



Arb.O.P.(Com.Div.) No.228 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	15.12.2023
Pronounced On	07.06.2024

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.) No.228 of 2021

and

O.A.No.735 of 2023

and

A.No.4180 of 2021 and Arb.Appln.Nos.441 and 442 of 2023

ASV Constructions Pvt. Ltd.

Represented by its Managing Director

... Petitioner

Vs.

1.L.Dharmichand

2.D.Prakash Devi

3.D.Sunil Kumar

4.D.Rishab Singhvi

... Respondents

Prayer: Original Petition is filed under Section 34(2) of the Arbitration and Conciliation Act, 1996, to set aside the Arbitral Award dated 11.08.2021 passed by the Arbitral Tribunal in its entirety and to direct the respondents to pay the costs.

For Petitioner : Mr.C.A.Sundaram

Senior Counsel
for Mr.C.Seethapathy



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For Respondents : Mr.Vijay Narayan
Senior Counsel
for M/s.Mothilal & Goda
Mrs.G.Revathy and
Mr.Ravi Kiran

ORDER

The Respondent before the Arbitral Tribunal is before this Court in this Original Petition under Section 34 of the Arbitration and Conciliation Act, 1996 assailing the Arbitral Award dated 11.08.2021 passed by the Arbitral Tribunal constituted by a Sole Arbitrator.

2. By the Impugned Award dated 11.08.2021, the Arbitral Tribunal has allowed all the claims of the Respondents/Claimants and rejected the counter claims of the Petitioner in entirety.

3. The dispute between the Petitioner and the Respondent before the Arbitral Tribunal was under a Joint Development Agreement dated 09.04.2012 signed between the Petitioner and the Respondents/Claimants herein.

4. After the pleadings were completed, the Arbitral Tribunal framed the following 14 issues as follows:-



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1. *Whether the Joint Development Agreement dated 09.04.2012 between the claimants and respondent a revenue sharing agreement or an area sharing agreement?*
2. *Whether Clause 5(a) of the JDA is a contingent contract which comes into effect only after the conditions are fulfilled?*
3. *Whether the actions of the claimants amount to implied acceptance?*
4. *Whether the claimants have acquiesced to the agreement being an area sharing agreement by not arriving at a mutual price for sale, modus operandi and by not giving the power of attorney for the 48% share of the claimants?*
5. *Whether the claimants can now traverse beyond the scope of their JDA and seek to claim for a percentage of sales from the Chemsols JDA?*
6. *Whether the claimants were offered possession of the completed apartments, if so, whether clause 30 will remain operational?*
7. *Whether the respondent is entitled to receive the refund of the security deposit?*
8. *Whether the respondent is entitled to receive the maintenance charges from 01.04.2018 till date at the rate mentioned in the claim statement as per the size of the flat?*
9. *Whether the respondent is entitled to receive the additional charges that have been incurred?*
10. *Whether the respondent is entitled to receive the damages as sought for?*



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11. *Whether Clause 30 of the JDA can remain operational inspite of the claimants offering possession from 2018?*
12. *Whether GST or applicable and statutory taxes to be paid by respective parties?*
13. *Whether property and corporation taxes to be paid by respective parties?*
14. *Whether any other relief is to be granted to the parties herein?*

5. In the Impugned Award, the above stated 14 issues were answered as

follows:-

“Issue No.1

The issue is answered in favour of the claimants holding that the Joint Development Agreement dated 09.04.2012 entered into between the claimants and the respondent is revenue sharing agreement and not an area sharing agreement.

Issue No. 2 to 5

Issues 2 to 5 are answered in favour of the claimants that the Clause 5(a) of the JDA is not a contingent contract to contend that it comes into effect only after the conditions are fulfilled. The actions of the claimants do not amount to implied acceptance. The claimants have not to the agreement being an area sharing agreement by not arriving at a mutual price for sale, modus operandi. The Power of Attorney given under the Deeds of Power of Attorney is evidently acted upon by the respondent to execute the sale deeds and receive the sale consideration on behalf of the claimants. The sharing ratio given therein in the power has to be seen in the light of the Joint Development Agreement and relates to the sharing of the sale consideration and the authority



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given to the respondent related to its right to mortgage on 52%. The claimants have not traversed the scope of the Joint Development Agreement. Thus, considering the relief granted under issue no 1 and holding the terms of Clause 5 (a) as revenue sharing only, the issues are answered in favour of the claimants as above.

Issue No.6

The issue is answered in favour of the claimants that the respondent did not offer possession unconditionally be it at the time of issuing the notice or at any time before the dispute surfaced.

Issue No. 7 to 13

Issues 7 to 13 on counter claims stand rejected and accordingly the issues are answered against the respondent.

Issue No.14

Considering the nature of disputes raised, the parties are directed to bear their respective costs of the proceedings. There are no other issues left for consideration other than those narrated above.”

6. The dispute between the Petitioner and the Respondents/Claimants had arisen on account of alleged breach of terms and conditions of the aforesaid Joint Development Agreement dated 09.04.2012 signed between the Petitioner and the Respondents/Claimants.

7. The aforesaid Joint Development Agreement dated 09.04.2012 contemplates a clause for resolution of dispute through Arbitration. Clause 42 of the Joint Development Agreement dated 09.04.2012 reads as under:-

“42. The parties hereto mutually agree that in the event of any dispute or differences over the interpretation of any of the clauses in this agreement or arising out of the terms of



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the present agreement the same shall be resolved by the taking resort to Arbitration by a sole arbitrator to be appointed jointly by both parties whose award shall be final and binding.”

8. Under the aforesaid Joint Development Agreement dated 09.04.2012, the Petitioner herein had agreed to develop the land belonging to the Respondents/Claimants measuring an extent of 2.82 acres and the Respondents/Claimants agreed to transfer, convey and assign 52% of the undivided shares/interest over the land in favour of the Petitioner or its nominee in consideration of the Petitioner constructing and delivering 48% share in construction to the Respondents/Claimants.

9. As per clause (2) of the aforesaid Joint Development Agreement dated 09.04.2014 in the constructed complex (residential flats/apartments), the built up area was to be shared between the Petitioner and the Respondents/Claimants in the ratio 52:48 and out of that 366326.20 sq.ft., and 12,688 sq.ft., against premium FSI can be constructed as per the law prevailing at the time in respect of the construction over the land and the same shall be shared between the Petitioner and the Respondents/Claimants in the ratio 48% and 52% respectively.

10. Clause (2) of the aforesaid Joint Development Agreement dated 09.04.2014 also further contemplated that any additional area construction over



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and above 3,79,014.20 sq.ft., (3,66,236.20+12,688) shall be shared between the Respondents/Claimants and the Petitioner in the same ratio as 48 % and 52% respectively.

11. Clause (2) of the aforesaid Joint Development Agreement dated 09.04.2014 reads as under:-

“2. The parties hereto have mutually agreed to develop the schedule ‘A’ property by putting up residential buildings flats/apartments/commercial complex and the residential flats/apartments/commercial complex so construed will be shared between the developer and the land owner in the ration 52:48 respectively and that 366326.20 sq.ft and 12688 sq.ft against the Premium FSI can be constructed as per the laws prevailing for the time being in force in respect of the said construction over the schedule A lands and the same shall be shared between the Land owners and Developer in the ratio 48:52 respectively. It is further agreed that any additional area constructed over and above 379014.20 sq.ft (366326.20 + 12688.00) shall also be shared between the Land owners and Developer in the same ratio 48:52 respectively. The developer agrees to complete the construction and hand over the agreed built up area to the land owner in 30 minutes from the date of obtaining sanction of the plans for construction from the DTCP/CMDA or such other competent authorities subject to Acts of God and force majeure.”

12. The Petitioner was required to complete the construction within a period of thirty (30) months from the date of obtaining sanction from the Director of Town and Country Planning, Chennai Metropolitan Development Authority or such other Component Authority subject to force majeure in consideration of the



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above Joint Development Agreement dated 09.04.2012.

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13. The Petitioner paid the Respondents/Claimants an Interest Free Refundable Deposit of Rs.4,00,00,000/-. The aforesaid Interest Free Refundable Deposit of Rs.4,00,00,000/- was to be refunded back to the Petitioner by the Respondents/Claimants subject to the Petitioner handing over the agreed share to the Respondents/Claimants in the built up area as per the Respondents/Claimants entitlement under the aforesaid agreement in Joint Development Agreement dated 09.04.2012.

