



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

% **Reserved on : 26th April, 2023**

Pronounced on: 19th July, 2023

+ **O.M.P. (COMM) 205/2022 & I.A. 6391/2022 & I.A. 6392/2022
& I.A. 6393/2022 & I.A. 6394/2022**

OMAXE LTD.

..... Petitioner

Through: Mr. Ramesh Singh and Mr. Rajshekhar Rao, Sr. Advocates with Ms. Mukti Bodh, and Mr. Vipin Sharma, Advocates

Versus

JOGINDER SINGH NIJJAR & ANR.

..... Respondents

Through: Ms. Shobhana Takiar and Mr. Kuljeet Singh, Advocates
Mr. Sujoy Gaur, Mr. Rajat Gaur, Mr.R.K.Sharma, and Mr.Himanshu Aggarwal, Advocates for Interveners

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant Petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter "The Act, 1996") being aggrieved of the Award dated 20th March 2020 seeking the following reliefs:

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- “a. Pass an order summoning the entire original arbitral record from the Learned Sole Arbitrator in the arbitration proceedings arising out of Arbitration Petition No.25/2015 titled Joginder Singh Nijjar & Anor. Vs. Omaxe Ltd.;*
- b. Pass an order thereby setting aside the impugned award dated 20.03.2020 passed in arbitration proceedings arising out of Arbitration Petition No.25/2015 titled Joginder Singh Nijjar & Anor. Vs. Omaxe Ltd.;*
- c. Pass an order thereby allowing the Counter Claims made by the Petitioner in arbitration proceedings arising out of Arbitration Petition No.25/2015 titled Joginder Singh Nijjar & Anor. Vs. Omaxe Ltd.;*
- d. stay the operation and execution of the impugned Award dated 20.03.2020 passed by the Learned Sole Arbitrator during the pendency of the present proceedings.*
- e. Pass an order allowing costs of the present proceedings in favour of the Petitioner and against the Respondents;*
- f. Pass any other or further order(s) deemed fit in the facts and circumstances of the case and in the interest of justice.”*

FACTUAL MATRIX

2. The petitioner was a Real-Estate Development Company incorporated under The Companies Act, 1956 and subsequently under the Companies Act, 2013. It works in the construction and development of commercial, residential and integrated Real-Estate projects across India.

3. The petitioner undertook the construction and development of a commercial project in the nature of a shopping/commercial mall in the name and style of "Omaxe Novelty Mall" situated at Lawrence Road, Amritsar, Punjab (hereinafter referred to as "Project/said Project") in collaboration with the landowners, namely M/s. Novelty Associates Pvt. Ltd., vide Collaboration Agreement dated 23rd May, 2005.



4. On 7th April 2005, an MOU was executed at New Delhi between the petitioner and the respondent (owner & Attorney Holder of other Co-owners) for the purpose of development and construction of commercial complex on the land owned by them under the name and style of Omaxe Novelty Mall, Amritsar. As per the terms of the said MOU, built-up area was to be shared by petitioner and respondent in the ratio of 55% and 45%, respectively. The sale proceeds were to be received in a separate escrow account in the name of "Omaxe-Novelty" with standing instructions to the Bank to transfer 90% of the proceeds to the individual account of the parties as per their sharing ratio of the project. The balance amount of 10% was agreed to be transferred to the account of Omaxe for meeting costs and expenses of advertisement, marketing, brokerage, documentation and office expenses.
5. On 23rd May 2005, a Collaboration Agreement was executed between the petitioner and the respondent for the development of the Commercial Complex/Mall.
6. The landowners had also executed the Power of Attorney dated 23rd May, 2005 in favor of the Petitioner for carrying out the objectives contained in the Collaboration Agreement.
7. The Municipal Corporation, Amritsar *vide* its letter dated 25th May, 2006, sanctioned the building plan of the project/mall in question with height upto 30 meters pursuant to which the Municipal Corporation, Amritsar, the petitioner started the construction of the Mall and it was in full swing by April, 2007.
8. The respondents had approached the petitioner seeking purchase of commercial real-estate in furtherance to the respondents' intentions; the



petitioner offered them an opportunity to purchase a commercial property in the nature of a shop in their upcoming said project.

9. Accordingly, the respondents submitted an application dated 10th February, 2007 with the petitioner for provisional allotment of a Unit in the said project. Subsequently following mutual agreement and deliberations between the respondents and the petitioner, *vide* allotment letter dated 19th March, 2007, the respondents were allotted the Multiplex Unit on Fourth and Fifth Floor having an approximate area of 2601.263 sq. mt. at a basic sale consideration of INR 10,58,04,160.00. Additionally, an addendum dated 20th March 2007 to the allotment letter was also executed between the respondents and the petitioner which stipulated that upon receipt of 95% of the basic sale price for the said shop by the petitioner, the petitioner shall be liable to pay a sum of Rs. 9,84,199.00/- per month as monthly return in terms of the said addendum. The same was subjected to the Respondents/Allotted adherence to the allotment letter including the *force majeure* clause.

10. The Clause 26 (a) of the Allotment Agreement stipulated that the Petitioner shall complete the construction of the Unit/Commercial Complex within 36 months from the date of the signing of the Allotment Agreement with further reasonable extension of time for delivery of possession, subject to the other conditions and *force majeure*. It also provided that no claim by way of damages/compensation shall lie against the petitioner Company for delay in handing over the possession on account of any reason beyond the control of the Company. However, Clause 26 (e) further stipulated that in case, delay in construction of the Unit/Commercial Complex is attributable to the Company, the Company



would pay a sum at the rate of Rs. 10/- per sq. ft. of Super area per month for the period of delay.

11. The Archaeological Survey of India, Punjab (hereinafter referred to as “ASI”) issued letter to the petitioner as well as the landowners i.e. M/s Novelty Associates on the ground that the project in question was encroaching upon the regulated area of the monument of Maharaja Ranjit Singh Summer Palace, Company Bagh Complex, Amritsar, Punjab that was declared to be a monument of national importance. The petitioner issued Show-Cause Notice on April, 2007 by Archaeological Survey of India, Punjab Circle. The petitioner obtained the necessary permissions, approvals and licenses from the Municipal Corporation, Amritsar and after receiving the sanction of the Building Plan by the Municipal Corporation, Amritsar dated 25th May, 2006 the petitioner began the construction and development of the said Project.

12. That ASI directed to stop the construction of the said project at 15 meters whereas the Building Plan was approved by the Municipal Corporation, Amritsar, had sanctioned the height to be 30 meters and it was on the basis of the sanction of the building plan by the Municipal Corporation, Amritsar, that the petitioner had floated and advertised the proposed project at such a pertinent time. Archaeological Survey of India further directed the Municipal Corporation, Amritsar, to take necessary actions to stop the ongoing construction of the project, vide its letter dated 27th April, 2007 to the landowners. *Vide* the said letter, the ASI also directed the Municipal Corporation Amritsar not to sanction any building plan within the prohibited area without receiving a No-Objection Certificate from the ASI and further dictated the Municipal Corporation,



Amritsar to cancel the site plans accorded to the projects within the prohibited area. The same objection created hindrance and delay in development of the project. The petitioner in order to resume construction and to resolve the said issue pursued the ASI to obtain the requisite NOC. Subsequently the ASI, vide its letter dated 27th and 28th July, 2007, granted the NOC for construction only up to a height of 15 meters from the ground level.

13. The revised building plans to the Municipal Corporation Amritsar and after receiving assent to the revised building plans resumed the construction of the project. The construction was completed and the Completion Certificate dated 08th July, 2015 was issued by the Competent Authority *vide* letter dated 08th July, 2015 and subsequently, the possession was offered.

14. The matter was pursued vigorously by the petitioner before the Competent Authorities and finally after several representations and letters, the Competent Authority granted the permission on 22nd February, 2012 to construct the said project up to a height of 24 meters and additional 2 meters height for air conditioning plant and mumty etc. It is submitted that on account of the aforesaid objection by the Archeological Survey of India, Punjab the said Project remained stalled and the construction was at a standstill (with off and on construction) for a period of almost 60 months i.e. w.e.f. from April 2007 up until March 2012. It is submitted that the same was force-majeure as the delay was beyond the control of the Petitioner.

15. The respondent invoked arbitration vide legal notice dated 31st January 2013 as per Arbitration Clause 44 (b) of the Allotment Letter.



Subsequently, the respondent filed a petition under Section 11 of the Act, 1996 before this Court. The said petition was disposed of on the ground that the respondent is a resident of United Kingdom and thus, the dispute falls in the domain of International Arbitration and does not fall within the domain of the Domestic Arbitration. Subsequently, the respondent filed an application under Section 11 of the Act, 1996 was filed before the Hon'ble Supreme Court *vide* order dated 11th May 2015. On 15th May 2018, the Hon'ble Supreme Court suggested that the amount should be refunded by the petitioner to the respondent.

16. The Hon'ble Supreme Court referred the matter to Mediation Centre for settlement of the matter by mediation. The mediation report was sent by the Mediation Centre on 23rd August 2015 as per which the matter could not be settled and hence, was sent back to the Court for adjudication of the matter. On 17th September 2018, on petitioner's failure to refund the said amount to respondent and no settlement by way of mediation, the Hon'ble Supreme Court allowed the Application u/s 11 of Act, 1996 and appointed Sole Arbitrator in the matter.

17. Under Section 29 A (3) of Act, 1996 was allowed *vide* order dated 10th September 2019 and the time was extended by mutual consent for six months.

18. The Award was passed on 20th March 2020. Aggrieved by the Award the petitioner, challenged the Award dated 20th March 2020.

SUBMISSIONS

(On behalf of the petitioner)

19. Learned Senior Counsel appearing on behalf of the petitioner submitted that the time was not the essence of the aforesaid Allotment



Agreement and the respondent never made/gave notice making time the essence of the said Agreement.

20. It is submitted that the parties had entered into an Addendum to the aforesaid Allotment Agreement, according to which, the allottees including the respondents were entitled to an assured monthly return of Rs.9.84 lacs per month w.e.f. 29th November 2007, i.e. the date by which the said allottees had paid 95% of the total basic sale consideration till the date of the offer of possession.

