

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

% **Date of decision: 5th November, 2020**

+ **FAO (OS) (COMM) 95/2020 & CM Nos.18959/2020 (of the appellant seeking interim directions and orders) & 18962/2020 (of the appellant for condoning the delay in filing the appeal).**

SHON RANDHAWA.

..... Appellant

Through: Mr. Akhil Sibal, Sr. Advocate with
Mr. Aditya Bharech, Advocate

Versus

RAMESH VANGAL & ORS.

..... Respondents

Through: Mr. Anand Varma & Mr. Abhishek
Prasad, Advocates for the
respondents No. 1 to 3.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MS. JUSTICE ASHA MENON

[VIA VIDEO CONFERENCING]

RAJIV SAHAI ENDLAW, J.

1. This appeal, under Section 37(1)(c) of the Arbitration & Conciliation Act, 1996 read with Section 13(1A) of the Commercial Courts Act, 2015 and Section 10(1) of the Delhi High Court Act, 1966, impugns the order dated 27th May, 2020 of the Single Judge of this Court of dismissal of OMP No.1255/2014 preferred by the appellant under Section 34 of the Arbitration Act with respect to the Arbitral Award dated 9th October, 2014.

2. The appeal came up first before us on 14th August, 2020, when the counsel for the respondents No.1 to 3 i.e. Ramesh Vangal, Gokul Patnaik & Seagrow Bio-Technics India Pvt. Ltd., appeared on advance notice.

However on request of the counsel for the appellant, the appeal, on that day was adjourned to 25th September, 2020. On 25th September, 2020, the senior counsel for the appellant was heard for over one and a half hours and the counsel for the respondents No. 1 to 3 stated that his written submissions before the Single Judge were already on record and he be granted liberty to file written submissions in this appeal. Granting such liberty to the counsel for the respondents No. 1 to 3 to file written submissions in this appeal, order/judgment in the appeal was reserved.

3. We may at the outset state that the appeal, so far as preferred invoking Section 10 of the Delhi High Court Act, does not lie. Need to elaborate further on the subject is not felt as we have recently, in ***Raj Kumar Brothers Vs. Life Essentials Personal Care (P) Ltd.*** MANU/DE/1930/2020 (DB), dealt with the said aspect and held that the Arbitration Act being a special statute and a self contained code and by express language of Section 37 having confined appeals only to the matters prescribed therein, Section 10 of the Delhi High Court Act cannot be invoked in matters pertaining to arbitration.

4. The arbitral award with respect to which the petition under Section 34 of the Arbitration Act was filed and has been dismissed vide the impugned order, records that (i) the respondents No.1 and 2 were promoters of the respondent No.3 Company; (ii) in the year 2006, the respondent No.3 Company was allotted a plot of land being No. 445, Phase-V, Udyog Vihar, Gurgaon, Haryana; however subsequently the lease of the said plot was cancelled by the Haryana State Industrial Development Corporation Ltd.

(HSIDC) and the respondent No.3 Company had filed proceedings before the High Court of Punjab & Haryana in this regard; (iii) the respondents No.1 and 2 approached the appellant and respondent No.4 Iqbal Jumabhoy, seeking investment in the respondent No.3 Company by purchase of 50% equity shares of the respondent No.3 Company and a Share Purchase Agreement dated 26th September, 2006 (SPA) containing an arbitration clause was entered into, whereunder the respondents No.1 and 2 agreed to sell their 30,000 shares constituting 50% of the entire issued, subscribed and voting equity share capital of the respondent No.3 Company to the appellant and respondent No.4, for a total sale consideration of Rs.10 crores; (iv) on the same day i.e. 26th September, 2006 itself, an associate company of the appellant viz. Classic Fincap Pvt. Ltd. (CFPL) advanced a loan of Rs. 3 crores to the respondent No. 2, on security of pledge of 30,000 shares of the respondent No.3 Company along with Share Certificates and transfer forms executed in blank and respondent No.1 executed a guarantee for repayment of the loan in the event of default by respondent No.2; (v) on 27th March, 2007, the loan agreement was novated in favour of Global Emerging Markets India (GEMI), another associate company of the appellant and the pledge was also transferred in favour of GEMI; (vi) the SPA provided that the parties, at the time of transfer of the shares in pursuance thereto, would enter into a 50:50 Shareholders Agreement in relation to management, operations and functioning of the respondent No.3 Company, on such terms as may be mutually agreed between them within 45 days of execution of the SPA and that if the said Shareholders Agreement was not executed within 45 days, the appellant and the

respondent No.4 would have the right but not the obligation to terminate the SPA; (vii) on 4th December, 2007, HSIDC sent a letter to the respondent No.3 Company, agreeing to an out of court settlement and re-allotment of the plot to the respondent No.3 Company; (viii) the respondent No.1, vide communication dated 18th December, 2007 requested the appellant and the respondent No. 4 for Rs. 6.5 crores towards consideration for purchase of shares of the respondent No. 3 Company and vide communication dated 20th December, 2007, the appellant and the respondent No. 4 informed that they could not mobilise the funds requested and also that the conditions precedent in the SPA had not been satisfied and therefore there was no question of any monies being released pursuant to the SPA; (ix) on 4th February, 2008, the respondent No.3 Company withdrew the legal proceedings initiated against HSIDC in the Punjab and Haryana High Court with respect to cancellation of allotment of the plot aforesaid; (x) the respondent No.1, vide communication dated 28th February, 2008 to the appellant and respondent No.4 informed that if Rs.5 crores was not paid immediately, the compromise with the HSIDC may be cancelled; (xi) the appellant thereafter informed the respondent No.2, that in case of sale of project to third party for Rs.30 crores, the appellant and the respondent No.4 were entitled to an amount of Rs. 8 crores to Rs. 9 crores; (xii) thereafter the respondents No.1 and 2 negotiated with third parties; (xiii) on 1st September, 2008, the respondent No.4 informed the appellant that if sale to a third party is concluded, the appellant and the respondent No.4 were due to received a sum of Rs.8.5 crores; the appellant however informed the respondents No.1 and 2 that the appellant and the respondent No. 4 would