14. Relevant clauses under the Joint Development Agreement dated 09.04.2014 reads as under:-

Clause 4	Clause 5
That in consideration of the above covenants, the DEVELOPER has already paid a sum of Rs.3,50,00,000/- (Rupees Three Crore Fifty Lakhs only) and agree to pay a further sum of Rs.50,00,000/- (Rupees Fifty Lakhs only) at the time of signing the agreement totaling a sum of Rs.4,00,00,000/- (Rupees Four Crores only) an interest free refundable deposit to the LAND OWNER, the receipt of which sum the land owner doth hereby admit and acknowledge. The above amount paid to the land owners shall be refunded free of interest to the DEVELOPER by the land owners	The DEVELOPER herein agrees to carry out the development on the Schedule A lands as per the sanctioned plan to be obtained with any further approved modifications as the work progresses and for that purpose the land owner has agreed to make available the land in the property more fully described in schedule 'A' and the DEVELOPER has agreed to develop the said lands by putting up buildings as per the plans to be approved, with such variations as may be agreed upon from time to time by the parties hereto. The Developer covenants that all such modifications/alteration will be as per the Development Control Rules

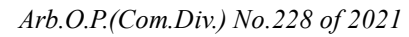


subject to the developer handing over the agreed share of LAND OWNER in the built up area as per the owner's entitlement as herein contained.

prevailing at that point of time. The Developer agrees to make available a copy of the complete set of sanctioned plan and all such modified sanctioned plans to the land owners.

a. The Parties further covenant while the sharing ratio shall remain 52% to the Developer & 48% to the Land Owners and that instead of allotting specified and identified constructed area to the Land Owners and the Developer in accordance with the aforesaid proportion as agreed in the **Development Agreement, with a view to evolve a market strategy which is acceptable to and beneficial to both the parties, agree that the entire/part constructed area/apartments shall be marketed by the Developer without specific allotment of physical areas to either of them and the sale proceeds shall be divided in the proportion 52% to the Developer & 48% to the Land Owner. The parties have agreed for the sake of convenience and better marketing procedures and efficiency that the marketing shall be done by the Developer with the assistance of the Land Owners wherever necessary at mutually agreed price.** It is also agreed that the Land Owners can retain certain apartments out of their share and the same can be identified and earmarked.

b. The Developer agrees to sell on mutually agreed price and collect the sale proceeds and pay the share of the Land Owners within 30 days of such



f. All advertising, marketing expenses, brokerage and commission to sell the flats will be solely to the account of the developer and the land owners will not be responsible to share the same with the developer.



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15. Thus, the Agreement stipulated that while sharing ratio shall remain 52% in favour of Petitioner and 48% in favour of the Respondents/Claimants, the Petitioner instead of allotting specified and identified constructed area to the Respondents/Claimants agreed to market the entire/part constructed area of the apartments under the Joint Development Agreement dated 09.04.2012 and the sale proceeds shall be divided in the proportion 52% to the Petitioner/Developer and 48% to the Respondents/Claimants. This was with a view to evolve a marketing strategy which was acceptable to and be beneficial to both the parties without specific allotment of physical areas to either of them.

16. The parties also agreed for the sake of convenience and better marketing procedure and efficiency that the marketing shall be done by the Petitioner/Developer with the assistance of the Respondents/Claimants wherever necessary at mutually agreed price. It was also agreed that the Respondents/Claimants could retain certain apartments out of their share and which could be identified and earmarked.

17. The Respondents/Claimants vide Email dated 03.04.2013 opted for East facing and Sea facing flats. Accordingly, the Petitioner reserved Flat



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Nos.1703, 1704, 1803 and 1804 in the 'Fortuna' Block for the Respondents/Claimants.

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18. Sub-clause (a) to (f) to Clause 5 of the aforesaid Agreement dated

09.04.2012 reads as under:-

“5. The DEVELOPER herein agrees to carry out the development on the Schedule A lands as per the sanctioned plan to be obtained with any further approved modifications as the work progresses and for that purpose the land owner has agreed to make available the land in the property more fully described in Schedule 'A' and the DEVELOPER has agreed to develop the said lands by putting up buildings as per the plans to be approved, with such variations as may be agreed upon from time to time by the parties hereto. The Developer covenants that all such modifications/alteration will be as per the Development Control Rules prevailing at that point of time. The Developer agrees to make available a copy of the complete set of sanctioned plan and all such modified sanctioned plans to the land owners.

a. The parties further covenant while the sharing ratio shall remain 52% to the Developer & 48% to the Land Owners and that instead of allotting specified and identified constructed area to the Land Owners and the Developer in accordance with the aforesaid proportion as agreed in the Development Agreement, with a view to evolve a market strategy which is acceptable to and beneficial to both the parties, agree that the entire/part constructed area / apartments shall be marketed by the Developer without specific allotment of physical areas to either of them and the sale proceeds shall be divided in the proportion 52% to the Developer & 48% to the Land



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Owner. The parties have agreed for the sake of convenience and better marketing procedures and efficiency that the marketing shall be done by the Developer with the assistance of the Land Owners wherever necessary at mutually agreed price. It is also agreed that the Land Owners can retain certain apartments out of their share and the same can be identified and earmarked;

b. The Developer agrees to sell on mutually agreed price and collect the sale proceeds and pay the share of the Land Owners within 30 days of such collection. Also the Developer will not charge any service charges, marketing expenses, brokerage or commission for selling the constructed area belonging to the Land Owners;

c. The parties hereto mutually agree and confirm that the sharing of 52% to the Developer & 48% to the Land Owner between the parties hereto is only in respect of the amount as stipulated in the respective agreement of sale cum construction which in respect of the cost of the flat including the cost of undivided of land and the cost of car parking;

d. The parties have specifically agreed that the Development Agreement does not constitute them into an Association of Persons or a Partnership but is only an agreement for the transfer of the undivided interest in land and the sharing of the constructed areas provided as a consideration for the transfer of the corresponding undivided share in the land;

e. The Land Owners agree that all acts deeds and things done by the developer in respect of his/her 52% entitlement in the joint development of the schedule-A mentioned property is valid and binding on them;

f. All advertising, marketing expenses, brokerage and



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commission to sell the flats will be solely to the account of the developer and the land owners will not be responsible to share the same with the developer.”

19. The aforesaid Joint Development Agreement dated 09.04.2012 also contemplated execution of Power of Attorney in favour of the Petitioner empowering the attorney to execute conveyance/sale deeds in respect of 52% of shares in the land in favour of the prospective buyers of the flat.

20. The Joint Development Agreement dated 09.04.2012 also empowered the Petitioner to use 52% of their share for getting project loan in their own name without any personal liability of the Respondents/Claimants and that the Petitioner was entitled to create mortgage or charge in respect of 52% of the undivided shares in the land for such project loan.

21. Accordingly, pursuant to the aforesaid Joint Development Agreement dated 09.04.2012, the Respondents/Claimants executed Power of Attorney in favour of the Petitioner on 09.04.2012 and 10.04.2012 enabling the Petitioner to sell and act on the 52% share that is allocated to the Petitioner in the Joint Development Agreement dated 09.04.2012.

22. The records indicate that similar Joint Development Agreements dated



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09.04.2012 were signed with M/s.Chemisols Phenolics LLP and C.Savithri for area sharing of the construction while the Joint Development Agreement dated 09.04.2012 with Respondents/Claimants are for revenue sharing from the proceeds of sale from the construction.

23. However, even before the aforesaid Development Agreements were signed, two separate Joint Development Power of Attorney were executed by the 1st respondent and the 2nd respondent on 07.12.2010 in favour of one Bharath Kumar.K (the petitioner) registered as Document.No.1520 of 2010 and by the 3rd and the 4th respondent on 08.12.2010 and Document No.1521 of 2010 for reconstitution of the land into one large piece of land with the land belonging to M/s.Chemisols Phenolics Pvt. Ltd. and one C.Savithri.

24. At that stage, the Petitioner had also entered into similar arrangements with M/s.Chemisols Phenolics Pvt. Ltd. and one C.Savithri who are the land owners of the land adjacent to the Respondents/Claimants on the strength of the aforesaid Power of Attorney dated 07.12.2010 and 08.12.2010 given by the Respondents/Claimants in favour of the Petitioner.

