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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on 03.12.2018

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Judgment pronounced on 01.08.2019

+ **O.M.P. (COMM) 3/2016**

CHOPRA MARKETING PVT. LTD. Petitioner

Through: Mr. Rajiv Talwar with Mr. Diwakar
Singh, Advs.

versus

DRISHTICON PROPERTIES PVT. LTD. & ANR..... Respondent

Through: Mr. Sanat Kumar, Sr. Adv. with Mr.
Viyak Batta, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.:

1. This is a Section 34 petition, which is directed against the award dated 27.5.2017. This award was passed pursuant to the appointment of Hon'ble Mr. Justice (Retd.) S.C. Agrawal, former Judge, Supreme Court of India, as an arbitrator vide order dated 6.7.2009 passed in Special Leave Petition (Civil) No.(s) 6717-6718/2009.

2. As to how the matter was carried in an appeal will be adverted to by me in the course of narration of events. However, what is important to note is that at the heart of the dispute obtaining between the parties is the issue as to whether the learned arbitrator ought to have allowed the prayer made by the petitioner, i.e., M/s. Chopra Marketing Pvt. Ltd. (hereafter referred to as "CMPL") to grant specific performance of the Agreement to Sell dated 18.7.2006 (hereafter referred to as "2006 ATS").

3. Evidently, via the impugned award, the learned arbitrator, while declining the relief sought for by CMPL, to grant specific performance of the 2006 ATS concerning the immovable property, described as urban property bearing No. 4, Ata Ur-Redman Lane, Under Hill Road, Rajpur Road, Delhi, measuring around 5400 Sq.Yds., popularly known as “Anand Bhawan” (hereafter referred to as “subject property”) has directed, respondent No. 1 i.e. Drishticon Properties (P.) Ltd. (hereafter referred to as “DPPL”) to refund a sum of Rs. 94 lakhs received by it from CMPL along with interest @ 12% per annum, which is to run from the date of award till the date of payment.

4. Given this preface, to adjudicate upon the petition, the following facts are required to be noticed.

5. The record is suggestive of the fact that the subject property was initially owned by one Rao Bahadur Madho Prasad. On 5.5.1950, the subject property was sold to one Smt. Veera Wali, wife of one Mr. Ram Lal Anand. In and about 1957, Smt. Veera Wali expired, *albeit*, intestate, leaving behind legal heirs comprising her husband Mr. Ram Lal Anand, two sons and five daughters.

6. Ram Lal Anand executed two separate gift deeds in favour of his sons. These gift deeds were executed on 9.12.1962 and 5.1.1963. Via these gift deeds, out of the total area available which included the subject property, 840 square yards were transferred by Ram Lal Anand in favour of his sons.

7. Within a couple of years of this event occurring, Ram Lal Anand entered into an Agreement to Sell with one, Mr. Keshav Swaroop Bhatnagar (hereafter referred to as “K.S. Bhatnagar”) for sale of the subject property.

This Agreement to Sell was executed on 30.5.1966 (hereafter referred to as "1966 ATS"). As per 1966 ATS, Ram Lal Anand was to receive total consideration of Rs.3,55,000/-. However, at the time of execution of the 1966 ATS, Ram Lal Anand, out of total consideration of Rs.3,55,000/-, received only a sum of Rs. 30,000/- as earnest money.

8. The record shows that, thereafter, on 4.7.1966, K.S. Bhatnagar paid a further sum of Rs. 1,70,000/- to Ram Lal Anand under the 1966 ATS. At this juncture, Ram Lal Anand handed over possession of 11 rooms which formed part of the subject property.

9. On 23.11.1966, Ram Lal Anand died leaving behind his two sons and five daughters, and since 840 square yards, out of 5400 square yards had already been gifted by Ram Lal Anand during his lifetime to his two sons, the remaining portion of subject property admeasuring 4560 square yards was jointly inherited by the progeny of Ram Lal Anand and Smt. Veerawali.

9.1. Each sibling was entitled to 1/7th share of the subject property excluding the gifted portion.

10. Given these circumstances, K.S. Bhatnagar on 17.2.1968, filed a suit for specific performance *qua* the 1966 ATS. The suit was filed in this Court and was numbered as CS No. 92/1968. The single judge of this Court vide judgment dated 3.10.1974 decreed the suit for specific performance filed by K.S. Bhatnagar. Thus, K.S. Bhatnagar obtained a judgment and decree in his favour *qua* the subject property excluding 840 square yards, which was gifted, as noted hereinabove, by Ram Lal Anand in his lifetime in favor of his two sons.