be entitled to a sum of Rs.9.4 crores plus interest; (xiv) the respondent No.1, on 1st October, 2008 informed the appellant that sale to third party stood concluded and thanked the appellant and respondent No.4 for their understanding; (xv) on 25th November, 2008, the respondents No. 1 & 2 proposed to the appellant and respondent No.4 that the sale under SPA to the appellant and respondent No.4 be of only 49% share capital of the respondent No.3 Company instead of 50% and if the same was not agreeable to the appellant and respondent No.4, the respondents No.1 and 2 will refund the advance of Rs.3 crores with interest; (xvi) various communications were exchanged between the parties thereafter; (xvii) on 21st December, 2009, the respondent No.3 Company applied to HSIDC for Floor Area Ratio (FAR) of 2.5 and on 8th January, 2010 an agreement was reached between the respondent No.3 Company and HSIDC; (xviii) on 21st February, 2010, the respondent No.1 informed the appellant that the Haryana Government had imposed a blanket ban on increase of FAR of above 1.5; (xix) on 2nd March, 2010, a resolution was passed by the shareholders of the respondent No.3 Company, to increase the authorized share capital of the company from Rs.50 lacs to Rs.100 lacs; (xx) some times thereafter, HSIDC executed a Conveyance Deed dated 20th April, 2010 of the plot aforesaid in favour of the respondent No.3 Company; (xxi) after nearly four months, the appellant, vide communication dated 4th August, 2010 enquired from the respondent No.2, the status of the plot and a meeting was held between the parties on 28th August, 2010 but without any resolution; (xxii) the appellant filed an application under Section 9 of the Arbitration Act and vide order dated 6th October, 2010 wherein the

respondents No.1 to 3 were restrained; (xxiii) thereafter, the parties exchanged legal notices and vide order dated 3rd November, 2011 of the Supreme Court on an application under Section 11 of the Arbitration Act filed by the appellant, the Arbitral Tribunal (AT) of sole Arbitrator was constituted; (xxiv) the appellant, before the AT sought (a) specific performance of the SPA, (b) cancellation of 9, 31,140 equity shares issued by the respondent No.3 Company to respondents No.1 and 2 and to Gokul Patnaik Associates, an associate company of respondent No.2 and to Tina Patnaik, all after execution of the SPA; and, (c) actual costs and losses suffered by the appellant and the respondent No.4 to the tune of Rs. 1 crore along with interest and costs of arbitration; and, (xxv) the respondents No.1 to 3 contested the said claims of the appellant and respondent No. 4.

5. On the pleadings of the parties, the AT framed the following issues:

- “1. Whether the share purchase agreement is duly executed, concluded, valid and enforceable? OPC*
- 2. Whether the share purchase agreement, the loan facility letter, the guarantee, the share pledge and the novation agreement, constitute a part of the same transaction? OPC*
- 3. Whether the loan amount of Rs.3.00 crores was to be set off against the payment of sale consideration in terms of Clause 4 of the loan facility dated 26.09.2006? OPC*
- 4. Whether the Claimant was at all times ready and willing to perform and did perform her part of the share purchase agreement? OPC*
- 5. Whether the Respondent Nos. 1 to 3 committed breach of article 4 of the share purchase agreement? OPC*
- 6. Whether the conditions precedent set in article 6.1 of the share purchase agreement were satisfied only on or after*

24.04.2010? OPC

7. *Whether the Claimant and Respondent No.4 had the right to extend the nine months period for satisfaction of the conditions precedent? OPC*
8. *Whether the Claimant is entitled to specific performance of the share purchase agreement? OPC*
9. *Whether the claim is barred by law of limitation or principles of delay and laches? OPR*
10. *Whether the contingency stipulated in the share purchase agreement has not occurred for the Respondent Nos. 1 to 3 to transfer the share of Respondent No.3? OPR*
11. *Whether the share purchase agreement has been terminated by the Claimant? OPR*
12. *Whether the Arbitral Tribunal has no jurisdiction to entertain and adjudicate the claim of the Claimant if the share purchase agreement containing arbitration clause is held to be not duly executed and concluded? OPR*
13. *Cost of arbitration?*
14. *Relief?"*

6. The AT, in the impugned award *inter alia* found and held that (i) the loan advanced (pursuant to the facility letter/loan agreement) and the SPA were part of the same transaction; (ii) the SPA was duly executed and concluded and enforceable and the AT had jurisdiction to entertain and adjudicate the claim of the appellant and the respondent No.4; (iii) the appellant and the respondent No.4 had the right to extend the nine months period for satisfaction of the conditions precedent and so extended the time and their claim before the AT was not barred by time or by principles of delay and laches; (iv) the contingency stipulated in the SPA had not

occurred for the respondents No.1 to 3 to transfer the shares of the respondent No.3 company to the appellant and respondent No.4; (v) the SPA had not been terminated by the appellant; (vi) the appellant and respondent No. 4 were at all times ready and willing to perform their part of the agreement and the conditions precedent set out in the SPA were satisfied only on or after 24th April, 2010; and, (vii) it is the respondents No.1 to 3 who had committed breach of the terms and conditions of the SPA. The AT, after so deciding all the other issues in favour of the appellant and respondent No.4 and against the respondents No.1 to 3, proceeded to decide issue no. 8, holding the same to be the most critical issue, with both parties having addressed extensive arguments thereon, as under: (a) the grant of specific relief is a discretionary remedy as evident from Section 20 of the Specific Relief Act, 1963; (b) if the parties were brought together, it will at best result in a glorified partnership; (c) the relationship between them was already strained, with allegations of fraud being made against each other and it was difficult to understand how the respondent No.3 Company will function or be managed; (d) in all likelihood, the affairs of the respondent No.3 company will result in a deadlock; (e) any order of specific relief would amount to making entities forcibly enter into this glorified partnership; (f) merely because there were provisions in the Companies Act and in the Articles of Association of the respondent No.3 Company, may not solve the problem entirely and may only lead to further problems and litigations; (f) the contention of the appellant and the respondent No. 4 that the Articles of Association of a company are a statutory Shareholders Agreement and thus no separate