25. Ahead of reconstitution of lands of the Respondents/Claimants and the



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said M/s.Chemisols Phenolics Pvt. Ltd. and C.Savithri, a Deed of Reconstitution dated 20.12.2010 was entered between the Petitioner as power agent of the Respondents/Claimants and M/s.Chemisols Phenolics Pvt. Ltd. and C.Savithri, whereby an extent of 615.56 cents of land which included 282 cents of that of the Respondents/Claimants was reconstituted as one large piece of land for development.

26. The Petitioner also signed two separate area sharing Joint Development Agreements with M/s.Chemisols Phenolics LLP, (Formerly known as M/s.Chemisols Phenolics Pvt. Ltd.) (hereinafter referred to as Chemisols) and C.Savithri on the same date *i.e.*, on 09.04.2012.

27. The facts also indicate that on 01.12.2012, the Petitioner also signed a separate Memorandum of Understanding with Chemisols and C.Savithri to demarcate the ownership of flats in the project in M/s.ASV Alexandria in the four towers namely Fortuna, Aurora, Tela and Victoria. Such an arrangement was not signed with the Respondents/Claimants.

28. Thereafter, planning permission was granted on 13.10.2012 by Chennai Metropolitan Development Authority and a Supplementary Agreement



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was signed on 12.12.2012 between the Petitioner and the Respondents/Claimants extending the time for completion of the project.

29. On the strength of Power of Attorney executed on 09.04.2012 and 10.04.2012 by the Respondents/Claimants, the Petitioner has also sold proportionate share of undivided share of 52% to various third parties who have invested in flats in the four blocks namely Fortuna, Aurora, Tela and Victoria in the project promoted by the Petitioner in ASV Alexandria project.

30. Similar sales have also been effected by the Petitioner on its share in terms of area sharing Joint Development Agreement dated 09.04.2012 and the Memorandum of Understanding dated 01.12.2012 with M/s.Chemisols Phenolics LLP and C.Savithri.

31. It is also not in dispute that the Petitioner by an email dated 13.04.2015 informed the Respondents/Claimants that the total built up area of the construction was 8,27,500 sq.ft., and that the proportionate share of the Petitioner and the Respondent was 3,79,439 sq.ft., whereas the total built up area of the other land owners namely M/s.Chemisols Phenolics LLP and C.Savithri would be 4,48,061 sq.ft, in all totaling to 8,27500 sq.ft.

32. On 17.04.2019, the Respondents/Claimants informed the Petitioner



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regarding a resolution passed by them in respect of leasing of EWS units in accordance with the share of the former in the EWS area. It reads as under:-

“Each co-owners should independently take allotment of his / her share in the developed EWS units constructed in this project known as Alexandria. For completing the process of allotment, Mr.D.sunil Kumar is hereby authorised to discuss with you and finalise the agreed unit numbers as per Joint Development Agreement dated 9th April, 2012. This he should do before the balance EWA units are either sold or leased out by the Developer or M/s Chemisols Phenolics LLP, Chennai. This allotment procedure should be completed at the earliest. Each co-owner will be free to deal with his or her EWS units.”

33. On 21.04.2019, the Petitioner replied to the email dated 17.04.2019 of the Respondents/Claimants regarding the resolution passed by them in respect of EWS units and called upon the Respondents/Claimants to execute a Power of Attorney for 100% of the UDS in the land in favour of the Petitioner as a prerequisite and as a condition to give effect as a revenue sharing arrangement under Joint Development Agreement dated 09.04.2012.

34. The relevant portion of the email attached is been extracted below:-

“At the outset we are surprised to note a resolution passed by you without ASV Constructions P Ltd; being a party to it. Hence the same cannot bind our company.

In respect of the subject matter raised by you we wish to bring to your kind attention Clause 5(a) of the



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JDA which reads as follows:-

“The parties further covenant while the sharing ratio shall remain 52% to the Developer & 48% to the Land Owners and that instead of allotting specified and indentified constructed area to the Land Owners and the Developer in accordance with the aforesaid proportion as agreed in the Development Agreement, with a view to evolve a market strategy which is acceptable to and beneficial to both the parties, agree that the entire/part constructed area/apartments shall be marketed by the Developer without specific allotment of physical areas to either of them and the sale proceeds shall be divided in the proportion 52% to the Developer & 48% to the Land Owner. The parties have agreed for the sake of convenience and better marketing procedures and efficiency that the marketing shall be done by the Developer with the assistance of the Land Owners wherever necessary at mutually agreed price.” We wish to reiterate that it was only at your request no area sharing agreement was entered into till date. This was mainly at your instance to postpone your capital gains liability.

In this connection we wish to state that to give effect as a revenue sharing Joint Development, your execution of a Power of Attorney for 100% of the UDS in the land, in our favor becomes a prerequisite or a condition precedent.

Further vide your email 24 Feb 2019 you had also confirmed through the drafts of letter & the deed of confirmation attached thereto, that the JDA between us is not a revenue sharing one. Hence we confirm that the flats in the project to be shared between us are intact and we are always ready to enter into an area sharing agreement and hand over possession of the flats & EWS allotted to you. The list of flats to be shared between us including EWS has been shared with you long ago. At



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your request a declaration was given to the income tax department that the flats sold by dos not form part of the flats to be shared between us. You are well aware that the flats for sharing between Chemisols Phenolics LLP and us has been completed and all the flats sold till date are part of our flats falling to our share with Chemisols Phenolics LLP which sales have already declared in our income tax returns and the statement has been given by us to the income tax department.

We have been time and again requesting you to take possession of the flats entitled to you after settling all the dues to us including the refund of the security deposit. In this connection you are aware that the Completion Certificate for the project was received as 13-04-2016.

In the light of the above you, we request your good self to kindly take possession of the flats & EWS entitled to you from out of the list of our joint holding (between ASV & Dharmichand group), which list already shared with you, subject to your payment of all dues to us including the refund of the security deposit.

In case you would like to sell your flats to third parties through us, we shall always be happy to do the same. In this connection, we had already sent to you the draft of MOU in order to enable us to sell your flats to prospective buyers. On your confirmation of the draft of the MOU already sent to you we can proceed to execute the same. Please not any statutory tax(es) that may arise out of the JDA in respect of your entitlement(s) shall be payable by you.

Looking forward to hear from you.”

35. In the light of the alienation of the UDS by the Petitioner, the Respondents/Claimants were exposed to capital gains Income Tax. It is at this



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stage, the Respondents/Claimants issued Legal Notice dated 08.05.2019, wherein the Respondents/Claimants called upon the Petitioner to produce accounts regarding the sales made till 08.05.2019, and to arrive at an understanding regarding the allocation of units to Chemisols Phenolics LLP to proceed with the Project amicably.

36. The Petitioner replied back on 16.05.2019 to the Respondents/Claimants and called upon the Respondents/Claimants to take possession of the flats. This lead to exchange of further communications between them.

37. On 30.05.2019, the Petitioner, thereafter issued a Legal Notice called upon the Respondents/Claimants to pay the amounts due on account of the EWS and to take possession of the flats, EWS & designated Car parking area. Relevant portion of the aforesaid Legal Notice dated 30.05.2019 is extracted here under:-

“Please note if your clients fail to take possession of the flats, EWS & designated Car parking area on any of the dates mentioned supra as stipulated above, our clients would be proceedings to keep the keys of all the flats & EWS entitled to your client in a sealed container and be kept in a locker in the presence of two witnesses and pursuant thereto all the obligations of our client towards your client in terms of the Joint Development Agreement



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dated 09-04-2012 shall stand fully discharged. Your clients may please be informed that the Corporation authorities are insisting to complete the assessment of the flats to property tax. If your clients fail to take possession of the flats, EWS & designated Car parking area on any of the dates mentioned supra as stipulated above, our client would be constrained to handover the list of the Flats mentioned in the Annexure herein to the corporation authorities to enable them to assess the flats to property tax in your clients' name."

38. The Respondents/Claimants filed A.Nos.4505, 4507 & 4508 of 2019 moved this Court for interim protection under Section 9 of the Arbitration and Conciliation Act, 1996.