11. Being aggrieved by the judgment *qua* the aspect of exclusion of 840 square yards, K.S. Bhatnagar preferred an appeal which was numbered as

RFA (OS) 17/1975. This appeal was filed on 1.5.1975. The record shows that one of the daughters of Ram Lal Anand also preferred an appeal against the judgment and decree of the learned Single Judge, *albeit*, few weeks before K.S. Bhatnagar instituted his appeal.

12. This appeal which was numbered as RFA (OS) 13/1975, was instituted on 14.4.1975. Via this appeal, the entire judgment was challenged.

13. Some thirty years later, the progeny of late Ram Lal Anand i.e. his two sons and five daughters executed an Agreement to Sell dated 6.2.2005 *qua* the subject property (hereafter referred to as “2005 ATS”). Notably, the 2005 ATS related to the entire 5400 square yards. The total consideration fixed in the 2005 ATS was Rs. 2,15,00,000/-, out of which Rs. 39,00,000/- was paid by DPPL to the legal heirs of late Ram Lal Anand at the time of the execution of the 2005 ATS.

13.1 The balance consideration i.e. the sum of Rs. 1,76,00,000/- was paid by DPPL to the legal heirs of late Ram Lal Anand on 8.4.2005 upon execution of an irrevocable power of attorney by them in its favour. The irrevocable power of attorney was executed on the same date i.e. 8.4.2005.

14. Consequent thereto on 18.7.2006, respondent No. 2 i.e. one Ajay Gupta, who was the Director of DPPL at the relevant point in time, ostensibly executed an Agreement to Sale in favour of CMPL (hereafter referred to as “2006 ATS”).

14.1 As per 2006 ATS, the total consideration that CMPL was to pay to purchase the right, title, and interest of the subject property was a sum of Rs. 4 Crores out of which Rs. 94 lakhs was recorded as already having been paid by CMPL to DPPL towards part performance of the said agreement.

14.2 CMPL was to pay to DPPL not only the balance consideration equivalent to Rs. 3,06,00,000/-, but it was also required to bear the burden of stamp duty, registration charges, and all other incidental expenses.

14.3 Pertinently, Paragraph B. 35 of 2006 ATS contained the arbitration agreement.

15. It is CMPL's case that when it approached DPPL for the execution of sale deed, the request was sought to be avoided by DPPL. In this behalf, reliance is placed by CMPL on communications dated 15.2.2008 and 18.2.2008. Apparently, around this time i.e. on 19.2.2008, DPPL sold of the total area of 5400 square yards (which included the subject property), an area equivalent to 2700 square yards for a consideration of Rs. 6.30 Crores to one Ms. Kaushalya Devi via a registered sale deed of even date (hereafter referred to as "2008 Sale Deed").

16. It is CMPL's case that in and about 14.10.2008 when DPPL refused to execute the sale deed *vis-à-vis* the subject property on the ground that its market price had risen, it was compelled to trigger the arbitration agreement obtaining between them.

16.1 As a result of this situation obtaining, CMPL on 19.10.2008 invoked the arbitration agreement and in terms thereof appointed an arbitrator.

16.2 This was followed with CMPL instituting a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as "1996 Act") in this Court on 21.10.2008 to protect its interest in the subject property. Resultantly, on 24.10.2008, the learned Single Judge passed an *ex parte* order restraining DPPL from creating any third party interest or parting with the possession of the subject property.

17. In the meanwhile, DPPL filed a suit for declaration and injunction in this Court on 10.12.2008, which was numbered as CS (OS) No.2582/2008, in which, one of the prayers made was to declare 2006 ATS as null and void on the ground that it was forged and fabricated. This suit though was dismissed on 21.01.2009.

18. Being aggrieved, DPPL preferred an appeal before the Division Bench of this Court, which was numbered as RFA (OS) No. 19/2009. The Division Bench stayed the judgment of the Single Judge *vide* order dated 16.2.2009 and while doing so, also stayed the arbitration proceedings during the pendency of this appeal.

19. Before the order dated 16.2.2009, the Division Bench had passed an ad-interim order dated 11.2.2009, which was carried in appeal by CMPL, as noticed at the outset by me, to the Supreme Court. The Supreme Court, as adverted to hereinabove, *vide* order dated 6.7.2009 passed in Special Leave Petition (Civil) No(s). 6717-6718/2009 appointed a sole arbitrator to adjudicate upon the disputes obtaining between the parties including the issue concerning existence of an arbitration agreement. This order was passed based on the consent of parties. The Court *via* this order left all questions open for adjudication by the learned arbitrator. The Court also ruled that pending the arbitration, the suit i.e. CS (OS) No. 2582/2008 shall remain stayed.

