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O.S.A.No.171 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.07.2024

CORAM :

THE HONOURABLE MR.R.MAHADEVAN, ACTING CHIEF JUSTICE
and
THE HONOURABLE MR. JUSTICE MOHAMMED SHAFFIQ

Original Side Appeal No.171 of 2020

&

C.M.P.No.8730 of 2020

1. Jumbo World Holdings Limited
Sea Meadow House
Blackburne Highway, Road Town
British Virgin Islands

2. Dandavati Investments and Trading
Company Private Limited
5th Floor, "The International"
16, New Marine Lines
Cross Road No.1, Churchgate
Mumbai - 400 020

.. Appellants

Versus

1. Embassy Property Developments Private Limited,
Dynasty Developers Private Limited
150, Embassy Point
150, Infantry Road
Bangalore - 560 001
represented by its Director
Mr. K.Y. Gobikrishnan



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2. Mr. Justice V.N. Khare
Former Chief Justice of India
B-91, Sector-27, Noida - 201 901
3. Mrs. Justice Sujata Manohar
Former Judge, Supreme Court of India
16, Walkeshwar Road
Mumbai - 400 006
4. Mr. Justice U.P. Singh
former Chief Justice
Kerala High Court
37, Patliputra Colony
Patna - 800 013.

.. Respondents

(Respondents 2 to 4 are given up)

Original Side Appeal filed under Order XXXVI Rule 9 (1) (c) of the Madras High Court Original Side Rules and Section 37 of the Arbitration and Conciliation Act, 1996 read with Clause XV of the Madras High Court Letters Patent against the Judgment dated 10.01.2020 made in Original Petition No. 891 of 2015 on the file of this Court.

For Appellant : Mr. Harish Salve, Senior Advocate
for Mr. Anirudh Krishnan

For Respondents : Mr. Vijay Narayan, Senior Advocate
Mr. Sathish Parasaran, Senior Advocate
for Mr. R. Parthasarathy for R1



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JUDGMENT

R. MAHADEVAN, J

The appellants have preferred this intra-court appeal questioning the correctness and legality of the order dated 10.01.2020 passed by the learned Judge dismissing the petition in Original Petition No. 891 of 2015 filed by them under Section 34 of the Arbitration and Conciliation Act, 1996.

2. The appellants have filed the Original Petition No. 891 of 2015 before the learned Judge, praying to set aside the award dated 31.08.2015 passed by the Arbitrators/respondents 2 to 4 in this appeal, in the arbitration proceedings initiated by M/s. Dynasty Developers Private Limited.

3. The claim petition was filed before the Arbitrators by M/s. Dynasty Developers Private Limited with the following prayer:-

(i) That the respondents 1, 2 and 3 be directed to transfer the shares and preferential shares in terms of the Share Purchase Agreement dated 21.12.2005

(ii) To hand over control of all the books of the company, its movable and immovable assets, documents of



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title, documents, deeds, receipts, bank passbooks, cheque books, account books with regard to all its accounts, statutory registers and books of the company

c) To comply with the provisions of Clause 4 (1) (a) to (f), 4 (2), 4 (3) and 4 (4) of the Share purchase agreement

C1) Alternatively and without prejudice, in the event of this Honourable Tribunal coming to a conclusion that the relief of specific performance of the Share Purchase Agreement dated 21.12.2005 cannot be granted, this Honourable Tribunal may kindly be pleased to direct the respondents to make payment of a sum of Rs.12,232 million as damages as shown and calculated in the above claim petition and the report of Cushman Wakefield

d) grant such other or further relief or reliefs as are just in the interest of justice and equity

e) cost of the proceedings."

4. M/s. Dynasty Developers Private Limited, represented by its Director K.Y.Gopikrishnan, has filed the claim petition contending that the Claimant company was incorporated under the provisions of the Companies Act, 1956, having its registered office at Bangalore. It is further stated that the respondents 1 to 3 in the claim petition, namely, the appellants herein and one Ferom Trading and Investment Limited are the majority shareholders of a company called M/s.Gordon Woodroffe Limited (4th respondent in the



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claim petition) (in short, "the company") having 93.47% of the total issued, subscribed and paid up equity share capital viz., 1,76,67,695 equity shares having a face value of Rs.5/-. The claimant further stated that sometime during the year 2005, the respondents 1 to 4 in the claim petition had negotiation with the claimant company for sale of the immovable properties situated at Pallavaram, Chennai; Maraimalai Nagar, Kancheepuram District, Mandwa, Thane District, Maharashtra and Vizagapattinam, now in Andhra Pradesh. After deliberations, it was agreed that the total sale consideration of the various properties mentioned above is Rs.228 crores. In connection with this transaction, several meetings took place, during which the said company suggested that instead of transferring the properties belonging to them at Pallavaram, 93.47% of the shares held by the said company shall be transferred to the claimant and by virtue of such transfer, the claimant will have controlling interest in the properties of the company. Pursuant to such discussion, the claimant, by letter dated 09.06.2005, expressed their willingness to value the assets of the company and to arrive at a total price for the shares before completing the sale transaction. During September 2005, the fourth respondent company also prepared an information



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memorandum containing the terms and conditions of the transaction.

Pursuant to such Information Memorandum, several correspondences and e-mails have been exchanged between the claimant and respondents 1 to 4.

Ultimately, a Share Purchase Agreement (in short, "the SPA") dated 21.12.2005 came to be entered into between the claimant and the respondents 1 to 4 containing several terms and conditions for transfer of the property as well as the shares held by the company.

4.1. According to the claimant, after execution of the SPA, the respondents expressed difficulty in respect of repatriation of the sale consideration for transfer of some of the shares of Respondent No.1. In order to accommodate the respondents and to complete the transaction despite non-availability of permission to open the NRO Account in time, a side letter was executed between the claimant and respondent Nos.1 and 2 in the claim petition, who was to hold the amounts of respondent No.1 on payment being made for transfer of certain shares being 65,200 shares and 7,82,666 equity shares owned by the respondent No.1 on non-repatriable basis. The said side letter clearly indicates the completion of transaction by



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payments to be made by the claimant and in case, the NOR account could not be opened in time, the said amounts were to be deposited with the respondent No.2.

4.2. While the facts are so, surprisingly, the respondents once again sent the same agreement to the claimant, but by changing the number of shares from 7,82,666 to 19,56,666 i.e., the entire shareholding of the first respondent in the fourth respondent held on non-repatriable basis. Since the number of shares were increased unilaterally, the claimant was not agreeable to the same. In this context, several correspondence were exchanged between the claimant and the respondents. That apart, pursuant to the SPA, the claimant issued public notice in Times of India and Economic Times dated 05.06.2006. Pursuant to such publication, several objections were received by the claimant in relation to the transaction of the property at Pallavaram. Such objections received by the claimant were also forwarded to the company.

4.3. The claimant further stated that as per the SPA, when the claimant attempted to put up a fence around the property at Pallavaram,



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several third party individuals obstructed to the same by claiming themselves to be the owners of the said property. In this context, the claimant sent a letter dated 11.02.2006 to the respondents bringing to their notice the objections raised by third parties for fencing the land at Pallavaram. In response, the first respondent, on behalf of the respondents 1 to 3, sent a reply stating that such claims are baseless and false and suggested that the transaction could be completed on the basis of the SPA dated 21.12.2005 and to complete the transaction by 21.02.2006 or in the alternative to amend the SPA to exclude the item No.1 of the schedule of property and the transaction could be closed by extending the period by 15 days. On receipt of the reply, the claimant, by a letter dated 21.12.2005, has stated that they have not breached the terms and conditions of the agreement and the respondents have to ensure that there is no objection to fence the property by third parties and in such event, the claimant would complete the transactions in time. Subsequently, a meeting had taken place between the Managing Director of the claimant company and the Chairperson of the respondents on 15.03.2006 followed by two meetings on 08.04.2006 and 27.04.2006. During such meetings, the claimant was assured of the closure of the transaction.



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However, the claimant was requested to suggest an alternative method of payment to enable them to close the transaction. Later, when the Managing Director of the claimant company attempted to meet the Chairperson of the respondents company, it could not fructify. Subsequently also, there were exchange of e-mails between the claimant and the respondents. While the facts are so, as stated above, a letter dated 18.05.2006 was received from the respondents stating falsely that the claimant failed to comply with the terms and conditions of the SPA and that there was no fault attributable on their part. By the said letter dated 18.05.2006, the respondents have also called upon the claimant to show cause as to why clause 12.3 of the SPA be not invoked to terminate the contract between them, for the fault attributable on the part of the claimant.

