



2023:DHC:8875



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

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Date of Decision: 12th December, 2023+ O.M.P. (COMM) 296/2021 and I.A. 12900/2021, 12901/2021,
10548/2023 & 16528/2023

OMAXE LTD.

..... Petitioner

Through: Mr. Ramesh Singh, Senior Advocate
with Mr. Mukti Bodh, Advocate

versus

PRAVEEN KAPOOR & ORS.

..... Respondents

Through: Ms. Kaadambari, Ms. Ayushi
Ranade and Mr. Sahil Khanna, Advocates**CORAM:****HON'BLE MS. JUSTICE JYOTI SINGH****JUDGEMENT****JYOTI SINGH, J.**

1. This petition has been filed by the Petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'), assailing the impugned Award dated 19.09.2019 passed by the learned sole Arbitrator.

2. Brief facts to the extent necessary and as averred in the petition are that Petitioner is a Real Estate Development Company, duly incorporated under the Companies Act, 1956 and is engaged in the business of construction and development of commercial, residential and integrated Real Estate Projects pan India. Disputes in the present case concern the construction and development of a commercial project, being a shopping mall, in the name and style of 'Omaxe Novelty Mall' situated at Lawrence



Road, Amritsar, Punjab, in collaboration with land owners, namely, M/s Novelty Associates Private Limited on a land area ad-measuring approximately 4450 sq. yds. Sale proceeds of the collaboration/joint venture were to be shared by the Petitioner and the land owners in the ratio of 47.25% and 52.75% respectively, to be received in a separate Escrow account in the name of 'Omaxe-Novelty', after adjusting 10% of receipts towards costs and expenses for marketing, advertising, etc.

3. Respondents approached the Petitioner for purchasing commercial real-estate in order to park and invest their surplus funds and derive profits. Petitioner offered the Respondents an opportunity to purchase a shop in their upcoming project. After mutual deliberations between the Petitioner, Respondents and M/s Novelty Associates Private Limited, Allotment Letter was issued on 23.08.2007 and shop bearing No.16A on the Atrium Floor, ad-measuring super area approximately 107.246 sq. mtr., was allotted to the Respondents. In addition to the Allotment Letter, an Addendum dated 23.08.2007 was also executed by and between the parties wherein it was stipulated that upon receipt of 95% of the Basic Sale Price for the said shop by the Petitioner, a sum of Rs.1,05,788.80 per month shall be paid by the Petitioner to the Respondents as 'assured monthly return', till the handing over of possession/date of offer of possession to the Respondents.

4. As per the Allotment Letter, basic sale consideration of the shop was Rs.84,63,768.42 plus additional charges, totalling to Rs.87,83,967.82, out of which Respondents paid an amount of Rs.80,40,596.72 towards 95% of the Basic Sale Price. Petitioner avers that after receiving the Certificate of Sanction of the Building Plan dated 05.05.2006 from the Municipal Corporation, Amritsar, Petitioner started construction of the project in 2006 itself. The sanction to develop and construct the project was upto a height

Signature Not Verified of 30 meters.



5. It is further averred that when the construction was in progress, the Archaeological Survey of India (ASI), Punjab vide its letter dated 27.04.2007 informed the Petitioner and the land owners that the project was abutting/encroaching upon the territorial boundaries of Rambagh, a protected monument defined under the Punjab Ancient and Historical Monuments and Archaeological Sites and Remains Act, 1964 and was granted the said status vide Punjab Government Notification of the Department of Tourism and Cultural Affairs No.1/14/97-TS/2051 dated 10.10.1997. This information was received much after the sanction of the building plan by the Municipal Corporation and Petitioner had begun the development of the project.

6. After consistent follow up by the Petitioner, ASI vide letter dated 28.07.2007 granted license to the Petitioner to develop the project but only upto a height of 15 meters. Pursuant thereto, Petitioner issued an Allotment Letter dated 23.08.2007 in favour of the Respondents as at that time there was no impediment in further development. However, vide letter dated 19.09.2007, ASI again raised objections and from time to time created physical obstructions in construction. Vide order dated 23.07.2008, ASI revoked the 'No Objection Certificate' granted on 03.07.2007 even for construction upto 15 meters height. Extensive correspondence ensued thereafter and finally after completion of procedural formalities, ASI permitted construction of the project upto a height of 24 meters with additional 2 meters vide letter dated 22.02.2012 and development and construction resumed w.e.f. 22.02.2012. Petitioner submitted the revised building plans to the Municipal Corporation, which were approved and construction was completed. Municipal Corporation issued a Completion Certificate dated 08.07.2015 and thereafter possession was offered to the

Respondents by letter dated 16.07.2015. Instead of taking possession,



Respondents invoked the arbitration clause, incorporated in the Agreement and appointed the learned sole Arbitrator to adjudicate the disputes between the parties.

7. Respondents filed their Statement of Claim dated 30.05.2018, in which there were five claims and also filed an application dated 30.05.2018 for deciding the preliminary issue of whether the claims arising out of Addendum to Allotment Letter were arbitrable. Petitioner filed the Statement of Defence dated 02.07.2018 as also reply dated 17.07.2018 to the application and Respondents filed their rejoinder.

8. Respondents thereafter filed an application dated 25.08.2018 for withdrawal of part claims and sought to withdraw Claim No.1 in the Statement of Claim, which pertained to illegal cancellation of the Addendum to the Allotment Letter. The learned Arbitrator allowed the application vide order dated 05.09.2018, permitting the Respondents to withdraw Claim No.1, pertaining to recovery of assured monthly return, with liberty to proceed with the same in any other judicial forum.

9. Amended Statement of Claim dated 14.09.2018 was filed by the Respondents and Petitioner filed amended Statement of Defence. Petitioner had also filed counter claim seeking 5% of the balance payment towards the sale price along with interest on the same as well as common area maintenance charges with interest and damages. On the basis of the pleadings, the learned Arbitrator framed the following issues vide order dated 27.10.2018:-

“1. Whether the statement of claim is bad for non-joinder of M/s. Novelty Associates Pvt. Ltd. and others as alleged in preliminary objection No.1 of the amended reply to the statement of claim. OPR

2. Whether there is no valid and subsisting arbitration agreement between the parties and whether there is no arbitrable dispute. OPR

3. Whether the statement of claim is premature and has been filed without following the due process of law. OPR



4. Whether the claimant is entitled to claim No.1 as shown in amended statement of claim. OPC

5. Whether the claimant is entitled to claim No.2 as shown in amended statement of claim. OPC

6. Whether the claimant is entitled to claim No.3 as shown in amended statement of claim. OPC

7. Whether the claimant is entitled to claim No.4 as shown in amended statement of claim. OPC

8. Whether the claimant is entitled to claim No.5 as shown in amended statement of claim. OPC

9. Whether the respondent/counter claimant is entitled to payment of Rs.7,43,386.74 as alleged. OPR

10. Whether the counter claimant is entitled to a sum of Rs.4,80,982/- on account of interest @ 24% on the balance amount of Rs.7,43,386/-. OPR

11. Whether the counter claimant is entitled to a sum of Rs.8,70,828/- on account of common area maintenance charges alongwith interest@ 24% per annum as alleged. OPR

12. Whether the counter claimant is entitled to damages to the tune of Rs.30,00,000/-. OPR

13. Whether the respondent/counter claimant is guilty of concealment and unfair trade practice as alleged in paras -4 to 6 of the reply to the counter claim. If so to what effect? OPC

14. Whether the construction of the project in question commenced without permissions and sanctions from the government authorities including ASI. If so, to what effect? OPC/OPR.”