20. Consequent thereto, CMPL and DPPL filed their respective pleadings before the learned arbitrator, whereupon, issues were framed and the trial was commenced. Upon conclusion of the evidence and after hearing oral submissions of the counsel for the parties, the learned arbitrator passed the impugned award, as noted hereinabove, on 25.7.2015.

21. What is important to note is while the disputes between CMPL, DPPL and respondent No.2 i.e. Ajay Gupta, were pending adjudication, certain developments took place, which is noticed in the award.

21.1 The first development was that RFA No. 13/1975, which was filed by one of the daughters of late Ram Lal Anand against the judgment dated 3.10.1974 passed in Civil Suit No. 92/1968, whereby, specific performance of the subject property was ordered sans the area which was the subject matter of the gift deed executed in favour of the sons of late Ram Lal Anand, was dismissed. The appeal was dismissed on 24.12.2010. The Special Leave Petition preferred against the judgment dated 24.12.2010 was dismissed on 10.7.2013. Notably, the Special Leave Petition (Civil) No.7883/2011 was filed by DPPL.

21.2 Insofar as RFA No.17/1975 was concerned, which was filed against the judgment dated 3.10.1974, passed in CS No. 92/1968, it was ultimately withdrawn. In this appeal, as noted above, K.S. Bhatnagar had assailed the judgment dated 3.10.1974 on the ground that the learned Single Judge had wrongly excluded from the relief of specific performance granted in his favour an area admeasuring 840 square yards, which was the subject matter of two gift deeds that late Ram Lal Anand had executed in favour of his sons. Thus, the judgment and decree dated 3.10.1974 affirmed finality.

21.3 The net result was that while via 2005 ATS, legal heirs of late Ram Lal Anand had sold DPPL, the right, title, and interest in the entire area comprising the subject property equivalent to 5400 square yards as per the judgment dated 3.10.1974 passed in Civil Suit No. 92/1968 which had been sustained by the Supreme Court, they could have conveyed right, title and interest only in 840 square yards.

21.4 This aspect becomes important as the 2006 ATS based on which CMPL claims rights in the subject property i.e. entire 5400 square yards is pivoted on 2005 ATS executed between the legal heirs of late Ram Lal Anand and DPPL.

22. Be that as it may, aggrieved by the impugned award, the instant petition has been filed under Section 34 of the 1996 Act by CMPL.

23. Before I proceed further, it may be important to note that DPPL, both before and after the execution of the 2006 ATS, had on its own made attempts to purchase the shares in the subject property which had been acquired by the legal representatives of late S.K. Bhatnagar. The impugned award notes that in respect of some of these transactions, DPPL had filed civil suits. I need not advert to these transactions as they have been broadly delineated in the impugned award. It would, however, suffice if I were to mention that in respect of the shares of the legal representatives, DPPL had paid a total sum of Rs. 5,67,00,000/-

24. Given this background, Mr. Rajiv Talwar, Advocate advanced arguments on behalf of CMPL, while submissions on behalf of DPPL and respondent No.2 i.e. Ajay Gupta were made by Mr. Sanat Kumar, Senior Advocate, instructed by Mr. Vinayak Batta, Advocate.

25. The submissions of Mr. Talwar can be paraphrased as follows:

- (i) Firstly, learned arbitrator having held in favour of CMPL that the 2006 ATS was not forged and fabricated, erred in holding, contrary to the terms of the said the agreement, that the said agreement was executed to provide security against the sum of Rs. 94 lakhs given as advance by CMPL to DPPL. The emphasis was on the fact that since 2006 ATS mentioned that Rs. 94 lakhs was paid as

earnest money, the learned arbitrator could not have ruled contrary to the terms of the written agreement that the sum of Rs. 94 lakhs was in the nature of an unsecured loan.

(i)(a) In the same vein, it was submitted that the learned arbitrator had committed patent illegality by seeking to interpret the 2006 ATS when no such plea was taken by DPPL. The only plea which was taken by DPPL and respondent No.2 i.e. Ajay Gupta was that the 2006 ATS was forged and fabricated. Therefore, once the learned arbitrator had ruled otherwise, he had no jurisdiction to ferret out, so to speak, the intention of the parties contrary to the plain terms of the agreement.