21. It is further submitted that according to Clause 26 (e) of the Allotment Agreement the Company had to pay sum @ Rs. 10/- per sq. ft. of super area per month for the period of delay.

22. It is submitted that under Section 55 of the Indian Contract Act 1872, particularly the second part of the said provision – “Effect of such failure when time is not essential”, the Respondents could not have avoided/ terminated the Agreement and placed reliance on the judgment of the Supreme Court in **Banglore Development Authority vs. Syndicate Bank 2007 (6) SCC 711**.

23. It is submitted that the Completion Certificate in the present case had also been issued on 08th July 2015. It is further contended that the said Certificate was cancelled on 29th January 2016 and was immediately taken care of, by way of approaching the High Court of Punjab & Haryana vide its order dated 17th February 2016, wherein the stay was granted to the said cancellation, and ultimately the said certificate was restored on 31st July 2019.

24. It is submitted that in any event, the petitioner was entitled to the benefit of exclusion of the period between 03rd July 2008 to 22nd February



2012 in the total period starting from 02nd May 2008 i.e, the date of the Allotment Agreement and 16th July 2015 i.e. the date of the original offer of possession. It is submitted that hence, the delay was effective was only 42 months.

25. It is further submitted that the Learned Arbitrator has not given the benefit of the said period on the ground that the *force majeure* clause started after entering into the Contract however ASI intervention, was not subsequent but prior to the date of signing of the Agreement.

26. It is submitted that as per the evidence on record the crucial intervention of ASI for the purpose of the aforesaid *force majeure* event arose only with the cancellation of NOC by ASI which happened only on 03rd July 2008 which was after signing of the Agreement dated 02nd May 2008.

27. It is submitted that the Learned Arbitrator also wrongly held that the respondents were not informed of the developments of ASI interventions. It is submitted that the Learned Arbitrator ignored the crucial evidence of the Minutes of meetings dt. 14th March 2011 duly signed by respondent whereby it was agreed that permission to build/construct the multiplex would be sought.

28. It is contended that the Learned Arbitrator ignored the fact that the ASI had wrongly restrained the petitioner from raising the height beyond 15 mtrs and it is evident from the fact that it had allowed the petitioner to raise the construction till 26 mtrs.

29. It is submitted that the letter of termination dated 18th April 2013 was issued only by the present two Respondents. It is also an admitted position that the Allotment Agreement was executed by five co-allottees



including the present two respondents and 95% of the Basic Sale Consideration was paid by all the said five co-allottees.

30. It is submitted that the present respondents did not even seek to join the other three co-allottees as parties in the present Arbitration proceedings. It is submitted that the Learned Arbitrator while dealing with issue regarding the claim is bad for non-joinder of necessary parties, held that non-arraying the co-allottees is not fatal.

31. It is submitted that interest has been granted for the period between 01st May 2011 [i.e. the date post expiry of 36 months period – as provided in Clause 26(a) of the Agreement] and 20th March 2020 (i.e. the date of award). It is submitted that if the award upholding the termination and the consequent refund is upheld, the period between 03rd July 2008 and 22nd February 2012 and therefore, the period between 01st May 2011 and 22nd February 2012 has to be excluded. It is further submitted that period after 16th July 2015 and 20th March 2020 has to be excluded, as the petitioner had already made the offer of possession on 16th July 2015.

32. It is further submitted that the interest amount has to be reduced by an amount of Rs.2,85,71,431/-, i.e., the total assured monthly return paid by the petitioner to the allottees under the aforesaid Addendum. It is submitted that the termination of the Allotment Agreement is upheld, the Addendum to the same also ceases to exist automatically and that too from the very inception. Therefore, any benefit which the respondent had enjoyed under the said Addendum, has to be returned back in favor of the petitioner as per the principle of Section 64 of the Contract Act.

33. It is submitted that since the termination of the Allotment Agreement vide notice dated 18th April 2013, is patently illegal, the



consequences of the same is that the respondents were in breach of their obligations to take over possession of the multiplex once the offer of possession was made on 16th July 2015. Therefore, in terms of Clause 26(d) of the Allotment Agreement, the respondents were deemed to have taken possession and accordingly, were liable to pay maintenance charges and other taxes, levies and outflows due to said unit as per the said provision from the date of offer of possession.

34. It is submitted that though the original offer of possession was made on 16th July 2015, the said liability, in present peculiar facts would arise only w.e.f. 29th June 2016 i.e., the date of the renewed offer of possession once the cancellation of the completion certificate was stayed by the Punjab and Haryana High Court *vide* order dated 17th February 2016.

35. It is submitted that accordingly, the respondents were liable to pay maintenance charges and other taxes, levies, outflows on account of the said unit for any other purpose under the said provision.

36. It is contended that the learned Arbitrator has dismissed the said principal counter claim on ground of limitation , the said finding is ex-facie perverse given the fact that the counterclaim was filed on 04th April 2019 and therefore, within three years of 19th June 2016.

37. It is submitted that in any event, the aforesaid payment under Clause 26(d) were recurring liability and therefore, the exact and complete liability can only be ascertained after the said breach of Clause 26(d) had been taken care of by the respondents. Thus, the said payment claim is also a case of continuing cause of action in terms of Section 22 of the Limitation Act, 1963.



38. It is submitted that while deciding issue No.2 and other issues, the Learned Arbitrator has repeatedly held *“even today it is not possible to ascertain as to whether the respondent has been issued the Completion Certificate by the Corporation which is valid and can be acted upon. The respondent withheld all material information in this regard, though the law requires the party to adduce best evidence to substantiate its case. In such an eventuality even adverse inference can be drawn against such a party.”* It is submitted in this regard that no legally sustainable or admissible evidence or proof was brought on record by the respondents to this effect.

39. It is further submitted that merely on the basis of the copies of some wrong and unsubstantiated Newspapers reports filed by the respondents, the Learned Arbitrator has held that it was not clear whether the Unit was ready for possession even on that day. It is contended that the Learned Arbitrator failed to appreciate that the petitioner had proposed to summon, examine, and to produce documents from the ASI, the Municipal Corporation, Amritsar, and from the Police Authorities. However, the Learned Arbitrator himself, vide his order dated 23rd December 2019, dispensed with the examination of witnesses proposed to be summoned by the petitioner from the ASI, the Municipal Corporation, Amritsar, and from the Police Authorities on the basis of the statement by the counsel for the respondents that she would not insist for proof of such documents. It is submitted that no issue was framed in this regard by the Learned Arbitrator, nor pressed by the respondents.

(On behalf of respondent)

40. Learned Counsel for the respondent contends that the Award



passed by the Learned Arbitrator is well- reasoned and has considered all the material on record. Therefore, the Award does not warrant interference under Section 34 of the Act, 1996.

41. It is submitted that since the respondents are residents of the United Kingdom and the present dispute amounts to International Commercial Arbitration. Under Section 34 of the Act, 1996 the ground of patent illegality is not applicable to International Commercial Arbitration, hence the Award challenged in the present petition cannot be challenged on the ground of patent illegality.

42. It is submitted that as per Clause 19 of the Allotment Agreement the, timely payment of installment was the essence of the allotment which was admittedly duly complied with by the respondents. It is further submitted that *vide* clause 21 of the Agreement, in the event of failure on the part of the respondent to perform their obligation the petitioner had the authority to cancel the allotment by forfeiting earnest money with interest and in exceptional circumstances the petitioner had the discretion to condone the delay in payment by charging penal interest @ 18% p.a. on the amount outstanding and @ 24% p.a. thereafter, on the delayed payment. It is submitted that as per Addendum Letter petitioner agreed to pay monthly return upon receipt of 95% of the sale consideration. It is further submitted that the Allotment Agreement and Addendum are one-sided contracts in favor of the petitioner with the respondents getting no opportunity to amend them.

43. It is submitted that the timely payment of installments and any other charges were one of the conditions of the Contract in the Allotment Letter and the Addendum to the Allotment Letter. It is submitted that the



petitioner has accepted in all the contracts that 95% of the basic sale price was paid and agreed to pay monthly returns as a result.

44. It is submitted that petitioner agreed to construct the unit/commercial complex within 36 months from the date of signing the Allotment letter and Addendum to the Allotment letter.

45. It is contended that in respect of the Multiplex, the Allotment Letters and Addendum were both signed on the 2nd May 2008. As a result it was agreed possession would be handed over by the 1st May 2011. It is submitted that as per Exhibit CW1/19 the meeting of the 14th May 2010 it was agreed completion of the delayed mall would be completed by February 2011 and possession would be handed over.

46. It is submitted that agreed monthly returns would be paid for February and March 2010. It is submitted as per Exhibit CW1/20 – the as per minutes of the meeting dated 19th January 2011 it was agreed to pay the principal amount plus the assured return till date of actual payment will be paid by Omaxe to the investors on or before 05th February 2011 in full and final settlement as due.

47. It is submitted that the respondents have fully complied with their obligation in the allotment letter and addendum but the petitioner has failed to honor their obligations by failing to construct within the time limits agreed upon failure to pay monthly returns from the 1st March 2010 on the Multiplex and all other units.

48. It is submitted that after the petitioner's failures to pay the monthly returns from 1st March 2010 and their failure to construct within the agreed time limits the respondents as per CW1/21 of documents sent a legal notice on 18th April 2013 for a refund of the entire amount in



accordance with law and invoked the arbitration clause.

49. It is submitted that the claim was for the recovery of the whole amount as mentioned in the claim and no occasion ever arose where possession could have been lawfully given by the petitioner to the respondents.

50. It is submitted that petitioner have accepted in evidence that they had their own construction and mining team at the site of the construction of Omaxe Novelty Mall since at least the year 2006 and that they are experienced builders and have been involved in the construction of numerous projects across India since at least 1989. The Municipal Corporation Amritsar was never going to be conducting any mining operation or construction at the site and only Omaxe Ltd were going to be conducting construction operations or mining operations at the site.

51. It is submitted that Omaxe Ltd never had a licence from the ASI as was required under Rule 34 of the ‘Ancient Monuments and Archaeological sites and remains rules 1959’ which states –“*Application for a licence – Every person intending to undertake any mining operation or any construction in a regulated area shall apply to the Director General in form VI at least 3 months before the commencement of such an operation or construction*”.