Shareholders Agreement was required to be entered into, was not convincing; (g) when there is an arrangement in the ratio of 50:50, it requires some arrangement under the Shareholders Agreement and the argument, that the said arrangement was only for the benefit of the appellant and respondent No.4, was liable to be rejected; (h) the existing Articles of Association of the respondent No.3 Company were not sufficient to take care of any disagreements and the parties expressly admitted so, by, in the SPA providing for signing of a separate Shareholders Agreement for smooth running of the affairs of the respondent no.3 company; (i) in the absence of Shareholders Agreement, to grant specific performance under such circumstances, was entirely discretionary, even assuming the Shareholders Agreement was an independent provision; (j) the Master Circular dated 1st July, 2006 issued under the Foreign Exchange Management Act, 1999 (FEMA) also had to be complied with since the appellant was a resident of United Kingdom and the respondent No.4 a citizen and resident of Singapore; compliances had not been made recording payments in one go and valuation of shares had not been done; the automatic route, without approval of Reserve Bank of India (RBI) was also not available under the Master Circular 1 of 2013 of the Consolidated FDI Policy issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, as payment had been made in phases and not under one transaction and there was an evident non-compliance with the conditions of the same; (k) though permission for compliances with the Master Circular dated 1st July, 2006 can be granted by RBI even later but the same would also lead to a situation of uncertainty

with respect to operations and management of the respondent No. 3 Company and this was yet another reason for not granting specific performance; and, (l) thus the appellant was not entitled to specific performance of the SPA; (ix) even though specific performance was not liable to be granted, yet admittedly Rs.3 crores had to be returned by respondents No.1 to 3 to the appellant and the respondent No. 4; (x) the respondents No. 1 to 3 had already agreed to return the money with 18% interest; (xi) however in view of breaches of the agreement by the respondents No.1 to 3, some additional amounts by way of damages and compensation should be awarded to the appellant; (xii) the appellant in its statement of claim had claimed an amount of Rs.1 crore towards costs and losses and had pleaded that the amounts towards loss of opportunity and profits could only be assessed on closure of the arbitration proceedings; (xiii) however at no point of time any evidence had been led by the appellant to spell out the said amount and no amendments had ever been made by the appellant to claim more than Rs.1 crore; (xiii) rather, the appellant had reserved its right to pray for damages; (xi) at the belated stage, the appellant could not be allowed to reopen the case and lead evidence in respect of damages suffered; (xii) however it was evident that due to breaches by respondents No.1 to 3, the appellant had suffered losses and was therefore entitled to some amount of compensations particularly as the respondents No.1 to 3 had themselves been pleading and claiming that the value of the respondent No. 3 Company had increased manifold; (xiii) however since the amount claimed was Rs. 1 crore, therefore only Rs.1 crore could be granted to the appellant towards costs and loss along with

interest at 9% from the date of filing of the statement of claim; (xiv) ends of justice would be served by directing the respondents No.1 to 3 to return to the appellant and respondent No.4 the sum of Rs.3 crores and by way of damages the said amount be liable to be returned with interest at 24% per annum from the original date of receipt of money by respondents No.1 to 3 till the date of actual payment; and, (xv) a further amount of Rs.25 lacs was also directed to be paid by respondents No.1 to 3 to the appellant and respondent No.4 towards costs of arbitral proceedings.

7. The Single Judge, in the impugned judgment has recorded that it was the contention of the appellant that (i) the AT had committed a patent illegality in declining the grant of the relief of specific performance of the SPA, particularly in the background of other findings returned in the award and thus the denial by the AT of the relief of specific performance fell in the category of “shocking the conscience of the court” and deserved to be set aside; (ii) the AT had committed grave error in law in ignoring the basic postulate of the law on specific relief, that grant of specific performance is a rule and refusal an exception; specific performance can only be denied when equitable considerations point to its refusal and circumstances show that damages would be an adequate relief; the AT had erred in declining specific performance by simply stating that it was a discretionary remedy, ignoring that the discretion had to be exercised on settled judicial principles and not arbitrarily or against the agreement between the parties and the material on record; (iii) the AT was influenced by the fact that the relationships between the parties was hostile, without appreciating that

under company law this position could prevail in every company where one shareholder does not have exclusive control; moreover, this reference was not in the nature of a family dispute but a commercial transaction with commercial interest in mind; (iv) the AT had erred in not appreciating that the present was not a case of mere sale of shares but was a case where the value of the shares enhanced with the money given by the appellant and respondent No.4; the respondents No.1 to 3 having reaped the fruits of the monies received from the appellant and respondent No.4, could not be permitted to deny the legitimate share of the appellant and respondent No. 4; and, (v) the AT had not considered that the appellant and respondent No.4 were always the de-facto part owners of the respondent No.3 Company and were only required to pay balance consideration to acquire 50% shareholding.