(ii) Secondly, the learned arbitrator had committed an error by giving weight to the fact that DPPL had paid a sum of Rs. 5.30 crores to the legal heirs of late K.S. Bhatnagar. The 2006 ATS was a back to back arrangement whereby DPPL having acquired rights in the subject property from the legal heirs of late Ram Lal Anand via 2005 ATS and irrevocable power of attorney dated 8.2.2005 for a sum of Rs. 2.15 Crores sold the subject property to CMPL for a total sum of Rs. 4 Crores. Learned arbitrator, thus, committed an error in denying the relief of specific performance to CMPL on the ground of inadequacy of consideration. Furthermore, assuming without admitting that it was a bad business bargain, it could not have become a reason for denying CMPL the relief of specific performance.

(iii) Thirdly, the learned arbitrator committed a patent error in observing that CMPL had not offered to pay the balance consideration

as stipulated in the 2006 ATS. In this behalf, reliance was placed on the notice dated 19.10.2008 served by CMPL on DPPL.

(iv) Fourthly, learned arbitrator erred in holding that CMPL had not assailed the 2008 sale deed executed by DPPL in favour of Smt. Kaushalya Devi. In this behalf, it was submitted that it was not incumbent upon CMPL to institute legal action against Smt. Kaushalya Devi since it was not a party to the 2008 sale deed. Furthermore, in this behalf, it was contended that since the 2008 sale deed had been executed post-execution of the 2006 ATS, CMPL was not required to institute any legal proceedings as the rule of *lis pendence* and/or principles analogous thereto, would apply. Clause 34 of the 2006 ATS provides that any agreement and/or deed of transfer executed post the execution of the said agreement would be illegal.

(v) Fifthly, the learned arbitrator had, based on surmises and conjectures, concluded that the subject property on the date of execution of the 2006 ATS was worth Rs. 10 Crores.

(vi) Lastly, the finding returned by the learned arbitrator that the sum of Rs. 94 lakhs paid by CMPL to DPPL was in the nature of an unsecured loan, based on his reading of the terms of the agreement, was erroneous. In other words, plain terms of the 2006 ATS were so read by the learned arbitrator to mean what was not intended by the parties. This, according to the learned counsel, was another instance of patent illegality committed by the learned arbitrator.

(vii) In sum it was also argued that the impugned award not only suffered from patent illegality, but was also contrary to the public policy of India.

(viii) In support of his submission, learned counsel relied upon the following judgments:

(1) *S.K. Jain vs. State of Haryana and Another*, (2009) 4 SCC 357;

(2) *Delhi Development Authority vs. Durga Chand Kaushish*, (1973) 2 SCC 825;

(3) *Roop Kumar vs. Mohan Thedani*, (2003) 6 SCC 595;

(4) *Rajasthan State Industrial Development & Investment Corporation Ltd. & Anr.*, (2013) 5 SCC 470;

(5) *Associate Builders vs. Delhi Development Authority*, (2015) 3 SCC 49.

26. On the other hand, Mr. Sanat Kumar learned Senior Counsel, who appeared on behalf of DPPL and respondent No.2 i.e. Ajay Gupta, largely relied upon the impugned award. Mr. Kumar submitted that though the learned arbitrator had ruled against DPPL *qua* the contention raised by it that the 2006 ATS was a forged and fabricated document, DPPL *dehors* this finding was in complete agreement with other findings returned by the learned arbitrator, including, that the 2006 ATS was executed to provide security for the sum of Rs. 94 lakhs advanced by CMPL to DPPL.

26.1 Learned senior counsel further submitted that the impugned award was based on an appreciation of the pleadings and the evidence placed before the learned arbitrator and therefore, while exercising jurisdiction

under Section 34 of the 1996 Act, this court ought not to interfere with the impugned award.

26.2 It was submitted that the interpretation of an instrument with the help of extrinsic evidence to determine the intent of parties was well within the domain of learned arbitrator. In this context, Mr. Kumar submitted that as a matter of fact, out of the sum of Rs. 94 lakhs advanced by CMPL to DPPL, Rs. 50 lakhs had been repaid by a sister concern of DPPL and therefore, DPPL was liable to refund only Rs. 54 lakhs. This plea though, learned senior counsel conceded, had been rejected by the learned arbitrator. In this behalf, reliance was placed on the judgment of the Supreme Court in *Godhra Electricity Co. Ltd. & Anr. Vs. The State of Gujarat and Anr.* (1975) 1 SCC 199. The relevant paragraph of the judgment relied upon by the learned counsel is extracted hereinbelow:

“18. In these circumstances, we do not think we will be justified in not following the decision of this Court in Abdulla Ahmed v. Animendra Kissen Mitter, where this court said that extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning and that evidence of the acts done under it is a guide to the intention of the parties, particularly, when acts are done shortly after the date of the instrument.”