10. After passing of the order dated 05.09.2018, Respondents preferred their claims relating to assured monthly return before the National Company Law Tribunal (NCLT), Chandigarh being C.P. No. (IB)-116/Chd/Hry/2019, stating therein that the petition was filed pursuant to the liberty granted by the learned Arbitrator. It is stated that the matter is still *sub-judice* before the NCLT. During the recording of evidence, Respondents again filed an application dated 27.02.2019, seeking permission to further amend the Statement of Claim, which was allowed and second amended Statement of Claim was taken on record granting opportunity to the parties to complete the pleadings and fixing the matter



for evidence of the Respondents. On the basis of the second amendment, the learned Arbitrator vide order dated 05.04.2019, framed the following additional issues:-

“Additional issue No.1

Whether the claimant is entitled to claim No.6 as shown in the amended statement of claim. OPC

Additional Issue No.2

Whether the claimant is entitled to the cost of arbitration, if so, to what amount. OPC”

11. After conclusion of the evidence and final arguments, the impugned Award was passed by the learned Arbitrator holding the Petitioner liable for payment of assured monthly returns, on the finding that delay in construction of the project was entirely due to the acts/omissions on the part of the Petitioner. Learned Arbitrator further directed the Petitioner to hand over possession of the shop within a period of 15 days and execute a Sale Deed/Conveyance Deed within 30 days of handing over the possession. Petitioner was directed to adjust the amount which had become due and payable to the Respondents on account of assured monthly returns w.e.f. June, 2010 till handing over of possession from the 5% Basic Sale Price due to the Petitioner. Liability to pay annual maintenance charges from the date, on which possession was actually delivered, was fixed on the Respondents.

12. Insofar as the other claims of the Respondents pertaining to compensation/damages and cost of litigation, etc. with interest were concerned, the learned Arbitrator was of the view that the amount of Rs.1,05,788.80 per month, awarded towards assured monthly return was adequate compensation for the amounts invested but awarded interest @ 10% per annum on the assured monthly returns along with Rs.5,00,000/- towards legal fee and costs of proceeding. Future interest was granted @



10% per annum from the date of the award till actual payment. It is undisputed that Respondents have neither challenged the Award nor taken possession of the shop in question.

Contentions raised on behalf of the Petitioner

13. Impugned Award suffers from a patent illegality inasmuch as the learned Arbitrator has held the Respondents entitled to assured monthly returns, overlooking the fact that the said claim was sought to be withdrawn by the Respondents vide application dated 25.08.2018, which was allowed by the learned Arbitrator vide order dated 05.09.2018, granting liberty to raise the claim before any other judicial forum. Having withdrawn the claim, Respondents could not be held entitled to the assured monthly returns and that too when said claim had been preferred before the NCLT, Chandigarh and was pending consideration. Withdrawal of the claim was clearly admitted by the Respondents in their second amended Statement of Claim dated 27.02.2019 in paragraph 23 and in the absence of there being a claim before the Arbitrator regarding validity of cancellation of the Addendum/assured monthly returns, the sole Arbitrator had no jurisdiction to adjudicate on the said issue.

14. Impugned Award is hit by Section 34(2)(a)(iii) and (iv) of the Act and is also against public policy of India. While it is always open to the learned Arbitrator to mould the relief, but it is beyond the jurisdiction of an Arbitrator to grant a relief not claimed or initially claimed but later withdrawn. In *State of Chhattisgarh and Another v. Sal Udyog Private Limited*, (2022) 2 SCC 275 and several other judgments, it has been held by the Supreme Court that Arbitral Tribunal cannot decide a question or dispute not referred to it by the parties. Without prejudice to the legal argument, this has also caused serious prejudice to the Petitioner as it was



claim related to assured monthly return and/or lead evidence, since the claim stood withdrawn by the Respondents.

15. Learned Arbitrator failed to appreciate that even otherwise, claims related to the Addendum were barred by limitation inasmuch as the Addendum was cancelled by the Petitioner vide letter dated 17.02.2010 and no challenge was laid by the Respondents till the present reference. Moreover, the Addendum to the Allotment Letter did not contain an arbitration clause and therefore the disputes concerning the Addendum were non-arbitrable and this was the reason why Respondents withdrew the claim on an objection to decide this as a preliminary issue.

16. Even on merits the Award cannot be sustained. Learned Arbitrator wrongly concluded that there were no *force majeure* conditions. Petitioner had started the construction of the project soon after obtaining due sanction from the Municipal Corporation, permitting construction upto a height of 30 meters. It was the duty and obligation of the Corporation to have asked the Petitioner to obtain NOC from ASI. Even the shifting stands of the ASI were illegal as firstly, they restricted the construction upto 15 meters height but later allowed upto a height of 24 meters with additional 2 meters. Time was lost in this entire process for which the Petitioner cannot be blamed and the delay is clearly covered by the *force majeure* circumstances. Further, as soon as the construction was completed and Completion Certificate was received by the Petitioner from the Municipal Corporation on 08.07.2015, possession was offered to the Respondents on 16.07.2015, which is an undisputed fact. In fact, even despite the directions of the learned Arbitrator, Respondents have not so far come forward to take possession and Petitioner is unable to execute the Conveyance Deed, in accordance with the directions in the Award.



17. Once the claim for assured monthly return was withdrawn and could not be awarded, the Award of 10% interest on monthly returns by an indirect method of compensation, amounts to patent illegality on the face of the Award. The second part of the Award whereby the learned Arbitrator has awarded Rs.5,00,000/- in favour of the Respondents towards the cost of arbitral proceedings also cannot be sustained as the claim itself under this Head was restricted to Rs.3,00,000/- by the Respondents.

18. The Award deserves to be set aside and thus the petition be allowed setting aside the impugned Award with a direction to the Registry to refund the deposited amount of Rs.66,00,000/- to the Petitioner along with upto date accrued interest.

CONTENTIONS ON BEHALF OF THE RESPONDENTS:

19. Present matter highlights the deficiency of service of the Petitioner and also concerns gross misrepresentation and inordinate delay in handing over possession. As per the Allotment Letter, Respondents were to pay 95% of the Basic Sale Price upon which Petitioner was to remit Rs.1,05,788.80 per month as assured monthly return, till the offer of possession. This was a clear understanding between the parties but only because it was not mentioned in the Allotment Letter, an Addendum was executed on the same day on 23.08.2007 incorporating this obligation of the Petitioner and Petitioner cannot be absolved of this liability arising under a mutual agreement.