39. In A.Nos.4505, 4507 and 4508 of 2019, the Respondents/Claimants prayed for the following relief:-

A.No.	Prayer of the Application
4505 of 2019	Seeking for an Interim Direction to the first respondent to deposit a sum of INR 56,34,06,234/- (Rupees Fifty Six Crores Thirty Four Lakhs Six Thousand Two Hundred and Thirty Four Only) to the account of the present Original Application pending the arbitral proceedings between the applicants and the first respondent and passing of an award therein.
4507 of 2019	Seeking for an Interim Direction to the first respondent to deposit 48% of the consideration received by it in exchange for alienating, transferring, selling, pleading or otherwise creating any encumbrances, either directly or indirectly, whether in part or in full, on the property situated at Survey Nos.476/35, 476/2A1, 476/2A2, 476/4A2, 476/2A3A1 in Sholinganallur Village, Tambaram Taluk, Kancheepuram District and/or on the developments constructed thereupon to



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	the account of the present original application pending the arbitral proceedings between the applicants and the first respondent and passing of an award therein.
4508 of 2019	Seeking for appointment of an ad-hoc third party receiver and committing the said property to his possession, custody and management, which includes a direction that any sale transaction of an Undivided Share or otherwise of the same shall be made only with his consent and signature and he shall be empowered to receive 48% of the consideration from all such transactions to deposit the same before this Court.

40. The Respondents/Claimants sought for an interim direction to the Petitioner to deposit 48% of the consideration i.e., Rs.56,34,06,234/- received by the Petitioner in exchange for alienation and sale of the land in the ASV Alexandria project developed by the Petitioner pursuant to the Joint Development Agreement dated 09.04.2012.

41. By an Order dated 09.08.2019, this Court however dismissed A.No.4505 & 4508 of 2019. However, the Court issued a direction in A.No.4507 of 2019 to the Petitioner by observing that the Respondents/Claimants were entitled to 48% of the “revenue share” from and out of the sale proceeds of the apartments in terms of the Joint Development Agreement between the Petitioner and the Respondents/Claimants dated 09.04.2012.



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herein:-

42. Relevant portion of the aforesaid Order dated 09.08.2019 is extracted

“7. There is no dispute with respect to the sharing ratio between the applicants and the first respondent. Though the first respondent had contended that it could not sell the flats, which are entitled to the applicants and the respondent, it is pointed that some of the apartments belonging to the combined list of applicants and the first respondent have been sold by the first respondent. When Clause 5(a) envisages the sharing ratio, it is specifically stated that the sale proceeds shall be proportionate, i.e., 52% to the Developer and 48% to the Land Owner. It is also agreed that the Developer would do the marketing for the entire project. It is only agreed that the land owner can retain certain apartments out of the share and the same can be identified and earmarked. Therefore, Clause 5(a) of the JDA is very clear that the sale proceeds shall be divided in the proportion of 52:48. In such circumstances, when the sales have been made by the first respondent, the applicants are entitled to a revenue share of 48%.

10. Admittedly, the land owners have already executed a Power of Attorney for sale of 52% of the land belonging to them and have retained 48%. Once the first respondent had started marketing the constructed units, the parties have to share it in the ratio of 52:48. It is not the case of the first respondent that none of the units have been sold to any third party. Even if only one unit is sold, as per the JDA, the first respondent is to account for the sale.

*12. However, the applicants are entitled to 48% of revenue share from and out of the sale proceeds of the apartment in terms of the JDA that they have entered into with the first respondent. **To enable the applicants to have such revenue share, the first respondent shall not***



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sell any apartment/flat covered under the JDA without the knowledge of the applicants. In other words, the apartment/flat covered under the JDA shall be sold with the consent of the applicants.”

43. It is in this background, the Respondents/Claimants invoked arbitration proceedings in accordance with the arbitration clause in the Joint Development Agreement dated 09.04.2012 and the Petitioner and the Respondents/Claimants decided to resolve their disputes by constituting an Arbitral Tribunal consisting of Hon'ble Mrs.Justice.Chitra Venkatraman (Retd.) as the Sole Arbitrator, who has passed the Impugned Award dated 11.08.2021.

44. Meanwhile, during the interregnum, several Sale Deeds have been executed transferring the undivided share in the reconstituted land in favour of third parties who had invested in the flats in the project ASV Alexandria by the Petitioner on the land of the Respondents/Claimants, M/s Chemisols Phenolics LLP and C.Savithri and has profited from it.

45. It is stated after the receipt of the Award, the Respondents/Claimants filed an application before the Arbitral Tribunal under Section 33 of the Arbitration and Conciliation Act, 1996 seeking rectification as to the percentage of their revenue share in the sale of the reconstituted lands. The Respondents/Claimants contended there is a computational error in the working of shares based on facts.



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46. The Arbitral Tribunal, by an Order dated 27.12.2021 rejected the application stating that the Arbitral Tribunal did not find any arithmetical or clerical error in the computation in the Award in accordance with the findings.

The relevant portion of the aforesaid Order is extracted below:-

“7. I have considered the contentions made by the parties herein and I agree with the submissions of the respondent.

8. Keeping in the background the law laid down by the Apex Court as to the jurisdiction of the Arbitral Tribunal under Section 33 that only clerical and arithmetical errors can be corrected and the award modified to that extent, if one looks at the prayer of the applicants/claimants seeking 28.334% it is clear that after accepting the findings by the Tribunal as correct and with the rejection of the claim for 28.334% by the claimant rejected, the present claim seeking rectification of an alleged arithmetical error would practically amount to rearguing the whole case again before this Tribunal.

9. In paragraph 110, the award gives the contention of the claimant seeking 28.334% in the reconstituted land taking into account the Chemisols share in the reconstituted land. The contention of the claimant that they are entitled to 28.334% is found in paragraphs 104, 105, 106 & 110. In paragraph 112, the award specifically observed that though the method of working the percentage of sharing at 28.334% is arithmetically not correct, the working done was in line with the respondents submission on the reconstituted lands developed as a single project and the respective sharing of the revenue as under the agreement between the



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parties herein.

10. The award in paragraph 113 gives the reasoning on the arithmetical working taking into account the entire reconstituted lands and the respective shares of the parties. I do not think it is necessary to once again elaborate on this since a cursory glance of the working shows that it toes on the line of the reasoning as given under the above said paragraphs and paragraph 114.

11. In paragraph 9 of the application, the applicants/claimants have contended that the revenue share entitlement ought to be 28.334 sq.ft. in the total area of 643292 sq.ft. If only one adverts his attention to what is stated in paragraphs 113 and 114, I do not think there could ever arise a situation to file a petition under Section 33. I do not think it is necessary for me to elaborate once again on the reasoning to arrive at 22% of revenue on total sale consideration on the undivided are out of the reconstituted lands which would work out 48% as per the Joint Development Agreement between the parties herein. The answer to the contention of the claimant applicants is already there in paragraphs 113 and 114 and the working to get 22% is based on the total reconstituted area. Conversely, if one works out with the area excluding Chemisols group, the result will give 28.334% which is nothing but 22% on the overall reconstituted area. The share of the applicants/claimants remain at the same sq.ft.

12. As pointed out by the learned Senior Counsel appearing for the respondent, the jurisdiction under Section 33 is very limited and narrow; that the Tribunal can exercise its jurisdiction only when the error is arithmetical, too glaring and patent that without any strain, and a long winding enquiry, the error gets noticed to make one wonder how the computational error had crept in the main order.



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13. I have gone through the award in the light of the contentions made by the applicants/claimants. I do not find any arithmetical or clerical error in the computation done in accordance with the findings noted. The discussion in Paragraphs 113 & 114 clearly brings out the working done.

In the circumstances, I do not find any justification to correct the award as sought for by the claimants in their application filed under Section 33 of the Arbitration and Conciliation Act, 1996. Consequently, the application is rejected.”

47. It is the contention of the Petitioner that the Arbitral Tribunal did not take into account the relevant clauses/terms of the Joint Development Agreement dated 09.04.2012 entered between the Petitioner and Respondents/Claimants and thus the Impugned Award is in violation of Section 28(3) of the Arbitration and Conciliation Act, 1996.

48. It is further submitted that the relevant clauses of the Joint Development Agreement dated 09.04.2012 entered between the Petitioner and Respondents/Claimants and pertinent material available on record were ignored and an implausible conclusion has been arrived that the Joint Development Agreement dated 09.04.2012 entered between the Petitioner and Respondents/Claimants is a ‘revenue sharing’ agreement. It is stated by the Petitioner that the Agreement contemplates only sharing of space/area.

