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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 13th May, 2019

Date of decision : 16th July, 2019

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O.M.P. 327/2010

S DAYA SINGH & SONS(HUF) AND OTHERSPetitioners

Through: Mr. Rana Mukherjee, Sr. Advocate
with Ms. Madhumitta Bora, Mr. Riju
Raj Singh Jamwal, Ms. Kanik Sharma
& Ms. Sreoshi Chatterjee, Advocates
(M-9810353267)

versus

M/S SOM DATT BUILDERS PVT LTD. Defendant

Through: Mr. H.L. Tiku, Sr. Advocate with Mr.
Rajesh Bhardwaj, Mr. Ajay Tejpal,
Mr. Yashmeet & Ms. Shradha,
Advocates (M-9810006861).

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 has been filed by Daya Singh & Sons (HUF) and others (*hereinafter* 'owners') against M/s Som Datt Builders Pvt. Ltd. The petition challenges the impugned award dated 13th March, 2010 passed by the Ld. Arbitral Tribunal by 2:1 majority. The Petitioner Nos. 2 and 3 are the son and wife of Late Sh. Daya Singh respectively.

2. The dispute concerns 5, Jantar Mantar Road, New Delhi admeasuring around 2.52 acres (*hereinafter* 'suit property'). The said property was given on lease by the then Chief Commissioner of Delhi to one Sh. Rai Bahadur S. Basakha Singh in 1920 on which a double storied house along with some

annexes/out houses were constructed. The property was gifted by Sh. Rai Bahadur Singh to his son Sh. Daya Singh on 7th March, 1956, who then put the suit property in the common stock of the family namely S. Daya Singh & Sons (HUF).

3. M/s Som Datt Builders Pvt. Ltd. (*hereinafter 'builder'*) and the owner entered into a MOU dated 9th December, 1988 under which the builder was to raise construction on the suit property as a group housing complex. It was agreed that 40% of the constructed space was to be the share of the builder. The builder also undertook to apply to the L&DO on behalf of the owners for seeking permission for development of the group housing. The expenses, fees and charges for the same were to be borne by the builder. The parties agreed as per the MoU that the coverage would be a minimum of 2.5 FAR which was then applicable. Plans were to be jointly prepared and submitted to NDMC by 31st March, 1989. A sum of Rs.50 lakhs was paid to the owners by the builder on an interest free basis. On 15th December, 1988, an application was made with the L&DO seeking permission and conversion of the suit property into a multi-storied group housing complex. The charges for the same were paid by the builder. On 24th May, 1989, the building plans were also submitted with the NDMC. The NDMC however, on 7th June, 1989, rejected the building plans as L&DO's permission for construction of group housing had not been given. At that stage, it was realised that the suit property could only be used for 'institutional purposes' as per the master plan and not for 'residential purposes'. The parties, however, went ahead and signed the development agreement dated 4th August, 1989 for developing the residential multi-storied housing project. A further sum of Rs.50 lakhs was paid to the owners. On 15th May, 1998, a notification was

issued by the Government of India allowing use of the suit property for residential purposes. Applications were then made for conversion of the land from leasehold to freehold and the requisite charges were paid by the builder. The owners also wrote a letter to the L&DO on 28th January, 2000 seeking necessary permissions.

4. On 7th June, 2000, the Ministry of Urban Development, Government of India issued a notification that no residential plots would be approved for a group housing project. The said notification is extracted herein below:

“S.O.557 (E) - In exercise of the powers conferred by Section 349A of the Delhi Municipal Corporation Act, 1957 and Section 260 of the New Delhi Municipal Council Act, 1994, the Unified Building Bye-Laws, 1983 stand modified to the extent as indicated in paras 1 to 3 of the Annexure to this Ministry's Notification of even number dated 23rd July, 1998, as required under Section 483 of the DMC Act and Section 388 of the NDMC Act. The building plans to be sanctioned in accordance with the amended bye-laws would be subject to provisions of the layout plans and, service plans already sanctioned, and no such lay out/service plans would be amended till arrangements for provision of augmented municipal services such as water, power, sewerage, road widening, circulation, parking, parks (green areas) etc., have been made No Plot Housing can be converted into group-housing.”

Despite this notification, the builder submitted fresh plans to the NDMC seeking approval – which was rejected on 6th June, 2001. On 27th November, 2001, a press note was issued by the Government of India permitting construction of additional floors. This press note along with the notification dated 7th June, 2000 became the subject matter of proceedings before the Supreme Court. Initially, the Supreme Court had granted a stay on the press

note which was however vacated on 12th December, 2003 on certain conditions which will be discussed later.

5. In 2002, Sh. Daya Singh expired and his son Sh. Harisimran Singh – Petitioner No.2 became the *karta* of the HUF. Various discussions took place between the parties in view of the order dated 12th December, 2003 of the Supreme Court. There were disputes as to what would be the FAR which would be permissible and how much construction could in fact be raised. Correspondence ensued between the parties wherein the builder proposed submission of fresh plans to NDMC with FAR of 1.67. The owners responded that there was uncertainty and it was not clear as to whether the said plans with FAR of 1.67 would in fact be sanctioned. Several letters were exchanged between the parties and finally on 23rd June, 2004, the development agreement was terminated by the owners. The said letter of termination reads as under:

*“Som Datt Builders Ltd.,
56-58, Community Centre,
East of Kailash,
New Delhi*

Re: 5, Jantar Mantar Road, New Delhi

Re: Agreement dated 4th August, 1989

Dear Sir,

Further to the correspondence resting with my letters of 22nd May 2004 and 31st May, 2004 and in view of the delays that have occurred since the above project was initially conceived of and the above agreement was made and in view of uncertainty and indefiniteness that has continued to prevail with no end in sight and the admitted position about the unlikelihood of approval of plans as had been contemplated in terms of the agreement within any certain, definite and specific time period and without recourse to litigation even for that

purpose and the default and non-performance on your part and the resultant frustration of the agreement the same has to be treated as rescinded, cancelled and at an end. You are notified accordingly.

Yours faithfully

Sd/-

(HARISIMRAN SINGH SANDHU) ”

6. The builder initially sought resolution of disputes mutually and thereafter invoked arbitration. A Section 9 petition being OMP 207/2010 was filed by the builder in which the owners were restrained from selling, alienating, transferring or parting with possession of the suit property without prior permission of this Court.

7. Arbitration was thereafter invoked. A three-member Tribunal was constituted. The builder filed its statement of claim and sought damages/compensation to the tune of Rs.84 crores. On 8th May, 2007, arbitration proceedings were concluded and the matter was reserved for making of award.

8. Vide award dated 13th March, 2010, the Arbitral Tribunal by a 2:1 majority held the termination by the owners to be illegal. The builder was awarded loss of profits as also refund of all the monies paid along with costs. The relief of specific performance was however, rejected.