20. Time was the essence of the contract and Respondents fulfilled their part of the obligation and paid 95% of the Basic Sale Price. Initially, Petitioner did pay the assured monthly return till January, 2010, however, on 17.02.2010, Petitioner unilaterally and illegally cancelled the Addendum and stopped paying, upon which legal notice dated 11.03.2010 was issued

Signature Not Verified by the Respondents. On receipt of the notice, payment of assured monthly



returns was resumed, however, the same was again discontinued w.e.f. June, 2010.

21. The agreement to invest in the premises was entered into by the Respondents believing the representations of the Petitioner that the project will be completed on time, however, despite assurances, nor was the project completed timely nor was the assured monthly return paid, as promised. According to Clause 26(a) of the Allotment Letter, Petitioner was liable to complete the construction within 36 months and pertinently Clause 26(b) pertaining to *force majeure* does not cover conditions relating to permissions/licenses from ASI, which the Petitioner was obliged to take before entering into the construction project. In terms of Clause 26(e), if the delay in construction was attributable to the Petitioner, it was liable to pay Rs.10/- per sq. ft. of super area per month till date of actual and physical possession being handed over. Therefore, Respondents are, in fact, entitled to claim 18% per month on payments made besides the assured sums.

22. It is incorrect for the Petitioner to plead that the Respondents are not taking possession despite being offered since the possession was offered vide letter dated 10.07.2015 without offering the outstanding payments towards assured monthly returns. In response to the said letter, the Respondents sent a letter dated 06.08.2015 requesting adjustments of the outstanding assured monthly returns as well as adjustment of charges like EDC, IDC, etc. Petitioner is guilty of indulging in unfair trade practices and deficiency in service as well as breach of the contractual terms. It is a fallacious argument by the Petitioner that the learned Arbitrator has awarded assured monthly return to the Respondents. Reading of the Award would show that the Arbitrator has awarded adequate compensation for the



towards assured monthly returns as a reference point to determine the compensation.

23. Petitioner cannot take advantage of its own wrongs and misrepresentations resulting in delay in handing over possession, which was offered only on 16.07.2015, despite having accepted the 95% payment on 23.08.2007. Petitioner had kept the Respondents in the dark by not disclosing that the project did not have the necessary approvals from the Government authorities and assured that the complex will be completed within 3 years from the date of booking/Buyer's Agreement dated 23.08.2007. It was not disclosed while inducing the Respondents to buy the unit, that there was a stay operating on the project at the instance of ASI despite having knowledge, as admitted during cross-examination dated 24.04.2019.

24. Petitioner's witness has admitted in the cross-examination as well as letter dated 16.07.2015 that due to non-clearance from ASI and other statutory bodies, construction of the complex was on standstill from April, 2007 to February, 2012, which was not disclosed even on 23.08.2007, when a sum of Rs.80,40,596.72 was taken by the Petitioner. Looking at the circumstances and the injustice meted out to the Respondents, the learned Arbitrator rightly awarded compensation and interest as well as cost of arbitration. No party can justify offering possession after years, having accepted 95% sale consideration and keeping the same blocked and at the same time, utilizing the said money, which is the life saving of the Respondents.

25. Without prejudice, assuming the Court is inclined to interfere with the Award and set it aside qua the assured monthly returns, discretion may be exercised under Section 34(4) of the Act to remit part of the Award to



Award is severable with respect to the different claims raised by the Respondents and the claim of assured monthly returns is separate and distinct from the claim of compensation, damages for loss suffered on account of 95% of the investment remaining blocked for several years and the mental agony undergone by the Respondents on not being able to get possession despite investing their hard earned money and despite the initial assurance of the Petitioner that time was the essence of the contract and the shop will be handed over within the stipulated period of time. Petitioner is liable to pay compensation on all these counts as well as interest on the said amounts. It is the illegal action of the Petitioner which constrained the Respondents to resort to the arbitral proceedings and have been rightly awarded the cost of arbitration.

26. Relevant it is to note at this stage that the argument of the Respondent under Section 34(4) of the Act was predicated on an application filed during the course of hearings, being I.A. No.16528/2023, pleading that if the Court is inclined to set aside the impugned award, then in order to do complete justice, the Court may remit part of the award to the Arbitral Tribunal not concerning the assured monthly return, to remedy and cure the same. It was argued by the Respondents that in case part of the award is not remitted under Section 34(4) of the Act, a situation will arise where *inter alia* the remaining issues relating to compensation, set-off, adjustments, etc. which do not touch upon the assured monthly return will remain undecided and this would be extremely unfair to the Respondents. Petitioner urged that the application is wholly misconceived as the claims of the Respondents are interlinked and cannot be severed from each other and thus the discretion under Section 34(4) cannot be exercised in the present case. **[Ref.: *National Highways Authority of India v. Trichy***



circumstances of the present case, if the application under Section 34(4) is allowed and the Award is remitted, it would amount to the Arbitral Tribunal reviewing the Award on merits, which is impermissible in law. No evidence has been led by the Respondents in support of the claim for damages or loss and the remission would, in any event, be a futile exercise.

27. I have heard learned Senior Counsel for the Petitioner and counsel for the Respondents.

28. The dispute in the present petition arises in relation to purchase of a shop by the Respondents in the upcoming project of the Petitioner. After mutual discussion between the parties, Allotment Letter was issued on 23.08.2007 in favour of the Respondents and shop bearing No.16A on the Atrium Floor, ad-measuring super area approximately 107.246 sq. mtr. was allotted to the Respondents. It is undisputed that in addition to the Allotment Letter, an Addendum dated 23.08.2007 was also executed whereby it was agreed that upon receipt of 95% capital of the Basic Sale Price of the shop by the Petitioner, a sum of Rs.1,05,788.80 per month shall be paid by the Petitioner to the Respondents as assured monthly return, till the handing over of possession/date of offer of possession to the Respondents. It is equally undisputed that Petitioner received Rs.80,40,596.72 towards 95% of the Basic Sale Price, however, the Addendum was subsequently cancelled by the Petitioner and after payment of the assured monthly returns till May, 2010, no further payment was made to the Respondents on this count. Disputes having arisen between the parties, Respondents invoked the arbitration clause and a sole Arbitrator was appointed to adjudicate the disputes.