49. The Petitioner highlighted certain clauses of the Joint Development



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Agreement dated 09.04.2012 entered between them and the

Respondents/Claimants to prove that the Agreement is an 'area sharing'

Agreement and not a 'revenue sharing' Agreement. It reads as under:-

"Whereas the Developer assured the Land Owners that it would construct a Residential Complex/Apartments/Commercial Complex and allot 48% of the total built up area to be constructed on the land, more particularly described in the Schedule A with minimum saleable area of the allotment in favour of the land owners being 175837 sq.ft (excluding premium FSI) or 48% of the total built up area, whichever is higher.

Whereas Land Owners assured the Developer that they would sell, transfer, convey and assign 52% undivided share or interest over the land comprised in Schedule 'A' in favour of the DEVELOPER or its nominee(s) in consideration of the DEVELOPER constructing and delivering to the Land Owners 48% of the super built up area of the building to be constructed on the Schedule 'A' property.

The Developer herein have also assured the Land Owners that it would construct an additional area of minimum 12688 Sq.Ft saleable area against the Premium FSI which will be over and above the existing saleable area of 366326.20 sq.ft and the land owners will be given the proportionate share in the said additional FSI.

Whereas the Developer assured the Land Owners that it would construct a Residential Complex/Apartments and allot 48% of the total built up area to be constructed on the land, more particularly described in the Schedule A and that 366326 sq.ft. and 12688 sq.ft against the Premium FSI can be constructed as per the laws prevailing



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for the time being in force or more area if constructed over the Schedule A lands and the same shall be shared between the Land Owners and the Developer in the ratio of 48:52 respectively.”

50. It is the contention of the Petitioner that the Impugned Award only takes into consideration Clause 5(a) of the Joint Development Agreement dated 09.04.2012 entered between them and the Respondents/Claimants while leaving behind all the aforesaid clauses in the Agreement which reinstates that the Agreement is an ‘area sharing’ Agreement and not a ‘revenue sharing’ Agreement.

51. It was further contended by the learned Senior Counsel for the Petitioner that the Respondents/Claimants had given access to the Petitioner only to sell and alienate 52% of the land in the construction while withholding the power to sell the remaining 48% of the share under the Joint Development Agreement dated 09.04.2012 entered between them and the Respondents/Claimants. It is stated that if the Agreement had been a revenue sharing Agreement then the Respondents/Claimants would have given powers to the Petitioner to deal with 100% of the property.

52. A reference was made to email dated 03.04.2013 of the Respondents/Claimants to the Petitioner, wherein the Respondents/Claimants



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wanted an additional twenty more apartments, besides the five apartments already selected by them and had made a list of the same. It is therefore contended that the Agreement between the Petitioner and the Respondents/Claimants is an 'area sharing' Agreement and not a 'revenue sharing' Agreement.

53. Further, a reference was made to the Letter dated 17.04.2019 of the Respondents/Claimants to the Petitioner which pertains to the allotment of EWS, which is stated to make it unambiguously clear that the Joint Development Agreement dated 09.04.2012 entered between them and the Respondents/Claimants is an 'area sharing' Agreement.

54. Therefore, it is submitted that the Impugned Award suffers from patent illegality and that revenue sharing is not a plausible conclusion that the Arbitral Tribunal has taken.

55. It is further submitted that the Arbitral Tribunal has travelled beyond the scope of the Joint Development Agreement dated 09.04.2012 entered between them and the Respondents/Claimants by granting revenue share to the Respondents/Claimants from the share of the Petitioner under the Joint Development Agreement dated 09.04.2012 entered between the Petitioner and the Chemisols group.



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56. It is submitted that the Arbitral Tribunal ought to have taken into consideration only the 3,79,014.20 sq.ft of the total built up area which is to be shared in the ratio of 52:48 in accordance with the Joint Development Agreement dated 09.04.2012 entered between the Petitioner and the Respondents/Claimants.

57. It is stated that there is no clause in the Joint Development Agreement dated 09.04.2012 entered between the Petitioner and the Respondents/Claimants specifying either 22% or 28.33%. Therefore, it is submitted that the Arbitral Tribunal has re-written the contract between the parties and has acted beyond the scope of the arbitral proceedings.

58. It is submitted by the learned Counsel for the Petitioner that a 'tenancy in common' continues for the reason that undivided share is incapable of partition. It is stated that once lands are reconstituted into a single unit, there cannot be a revenue sharing arrangement and that the reconstituted land cannot be divided thereafter. It is further stated that if it is declared to be a revenue sharing Agreement, then it is fundamentally against the clauses of Joint Development Agreement executed between the parties and is non-executable.

59. It is the contention of the Petitioner that the Respondents/Claimants are arguing a new case before this Court in this Original Petition *inter alia* by



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placing reliance on the Joint Development Agreement dated 09.04.2012 entered between the Petitioner and the Chemisols Group.

60. In support of the above, the Petitioner relies on the following judgments of the Hon'ble Supreme Court:-

1. ***Ssangyong Engineering & Construction Company Limited Vs. National Highways Authority of India*, 2019 15 SCC 131.**
2. ***Patel Engineering Ltd Vs. North Eastern Electric Power Corporation Ltd*, 2020 7 SCC 167.**
3. ***Projector Director, NHAI Vs. M.Hakeem & Anr*, 2021 9 SCC 167.**
4. ***IOCI Vs. Shree Ganesh Petroleum Rajgurunagar*, 2022 4 SCC 463.**

61. It is submitted by the learned Senior Counsel for the Respondents/Claimants that the findings of the Arbitral Tribunal are based on consideration of facts, evidence and interpretation of contract and cannot be interfered under Section 34 of the Arbitration and Conciliation Act, 1996 by this Court. It is stated that the Arbitral Tribunal has unequivocally decided that the aforesaid Joint Development Agreement dated 09.04.2012 entered between the Petitioner and the Respondents/Claimants was that of revenue sharing and not area sharing.

62. It is submitted that the proposed amendment to the aforesaid Agreement not being agreed upon by the parties shows that the Agreement



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remained as revenue sharing and not area sharing Agreement. It is stated that there was no consensus on the modification of the Joint Development Agreement dated 09.04.2012 entered between the Petitioner and the Respondents/Claimants.

63. It is submitted that the Arbitral Tribunal upon consideration of all clauses had come to a clear conclusion that the aforesaid Agreement between the parties was a revenue sharing Agreement and that the contention of the Petitioner that only Clause 5(a) was considered by the Arbitral Tribunal cannot be held to be logically right.

64. It is further submitted by the learned Senior Counsel for the Respondents/Claimants that the Arbitral Tribunal has rightly considered that the failure of the Respondents/Claimants to give a Power of Attorney to the entire 100% of the share does not have any bearing on the nature of the Joint Development Agreement dated 09.04.2012 entered between the Petitioner and the Respondents/Claimants as there was no hindrance to the autonomy and power of the Petitioner to execute Sale Deeds for the land in the project in favour of third parties.

65. In furtherance, it is submitted that the Power of Attorney being given only for 52% of the share of the Petitioner and not to the entirety of 100% is to



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limit the capacity of the Respondents/Claimants to raise loans for the project upto 52% in accordance with Clause 16 of the Joint Development Agreement dated 09.04.2012 entered between the Petitioner and the Respondents/Claimants and that the Power of Attorney has to be seen.

66. It is submitted by the learned Senior Counsel for the Respondents/Claimants that there is no mention in the Sale Deeds indicating the sale of undivided share from Chemisols Group lands or the lands allocated to the Claimants. It is submitted that in the sale which happened between September, 2014 and April, 2019, the Petitioner, the Respondents/Claimants and the Chemisols Group were all parties and jointly executed the Sale Deeds. It is submitted however, after the initiation of arbitration proceedings from January, 2020, the Petitioner changed its stand in execution of the Sale Deeds executed in favour of third parties to reflect that it is an area sharing Agreement and its stand before the Arbitration Tribunal and stopped including the names of the Respondents/Claimants in the Sale Deeds executed in favour of third parties.

67. It is submitted that in accordance to the admission of the Petitioner that the parties cannot execute Sale Deeds to third parties stating that the respective flats are constructed on their portion of the land, the stand of the Petitioner that



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the Respondents/Claimants cannot have any say in the matter of sharing the consideration in respect of the undivided share in the reconstituted lands ought to be rejected.

68. It is submitted by the learned Senior Counsel for the Respondents/Claimants that the Petitioner failed to act in a fair manner and had put their interest over and above the interests of the Respondents/Claimants, the other party in the Agreement and that it is stated that the action of the Petitioner brings in conflict of interest.