9. In the dissenting award, the termination was upheld. Hence the present petition.

Impugned Majority Award

10. The award dated 13th March, 2010 holds that the termination of the development agreement by the owners dated 23rd June, 2004 is illegal on the following grounds:

- That time was not the essence of the contract particularly in respect of obligations to obtain approvals and sanctions including the sanction of building plans;
- Till 1998, since the suit property was not converted from institutional to residential, no permission could in any case have been granted;
- The owners were repeatedly writing to the L&DO seeking permission;
- The parties sought conversion of the suit property from leasehold to freehold and the same was pending.
- The builder has not been negligent in performing its obligations under the contract;
- Neither of the parties can be blamed for the delay in achieving progress in the project;
- The owners ought not to have terminated the agreement since it was only after conversion from leasehold to freehold, that the plans could have been sanctioned;
- Reasonable time under Section 46 of the Contract Act has to be construed in the facts and circumstances of each case;
- Both the parties were unaware of the fact that the property was institutional in nature. Eight years were consumed in converting the property from institutional to residential, but the parties continued to keep the contract alive;
- The owners have enjoyed a sum of Rs.1 crore;
- The Tribunal rejected the contention that the builder failed to perform its obligations even after 1998 when the user of the suit property was

changed to residential;

- The builder is not in breach of contract. Reasonable time had not expired for performance of obligations by the builder;
- No time has been fixed for performance of obligations and parties were well aware that no time limits could be fixed.
- The owners ought to have issued a notice to the builder seeking performance of obligations within a reasonable time. Thus, the termination was held to be illegal and invalid;
- On the question of frustration, it was held that notification dated 7th June, 2000 was modified with the press note dated 27th November, 2001. The prohibition existed till augmentation of municipal services in the residential area. In view of the notified bye-laws of January, 2003, there was no impediment in the NDMC allowing the group housing complex. Recently, group housing complexes were constructed in the vicinity of the area;
- The rejection of the building plans by NDMC on 6th June, 2001 does not refer to any prohibition;
- The contract has not become void under Section 65 of the Contract Act;
- The owners did not prove that there was any prohibition or that the contract had become frustrated under Section 56;
- The contract has thus not become impossible of enforcement and has not become void.

11. The Arbitral Tribunal in the light of the above findings ruled on the following aspects which are termed as 'Claims' in the award. Since the

claims as per the claim petition and as described in the award are not the same, the claims extracted below are as per the award:

Claim No.1:- A declaration that the termination dated 23.6.2004 is illegal and for continuation of agreement dated 04.08.1989.

12. The findings of the Tribunal on this claim are as under:

“64. In this claim, the claimant seeks the relief that the cancellation letter dated 23.6.2004 sent by the respondent in respect to the contract in question is illegal and the same be set aside and it be declared that the agreement dated 4.8.1989 continues to be in force and binding on the parties. The claimant seeks relief of specific performance of the said Agreement.

65. The short question which arises for consideration is whether the relief of specific performance, which is a discretionary relief, should be awarded to the claimant. We have already given a finding that the cancellation of the contract by the respondent is illegal and unjustified. Normally, in a contract of sale of immovable property, the courts are inclined to grant relief of specific performance. The present contract is not simplisiter an agreement to sell any immovable property. The agreement is for the development and construction of multi storey group housing complex. This agreement does not constitute as a demise or assignment or conveyance of a plot or any part thereof or has created any right, title or interest in the said plot (See Article 8.4). The commencement of the construction of the building was contingent upon the claimant obtaining permissions and sanctions of the building plans.

66. Only one hurdle has been crossed by the parties after entering into the aforesaid development and construction contract that of getting the plot converted from institutional in nature to residential in nature after lapse of many years. The plot has to be yet got

*converted from freehold to leasehold and thereafter, the claimant is to get the plans sanctioned, permitting the construction of multi-storeyed group housing complex with at least minimum FAR mentioned in the contract. Section 14 of the Specific Relief Act provides that the relief of specific performance may not be granted, if it involves the performance of continuous duty by the court for supervising the enforcement of such a relief. **It is evident that the object of this project will not be achievable in any reasonable time. It will be better that the parties are not forced to perform the obligations under this contract by grant of relief of specific performance.***

67. So, we decline this claim for relief of specific performance of the contract.”

13. The above findings clearly show that the Tribunal was conscious that only one hurdle of conversion of the property from ‘institutional’ to ‘residential’ had been crossed in so many years despite the cooperation of both the parties. The further steps included conversion from leasehold to freehold, permission by L&DO for group housing and sanction of plans. Even the FAR which would be permitted was not clear. Thus, the Tribunal rejected the relief of specific performance.

Claim No.2:- Refund of interest free deposit

14. The builder, had only paid a sum of Rs. 1 crore to the owners instead of the agreed amount of Rs. 2.5 crores. The amount of Rs.1 crore has been refunded along with the interest @ 10% p.a. i.e. a total sum of Rs.3.7 crores.

Claim No.3:- Claim for the amount of Rs.10,00,000/- deposited with L&DO for conversion of lease hold rights to free hold

15. The sum of Rs.10 lakhs was directed to be refunded with interest i.e. a total sum of Rs.19.5 lakhs.

Claim No.4:- Refund of Rs.34,610/- deposited with the NDMC towards sanction of the plans

16. This claim was rejected.

Claim No.5:- Refund of Rs.1,85,68,569/- which includes fee paid to the Architect and other expenses incurred on the project

17. This claim was rejected.

Claim No.6:- The reimbursement of the expenses incurred by the claimant on this project apart from the fees paid to the Architect

18. This claim was rejected.

Claim No.7:- Claim of damages in shape of loss of profit on account of wrongful termination of the agreement and in lieu of relief of Specific Performance of the Agreement

19. The Tribunal holds that since the termination is illegal, the builder is entitled to loss of profits. The award on this claim reads as under:

“85. It is true that the expert has not given any documents like copies of sale deeds or agreements to sell of similar buildings in the vicinity from where one could calculate the rate prevalent at the relevant periods. The expert had given out the rates of the nearby areas of the building varying from Rs. 9500/- sq. ft. to Rs. 17000/- per sq. ft. of the buildings located at prestigious places, like Bhagwan Dass Road, Prithvi Raj Road, Malcha Marg, Golf Links, Vasant Vihar, Hellay Road, Anand Niketan, Jantar Mantra Road, Jor Bagh, Sunder Nagar etc. According to the expert, certain real estate dealers had provided him the information relating to such rates. In cross examination, he could not name even one dealer from whom he got the information. The expert also relied upon a report prepared by Knight Frank India Pvt. Ltd., which is also dated 9.6.2006. This expert was engaged by the claimant but the person who had prepared the report has not been examined as witness.

Thus, this report cannot be taken into consideration. The expert has also placed on record certain extracts taken from publication Cushman and Wakefield of the months of March and May 2006 giving certain rates prevailing in the areas mentioned above. Significantly, the rates mentioned in the said magazine show that there took place huge increase in rates ranging from 13% to 117o/o in various areas in one year time.

86. It is a common knowledge that during the years after liberalization of the economy, the real estate rates jumped vary high but they have drastically come down in the last two years or so and have started picking up recently. In absence of any other evidence on record, we would take the rate of Rs. 7000/- per sq. ft. as reasonable rate for giving compensation for loss of profit to the claimant. The fact has to be kept in view that the claimant would be earning this profit without spending a single penny on this project, so, we calculate the damages in this head as follows:-

i) Cost of construction @ 1200
per sq. ft. Rs.23.10 crores
ii) The claimants share 40%=
76,997 sq. ft
iii) Sale value @ Rs.7000 per sq.ft.= Rs.53.89 crores
loss of profit Rs.5.89 crore-Rs.23.10 crores=Rs.30.79
crores
we allow this amount.