29. The chronology of events during the arbitral proceeding is significant in the context of the claim of assured monthly returns. When the statement



No.1 was for assured monthly returns for the period June, 2010 till July, 2015 @ Rs.1,05,788.80 per month along with 18% interest per annum, in terms of Addendum to the Allotment Letter. As per the Respondents, the rate of interest was as per the stipulation in the Buyer's Agreement for the delayed payment by the Petitioner. Thus, the total claim was for a sum of Rs.65,58,905.60 plus 18% interest till the date of realization. A tabular representation of Claim Nos. 1 to 5, as given in the petition, is as follows:-

CLAIM NO.1 To pay the amount due towards the monthly assured returns in terms of the Addendum to Allotment from June, 2010 till July 2015 to the tune of Rs.1,05,788.80 per month alongwith 18% of interest per annum. (The rate of interest as 18% per annum is being claimed by the petitioner as the same rate has been stipulated by the respondent in its Buyer's Agreement for delayed payments by the petitioner in Clause I of the said Agreement).	Rs.65,58,905.60/- plus 18% interest per annum on the aforesaid amount till date of its realization.
Claim No.2 Handing over the possession of the said property alongwith the penalty for the delay in providing the possession in terms of Clause 26 of the Agreement @ Rs.10/- per sq. ft. alongwith 18% of interest per annum till the date of its realization Or Alternatively, if the above can not be granted 18% interest per annum calculated from 23.08.2010 till the date of realization on the 95% sale	Rs.7,15,480/- alongwith 18% interest per annum till the date of its realization.



consideration i.e.80,40,596.72/- paid by the claimant to the respondent	
<u>Claim No.3</u> Compensation for the harassment and mental agony caused to the petitioner by the various acts of the respondent of not completing the project in time. Giving false assurances and misappropriating the hard earned money of the petitioner for objective other than for which the amount was taken.	Rs.25,00,000/- (Rupees Twenty Five lacs only)
<u>Claim No.4</u> Cost of present arbitration	
<u>Claim No.5</u> Litigation Fees and Expenses	Rs.5,00,000/- (Five lakh only)

30. It is a matter of arbitral record that Respondents thereafter filed an application dated 25.08.2018 seeking withdrawal of part claims stipulated in the Statement of Claim and this was in light of a preliminary objection on arbitrability of the claims arising out of the Addendum to the Allotment Letter. In para 4 of the application, it was categorically stated by the Respondents that in light of the preliminary objection that claims pertaining to assured monthly returns, as envisaged in the Addendum, are not subject matter of arbitration, claimant wishes to withdraw the claim pertaining to assured monthly returns from the domain of the present arbitration proceedings, without prejudice to rights to take alternative legal recourse to



recover the amounts pertaining to the same. For ready reference, relevant paragraph of the application and prayer clause are extracted hereunder:-

“4. That the counter claimant had raised an issue of maintainability of arbitration in terms of the Addendum dated 23.08.2008 as the same does not specifically contain any arbitration clause, thus the respondents/non claimants have been opposing the arbitrability of the claims arising out of addendum. That in the light of the objections raised by the respondents that the claims pertaining to the monthly assured returns as envisaged in Addendum are not the subject matter of arbitration, the claimant wishes to withdraw the claims pertaining to the monthly assured returns as envisaged in Addendum from the domain of the present arbitration proceedings without prejudice to his rights to take an alternative legal recourse to recover the amounts pertaining to the same.”

Prayer Clause

“In the light of aforesaid facts and circumstances it is therefore prayed to this Hon'ble Tribunal to:-

a. Allow the claimant to withdraw the claims No. 1 pertaining to recovery of the monthly assured returns as per the terms of the addendum dated 23.08.2007 from June 2010 till July 2015 amounting to Rs.65,58,905.60/- along with 18 percent interest for the abovesaid period ,with liberty to proceed with the same in other judicial forum.”

31. By order dated 05.09.2018, the aforesaid application was allowed by the learned Arbitrator and following order was passed, permitting the Respondents to file an amended Statement of Claim and Petitioner was given time to file amended reply and counter claim:-

*“On the last date of hearing, an application was filed by the claimant for withdrawal of part of the claim filed by him. The respondent had taken a date for filing a reply and for arguments. Today, the Ld. Counsel appearing for the respondent states that the respondent has no objection to the allowing of the application filed by the claimant on the last date of hearing. Accordingly the application is allowed. **The claimant is allowed to withdraw claim No.1 pertaining to recovery of assured monthly returns with liberty to proceed with the same in any other judicial forum.** The claimant shall file an amended statement of claim. The same be filed within two days and a copy be supplied to the respondent's counsel simultaneously who shall file an amended reply cum counter claim on 14/09/2018 at 3.00 PM. The parties shall also file their respective documents.*



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In view of the application for withdrawal of the part of the claim having been allowed today, the claimant does not press the application dated 30.05.2018 which is dismissed as withdrawn."

(Emphasis supplied)

32. It is also not disputed by the Respondents that after withdrawing Claim No.1, they approached NCLT, Chandigarh in C.P. No. (IB)-116/Chd/Hry/2019, with respect to their claims of assured monthly returns. An amended Statement of Claim dated 14.09.2018 was filed by the Respondents and it is significant to note Claim No.1 sought therein, which for ready reference is extracted hereunder:-

"Claim No.1

Since the possession is being offered by the respondent subject to payment of certain amounts (which are not payable). The respondent may be directed to register the sale deed of the said Unit in favour of the claimant without insisting on any further payments, which stood waived of by the respondent vide letter dated 17.02.10 by the respondents herein due to non payment of monthly assured returns."

33. The above claim would show that amended Claim No.1 in the amended Statement of Claim was not with respect to monthly assured return, but was for a direction to the Petitioner herein to register the sale deed without insisting on any further payments, which stood waived by the Petitioner herein vide letter dated 17.02.2010. Thereafter, another application was filed by the Respondents to carry out further amendments in the amended Statement of Claim, which was also allowed and second amended Statement of Claim dated 27.02.2019 was taken on record, to which reply was filed by the Petitioner. Thus, the final Statement of Claim before the learned Arbitrator for adjudication was as follows:-



<u>CLAIM NO.1</u> DIRECT THE RESPONDENT TO HAND OVER THE POSSESSION OF THE SAID UNIT AND REGISTER A SALE DEED OF THE SAID UNIT IN FAVOUR OF THE CLAIMANTS WITHOUT INSISTING ON ANY ADDITIONAL PAYMENTS IN VIEW OF THE RESPONDENT'S LIABILITY TO PAY TO THE CLAIMANTS VARIOUS AMOUNTS AS STATED UNDER OTHER CLAIMS AS SET OUT HEREUNDER PART OF WHICH AMOUNTS AS PAYABLE BY THE RESPONDENTS ARE LIABLE TO BE SET OFF AGAINST THE DUES, IF ANY, PAYABLE BY THE CLAIMANTS TO THE RESPONDENT UNDER THE FINAL DEMAND LETTER, AND TO PAY THE BALANCE AMOUNTS TO THE CLAIMANTS.	VALUATION OF THIS CLAIM IS TO BE CONSIDERED @ RS.87,83,967.82/- I.E., THE TOTAL SALE CONSIDERATION OF THE SUBJECT PROPERTY
OR THAT ONLY IN CASE OF FAILURE OF THE RESPONDENT TO HANDOVER THE POSSESSION OF THE SAID UNIT, TO PROVIDE AN ALTERNATIVE RELIEF OF REFUND OF THE WHOLE AMOUNT PAID BY THE CLAIMANTS I.E., RS. 80,40,596.72/- ALONG WITH THE INTEREST AS SEPARATELY CLAIMED UNDER CLAIM NO.2	RS. 80,40,596.72/-
<u>CLAIM NO.2</u> PAY INTEREST @ 18 % PA FROM THE DATE OF PAYMENT OF RS. 80,40,596.72/- BY THE CLAIMANTS TO THE RESPONDENT I.E., FROM 23.08.2007 TILL THE DATE OF REALISATION, TAKEN MALAFIDELY FROM THE CLAIMANTS UNDER THE FALSE ASSURANCE OF HANDING OVER POSSESSION OF THE UNIT BY 2010 AND ASSURING THEM OF FIXED ASSURED RETURNS, INSPITE OF KNOWING ABOUT THE ASI RESTRICTION STARTING FROM APRIL 2007, WHICH WAS PRIOR TO THE ALLOTMENT OF THE UNIT AND TAKING OF THE MONIES, TILL THE POSSESSION WAS HANDED OVER I.E., 23.08.2010	RS. 1,66,44,035/- (CALCULATED TILL 26.02.2019)
<u>CLAIM NO.3</u> ON ACCOUNT OF THE COMPENSATION PAYABLE TO THE CLAIMANTS DUE TO	TOTALLING TO RS.1,23,02,113/-