52. It is submitted that petitioner failed in the exercise of due diligence since an examination of the map of the area of construction that the site at Omaxe Novelty mall Amritsar fell in the regulated area of Maharaja Ranjit Singh Summer Palace. The Summer Palace was across the road in an area directly opposite the corner of Lawrence Road and Mall Road from the site of construction was at distance of 127 meters away from the



site of construction and petitioner believed it was a distance of 500 metres away which was a glaring error on their part.

53. It is submitted that Novelty Sweets, the owners of the site according to their website have been established since 1950 at the site of the construction of Omaxe Novelty Mall and would have been well aware of the Summer Palace and received notices from the ASI through the years petitioner had prior knowledge to the 25th April 2007 of the illegal and unauthorized construction in the regulated area of Rambagh.

54. It is submitted that petitioner built illegally on public land and the cancellation of the Completion Certificate for Omaxe Novelty mall, Amritsar by the Commissioner of the Municipal Corporation of Amritsar on the 29th January 2016 for obtaining the completion certificate was for misrepresentation by the respondents.

55. It is submitted that after the show cause notice was issued by the ASI against the petitioner the project remained stalled and stayed by the order until 22nd February 2012 due to the action of the respondents in failing to honour local laws and other regulations for the construction of buildings.

56. It is submitted that the respondent paid 95% of amount on 30th October 2007 *vide* receipt. It is further submitted that the assured return was paid only till January 2010. But the Learned Arbitrator has only allowed refund of principal amount with interest from @ 14% simple interest from 01st May 2011 till the date of award under Section 31(7)(b) @ 12% from the date of award till the date of realization.

57. It is submitted that no interest has been awarded from date of payment which was October 2007 though *vide* CW1/20 at the petitioner



Company agreed to pay the principal amount plus the assured return till date of actual payment on or before 05th February 2011 as full and final settlement as a final decision. It is submitted that though as per the Allotment Letter under clause 21 of the Agreement in case of delay in payment, Omaxe can condone the delay by charging penal interest @18% p.a. on the amount outstanding up to one month delay and @24% p.a. thereafter on the delayed outstandings. The respondent relies upon judgment of the Hon'ble Supreme Court titled **UHL Power Company Limited v. State of Himachal Pradesh (2022) 4 SCC 116** wherein award of compound interest was restored.

58. It is hence, submitted that petitioner is liable to be dismissed.

ANALYSIS AND FINDING

59. I have heard learned counsel for the parties at length, who have taken me through the award passed by the learned Arbitral Tribunal, provisions of the contract executed between the parties and the correspondences exchanged between them as well as the relevant documents.

Scope and Spirit of Section 34 under Arbitration and Conciliation Act, 1996

60. Before adjudicating upon the merits of the case, it is essential to recapitulate the idea, purpose, goal and objective of the Arbitration Act as well as Section 34 of the Act to understand the implications the provisions therein have on the powers and jurisdiction of this Court. Section 34(1) of the Arbitration and Conciliation Act, 1996 is thus reproduced as follows;

““34. *Application for setting aside arbitral award.*—



(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application establishes on the basis of the record of the arbitral tribunal that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—



(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award: Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.] ...”

61. The Law Commission of India in its 246th Report has also elaborated upon the background of introducing Section 34 of the Arbitration Act and laid down as under:-

“3. The Arbitration and Conciliation Act, 1996 (hereinafter "the Act") is based on the UNCITRAL Model law on International Commercial Arbitration, 1985 and the UNCITRAL Conciliation Rules, 1980. The Act has now been in force for almost two decades, and in this period of time, although arbitration has fast emerged as a frequently chosen alternative to litigation, it has come to be afflicted with various problems including those of high costs and delays, making it no better than either the earlier regime which it was intended to replace; or to litigation, to which it intends to provide an alternative. Delays are inherent in the arbitration process, and costs of arbitration can be tremendous. Even though courts play a pivotal role in giving finality to certain issues which arise before, after and even during an arbitration, there exists a serious threat of



arbitration related litigation getting caught up in the huge list of pending cases before the courts. After the award, a challenge under Section 34 makes the award inexecutable and such petitions remain pending for several years. The object of quick alternative disputes resolution frequently stands frustrated.

4. There is, therefore, an urgent need to revise certain provisions of the Act to deal with these problems that frequently arise in the arbitral process. The purpose of this Chapter is to lay down the foundation for the changes suggested in the Report of the Commission. The suggested amendments address a variety of issues that plague the present regime of arbitration in India and, therefore, before setting out the amendments, it would be useful to identify the problems that the suggested amendments are intended to remedy and the context in which the said problems arise and hence the context in which their solutions must be seen.

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25. Similarly, the Commission has found that challenges to arbitration awards under Sections 34 and 48 are similarly kept pending for many years. In this context, the Commission proposes the addition of Sections 34(5) and 48(4) which would require that an application under those sections shall be disposed of expeditiously and in any event within a period of one year from the date of service of notice. In the case of applications under Section 48 of the Act, the Commission has further provided a time-limit under Section 48(3), which mirrors the time-limits set out in Section 34(3), and is aimed at ensuring that parties take their remedies under this section seriously and approach a judicial forum expeditiously, and not by way of an afterthought.”

62. The Hon'ble Supreme Court regarding the scope of Section 34 of the Act, 1996 has held in the judgment of ***Reliance Infrastructure Ltd. v. State of Goa*** 2023 SCC OnLine SC 604 as under:

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47. Having regard to the contentions urged and the issues raised, it shall also be apposite to take note of the principles enunciated by this Court in some of the relevant decisions cited by the parties on the scope of challenge to an arbitral award under Section 34 and the scope of appeal under Section 37 of the Act of 1996.

48. In *MMTC Limited (supra)*, this Court took note of various decisions including that in the case of *Associate Builders (supra)* and expounded on the limited scope of interference under Section 34 and further narrower scope of appeal under Section 37 of the Act of 1996, particularly when dealing with the concurrent findings (of the Arbitrator and then of the Court). This Court, *inter alia*, held as under:—

“11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the “fundamental policy of Indian law” would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and *Wednesbury* [*Associated Provincial Picture Houses v. Wednesbury Corpn.*, [1948] 1 K.B. 223 (CA)] reasonableness. Furthermore, “patent illegality” itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

12. It is only if one of these conditions is met that the



Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]. Also see ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705]; Hindustan Zinc Ltd. v. Friends Coal Carbonisation [Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445]; and McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181]) 13. It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian Page 20 of 61 public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2-A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappraisal of evidence.

14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot



travel beyond the restrictions laid down under Section 34. In other words, the court 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. Thus, it is evident 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, this Court must be extremely cautious and slow to disturb such concurrent findings.”

49. In the case of Ssangyong Engineering (supra), this Court has set out the scope of challenge under Section 34 of the Act of 1996 in further details in the following words:—

“37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the Page 21 of 61 matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of



Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.”

50. The limited scope of challenge under Section 34 of the Act was once again highlighted by this Court in the case of



PSA SICAL Terminals (supra) and this Court particularly explained the relevant tests as under:—

“43. It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and reappreciate the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act. The interference would be so warranted when the award is in violation of “public policy of India”, which has been held to mean “the fundamental policy of Indian law”. A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Section 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. The ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. It is only such arbitral awards that shock the conscience of the court, that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, reappreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award.

44. A decision which is perverse, though would not be a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. However, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.

45. To understand the test of perversity, it will also be



appropriate to refer to paragraph 31 and 32 from the judgment of this Court in *Associate Builders (supra)*, which read thus:

“31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where: (i) a finding is based on no evidence, or(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or(iii) ignores vital evidence in arriving at its Page 24 of 61 decision, such decision would necessarily be perverse. 32. A good working test of perversity is contained in two judgments. In *Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons* [1992 Supp (2) SCC 312], it was held : (SCC p. 317, para 7) “7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.””

51. In *Delhi Airport Metro Express (supra)*, this Court again surveyed the case-law and explained the contours of the Courts' power to review the arbitral awards. Therein, this Court not only re-affirmed the principles aforesaid but also highlighted an area of serious concern while pointing out “a disturbing tendency” of the Courts in setting aside arbitral awards after dissecting and re-assessing factual aspects. This Court also underscored the pertinent features and scope of the expression “patent illegality” while reiterating that the Courts do not sit in appeal over the arbitral award. The relevant and significant passages of this judgment could be usefully extracted as under:-



“26. A cumulative reading of the UNCITRAL Model Law and Rules, the legislative intent with which the 1996 Act is made, Section 5 and Section 34 of the 1996 Act would make it clear that judicial interference with the arbitral awards is limited to the grounds in Section 34. While deciding applications filed under Section 34 of the Act, Courts are mandated to strictly act in accordance with and within the confines of Section 34, refraining from appreciation or reappreciation of Page 25 of 61 matters of fact as well as law. (See Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd. [Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455 : (2020) 1 SCC (Civ) 570], Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd. [Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd., (2022) 1 SCC 75] and Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306].)

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28. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by Courts while examining the validity of the arbitral awards. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the Courts. There is a disturbing tendency of Courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That



apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.

29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression “patent illegality”. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression “patent illegality”. What is prohibited is for Courts to reappraise evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression “patent illegality”.

30. Section 34(2)(b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict



with public policy of India, the award is liable to be set aside. Explanation (1), amended by the 2015 Amendment Act, clarified the expression “public policy of India” and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice.

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42. The Division Bench referred to various factors leading to the termination notice, to conclude that the award shocks the conscience of the court. The discussion in SCC OnLine Del para 103 of the impugned judgment [DMRC v. Delhi Airport Metro Express (P) Ltd., 2019 SCC OnLine Del 6562] amounts to appreciation or reappraisal of the facts which is not permissible under Section 34 of the 1996 Act. The Division Bench further held [DMRC v. Delhi Airport Metro Express (P) Ltd., 2019 SCC OnLine Del 6562] that the fact of AMEL being operated without any adverse event for a period of more than four years since the date of issuance of the CMRS certificate, was not given due importance by the Arbitral Tribunal. As the arbitrator is the sole Judge of the quality as well as the quantity of the evidence, the task of being a Judge on the evidence before the Tribunal does not fall upon the Court in exercise of its jurisdiction under Section 34. [State of Rajasthan v. Puri Construction Co. Ltd., (1994) 6 SCC 485] On the basis of the issues submitted by the parties, the Arbitral Tribunal framed issues for consideration and answered the said issues. Subsequent events need not be taken into account.”