8. The Single Judge, in the impugned judgment has held that (i) Section 20 (1) of the Specific Relief Act, by its plain reading indicated that the jurisdiction to grant relief of specific performance is discretionary; undoubtedly the discretion cannot be exercised arbitrarily but has to be guided by settled judicial principles as held in ***Parakunnan Veetill Joseph's Son Mathew Vs. Nedumbara Kuruvila's Son*** 1987 Supp SCC 340, ***Sardar Singh Vs. Krishna Devi*** (1994) 4 SCC 18 & ***Nirmala Anand Vs. Advent Corpn. (P) Ltd.*** (2002) 8 SCC 146; (ii) applying the law laid down in all the aforesaid judgments, in ***Jayakantham Vs. Abaykumar*** (2017) 5 SCC 178 the decree for specific performance was set aside taking into consideration the terms of the contract, conduct of the parties at the

time of entering into the agreement, the circumstances under which the contract was entered into and all of which gave unfair advantage to the purchaser against the seller and which made it inequitable to enforce specific performance; (iii) the remedy of specific performance is not only discretionary but equitable; reliance in this regard was placed on *Rooke's case* 77 ER 209; (iv) applying the said law as also the dicta of the Calcutta High Court in *Pravudayal Agarwala Vs. Ramkumar Agarwala* 1954 SCC OnLine Cal 66, no infirmity could be found by the refusal of the AT to direct enforcement of the SPA by directing specific performance; (v) the opinion of the AT was based on a detailed analysis of various documents and evidence put forth / lead by the parties and the various clauses of the SPA and the passage of seven years during the pending litigation, from the date of SPA; (vi) the arbitral award was not liable to be interfered with, also in accordance with the principles laid down in *Associate Builders Vs. Delhi Development Authority* (2015) 3 SCC 49 and *Ssangyong Engineering & Construction Co. Ltd. Vs. National Highways Authority of India* 2019 SCC OnLine SC 677; (vii) the clause in the SPA, to the effect that the appellant and respondent No. 4 would have a right to seek specific performance and that damages will not be an adequate remedy could not be interpreted to mean that the arbitrator, to whom the disputes were referred in accordance with the clause in the agreement, was bound to grant the relief of specific performance; (viii) the conclusion of the AT that it was not a fit case for grant of specific performance, was based on material on record; and, (ix) once discretion had been exercised by the AT while considering a claim of specific performance, after appreciating the entire

evidence and material on record, even an appellate court in appeal against a decree of refusal of specific performance cannot supplant the view unless the discretion is arbitrarily exercised or is against the settled judicial principles. Reliance in this respect was placed on *K. Nanjappa Vs. R.A. Hameed* (2016) 1 SCC 762 and *Jayakantham supra*.

9. The senior counsel for the appellant has argued that, (i) the application/petition under Section 34 of the Arbitration Act having been filed in the year 2014 i.e. prior to the amendment with effect from 23rd October, 2015 to the Arbitration Act, is to be governed by the un-amended Act and not in accordance with the amendment with effect from 23rd October, 2015 to Section 34; (ii) of the 12 issues framed by the AT, 11 have been decided in favour of the appellant; (iii) on the contrary, the respondents No. 1 to 3 were found to have taken dishonest pleas, having tampered with documents and being in breach of contract; (iv) the amount of Rs.3 crores paid to the respondents No.1 to 3, though described as a loan, was part of the consideration of Rs.10 crores agreed to be paid by the appellant and respondent No.4 to the respondents No.1 and 2 for acquiring 50% of the equity share capital of the respondent No.3 Company and has been held to be so by the AT; and, (v) the said money was used by the respondents No.1 to 3 to free the only asset owned by the respondent No.3 Company from litigation.

10. At this stage, we enquired from the senior counsel for the appellant, the effect of the amendment with effect from 1st August, 2018 to the Specific Relief Act, particularly of Section 10 thereof.

11. The senior counsel for the appellant responded that though the award is of the year 2014 i.e. of much prior to the amendment to the Specific Relief Act but drew attention to the judgment of one of us (Rajiv Sahai Endlaw, J) sitting singly, in ***Jindal Saw Ltd. Vs. Aperam Stainless Service and Solution Precision Sas*** 2019 SCC OnLine Del 9163 holding the amendment to Section 10 to be merely procedural and therefore applicable to pending cases and contended that since the challenge to the arbitral award is pending and has not attained finality, the said amendment to the Specific Relief Act would apply to the present situation; while Section 10 of the Specific Relief Act prior to its amendment with effect from 1st August, 2018 provided that “the specific performance of any contract may, in the discretion of the Court be enforced.....”, it, post amendment provides that “the specific performance of a contract shall be enforced by the Court subject to the provisions contained in Sub-Section (ii) of Section 11, Section 14 and Section 16.” ; while Section 20, prior to its amendment w.e.f. 1st August, 2018 provided that “The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so.....” it, post amendment no longer provides so.

12. The senior counsel for the appellant, continuing his arguments, contended that (i) even under the un-amended Act, specific performance was- the Rule and not an exception; (ii) Section 10 contemplates that shares of a private limited company are not easily available; reliance in this regard was placed on ***M.S. Madhusoodhanan Vs. Kerala Kaumudi (P) Ltd.***

(2004) 9 SCC 204; (iii) the discretion in the matter of grant of specific performance, even under the un-amended Sections 10 and 20, had to be exercised on equitable considerations; (iv) all the grounds given in the arbitral award, for denying specific performance, viz. of the parties owing to having equal shareholding unlikely to be able to work together, the shareholders agreement contemplated to be executed having not been executed and the difficulties of compliance with FEMA, were not such on which specific performance could be denied; (v) it was not for the AT to decide whether the bargain was good or bad; (vi) the interest of the respondent No.3 Company i.e. whether on sale / transfer of shares pursuant to specific performance, the company could work or be in a deadlock, was not a consideration before the AT; (vii) the AT did not give weightage to the fact that the option to terminate the agreement, on the parties being unable to initiate the terms of the Shareholders Agreement, was only of the appellant and the respondent No.4 and not of the respondents No.1 and 2; (viii) it is not as if the SPA was violative of any of the provisions of FEMA and specific performance could not have been refused on grounds of non-compliance with FEMA; reference in this regard was made to ***Cruz City 1 Mauritius Holdings Vs. Unitech Limited*** 2017 SCC OnLine Del 7810.; (ix) whether approval of the RBI to transfer the shares could be obtained or not, was a consideration at the time of execution of the decree for specific performance and not at the stage of deciding whether to decree specific performance or not; (x) the AT overlooked the relevant considerations to be looked into i.e. the conduct of the parties and the parties, in the SPA having agreed that damages for breach would not be adequate remedy and

the SPA would be specifically enforced; (xi) the outcome of the arbitral proceedings is manifestly unjust and rewards the respondents No.1 and 2 whose conduct has been found to be dishonest; (xii) attention was invited to the findings on issues no. 2 and 3 and on issues 1 and 12 to contend that the respondents No.1 to 3 were found to have forged documents and having tampered with documents and from which forgeries / tampering, only the respondents No.1 to 3 derived benefit and the appellant got no benefit; and, (xiii) attention was also invited to findings on issue no. 5 to contend that the share capital issued after the execution of the SPA was only to family members and associates of respondents No.1 and 2 and which share capital also the AT has held the respondents No.1 to 3 to be not entitled to issue.