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By: KAMAL KUMAR
Signing Date: 15.12.2023
21:00:15

O.M.P. (COMM) 296/2021



THE DELAY IN HANDING OVER THE POSSESSION BY AWARDED INTEREST @18% ON THE AMOUNT OF CONSIDERATION PAID OF RS. 80,40,596.72/- INSTEAD OF RS. 10/- PER SQ. FT. PER MONTH FROM 23.08.2010, I.E., THE DATE OF PROMISED POSSESSION TILL THE DATE OF REALISATION	(CALCULATED TILL 25.02.2019)
OR ON THE ACCOUNT OF LOSS OF OPPORTUNITY COST/MESNE PROFITS FOR THE DELAY CAUSED IN HANDING OVER THE SAID UNIT IN QUESTION I.E., RENTAL OF RS.1,04,743 PER MONTH @18% INTEREST PER ANNUM FROM 23.08.2010 TILL THE DATE OF REALISATION	I.E., RS.1,91,63,027/- (CALCULATED TILL 25.02.2019)
WHICHEVER IS HIGHER AND ADMISSIBLE	
<u>CLAIM NO.4</u>	
COMPENSATION FOR THE HARASSMENT AND MENTAL AGONY CAUSED TO THE PETITIONER BY THE VARIOUS ACTS OF THE RESPONDENT OF NOT COMPLETING THE PROJECT IN TIME, GIVING FALSE ASSURANCES AND MISAPPROPRIATING THE HARD EARNED MONEY OF THE PETITIONER FOR OBJECTIVES OTHER THAN FOR WHICH THE AMOUNT WAS TAKEN AND	RS. 5,00,000/- (RUPEES FIVE LAKHS ONLY)
INDULGING IN UNFAIR TRADE PRACTICES	
<u>CLAIM NO.6</u>	
LITIGATION FEES AND EXPENSES	RS.3,00,000/- (RUPEES THREE LAKH ONLY)
<u>CLAIM NO.7</u>	
COST OF PRESENT ARBITRATION	AS PER THE ACTUAL ARBITRAL FEE PAYABLE BY THE CLAIMANTS

34. Based on the amendments, two additional issues were framed by the learned Arbitrator, which are extracted in the earlier part of the judgment. From the entire chronology of dates and events and a close perusal of the order sheets as well as the Statements of Claims, it is palpably clear that



relating to assured monthly returns was no longer the subject matter for adjudication before the learned Arbitrator. Despite withdrawal of this claim, the learned Arbitrator adjudicated the issue of assured monthly returns and after examining the contractual terms on this aspect in great detail and delving into the evidence, the Arbitrator rendered a finding that Petitioner was not entitled to unilaterally cancel the Addendum to the Allotment Letter dated 23.08.2007 and was bound to pay to the Respondents assured monthly returns w.e.f. June, 2010 till the offer of possession vide letter dated 16.07.2015. Ex-consequencia, the learned Arbitrator directed the Petitioner herein to handover the possession of the shop within 15 days from the date of the order and execute a sale deed/ conveyance deed within 30 days of handing over the possession. Petitioner was further directed to adjust the amount, which became due and payable to the Respondents on account of assured monthly return w.e.f. June, 2010 till the possession of the shop was actually delivered. Petitioner was held entitled to adjust from the above amount, 5% of the Basic Sale Price of the shop and other charges payable under the contract. Relevant paragraphs of the Award are extracted hereunder:-

“28. As already stated two separate agreements were signed by the parties on 23.08.2007. The respondent vide letter dated 17.02.2010 sought to cancel the agreement dated 23.08.2007 which was described as addendum to the allotment dated 23.08.2007. The letter dated 17.02.2010 has already been reproduced above. What is the effect of this letter? Could the respondent validly rescind the contract described as the addendum to the allotment dated 23.08.2007 unilaterally. The answer has to be given in the negative. The Respondent had no power to unilaterally withdraw from an agreement entered into between the parties. A contract involves mutual obligations on the parties which they are bound to perform. In this case, by means of the agreement which has been described as an addendum to allotment dated 23.08.2007, the respondent was obliged to pay to the claimants every month an assured return of Rs.1,05,788.80. The claimants had rightly protested against the stoppage of the payment of the assured monthly return. They had served a legal notice dated 11.03.2010 on the respondent. On the receipt of this notice, the respondent duly complied with the same and resumed payment of the assured monthly return. The



resumption of the assured monthly return in compliance to the notice dated 11.03.2010 has the effect of withdrawal of letter dated 17.02.2010. In fact this has been conceded to by the respondent itself. The respondent's main witness i.e. RW-1 Shri A.K. Mathur in his cross examination has stated that the addendum has not been cancelled. It is, therefore, clear that as per the agreement which was described as the addendum to the allotment dated 23.08.2007, the respondent was bound to pay to the claimants the assured monthly return w.e.f. June, 2010 (when it was illegally stopped by it) till the date of offer of possession vide letter dated 16.07.2015. If any dues were payable by the claimants against the Allotment Letter dated 23.08.2007 including 5% of the basic sale price, the same was adjustable against the outstanding amount of the assured monthly return. The refusal of the respondent to adjust the said amount in the manner stated above means that the offer of possession was not valid. At the cost of repetition, it has to be stated that the respondent was bound to adjust the outstanding amount on account of assured monthly return against any payment which had become due to it under the contract. This proves that the respondent was guilty of contravention of the terms of the Allotment Letter signed by the parties. The claimants on their part were justified in not making any further payment to the respondent until the outstanding amount on account of the assured monthly return was adjusted. Having come to the above conclusion, it must be held that the respondent is liable to pay to the claimants the amount of the assured monthly return till the possession is actually delivered to them.