(emphasis supplied)

52. In the case of Haryana Tourism Ltd. (supra), this Court yet again pointed out the limited scope of interference under Sections 34 and 37 of the Act; and disapproved interference



by the High Court under Section 37 of the Act while entering into merits of the claim in the following words:

“8. So far as the impugned judgment and order passed by the High Court quashing and setting aside the award and the order passed by the Additional District Judge under Section 34 of the Arbitration Act are concerned, it is required to be noted that in an appeal under Section 37 of the Arbitration Act, the High Court has entered into the merits of the claim, which is not permissible in exercise of powers under Section 37 of the Arbitration Act. 9. As per settled position of law laid down by this Court in a catena of decisions, an award can be set aside only if the award is against the public policy of India. The award can be set aside under Sections 34/37 of the Arbitration Act, if the award is found to be contrary to : (a) fundamental policy of Indian Law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal. None of the aforesaid exceptions shall be applicable to the facts of the case on hand. The High Court has entered into the merits of the claim and has decided the appeal under Section 37 of the Arbitration Act as if the High Court was deciding the appeal against the judgment and decree passed by the learned trial Court. Thus, the High Court has exercised the jurisdiction not vested in it under Section 37 of the Arbitration Act. The impugned judgment and order passed by the High Court is hence not sustainable.” 53. As regards the limited scope of interference under Sections 34/37 of the Act, we may also usefully refer to the following observations of a 3-Judge Bench of this Court in the case of UHL Power Company Limited v. State of Himachal Pradesh, (2022) 4 SCC 116:— “15. This Court also accepts as correct, the view expressed by the appellate court that the learned Page 29 of 61 Single Judge committed a gross error in reappreciating the findings returned by the Arbitral Tribunal and taking an entirely different view in respect of the interpretation of the relevant clauses of the implementation agreement



governing the parties inasmuch as it was not open to the said court to do so in proceedings under Section 34 of the Arbitration Act, by virtually acting as a court of appeal.

16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed.””

Therefore, it held by the said judgment that the Court may set aside an arbitral award on very limited grounds under Section 34 of the Act, 1996. Even if a contrary view is possible on the facts established before the Arbitral Tribunal, the Court cannot, in the absence of any compelling reason, interfere with the view taken by the arbitrators. The Court does not seat in appeal over the award made by the Tribunal. Hence, the scope of interference is very limited under Section 34 of the Act, 1996. Keeping these principles in mind, I will now examine the present case.”

63. The repeal of Arbitration Act of 1940 by way of Arbitration Act, 1996, the legislature sought to achieve the objective of reducing the supervisory role of courts in arbitration proceedings. The amendment of Section 34 was also to have the Courts readily and expeditiously adjudicate upon any proceedings arising out of arbitration proceedings. The challenge to an Award also must be disposed of as expeditiously possible by the Courts.

64. It is clear that the speed and efficiency of disposal of disputes between parties are few of the substantial and key purposes of the introduction, development and promotion of resolving disputes by way of alternate mechanisms of dispute resolution.



65. Hence, the objective, goal and purpose of the Act as well as the intention of the legislature have to be given due consideration while adjudicating a petition under Section 34 of the Arbitration Act.

Scope of Patent Illegality in International Arbitration

66. The law regarding patent illegality and public policy of India in no more *res integra* and has been authoritatively clarified by the Hon'ble Supreme Court in a number of judicial pronouncements. In ***Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644***, the Hon'ble Supreme Court dealt with a challenge to a foreign award under Section 7 of the Foreign Awards (Recognition and Enforcement) Act, 1961. Though the Arbitration Act has repealed the Foreign Awards Act, the said judgment is of great importance in understanding the parameters of judicial review when it comes to either foreign awards or international commercial arbitration seated in India as Section 7 of the Foreign Awards Act contained grounds that were borrowed from Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the "New York Convention"), which is almost in the same terms as Sections 34 and 48 of the Arbitration Act.

67. After referring to the New York Convention, the Hon'ble Supreme Court delineated the scope of inquiry of grounds under Sections 34/48 (equivalent to the grounds under Section 7 of the Foreign Awards Act, which was considered by the Court), and held:

“34. Under the Geneva Convention of 1927, in order to obtain recognition or enforcement of a foreign arbitral award, the requirements of clauses (a) to (e) of Article I had to be fulfilled and in Article II, it was prescribed that even if the conditions laid down in Article I were fulfilled



recognition and enforcement of the award would be refused if the Court was satisfied in respect of matters mentioned in clauses (a), (b) and (c). The principles which apply to recognition and enforcement of foreign awards are in substance, similar to those adopted by the English courts at common law. (See: Dicey & Morris, The Conflict of Laws, 11th Edn., Vol. I, p. 578). It was, however, felt that the Geneva Convention suffered from certain defects which hampered the speedy settlement of disputes through arbitration. The New York Convention seeks to remedy the said defects by providing for a much more simple and effective method of obtaining recognition and enforcement of foreign awards. Under the New York Convention the party against whom the award is sought to be enforced can object to recognition and enforcement of the foreign award on grounds set out in sub-clauses (a) to (e) of clause (1) of Article V and the court can, on its own motion, refuse recognition and enforcement of a foreign award for two additional reasons set out in sub-clauses (a) and (b) of clause (2) of Article V. None of the grounds set out in sub-clauses (a) to (e) of clause (1) and sub-clauses (a) and (b) of clause (2) of Article V postulates a challenge to the award on merits. XXXXXX 37. In our opinion, therefore, in proceedings for enforcement of a foreign award under the Foreign Awards Act, 1961, the scope of enquiry before the court in which award is sought to be enforced is limited to grounds mentioned in Section 7 of the Act and does not enable a party to the said proceedings to impeach the award on merits.”)]”

68. In the judgment of ***Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI) [2019] 15 SCC 131***, the Hon’ble Supreme Court has set out the scope of challenge under Section 34 of the Act of 1996 in case of international commercial arbitration in further details as follows:—

“37. Insofar as domestic awards made in India are



concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.”

69. At the outset, it is observed that the ground of patent illegality as enshrined in Section 34(2A) is not available for an award arising out of international commercial arbitrations. It is evident from the record in this case that Arbitral Award impugned has arisen out of an international commercial arbitration given the fact that the Respondents/Claimants are overseas citizens of India under the provisions of Section 7A of the Citizenship Act, 1955. The respondents are residents of UK and the present dispute falls under the domain of International Commercial Arbitration. The record further reveals that arbitral proceedings between the parties were initiated on a reference by the Hon'ble Supreme Court of India under Section 11 of the Act, 1996. Hence, the ground of patent illegality is not available to the petitioner in this case. In light of the foregoing, all that remains is to deal with the question as to whether the impugned award or any part thereof is liable to be set aside on the ground enshrined under Section 34(2) of the Act, 1996.

70. The following issues framed by the Learned Arbitrator in the Award are as follows:



- “(1) Whether the Respondent failed to honour the local laws and other requirements for construction of buildings?
 (2) Whether the Respondent breached the terms and conditions of the contract?
 (3) Whether time was the essence of the Allotment letter Agreement? If so, its effect?
 (4) Whether the addendum to the allotment letter/agreement is a separate agreement?
 (5) Whether the claims raised by the Claimants are time-barred?
 (6) Whether the non-completion of the Project in the time stipulated in the Agreement was due to force-majeure?
 (7) Whether the present statement or claim is bad for non-joinder or necessary parties?
 (8) Whether Claimant/Respondent is entitled for the reliefs claimed?”*

71. The instant arbitral award was challenged by the petitioner mainly on the four ground firstly whether there is a breach of Contract and whether the non- completion of the project falls within the domain of *force majeure*, secondly whether the claims raised by the respondent (in the present petition) are time-barred, thirdly present statement or claim is bad for non-joinder or necessary parties and fourthly whether the respondent (in the present petition) is entitled for the reliefs claimed.

ISSUE NO. 1 & 6

72. Issues no. 1 and 6 are inter-connected and were dealt with simultaneously by the Learned Arbitrator. The issues pertains to whether there has been a violation of the local laws and whether such non – completion of the project falls within the domain of the “*force majeure*”. The relevant portion of the Award is reproduced as follows:



Issue no. 1 Whether the petitioner (in the present petition) failed to honour the local laws and other requirements for construction of buildings?

Issue No. 6- Whether the non-completion of the Project in the time stipulated in the Agreement was due to force-majeure?

"38. In the instant case, the ASI had intervened and informed the Respondent Company that NOC was required from ASI for the construction and the Respondent Company applied for permission prior to the allotment letter and addendum dated 2.05.2008. Shri Joginder Singh Nijjar in his cross-examination in reply to Question no.99 deposed as under:

"There was never Force majeure. Omaxe built illegally on public land and lacked capacity. Omaxe received the notice from the ASI on 8.04.2007, and continued to take bookings and sale considerations. Omaxe did not exercise due-diligence and process of law as the area fell within the prohibited area of Protected Monuments.... and lastly Force-Majeure is applicable in the situation where after the contract is made, the Act becomes enforceable"

39. Section 2 (ha) of Act 1958 defines prohibited area as any area specified or declared to be prohibited area under Section 20A. Section 19 provides that no person shall construct my building within the protected area without the permission or the Central Government. Section 20A(4) imposes restrictions for grant of permission f()r construction in the prohibited area. Rule 10 of the Rules 1959 imposes restrictions on every person to undertake any construction within a protected area except under and in accordance with a permission granted in this behalf by the Central Government. The rule further provides to make an Application to the Central Government at least three months



before the commencement of the construction. Rule 34 provides that every person intending to undertake any construction in a regulated area shall apply to the Director-General in form VI at least three months before the date of commencement of such operation or construction.