4.4. The claimant submitted that the communications exchanged between the parties would make it abundantly clear that they are willing to adhere to and enforce the SPA and to pay the balance sale consideration which the respondents are legally entitled to. The claimant has acted in a *bonafide* manner, invested time, energy and money and performed their part



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of the obligations under the SPA. While so, invocation of termination clause to terminate the agreement is not warranted. In spite of the same, the respondents unilaterally sent a letter dated 31.05.2006 seeking to once again terminate the SPA and sent a pay order for Rs.25 crores. In response, the claimant, by letter dated 12.06.2006 claimed that the proposal to terminate the agreement is invalid and there was no fault attributable on their part. The claimant also informed that the advance made by them was Rs.35 crores and not Rs.25 crores. In response, the respondents, by a letter informed the claimant that the advance paid was only Rs.25 crores and not Rs.35 crores. The claimant immediately sent letters calling upon the respondents to inform them as to whom the pay order should be handed over and when. The claimant also stated that for handing over the pay order, they require an acknowledgment from the competent person. Subsequently, the claimant called upon the respondents to complete the transaction but it went in vain. Later, the claimant came to know that the respondents are trying to alienate the properties covered under the SPA dated 21.12.2005. In such circumstances, the claimant filed the Claim Petition before the Arbitrators.



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5. Opposing the claim petition, on behalf of the respondents, a written statement was filed contending *inter alia* that the time was the essence of the agreement between the parties and the period of 60 days mentioned therein cannot be extended. Prior to the entering into the SPA, the claimant was put on notice that about 38.25 acres of land out of 87.11 acres was proposed to be acquired by the Tamil Nadu Housing Board, however, at the request of the claimant, it was not indicated in the SPA since it was felt by the claimant that mentioning the proposed acquisition will dilute the chances of availing financial assistance from the banks. The agreement was entered into on 21.12.2005 and an advance of Rs.25 crores was paid by the claimant. However, after a lapse of 45 days, the claimant alleged that they are facing certain obstructions in putting up the fence and requested for extension of time by 60 days for closing the transactions. At this stage, by a letter dated 24.02.2006, the respondents, while reiterating that they will render all assistance for clearing the encumbrances, if any, requested the claimant to close the transaction within the time agreed. In response, by a communication dated 24.02.2006, the claimant stated that unless all encumbrances were removed and the lands were given free of any



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encroachment or from all kinds of encumbrances and third party claims, they will not be in a position to complete the transaction. The agreement dated 21.12.2005 did not provide for clearing the obstructions or encumbrances, if any. Moreover, there were no third party claims made as alleged by the claimant. The period stipulated in the agreement came to an end on 20.02.2006 and after the expiry of the period, the claimant has no right to deal with the properties covered thereof. However, two months after the expiry of the agreement, i.e., on 08.05.2006, the claimant expressed their readiness and willingness to perform their part of the contract. The parties are governed by the terms and conditions of the SPA dated 21.12.2005. The agreement expired on 20.02.2006 and the advance amount of Rs.25 crores received was also returned to the claimant. The claimant failed to adhere to the time period stipulated in the agreement and therefore, they are no longer entitled to claim themselves to have any right or interest in the properties covered in the agreement. The termination was warranted due to the continued failure on the part of the claimant to perform their part of the contract. The claimant repeatedly harped upon the third party interference while fencing the property, but such an allegation is baseless. There was no



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interference or objection at all raised by any of the third parties, as alleged by the claimant. The claimant was never ready and willing to carry out the transaction as recorded in the agreement dated 21.12.2005. The period stipulated in the agreement lapsed, the advance amount paid by the claimant was refunded and the contract itself was duly terminated. While so, the relief claimed in the Claim Petition is devoid of any merits and the claim petition is liable to be rejected.

6. Apart from filing a written statement, the respondents also filed a counter claim contending that as per clause 12.1 of the agreement, in the event of the sellers/respondents complying with their obligations within the closing date and in the event of the purchaser/claimant failing to adhere to the time limit set in the agreement, the agreement shall stand terminated and the seller will be entitled to forfeit Rs.9 crores from the advance as liquidated damages and the balance amount will be refunded within 7 days. In this case, the balance amount of Rs.25 crores was refunded by the respondents and it was also admitted by the claimant. As per the terms and conditions of the agreement dated 21.12.2005, the period for performance of the



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obligations expired on 20.02.2006 due to the non-adherence of the obligations by the claimant. Therefore, the respondents claimed that forfeiture of Rs.9 crore is wholly justified in view of the breach of the time limit by the claimant and it is in accordance with the terms of the SPA.

7. For the written statement filed by the respondents, the claimant filed a detailed rejoinder denying the various averments made therein. Similarly, for the counter claim of the respondents, the claimant filed a separate rejoinder contending that the counter claim itself was an after-thought inasmuch, as until the claimant files the claim petition, the respondents have not made any such demand or issued any notice to the claimant as regards the counter claim. Before filing of claim petition, there were exchange of notices, but in none of the communications, the respondents have made any demand of the counter claim. It was further stated that clause 12.1 is not attracted to the facts and circumstances of the case, much less the counter claim. The forfeiture of the amount will arise only if the claimant failed to fulfil the terms and conditions of the contract. The forfeiture of Rs.9 crores is therefore not justified and warranted. It was



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the specific case of the claimant that the period stipulated in the agreement lapsed on 20.02.2006 and till such time, the respondents did not adhere to the obligations mentioned thereof. On the other hand, the claimant was always ready and willing to perform their part of the contract, which is evident from the various correspondences exchanged between the parties. Therefore, the claimant prayed for dismissal of the counter claim and to direct the respondents to refund the sum of Rs.9 crores forfeited by them with interest at the rate of 21% on Rs.9 crores from 20.02.2006 till realisation.

8. Before the Arbitral Tribunal, documentary evidence has been marked by both sides. The Tribunal, after analysing the evidence made available, rendered a split verdict. The Presiding Arbitrator, in the award dated 31.08.2015 held that there is no breach of the terms and conditions of the SPA dated 21.12.2005 by the claimant. It was further held that for invocation of clause 12.1 of the agreement by the respondents, it must be shown that the respondents have fulfilled their obligations and that the claimant failed to complete the transaction in time. On the other hand, it is evident from the documentary evidence that it was the respondents, who



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have failed to complete the obligations as per the agreement dated 21.12.2005. Further, it was held in the award dated 31.08.2015 that even though time is not the essence of the agreement, even if it were, time would commence only running after the respondents complete their obligations. On the other hand, the respondents, having admitted their inability to comply with the obligations imposed against them, cannot be heard to contend that the time stipulated under the agreement expired, within which period the claimant failed to close the transaction.

9. However, a dissenting award was passed by the Co-Arbitrator stating that the claimant insisted on being given possession of unencumbered land as per the agreement before making payment and completing the contract. Even though the claimant expressed their willingness to purchase the land with encumbrances, it is for the respondents to consider the same subject to the claimant paying the agreed contract price for the land. When there is no pleading to that effect in the claim petition, the relief under Section 20 of the Specific Relief Act cannot be granted merely because it is lawful to do so. The discretion to be exercised by the Arbitral Tribunal



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should be based on sound and reasonable principles. This is relevant because, the claimant has expressed their willingness during the course of argument of the claim petition and by then, 8 to 9 years have lapsed and the rise in price of the land also deserves to be taken note of. In any event, as the claimant had breached the terms and conditions of the Share Purchase Agreement dated 21.12.2005, it is desirable to dismiss the claim petition and to allow the Counter Claim. Accordingly, the Co-arbitrator, by the dissenting award dated 31.08.2015 dismissed the claim petition and allowed the Counter claim of the respondents.

10. Aggrieved by the award dated 31.08.2015 passed by the Arbitral Tribunal, the respondents 1 and 2 in the claim petition have preferred the Original Petition in O.P.No. 891 of 2015 under Section 34 of the Arbitration and Conciliation Act, 1996.