13. At this stage, we enquired from the senior counsel for the appellant, whether the share capital already issued to others, even if family members/associates of the respondents No.1 and 2, would also lead to unworkability of the SPA and / or be an impediment to the specific performance of the SPA inasmuch as the shares already allotted, even if to the family members, could not be revoked / cancelled and which cancellation / revocation was likely to lead to further litigation.

14. The senior counsel for the appellant responded that neither was the said plea taken by the respondents No. 1 to 3 nor has weighed with AT for denying specific performance to the appellant.

15. The senior counsel for the appellant, continuing with his arguments (a) drew attention to the findings on issue no. 8 to show that the AT has only granted the relief of refund of Rs.3 crores with 24% interest and not

awarded any damages for the loss suffered by the appellant on account of breach of SPA held on the part of the respondents No.1 to 3; (b) informed that the property now owned by the respondent No.3 Company is fetching annual rent of Rs.4 crores; (c) contended that the AT has only directed refund of the monies paid by the appellant, as if the transaction was a simpliciter loan transaction, inspite of holding the loan to be part of the transaction of SPA and of which specific performance was claimed; (d) argued that the AT has thus destroyed the bargain which the appellant had commercially entered into and the appellant stands cheated; (e) informed that the respondent No.3 Company has no other business and the appellant, on specific performance being ordered, would have been entitled to 50% of the rent earned by the property of the respondent No.3 Company; (f) contended that the Single Judge wrongly relied upon the judgment of the Calcutta High Court; (g) contended that the Single Judge has also reasoned that more than seven years had passed but this was not a reason given by the AT; (h) contended that *Associate Builders* supra relied upon by the Single Judge is no-longer good law and the Single Judge has thus applied the wrong test while exercising jurisdiction under Section 34 of the Arbitration Act; (i) contended that *Ssangyong Engineering & Construction Co. Ltd.* supra is qua the amendments carried out with effect from 2015 to the Arbitration Act and the learned Single Judge has not considered that the subject arbitral award was of prior thereto; (j) contended that the award is not in terms of the agreement between the parties of which specific performance was claimed; and, (k) informed that *Jindal Saw Ltd.* supra was cited but not discussed by the Single Judge and reference before

the Single Judge was also made to the judgments at serial nos.9,11 and 13 of the compilation of judgments, being *Prakash Chandra Vs. Angadlal* (1979) 4 SCC 393, *Zarina Siddiqui Vs. A. Ramalingam alias R. Amarnathan* (2015) 1 SCC 705 and *Devalsab Vs. Ibrahimsab F. Karajagi* (2005) 3 SCC 342 respectively, on the aspect of specific performability and on the judgments at serial nos.15, 17 to 19 of the compilation of judgments, being *M.S. Madhusoodhanan supra*, *Cruz City 1 Mauritius Holdings supra*, *Ajit Prasad Jain Vs. N.K. Widhani* (1989) 38 DLT 456 and *Indra Prasad Saxena Vs. Chaman Lal Malik* 1993 SCC OnLine All 159 respectively, on the aspect of equity in specific performance.

16. The counsel for the respondents No.1 to 3 has not filed written arguments for which liberty was sought. On being telephonically contacted while dictating the judgment, he informed that he has been ailing and thus could not comply. Though he sought one week's more time to file written arguments but the same was telephonically declined. We have however perused the written arguments filed by the respondents No. 1 to 3 before the Single Judge and which are on record.

17. We may at the outset state that the Division Bench of this Court, in *Shree Vinayak Cement Clearing Agency Vs. Cement Corporation of India* (2007) 142 DLT 385 followed in *Thyssen Krupp Werkstoffe GMBH Vs. Steel Authority of India Ltd.* MANU/DE/1853/2011 (DB) observed that the scope of enquiry in an appeal against the dismissal of an application under Section 34 of the Arbitration Act is even more restricted and limited than before the Court dealing with an application under Section 34 of the

Act. In the same vein, in ***Jhang Cooperative Group Housing Society Ltd. Vs. Pt. Munshi Ram & Associates Pvt. Ltd.*** (2013) 202 DLT 218 (DB), while reiterating that under Section 37 the judicial scrutiny and scope of interference is further narrower than the narrow scope of interference under Section 34, it was held that an appeal under Section 37 is like a second appeal, the first appeal being to the Court by way of objections under Section 34; where there are concurrent findings of fact of law, first by the AT which are then confirmed by the Court while dealing with the objections under Section 34, in an appeal under Section 37, the appellate Court would be very cautious and reluctant to interfere in the findings returned in the award by the AT and confirmed by the Court under Section 34.