40. The maintenance of monuments has been considered within the ambit of Articles 21, 25, 26, 49, and 51 A or the Constitution of India as right to life includes right to mental and intellectual growth there is a Constitutional obligation on the Government to protect and preserve the ancient monument (vide: Sarika v. Administrator, Shri Mahakaleshwar Mandir Committee, Ujjain, (2018) 17 SCC 112).

41. The law must be given effect within the sphere of its operation. The court cannot issue direction contrary to law or direct a statutory authority to act in convention of law. If law behaves lawlessly, social justice becomes a judicial hoax. Rule of law requires the court to direct to do what has been injected by law. Law is a social mechanism to be used for the advancement of the society. It should not be allowed to be a dead weight on society.

"The law should not be seen to sit by limply, while those who defy it go free and those who seek its protection lose hope". Where a prohibition is enacted in public interest, its violation should not be treated lightly. (vide; VD. Dhanwatey v. Commissioner of Income Tax, M.P. Nagpur, AIR 1968 SC 683; Karnataka state road corporation v. Ashrafulla Khan, AIR 2002 SC 629; Zahiro Habibulla Sheikh (5) & Ans. v. State of Gujrat & Ors. (2006) 3 SCC 37; and Manish Goel v. Rohini Goel ,AIR 2010 SC 1099).

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49. The Respondent was having regular correspondence with ASI prior to the date of Agreement. It is not the case



where the ASI intervened subsequent to the date of signing the contract by the parties. In spite of the intervention by the ASI, the Respondent continued the booking and taking advances from the intended buyers without disclosing the fact of intervention and stipulating the time of completion of the construction. Hence, the Respondent cannot raise the issue of force majeure, in case the ASI did not permit the Respondent to raise the construction for five years. The plea taken by the Respondent that it was not aware of the legal requirement of obtaining the NOC from the ASI is not factually correct and thus untenable.

The issues are decided against the Respondent.”

73. The Tribunal has held that correspondence between parties reveals that the plan for construction was sanctioned by the Corporation without having NOC from the ASI which was mandatorily required. Moreover, Corporation had been informed by the ASI time and again regarding the same that it had no jurisdiction to consider the approval of the essential plan, without having an NOC from the ASI. The petitioner was having regular correspondence with ASI prior to even entering into the Agreement. The petitioner continued booking despite knowing it has not taken the requisite sanction required and even did not disclose the fact to the intended buyers.

74. The term “*force majeure*” has been defined in Black’s Law Dictionary, as ‘*an event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g. floods and hurricanes) and acts of people (e.g. riots, strikes, and wars) - Also termed force majesture, viz majour; superior force. Cf. ACT OF GOD; vis MAJOR.*’. In such contracts, the determination as to whether or not an



event is a *force majeure* event will be if such an event could be contemplated as per the course of an event or if it was something extraordinary.

75. This Court has relied on the judgment of the Hon'ble Supreme Court in "*South East Asia Marine Engg. & Constructions Ltd. (SEAMEC LTD.) v. Oil India Ltd., (2020) 5 SCC 164*" regarding the *force majeure* held as follows:

"19. The High Court, in its reasoning, suggests that Clause 23 is akin to a force majeure clause. We need to understand the utility and implications of a force majeure clause. Under Indian contract law, the consequences of a force majeure event are provided for under Section 56 of the Contract Act, which states that on the occurrence of an event which renders the performance impossible, the contract becomes void thereafter. Section 56 of the Contract Act stands as follows:

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

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

*20. When the parties have not provided for what would take place when an event which renders the performance of the contract impossible, then Section 56 of the Contract Act applies. When the act contracted for becomes impossible, then under Section 56, the parties are exempted from further performance and the contract becomes void. As held by this Court in *Satyabrata Ghose v. Mugneeram Bangur & Co. [Satyabrata Ghose v. Mugneeram Bangur & Co., AIR 1954 SC 44] : (AIR p. 48, para 15)**



“15. These differences in the way of formulating legal theories really do not concern us so long as we have a statutory provision in the Indian Contract Act. In deciding cases in India, the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in Section 56 of the Contract Act, taking the word “impossible” in its practical and not literal sense. It must be borne in mind, however, that Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.”

(emphasis supplied)

However, there is no doubt that the parties may instead choose the consequences that would flow on the happening of an uncertain future event, under Section 32 of the Contract Act.

*21. On the other hand, the common law at one point interpreted the consequence of such frustration to fall on the party who sustained loss before the frustrating event. The best example of such an interpretation can be seen in the line of cases which came to be known as “coronation cases”. In *Chandler v. Webster* [*Chandler v. Webster*, (1904) 1 KB 493 (CA)] , Mr Chandler rented space from Mr Webster for viewing the coronation procession of King Edward VII to be held on 26-6-1902. Mr Chandler had paid part-consideration for the same. However, due to the King falling ill, the coronation was postponed. As Mr Webster insisted on payment of his consideration, the case was brought to the court. The Court of Appeals rejected the claims of both Mr Chandler as well as Mr Webster. The essence of the ruling was that once frustration of contract happens, there cannot be any enforcement and the loss falls on the person who sustained it before the force majeure took place.*

*22. This formulation was overruled by the House of Lords in the historic decision of *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [*Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, 1943 AC 32 : 1942 UKHL 4 (HL)] , wherein the harsh consequences*



of frustration as per the old doctrine were moderated by the introduction of the law of restitution. Interestingly, Lord Shaw in Cantiare San Rocco SA (Shipbuilding Co.) v. Clyde Shipbuilding and Engg. Co. Ltd. [Cantiare San Rocco SA (Shipbuilding Co.) v. Clyde Shipbuilding and Engg. Co. Ltd., 1924 AC 226 (HL)] , had observed that English law of leaving the loss to where it fell unless the contract provided otherwise was, he said, appropriate only “among tricksters, gamblers and thieves”. The UK Parliament took notice of the aforesaid judgment and legislated the Law Reform (Frustrated Contracts) Act, 1943.”

76. In the judgment of Bombay High Court in ***Deluxe Caterers Pvt. Ltd.v. Narayani Associates and Others*** 2023 SCC OnLine Bom 415 held as follows:

“22. The Black's Law Dictionary (8th Edition) defines force majeure to mean an event or effect that can be neither anticipated nor controlled which would include both, the acts of nature and acts of people. It also defines force majeure clause, being a contractual provision allocating risk performance became impossible or impracticable. It would be relevant to note these definitions which are as follows:—

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Force-majeure clause. A contractual provision allocating the risk if performance becomes impossible or impracticable, esp. as a result of an event or effect that the parties could not have anticipated or controlled. [Cases : Contracts - 309(1). C.J.S. Contracts - 520-522, 524]”

23. Advanced Law Lexicon ‘P Ramanatha Aiyar’ describes “force majeure” as under:

“Force majeure. Events outside the control of the parties and which prevent one or both of the parties from performing their contractual obligations.



A contract provision that stipulates the unforeseen events-wars, Acts of God, certain strikes-that will excuse a party from its duty to perform the contract.

Standard clause in a contract that absolves either of the parties of blame for non-fulfillment of obligations caused by events beyond their control (such as earthquakes, floods or acts of war).

Irresistible force or compulsion; circumstance beyond one's control. (See 48 Mad. 538 : 87 IC 68 : AIR 1925 Mad 626 : 48 Mad LJ 374)

... ..

A contractual provision allocating the risk if performance becomes impossible or impracticable as a result of an event or effect that the parties could not have anticipated or controlled. (Black, 7th Edn., 1999)”

24. In Dhanrajamal Gobindram v. Shamji Kalidas and Co.3, the Supreme Court considered as to what would be meant by force majeure. On analysis of the rulings on the subject it was observed that where reference is made to “force majeure”, the intention is to save the performing party from the consequences of anything over which he has no control. Mr. Justice M. Hidayatullah speaking for the Bench observed thus:

“17. McCardie J. in Lebeaupin v. Crispin ([1920] 2 K.B. 714), has given an account of what is meant by “force majeure” with reference to its history. The expression “force majeure” is not a mere French version of the Latin expression “vis major”. It is undoubtedly a term of wider import. Difficulties have arisen in the past as to what could legitimately be included in “force majeure”. Judges have agreed that strikes, breakdown of machinery, which, though normally not included in “vis major” are included in “force majeure”. An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to “force majeure”, the intention is to



save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to “force majeure”, and even if this be the meaning, it is obvious that the condition about “force majeure” in the agreement was not vague. The use of the word “usual” makes all the difference, and the meaning of the condition may be made certain by evidence about a force majeure clause, which was in contemplation of parties.”

77. The Hon’ble Supreme Court in the judgment of **NBCC (India) Ltd. v. Shri Ram Trivedi, (2021) 5 SCC 273** held that delay in handing over the possession of the building does not constitute “Force- Majeure ”as follows:

"16. Similarly, there is absolutely no substance in the force majeure defence. The appellant has alleged that a dispute with the contractor over termination and a boundary wall dispute with neighbouring landowners constituted a force majeure condition under Clause 20 of the allotment letter. We find no merit in this argument as the appellant, being an experienced developer, must be conscious of routine delays caused by business exigencies. This would not frustrate the contract or absolve the appellant of the obligations assumed under the terms of the agreement. Similar delays were rejected as force majeure grounds by a three-Judge Bench of this Court in DLF Home Developers Ltd. v. Capital Greens Flat Buyers Assn. [DLF Home Developers Ltd. v. Capital Greens Flat Buyers Assn., (2021) 5 SCC 537] where the Court noted : (SCC pp. 540-41, para 7)

“7. At the outset, we must deal with the force majeure defence. NCDRC has carefully evaluated the basis on which the defence was set up and has come to the conclusion that there is no cogent evidence in regard to the nature of the delay and the reasons for the delay in the approval of the building plans. Quite apart from this finding of fact, it is evident that a delay in the approval of building plans is a normal incident of a construction project. A developer in the



position of the appellant would be conscious of these delays and cannot set this up as a defence to a claim for compensation where a delay has been occasioned beyond the contractually agreed period for handing over possession. As regards the stop work orders, there is a finding of fact that these were occasioned by a succession of fatal accidents which took place at the site and as a result of the failure of the appellant to follow safety instructions. This is a pure finding of fact. There is no error of law or fact. Hence, we find no substance in the force majeure defence.”