87. Thus, in all, the respondents are liable to the claimant as follows:-

Claim No.2	Rs.03,70,00,000/-
Claim No.3	Rs. 19,50,000/-
Claim No.7	Rs.30,79,00,000/-
Total	<u>Rs.34,68,50,000/- ”</u>

Counter Claims

20. All counter claims were rejected.

Submissions of the Ld. Counsels

21. Mr. Rana Mukherjee, Ld. Senior Counsel appearing for the owners

submits that the contract was clearly frustrated as the project was completely unachievable. The notification dated 7th June, 2000 clearly imposed a prohibition against conversion of the plot from residential to group housing. He relies on a RTI reply dated 20th November, 2009 which also states that only FAR of 120 is permissible as it is a residential plot. For group housing however FAR is 200, though the NDMC clarified that the matter pertains to the L&DO. He submits that the frustration of the contract is in two stages i.e. that the contract could not be construed as being open-ended and secondly, subsequent events which took place when approvals and sanctions were sought. In any event, no damages could be granted by the Tribunal as the permissions were in fact rejected by the NDMC and the L&DO. The findings of the Tribunal that the owners failed to prove that group housing is not permissible is completely contrary to the record. If the object of the project was unachievable, the contract stood frustrated. He relies on the following judgments:

- ***Satyabrata Ghose vs. Mugneeram Bangur & Co. and Anr., AIR 1954 SC 44***
- ***Delhi Development Authority vs. Kenneth Builders and Developers Private Limited and Ors., (2016) 13 SCC 561***
- ***Fateh Chand vs. Balkishan Dass, (1964) 1 SCR 515***
- ***Maula Bux vs. Union of India, (1969) 2 SCC 554***
- ***Oil & Natural Gas Corporation Limited vs. Saw Pipes Ltd., (2003) 5 SCC 705***
- ***Kailash Nath Associates vs. Delhi Development Authority and Anr., (2015) 4 SCC 136***
- ***Satish Batra vs. Sudhir Rawal, (2013) 1 SCC 345***
- ***Shree Hanuman Cotton Mills and Ors. vs. Tata Air Craft Limited, (1969) 3 SCC 522***
- ***The Official Receiver, Calcutta vs. Baneshwar Prasad Singh and Anr., AIR 1962 PAT 155***

- ***Sat Prakash L. Tara Chand and Anr. vs. Dr. Bodh Raj L. Bhagwan Das Khatri, AIR 1958 P&H 111***
- ***Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49***
- ***News Item published in Hindustan Times titled “And Quit Flows Maily Yamuna” In Re, (2004) 9 SCC 569***

22. It is further submitted by Mr. Mukherjee that the calculation of loss of profits is completely contrary to law as laid down in the judgments of the Supreme Court starting with ***Maula Bux vs. Union of India, (1969) 2 SCC 554*** till ***Kailash Nath Associates vs. Delhi Development Authority and Anr., (2015) 4 SCC 136*** as the factum of loss was not proved.

23. On the other hand, Mr. H.L. Tikku, Ld. Senior Counsel appearing for the builder seeks to urge that the frustration being pleaded is under common law which is not permitted, since under Indian law, frustration has been codified. Unless there is an impossibility, there is no frustration. With the NDMC bye-laws of 2003 in any event, any obstructions which existed also came to an end. There is in fact a neighbouring building where a group housing has been constructed, that itself shows that approvals could have been obtained. The press note dated 27th November, 2001 could have been implemented as per the Supreme Court order. According to Mr. Tikku, at best, there was *force majeure* but no frustration. Since the plot has now been converted into freehold in 2016, there is no impediment in going ahead with the project. According to him, the permissible FAR is now 200. Mere long delay does not constitute frustration. The builder has always complied with his part of the obligations by paying all the charges to the L&DO for conversion at various stages which is evident from the various documents on the record. Parties were always acting together and it was due to the demise

of Sh. Daya Singh that the relationship between the parties broke up. In fact, the Archaeological Survey of India (ASI) has also given approvals. Uncertainty or delay does not constitute frustration. He relies on the following judgments:

- *Gian Chand vs. York Exports Ltd.*, [OSA No. 9/2005 (decided on 14th June, 2012)]
- *Gian Chand and Ors. vs. York Exports Ltd. and Ors.*, (2015) 5 SCC 609
- *Nirmala Anand vs. Advent Corporation Pvt. Ltd. and Ors.*, (2002) 5 SCC 481
- *Madhan and Company and Ors. vs. Punjab & Sind Bank and Ors.* [RFA No. 73/2018 (decided on 24th January, 2018)]
- *Gwalior Rayon Silk Mfg. Co. Ltd. vs. Shri Andavar & Co.*, AIR 1991 Ker 134
- *M/s. A.T. Brij Paul Singh & Bros. vs. State of Gujarat*, AIR 1984 SC 1703
- *Union of India (Ministry of Railways) and Ors. vs. J. Sons Engineering Corporation Ltd. and Ors.*, 219 (2015) DLT 495
- *Construction and Design Services vs. DDA*, 2015 (2) SCALE 48
- *DDA vs. Anant Raj Agencies*, 2016 (155) DLT 175 [DB]
- *Associate Builders vs. DDA* (2015) 3 SCC 49
- *M/s. Hind Construction Contractors vs. State of Maharashtra*, AIR 1979 SC 720
- *M.P Power Generation Co. Ltd. & Anr. vs. Ansaldo Energia Spa & Anr.*, (2018) 16 SCC 661
- *Jagdish Singh vs. Natthu Singh*, (1992) 1 SCC 647

Clauses in the MOU and the Development Agreement

MOU dated 9th December, 1988

24. As per the MOU, the parties agreed to enter into a development construction agreement subject to certain pre-conditions being fulfilled. The clauses of the MOU are as under:

“NOW THIS MEMORANDUM WITNESSETH:

1. The provision of clause 5 hereunder set out in this Memorandum of Understanding will come into effect if and only if after the preconditions set out in clause 2 hereunder are fulfilled.

2. The preconditions referred to in clause 1 above are the following:

a) Within a reasonable time of this MOU, the INTENDED BUILDERS shall file the necessary application on behalf of the OWNERS with L&DO for ensuring allowance of a minimum of presently applicable FAR of 2.5 for development of group housing on the said land and pay all the necessary fees and charges and bear all the cost and expenses.

b) The INTENDED BUILDERS to get plans prepared jointly with the OWNERS for the development of group housing complex on the said land in consultation between the BUILDERS AND OWNERS and the plans submitted to the NDMC and other concerned authorities by 31.3.1989.

c) Draft agreement containing, inter alia, the terms and conditions referred to in Annexure-A as approved by the OWNERS is settled between the parties before 31st March 1989 and the agreement is signed between the parties before 30th April 1989 annexing the plans and specifications.