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40. *In the result, I pass an award in favour of the claimants and against the respondent whereby I direct the respondent to hand over the possession of the shop allotted to the claimants within a period of 15 days from the date of this order and execute a sale deed/ conveyance deed in respect of the shop in question within 30 days of handing over the possession of the shop. I further direct the respondent to adjust the amount which has become due and payable to the claimants on account of the assured monthly return w.e.f. June, 2010 till the possession of the shop is actually delivered to the claimants. The respondent shall be entitled to adjust from the above amount, 5% of the basic sale price of the shop and other charges which are payable under the contract. It is clarified that the claimants shall be liable to pay annual maintenance charges from the date on which the possession of the shop in question is actually delivered to them. The balance amount which is found to be due and payable to the claimants after adjustment as indicated above shall be paid forthwith."*

35. Learned Senior Counsel for the Petitioner is, thus, right in his submission that there is a patent illegality in the impugned Award

inasmuch as the learned Arbitrator allowed a claim, which stood withdrawn



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by the Claimants/Respondents. There is no gainsaying that the jurisdiction of an Arbitral Tribunal is circumscribed by the disputes referred to it and the claims/counter claims filed by the parties being subject matter of the arbitration proceedings. Arbitral Tribunal cannot travel outside the claims/counter claims filed or the claims/counter claims made, but withdrawn by the concerned party during the arbitral proceedings. **[Ref.: India Yamaha Motor Pvt. Ltd. v. Divya Ashish Jamwal, 2019 SCC OnLine Del 6912]**. Since the learned Arbitrator has awarded a claim withdrawn by the Claimants, the arbitral award suffers from patent illegality and deserves to be set aside under Section 34(2A) of the Act as also under Section 34(2)(a)(iv) of the Act, which provides that an arbitral award may be set aside if it deals with the dispute not falling within the terms of submission to arbitration or contains decisions on matters beyond the scope of the submission.

36. Challenge is also laid to the award of 10% interest p.a. in favour of the Respondents on the assured monthly returns from the date they became due till delivery of possession. Perusal of the award shows that the interest component on the assured monthly returns has been awarded as 'compensation' under Claim Nos. 2, 3 and 4. In my view, this part of the Award cannot be sustained for two reasons. Interest was claimed under Claim No. 2 on the amount paid initially as 95% of the Basic Sale Price while interest under Claim Nos. 3 and 4 was compensation due to delay in handing over possession and harassment and mental agony, respectively. Reading of the impugned award shows that the learned Arbitrator was of the view and rightly so, that the agreement between the parties was a purely commercial transaction and Respondents were interested in investing their savings to earn through the lease of the commercial space allotted to them



parties, which provided adequate compensation in the form of assured monthly returns from the date of investment till date of possession. Having so noted, learned Arbitrator declined to grant compensation as the contractual provisions provided assured monthly returns as a form of compensation for the investment made and delay in handing over possession, if any. This claim, as noted above, is now a subject matter of separate proceedings and will be decided by the appropriate Forum. However, in ignorance of this finding and contrary thereto, 10% interest was awarded as compensation “*to meet the ends of justice*”. The award of interest is therefore beyond the learned Arbitrator’s own finding as well as the contractual provisions between the parties. Secondly, once the claim towards grant of assured monthly return was withdrawn, no interest could be awarded on the assured monthly returns, even as a reference point, as urged by the Respondents. Reading of the award makes it apparent that the first patent illegality in awarding assured monthly returns led to the next one by awarding 10% interest on the same. The assured monthly returns were envisaged and provided in the contract as measure of compensation to the Respondents for delay in handing over possession and as returns for investments made, with no further stipulation of interest and thus the award of interest was beyond the contract between the parties.

37. The next challenge to the Award is to the award of costs of Rs.5 lacs to the Respondents. The argument urged on behalf of the Petitioner is that the claim under this head was restricted to Rs.3 lacs and the learned Arbitrator has exceeded his jurisdiction and awarded an amount beyond what was claimed. Insofar as the costs of the proceedings are concerned, the same is Claim No.7 in the amended Statement of Claim while the Claim towards litigation fees and expenses was Claim No.6. Perusal of the

amended Statement of Claim shows that as against the claim for cost of



arbitration, Respondents had claimed actual arbitral fee payable by them and no specific amount was mentioned. The amount of Rs.3 lacs, which is the figure relied upon by the Petitioner, was against the litigation fees and expenses and therefore, it would be wrong to contend on behalf of the Petitioner that Respondents had restricted the claim of cost to Rs.3 lacs. The learned Arbitrator has awarded a consolidated amount of Rs.5 lacs under both the heads and rightly so, as the Respondents were constrained to resort to arbitration due to non-payment of assured monthly returns and delay in handing of possession and no ground warranting interference in this part of the award is made out by the Petitioner.

38. At this stage, it is pertinent to mention that during the course of hearing, an application was preferred on behalf of the Respondents to remand the impugned Award to the Arbitral Tribunal for remedying and curing the defects and/or filling up the gaps by adequate reasoning for the findings, so as to eliminate the grounds for setting aside the Award and for deciding claim of compensation, which has remained undecided, in the event this Court is inclined to set aside the Award. With the consent of the parties, arguments were heard on the application also before the order was reserved.

39. The application is filed under Section 151 CPC, but the grounds mentioned in the body of the application indicate that Respondents invoked Section 34(4) of the Act. In a nutshell, the contention of the counsel for the Respondents was that if the Court was not inclined to uphold the Award on account of the claim of assured monthly returns having been wrongly awarded, the matter be adjourned, permitting the Arbitrator to resume the arbitral proceedings and rehear with respect to the remaining claims of compensation etc. Needless to state that this was an alternative contention,



needs no interference and objections deserve to be dismissed. Learned Senior Counsel for the Petitioner had vehemently opposed the application, both on maintainability and merits. It was urged that Section 34(4) enables the Court to adjourn the proceedings on an application received under Section 34(1), for a period of time, to give the Arbitral Tribunal an opportunity to resume the proceedings or to take such other action as in the opinion of the Tribunal will eliminate the grounds for setting aside the arbitral award. The provision cannot be misused to seek a remand for a rehearing or a review on merits. No evidence was led by the Respondents to prove damage or loss and the relief sought is wholly beyond the scope of Section 34(4) of the Act.

40. Scope of Section 34(4) has been the subject matter of several judicial precedents. In *Dyna Technologies Private Limited v. Crompton Greaves Limited*, (2019) 20 SCC 1, the Supreme Court held as follows:-

“36. At this juncture it must be noted that the legislative intention of providing Section 34(4) in the Arbitration Act was to make the award enforceable, after giving an opportunity to the Tribunal to undo the curable defects. This provision cannot be brushed aside and the High Court could not have proceeded further to determine the issue on merits.

37. In case of absence of reasoning the utility has been provided under Section 34(4) of the Arbitration Act to cure such defects. When there is complete perversity in the reasoning then only it can be challenged under the provisions of Section 34 of the Arbitration Act. The power vested under Section 34(4) of the Arbitration Act to cure defects can be utilised in cases where the arbitral award does not provide any reasoning or if the award has some gap in the reasoning or otherwise and that can be cured so as to avoid a challenge based on the aforesaid curable defects under Section 34 of the Arbitration Act. However, in this case such remand to the Tribunal would not be beneficial as this case has taken more than 25 years for its adjudication. It is in this state of affairs that we lament that the purpose of arbitration as an effective and expeditious forum itself stands effaced.”