17. We, accordingly, uphold the principal findings of NCDRC in regard to the entitlement of the respondent to receive compensation for the delayed handing over of possession. The force majeure defence raised by the appellant was justifiably rejected by NCDRC. The respondent was entitled to be compensated for the delay of the appellant for which an appropriate direction for interest is necessary. However, as indicated above, the order [Shriram Trivedi v. National Building Construction Corpn. Ltd., 2019 SCC OnLine NCDRC 339 (NCDRC)] of NCDRC in regard to the rate of interest and the date from which it becomes payable has to be modified.”

78. This Court is of the view as per Section 56 of the Contract Act as per the said Section the *force majeure* is an unprecedented event. The petitioner was already in the knowledge of the said event and therefore, the event cannot be covered under the garb of *force majeure*. Since, even before entering into Contract with the petitioner the respondent had knowledge that it requires the No-Objection Certificate from ASI. Therefore, the plea of force- majeure cannot be taken at this stage and the petitioner has committed a violation of the local laws by not adhering to the requirement of taking a No-Objection Certificate from the ASI which is mandated as per the local laws. I do not find any reason to interfere *qua*



issues no. 1 and 6.

ISSUE NO. (2)

79. Issue no. 2 issue pertains to whether the petitioner breached the terms and the conditions of the Contract. The relevant part of the Award has been reproduced below:

Issue No. (2) Whether the Respondent breached the terms and Conditions of the Contract?

“50. Clause 26(a) of the Agreement dated 02.05.2008 stipulated that the construction of the commercial complex would be completed within 36 months from the date of the agreement, however, subject to force-majeure and other conditions of the agreement. Admittedly the Claimants had paid 95% of the basic sale price prior to the date of agreement. Doctrine of force majeure, as explained above does not apply in the instant case for the reason that it does not take within its ambit the events occurred prior to the commencement of the agreement. Undoubtedly, Clause 39 of the Agreement provided that delay on the part of the Respondent would not be construed as a breach of the Agreement, but the same has to be read along with other terms of the Agreement which may include the Application of doctrine of force-majeure. In the instant case, the Respondent started construction without meeting the legal requirement. Respondent could not complete the construction even after expiry of 5 years from the date of the Agreement which provided the completion period as 36 months. The Completion Certificate dated 08.07.2015 issued by the Corporation was subsequently cancelled vide Order dated 29.01.2016 as evident from Ext. CW 1/24. Mr. Anshul K. Mathur, the representative of the Respondent in his cross-examination admitted that "permission was cancelled due to breach of conditions by the Respondent" but voluntarily said



that though the respondent received the cancellation letter but there was no breach of conditions by the Omaxe Ltd.

The order dated 15.05.2018 (Ext-CW-1/23) passed by the Supreme Court make it evident that a statement was made at the bar on behalf of the respondent that the Completion Certificate issued by the Corporation had been a subject matter of litigation before the High Court of Punjab and Haryana. No document relating to that litigation had ever been placed on record in these proceedings. Nor has it been explained as what has been the progress in those cases before the High Court. Copy of any plan sanctioned by the Corporation had never been placed on record. Even today, it is not possible to ascertain as to whether the respondent has been issued the Completion Certificate by the Corporation which is valid and can be acted upon. The respondent withheld all material information in this regard, though the law requires a party to adduce the best evidence to substantiate its case. In such an eventuality even adverse inference can be drawn against such a party. Hence, it is held that the respondent failed to fulfil its obligations under the Agreement and it breached the terms and conditions of the contract.”

80. The Tribunal has held that the petitioner started the construction without the meeting legal requirement. Furthermore, the petitioner was not able to complete the construction within 5 years from the date of the Agreement which provided the completion period as 36 months. Moreover, the Completion Certificate dated 08th July 2015 issued by the Corporation was subsequently canceled vide order dated 29th January 2016. This Court is of the view that the Tribunal has given its reasons regarding the same to hold that there has been a breach of the Contract.

81. I do not find any reason to interfere *qua* issue no. 2.

ISSUE NO. 4



82. Issue no. 4 issue pertains to whether the Addendum to the allotment letter/ Agreement was not part of the Allotment letter/ Agreement and is a separate Agreement. The relevant part of the Award has been reproduced below:

“Issue No. (4) Whether the Addendum to the allotment letter/ Agreement is not part of the Allotment letter/ Agreement and is a separate Agreement?”

61. An addendum to a document is a document or information attached or added to clarify, modify, or support the terms incorporated in the original document. The English Dictionary defines the phrase as: A thing to be added or to add supplemental terms or conditions to a contract and it forms an integral part of the agreement to which it is added.”

62. In the instant case, the addendum reads:

"Sub: Addendum to the Allotment Letter dated 02.05.08".

The Addendum further reads: "This further reference to the allotment of the aforesaid until in our proposed commercial complex known as 'OMAXE NOVELTY MALL' situated at Lawrence road, Amritsar.. Punjab on the terms mentioned in the said Allotment letter dated 2nd May 2008.

Various paragraphs of the addendum make reference to the Allotment letter. The Communication between the parties also reveal that the parties understood the addendum to be an integral part of the Agreement.

Thus, it is held that Addendum is an integral part of the Allotment letter and does not constitute a separate Agreement/Contract.

However, in view of the provisions of Section 7(5) of the Act 1996, it is required to be determined in each case as to whether a reference in a document like Addendum etc. or separate contracts would attract the Arbitration clause in the referred document even for the subsequent contract/ Agreement. The issue can be determined only on the basis or the contents of the referring contract and the intention of the



parties to apply the Arbitration clause in subsequent contract also. (vide; M.R. Engineers & Contractors Pvt. Ltd. v. Som Datt Builders Ltd. (2009) 7 SCC 696). In the instant case, the issue becomes purely academic for the reason that addendum dated 2.05.2008 provides for payment of monthly return till possession is offered. The Claimants have repudiated the contract and are not claiming for possession.

83. The Tribunal has held that since an Addendum is a document attached to the original document, therefore the Addendum is a part of the allotment letter in the present case. It has been further held that the issue does not have any practical implication since the Addendum provided for the payment of monthly return till possession is offered. In the present case, however, the respondent has repudiated the contract and is not claiming possession. This Court is of the view that the reasoning of the Tribunal is cogent and there is no reason to interfere *qua* issue no. 4.

ISSUE NO. 5

84. Issue no.5 issue pertains to whether the claims are time-barred. The relevant part of the Award has been reproduced below:

“Issue No. (5)

Whether the Claims raised by the Claimants are time-barred?

66. The Arbitration proceedings commenced on the date of receipt of notice by the Respondent for reference of the dispute of the Arbitration. The Claim was made within limitation and thus Claims are by no means time-barred. The issue is decided in favour of the Claimants and against the Respondent.”

85. The Tribunal has held that the arbitral proceedings commenced on the date of the receipt of the notice by the petitioner invoking arbitration. The claims fall within the period of limitation and are not time-barred.



This Court is of the view that the reasoning of the Tribunal is cogent and there is no reason to interfere *qua* issue no. 5.

ISSUE NO. 7

86. Issue no.7 issue pertains to whether the present statement is bad for non-joinder of necessary parties. The relevant part of the Award has been reproduced below:

“Issue No. (7)

Whether the present statement of claim is bad for non-joinder of necessary parties?

68. *The co-allottee(s) are not necessary parties as to enable the Arbitrator to adjudicate effectively and completely all the issues/controversies between the parties. "A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding." (vide Udit Narain Singh Malpaharia v. Additional Member, Board of Revenue, Bihar, AIR 1963 SC 786; and Kasturi v. Iyyamperumal AIR 2005 SC 2813) .*

69. *More so each allottee has a definite share in the allotted premises and the claimants may not be awarded the total amount of investment. Both the Claimants have only 33.33% shares. While dealing with the application of the co-allottee(s) for impleadment on 20.02.2020 the co-allottee(s)/Applicants were given liberty to agitate their claims independently.*

The issue is decided accordingly".

87. The Tribunal has held that the co- allottee are not necessary parties to enable the Arbitrator to adjudicate as each allottee has a definite share and both the respondents have only. Moreover, an application was filed by the co-allottee for the impleadment and they were given liberty to



pursue their claim independently.

88. Before examining the reasons of the Tribunal this Court relies on the judgment of the Hon'ble Supreme Court regarding the law on "necessary party" in ***Moresnar S/O Yadaorao Mahajan V.Vyankatesh Sitaram Bhedi (D) Thr. Lrs. And Others CIVIL APPEAL NOS. 5755-5756 OF 2011 dated 27th September 2022*** held as follows:

"17. This Court, in the case of Mumbai International Airport Private Limited (supra), has observed thus:

"15. A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "proper party" is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/ interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance."

18.It could thus be seen that a "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. It has been held that if a "necessary party" is not impleaded, the suit itself is liable to be dismissed."

89. This Court is of the view as per the aforementioned judgment the Arbitral Tribunal has correctly held that the other parties which have not



been impleaded as “necessary party” because there is no requirement joinder of the parties on the ground of effective adjudication since there is a specific amount of share of each of the parties and joinder of parties is not necessary.

90. The Tribunal has further correctly held that the co- allottee are not necessary parties to enable the Arbitrator to adjudicate as each allottee has a definite share and both the respondents have only. Moreover, an application was filed by the co-allottee for the impleadment and they were given liberty to pursue their claim independently. I do not find any reason for interference *qua* issue no. 7.

ISSUE NO. 8

Issue No. (8)

Whether Claimant/Respondent is entitled for the reliefs claimed?