3. The INTENDED BUILDERS have given a sum of Rs.50 lakhs (Rupees fifty lakhs) by cheque, Grindlays Bank No.532735 dated 9.12.1988 to the OWNERS as interest free earnest money deposit for fulfillment of pre-conditions by the INTENDED BUILDERS referred to in clause 2 hereof.

4. The OWNERS confirm that they have not entered into any arrangement or agreement or Memorandum of Understanding with any other party for the

development of the said PLOT. The OWNERS shall not sell, mortgage, or enter into any other arrangement in respect of the said property/plot during the tenure of this Memorandum of Understanding with any other party pending the fulfillment of obligations by the BUILDERS referred to in clause 2 above.

5. On fulfillment of the conditions referred to in clause 2 above, OWNERS and the INTENDED BUILDERS shall enter into Construction Agreement containing, inter alia, basic terms and conditions referred to in Annexure-A wherein the INTENDED BUILDERS shall develop and construct at its own cost group housing complex as per FAR 2.5 and extra areas and amenities not included in FAR or 2.5 and referred to in BUILDERS obligations and the cost of construction on the said land is to be compensated by the OWNERS by allotment of 40% of the constructed area.

6. If the INTENDED BUILDERS fails to fulfil any of the conditions referred to in clause 2 within the time referred therein or having fulfilled the conditions but fails to enter into agreement before 30th April 1989, containing, inter alia, the broad terms and conditions referred to in Annexure-A, the performance security deposit of Rs.50 lakhs shall stand forfeited and the INTENDED BUILDERS shall have no right or claim against the OWNERS and/or against the said property/land under this Memorandum of Understanding. And in such event the Memorandum will become void and provision of clause 5 will not become operative.

The above referred forfeiture of security deposit shall be suspended during the period the parties may mutually agree to extend the period beyond the time stipulated in clause 2(b) and (c) hereof of this Memorandum of Understanding.”

Development Agreement dated 4th August, 1989

25. The relevant clauses of the Development Agreement are extracted herein below: -

"2.1 The BUILDERS shall at its own cost erect PROJECT BUILDING on the PLOT against allocation of 40% of the Available Space of the PROJECT BUILDING to be allocated to the BUILDERS.

2.4 The BUILDERS shall pursue with the competent authority under the Urban Land (Ceiling and Regulation) Act, 1976 and all other authorities having control or concern under any law, rule, regulation or bye-law concerning the work of development and construction of the proposed project building and shall also apply for the requisite permission from the Land & Development Office, Ministry of Works and Housing, Government of India and any other Agency or authority or body statutory or otherwise, and obtain such of her approvals, permissions as may be necessary or required for ensuring the due execution of the proposed work of development and construction of the Project Building."

2.5 The BUILDERS after having obtained the relevant permission/sanction of Building plans of the PLOT by NDMC for commencement of construction shall intimate to the OWNERS in writing about having obtained the same and OWNERS within three months of receiving the intimation from BUILDERS and the receipt of original permission, shall vacate the premises alongwith tenants on the first floor of the Main Building in the said property to enable the BUILDERS to commence construction.

2.9. The BUILDERS shall, in the first instance, be responsible and liable to pay the charges for change of purpose / user that may be levied or demanded by the Land & Development Officer, or his successor or any other competent Authority from the OWNERS. However, except for the interest or penalty on any

delayed payments which shall be the sole responsibility of the BUILDERS, only the conversion charges levied by the Land & Development Office are later on to be borne by the parties in the ratio of 60% by OWNERS and 40% by the BUILDERS. The OWNERS agree and undertake to refund the said charges to the BUILDERS as under:

- a) 20% when 50% of the structure is completed on the said PLOT as certified by the Architect.*
- b) 30% when 100% of the structure is completed on the said plot as certified by the Architect.*
- c) Balance 50% when fire fighting clearance certificate is received by the OWNERS from the Chief Fire Officer or other authority and the flats are ready and permitted by the concerned authority(s) fit/allowable for use and occupation.*

2.10. The BUILDERS have agreed and undertaken to expeditiously commence and carry out the Project Building works and complete the same within a period of 36 months commencing from the date the PLOT is made available by the OWNERS to the BUILDERS for construction, (within 3 months from the date of sanction of building plans). If delay, is occasioned for any reasons beyond the control of or on account of any Force Majeure circumstances or by reasons of any Act of Legislation or restriction, prohibition or restraint imposed by any statutory body and/or Government authority, no liability shall attach to the BUILDERS. However, it is agreed and understood that if due to delay in construction occasioned not because of any such circumstances if any of the concerned authorities impose any penalty or take any action, the responsibility for the same shall solely be that of the BUILDERS and the OWNERS shall be kept completely harmless and indemnified.

2.11 It is also agreed that in the event of there being any delay in completion of the work of the Project Building due to delay not attributable to the

OWNER, then a grace period of 12 months shall be given to the BUILDERS over and above the specified period of 36 months. If the Project Building is not completed even in the grace period aforesaid then the BUILDER shall be liable to pay a penalty of Rs. 1,00,000/- (One Lac) per month to the OWNER provided, however, that in the event of the delay exceeding three months, the matter shall be referred to Arbitration as per Article 9.2 hereof.

2.12 Immediately on the occurrence of the Force Majeure conditions, the BUILDERS shall notify the OWNERS thereof in writing and the 36 months period for completion referred to in 2.11 shall be extended by the period during which such Force Majeure conditions continue.

2.13 In case the BUILDERS fail to notify the OWNERS of the existence of any force majeure conditions immediately upon its occurrence, the BUILDERS shall not be entitled to claim any extension as aforesaid and shall be considered in default of their obligations.”

Owner’s obligations under the Development Agreement

“3.1 OWNERS have applied to the Land & Development Office. Ministry of Works & Housing, Government of India, for grant of requisite permission for change of purpose/use in respect of the Lease-hold Plot, subject to the BUILDER’S obligation under Article 2.3 hereof.

3.2 The OWNERS have submitted provisional Building Plans for grant of sanction to NDMC subject, however, to any mutually agreed revisions/modifications/additions and alterations to the said plans in terms of this Agreement.

3.3 OWNERS shall sign all applications, affidavits, documents and petitions as may be necessary for obtaining any permissions, sanctions, clearances or certificates for the purpose of

undertaking the work of development and construction in terms of this Agreement.

3.4 All applications, plans and other papers and documents shall be submitted by the BUILDERS in the name of the OWNERS and all costs, expenses, fee and charges in all respects in relation thereto shall be paid and borne by the BUILDERS, provided always that the BUILDERS shall be exclusively entitled to all refunds from the concerned Authorities, against all payments and/or deposits made and borne by the BUILDERS”

26. As per the above clauses:-

- The builder was to file the application with the L&DO and was also to ensure that the L&DO allows a minimum FAR of 2.5 for development of the group housing on the suit property.
- All the necessary fees and charges and other expenses were to be borne by the builder. A sum of Rs.50 lakhs was paid. The agreement was to be finalized before 31st March, 1989.
- Upon the L&DO granting permission, the builder was to develop and construct the group housing complex. 40% of the constructed area was to vest with the builder.
- If the builder does not fulfil the conditions under clause 2, the security deposit was to be forfeited and no claim would lay against the owners.
- The memorandum would then be treated as void and inoperative.