11. *Vide* order dated 10.01.2020, the learned Judge, after hearing the submissions of counsel for both sides, dismissed the aforesaid original petition with the following observations:

"20. In light of the above discussion, a follow through question arises for consideration: is Section 12 of the SRA intended or designed to take within its ambit any request for amendment or waiver



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of contractual commitments by treating the same as a request for part performance? The Petitioners agreed to and, in fact, provided the representations and warranties when they executed the SPA. Indeed, they even agreed to and provided an indemnity in respect of breach of representations and warranties. As a corollary, if there were a misrepresentation or breach of warranty, the Respondent would have been entitled to sue for rescission or claim damages. Similarly, a claim could have been made for indemnification so as to enforce the indemnity. Indeed, in the context of the above discussion, it is clear that only an amendment or waiver would serve the purpose of absolving the Petitioners of liability and, therefore, an amendment and not part performance was requested. To put it differently, the Respondent was not required to and would not be suing for specific performance for the above purposes. An action for specific performance would lie only in respect of unfulfilled obligations or covenants, under a contract, which cannot be adequately compensated monetarily, provided other requirements under the SRA are satisfied for seeking specific relief. In this case, for instance, the Respondent sued for specific performance because the Petitioners refused to transfer the sale shares to the Respondent and, in fact, issued a termination letter as regards the SPA. If the Respondent had sued for specific performance in respect of a part of the sale shares, it would have amounted to a request for part performance. In fact, even if one considers the SPA as no more than an ostensible agreement for sale of shares with the real object and purpose of effecting a change in the ownership of underlying assets, the removal of a part of such assets from the scope of the action for specific relief would, probably, qualify as part performance. Consequently, I am of the view that, in this case, there was a request for and refusal of amendment of the SPA with regard to specific contractual rights qua the Contentious Parcels of Land and not a request for and refusal of part performance as per Section 12 of the SRA.

21. Another fundamental question arises for consideration, namely, whether a party - arguably and, perhaps, probably, in breach of particular provisions of a contract would be justified in requesting for an amendment of the contract so as to delete those clauses and, thereafter, contend that the refusal to accede to the request for amendment disentitles the counter party from subsequently waiving those contractual requirements. Given that specific performance is an equitable remedy, in my view, a party in breach could offer part performance and rely on the refusal to accept such part performance,



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provided it can establish that its inability to perform, in full, is for reasons beyond its control. In this case, the Arbitral Tribunal recorded definitive factual findings, inter alia, in paragraphs 46 and 76, that the Petitioners failed to establish that the failure to offer full performance is for reasons beyond their control. By contrast, the affected party can, in such situation, offer to accept part performance by foregoing its entitlement to full performance. Otherwise, one would be putting a premium on non-adherence to contractual commitments. This interpretation is also in conformity with the judgment in Surjit Kaur. From paragraphs 3-5 of the said judgment, it is clear that the inability to provide possession was on account of a court order of injunction and the affected party was a party to the suit in which such order was obtained. In those circumstances, the court held, in paragraph 15, that readiness and willingness, in the context of a contract that is not capable of being performed as a whole, is the readiness and willingness to accept part performance. For reasons set out in the preceding paragraphs, I am of the view that there was no offer of part performance, in this case, and, in any event, the request for amendment by letter dated 20.2.2006 and the refusal to accede to such request did not foreclose the right of the Respondent to waive its contractual rights subsequently as held in Jiwan Lal and Surinder Singh.

22. *The other aspect that remains to be considered is whether time is of the essence of the SPA and, therefore, whether the Petitioners were entitled to avoid the SPA as per Section 55 of the Contract Act. In this connection, upon appraisal of evidence, the Arbitral Tribunal concluded that time is not of the essence. In addition, the Arbitral Tribunal also held that the Petitioners were in breach of their obligations under the SPA and, therefore, could not insist on the consummation of the transaction within the stipulated time limit. I see no reason to interfere with these factual findings as per applicable legal principles. As regards the contention that the SPA is not specifically enforceable because it is in its nature determinable, I set out below my analysis from an earlier order dated 26.11.2019 in O.P. No.698 and 711 of 2012 on this issue:*

'16. On examining the judgments on Section 21(d) of SRA 1877 and Section 14(c) of the Specific Relief Act, as applicable to this case, i.e. before Act 18 of 2018, I am of the view that Section 14(c) does not mandate that all contracts that could be terminated are not specifically enforceable. If so, no commercial contract would be specifically enforceable.



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Instead, Section 14(c) applies to contracts that are by nature determinable and not to all contracts that may be determined. If one were to classify contracts by placing them in categories on the basis of ease of determinability, about five broad categories can be envisaged, which are not necessarily exhaustive. Out of these, undoubtedly, two categories of contract would be considered as determinable by nature and, consequently, not specifically enforceable: (i) contracts that are unilaterally and inherently revocable or capable of being dissolved such as licences and partnerships at will; and (ii) contracts that are terminable unilaterally on "without cause" or "no fault" basis. Contracts that are terminable forthwith for cause or that cease to subsist "for cause" without provision for remedying the breach would constitute a third category. In my view, although the Indian Oil case referred to clause 27 thereof, which provided for termination forthwith "for cause", the decision turned on clause 28 thereof, which provided for "no fault" termination, as discussed earlier. Thus, the third category of contract is not determinable by nature; nonetheless, the relative ease of determinability may be a relevant factor in deciding whether to grant specific performance as regards this category. The fourth category would be of contracts that are terminable for cause subject to a breach notice and an opportunity to cure the breach and the fifth category would be contracts without a termination clause, which could be terminated for breach of a condition but not a warranty as per applicable common law principles. The said fourth and fifth categories of contract would, certainly, not be determinable in nature although they could be terminated under specific circumstances. Needless to say, the rationale for Section 14(c) is that the grant of specific performance of contracts that are by nature determinable would be an empty formality and the effectiveness of the order could be nullified by subsequent termination."

23. *On examining Clause 12 of the SPA, I find that it does not enable either party to terminate the contract on a "no-fault" basis. Equally, it cannot be concluded that the SPA is inherently unilaterally determinable like a licence or a partnership at will. Therefore, I am of the view that it is not a contract which is determinable in nature as per Section 14 of the SRA. Consequently, it cannot be said that the SPA cannot be specifically enforced.*



24. *The inequity of the waiver after the prices of the underlying assets escalated manifold was also canvassed by the learned senior counsel for the Petitioners and this contention would have merited close attention if the Petitioners had continued to offer performance of the SPA subject to the third party claims and, in response, if the Respondent refused continually over a long period of time before making a volte face. Instead, the Petitioners purported to terminate the SPA fairly swiftly on 18 May 2006 and, consequently, triggered an action for specific performance, which ran its course over time. Therefore, in my view, the adverse monetary consequences that are entailed by the order of specific performance appear to be a self-inflicted wound.*

25. *In fine, the Petitioners have failed to make out a case for interference with the Award as per established principles, in this regard, including those laid down in Associate Builders and Ssyangyong. Consequently, the Petition to set aside the Award is dismissed. In the facts and circumstances of the case, there will be no order as to costs. By an earlier order dated 15.10.2019, A.No.6642 of 2019 was disposed of on the basis of affidavits dated 04.10.2019 and 14.10.2019 of the Petitioners and the Respondent, respectively. A.No.6816 of 2019 is a similar application by another third party and is, consequently, disposed of on the same basis by treating the order in A.No.6642 of 2019 as a part and parcel of the order in A.No.6816 of 2019. A.No.2795 of 2019 is filed by the Respondent, in the O.P., against the third party applicant in A. No. 6642 of 2019 for clarification of an order and this application is closed in view of and in terms of the earlier order in A. No. 6642 of 2019. "*

12. Challenging the order dated 10.01.2020 passed by the learned Judge dismissing the original petition filed by the petitioners / respondents 1 and 2 in the claim petition, the present Original Side Appeal is filed.

13. Mr. Harish Salve, learned Senior counsel appearing for the



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appellants would vehemently contend that the dispute encompasses around the SPA dated 21.12.2005 intended for sale of substantial portion of the shares of Gordon Woodroffe Company. A substantial portion of the assets of the company measuring about 87.11 acre is located in Pallavaram, Chennai. To achieve the commercial objectives, the agreement was entered into instead of entering into a document, such as, agreement of sale. According to the learned Senior counsel, clauses 3.1, 8 (g), 5.2, 9.1 (viii) and 12.3 are relevant for the purpose of considering this appeal. As per Clause 3.1, the transaction was to be completed within 30 days and a further extension of 30 more days will be provided for, in case, the parties are unable to complete the transaction within 30 days. As per clause 8 (g), the appellants warranted that the properties at Pallavaram were free from encumbrances. As per Clause 5.2, the first respondent / claimant shall proceed with the transactions only if the representations and warranties stood good. In other words, clause 5.2 elevates the representations and warranties clause to that of a condition precedent.