“74. During the course or the argument Ms. Takiar did not press the claim no. (vii) i.e., damages for INR 1,50,00,000 (Rupees One Crore and Fifty Lakh only) for misrepresentation in contractual obligations. Moreso, Ms. Takiar could not explain how the multiple claims of interest can be awarded. Claim no (iii) is in respect of monthly return of Rs.9,84,199 (Rupees Nine Lakh, Eighty Four Thousand, One Hundred and Ninety Nine only) p.m. as provided in the Addendum, till the date of possession. In fact the monthly return is an amount of interest on the debt (total amount paid to the builder over and above the earnest money). Earnest money may be a reasonable amount i.e. 10% of the sale price .Claim no (iv) is interest on the monthly returns mentioned in Claim (iii) and it is claimed till possession is handed over. Claim no. (v) relates to a sum of INR 10 per sq.ft per month for a period or delay. In case Claim no (i) and (ii) are allowed, the said Claim nos (iii), (iv) and (v) do not survive as the Claimants are not willing to take possession of the premises and claimed to have



repudiated the Agreement dated 2.05.2008. Though Ms. Takiar has time and again unsuccessfully tried to impress by making reference to the terms of agreement elated 02.05.2008 and addendum of the same date. Thus, consideration or the said Claim nos i.e. (iii), (iv),(v) and (vii) is not warranted The Claim nos (i), (ii),(vi),(viii) and (ix) are required to be considered.

75. Claim no (i): Refund of INR 10,05,13,952 (Rupees Ten Crore, Five Lakh, Thirteen Thousand, Nine Hundred and Fifty two only) paid by the Claimants to the respondent Company.

While dealing with the issues, it has been held that the respondent filed to ensure compliance with the requirement of law as it failed to take NOC from the ASI before signing the contract. Being fully aware of the intervention by the ASI, before the date of Agreement the Respondent ought to have disclosed the facts to the allottee(s). Moreso, the minutes of the meetings dated 14.05.2010 (Ext-CW-1/19) and dated 19.01.2011 (Ext-CW-I/20) the Respondent had agreed to refund the amount with interest in case the construction could not proceed in time. The Claimants have sought refund of the entire amount on the basis that the entire amount had been paid by the Claimant no.1 from his bank account on different dates between 10.03.2007 to 28.11.2007. However the Allotment letter dated 2.05.2008 is in the name of five persons including the Claimants. The names are Mr. Jatinder Singh Chatta, Mr. Mohinder Singh Sanghera and Mr. Ashwani Kumar Uppal. All residents of the U.K. Their names had been included on the basis of Assignment Deed dated 21.01.2008, duly notarized, executed by the first Claimant Mr. Joginder Singh Nijjar and Affidavit cum Undertaking dated 20.03.2008 submitted by him. It also makes it clear that both the Claimants hold 33.33% shares. Mr. Jatinder Singh Chatta and Mr. Mohinder Singh Sanghera both would hold 33.33% shares, while Mr. Ashwani Kumar Uppal would hold 33.34% shares. The



Assignee Mr. Joginder Singh Nijjar has also declared as under:

"I hereby confirm that I am now left with no right, claim or interest in respect of 66.67% individual share of any nature in the aforesaid Unit. Now forward the above named assignees shall become the joint allottee with me "

The other co-allottee(s) have also signed the Assignment deed observing:

"... do hereby confirm and accept the above endorsement/assignment in our favour..."

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79. Both the Claimants are entitled for refund of Rs. 3,35,04,650/- (R.s. Three Crore, Thirty Five Lakh, Four Thousand, Six Hundred Fifty Only), i.e.33.3% of the total amount Rs. 10,05,13,952/- (Rs. Ten Crore, Five Lakh, Thirteen Thousand, Nine Hundred Fifty Two only). However, it is open to the Claimants to settle their disputes/accounts with the co-allottee(s), if any, separately and independently in accordance with law.

80. **Claim nos (ii) and (viii)** - Interest @ 24 % on the amount mentioned in Claim no. (i).

Clause 26(f) of the Agreement quoted herein above, provided that in case there is a delay in construction due to force-majeure, the amount shall be refunded on demand with simple interest @6% p.a. from the happening of such eventuality. However, Clause 21 of the Agreement provided that in case there is a delay in payment by the allottee, the allotment shall be cancelled and the amount paid by the allottee(s) as earnest money would stand forfeited. The Company may, "in its absolute discretion, condone the delay in payment by charging penal interest @ 18% p.a. on the amount outstanding upto one month delay and @ 24% p.a. thereafter on the delayed payments outstanding upto next two months.



81. Interest is compensation or damages to a person for deprivation of the use of his money without a proper justification. Interest is compensatory in nature and not penal. Interest may be awarded if it is provided in the agreement/contract or the statutory provisions provide for it. It may also be awarded on equitable grounds if the facts and circumstances of the case justify it and Jaw does not prohibit the same. (vide: *Secretwy, Irrigation Department, Government of Orissa v. G. C. Roy*, AIR 1992 SC 732; *JK Synthetics Ltd. v. Com.mercial Tax Qfficer*, AIR 1994 SC 2393; *Sovintorg India Ltd. v. State Bank of India*, AIR 1999 SC 2963; and *Union of India v. Upper Ganges Sugar & Industries Ltd.*, AIR 2005 SC 778.).

82. Claimants have sought interest on the outstanding dues 24% p.a. (a). the Agreement/ Allotment Letter does not contain any clause for providing the interest or f(w prohibition forwarding the interest. The Agreement does not stipulate any term in respect or interest in the facts and scenario or the instant case. Clause 4 of the Agreement provided that in case or decrease of super area or the Unit, the amount received in excess over unci above the total cost shall be refunded by the Respondent along with interest (ii) 12% p.a. the respondent, in view of Clause 21 of the Agreement could recover the outstanding dues, if any from the allottee(s) in view of the terms incorporated in the agreement with 18% or 24% interest. The Respondent in its counter claim also sought recovery of its dues with interest@ 24<% p.a. It was a commercial transaction and after signing the Agreement a period of approximately twelve years has lapsed and the Claimants have been running from pillar to post. The Respondent had suppressed the material information from the Claimants about the requirement of NOC from the ASI. Moreso, the Respondent continued to book and receive advances in respect of the Units knowing it well that it would not be possible to raise construction and complete the same within the stipulated area due to the intervention of the ASI. In *B. Radhakrishna v*



Maharashtra Apex Corporation Ltd. (20 17) 4 MLJ 492, the Supreme Court while dealing with the interpretation of Section 31 (7) of the Act, 1996 observed that in absence of any stipulation in the Agreement about the rate of interest ((r the pre-award period has been left to the Arbitrator. In the said case in terms of the Agreement, the interest was awarded ({lJ 36% p.a. and interest under Section 3 l (7)(b) of the Act, 1996 was awarded @ 18% p.a.

83. In the facts and circumstances of the case the Claimants shall be entitled to the simple interest @14% p.a, on the Amount of INR 3,35,04,650 (Rupees Three Crore Thirty Five Lakh Four Thousand and Six Hundred Filly Only), from 01.05.2011 till date of Award i.e. 20.03.20 II, for nine years, ten months and twenty days. It comes to INR 4,16,94,674 (Rupees Four Crore Sixteen Lakh Ninety Four Thousand Six Hundred Seventy Four only). The Claimants are further entitled under Section 31(7)(b) or the Act, 1996. for interest @12%> on the sum of INR 3,35,04,650+INR 4,16,94,674 = INR 7,51,99,324 (Rs. Seven Crores Fifty One Lakhs Ninety Nine Thousand three hundred and twenty Four only, from the date of Award till the date of realisation.

*84. **Claim no** (vi) Damages fix the loss of opportunity to the tune of INR 150 lakhs. It has been submitted by the Learned Counsel of the Claimant that the Claimants have been deprived of the right to enjoy the use of the commercial complex and have suffered a huge loss. There has been price escalation and is skyrocketing and thus the claimants are entitled for the said relief. In the instant case, there are no pleadings to substantiate the above claim, what to talk of the evidence in that respect. The claimants did not produce any document nor examine any witness to establish that there has been price escalation on the area concerned during the relevant period. The claim is liable to be rejected for want of proper pleadings etc. The newspaper clippings were sent after the award had been reserved to show the trend of price-escalation, the same cannot be relied upon as the same*



neither been proved, exhibited nor any opportunity of rebuttal is given to the respondent. The law requires a specific procedure for proving the newspaper clips. Newspaper, is at the best secondary evidence of its contents and is not admissible in evidence without proper proof of the contents under the Indian Evidence Act. The Court/Tribunal cannot treat the newspaper reply as duly 'proved' only by the production of the copies of the newspaper. Thus, this claim is liable to be rejected.

. Claim no (ix)- Cost of Arbitration

The cost of arbitration can be awarded the terms of Section 31 (8) of the Act, 1996. The explanation appended to the said sub-section provides the guidelines for awarding the reasonable costs taking into consideration, the fees and expenses of Arbitrator and witnesses, legal fees and expenses, administrative fees of the institution if any and other expenses in connection with the Arbitral Proceedings. The cost is awarded to a party which is forced to go for litigation just to be compensated for the cost incurred in prosecuting his case. The costs include all expenses properly incurred by the parties during the course of arbitration. The cost is to be awarded to the party which has succeeded in the case. The cost is to be awarded by taking guidance from the principle of justice and fairness and keeping in mind the nature of litigation, the complex question of facts and laws etc. In determining the cost, the factors i.e. the conduct of all the parties, the extent to which a party has succeeded in a case and whether a party had made a frivolous counter-claim leading to delay in arbitration proceedings are also required to be considered. (vide: Santokh Singh v Union (India, AIR 1992 sc 1809) Ms Takiar, Learned Counsel for the Claimants have submitted the Certificate of Costs claiming as under:

Certificate of costs as per Section 31 A of the Act, 1996 for nine cases incurred by the Claimants

a) Fees and expenses before the H.igh Court, Supreme Court and the



Learned Arbitrator, Court for nine cases -

i) Before High Court- Rs.1 ,00,00,000 (Rupees One Crore only)

ii) Before Supreme Court- Rs.1 ,00,00,000 (Rupees One Crore only)

iii) Before Tribunal Fee - Rs.26,00,000 (Rupees Twenty Six Lakh only)

iv) Expenses for proceedings @ 10 lakhs for nine cases- Rs.90 lakhs(Rupees Ninety Lakh only)

b) Legal Fees and expenses- Rs.1,00,00,000 (Rupees One Crore only)

c) Administration fees of SNS ADR Centre @ Rs.12000 for 6 hearings Rs. 72,000/- (Rupees Seventy Two Thousand only)

Total cost- Rs.4,16,72,000/- (Rupees Four Crore, Sixteen Lakh, Seventy

Two Thousand only)

The Claimants have succeeded in their case. The Claimants were not furnished full information, expected from the builder at the time of entering into the contract. The factum of intervention by the ASI had occurred prior to the date of the Agreement. In all fairness, this fact could have been made known to every Applicant. Suppressing such a material fact and knowing it well that construction would not be permitted without the NOC by the ASI, the Respondent continued to book and receive advances from the people for the Units with a clear cut stipulation in the Agreements that construction would be completed within stipulated period. The respondent, expected to adduce the best evidence in support of its case filed to furnish the required information about the Completion Certificate. Even today, there is nothing on record to show as to whether the respondent has a valid Completion Certificate and is in the position to put an allottee in possession. The Claimants have suffered from mental agony and have been deprived of the right to enjoy the property. The Certificate of Costs submitted on behalf of the Claimants for INR 4,16,72,000 (Rupees Four Crore, Sixteen Lakh, Seventy Two Thousand only) is definitely



excessive. In order to meet the ends of justice, it is desirable that a cost of INR 25,00,000 (Rupees Twenty Five Lakh only) be awarded for all the consolidated nine cases. All the outstanding dues shall be paid by the respondent to the Claimants within a period of three months from today.”