18. The same view has been followed in ***State Trading Corporation of India Ltd. Vs. Toepfer International Asia PTE Ltd.*** MANU/DE/1480/2014 (DB), ***Delhi State Industrial & Infrastructure Development Corporation Ltd. Vs. Rama Construction Company*** MANU/DE/1518/2014 (DB), ***Mahanagar Telephone Nigam Ltd. Vs. Fujitsu India Pvt. Ltd.*** MANU/DE/0459/2015 (DB) [SLP No. 21831/2015 preferred whereagainst was dismissed on 14th August, 2015], ***Mahanagar Telephone Nigam Ltd. Vs. Finolex Cables Ltd.*** MANU/DE/2818/2017 (DB), ***L.G. Electronics India (P) Ltd. Vs. Dinesh Kalra*** MANU/DE/1379/2018 (DB), ***M.L. Lakhanpal Vs. Darshan Lal*** MANU/DE/2159/2018 (DB), ***Airports Authority of India Vs. Sikka Associates*** MANU/DE/2988/2018 (DB), ***ADTV Communication Pvt. Ltd. Vs. Vibha Goel*** MANU/DE/1688/2018

(DB), *State Trading Corporation of India Vs. Helm Dungenmittel GmbH* MANU/DE/2063/2018 (DB), *NHAI Vs. BSC-RBM-Pati Joint Venture* 2018 SCC OnLine Del 6780 (DB), *V2 Retail Ltd. Vs. S.S. Enterprises* MANU/DE/1365/2019 (DB), *Union of India Vs. Chenab Construction Company (Regd.)* MANU/DE/3355/2019 (DB), *Theme Engineering Services Pvt. Ltd. Vs. Rail Vikas Nigam Ltd.* MANU/DE/3356/2019 (DB), *National Highways Authority of India Vs. PCL Suncon (JV)* 2019 SCC OnLine Del 10933 (DB), *National Highways Authority of India Vs. PNC-BEL (JV)* 2019 SCC OnLine Del 9461 (DB) and *MMTC Limited Vs. Karam Chand Thapar & Bros (Coal Sales) Ltd.* 2019 SCC OnLine Del 7648 (DB) [SLP No. 9877/2019 preferred whereagainst was dismissed on 29th April, 2019]. Finally, the Supreme Court in *MMTC Ltd. Vs. Vedanta Ltd.* (2019) 4 SCC 163 has held that interference under Section 37 of the Arbitration Act cannot travel beyond the restrictions laid down under Section 34 and that the appellate Court exercising jurisdiction under Section 37 cannot undertake an independent assessment of the merits of the award and must only ascertain that the exercise of power by the Court under Section 34 has not exceeded the scope of the provision; it was further held that in case an arbitral award has been confirmed by the Court under Section 34 and by the Court in an appeal under Section 37, even the Supreme Court must be extremely cautious and slow to disturb such concurrent findings. Since then, other Division Benches of this Court in *Bharat Sanchar Nigam Ltd. Vs. Aksh Optifibre Ltd.* MANU/DE/1771/2020, *Prestress Wire Industries Vs. Uppal Builders Pvt. Ltd.* 2019 SCC OnLine Del 11104 *National Highways Authority of India*

Vs. Patel KNR (JV) MANU/DE/4517/2019 have reiterated that the appellate court exercising power under Section 37 of the Arbitration Act is not to independently assess the relative merits and demerits of the award and the limited scope of determination under Section 37 is to assess as to whether the views expressed by the Single Judge fall within the parameters laid down under Section 34 of the Act. It was further held that only when the Court has taken a glaringly preposterous view and has overlooked the patent error in the award, is interference called for under Section 37 of the Act.

19. Applying the aforesaid parameters, all that we are required to see while exercising jurisdiction under Section 37 of the Arbitration Act is, whether the Single Judge has taken a glaringly preposterous view or has overlooked any patent error in the arbitral award.

20. None of the arguments of the senior counsel for the appellant make us form the said opinion.

21. The Single Judge, referring to various judgments of the Supreme Court, has held that the grant of relief of specific performance (under the Specific Relief Act, 1963 as it stood prior to its amendment with effect from 1st August, 2018) was discretionary and the discretion exercised by the AT was not in violation of the settled judicial parameters for exercise of such jurisdiction. The said reasoning by the Single Judge, by no stretch of imagination, can be said to be glaringly preposterous or overlooking any patent error in the arbitral award.

22. All the arguments of the senior counsel for the appellant before us

tantamount to contending, that the AT has wrongly exercised the discretion implicit in the grant of relief of specific performance.

23. We have wondered, whether wrong exercise of discretion, while dealing with a claim for specific performance, can be a reason under Section 34 of the Arbitration Act for setting aside of an arbitral award.

24. We may at this stage mention that this Court in *Sulochana Uppal Vs. Surinder Sheel Bhakri* (1990) 42 DLT 379 held that because the relief of specific performance was a discretionary relief and under the Specific Relief Act, the discretion had been vested only in the Court, the disputes of specific performance were not arbitrable. However the said judgment was disapproved of by the Supreme Court in *Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan* (1999) 5 SCC 651, holding that the right of specific performance of an agreement of sale deals with contractual rights and it is certainly open to the parties to agree, with a view to shorten litigation in regular courts, to refer the issues relating to specific performance to arbitration. It was further held that merely because the Sections of the Specific Relief Act confer discretion on courts to grant specific performance of contract does not mean that parties cannot agree that the discretion will be exercised by a forum of their choice.

25. Once, it has been held that the parties can agree that the discretion implicit in the grant of relief of specific performance be exercised by a forum of their choice, the scope of interference with such discretion exercised by the forum of the choice of the parties, in our view, would be even narrower than the scope of interference with the discretion exercised

by a court, in the hierarchy of courts.

26. Without wanting to make a general statement and confining it to the aforesaid facts, in our opinion, the answer to the question posed in para 23 above, has to be an emphatic no. We are also of the opinion that if the answer is anything else than “no”, the same will strike at the very root of arbitration.

27. An Arbitrator is a private alternate dispute resolution forum, of the choice of the parties and with the decision of which the parties agree to be bound, whether it be right on facts and/or right on law, or not. The scope of interference therewith is in the narrow confines prescribed in the statute governing arbitration. Earlier the said statute was in the form of Arbitration Act, 1940 but which was widely considered to have not served the purpose and having reduced arbitration to a first step in litigation before the courts. To remedy the situation, the Arbitration & Conciliation Act, 1996 was brought into existence, by repealing the earlier law and with the experience of working thereof, several amendments have been carried out thereto from time to time, with each amendment being guided by the spirit of reducing judicial interference with arbitration proceedings and arbitral awards.

