bansal** (Supra).

77. In **Sushil Kumar Agarwal** (Supra), the Supreme Court having held that Development Agreements that create a right in the immoveable property in favour of the constructor can be enforced, on facts held as under:-

“29. The condition under Section 14(3)(c)(i) is that the building or other work described in the contract is sufficiently precise to enable the court to determine the exact nature of the building or work. To examine the question as to whether the scope of the building or work described in the agreement is sufficiently defined, the Court needs to determine the exact nature of the work by referring to the relevant clauses of the agreement. Clause 8 of the agreement provides that the building shall be constructed in accordance with approved plans and built with “first class materials” with wooden doors, mosaic floor, basin and lavatories, tap water arrangement, masonry work, electric

points, finished distemper and bathroom fittings of glazed tiles up to 6" height and lift, "etc." Further, at Clause 13 of the agreement, the parties have agreed that the contractor would construct a building at the premises consisting of "residential apartments of various sizes and denomination" in the said building complex in accordance with plans sanctioned by the Calcutta Municipal Corporation and the owner shall convey the proportionate share in the land to the respective buyers. Clause 22 of the agreement states that if for any reason after the plan is sanctioned or "for any act or omission on the part of the owner" the building cannot be constructed; the owner shall refund to the contractor Rs 4,00,000 in addition to all costs, charges and expenses incurred by the contractor. At Clause 20 of the agreement, the parties have agreed that the apartments of the owner shall be constructed and be made in "similar condition" as that of the contractor with water connection, sewerage, electric wiring except "special fittings".

30. Use of such vague terms in the agreement such as "first class materials", "residential apartment of various sizes and denomination", "etc.", "similar condition", and "special fittings", while discussing the scope of work clearly shows that the exact extent of work to be carried out by the developer and the obligations of the parties, have not been clearly brought out. The parties have not clearly defined, inter alia, the nature of material to be used, the requirements of quality, structure of the building, sizes of the flats and obligations of the owner after the plan is sanctioned. Further, Clause 9 of the agreement states that the owner shall pay the contractor costs, expenses along with agreed remuneration only after completion of the building on receiving the possession. However, the exact amount of remuneration payable by the owner to the contractor is not to be found in the agreement. The agreement between the parties is vague. The court cannot determine the exact nature of the building or work. The first condition in Section 14(3)(c)(i) is not fulfilled.

31. Another condition under Section 14(3)(c)(ii) is that the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief. The intent of the section is to make a distinction between cases where a breach of an agreement can be remedied by means of compensation in terms of money and those cases where no other remedy other than specific performance will afford adequate relief. Therefore, before granting the remedy of specific performance, we need to analyse the extent of the alleged harm or injury suffered by the developer and whether compensation in money will suffice in order to make good the losses incurred due to the alleged breach of the agreement by the owner. From the facts of the case, it is clear that the case of the developer is that he incurred an expenditure of Rs 18,41,000 towards clearing outstanding dues, security deposit and development, incidental and miscellaneous expenses. The alleged losses/damages incurred by the plaintiff can be quantified. The plaintiff can be provided recompense for the losses allegedly incurred by payment of adequate compensation in the form of money. The developer has failed to satisfy the conditions under sub-clauses (i) and (ii) of Section 14(3)(c) of the Act. In such a case, specific performance cannot be granted.

78. In **Pradeep Shankar Walvekar** (Supra), the Court found it to be a case of transfer of immovable property for consideration. The Court further found that the case was covered either under the Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963, or the Maharashtra Apartment Ownership Act, 1970 and therefore, there was a provision for execution of the Sale Deed, which even otherwise the builder could have got executed in favour of any person on the basis of the irrevocable Power of

Attorney executed by the owners. These facts clearly distinguish the said case making it inapplicable to the present case.

79. In *Jaichandlal Ashok Kumar* (Supra), unlike in the present case, the plans had already been approved by the builder from the Calcutta Municipal Corporation. The Agreement further provided for payment of lease premium by the developers upon execution of the Agreement. In those facts the Court found that the Agreement therein was not for development simpliciter; the Agreement was coupled with an interest created in favour of the developer. The same is therefore, distinguishable from the facts of the present case.

80. As noted above, the petitioner itself had requested the Arbitrator to issue further directions incase the Arbitrator was granting specific performance of the Collaboration Agreement. The Arbitrator in the Impugned Award refused to issue such further directions stating that these would be matters which may require examination of various factual matters and which can be considered by the High Court at an appropriate stage. The Arbitrator further held that even with respect to the alternative accommodation, the same would require supervision and would have to be worked out by the parties in an amicable manner or through Court's intervention and supervision. This itself shows that even as per the petitioner and the Arbitrator, the Contract, to be specifically performed, required constant supervision and direction from the Court. There may be substance in the submission made by the learned senior counsel for the petitioner that such apprehension has been compounded due to past conduct of the respondent on termination of the Agreement on frivolous

ground, however, the same cannot justify grant of specific performance against the statutory presumption.