41. The issue again came up for consideration before the Supreme Court in *I-Pay Clearing Services Private Limited v. ICICI Bank Limited*,



(2022) 3 SCC 121 and the Supreme Court made the following observations:-

“37. In our view, Section 34(4) of the Act can be resorted to record reasons on the finding already given in the award or to fill up the gaps in the reasoning of the award. There is a difference between “finding” and “reasons” as pointed out by the learned Senior Counsel appearing for the respondent in the judgment in ITO v. Murlidhar Bhagwan Das [ITO v. Murlidhar Bhagwan Das, AIR 1965 SC 342]. It is clear from the aforesaid judgment that “finding is a decision on an issue”. Further, in the judgment in J. Ashoka v. University of Agricultural Sciences [J. Ashoka v. University of Agricultural Sciences, (2017) 2 SCC 609 : (2017) 1 SCC (L&S) 517] , this Court has held that “reasons are the links between the materials on which certain conclusions are based and the actual conclusions”.

38. In absence of any finding on Point 1, as pleaded by the respondent and further, it is their case that relevant material produced before the arbitrator to prove “accord and satisfaction” between the parties, is not considered, and the same amounts to patent illegality, such aspects are to be considered by the Court itself. It cannot be said that it is a case where additional reasons are to be given or gaps in the reasoning, in absence of a finding on Point 1 viz. “whether the contract was illegally and abruptly terminated by the respondent?”.

39. Further, Section 34(4) of the Act itself makes it clear that it is the discretion vested with the Court for remitting the matter to Arbitral Tribunal to give an opportunity to resume the proceedings or not. The words “where it is appropriate” itself indicate that it is the discretion to be exercised by the Court, to remit the matter when requested by a party. When application is filed under Section 34(4) of the Act, the same is to be considered keeping in mind the grounds raised in the application under Section 34(1) of the Act by the party, who has questioned the award of the Arbitral Tribunal and the grounds raised in the application filed under Section 34(4) of the Act and the reply thereto.

40. Merely because an application is filed under Section 34(4) of the Act by a party, it is not always obligatory on the part of the Court to remit the matter to Arbitral Tribunal. The discretionary power conferred under Section 34(4) of the Act, is to be exercised where there is inadequate reasoning or to fill up the gaps in the reasoning, in support of the findings which are already recorded in the award.

41. Under the guise of additional reasons and filling up the gaps in the reasoning, no award can be remitted to the arbitrator, where there are no findings on the contentious issues in the award. If there are no findings on the contentious issues in the award or if any findings are recorded ignoring the material evidence on record, the same are acceptable grounds for setting aside the award itself. Under the guise of either additional reasons or filling up the gaps in the reasoning, the power



conferred on the Court cannot be relegated to the arbitrator. In absence of any finding on contentious issue, no amount of reasons can cure the defect in the award.

42. A harmonious reading of Sections 31, 34(1), 34(2-A) and 34(4) of the Arbitration and Conciliation Act, 1996, make it clear that in appropriate cases, on the request made by a party, Court can give an opportunity to the arbitrator to resume the arbitral proceedings for giving reasons or to fill up the gaps in the reasoning in support of a finding, which is already rendered in the award. But at the same time, when it prima facie appears that there is a patent illegality in the award itself, by not recording a finding on a contentious issue, in such cases, Court may not accede to the request of a party for giving an opportunity to the Arbitral Tribunal to resume the arbitral proceedings.”

42. Taking note of these decisions of the Supreme Court, a Co-ordinate Bench of this Court in ***Trichy Thanjavur Expressway Ltd. (supra)***, has held that scope of Section 34(4) extends to curable defects only and therefore, the Applicant must satisfy that the award suffers from a defect, which is curable and the power conferred by the provision cannot be viewed or understood as empowering the Arbitral Tribunal to either review or reconsider findings or conclusions that may have already been referred. The structure of Section 34(4) is limited to an opportunity to the Tribunal to rid the award of defects which are manifest and can be remedied without the foundation of the award or various findings and conclusions recorded therein being impacted. The remit cannot be read as conferral of authority to reconsider or modify a finding, which may entail “merit review”. Relevant passages are as follow:-

“78. From the aforesaid decisions which have been rendered on the subject, it is manifest that once the Court has been moved by way of an application referable to Section 34(4), it must, at least prima facie, be satisfied that the award suffers from a defect which is curable and thus the ends of justice warranting the AT being accorded an opportunity to take appropriate measures to eliminate the spectre of the award itself coming to be set aside. The necessity of the Court being satisfied in the first instance flows from the provision adopting the phrase “the Court may where it is appropriate....”. However, as had been explained by the Supreme Court in Dyna Technologies as well as I-Pay Clearing Services, the suspension of the setting aside proceedings and the remit to the AT in the meanwhile stands restricted to an opportunity being accorded to it to





cannot extend to the AT undertaking a review of the award or revisiting or revising its opinion which already stands recorded therein. This would also be in accord with the decisions in Dyna and I-Pay Clearing Services which had recognized that provision as extending to a situation where the AT may have failed to provide adequate reasons or where a gap in the reasoning is discerned. However, those two decisions had also emphasized the narrow window within which such recourse would be available and the folly of the same being extended to a case where no reasons had been recorded. It would thus stand confined to curative and remedial measures which could be adopted by the AT without influencing or modifying the basic structure or edifice of the award.

84. The power under Section 34(4) must thus be held to be confined to an opportunity being accorded to the AT to correct typographical, arithmetical errors akin to those which are conceived in Section 33. It could also extend to situations contemplated under Section 33(4). This since an award rendered on a claim which has been overlooked would essentially be a fresh award untainted by the adjudicatory proceedings initiated by the AT. This would be a conceivable and justifiable ground to resort to Section 34(4) bearing in mind the plain language and intent underlying Section 32(3) of the Act. It becomes pertinent to note that the mandate of the AT terminates upon the happening of any one of the contingencies stipulated in Section 32. Thus, while ordinarily arbitral proceedings would terminate upon the final award being rendered or where no steps in terms of Section 33 are initiated, Section 32(3) makes the closure of proceedings subject to a court framing a direction in terms of Section 34(4). The Section 34(4) power, undoubtedly, is one which would be invoked only after the award has been rendered. However, in a case where the AT has failed or omitted to rule upon a claim, the Court may exercise its authority under Section 34(4) rather than being compelled to set aside the award merely on the ground that the AT had failed to rule on one of the various claims laid before it. Courts may adopt such a course provided the claim on which the AT is being invited to render its award is independent and the question of entitlement relating thereto not connected to other parts of the award.

85. Steps in terms of Section 34(4) can clearly be taken where the AT is required to provide additional reasons or fill in gaps in the line of reasoning set forth in the award subject to the cautionary note entered by I-Pay Clearing Services. The reasoning would necessarily have to rest on material already existing on the record of the AT. The Court further notes that while it was urged that evident fallacies could also be envisaged as falling within the Section 34(4) power, the argument though attractive, especially when viewed in light of the likely prejudice to be caused to parties in the sense of they being constrained to initiate proceedings afresh, it would be imprudent to concur to the aforesaid submission as broadly articulated for the following reasons.