13.1. It is further submitted by the learned Senior counsel for the



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appellants that under Clause 9.1 (viii), the first respondent / claimant was empowered to fence around the land. In Clause 12.3, the parties to the agreement were given the option to terminate the agreement if they were unable to fulfil the obligations for reasons beyond their control. As per clause 9.1 (viii), when the first respondent / claimant attempted to fence around the land, they faced third party claims over certain parts of the land. In view of such third party claims, through a letter dated 11.02.2006, the first respondent / claimant sought additional time to complete the transaction. However, by a letter dated 20.02.2006, the appellants sent a reply stating that such third party claims are baseless and have got nothing to complete the contract. At this stage, the appellants had given two options to the first respondent viz., (i) to exclude warranties and indemnities in respect of survey numbers with third party claims by amending the agreement in which case the closing date could be extended or (ii) to close the agreement by relying on the representations and warranties. On receipt of the communication dated 20.02.2006, the first respondent/ claimant sent a reply dated 24.02.2006 stating that they are willing to complete the transaction only after the third party encumbrances were cleared. Thus, the offer made



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by the appellants for part performance was categorically rejected and the first respondent intended to seek performance of the agreement in entirety. As the respondent No.1 / claimant insisted for full performance and rejected the offer of part performance, the letter dated 18.05.2006 was sent terminating the contract in terms of clause 12.3 of the SPA. After termination of the SPA, the first respondent sent a letter dated 25.05.2006 refusing to accept the termination, however, reiterated that they are not willing to accept the part performance. In such a situation, the appellants, invoking the arbitration clause, initiated arbitration proceedings. Even during the arbitration proceedings, the first respondent / claimant insisted for only complete performance and refused to accept the lands at Pallavaram with existing encumbrances. However, at the fag end of the arbitration proceedings, the first respondent took a different stand to accept the partial performance. This was also recorded by the Arbitral Tribunal in para No.19. In any event, such belated relinquishment made by the first respondent/claimant cannot be accepted as it is contradictory to the ratio laid down by the Honourable Supreme Court in the case of ***Surjit Kaur vs. Naurata Singh and another*** reported in (2000) 7 Supreme Court Cases 379. Notwithstanding the same,



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the majority Tribunal in the award dated 31.08.2015 allowed specific part performance in terms of the relinquishment by the respondent No.1/claimant.

The minority award also granted the same relief, however, on account of the price rise in the interregnum, increased the consideration payable by another Rs.100 crores. When the award was put to challenge, the learned Judge failed to consider the various grounds raised by the appellants and dismissed the original petition. In fact, the learned Judge erroneously distinguished the decision of the Honourable Supreme Court in *Surjit Kaur* mentioned supra and completely ignores Section 12 of the Specific Relief Act while dismissing the Original Petition filed by the appellants.

13.2. The learned Senior counsel proceeded to contend that clause 12.3 of the SPA was not considered in proper perspective on the erroneous view that the appellants have given up the claim under clause 12.3. The Arbitral Tribunal erroneously permitted the belated relinquishment made by the first respondent/claimant at the final stage of arguments and it violated the cardinal principles of fairness in the conduct of the arbitration proceedings, in disregard to the decision of the Honourable Supreme Court



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in *Surjit Kaur* case mentioned supra. In this case, there was no pleading raised by the first respondent/claimant regarding acceptance of part performance. The first respondent ought to have pleaded and demonstrated that they are ready and willing to accept part performance at the material point of time when such an offer was made by the appellants. While so, it is not open to the first respondent/claimant to plead it at the fag end of the arbitration proceedings and it was not properly considered by the arbitral tribunal as well as the learned Judge.

13.3. It is further submitted by the learned Senior counsel for the appellants that relinquishment could not happen at any stage. To invoke the principle of relinquishment, the first respondent/claimant has to get over the additional burden of doctrine of election, which is a mixed question of fact and law and it ought to have been pleaded. In this case, no such pleading has been raised by the first respondent. While so, the arbitral Tribunal as well as the learned Judge ought not to have entertained the plea of partial performance or relinquishment made by the first respondent/claimant. In fact, various case laws have been cited before the Arbitral Tribunal as well as the learned Judge on behalf of the first respondent, but those cases are in



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relation to permissibility of relinquishment in the context of Section 12 (3) of the Specific Relief Act, 1963. When once a party elects not to accept part performance, that party would be precluded from raising it subsequently at the fag end of the proceedings. When seeking specific performance of part of a contract, the buyer has to establish readiness and willingness to accept partial performance at the contemporaneous point of time and not later. It is inequitable for a buyer to reject partial performance when the price is fixed but accept it at a later point in time if the value of the property witnesses an uptick. In this case, at the earliest point of time, the respondent No.1/claimant made it very clear in the letters dated 24.02.2006 and 25.05.2006 that they are not ready and willing to accept specific performance after the relinquishment of part of its claim. This can also be fortified from the deposition of CW1 and CW2.

13.4. According to the learned Senior counsel, the termination of the contract was in accordance with Clause 12.3 of the SPA and it was also recognised by the arbitral Tribunal in paragraph Nos. 18 to 21. However, in Para No.28, it was held that clause 12.3 has been given up by the appellants



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and proceeded on the basis of the same to conclude that the plea of part performance made by the first respondent/claimant can be accepted. As per explanation 1, sub-clause (ii) to 34 (2) (b) (ii) of the Arbitration Act, an award is to be set aside if it contravenes the fundamental basic notions of morality of justice. In this context, reliance was made to the decision of the Honourable Supreme Court in *Vijay Karia and others vs. Prysmian Cavi E Sistemi Srl and others* reported in (2020) 11 Supreme Court Cases Page No.1 wherein it was held that failure to consider material issue will contravene the most basic notions of justice or morality. In this case, the failure to consider clause 12.3 of the SPA has led to miscarriage of justice, which was not properly taken note of by the arbitral Tribunal as well as the learned Judge.

13.5. The learned Senior counsel also submitted that the contractual obligation of the appellants to protect the property arose after the execution of SPA. Immediately after entering into the SPA, the respondent No.1/claimant commenced the fencing of lands and discovered certain encumbrances. It is apparent that these were not created in a short time between execution of the SPA and date on which fencing commenced. The



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lands at Pallavaram are vacant lands and they are prone to third party claims.

Such disputes cannot be resolved within a shorter period. The SPA being time specific, clause 12.3 empowered the appellants to terminate it but it was not properly appreciated by the arbitral Tribunal as well as the learned Judge.

13.6. The learned Senior counsel further submitted that admittedly, the first respondent/claimant made relinquishment during oral rejoinder arguments and the appellants were not given sufficient opportunity to meet such argument. Even before the arbitral Tribunal, they were not willing to accept partial performance and relinquish their claim for complete performance of the SPA. While so, the appellants were reasonably prevented from making effective submissions as against the acceptance of the partial performance by the first respondent. As per the valuation made by the first respondent, the value of the property increased from Rs.238.05 crores to Rs.1223 crores. According to the learned Senior counsel, the lands at Pallavaram will be much higher than the projected value of the first respondent at Rs.1223 crores. The parties resiling on their election opportunistically in the backdrop of the price rise of immovable property is



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the precise inequity that the judgment in *Surjit Kaur* identifies and prohibits.

13.7. The learned Senior counsel for the appellants also invited the attention of this Court to paragraph Nos. 19 and 20 of the award and submitted that the arbitral Tribunal referred to option (a) given by the appellants in their letter dated 20.02.2006 as a novation of the SPA. The learned Judge termed it in the impugned order as an "amendment" to the contract. The conclusion that there was a novation of contract or amendment to the contract is a serious misdirection of law. The learned Judge observed that if this was a sale of land, certain parcels were removed, it would be part performance inasmuch as the SPA is for sale of shares and removing certain shares would amount to an offer for part performance. This reasoning ignores the finding of the Tribunal that SPA is, in effect, an agreement for the sale of immovable properties of the company structured through the SPA. The conclusion that there would be a part performance if a part of the shares was actually transferred, then the principal of part performance would not apply. In any event, the award of the arbitral Tribunal and the impugned order of the learned Judge are in express contravention of the decision of the Honourable Supreme Court in *Surjit Kaur* case mentioned supra. A



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contravention of a binding precedent of a Superior Court has been explicitly recognised as forming part of the fundamental policy of Indian Law by the Honourable Supreme Court in *Associate Builders vs. Delhi Development Authority* reported in (2015) 3 Supreme Court Cases 49 and therefore, the award of the arbitral Tribunal as well as the order of the learned Judge are liable to be set aside and allow this appeal.