28. The AT in the present case, on an assessment and analysis of the facts as unravelled before it, having exercised the discretion implicit in the grant of relief of specific performance against the grant of specific performance, in our opinion neither the 1940 Act nor the 1996 Act permits the courts to set aside the award.

29. In fact, even the Courts exercising appellate power against decrees

refusing or granting specific performance refrain from interfering with the decree merely because they, in the facts, would have exercised discretion differently, unless the discretion exercised by the trial court in granting or refusing specific performance has been exercised perversely, arbitrarily or against judicial principles. It has been held in ***K. Prakash Vs. B.R. Sampath Kumar*** (2015) 1 SCC 597 and ***K. Nanjappa supra*** that the appellate court should also not exercise its discretion on extraneous or sympathetic considerations. It has further been held in ***Parakunnnan Veetill Joseph's Son Mathew supra, K. Prakash supra, K. Nanjappa supra, Gobind Ram Vs. Gian Chand*** (2000) 7 SCC 548, ***Bal Krishna Vs. Bhagwan Das*** (2008) 12 SCC 145, ***Jayakantham supra*** that a party is not entitled to get a decree for specific performance merely because it is lawful to do so.

30. As far as the response of the senior counsel for the appellant to our query with respect to the amendment with effect from 1st August, 2018 to the Specific Relief Act and reference to ***Jindal Saw Ltd. supra*** pronounced by one of us (Rajiv Sahai Endlaw, J.) sitting singly is concerned, we are of the opinion that while an appeal arising from a judgment or decree of the Court, is a continuation of the *lis* commenced by a suit, the same cannot be said with respect to jurisdiction under Section 34 of the Arbitration Act. The jurisdiction under Section 34 of the Arbitration Act is not an appellate jurisdiction and is widely different therefrom. While in exercise of jurisdiction as First Appellate Court, facts as well as law can be gone into and reviewed/revised and judgment of the Trial Court can be confirmed,

reversed, modified or the matter can be remanded to the Trial Court for taking further evidence, jurisdiction under Section 34 of the Arbitration Act permits scrutiny of the arbitral award only on the grounds specified and that too only for setting aside of the arbitral award; the court is not empowered to modify the award or to on such scrutiny grant a different relief than that granted by the Arbitrator or to substitute the award. Reference in this regard may be made to ***J.G. Engineers Private Limited Vs. Union of India*** (2011) 5 SCC 758, ***Dyna Technologies Pvt. Ltd. Vs. Crompton Greaves Ltd.*** 2019 SCC OnLine SC 1656 and ***South East Asia Marine Engineering and Constructions Limited Vs. Oil India Limited*** (2020) 5 SCC 164. When the scrutiny is only to judge whether the award is worth setting aside, having the harsh consequence of relegating the parties to the pre-arbitral stage and it is not open to the court to tweak with the award, unless a gross case for setting aside is made out, the court will not interfere.

31. In the present case, under Section 34, what is required to be *inter alia* seen is that the arbitral award is not in conflict with the public policy of India. The public policy of India, in the context of certain matters, is defined by the statutes governing those matters and though such statutes may change with change in public policy but unless the change brought about by the statute is retrospective, the change in public policy also cannot be said to be retrospective. The test to be applied under Section 34 i.e. whether the arbitral award is in conflict with the public policy of India, is of the date of the making the award and cannot be of the changes if any in the public policy after the date of making of the award. The public policy of

India, in the matter of specific performance of contracts, as contained in the Specific Relief Act, till prior to 1st August, 2018, was that the relief of specific performance is discretionary and not mandatory and which discretion the parties herein agreed to be exercised by a forum of their choice. Merely because with effect from 1st August, 2018 the Specific Relief Act, particularly Sections 10 and 20 thereof, were amended and took away the discretion earlier vested in the Court/Arbitrator, would not, in our view, affect the arbitral award made nearly four years prior thereto and the arbitral award cannot be said to be contrary to the public policy of India on that account.

32. As far as reference by the senior counsel for the appellant to the ground of patent illegality for interference with the award is concerned, reference may be made to the recent dicta of the Supreme Court in ***Patel Engineering Ltd. Vs. North Eastern Electric Power Corporation Ltd.*** 2020 SCC OnLine SC 466, holding that (i) patent illegality as a ground for setting aside a domestic award was first expounded in ***Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*** (2003) 5 SCC 705 where wider interpretation was given to public policy and it was held that an award would be patently illegal if it is contrary to the substantive provisions of law or provisions of 1996 Act or terms of contract; (ii) patent illegality in ***Associate Builders supra*** was held to contain three sub-heads i.e. (a) contravention of substantive law of India, (b) contravention of the Arbitration Act itself and (c) contravention of terms of the contract; contravention of substantive law of India would result in the death knell of

an arbitral award – this must be understood in the sense that such illegality must go to the root of the matter and cannot be of trivial nature; the contravention of terms of the contract must be understood with a caveat – if an arbitrator construes a term of the contract in a reasonable manner it will not mean that the award can be set aside on this ground; construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do; (iii) the Law Commission in its 246th Report recommended the insertion of the ground of ‘patent illegality’ for setting aside a domestic award by insertion of Clause 2A in Section 34 of the Act and pursuant to the said recommendation, the Arbitration Act was amended with effect from 23rd October, 2015 and the ground of patent illegality for setting aside a domestic award has been given statutory force in Section 34(2A) [the proviso to Section 34(2A) is that an award shall not be set aside merely on a ground of an erroneous application of law or by re-appreciation of evidence]; (iv) in *Ssangyong Engineering & Construction Co. Ltd. supra* the Court noted that the expansive interpretation given to public policy of India in *Saw Pipes Ltd. supra* and *Oil & Natural Gas Corporation Ltd. Vs. Western Geco International Limited* (2014) 9 SCC 263 have been done away with a ground of patent illegality but clarified that re-appreciation of evidence was not permitted under the ground of patent illegality and that construction of terms of the contract is primarily for an arbitrator to decide unless the arbitrator construes a contract in a manner which no fair minded or reasonable person would take i.e. if the view taken by the arbitrator is not even a possible

view to take; and, (v) only if a decision of an arbitrator is found to be perverse or so irrational that no reasonable person would have arrived at the same or the construction of the contract is such that no fair or reasonable person would take, only that view of the arbitrator is a view not possible of taking.