91. This Court before adverting to the finding of the Tribunal has relied on the judgment of the Hon’ble Supreme Court **Welspun Speciality Solutions Ltd. v. ONGC, (2022) 2 SCC 382** regarding the principle governing the damages held as follows:

“32. In order to examine whether the delayed execution of contract by the Remi Metals was liable for compensation, the Tribunal examined whether time was of the essence in the contract. In our considered opinion, “time not being the essence of the contract”, as determined by the Arbitral Tribunal, was beyond reproach. Reliance on the contractual conditions and conduct of parties to conclude that existence of extension clause dilutes time being the essence of the contract, was in accordance with rules of contractual interpretation.

33. In this context, the award concludes that as time was not the essence, liquidated damages could not be granted, in the following manner:

“Since time was not the essence of the contract, the measure of damages specified under clause liquidated damages, which was the essence of the contract, cannot be regarded as appropriate for determining the loss sustained by ONGC.”
(emphasis supplied)

34. In order to consider the relevancy of time conditioned obligations, we may observe some basic principles:

(a) Subject to the nature of contract, general rule is that promisor is bound to complete the obligation by the date for completion stated in the contract. [Refer to Percy Bilton Ltd. v. Greater London Council [Percy Bilton Ltd. v. Greater London Council, (1982) 1 WLR 794 (HL)]]



(b) That is subject to the exception that the promisee is not entitled to liquidated damages, if by his act or omissions he has prevented the promisor from completing the work by the completion date. [Refer Holme v. Guppy [Holme v. Guppy, (1838) 3 M & W 387 : 150 ER 1195]]

(c) These general principles may be amended by the express terms of the contract as stipulated in this case.

35. It is now settled that “whether time is of the essence in a contract”, has to be culled out from the reading of the entire contract as well as the surrounding circumstances. Merely having an explicit clause may not be sufficient to make time the essence of the contract. As the contract was spread over a long tenure, the intention of the parties to provide for extensions surely reinforces the fact that timely performance was necessary. The fact that such extensions were granted indicates ONGC's effort to uphold the integrity of the contract instead of repudiating the same.

38. In Saw Pipes case [ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705] , impugned clause for liquidated damages was considered and upheld by this Court in the following manner : (SCC pp. 733 & 740-41, paras 46, 64 & 66)

“46. From the aforesaid sections, it can be held that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arises in the usual course of things from such breach. These sections further contemplate that if parties knew when they made the contract that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the court arrives at the conclusion that no loss is likely to occur because of such breach. Further, in case where the court arrives at the conclusion that the term contemplating damages is by way of penalty, the court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages. However, when the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the words used therein.



In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such a case, it is for the party who contends that stipulated amount is not reasonable compensation, to prove the same.

64. ... Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasises that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. ... But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. ...

66. In Maula Bux case [Maula Bux v. Union of India, (1969) 2 SCC 554] the Court has specifically held that it is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree and the court is competent to award reasonable compensation in a case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. The Court



has also specifically held that in case of breach of some contracts it may be impossible for the court to assess compensation arising from breach.”

40. *This brings us to the waiver. It may be noted that ONGC waived liquidated damages twice before giving extension with pre-estimated damages. The approach of the Arbitral Tribunal was to hold that once liquidated damages were waived in the first extension, subsequent extension could not be coupled with liquidated damages unless a clear intention flowed from the contract; while this Court recognises the autonomy of the party to engage in contractual obligation. Such obligation must be contracted in clear terms. From the aforesaid discussion, it is clear that the promisee (ONGC) waived the liquidated damages initially and the same cannot be imposed, unless such imposition was clearly accepted by the parties. In this case, the interpretation of the Arbitral Tribunal could not be faulted as being perverse, for the reasons stated above.*

42. *This Court cannot interfere with this award, as the award is a plausible view for the following reasons:*

42.1. *The Arbitral Tribunal's interpretation of contractual clauses having extension procedure and imposition of liquidated damages, are good indicators that “time was not the essence of the contract”.*

42.2. *The Arbitral Tribunal's view to impose damages accrued on actual loss basis could be sustained in view of the waiver of liquidated damages and absence of precise language which allows for reimposition of liquidated damages. Such imposition is in line with the 2nd para of Section 55 of the Contract Act.*

42.3. *The Arbitral Tribunal was correct in distinguishing the dictum of this Court in Saw Pipes [ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705] , which validated imposition of liquidated damages in a similar contract.”*



The Division Bench of Calcutta High Court in the judgment of S.B.I.W. Steels (P) Ltd. v. SAIL, 2022 SCC OnLine Cal 3842 on the aspect of principle of awarding damages held as follows:

“27. Mr. Justice J.C. Shah delivering the judgment of the Supreme Court in Fateh Chand v. Balkishan Dass reported in AIR 1963 SC 1405 has inter alia pronounced the following dictum referring to Section 74 of the Indian Contract Act:—

“10.....The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of “actual loss or damage”; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.”

28. The dictum of that case was followed in Kailash Nath Associates v. Delhi Development Authority reported in (2015) 4 SCC 136 by Mr. Justice Nariman by the following words:

43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated.



Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.

43.4. The section applies whether a person is a plaintiff or a defendant in a suit be paid or be payable in future.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.”

29. See also Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd. reported in (2003) 5 SCC 705 and Construction and Design Services v. Delhi Development Authority reported in (2015) 14 SCC 263.

30. Thus, in the absence of loss, liquidated damages could not be claimed. The finding of the learned arbitrator that the respondent was unable to prove any loss was one of fact. In my opinion, it is a reasonable inference drawn from non-production of evidence by the respondent. That for lack of



proof for any loss or damages from breach of contract by the appellant, the respondent was not entitled to recover any amount as liquidated damages from the bills of the appellant is very ably supported by the above quoted dictum of the Supreme Court.

31. However, the learned judge in the impugned judgment and order reversed the finding of the learned arbitrator and expressed the following view:—

“As such, the claimant was in breach of the contract by reason of expiry of BIS licence on 17th May, 2012 during continuance of the contract resulting which the SAIL authority was entitled to levy penalty and/or effect recovery from the pending bills. The learned arbitrator did not consider these aspects which renders the subject award at variance with the terms of the contract and it is in conflict with public policy.

All the aforesaid issues stand disposed of in favour of the petitioner.”

92. The Tribunal has refunded an amount of Rs. 10,05,13,952/- paid by the respondent to the petitioner due to breach of Contract by the petitioner alongwith the interest as per its discretion. The Tribunal has not awarded damages to the petitioner and has given reasoning for loss of opportunity. Moreover, the cost of Arbitration has been awarded by the Tribunal.

93. This Court is of the view that that the Tribunal has rightly refunded the amount to the respondent and as it deemed fit awarded the interest of the said amount which was refunded. Furthermore, relying on the ***Welspun Speciality Solutions Ltd.(Supra)*** and ***S.B.I.W. Steels (P) Ltd (Supra)*** this Court finds that the Tribunal has correctly held that the loss of profit should not be awarded to the respondent as there is no proof or evidence to the effect that the loss of profit as claimed by the respondent has actually been suffered by it. Moreover, the Tribunal has correctly



awarded the cost of the arbitration to the respondent. Thus, there is no need for interference of this Court under Section 34 of the Act, 1996. I do not find any reason *qua* issue no. 8 for interference.

CONCLUSION

94. In light of the facts, submissions, and contentions in the pleadings, this Court finds that the petitioner has failed to corroborate with evidence, as to how, the learned Arbitrator had erred in adjudicating the dispute. The Courts shall not sit in an appeal while adjudicating a challenge to an Award which is passed by an Arbitrator, the master of evidence, after due consideration of facts, circumstances, evidence, and material before him.

95. The Court is of the view that the Learned Sole Arbitrator was well within his jurisdiction and capacity to award the claim/compensation in favour of the respondent.

96. It is settled law that the grounds under Section 34 of the Act, 1996 give way to setting aside an Arbitral Award with a very minimal scope of intervention. A party cannot merely raise an objection on the ground of Section 34 if the Award is against them. Section 34 of the Act, 1996 requires a distinct transgression of law, the clear lack of which thereof makes the petition simply a pointless effort of objection towards an Award made by a competent Arbitral Tribunal.

97. In the instant petition, it was argued that the impugned Award is 20th March 2020 and thus, liable to be set aside. The petitioner has failed to make out such a case and was unable to show that the Award warrants interference under Section 34 of the Act, 1996.



98. It is evident from the perusal of the impugned Award dated 20th March 2020 that interference under Section 34 of the Act, 1996 is not warranted. The Learned Arbitrator has passed the impugned Award after considering all the relevant material placed before it during the arbitral proceedings.

99. The Award is well-reasoned and is not in contravention of the fundamental policy of Indian law, and thus there is no reason for interference in the impugned Award. In view of the above discussion of facts and law, this Court finds no reason to set aside the impugned Arbitral Award dated 20th March 2020.

100. The petition is, accordingly, dismissed along with pending applications, if any.

101. The judgment be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

JULY 19, 2023

SV/DB

Click here to check corrigendum, if any