14. Opposing the arguments advanced by the learned senior counsel for the appellants, Mr. Vijay Narayan, learned Senior counsel appearing for the first respondent/claimant would contend that the SPA entered into between the appellants and the first respondent was structured and agreed as transfer of the entity by way of share transfer in terms of the agreement in a closely held company called Gordon Woodroffe Limited held by the appellants. The value of the shares was predominantly based on the value of several immovable properties referred to in annexure A of the SPA. As per the agreement, when the first respondent made an endeavour to fence the land, certain third parties objected to it, however, the appellants simply brushed such third party objection as *non est* and false and still insisted to



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conclude the transaction within the agreed time. It is pertinent to mention that the appellants did not disbelieve the third party objections, but only stated that resolving such claims would take time and offered a novation of contract that was refused by the first respondent and insisted for full contractual performance. Thus, there was no question of inability of performance by the first respondent, as claimed by the appellants. The documents produced by the first respondent relating to various meetings held between the parties *inter se* would clinchingly prove that the first respondent intended only for complete performance, which would not have taken place if the first respondent had stated that they are unable to perform the contract. While so, even when discussions were taking place, the appellant suddenly terminated the contract alleging that the first respondent could not perform the obligations within the time set under the SPA. The Tribunal also, upon analysis of the above factual position, concluded that the appellants failed to establish the so-called inability on the part of the first respondent to perform their part of the contract and the allegation relating thereto is *malafide*.

14.1. With respect to the so-called belated relinquishment made by the first respondent before the Tribunal, the learned Senior counsel for the



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first respondent / claimant submitted that there is no embargo for the first respondent to raise the plea of relinquishment at any stage. The Tribunal, after analysing the entire facts and circumstances of the case, in para Nos. 77 to 87 of the majority opinion, held that relinquishment can be made at any stage of the proceeding and it is for the Tribunal to examine whether such relinquishment can be entertained or not. Challenging the order of the Tribunal, the appellants filed Original Petition under Section 34 of the Arbitration and Conciliation Act before the learned Judge.

14.2. According to the learned Senior counsel for the first respondent, before the learned Judge, the appellants confined and/or restricted their submissions to examine as to whether there was in violation of principles of natural justice (ii) irrevocable election (iii) violation of Section 12 (1) and 12 (3) of the Specific Relief Act (iv) lack of readiness and willingness on the part of the first respondent to perform their part of the contract and (v) violation of Section 14 (1) (c) of the Specific Relief Act. The learned Judge, by referring to Section 34 of the Arbitration and Conciliation Act, 1996 held that the scope of interference against an award passed by the



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Tribunal is extremely limited unless the appellants fulfilled the parameters indicated in Section 34 of the said Act. In this context, the learned Senior counsel for the first respondent placed reliance on the decision of the Honourable Supreme Court in the case of ***S.V. Samudram vs. State of Karnataka*** (Civil Appeal No. 8067 of 2019 dated 04.01.2024) wherein it was reiterated that the scope of interference with arbitral awards under the Arbitration and Conciliation Act, 1996 was very limited. The scheme of Sections 34 and 37 of the Act did not permit the Courts to modify an award and any attempt to modify the award would amount to crossing the '*Laxman rekha*'. The court further held in that case that arbitral proceedings are different from judicial proceedings and the view of an arbitrator is binding the Court unless the grounds raised are within the parameters stipulated under Section 34. The Honourable Supreme Court also held that it is not open to the Courts to sit as an appellate Court and re-examine the merits of an arbitral award when it is challenged.

14.3. The learned Senior counsel proceeded to contend that the learned Judge, upon analysis of the pleadings and the award of the arbitral



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Tribunal, held that until the rejoinder submissions were made, the first respondent had no opportunity to make the plea of relinquishment. After such submissions were made, the appellants did not make any request for a further hearing nor pleaded before the arbitral Tribunal for an opportunity to oppose the plea with regard to relinquishment. Furthermore, the first respondent made a voluntary relinquishment of their entitlement and it did not affect the right of the appellants in any manner. In any event, raising the plea of relinquishment after the rejoinder submissions were made before the arbitral Tribunal will not in any manner disentitle the first respondent to get the relief in terms of the SPA and it was rightly considered by the arbitral Tribunal as well as the learned Judge.

14.4. With respect to the plea of irrevocable election, the learned Senior counsel for the first respondent submitted that the learned Judge, by placing reliance on the decision in *Surjit Kaur* mentioned supra, categorically held that plea of part performance raised by the first respondent can be entertained. In that case before the Honourable Supreme Court in *Surjit Kaur*, it was held that handing over the possession of the property to the purchaser after execution of the sale deed can itself be construed as a part



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performance of the agreement. Furthermore, it was concluded by the Honourable Supreme Court that interim order was granted by the competent Court and it was extended further. Above all, it was held by the Honourable Supreme Court that the parties to the suit were present in the office of the Sub-Registrar for execution of sale deed, however, the plaintiff insisted on execution of sale deed as well as delivery of possession, but the defendant expressed her inability to hand over possession owing to the pendency of the suit and offered part performance of the contract in executing the sale deed alone. The Honourable Supreme Court therefore specifically held that the plaintiff, who elected not to accept part performance of agreement and who refused specific performance, can seek, at the appellate stage, the plea of part performance.

14.5. The learned Senior counsel for the first respondent further submitted that Section 12 of the Specific Relief Act has no application to this case inasmuch as partial performance contemplated due to inability or impossibility of promisor to perform but not wilful abstention from performance. According to the learned Senior counsel, in a circumstance



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where partial performance is never sought for and only complete performance is sought for, Section 12 does not apply. Therefore, the impossibility or inability to perform may not be set up as a defence as the appellants feebly attempted to do without pleading the same. The said defence was rejected by the Tribunal by holding that this is not a case where impossibility or inability to complete performance was established and this is a case of voluntary restriction of a claim by a claimant in a case of complete performance and hence, it falls outside the scope of Section 12. As per the decision in *Surjit Kaur*, it only prevents a person who (i) rejects part performance (ii) fails in a suit for complete performance and (iii) subsequently, at a later stage, claims part performance. In this case, there is no failure on the part of the first respondent to perform their part of the contract and the continuation of a suit for specific performance and insistence on the same by itself is not a disqualification. In *Surjit Kaur* case, the defendant pleaded inability and offered partial performance, but in the present case, the appellants did not plead inability and terminated the contract, but cited the performance of the contract within the time frame set out in the SPA.



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14.6. Turning to the plea of election, the learned Senior counsel for the first respondent submitted that the first respondent never pleaded that they are unable to perform the terms of contract to the claimant nor it was the stand taken in the arbitration proceedings. Therefore, there was no opportunity to elect with knowledge of inability based on the representation of the first respondent in the meetings, correspondences and pleadings. The Tribunal rendered a specific finding that the appellants could have performed their obligation but refused to do so. In such circumstances, even though the first respondent is entitled to seek damages for breach of warranty or to insist on clearance of all the encumbrances, they chose not to do so. In this case, there was no necessity of relinquishment on the basis of the facts or law, but a voluntary relinquishment made though the first respondent was entitled to complete the performance. The entire question of partial performance under Section 12 of the Specific Relief Act or the inequity of resiling of an election would apply in a case where a party refuses partial performance and attempts to thereafter accept it or seek it when complete performance is not possible. There is a distinction between a voluntary relinquishment of right due to



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malafide conduct of one party and partial performance being necessitated due to inability of the other. In such circumstances, the arbitral Tribunal and the learned Judge are wholly justified in accepting the plea of partial relinquishment advanced by the first respondent by holding that the termination of the contract on specious grounds by the appellants is *per se* improper as the waiver of a claim by an innocent party does not amount to a validation of the *malafide* conduct by the appellants. According to the learned Senior counsel, such relinquishment is permissible even during oral arguments as has been held by the Honourable Supreme Court in the case of ***Surinder Singh v. Kapoor Singh*** reported in (2005) 5 Supreme Court Cases 142.