27. Apart from the above, the owners had to authorize the builder by a special power of attorney to enable the builder to carry out all the necessary acts to execute the project. After the approvals/sanctions were granted, the owners were to make available the plot to the builder. A sum of Rs.2.5 crores was to be paid by the builder which was to be refunded in different

tranches. The charges till the handing over were to be borne by the owners and at the time of the transfer of the flats/spaces to proposed purchasers, all the necessary documents were to be executed by the owners. A perusal of the clauses in the MOU and the agreement clearly shows that the obligation of obtaining approvals and sanctions from the governmental authorities including the L&DO and the NDMC was upon the builder and not the owners. The applications as per Clause 2(a) and 2(b) of the MOU were duly submitted prior to the execution of the development agreement and thus the owners had complied with all the obligations. The general power of attorney was also issued by the owners in favour of the builder. The builder was obliged to construct the building within 36 months from the date when the site was made available by the owners. The said period was extendible by another 12 months. However, the plot itself was to be made available to the builder only after the building plans were sanctioned and all the requisite approvals and permissions for construction of the building were obtained by the builder. This is clear from a reading of Clause 3.7 of the agreement which reads as under:

“3.7 After the building plans have been sanctioned and all the requisite approvals/permissions/sanctions for commencement of construction of the Project Building have been obtained by the BUILDERS and intimated to the OWNERS as stipulated hereinabove, the OWNERS shall make available the superstructure on the said PLOT for removal/dismantling and properly stacking by the BUILDERS of useable materials, fittings and fixtures as required by the OWNERS. The OWNER shall, subject to para 2.7 hereof, make arrangement for the removal of the dismantled remaining fittings, fixtures and useable material as required by them as soon as possible after

the entire dismantling of super structure has been completed by the BUILDERS. ”

28. The events that transpired clearly show that though initially both the parties had proceeded under a mistaken impression that the user of the suit property was residential, the same was converted to residential on 15th May, 1998. Even if it is presumed that until then both the parties co-operated with each other to work the contract, after 15th May, 1998, there was no reason as to why the builder could not obtain the requisite approvals/permissions and sanctions for commencement of the construction. On 15th May, 1998, the owners in fact wrote a letter to the L&DO seeking a permission at an early date. The owners co-operated with the builder for filing an application for conversion of land from leasehold to freehold. The same was submitted to the L&DO. It was during this period when the application for conversion from leasehold to freehold was pending that the notification dated 7th June, 2000 was issued by the Government of India. This was later modified by a press note dated 27th November, 2001. In the meantime, the plans submitted to the NDMC by the builder were rejected. The effect of the notification dated 7th June, 2000, press note dated 27th November, 2001 and the rejection of the building plans was that the project fell into complete uncertainty.

29. The builder relies on the order of the Supreme Court dated 12th December, 2003 which vacated the stay dated 11th December, 2001 on the press note. The said order also was not a completely unconditional vacation of stay. There were several conditions which were imposed in the said order including the requirement of augmenting infrastructure before any plans could be sanctioned. In fact, the original project with 2.5 FAR as contemplated therein had to be completely abandoned by the parties.

Discussions then took place between the parties that the builder would now explore achieving FAR of 1.67. Thus, the initial FAR of 2.5 stood completely negated and could no longer be achieved. Repeated correspondence exchanged between the parties shows that the initial contract had clearly lost its significance due to circumstances beyond the control of the parties. After 1998 till 2002, Sh. Daya Singh was alive and hence the non-substitution of his son as the *karta* of the HUF would not be a valid justification for the builder not to obtain the sanctions. Clearly, the governmental policies had changed and various developments on the policy front had almost made the project, unachievable, as originally contemplated by the parties. The finding of the Arbitral Tribunal that there was a delay by the Petitioner No.2 in getting substituted as the *karta* is clearly not justified, as from 1998 to 2002, when Sh. Daya Singh was still alive, the builder was unable to obtain the approval by the L&DO. In fact, during this period, the prohibition of 7th June, 2000 came into effect, the NDMC rejected the plans and a further modification dated 27th November, 2001 was issued by means of a press note. The press note dated 27th November, 2001 became subject matter of proceedings before the Supreme Court. Order dated 11th December, 2001 passed by the Supreme Court reads as under:

“1. IA has been filed. It has been taken on board and the same be numbered.

2. Learned amicus curiae draws our attention to the notification dated 7-6-2000, wherein it was inter alia stated that the plans would be sanctioned only after arrangements for provision of augmentation of municipal services have been made. He then contends that now a press note has been issued on 27-11-2001 which purports to supersede the said notification and permits construction of additional floor without first

augmenting the civic infrastructure. The press note indicates that it is only after money is generated by granting permission to construct additional floor that there will be augmentation of civic infrastructure. The learned amicus curiae submits that this is not only contrary to the notification of 7-6-2000, but town planning also requires the civic infrastructure being in place before a building is allowed to be constructed.

3. Issue notice to MCD, NDMC, Delhi administration as well as the Union of India. Stay of implementation of the press note dated 27-11-2001 in the meanwhile. ”

30. Thereafter, the Supreme Court considered the press note and vide a detailed order dated 12th December, 2003 noted that the Draft Unified Building Bye laws of 1993 which were to replace the 1981 Bye-laws, were put up for comments and objections/suggestions. Various representations were made by architects, builders, promoters, town planners, environmentalists and representatives of chamber of commerce. The representations made by these stakeholders were examined by a sub-committee formed under the Chairmanship of the Additional Commissioner, NCT of Delhi. The Supreme Court noticed that the said committee felt that the press note would lead to extra load on the existing civic amenities/services which required upgradation. This led to the modification of the Master Plan of Delhi, 2001 and the Unified Building Bye-laws 2003. The Supreme Court thus observed that upgradation of services was essential before relaxation of bye-laws could be considered. It was under these circumstances that the notification dated 7th June, 2000 was issued followed by the press note dated 27th November, 2001. The Supreme Court observed in respect of the said press note as under:

“6.....It is in those circumstances that the press note

dated 27-11-2001 was issued seeking to clarify that there will be no objection to augmenting the living space of the already existing family and that there was no intention to add dwelling units. There would be increase in FAR but no increase in density. They would give much-needed respite to existing bona fide resident owners and also facilitate the raising of additional resources for upgradation of services.”

31. Finally, after considering the press note, the Supreme Court held that the applications for modification by the MCD and Union of India for allowing the increased FAR would be allowed in the following manner:

“10. The present modification that is sought for on behalf of the Municipal Corporation and the Union of India is only for allowing increased FAR and the number of floors permitted in 1998 with an undertaking that no additional dwelling unit will be created and the various Committees have suggested that it would not pose a stress on the services as long as additional dwelling units are not permitted. It would only ease the accommodation already available and will not cause further problems but help those who are already residing in those units to have a little more accommodation. Bearing that aspect in view and after having studied the comparative chart set out earlier, it clearly indicates that all that will happen is to give a little more accommodation without adding to the burden of the infrastructure facilities.”