69. It is submitted that irrespective of the fact that the Joint Development Agreement dated 09.04.2012 entered between the Petitioner and the Respondents/Claimants is a revenue sharing or area sharing, the fact Respondents/Claimants are entitled for their share in the constructed area from the Joint Development Agreement with the Chemisols Group certainly imposes an obligation on the Petitioner to act with commercial prudence expected of the Petitioner as the agent of the Respondents/Claimants.

70. It is further submitted that the reconstituted land itself is a bundle of undivided shares of the Respondents/Claimants and the Chemisols Group. Therefore, it is submitted that on every sale made of an undivided share in the



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reconstituted lands, the Petitioner is bound to share consideration and the Respondents/Claimants are entitled to 22% in entirety of the project constituting 8,28,120 sq.ft. of the total built up area.

71. Therefore, it is submitted that the Impugned Award sets out the rights of the Respondents in the reconstituted lands within the scope and ambit of Joint Development Agreement dated 09.04.2012 entered between the Petitioner and the Respondents/Claimants and that it does not abrogate the rights of the Petitioner in any manner. It is stated that the Arbitral Tribunal has not granted any relief which is above and beyond the relief sought for in the Claim Statement.

72. In support of the above, the Respondents/Claimants rely on the following judgments of the Hon'ble Supreme Court:-

1. ***Ssangyong Engineering & Construction Company Limited Vs. National Highways Authority of India, 2019 15 SCC 131.***
2. ***Dyna Technologies Private Limited Vs. Crompton Greaves Limited, 2019 20 SCC 1.***
3. ***UHL Power Company Limited Vs. State of Himachal Pradesh, 2022 4 SCC 116.***

73. I have considered the arguments advanced by the learned Senior Counsel for the Petitioner and the Respondents/Claimants.



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74. The facts are not in dispute. It is the conclusion that has been arrived by the Arbitral Tribunal vide the Impugned Award dated 11.08.2021 which is in challenge before this Court on the ground that the Arbitral Tribunal has re-written the contract and therefore it is contrary to the decision of the Hon'ble Supreme Court in **Ssangyong Engineering & Construction Company Limited Vs. NHAI**, (2019) 15 SCC 131. It is therefore stated that the conclusion arrived by the Arbitral Tribunal was improbable based on the facts of the case.

75. As mentioned in detail, the Petitioner, the promoter of the project called 'ASV Alexandria' had entered into three separate Joint Development Agreements dated 09.04.2012 with the Respondents/Claimants herein, M/s.Chemisol Phenolics LLP and one C.Savithri to develop and build residential towers along with indoor and outdoor facilities under the project name 'ASV Alexandria' on 6.15 acres of land belonging to that of the afore stated three land owners.

76. The Petitioner had utilised 2.82 acres of land (282 cents) belonging to the Respondents/Claimants jointly along with an extent of 3.33 acres (333 cents) of land belonging to M/s.Chemisols Phenolics LLP and C.Savithri pursuant to re-constitution of land and signing of the respective Joint Development Agreements dated 09.04.2012 with the parties. The Petitioner had already



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obtained 'Power of Attorney' from the respective land owners including the Respondents/Claimants herein and with M/s. Chemisols Phenolics LLP and one C.Savithri and had constituted the entire extent of 6.15 acres (2.82 acres + 3.33 acres) of land as a single parcel of the land.

77. The Petitioner had entered into an "area sharing" Joint Development Agreement dated 09.04.2012 with M/s Chemisols Phenolics LLP and one C.Savithri, whereas, with the Respondents/Claimants, the Petitioner had entered into a "revenue sharing" Joint Development Agreement on the same day with the Respondents/Claimants.

78. Before the construction of the project was completed on 13.04.2016, the Petitioner had entered into a Memorandum of Understanding dated 01.12.2012 with M/s.Chemisols Phenolics Pvt. Ltd. and C.Savitri, wherein specific flats were identified and allocated separately in the four blocks namely, Fortuna, Aurora, Telas and Victoria in the 'ASV Alexandria Project' to the M/s.Chemisols Phenolics Pvt. Ltd. and C.Savithri in accordance with their proportionate share in the Joint Development Agreement dated 09.04.2012 signed with them.

79. As far as, the Joint Development Agreement dated 09.04.2012 with the Respondents/Claimants are concerned, the agreement was for a Joint



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Development for “revenue sharing”. No Memorandum of Understanding similar to the Memorandum of Understanding dated 01.12.2012 signed with M/s.Chemisols Phenolics Pvt. Ltd. and C.Savithri was signed with the Respondents/Claimants by the Petitioner. Relevant clause has been extracted in Paragraph 14 of this Order. However for the sake of clarity, from Sub-Clause (a) to (f) of Clause 5 of the aforesaid Joint Development Agreement dated 09.04.2012 is reproduced again below in the context of discussion:-

“a. The parties further covenant while the sharing ratio shall remain 52% to the Developer & 48% to the Land Owners and that instead of allotting specified and identified constructed area to the Land Owners and the Developer in accordance with the aforesaid proportion as agreed in the Development Agreement, with a view to evolve a market strategy which is acceptable to and beneficial to both the parties, agree that the entire/part constructed area / apartments shall be marketed by the Developer without specific allotment of physical areas to either of them and the sale proceeds shall be divided in the proportion 52% to the Developer & 48% to the Land Owner. The parties have agreed for the sake of convenience and better marketing procedures and efficiency that the marketing shall be done by the Developer with the assistance of the Land Owners wherever necessary at mutually agreed price. It is also agreed that the Land Owners can retain certain apartments out of their share and the same can be identified and earmarked;

b. The Developer agrees to sell on mutually agreed price and collect the sale proceeds and pay the share of the Land Owners within 30 days of such collection. Also the Developer will not charge any service charges, marketing expenses, brokerage or commission for selling the



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constructed area belonging to the Land Owners;

c. The parties hereto mutually agree and confirm that the sharing of 52% to the Developer & 48% to the Land Owner between the parties hereto is only in respect of the amount as stipulated in the respective agreement of sale cum construction which in respect of the cost of the flat including the cost of undivided of land and the cost of car parking;

d. The parties have specifically agreed that the Development Agreement does not constitute them into an Association of Persons or a Partnership but is only an agreement for the transfer of the undivided interest in land and the sharing of the constructed areas provided as a consideration for the transfer of the corresponding undivided share in the land;

e. The Land Owners agree that all acts deeds and things done by the developer in respect of his/her 52% entitlement in the joint development of the schedule-A mentioned property is valid and binding on them;

f. All advertising, marketing expenses, brokerage and commission to sell the flats will be solely to the account of the developer and the land owners will not be responsible to share the same with the developer.”

80. The above clause specifically states that apartments shall be marketed by the Petitioner without specific allotment of physical area either to the Petitioner or to the Respondents/Claimants and that the sale proceeds shall be divided in the same proportion as **52 %** and **48%** between them. Thus, the conclusion arrived by the Arbitral Tribunal in the Impugned Award dated



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11.08.2021 in so far as issue No.1 cannot be faulted. It cannot be therefore said in the Impugned Award, the Learned Arbitrator has re-written the terms of the contract.

81. As per Clause 5 of the Joint Development Agreement dated **09.04.2012** which has been extracted above stating the sharing of **52%** to the Petitioner and **48%** to the Respondents/Claimants was only in respect of the amount/sale proceeds as stipulated in the respective Agreements of Sale in respect of the cost of the flat including the cost of undivided land and the cost of car parking also makes it clear that the Agreement in the Joint Development Agreement dated **09.04.2012** with the Respondents/Claimants for sharing of the revenue from the proceeds of sale made by the Petitioner.

82. In the case of the Joint Development Agreements dated 09.04.2012 with M/s.Chemisols Phenolics LLP and C.Savithri, the Petitioner specifically agreed for 'Area Sharing' and to that effect, a Memorandum of Understanding dated **01.12.2012** was signed with them. As mentioned above, a similar agreement with the Respondents/Claimants is absent.

83. Flats which were specifically identified and allotted in the four blocks



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which were then under construction to M/s.Chemisols Phenolics LLP and C.Savithri under Memorandum of Understanding dated **01.12.2012** signed by the Petitioner with them. It is in proportion to **41.22%** share in the Joint Development Agreements dated **09.04.2012** signed with them.