14.7. The learned Senior counsel for the first respondent also placed reliance on the decision of the Honourable Supreme Court in the case of ***B. Santhoshamma vs. D. Sarala*** reported in (2020) 19 Supreme Court Cases 80 wherein it was held that once the requirements mentioned in Sections 11 (2), 14 and 16 of the Specific Relief Act are met, it is obligatory upon the Courts to order specific performance of a contract. It was also held



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that the provisions of Section 12 of the Specific Relief Act must be construed and interpreted in a purpose and meaningful manner to empower the Court to direct specific performance by a defaulting party. A contractee who frustrates a contract deliberately by his own wrongful acts cannot be permitted to escape and go scot-free. In that event, the provisions of Section 12 would have the effect of permitting specific performance in cases of genuine inability of the cases, but not in cases of wilful default.

14.8. The learned Senior counsel for the first respondent further contended that the SPA entered into between the parties was in substance, one for immovable property, but the form of the contract is one of transfer of shares. Therefore, the performance of such transfer has been ordered completely and there is no partial performance of the same. The non-enforcement of certain representations and warranties in relation to four survey numbers is not partial performance as envisaged under Section 12 of the Act. Taking note of the above, the Arbitral Tribunal held that the termination of the agreement by the appellants is illegal and the first respondent was entitled to complete performance of the agreement. It was



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also held that it was only by way of waiver, as under Order 23 Rule 1 of Code of Civil Procedure, the first respondent could relinquish a portion of its right to seek for performance of the representations and warranties in respect of the lands covered under four survey numbers and the waiver / relinquishment was only an incidental issue considered by the arbitral Tribunal. The learned Judge also, on thorough analysis of the material records, has rightly dismissed the Original Petition filed by the appellants and it does not call for any interference by this Court. Accordingly, the learned Senior counsel for the first respondent prayed for dismissal of the Original Petition.

15. We have heard the learned Senior counsel for the appellants and the learned Senior counsel for the first respondent and also perused the materials placed on record.

16. Before we proceed to discuss the rival contentions, it is necessary to refer to Section 34 of the Arbitration and Conciliation Act, 1996, post 2016 amendment, which reads as under:

"34. Application for setting aside arbitral award.—



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(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

(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.



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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.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party."

17. The provision of Section 34 has been the subject matter of consideration in numerous cases. The scope of interference under Section 34



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is limited to the conditions set out therein but all the conditions would be applicable only when it is a domestic award under challenge and not when it is an international commercial arbitration, as in the present case. In other words, the ground of “Patent illegality” is not applicable in International Commercial Arbitration Cases, as in the present case and therefore, the grounds for challenge is limited to other grounds including the ground of the award being against “Public Policy”. The scope of interference post amendment is restricted to circumstances (i) when there is a violation of the principles of natural justice (ii) Where is award is against the “Public Policy of India” which is relatable to the fundamental policy of India, (iii) most basic notions of morality or justice that shocks the conscience of the Court. The law on the point is well settled by the Hon’ble Apex Court in the following judgments:

(i) *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, [(2019) 15

***SCC 131 : (2020) 2 SCC (Civ) 213 : 2019 SCC OnLine SC 677]*:**

“34. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian law” as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to “Renuagar” understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done



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away with. In short, *Western Geco* [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of *Associate Builders* [Associate Builders v. DDA, (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of *Associate Builders* [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204].

35. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, 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”. This again would be in line with paras 36 to 39 of *Associate Builders* [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of *Associate Builders* [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of *Associate Builders* [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that *Western Geco* [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12], as understood in *Associate Builders* [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], and paras 28 and 29 in particular, is now done away with.

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



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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.

42. Given the fact that the amended Act will now apply, and that the “patent illegality” ground for setting aside arbitral awards in international commercial arbitrations will not apply, it is necessary to advert to the grounds contained in Sections 34(2)(a)(iii) and (iv) as



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applicable to the facts of the present case.”

(ii) *S.V. Samudram v. State of Karnataka*, (2024) 3 SCC 623 : 2024

SCC OnLine SC 19:

“25. Observations of this Court in Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204 (two-Judge Bench)] are also of note. It was held : (SCC p. 67, paras 15-17)

“15. This section in conjunction with Section 5 makes it clear that an arbitration award that is governed by Part I of the Arbitration and Conciliation Act, 1996 can be set aside only on grounds mentioned under Sections 34(2) and (3), and not otherwise. Section 5 reads as follows:

‘5. Extent of judicial intervention.—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.’

16. It is important to note that the 1996 Act was enacted to replace the 1940 Arbitration Act in order to provide for an arbitral procedure which is fair, efficient and capable of meeting the needs of arbitration; also to provide that the tribunal gives reasons for an arbitral award; to ensure that the tribunal remains within the limits of its jurisdiction; and to minimise the supervisory roles of courts in the arbitral process.

17. It will be seen that none of the grounds contained in sub-section (2)(a) of Section 34 deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances.”

(emphasis supplied)

28. In Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204 (two-Judge Bench)] the Court observed : (SCC p. 68, para 19)

“19. When it came to construing the expression “the public policy of India” contained in Section 34(2)(b)(ii) of the Arbitration



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Act, 1996, this Court in ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] held : (SCC pp. 727-28, para 31)

‘31. Therefore, in our view, the phrase “public policy of India” used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term “public policy” in Renusagar case [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be — award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or*
- (b) the interest of India; or*
- (c) justice or morality; or*
- (d) in addition, if it is patently illegal.*

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.’ ”

(emphasis supplied)

29.*Ssangyong Engg [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213 (two-Judge Bench)] followed the observations of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204 (two-Judge Bench)] . To efficiently encapsulate the extent thereof particularly in the context of Indian awards, we may refer only to para 37 where it has been held : (SCC p. 170)*

“37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-



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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.”

30. *The position in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204 (two-Judge Bench)] was recently summarised as hereinbelow recorded by Indian Oil Corpn. Ltd. v. Shree Ganesh Petroleum [Indian Oil Corpn. Ltd. v. Shree Ganesh Petroleum, (2022) 4 SCC 463 : (2022) 2 SCC (Civ) 672 (two-Judge Bench)] : (Shree Ganesh Petroleum case [Indian Oil Corpn. Ltd. v. Shree Ganesh Petroleum, (2022) 4 SCC 463 : (2022) 2 SCC (Civ) 672 (two-Judge Bench)] , SCC p. 485, para 42)*

“42. In Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204 (two-Judge Bench)] , this Court held that an award could be said to be against the public policy of India in, inter alia, the following circumstances:

42.1. When an award is, on its face, in patent violation of a statutory provision.

42.2. When the arbitrator/Arbitral Tribunal has failed to adopt a judicial approach in deciding the dispute.

42.3. When an award is in violation of the principles of natural justice.

42.4. When an award is unreasonable or perverse.

42.5. When an award is patently illegal, which would include an award in patent contravention of any substantive law of India or in patent breach of the 1996 Act.

42.6. When an award is contrary to the interest of India, or against justice or morality, in the sense that it shocks the conscience of the Court.”

17.1. In the present case, as rightly held by the Learned Judge, since the application has been filed after the amendment, the amended provisions



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will alone be available and we have already held that for the dispute falling under the International Commercial Arbitration, the ground of “patent illegality” is not available to the appellants. Therefore, what alone requires to be adjudicated is, whether the award can be interfered with under Section 34 by applying the above principles and other conditions.

18. Relinquishment Not Possible and Violation of the principles of natural justice.

18.1. As far as the question of relinquishment is concerned, it has been the contention of the appellants that the partial performance once rejected by irrevocable election could not be made subsequently and a reference was made to *Surjit Kaur's Case* (Supra) and Section 12 (3) of the Specific Relief Act. The answer to the said contention that the appellants were not provided any opportunity to meet out the said contention suddenly raised during oral arguments on relinquishment, lies in paragraphs 77 to 87 of the award of the Arbitral Tribunal and Paragraphs 19 to 21 of the order of the learned Judge. The Tribunal, after considering all the materials, has also recorded the objections in para 78 and therefore, the contention of the appellants that they were not given proper opportunity cannot be accepted.