26.3 Mr. Kumar further submitted that the argument advanced on behalf of CMPL that because the learned arbitrator had found that the 2006 ATS had been executed between the parties, he could not have thereafter held that it was executed to secure a loan transaction, was untenable. In support of this submission, reliance was placed on the following judgments:

(i) *Tejram vs. Patirambhau*, (1997) 9 SCC 634.

(ii) *Dadarao and another vs. Ramrao and others* (1999) 8 SCC 416.

26.4 Learned arbitrator had rightly found that CMPL had failed to prove that it was ready and willing to fulfil its part of specific performance. Reliance in this behalf was placed on the testimony of one, Mr. Naresh Chopra (CW-3). It was contended that CW-3 had admitted in his testimony that no offer had been made by CMPL to execute the sale deed and also no document had been placed on record to show that CMPL had the financial capacity to pay the balance consideration.

26.5 Learned arbitrator rightly appreciated the circumstances obtaining in the instant case and therefore, declined the relief of specific performance sought for by CMPL by taking into account the evidence on record and the width and amplitude of Section 20 of the Specific Relief Act, 1963.

Analysis & Reasons:

27. I have heard the counsel for the parties and perused the record.

28. What emerges from the record placed before the Court is as follows:

28.1 The subject property which admeasures 5400 square yards was sold to the wife of late Ram Lal Anand *via* a registered deed on 5.5.1950.

28.2 After the death of his wife, late Ram Lal Anand *via* two sale deeds gifted 840 square yards of the subject property which admeasures 5400 square yards in favour of his two sons. These gift deeds were executed on 9.12.1963 and 5.1.1963.

28.3 However, for some odd reason, late Ram Lal Anand executed the 1966 ATS in favour of late K.S. Bhatnagar which comprised the entire area equivalent to 5400 square yards.

28.4 With the death of late Ram Lal Anand, on 23.11.1966, K.S. Bhatnagar filed a suit for specific performance and consequent thereto, obtained a judgment and decree dated 3.10.1974 in his favour. This judgment was passed in CS(OS) No.92/1968.

28.5 Appeals against the said judgment were preferred both by K.S. Bhatnagar and one of the legal heirs of late Ram Lal Anand. These appeals were numbered as RFA(OS) No.17/1975 and RFA (OS) No.13/1975. The Division Bench of this Court dismissed RFA (OS) No.13/1975 preferred by the legal heirs of late Ram Lal Anand, on 24.12.2010. The SLP preferred against the judgment was also dismissed. Consequently, the judgment and decree dated 3.10.1974 acquired finality.

28.6 The net effect of this, as noted hereinabove, was that the legal heirs of K.S. Bhatnagar acquired, out of the total area comprising the subject property which admeasured 5400 square yards, rights in an area equivalent to 4560 square yards.

28.7 Consequently, the legal heirs of late Ram Lal Anand had rights in only the remaining area consisting of 840 square yards.

28.8 The learned arbitrator, to my mind, has carefully considered this aspect of the matter and ruled, apart from other issues, that specific performance sought for by CMPL concerning the entire area (i.e. 5400 square yards) could not be awarded.

28.9 In this behalf, learned arbitrator also considered the alternate plea advanced on behalf of CMPL that it ought to be accorded specific performance of an area equivalent to 2400 square yards which was in possession of DPPL out of a total area of 5400 square yards.

29. According to CMPL, 2400 square yards consisted of 1500 square yards which had been assigned by Sh. Brahm Swarup Bhatnagar, the legal representative of K.S. Bhatnagar, in favour of DPPL and 840 square yards which formed part of the two gift deeds referred to above, which even according to the judgment dated 3.10.1974, had fallen to the share of the legal heirs of late Ram Lal Anand.

29.1 The learned arbitrator considered this plea and, in my view, rightly rejected the argument. The reasons given in this behalf are extracted hereafter:

“...For the purpose of seeking relief of specific performance of the Agreement to Sell dated July 18, 2006, the Claimant cannot include one-third share of Brahm Swaroop Bhatnagar in the area of 4560 Sq. Yds. covered by the decree passed in favour of Keshav Swaroop Bhatnagar, measuring about 1500 Sq.Yds. which has been obtained by the Respondent company independently in its own right and not as Power of Attorney Holder on behalf of the Anand Family members. Anand Family members have no right, title or interest in the said one third portion covering about 1500 Sq. Yds. The Claimant cannot seek Specific Performance for part of the Agreement to Sell dated July 18, 2006 by including the said share of Brahm Swaroop Bhatnagar...