84. There was no identification of any area allotment *i.e.*, allotment of flats under Joint Development Agreement dated **09.04.2012** with the Respondents/Claimants between the Petitioner and the Respondent/Claimant except the one's as per Clause 5(a) of the Joint Development Agreement between them. Therefore, there can be only allocation of revenue from the sales by the Petitioner for the purpose of 'Revenue Sharing' from the homogeneous common pool of **6,43,292**, sq.ft. (8,28,120 – 1,84,828). Thus, the revenue was also required to be worked out in proportions.

85. The arguments of the Petitioner that while awarding the amounts to the Respondents/Claimants, the Learned Arbitrator has awarded amounts from and out of the sale made by the Petitioner from its **58.78%** share under the Joint Development Agreement dated 09.04.2012 with M/s.Chemisols Phenolics LLP and C.Savithri cannot be countenanced.



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86. The aforesaid **58.78%** share became a part of a homogenous pool in the hands of the Petitioner along with the Petitioner's **52%** share under the Joint Development Agreements dated 09.04.2012 signed with the Respondents/Claimants along with the Respondents/Claimants' 48% share under the aforesaid Joint Development Agreement dated 09.04.2012 signed with the Respondents/Claimants for being marketed by the Petitioner for itself and for the Respondents/Claimants without any identification or discrimination. Only proceeds from sale was to be shared between them, as all the flats in the homogenous pool were not identified, unlike in the case of arrangement of the Petitioner. Under the Joint Development Agreement dated 09.04.2012 with M/s.Chemisols Phenolics LLP and C.Savithri or under the Joint Development Agreement dated **09.04.2012** signed with the Respondents/Claimants, there was no allocation or reservaion of any specified flats in favour of either the petitioner or the respondent/claimant. Similarly, there was also no allocation or reservation of flats in any of the four towers in favour of the petitioner under Joint Development Agreement dated **09.04.2012** with M/s.Chemisols Phenolics LLP and C.Savithri.

87. That apart, in the Joint Development Agreement dated 09.04.2012 with M/s.Chemisols Phenolics LLP and C.Savithri was materially different from



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the Joint Development Agreement dated 09.04.2012 with the Respondents/Claimants. Under the former Joint Development Agreement dated 09.04.2012 with M/s.Chemisols Phenolics LLP and C.Savithri, there was allocation of specific flats which were identified and allotted only to M/s.Chemisols Phenolics LLP and C.Savithri under Memorandum of Understanding dated 01.12.2012 signed between them.

88. The Petitioner appears to have not only sold flats out of **1,97,458 sq.ft.** of built up area under the Joint Development Agreement, dated 09.04.2012 representing 52% with the Respondents/Claimants but also **2,63,566/- sq.ft.** under the Joint Development Agreement dated 09.04.2012 with the M/s.Chemisols Phenolics LLP and C.Savithri representing its share of **58.78%** from M/s.Chemisols Phenolics LLP and C.Savithri on the strength of Power of Attorney executed by the Respondents/Claimants for **52%** and based on the Memorandum of Understanding dated 01.12.2012 pursuant to the area sharing Joint Development Agreement dated 09.04.2012 with the M/s.Chemisols Phenolics LLP and C.Savithri for **58.78%**.

89. Thus, out of the total built up/constructed area of **8,28,120 sq.ft.**, an extent of **1,84,828 sq.ft.** was specifically identified and allotted in favour of



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M/s.Chemisols Phenolics LLP and C.Savithri in accordance with the Joint Development Agreements dated 09.04.2012 read with the Memorandum of Understanding dated 01.12.2012 signed by the Petitioner with them.

90. The allotment of **1,84,828 sq.ft.** to M/s.Chemisol Phenolics LLP and one C.Savithri which was equivalent to **41.22%** (which is equal to **23.31%** of total construction area of **8,28,120 sq.ft.**) pursuant to the 'Area Sharing' Joint Development Agreement dated 09.04.2012 with M/s.Chemisol Phenolics LLP and C.Savithri, would stand excluded from the homogeneous pools in view of specific Memorandum of Understanding read with Joint Development Agreement dated 09.04.2012 entered between the Petitioner and the M/s.Chemisol Phenolics LLP and one C.Savithri.

91. Therefore, an extent of **6,43,292 sq.ft** (8,28,120 – 1,84,828) remained in the homogeneous pool in the hands of the Petitioner after allotment of **1,84,828 sq.ft.** to M/s.Chemisols Phenolics LLP and C.Savithri under the Memorandum of Understanding dated 01.12.2012.

92. The aforesaid homogeneous pool after such allotment to M/s.Chemisols Phenolics LLP and C.Savithri in the hands of the Petitioner



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consisted of the Petitioner's share under the respective Joint Development Agreements dated 09.04.2012 with the Respondents/Claimants, with M/s.Chemisols Phenolics LLP and with C.Savithri and the Respondents'/Claimants' share under the Joint Development Agreement dated 09.04.2012 with the Respondents/Claimants.

93. The balance **6,43,292 sq.ft.** (8,28,120 – 1,84,828) which became a part of homogeneous pool of constructed area for being sold by the Petitioner for itself under the Joint Development Agreement dated 09.04.2012 with the M/s.Chemisols Phenolics LLP and C.Savithri and under the Joint Development Agreement dated 09.04.2012 with the Respondents/Claimants for itself and for the Respondents/Claimants.

94. The balance **6,43,292 sq.ft** (8,28,120 – 1,84,828) of the homogeneous pool in the hands of the Petitioner after such allotment to M/s.Chemisols Phenolics LLP and C.Savithri is equivalent to **77.68%** of the total built up/constructed area of **8,28,120 sq.ft.** under the three Joint Development Agreements all dated 09.04.2012 signed by the Petitioner with the Respondents/Claimants, M/s. Chemisols Phenolics LLP and C.Savithri.



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95. The share of the Petitioner under the Joint Development Agreements dated 09.04.2012 signed by the Petitioner with M/s.Chemisols Phenolics LLP and C.Savithri equivalent is **58.78%** which is equivalent to **2,63,566 sq.ft.**

96. The Petitioner's 58.78% share of **2,63,566 sq.ft** under the Joint Development Agreements dated 09.04.2012 with M/s.Chemisols Phenolics LLP and C.Savithri became part of the balance of the constructed area under the Joint Development Agreement dated 09.04.2012 with the Respondents/Claimants for sale by the Petitioner itself and for the Respondents/Claimants. It is equivalent to **31,82%** of total built up area of **8,28,120 sq.ft.**

97. **1,84,828 sq.ft.** allotted to M/s.Chemisols Phenolics LLP and C.Savithri under the Joint Development Agreement dated **09.04.2012** with M/s.Chemisols Phenolics LLP and C.Savithri read with Memorandum of Understanding dated 01.12.2012, translates to **23.31%** of total construction area of **8,28,120 sq.ft.**

98. The Respondents'/Claimants' **48%** share under the Joint Development Agreement dated 09.04.2012 with the Petitioner translates to **22%** of total constructed area including common built up area of **8,28,120 sq.ft.**

99. Similarly, the Petitioner's **52%** under the same Joint Development



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Agreement dated 09.04.2012 with the Respondents/Claimants translates to **23.84%** of total constructed area out of **828120 sq.ft.**

100. Similarly, the Petitioner's **58.78%** under the Joint Development Agreement dated **09.04.2012** with M/s Chemisols Phenolics LLP and C.Savithri translates to **31.82%** out of **8,28,120 sq.ft.**

101. Following Table will explain the factual position:-

Party	Share of the parties under the respective Joint Development Agreement dated 09.04.2012 in percentage	Proportionate Share under the respective Joint Development Agreement dated 09.04.2012 in sq.ft.	Overall percentage in proportion of the total construction of 8,28,120 sq.ft.
(a)	(b)	(c)	(d)
Respondents/Claimants	48% under the Joint Development Agreement dated 09.04.2012 with the respondent/claimant.	1,82,268 sq.ft	22% of 8,28,120 sq.ft
Petitioner	52% under the Joint Development Agreement dated 09.04.2012 with the respondent/claimant.	1,97,458 sq.ft	23.84% of 8,28,120 sq.ft



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Petitioner	58.7% under the Joint Development Agreement dated 09.04.2012 with M/s.Chemisols Phenolics LLP and C.Savithri	2,63,566 sq.ft	31.82% of 8,28,120 sq.ft
M/s.Chemisols Phenolics LLP and C.Savithri	41.22% of under the Joint Development Agreement dated 09.04.2012 with M/s.Chemisols Phenolics LLP and C.Savithri	1,84,828 sq.ft	22.31% of 8,28,120 sq.ft
Total:		8,28,120 sq.ft.	100%

102. The extent of sq.ft. that were identified and allocated with the above said percentage has arrived by the Learned Arbitrator in Para 113 of the Impugned Award which is extracted above.