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The Tribunal, on the legal submission of bar under Section 12(3) of the Special Relief Act to such relinquishment, has discussed the scope of Section 12(3) in Paragraphs 79 to 87 and after considering various judgments, has rejected the contentions. The determination on performance or non-performance or entitlement to specific relief is within the scope of the arbitration reference. Once the dispute falls within the realms of reference, it is arbitrable and hence, the contention that the Tribunal could not have considered the submission cannot be sustained. The claim was for a specific performance of the entire contract and not for part performance. The relinquishment of a portion of a property cannot be treated as a request for part performance as the agreement is primarily for the transfer of shares. Therefore, the direction for performance of the contract, envisaged in Section 12 of the Specific Relief Act is plausible for the Tribunal. Further, it will be useful to refer to Clause 15.5, which states the waiver of any breach shall not be construed as a waiver of any right under the agreement.

18.2. The Tribunal holding that the appellants having failed to perform their part of the contract in securing and transferring a clear title and



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right, cannot take advantage of their own mistake and considering the fact that the respondent herein has agreed to pay the entire sale consideration despite expressing their willingness to relinquish a part of the property, has rightly appreciated the claim of relinquishment. It is always open to the Tribunal to either grant the relief in full or in part. There is a distinction between the Tribunal passing an award on matters falling beyond the scope of its jurisdiction and outside the contract on one hand and on matters which are integral part of the larger claim on the other. We are in consonance with the reasoning given by the Tribunal and the Learned Judge. At this juncture, it will be useful to refer to the Judgment of the Hon'ble Apex Court in ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI***, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213 : 2019 SCC OnLine SC 677, wherein it has been held as follows:

“68. A conspectus of the above authorities would show that where an Arbitral Tribunal has rendered an award which decides matters either beyond the scope of the arbitration agreement or beyond the disputes referred to the Arbitral Tribunal, as understood in Praveen Enterprises [State of Goa v. Praveen Enterprises, (2012) 12 SCC 581] , the arbitral award could be said to have dealt with decisions on matters beyond the scope of submission to arbitration.

69. We therefore hold, following the aforesaid authorities, that in the guise of misinterpretation of the contract, and consequent “errors of jurisdiction”, it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise the aforesaid



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misinterpretation (which would include going beyond the terms of the contract), could be said to have been fairly comprehended as “disputes” within the arbitration agreement, or which were referred to the decision of the arbitrators as understood by the authorities above. If an arbitrator is alleged to have wandered outside the contract and dealt with matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of “patent illegality”, which, as we have seen, would not apply to international commercial arbitrations that are decided under Part II of the 1996 Act. To bring in by the backdoor grounds relatable to Section 28(3) of the 1996 Act to be matters beyond the scope of submission to arbitration under Section 34(2)(a)(iv) would not be permissible as this ground must be construed narrowly and so construed, must refer only to matters which are beyond the arbitration agreement or beyond the reference to the Arbitral Tribunal.”

18.3. Now, coming to the order of the learned Judge, which is impugned herein, it was clearly held that what was offered by letter dated 20.02.2006 was not a part performance but an amendment. The learned Judge has considered all the claims and rendered specific findings. The learned Judge also affirmed the findings of the Tribunal and concluded that the offer in the letter was for a waiver of the representations and warranties in clauses 7 and 8 of the agreement and indemnity in clause 11. The findings given by the learned Judge are neither against any substantive law nor against any settled case. The learned Judge has rightly held that such offer of part performance can be made only if the party in breach could not perform his contract for reasons beyond his control and thereafter considered the facts



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of the *Surjit Kaur*'s case (Supra) and held that the said Judgement cannot come to the aid of the appellants. It is settled law that a judgment is rendered in peculiar facts and it cannot be applied without appreciation of facts. The facts in *Surjit Kaur*'s case are different from the case on hand. In addition thereto, clause 15.8 of the contract (SPA) itself contains provision for enforcement of the contract by excluding the invalid and unenforceable part of the contract and facilitates replacement with appropriate amendment. Therefore, we do not find any error in application of law by the learned Judge.

19. Enforceability of the Contract.

19.1. Insofar the contention that the contract cannot be enforced as it is determinable as per Clause 12.3 of the SPA and the reliance placed on Section 14(d) of the Specific Relief Act, the Tribunal and the learned Judge have clearly held that the said clause and the provisions are not applicable. Clause 12.3 speaks about termination of the contract when it is impossible to perform for reasons beyond the control of the party proposing to terminate the contract. In the present case, as rightly held by the Tribunal and the



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learned Judge, the appellants have categorically accepted that there are certain disputes in the letter dated 20.02.2006. The representations and warranties are pre-conditions to Clause 5.2 and therefore, the appellants were obligated to not only furnish true information but also ensure such assertions are true. The appellants have not taken any steps to clear the cloud over their right to deal with the property. When there is an assurance as to the title and right over the properties in the SPA, the performance of the other party is dependent on such warranties and representations specified in clauses 7 and 8 of the agreement. On the other hand, the respondent has always been willing to perform their part of the agreement. The learned Judge has clearly discussed the scope of Section 14 of the Specific Relief Act and the circumstances under which the contract can be terminated. The case on hand clearly falls outside the scope of Section 14 as held by the learned Judge.

20. Price Escalation

20.1. Now coming to the issue of price escalation, the same has been dealt in para 24 of the order passed by the learned Judge and the Tribunal has dealt with the same in paragraphs 88 to 96 of the award holding that the



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appellants herein cannot take advantage of their own wrong and the arbitration proceedings was initiated by the claimant within two months. The learned Judge also has, in para 24, after considering the facts, concluded that the adverse monetary consequences are self-infected wound. The above findings are based on the conduct of the appellants in not only not disclosing the disputes but also having failed to take any remedial steps and comply with its assertions and warranties and rushing to terminate the agreement. The views and findings of the Tribunal as well as the learned Judge are plausible. The escalation of prices cannot be reason or ground under Section 34 of the Act to interfere, more so, when the fault lies with the appellants. Therefore, the contention of the appellants on this aspect is also rejected.

21. Conclusion on the Challenge to the award.

21.1. Upon perusal of the records including all the terms and conditions of the contract, we also find that the Arbitration Tribunal has been constituted as per the terms of the agreement, the Tribunal had the jurisdiction to decide the disputes raised, that the parties were not under any incapacity and both the parties have duly participated and put forth their



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case, giving them sufficient opportunity. The relinquishment is different from seeking part performance, which though can be ordered by the Tribunal. Relinquishment is an act by which a party voluntarily waives his right and it requires nothing to be performed by the opposite party towards such relinquished claim and hence, can be sought at any time. The grounds raised by the appellants in the application under Section 34 neither satisfy the ingredients to term as the award as against the public policy nor is it shocking to the conscience of the Court. On the contrary, we find the reasoning to be appropriate in the facts of the case. The judgements relied upon by the appellants are not applicable to the facts of the case as in the present case as the Civil Procedure Code or the Indian Evidence Act are not strictly applicable to arbitration proceedings, that the respondent had not received any benefits but rather is only put to deprivation of a portion of the property by relinquishment and the relinquishment happened during the course of the arguments on which objections were raised, considered and rejected by the Tribunal. The learned Judge has thus rightly dismissed the challenge to the award.

22. Before considering the scope of appeal under Section 37, it will



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be useful to refer to the said provision, which reads as under:-

“37. Appealable orders.—(1) Notwithstanding anything contained in any other law for the time being in force, an appeal] shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:

(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.

(2) Appeal shall also lie to a court from an order of the arbitral tribunal—

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or takeaway any right to appeal to the Supreme Court.”

22.1. On the scope of Section 37, it is again settled law that the Court in exercise of its powers under Section 37 of the Act is vested with limited powers to the extent of interference permitted under Section 34. As already seen from the above judgments, the question of perversity or non-appreciation of evidence in right perspective, which are relatable to consideration of merits of the case and relatable to “patent illegality” are not available to the appellants and even a plausible view is sufficient to sustain



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an award. On the scope of Section 37, it will be useful to refer to the following judgments of the Apex Court:

(i) **Konkan Railway Corpn. Ltd. v. Chenab Bridge Project, (2023) 9**

SCC 85 : 2023 SCC OnLine SC 1020:

“Analysis

18. At the outset, we may state that the jurisdiction of the court under Section 37 of the Act, as clarified by this Court in *MMTC Ltd. v. Vedanta Ltd.* [*MMTC Ltd. v. Vedanta Ltd.*, (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293], is akin to the jurisdiction of the court under Section 34 of the Act. [*Id.*, SCC p. 167, para 14:

“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.”]

Scope of interference by a court in an appeal under Section 37 of the Act, in examining an order, setting aside or refusing to set aside an award, is restricted and subject to the same grounds as the challenge under Section 34 of the Act.