32. A perusal of the above shows that even the Supreme Court modified its earlier interim order dated 11th December, 2001 with an undertaking that no additional dwelling units would be created and plans were to be sanctioned in the manner as permitted by the Supreme Court.

33. The above order of the Supreme Court was not sufficient to permit the construction of the group housing in the suit property. This is clear from the

fact that even after the passing of order dated 12th December, 2003, the FAR was to be reduced considerably to 1.67 compared to what was initially agreed i.e., 2.5 FAR.

34. Further, the owner had the obligation under the contract to handover the plot for the purposes of construction only after the requisite sanctions and approvals were obtained – which situation clearly did not arise. As per the agreement, the owner's obligations were contained in Article 3 i.e. 3.1 and 3.2 - both of which are duly complied with. Clauses 2.4, 2.5 and 3.7 make it clear that the approvals/permissions and sanctions were to be obtained by the builder. Upon the requisite permission application being made to the L&DO and the plans being submitted to the NDMC, the owner's obligation was only to handover the plot after the approvals and sanctions were obtained. This stage never arose and the owners were clearly not in breach.

35. It could be fairly argued on behalf of the builder that it was making several attempts to obtain the requisite sanctions/approvals. However, the circumstances were beyond the control of the parties. Strictly speaking, the builder was in breach for not obtaining the approvals and sanctions. However, the builder could be given the benefit of *bonafide* conduct, as the approvals/sanctions would not have been granted by the authorities in view of the various notifications and the underlying confusion created by the notification dated 7th June, 2000 followed by the press note dated 27th November, 2001. Moreover, the ultimate fact remains that till date, there has been no possibility for the builder to obtain approvals for the housing project.

36. It was under these circumstances, that the termination dated 23rd June,

2004 took place. The Tribunal has held that the said termination is illegal as time was not of the essence in the contract in the present case. The basis of the Tribunal's decision is that there was no time prescribed for obtaining the approvals/sanctions. While the Tribunal notes Section 46 of the Indian Contract Act i.e. that if no time is prescribed, reasonable time has to be read into the contract, the Tribunal comes to an incorrect and a wrong finding that the said reasonable time had not expired for performance of the obligations. By the date of termination i.e. 23rd June, 2004, more than 16 years had lapsed since the signing of the MOU and 15 years had lapsed since the signing of the development agreement. The owners never showed any non-cooperation. It could be possible that the builder's efforts in obtaining the sanctions/permissions did not fructify owing to the various governmental notifications and policy matters. However, the owners cannot be forced to wait endlessly for the builder to obtain approvals/sanctions.

37. The fact that the parties provided a period of 36 months for construction of the project and only 12 months' extension for completing the same, clearly showed that it was beyond the imagination of either of the parties that such a long time could be consumed in obtaining approvals/sanctions. The prescribing of a period of four years for completing the construction, the conduct of the parties in making the requisite applications for permission to L&DO and for sanction of plans even prior to the execution of the development agreement and as a pre-condition for entering into the agreement as also the prescribing of a penalty per month for any delay by the builder – all go to show that the parties contemplated time to be of the essence in the contract.

38. The fact that the parties did not prescribe any time period for the

builder to obtain the sanctions/approvals, does not mean that time was not of the essence in the contract. Even presuming that time was not prescribed, the same has to be read as being reasonable time under Section 46 of the Indian Contract Act, 1872 which reads as under:

“46. Time for performance of promise, where no application is to be made and no time is specified. -

Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation. —The question “what is a reasonable time” is, in each particular case, a question of fact.”

Thus, reasonable time has to be read into the clauses.

39. It could not have been in the contemplation of either of the parties that in a project for which four years was being prescribed as an outer limit for completing the construction, the approval process would itself extend to 16 years i.e. four times the said period. Even if parties were under a mistaken impression that the property was for residential use and time was consumed in converting the property from institutional to residential, there is still no justification as to why the approvals could not be obtained after 1998 - till the issuance of the notification dated 7th June, 2000. The issuance of notification dated 7th June, 2000 was in fact the last stroke. This notification clearly prohibited any conversion to group housing. The fact that this notification may have been superseded by an ambiguous press note which was thereafter clarified by the Supreme Court on 12th December, 2003 does not in any manner result in lifting of the prohibition.

40. In fact, because of the press note followed by the order of the Supreme Court, parties started discussing lower FAR levels of 1.33 and 1.67

– much less than what was initially contemplated in the agreement. The owners have acted *bona fide* all along and have not behaved in an unreasonable manner.

41. A perusal of the documents on the record shows that even as of 2004, the parties were holding meetings to give effect to the contract. As of 1st May, 2004, the builder states in the letter of the said date as under:

“Dear Sir,

In respect of the above project we had various meetings and telephonic discussions in which our Architect Mr. Rajinder Kumar of M/s. R.K. Associates was also a participant.

In these meetings you stated that the project had been delayed and that it should be started as early as possible. You yourself suggested that plans may be submitted to the NDMC with an FAR of 1.33 and a provision be kept for an FAR of 1.67. This would at least ensure that the plans would be sanctioned. It may be stated that it was made clear to you that we intended to complete the project with an FAR of 1.67 and that any delay which had occurred was because of conversion from Institutional to Residential Category as was desired by your father and as such there was no delay on our part.

In view of the above, the said points were recorded by us on paper and signed and sent to you for approval and signatures. However you did not sign the said minutes and instead sent the letter dated 19th April, 2004.

We wish to make it clear that in terms of the agreement we will submit our plans to the NDMC for approval with an FAR of 1.67 and hope to complete the project on schedule as contemplated in the agreement.

We thus want to make it clear that there is no reason for working out agreement afresh as stated by you in your letter-dated 19.04.2004. We further reiterate our

commitment to the contemplated Project, which we feel, can be proceeded with as per the agreement. Looking forward to a happy and continuous relationship.
Yours Sincerely,
(ASHOK KASHYAP)
CHIEF ENGINEER”

From the above letter itself it is clear that the contract as originally contemplated could not be performed anymore. Even the plans which were proposed to be submitted by the builder on 18th May, 2004 was with FAR of 1.67. The owners had, on 22nd May, 2004 clearly controverted the above letter and replied to the builder as under:

“Som Datt Builders Ltd.
56-58, Community Centre,
East of Kailash,
New Delhi

Re: 5, Jantar Mantar Road, New Delhi.

Re: Agreement dated 4th August, 1989.

Dear Sir,

This has reference to your letter No.546 dated 18th May, 2004 (which was hand delivered around 9.00 PM on 20th May, 2004) regarding a meeting that was held on 15th May, 2004 with your Chairman, Shri Som Datt ji.

Prior to the meeting, I had in my letter dated 12th May, 2004 clarified my position which had been reiterated during the meeting.

Since as per your Chairman’s own version which had been indicated by you in the earlier discussion that there was no certainty or definiteness about any Plans being sanctioned at present with an FAR of 1.67 and the matter may need to be litigated, it was considered that in the background of nearly 15 years having already elapsed since the Agreement was made – which had resulted in inordinate delays thereby

frustrating the underlying intention of the parties when the Agreement had been entered into – any further pursuit would be futile.