After the execution of the Agreement dated July 18, 2006, the Respondent company, in its capacity as the General Power of Attorney Holder of Anand Family members, on the basis of the Irrevocable General Power of Attorney dated April 8, 2005, has executed a Sale Deed dated February 19, 2008 in favour of Smt. Kaushalya Rani for a sum of Rs.6,30,00,000=00 in respect of area coveting 2700 sq.yds. out of the property in question. [Vol.V. p.95]. The Respondent in its Reply dated November 19, 2009 to the

Statement of Claim, has raised the plea that the Agreement to Sell dated July 18, 2006 with the Claimant cannot be performed in as much as the actual owners of the property in question have transferred a major part of the property admeasuring 2700 sq. yds. out of total 5400 Sq. Yds. vide registered Sale Deed in February 2008. [Vol.II p.3]. In its Rejoinder dated July 13, 2010 to the said Reply, the Claimant has raised the plea that the said Sale Deed is unlawful, sham, bogus, false and motivated and that the Claimant is in the process of filing appropriate legal proceedings in this regard. [Vol III P.5]. The Claimant has not produced any material to show about any proceedings having been filed in any forum to challenge the Sale Deed dated. February 19, 2008 executed in favour of Smt. Kaushalya Rani. The validity of the said Sale Deed cannot be gone into in these proceedings because the said Sale Deed is in favour of Smt. Kaushalya Rani who is not a party to these arbitral proceedings. Since the said Sale Deed in favour of Smt. Kaushalya Rani has not been challenged and the area of 840 Sq. Yds. covered by the two Gift Deeds and the area covered by the Sale Deed in favour of Smt. Kaushalya Rani have not been demarcated, it is not possible to say that the sq.id area of 840 sq. yds. is not included in the area of 2700 sq. yds. covered by the Sale deed dated February 19, 2008 in favour of Mrs. Kaushalya Rani and the Respondent Company or the Anand Family members are in possession and control of the 840 sq. yds. of land left out from the Decree dated October 3, 1974 passed in favour of Keshav Swaroop Bhatnagar. It is, therefore, not possible to say that 840 Sq. Y ds. of land in respect of which relief of Performance of part of the Agreement to Sell dated July 18, 2006 is sought, is available for granting such relief. It has, therefore, to be concluded that the Claimant cannot seek the relief of Specific Performance of the Agreement to Sell dated July 18, 2006, in these proceedings.”

29.2 Clearly, the learned arbitrator was of the view that 1500 square yards which were part of the total area of 5400 square yards could not form the

basis for claiming specific performance of the 2006 ATS as DPPL had purchased the same, independently, in its own right and not as a power of attorney holder of late Ram Lal Anand's family. 2006 ATS was, as noted hereinabove by me, pivoted on 2005 ATS executed between the legal heirs of late Ram Lal Anand and DPPL.

29.3 Likewise, insofar as 840 square yards are concerned, since DPPL executed 2008 sale deed in favour of one, Smt. Kaushalya Devi in respect of area admeasuring 2700 square yards, the learned arbitrator correctly appreciated the fact that it was not possible to conclude whether or not the said area was available for the grant of relief sought for by CMPL as it may have been included in the share of the subject property sold to Smt. Kaushalya Devi.

29.4 Besides this, the learned arbitrator after an elaborate appreciation based on his reading of the terms of 2006 ATS concluded that it contained clauses which contradicted each other. The learned arbitrator noted that certain terms provided for execution of a sale deed and transfer of possession on payment of the entire consideration *in futuro* while the other terms portrayed that the subject property had been sold and legal possession thereof had been handed over to CMPL via the 2006 ATS.

29.5 In that sense, the learned arbitrator, contrary to what has been argued by Mr. Talwar for CMPL, has not stepped outside the periphery drawn by the 2006 ATS insofar as the adjudication of disputes are concerned. In other words, the learned arbitrator has relied upon the intrinsic evidence available in the 2006 ATS which revealed contradiction and thus pointed in the direction that it had been executed to secure the sum of Rs. 94 lakhs advanced by CMPL and DPPL. Given the inherent contradiction in the

terms of the agreement (as noted in the impugned award), it became necessary for the learned arbitrator to examine the terms of the agreement and then ascertain the intent of the parties.

29.6 In my opinion, the exercise carried out by the learned arbitrator not only scrupulously adhered to the jurisdictional periphery set forth for him by law, but also accorded with the principles analogous to Section 91 and 92 of the Indian Evidence Act, 1872; the strict rules of evidence, in any event, not being applicable to the arbitration proceedings.