19. Therefore, the scope of jurisdiction under Section 34 and Section 37 of the Act is not akin to normal appellate jurisdiction. [*UHL Power Co. Ltd. v. State of H.P.*, (2022) 4 SCC 116, para 15 : (2022) 2 SCC (Civ) 401. See also : *Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.*, (2019) 20 SCC 1, paras 24, 25.] It is well-settled that courts ought not to interfere with the arbitral award in a casual and cavalier manner. The mere possibility of an alternative view on facts or interpretation of the contract does not entitle courts to reverse the findings of the Arbitral Tribunal. [*Ibid*; *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213; *Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd.*, (2019) 7 SCC 236, para 11.1 : (2019) 3 SCC (Civ) 552] In *Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.* [*Dyna Technologies (P) Ltd. v. Crompton*



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Greaves Ltd., (2019) 20 SCC 1] , this Court held : (Dyna Technologies case [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1] , SCC p. 12, paras 24-25)

“24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.

25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.”

20. In the present case, the Arbitral Tribunal interpreted the contractual clauses and rejected the respondent's claims pertaining to Disputes I, III and IV. The findings were affirmed [Chenab Bridge Project Undertaking v. Konkan Railway Corpn. Ltd., 2019 SCC OnLine Bom 13296] by the Single Judge of the High Court in a challenge under Section 34 of the Act, who concluded that the interpretation of the Arbitral Tribunal was clearly a possible view, that was reasonable and fair-minded in approach.

....

22. The Single Judge of the High Court affirmed [Chenab Bridge



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Project Undertaking v. Konkan Railway Corpn. Ltd., 2019 SCC OnLine Bom 13296] the findings of the Arbitral Tribunal. The reason for upholding the decision of the Tribunal is not that the Single Judge exercising jurisdiction under Section 34 of the Act is in complete agreement with the interpretation of the contractual clauses by the Arbitral Tribunal. The learned Judge exercising jurisdiction under Section 34 of the Act kept in mind the scope of challenge to an Arbitral Award as elucidated by a number of decisions of this Court. Section 34 jurisdiction will not be exercised merely because an alternative view on facts and interpretation of contract exists.

25. The principle of interpretation of contracts adopted by the Division Bench of the High Court that when two constructions are possible, then courts must prefer the one which gives effect and voice to all clauses, does not have absolute application. The said interpretation is subject to the jurisdiction which a court is called upon to exercise. While exercising jurisdiction under Section 37 of the Act, the Court is concerned about the jurisdiction that the Section 34 Court exercised while considering the challenge to the arbitral award. The jurisdiction under Section 34 of the Act is exercised only to see if the Arbitral Tribunal's view is perverse or manifestly arbitrary. Accordingly, the question of reinterpreting the contract on an alternative view does not arise. If this is the principle applicable to exercise of jurisdiction under Section 34 of the Act, a Division Bench exercising jurisdiction under Section 37 of the Act cannot reverse an award, much less the decision of a Single Judge, on the ground that they have not given effect and voice to all clauses of the contract. This is where the Division Bench of the High Court committed an error, in re-interpreting a contractual clause while exercising jurisdiction under Section 37 of the Act. In any event, the decision in *Radha Sundar Dutta [Radha Sundar Dutta v. Mohd. Jahadur Rahim, 1958 SCC OnLine SC 38 : AIR 1959 SC 24]*, relied on by the High Court was decided in 1959, and it pertains to proceedings arising under the Village Chaukidari Act, 1870 and Bengal Patni Taluks Regulation of 1819. Reliance on this judgment particularly for interfering with the concurrent interpretations of the contractual clause by the Arbitral Tribunal and Single Judge under Section 34 of the Act is not justified.

27. In the present case, we have examined the appreciation of evidence by the Arbitral Tribunal as well as the Single Judge of the High Court. We are convinced that their appreciation of the facts and interpretation of the contract is reasonable, and comprises a possible view. Keeping in mind the mandate of Section 5 of the 1996 Act, [Arbitration and Conciliation Act, 1996, Section 5:



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“5. Extent of judicial intervention.—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.”] we note the observation of this Court in *Vidya Drolia v. Durga Trading Corpn.* [*Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1, para 18 : (2021) 1 SCC (Civ) 549] : (SCC p. 48, para 18)

“18. Arbitration is a private dispute resolution mechanism whereby two or more parties agree to resolve their current or future disputes by an Arbitral Tribunal, as an alternative to adjudication by the courts or a public forum established by law. Parties by mutual agreement forgo their right in law to have their disputes adjudicated in the courts/public forum. Arbitration agreement gives contractual authority to the Arbitral Tribunal to adjudicate the disputes and bind the parties.”

28. The conclusion [*Chenab Bridge Project v. Konkan Railway Corpn. Ltd.*, 2022 SCC OnLine Bom 3148] of the Division Bench of the High Court that the award is liable to be set aside on the ground of perversity is incorrect, as it overlooks the principle laid down in *Associate Builders v. DDA* [*Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] wherein this Court held : (*Associate Builders case* [*Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , SCC pp. 75-76, paras 32-33)

“32. A good working test of perversity is contained in two judgments. In *STO v. Gopi Nath & Sons* [*STO 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.’

In *Kuldeep Singh v. Commr. of Police* [*Kuldeep Singh v. Commr. of Police*, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] , it was held : (SCC p. 14, para 10)

‘10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no



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reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.'

33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows: "General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong".It is very important to bear this in mind when awards of lay arbitrators are challenged.] ."

(emphasis supplied)

29. Having considered the matter in detail, we are of the opinion that the Division Bench of the High Court committed an error in setting aside the concurrent findings of the Arbitral Tribunal and the Single Judge of the High Court. The award of the Arbitral Tribunal and the decision of the Single Judge of the High Court under Section 34 of the Act cannot be termed as perverse or patently illegal as concluded by the Division Bench of the High Court. The decision of the Arbitral Tribunal is a plausible view, and the Single Judge refrained from interfering with it under Section 34 of the Act. We are of the opinion that the Division Bench should not have interfered with these orders."



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(ii) **S.V. Samudram v. State of Karnataka**, (2024) 3 SCC 623 : 2024

SCC OnLine SC 19:

“46. It has been observed by this Court in MMTC Ltd. v. Vedanta Ltd. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293 (two-Judge Bench)] : (SCC p. 167, para 14)

“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.”

(emphasis supplied)

47. This view has been referred to with approval by a Bench of three learned Judges in UHL Power Co. Ltd. v. State of H.P. [UHL Power Co. Ltd. v. State of H.P., (2022) 4 SCC 116 : (2022) 2 SCC (Civ) 401 (two-Judge Bench)] In respect of Section 37, this Court observed : (SCC p. 124, para 16)

“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.”

48. This Court has not lost sight of the fact that, as a consequence to our discussion as aforesaid, holding that the judgment and order under Section 34 of the A&C Act does not stand judicial scrutiny, an independent evaluation of the impugned judgment [S.V. Samudram v. State of Karnataka, 2017 SCC OnLine Kar 6559] may not be required in view of the holding referred to supra in MMTC [MMTC Ltd. v. Vedanta Ltd.,



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(2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293 (two-Judge Bench)] .
However, we proceed to examine the same.

49. We may also notice that the circumscribed nature of the exercise of power under Sections 34 and 37 i.e. interference with an arbitral award, is clearly demonstrated by legislative intent. The Arbitration Act, 1940 had a provision (Section 15) which allowed for a court to interfere in awards, however, under the current legislation, that provision has been omitted. [Larsen Air Conditioning & Refrigeration Co.v. Union of India, (2023) 15 SCC 472 : 2023 SCC OnLine SC 982 (two-Judge Bench)]”

22.2. Upon considering the well settled principles and having held that the grounds under which the award has been put to challenge, do not warrant any interference under Section 34 of the Act and having held that the order of the learned Judge is not only a plausible view but also appropriate, it goes without saying that the jurisdiction under Section 37 cannot be exercised to re-appreciate the evidence to take an alternative view.

23. We find no reasons to interfere with the award of the Arbitral Tribunal and the order of the learned Judge.

24. Hence, this Original Side Appeal is dismissed. There shall be no order as to costs. Consequently, connected civil miscellaneous petition is closed.



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[R.M.D., A.C.J.] [M.S.Q., J.]

05.07.2024

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THE HONOURABLE ACTING CHIEF JUSTICE
and
MOHAMMED SHAFFIQ, J

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