However, as desired by your Chairman, the day following the meeting I had a further telephonic talk with him. During the said talk it had again been indicated that there appeared no certainty, definiteness or prospect of sanction of the Plans or time bound completion of the Project as had been envisaged.

In the above background it seems that your communication is not based on the discussion I had with your Chairman.

I have also enquired from the Architect, who has informed me, that it could not be said with any certainty or definiteness whether the Plan with an FAR of 1.67 will be sanctioned and when.

The purpose and motive of your communication is not understood.

All outstanding in relation to the Agreement/Project, in the circumstances need to be discussed and mutually resolved.”

42. In reply dated 26th May, 2004, the builder responded as under:

“Dear Sir,

We are in receipt of your letter dated 22.05.2004. We would again like to clarify that there is no law at force that prohibits sanction of Plans with an FAR of 1.67. It was clarified by our Chairman in the meeting held at his residence that we will eventually achieve an FAR of 1.67 for which we might have to take a direction from the court if the NDMC acts funny. Accordingly we have requested our Architect to draw the plans with 1.67 FAR and the same shall be sent to you for your signatures shortly.

We would further like to clarify that there is no uncertainty for completion of this project and we can mutually draw up a time bound programme. We are open to discuss this issue and resolve through mutual

discussion. We request you to intimate the date and time for the meeting.

Looking forward to a happy and continuous relationship.

Yours sincerely,

(M.L. AILAWADI-II)

EXECUTIVE DIRECTOR”

43. Finally, prior to the termination on 31st May, 2004, the owners wrote to the builder as under:

“Dear Sir,

This has reference to your letter of 26th May, 2004 on the above subject which is response to undersigned’s letter dated 22nd May, 2004. In note what you state with regard to there being no Law at force that prohibits sanction of Plans with an FAR of 1.67. I wonder if that was the position why no sanction has thus far not been obtained.

The fact remains that it had been represented during the earlier discussions that there is at present no possibility of Plans with an FAR of 1.67 being sanctioned.

I also note the clarification now sought to be offered by you regarding the said FAR being eventually achieved but with the reservation about the need for direction from the Court. Delays involved in Court actions are proverbial without any certainty about outcome.

I have previously repeatedly brought to your attention the fact of delays that have already occurred, as also the continuing indefiniteness and uncertainty.

You would appreciate that with 15 years having already elapsed with no Plans much less any sanctioned Plans being available (and with there being no prospect of any sanction at this stage of Plans with an FAR of 1.67 as indicated by you) and contained uncertainty and indefiniteness, pursuing any attempts

and trials by submitting Plans for sanction is a matter of serious concern.

The Agreement has virtually remained unperformed.

It thus needs to be seriously considered at your end as to how best to resolve the situation.

As desired and indicated during telephonic conversation today, I propose meeting your Chairman in the next one or two days

*Yours faithfully,
(HARSIMRAN SINGH SANDHU)”*

44. All the above letters leading up to the termination dated 23rd June 2004, clearly show that there was no hope left to implement the contract as originally contemplated. The award passed by the Tribunal is also self-contradictory in nature. While on the one hand, the Tribunal rejects specific performance on the ground that the object of the project would not be achievable in any reasonable time, in the same breath, the Tribunal holds that the termination is illegal as reasonable time had not expired for performance of obligations by the builder. Paragraphs 47 and 66 of the award are totally contradictory and are set out below: -

“47. Keeping in view the facts and circumstances of this case we hold that the claimant has not breached the contract. It can not be said reasonable time had expired for performance of obligations by the claimant.

.....

66. Only one hurdle has been crossed by the parties after entering into the aforesaid development and construction contract that of getting the plot converted from institutional in nature to residential in nature after lapse of many years. The plot has to be yet got converted from freehold to leasehold and thereafter, the claimant is to get the plans sanctioned, permitting the construction of multi-storeyed group

housing complex with at least minimum FAR mentioned in the contract. Section 14 of the Specific Relief Act provided that the relief of specific performance may not be granted, if it involves the performance of continuous duty by the court for supervising the enforcement of such a relief. It is evident that the object of this project will not be achievable in any reasonable time. It will be better that the parties are not forced to perform the obligations under this contract by grant of relief of specific performance.”

45. The Tribunal further notes that there was no prohibition for converting the plot to group housing and bye-laws could have permitted it with FAR of 1.67. What the Tribunal fails to note is that both parties had agreed for FAR of 2.5 and in fact in the MOU, the clear term as stipulated in Clause 2(a) was that the builder would ensure “*allowance of a minimum of presently applicable FAR of 2.5*”. The possibility of FAR of 1.67 being allowed at an uncertain time in the future itself shows that the contract between the parties stood frustrated. This fact has been completely glossed over by the Tribunal. The finding of the Tribunal that the termination is illegal is wholly untenable inasmuch as the contract clearly stood frustrated in view of the following:

- Long time had elapsed from the initial MOU till the date of termination;
- The owners had made repeated efforts to cooperate with the builder. There is no allegation that the owners did not cooperate;
- The feeble argument that the *karta* of the HUF was not changed is not a valid ground for delay;

- The Arbitral Tribunal found that the both parties had proceeded on the basis that the property was residential in nature and both were not aware that it was institutional;
- The builder took 8 years to get the plot converted from institutional to residential. Even if it is presumed that this was not the builder's obligation, the builder failed to get the permissions/sanctions after 1998, when the plot was converted to residential;
- The building plans were rejected twice by the authorities and there was no immediate hope that the L&DO would sanction the group housing project;
- The notification prohibiting group housing projects came on 7th June, 2000, the builder had a clear two years to obtain permissions and approvals, but it failed to do so. Even after the issuance of the press note, discussions and correspondence took place between the parties;
- Only FAR of 1.33 was the permissible limit, but the builder represented that subsequently it could be enhanced to FAR of 1.67. Thus, there was no definiteness of FAR of 1.67 being allowed;
- The owner put the builder to notice repeatedly from 22nd May, 2004 that the agreement had remained unperformed. The agreement was terminated on 23rd June, 2004 on the ground that there was no definiteness and the agreement had become open-ended.

46. The present is a classic case of frustration of contract wherein parties have been unable to give effect to the agreement for various reasons. Primarily, the governmental notifications created a prohibition initially and thereafter a complete ambiguity and uncertainty. It is neither party's case

that the contract as originally envisaged can today be performed. FAR of 2.5 is not permissible for a group housing project even under the latest amended bye-laws. While adjudicating whether a particular contract stands frustrated or not, the facts and circumstances have to be considered as a whole and not on an event to event basis. The documents and correspondence on record in fact show the uncertainty and the indefiniteness beyond any doubt. At no point of time can it be said that the owners breached the contract. Not a single brick had been laid by the builder. The plans were rejected by NDMC on two occasions. Thus, there was no possibility of approvals or sanctions being given within any reasonable time. The letter of termination clearly captures the frustration on the part of the owners. The events that have transpired since 1988 clearly demonstrate frustration of the contract. In fact, the contract could have been terminated on several occasions even prior to 2004. However, it appears that both the parties prevailed on each other to continue to make the efforts to work the contract. Finally, the termination had to occur which in fact did occur. It cannot be held that the termination was illegal.