29.7 The learned arbitrator, thus, summarized the position which had emerged upon the perusal of the material placed before him by making the following observations:

“The position that emerges may be thus summed up:

- 1. Before the execution of the Agreement to Sell dated July 18, 2006, there were financial dealings between the parties whereunder Claimant had been advancing money as unsecured loan to the Respondent company. At the time of the execution of the Agreement in question, the amount of unsecured loan was Rs.94,00,000=00.*
- 2. The Agreement to Sell is one-sided and is weighted in favour of the Claimant and against the Respondent. The document is of a composite nature containing clauses which are normally found in an agreement providing for execution of Sale deed for transfer of title at a later date and also contains clauses which are found in a document for transfer of title in presenti.*
- 3. The price of Rs.4,00,00,000=00 mentioned in the Agreement to Sell as consideration for the property in question, free from all encumbrances is less than half of the value of the said property at the time of the execution of the Agreement.*

4. The Claimant had the practice of obtaining property papers when advances were made by the Claimant to its Directors.

5. The Respondent company before the execution of the Agreement to Sell dated July 18, 2006 as well as after the execution of the said Agreement had commenced negotiations with the heirs/and legal representatives of Keshav Swaroop Bhatnagali for obtaining assignment in respect of the share of each of them in area of the property covered by the Decree passed in favour of Keshav Swaroop Bhatnagar in the suit for Specific Performance of the agreement dated May 30, 1966. The Respondent company has paid an amount of Rs.5,67,00,000=00 in this regard.

6. The Claimant did not make any offer to pay the balance amount of the consideration and seek execution of the document of transfer on the basis of the Agreement to Sell dated July 18, 2006.

7. No objection was raised by the Claimant for the sale of an area of 2700 Sq.Yds. out of property in question by the Respondent company to Smt. Kaushalya Rani by Sale Deed dated February 19, 2008 even though Naresh Chandra, a Director in the Claimant was also a Director in the Respondent company at that time.

8. No proceedings have been initiated in an appropriate forum to challenge the validity of the Sale Deed executed by the Respondent company in favour of Mrs. Kaushalya Rani.”

29.8 Thus, the argument advanced by Mr. Talwar that since the learned arbitrator ruled that the 2006 ATS was neither a forged nor a fabricated document, he could not have then gone on to rule on the import and the scope of the document, to my mind, in the given facts and circumstances of the case, is an untenable submission.

29.9 The other submission by Mr. Talwar that the learned arbitrator had given undue weight to the amounts paid by DPPL to Bhatnagars is, to my mind, also a submission which cannot be accepted.

30. It is trite to say that the relief of specific performance is a discretionary relief which in the given facts and circumstances, the Court may refuse to grant. In considering the true import of the 2006 ATS, the learned arbitrator, *inter alia*, took into account the factum of the amount which DPPL had paid to the legal heirs of late K.S. Bhatnagar and late Ram Lal Anand.

30.1 Besides this, the learned arbitrator also took into account the circle rate of the property when 2006 ATS was executed. According to the learned arbitrator, based on circle rate obtaining on 18.7.2007, the subject property was worth Rs. 12 Crores and if adjustments were made for appreciation in value, then, even on the date of execution of 2006 ATS, its value would not be less than Rs.10 Crores. The findings returned in the award concerning this aspect of the matter are culled out hereafter:

“It is incomprehensible that the Respondent company would put in a sum of Rs.5,30,00,000=00 for acquiring interests of the three heirs and legal representative of Keshav Swaroop Bhatnagar in the said property which had been agreed to be sold for Rs.4,00,00,000=00 to the Claimant and for which the Respondent company had paid Rs.2, 15,00,000=00 to the Anand Family vide the Agreement to Sell dated February 6, 2005.