86. A curative alternative, which Section 34(4) has been understood to represent, cannot be invoked to call upon the AT to review a finding or



conclusion that stands rendered or recorded. The examination of a plea of apparent errors or fallacies would necessarily require the AT to revisit its conclusions on merits. An assertion of an ex-facie error may also not and invariably be free of disputation. While apparent mistakes in respect of which parties are ad idem may fall within the ken of Section 34(4), it would be impermissible in the scheme of that provision to acknowledge a mistake or error apparent, as those phrases are legally understood, as constituting valid grounds for application of Section 34(4) de hors the facts of a particular case. Ultimately, whether the mistake or error is one which is clearly evident and would merit rectification would be a subject matter of contestation and the position of parties in a particular case. The acceptance of the aforesaid submissions may lead courts down a perilous path and open a further floodgate of judicially recognised grounds to assail an award. If the delicate and nuanced balance which is sought to be struck by the Legislature between the power of setting aside and the curial measures which are envisaged in Section 34(4) is to be maintained, wisdom lies in restricting its essay within the narrow confines as enunciated above.

D. CONCLUSIONS

87. *The Court thus records its conclusions as follows:—*

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J. The Supreme Court in M. Hakeem, has enunciated the setting aside power as being equivalent to a power to annul or setting at knot an Arbitral Award. It has essentially held that bearing in mind the plain language of Section 34 coupled with the Act having desisted from adopting powers of modification or remission that existed in the erstwhile 1940 Act, a court while considering a challenge under Section 34 would not have the power to modify.

K. The expression “modify” would clearly mean a variation or modulation of the ultimate relief that may be accorded by an AT. However, when a Section 34 Court were to consider exercising a power to partially set aside, it would clearly not amount to a modification or variation of the award. It would be confined to an offending part of the award coming to be annulled and set aside. It is this distinction between a modification of an award and its partial setting aside that must be borne in mind.

L. The power to partially sever an offending part of the award would ultimately depend on whether the said decision is independent and distinct and whether an annulment of that part would not disturb or impact any other finding or declaration that may have been returned by the AT. The question of severability would have to be decided bearing in mind whether the claims are interconnected or so intertwined that one cannot be segregated from the other. This for the obvious reason that if the part which is sought to be set aside is not found to stand independently, it would be legally impermissible to partially set aside the award. A partial setting aside should not lead to



a component of the award being rendered vulnerable or unsustainable. It is only when the award relates to a claim which is found to stand on its own and its setting aside would not have a cascading impact that the Court could consider adopting the aforesaid mode.

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T. The Section 34(4) power could thus extend to the curative measures contained in Section 33. It could also be recognized to stretch to Section 33(4). However, it cannot extend to the AT undertaking a review of the award or revisiting or revising its opinion which already stands recorded therein. This would also be in accord with the decisions in Dyna and I-Pay Clearing Services which had recognized that provision as extending to a situation where the AT may have failed to provide adequate reasons or where a gap in the reasoning is discerned. It would thus stand confined to curative and remedial measures which could be adopted by the AT without influencing or modifying the basic structure or edifice of the award.....”

43. From a reading of the aforesaid judgments, it is clear that power under Section 34(4) cannot be exercised to remit the award to the Tribunal for a merit review. There cannot be a rehearing on claims/counter claims so as to modify or vary the findings and conclusions rendered and can only be curial in character restricted to granting an opportunity to the Arbitrator to resume the arbitral proceedings for giving reasons in support of findings already rendered or to fill up the gaps in the reasoning given in support of the said finding.

44. This is further subject to a caution or caveat that while taking a decision to partially set aside the award and remit a portion under Section 34(4), it must be carefully and cautiously seen by the Court that the allegedly offending part of the award is clearly severable, independent and distinct and the annulment of that part would not disturb or impact any other finding returned by the Tribunal and the question of severability would have to be decided by carefully examining whether the claims are interconnected or intertwined so as to be incapable of being severed. As held in **Trichy Thanjavur Expressway Ltd. (supra)**, it is only when the



award relates to a claim, which is found to stand on its own and its setting aside would not have a cascading impact, that the Court should consider adopting a course available under Section 34(4) of the Act.

45. Coming to the facts of this case, in light of principles elucidated in the above judgments, *albeit* the argument of the Respondents seems attractive at the first blush, cannot be accepted in law. It is clear that the claim of compensation was rejected by the learned Tribunal on the ground that there was an inbuilt mechanism in the Agreement to compensate the Respondents by way of assured monthly returns for the amounts invested towards purchase of the shop in question and therefore, no separate claim could be allowed. Exercising power under Section 34(4) to sever this part of the award would be clearly in the teeth of the judgments, aforementioned. This would amount to permitting the Arbitrator to rehear the claim by taking fresh evidence and hearing arguments and consequently leading to a possible modification of the findings already rendered against the Respondents with respect to compensation, which is beyond the scope of Section 34(4). This would also lead to a second hearing or a second inning for the Respondents, who knowing the fact that a claim for compensation had been made, chose not to lead any evidence in support of compensation/damages sought, over and above the assured monthly returns. Finding of the learned Arbitrator under the claims for compensation, in my view, is interconnected and inextricably linked to the earlier part of the award and the withdrawal of the claim of assured monthly returns and cannot be severed so as to permit the Arbitrator to resume the arbitral proceedings. The application, therefore, has no merit.

46. In view of the above, the impugned Award dated 19.09.2019 is set aside, save and except, the direction by the learned Arbitrator to hand over



Deed/Conveyance Deed within 30 days of handing over the possession. Direction for adjustments of amounts due and or paid between the parties is not disturbed but will be subject to the final outcome of the pending litigation with respect to the assured monthly returns and payment of annual maintenance charges by the Respondents as per the award, since there is no challenge to the said part of the award by the Respondents.

47. For all the aforesaid reasons, the impugned award is set aside to the extent mentioned above. I.A. 16528/2023 filed by the Respondents under Section 34(4) of the Act is dismissed.

48. Order dated 04.10.2021 indicates that execution of the impugned award was stayed, subject to the Petitioner depositing an amount of Rs.66 lacs with the Registrar General of this Court within eight weeks and further subject to executing the sale deed/conveyance deed in favour of the Respondents. On 29.11.2021, while it was confirmed on behalf of the petitioner that the amount had been deposited, however, a statement was made by the learned Senior Counsel that sale deed could not be executed as Respondents have not come forward. A communication had been sent to the Respondents demanding an amount of Rs.13,17,219.23/-. Counsel for the Respondents, on instructions, had undertaken to pay the amount, subject to final outcome of this petition and after adjustment of the assured monthly returns, as directed in the impugned award. It is a common ground between the parties that neither the possession has been handed over nor sale deed has been executed. During the course of hearing, Petitioner had offered possession to the Respondents, subject to all other claims and adjustments, however, the offer was declined to contest the case on merits. It is thus directed that the amount deposited by the Petitioner be released to the Petitioner within four weeks from today along with accrued interest,

Signature Not Verified since the amount was invested in a Fixed Deposit Receipt.



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49. The petition is partly allowed and disposed of in the aforesaid terms.
All other pending applications also stand disposed of.

JYOTI SINGH, J

DECEMBER 12, 2023/kks

Signature Not Verified

Digitally Signed
By: KAMAL KUMAR
Signing Date: 15.12.2023
21:00:15

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