47. It is the settled position in law that under Section 56 of the Indian Contract Act, 1872 it is not only an impossibility that can lead to frustration, but also impracticability. Section 56 reads as under:

"56. Agreement to do impossible act.— An agreement to do an act impossible in itself is void."

***Contract to do act afterwards becoming impossible or unlawful.**—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*

Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.”

48. The above provision has been recently interpreted by the Supreme Court in ***Delhi Development Authority v. Kenneth Builders and Developers Private Limited and Ors. (2016) 13 SCC 561***, wherein the Court has held that under Section 56, it is not a physical or a literal impossibility that is required, but if the contract is impracticable or useless from the initial object that it sought to achieve, the same constitutes frustration. The relevant paragraph of the judgment reads as under: -

“30. The interpretation of Section 56 of the Contract Act came up for consideration in Satyabrata Ghose v. Mugneeram Bangur & Co. [Satyabrata Ghose v. Mugneeram Bangur & Co., AIR 1954 SC 44 : 1954 SCR 310] It was held by this Court that the word “impossible” used in Section 56 of the Contract Act has not been used in the sense of physical or literal impossibility. It ought to be interpreted as impracticable and useless from the point of view of the object and purpose that the parties had in view when they entered into the contract. This impracticability or uselessness could arise due to some intervening or supervening circumstance which the parties had not contemplated.

31. Insofar as the present case is concerned, DDA certainly did not contemplate a prohibition on construction activity on the project land which would fall within the Ridge or had morphological similarity

to the Ridge. It is this circumstance that frustrated the performance of the contract in the sense of making it impracticable of performance.

32. It is true that the Government of India had notified the project land as “residential” and that the project land was shown as “residential” in MPD, 2001 and MPD, 2021. But that fact alone would not change the position at law. The exact boundaries of the Ridge do not appear to have been demarcated and in the absence of demarcation, it could not be said with any degree of certainty by DDA that merely because of the two notifications issued by the Ministry of Urban Development the project land could be used for residential purposes even if it fell within the Ridge. This would be ignoring the position at law and would be stretching the argument a little too far. DDA was unaware that even if the project land did not fall within the Ridge yet any development activity thereon would require permission from the Ridge Management Board as well as from this Court since there was morphological similarity between the Ridge and the project land. It is this intervening circumstance which eventually frustrated the implementation of the contract.

36. On a conspectus of the facts and the law placed before us, we are satisfied that certain circumstances had intervened, making it impracticable for Kenneth Builders to commence the construction activity on the project land. Since arriving at some clarity on the issue had taken a couple of years and that clarity was eventually and unambiguously provided by the report of CEC, it could certainly be said that the contract between DDA and Kenneth Builders was impossible of performance within the meaning of that word in Section 56 of the Contract Act. Therefore, we reject the contention of DDA that the contract between DDA and Kenneth Builders was not frustrated.”

49. Upon a contract being frustrated, parties are absolved and released from their obligations. The amount of Rs.2.5 crores as per the contract was never paid by the builder. The owners have however enjoyed the amount paid by the builder of a sum of Rs.1 crore. The builder also paid the expenses for seeking conversion of the user of the property from institutional to residential which would be a benefit which the owners would now enjoy. The builder has also made applications and paid the expenses for leasehold to freehold, the expenses so incurred paid by the builder along with the amount initially paid by the builder to the owners would thus be liable to be refunded to the builder with reasonable interest. Though, the contract contemplates that the security deposits would be interest free, since the contract never got fructified and the money has been enjoyed by the owners, interest is being awarded to the builder.

50. Accordingly, the Arbitral Tribunal's findings that the termination is illegal is set aside. It is held that the contract stood frustrated and hence the termination is valid in law. The finding in respect of claim no.1 that specific performance of the contract cannot be granted is upheld. The award under Claim nos. 2 and 3 is upheld.

51. As held in *Associate Builders, (2015) 3 SCC 49*, if the findings of the Tribunal are contrary to law and are perverse, the same is liable to be interfered with under Section 34.

52. Claim no.7 – Loss of Profits: A perusal of the findings of the Arbitral Tribunal on the award of loss of profits shows that the same has been awarded on the ground that the termination is illegal. The said finding in respect of termination has been set aside herein above. Moreover, even the manner in which profits have been calculated are completely conjectural.

The Tribunal has refused to accept the two reports submitted by the builder i.e. from M/s. Knight Frank India Pvt. Ltd and Cushman & Wakefield. Having rejected the two reports, the Tribunal applies common knowledge as the test to hold that the rate of Rs.7,000/- per sq. ft. is a reasonable rate. On that basis, loss of profits are awarded to the builder. Under Section 65, of the Indian Contract Act, 1872, Illustration No. (d) makes it clear that if a contract is void or becomes void due to any circumstances, no loss of profits are liable to be awarded. Section 65 and Illustration no. (d) is extracted herein below:

“65. Obligation of person who has received advantage under void agreement, or contract that becomes void. – When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.

Illustration (d) A contracts to sing for B at a concert for 1,000 rupees, which are paid in advance A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the 1,000 rupees paid in advance.”

53. The contract in this case was rendered void due to frustration. In fact, in ***Kailash Nath Associates vs. Delhi Development Authority & Anr., (2015) 4 SCC 136***, it has been held the factum of loss needs to be established. Further if there is no breach, then loss of profits cannot be granted. The termination having been held to be legal, the owners are not in breach. All along they cooperated with the builder. For whatever reasons,

the project could not proceed further. When the builder has merely paid Rs. 1 crore to the owners and some amounts to the authorities seeking permissions, award of profits as though the entire project had been completed and delivered, is completely perverse. The obligation to obtain approvals was on the builder in which it completely failed – for whatever reason. The owners were not to blame. Not a single brick was laid by the builder. Thus, the builder cannot earn all of its profits while the owner is made to lose, for no fault of his. The award of loss of profits under Claim No.7 is unjust, unequitable and is completely unsustainable and is set aside. The total sum awarded would therefore be as under:

- **Claim No.2** - The award of the Arbitral Tribunal is upheld. Thus, the amount to be refunded to the builder amounts to a total of Rs.3.7 crores [Rs. 1 crore (principal) + 2.7 crore (interest @ 10% p.a.)]
- **Claim No.3** - The award of the Arbitral Tribunal is upheld. Thus, the amount to be refunded to the builder amounts to a total of Rs. 19,50,000/- [Rs. 10,00,000/- (principal) + Rs. 9,50,000/- (interest @ 10% p.a.)]

54. Thus, a total sum of Rs.3.7 crores + Rs.19,50,000/- = Rs. 3,89,50,000/- is to be paid by the owners to the builder. The awarded sum be paid within a period of six weeks from today. If the same is not paid within six weeks, simple interest @ 8% per annum shall be liable to be paid on the awarded amount from the date of expiry of six weeks from today till date of payment.

55. The OMP is disposed of in the above terms.

**PRATHIBA M. SINGH, J.
JUDGE**

JULY 16, 2019/Rahul