In support of his contention Mr. Sanat Kumar has referred to copy of Sale Deed dated February 19, 2008 executed by the Respondent company, as the General Power of Attorney Holder on behalf of the members of the Anand Family in favour of Mrs. Kaushalya

Rani for sale of an area of 2700 Sq. Yds. for Rs.6,30,00,000=00 [Vol.X p.153]. The said Sale Deed shows the value of the said property was computed on the basis of the Circle Rate of Rs.27,300=00 per Sq.mt. prescribed for properties falling in category 'C' and calculating the Stamp Duty payable on the Sale deed on that basis an amount of Rs.26,20,000=00 was paid as Stamp Duty. It is submitted that on the basis of Circle Rate of Rs.27,300=00 the value of the property in question measuring 5400 Sq.Yds. approximately (4516 Sq. meters approximately) was more than Rs. 12 Crores on July 18, 2007. Making an adjustment on the amount of appreciation in value of the property during the period of one year from July 18, 2006, the date of the Agreement to Sell, and July 18, 2007, the date of the Government Notification, the value of the property in question at the time of execution of the Agreement to Sell dated July 18, 2006 would not have been less than Rs. 10 Crores. This means that the amount of Rs.4 Crores mentioned as consideration for the property in question in the Agreement to Sell dated July 18, 2006 is less than half of the value of the said property at the time of the Agreement. It cannot be said that the said submission of Mr. Sanat Kumar is without substance."

30.2 To my mind, these findings provide the rationale as to why the learned arbitrator refused to exercise his discretion in favour of CMPL, which on a holistic reading of the award, leads me to conclude that it was not pivoted, as contended by Mr. Talwar, only on the ground of inadequacy of consideration, but also on the true purport of the 2006 ATS. Therefore, as noted above, the submission on this score being untenable is rejected.

30.3 On the aspect of readiness and willingness, to my mind, a bald averment made in notice dated 19.10.2008 served by CMPL on DPPL would not suffice. As noted by the learned arbitrator, based on the testimony of Naresh Chopra (CW-3), CMPL had failed to demonstrate readiness and

willingness to perform its part of the obligation as provided in the 2006 ATS. The learned arbitrator, in fact, contrary to what has been contended by Mr. Talwar, noted that prior to service of notice dated 19.10.2008 on DPPL, whereby the arbitration mechanism was triggered, there was no written communication sent by CMPL offering to pay the balance consideration to DPPL.

30.4 The testimony of Mr. Naresh Chopra (CW-3) during cross-examination, to my mind, settles this issue.

“Q219. Did you ever before 19.10.2008 call upon the respondent company in writing informing it with regard to your alleged claim of agreement to sell dated 18. 7.2006?”

A. I do not remember.

Q220. Did you ever call upon the respondent in writing that you have the remainder funds (as per your version) readily available to execute the sale deed and take the money?”

A. When the property was not ready, therefore no offer was made.

Q221. Have you placed on record any document to evidence that the claimant company had in its bank accounts a sum of Rs.3,06,00,000/- readily available to pay to the respondent for the purpose of the alleged agreement to sell and sale deed?”

A. It is correct that the claimant company has placed no such document on record. (Vol.) Even if the claimant company had no such funds, I as the directors had arrangement for this purpose.

Q222. You as Naresh Chopra have also not filed on record any document of your aforesaid claim as stated in previous answer of having 'arrangement' for this purpose.

A. I have not .filed any such document. (Vol.) Since I was director in both the companies so there was no requirement of filing such document.

B. Q223. Did you give any notice to the respondent company in writing fixing a date for the purposes of executing the sale deed on the basis of your alleged agreement to sell dated 18.7.2006?

A. There was no need for such a notice because I was the director in both the companies and the property was also not free for sale. (Vol.) Even today it is not free for sale. The respondent company has already executed a sale deed for 2400 sq. yards which to my knowledge has been cancelled."

30.5 Furthermore, what, to my mind, was the last nail in CMPL's coffin, so to speak, was the fact that when 2700 square yards out of total area of 5400 square yards of the subject property was sold to Smt. Kaushalya Devi *vide* 2008 sale deed, Mr. Naresh Chopra (CW-3) was holding the post of Director both on the board of CMPL as well as DPPL. Concededly, CMPL did not object to the transaction. Therefore, the only conclusion that could have been drawn was that CMPL was not desirous of going through the transaction which was subject matter of the 2006 ATS. The submission advanced by Mr. Talwar that CMPL need not have taken recourse to legal action *qua* the 2008 sale deed as the *lis pendence* rule applied is, to my mind, a submission which is unmerited.

30.6 The *lis pendence* rule cannot come to the rescue of a litigant who knowingly allows a transaction to take place contrary to its interest. In the facts of the present case, Mr. Naresh Chopra's (CW-3) knowledge can be attributed to CMPL. Since CMPL did not deem it fit to object to the transaction, in the very least, it would show that it was neither interested nor willing to consummate the sale of the subject property, which was founded on the 2006 ATS.

31. For the foregoing reasons, I find no merit in the petition. The captioned petition is, according, dismissed. The parties shall, however, bear their respective costs.

RAJIV SHAKDHER, J

AUGUST 01, 2019/pmc