33. The aforesaid dicta appears to suggest that the ground of patent illegality, statutorily incorporated in the Arbitration Act by amendment with effect from 23rd October, 2015, has its genesis in the earlier judgment in *Saw Pipes Ltd.* supra. In our view, the said amendment did not affect the exercise of jurisdiction under Section 34 of the Act in relation to the subject award and the argument of the senior counsel for the appellant of the Single Judge having erred in applying *Ssangyong Engineering & Construction Co. Ltd.* supra has no merit.

34. We have otherwise wondered about the manner in which the Courts are called upon to deal with arbitral awards. Often it is found that fresh pleadings are sought to be made qua applications/petitions under Section 34 of the Act and lengthy arguments are addressed, making the hearing thereof no different from the hearing of a suit or of an appeal against the judgment and decree in a suit, thereby often leading to Section 34 applications remaining pending for adjudication for long, negating the difference between the adjudicatory process of the Court and the alternate dispute resolution mechanism through the medium of arbitration. Not only so, notwithstanding the plethora of judgments noted above holding the restricted scope of appeal under Section 37, in the hearing of these appeals,

all grounds as urged in application under Section 34, if not more, are agitated, as if the Appellate Court is to scrutinize the arbitral award *de novo*, again causing delays. Instead, the hearing has to be confined to showing that the view taken by the Section 34 Judge is preposterous or what the Section 34 Judge has overlooked.

35. With due deference to the various judgments pronounced on the subject of Section 34 and on the meaning of public policy of India, we would take this opportunity of expressing the scope of interference in our own words.

36. Arbitration is a mechanism of dispute resolution, an alternate to the courts set up by the State for the said purpose. Dispute resolution through the mechanism of the courts, traditionally has been multilayered i.e. providing for appeals, presumably to eliminate human error in such dispute resolution by courts manned by human beings. However dispute resolution through arbitration, being by a forum of the choice of the parties, no provision for appeal was built in therein, though we may record that certain States in India statutorily provide for appeals against arbitral award; the parties however by agreement can always agree thereto. Notwithstanding the absence of appeals against awards by arbitrators of the choice of the parties, the statutes governing arbitration have felt the need to open a window for recourse thereagainst. The reason therefor, in our opinion is that decision making in arbitration, though by a forum of the choice of the parties, has to still comply with certain basic norms/tenets of dispute resolution. The basic norms/tenets of dispute resolution, immediately bring

to mind, the principles of natural justice. A bare perusal of Section 34, enlisting the grounds on which an arbitral award may be set aside, shows each of the grounds i.e. (i) a party to arbitration being under some incapacity or the arbitration agreement being not valid; (ii) proper opportunity of hearing having not been given; (iii) the subject of arbitration being not arbitrable; or, (iv) the composition of AT being not in accordance with the arbitration agreement, are nothing but exposition of the principles of natural justice and which principles, over the years represent the public policy of India in the matter of dispute resolution. Since notwithstanding said exposition, the Arbitration Act also proceeds to list “conflict with public policy of India” as a ground for setting aside of the award, we wondered what else is the public policy of India for dispute resolution. The only other element of public policy of India pertaining to dispute resolution, in our opinion is, of the stream of dispute resolution remaining clean; the stream of dispute resolution can no longer be said to be clean if the decision is biased or is corrupted. In our view, when Section 34 uses the words “public policy of India”, the only other grounds besides those enumerated on which the award can be set aside are, if it is biased or corrupt or has been rendered for extraneous considerations and on none other. Direct evidence of bias or corruption is often not available; thus the words “the award is so preposterous or takes a view which no reasonable person could have taken” are used in the same vein i.e. that such award could not have been rendered except for extraneous reasons. This becomes evident also from the explanation added to Section 34(2) by the amendment w.e.f. 23rd October, 2015.

37. One of us (Rajiv Sahai Endlaw, J) speaking for the Division Bench of this Court in *Delhi Development Authority Vs. Bhardwaj Brothers* AIR 2014 Del 147, inter alia held that the scope of judicial review of an arbitral award is akin to review under Article 226 of the Constitution of India, where it is settled legal position that the judicial review is of the decision making process and not of the decision on merits and cannot be converted into an appeal. It was further held that the ground of challenge, of the award being in conflict with public policy of India, entails enquiry into whether the award is induced or affected by fraud or corruption and that the purpose of judicial review is to ensure that the individual receives fair treatment and not to ensure that the forum of the choice of the parties, after according fair treatment, reaches on a matter which it is authorized by law to decide, a conclusion which is correct in the eyes of court.

38. Applying the aforesaid tests, there is not even a whisper that the arbitral award in the present case is afflicted by a fraud or corruption or bias. Else , a mere wrong decision without anything more is not enough to attract the power of judicial review , being the supervisory jurisdiction conferred on the court under the Arbitration Act. The court cannot correct errors of arbitrators.

39. We do not deem it necessary to burden this judgment by dealing now with the lengthy compilation of judgments supplied by the senior counsel for the appellant, though to be fair to him, he only referred us thereto instead of reading out therefrom. Suffice it is to state that on application thereof, award cannot be said to be contrary to public policy of India and /

or the Single Judge cannot be said to have overlooked anything or having taken a preposterous view of the matter.

40. No merit is found in the appeal.

Dismissed. Since the counsel for the respondents No. 1 to 3 neither argued nor submitted written arguments, no costs.

RAJIV SAHAI ENDLAW, J.

ASHA MENON, J.

NOVEMBER 05, 2020
'gsr'