81. Though some argument was made on basis of the exemption letter dated 23/25.04.1986 issued by the Delhi Administration under the ULCRA stating that a person shall be entitled to own only one dwelling unit under the scheme and therefore, contending that the Collaboration Agreement, insofar as it provided for vesting of more than one dwelling unit to each of the parties, it had become unlawful and had stood frustrated, I cannot agree with the said submission. These stipulations by the Delhi Administration would not have caused the frustration of the Contract. However, there is yet another reason for non-grant of relief of specific performance in the facts of the present case. The Collaboration Agreement stipulates raising of a Group Housing/Multistorey construction on the property. As on the date of the Agreement, there was no restriction as to height and number of storeys that could be constructed on the plot. On 17.10.1985 the Government of India issued an order restricting the height to 45ft. and not exceeding four storeys. The petitioner while calculating and claiming its loss on account of breach of Agreement by the respondent had taken the total area to be constructed as nearly 97,000 sq.ft.

82. On 08.02.1988 further restrictions were imposed on the construction of building in the Lutyen's Bungalow Zone (where plot in question was situated) whereby the height of the building to be constructed was reduced to the height of the existing building, which in this case was fifteen and a half ft., and the area of construction was restricted to the existing plinth area. The counsel for respondent no. 1

submits that due to such restrictions instead of an area of 97,000 sq.ft. that was proposed under the Collaboration Agreement, construction of only 7,500 sq.ft. could now be made, that to only with a ground floor and with no basement. Even the petitioner in his submission submits that the total built-up area under the Lutyen's Bungalow Zone regulation would be approx 11767.98 sq.ft. This is a fundamental change from the Agreement.

83. In *Energy Watchdog v. Central Electricity Regulatory Commission*, 2017 SCC OnLine SC 378, the Court reiterated that under Section 56 of the Indian Contract Act, the performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose of the parties. If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered into their agreement, it can be said that the promisor finds it impossible to do the act which he had promised to do. While a wholly abnormal rise or fall in the prices may not allow the party to get rid of its bargain, however, where it is shown that a fundamentally different situation has unexpectedly emerged, the contract ceases to bind the parties. The Court also approved the judgment in *Sea Angel* case, 2013 (1) Lloyds Law Report 569, wherein it was held that the test of "radically different" is important. In the present case, with the coming into force of Lutyen's Bungalow Zone Regulation, the circumstances have undergone a radical change not contemplated by the parties.

84. Though the learned senior counsel for the petitioner has sought to contend that as per the Explanation of Section 4(3) of the ULCRA, Group Housing has been defined to mean a building with one or more floors and

the Ministry of Urban Affairs and Employment by its Circular dated 19.02.1997 has also clarified that under the Lutyen's Bungalow Zone guidelines there is no stipulation that the building should have the same plinth as well and therefore, even under these guidelines a group housing scheme is permissible, in my opinion what was in contemplation of the parties was certainly a different nature of group housing scheme with Multistorey construction.

85. At the same time, I agree with the learned senior counsel for the petitioner that the frustration of contract has been brought about by the respondents due to their own breach of the Agreement and they cannot be allowed to gain out of the same. In my opinion, while these subsequent events would hamper the claim of the petitioner to claim the specific performance of the Contract, the same can have no effect on the claim of damages of the petitioner due to such breach of the Agreement by the respondents.

86. In view of the above, the direction of the Arbitrator to order specific performance of the Collaboration Agreement cannot be sustained.

87. On the question of damages, though as noted above, the Arbitrator had framed issue no. 7, the Arbitrator did not go into the said issue for the reason that he had granted specific performance of the Contract. As I have held that specific performance of the Collaboration Agreement cannot be granted and as the Arbitrator during the pendency of the present proceedings has died, I deem it appropriate to exercise my powers under Section 8(b) read with Section 20 of the Act to appoint an Arbitrator to consider the issue of damages.

88. I therefore appoint **Justice Rajendra Menon**, Retired Chief Justice of this Court (R/o 9, Akbar Road, New Delhi-110065, Telephone: 011-23792644) as an Arbitrator.

89. The petition is disposed of with the above directions and with no order as to costs.

NAVIN CHAWLA, J

JULY 02, 2019
vp/RN/rv