103. This is what the Arbitral Tribunal has concluded in Paragraph 116 of the Impugned Award. It reads as under:-

“116. Admittedly, the flats that the Claimants sought for themselves have not been allotted so far. Going by the projections made to the prospective buyers on what is offered from out of the project constructed in the reconstituted lands the claimants are entitled to 22% revenue share as stated above or all sales that had happened so far and as well as those that may happen in future. The details of the sales done by the respondent as



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the Power of Attorney of the claimants and the Chemisols Group show that the sales were not exclusively from the Chemisols Group lands as claimed by the respondent or for that matter from the respondent share. In these circumstances, the claimants are entitled to the revenue share from all sale consideration received by the respondent and consequently for a direction to the respondent to furnish the copy of the true accounts on all sale consideration received by the respondent from the project ASV Alexandria along with interest at 12% since the date of the High Court order under Section 9 when the Hon'ble High Court made its observation on the pattern of sharing under the Joint Venture Agreement which order remains unchallenged. As per the Joint Development agreement, the respondent was bound to account for the consideration received within 30 days of the receipt of the sale consideration. Yet, taking the orders of the Hon'ble High Court in Section 9 application, which has become final, as the starting point for calculation of interest, the claimants are entitled to the grant of interest at the rate of 12%. From the date of the order in Section 9 application. The encumbrance certificates give the number of sales effected. Since the complete details on the construction agreement and the sale deeds are not available, the respondent is hereby directed to furnish the same on all sales effected since 2014 out of the Project ASV Alexandria within 30 days of the receipt of the award to the claimants to work out its share of sale consideration at 22% on each sale effected.”

104. This is what the learned Arbitrator has explained by way of a table in

Paragraphs 113 to 115 of the Impugned Award which reads as under:-

“113. Thus, taking in to account the extent of the claimants' holding at 282 cents, on the overall extent of



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the reconstituted land at 615 cents, the same comes to 45.854% and the Chemisols Group of 333 cents at 54.146%. The total built up area is given in the written arguments of the claimants as well as in the defence by the respondent in Schedule A as 828120 sq. ft. including premium FSI. Out of this, an extent of 379726 sq. ft. goes to claimants and 448394 sq. ft. to the Chemisols Group. The claimants and the respondent revenue sharing under their Joint Development Agreement is 48% and 52%. On the 379726 sq. ft. falling to the share of the claimants on the construction done on the reconstituted lands, the claimants revenue share being 48%, the eligibility of the area for revenue sharing would be 182268 sq. ft. for and respondent 197458 sqft, it being 52% (Total 182268 + 197458 = 379726). In the case of Chemisols Group, out of 448394 sq. ft. falling to Chemisols Group in the reconstituted land, Chemisols Group and the respondent area sharing under Joint Development Agreements of the Chemisols Group at 41.220% Would be 184828 sq. ft. for Chemisols Group and the respondent at 58.780% will be 263566 sq ft respectively (Total 184828 + 263566 = 448394). As per the Joint Development Agreement with Chemisol Phenilics LLP the sharing of Chemisol and the respondent is 41.22:58.780 and with Savithri the sharing is also the same ratio. Thus, excluding the Chemisols Group share and the claimants individual share in the overall project that fall under the respective Joint Development Agreement, the respondent's share in the project in total under the three Joint Development Agreements will be 461024 sq. ft. (197458 + 263566 = 461024 sq. ft.). Based on this working on the total share of the parties individually vis-a-vis the land area, as may be seen from the details stated above, the results will be the same and the same is given through a table as follows:-

On the constructed area sharing

Chemisols Group



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(excluding the respondent share) : $184828/828120 \times 100$
=22.33%

Claimants

(excluding the respondent share) : $182268 / 828120 \times 100 = 22\%$

Respondent : $461024 / 828120 \times 100 = 55.67\%$

	Units	A	C	B	Total
		Claimants	Chemisols Group	Builder	
Total reconstituted land extent	Cents	282	333		615.56
Sharing as per JV agreement-A & B		48%		52%	100%
Sharing as per JV agreement-C & B			41.22%	58.78%	100%

Land Holding Proportion		45.8500%	54.1500%		100.0000%
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Built up area – Total	Sq.ft				828120
Built up area in proportion to land holding	Sq.ft	379693	448427		828120



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Proportionate Built up area as per JV agreement – A & B	Sq.ft	182253 (48%)		197440	379693 (51.999) Rounded to 52%
Proportionate Built up area as per JV agreement – C & B	Sq.ft		184842	263585	448427

Total Built up area	Sq.ft	182253	184842	461025	828120
Built up area (as % of total built up area)		22.0100%	22.3200%	55.6700%	100.0000%
Area as per JV agreement	Sq.ft	182268	184828	461024	828120
Difference		-15	14	1	0

The Difference that one notes as between the agreement and the working on the area is on account of rounding off.

114. Thus, whether ones works out the share of the parties from the built up area or the reconstituted lands as per the share ratio given in the respective Joint Development Agreement, the results that one arrives at is the same, the difference one notes between the area in the working given above and as per the Joint Venture



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Agreements is due to the rounding off and not otherwise. Going by this, the revenue sharing by the claimants at 48% as per the Joint Development Agreement would be 22% on the total sale consideration received by the respondent as the agents of the claimants and the Chemisol Group. This working is also logically arrived at based on the share of the claimants, the Chemisols group and the respondent on the total reconstituted land. The revenue sharing between the parties herein is worked out based on the share ratio under the Joint Development Agreement. Thus, as against the claim of the claimants, the revenue share of the claimants on the overall total sales relating to the reconstituted lands is-a-vis their percentage of holding shall be 22% and that of the respondent 55.67% Overall. And certainly not as what the respondent contended or the claimants had given the net working at 28.33%.

115. In the light of the above, the only other issue that remains to be considered in the circumstances of the completed transactions is to direct the respondent to furnish the accounts for the claimants to work out their share of the sale consideration as per the above working.”

105. Therefore, conclusion in the Impugned Award in Para 116 of the Impugned Award by the Arbitral Tribunal cannot be questioned. The conclusion arrived by the Arbitral Tribunal in Paragraph 116 of the Impugned Award extracted above is based on the working in Paragraphs 113 to 115, which have been extracted above.



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106. The conclusion in the Impugned Award that the Respondents/Claimants are entitled to revenue for **1,82,268 sq.ft.**, which is equivalent to **22%** from and out of total built up/constructed area of **8,28,120 sq.ft.** excluding **22.31% (1,84,828 sq.ft.)** the share belonging to M/s.Chemisols Phenolics LLP and C.Savithri, is correct. The conclusion arrived was merely not a possible conclusion but the only conclusion that could be arrived. Therefore, it cannot be said that the Impugned Award has awarded amounts to the Respondents/Claimants from and out of **58.78%** share of the Petitioner under the Joint Development Agreement with M/s.Chemisols Phenolics LLP and C.Savithri dated 09.04.2012.

107. The failure to obtain necessary Power of Attorney from the Respondents/Claimants for selling balance extent bearing 1,84,268 sq.ft., being 48% of share under the Joint Development Agreement dated 09.04.2012 with the Respondents/Claimants [*i.e.*, 22% out of total built up area 8,28,120 sq.ft.] is on account of the faulty drafting of the Clause 5 in the said Joint Development Agreement dated 09.04.2012 with the Respondents/Claimants. The object of the Joint Development Agreement dated 09.04.2012 between the parties could be achieved only if the Respondents/Claimants execute Power of Attorney in favour



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of the Petitioner or the Respondents/Claimants co-operate with the Petitioner at each stage in the execution of the Sale Deeds for transferring the undivided share in the land as and when sale is completed by the Petitioner.

108. Although, the Arbitral Tribunal has not examined the issue from the point of '**Doctrine of Contra Proferentum**' which stipulates that if a Clause in a contract is ambiguous or can be interpreted in multiple ways, it ought to be read in a way that dis-favours the party who originally drafted, introduced, or demanded the inclusion of that specific Clause as observed by the Hon'ble Supreme Court in **Bank of India Vs. K.Mohandas**, 2009 (5) SCC 313 in Paragraph 28. Relevant portion from Paragraph 28 is extracted below:-

“28.The true construction of a contract must depend upon the import of the words used and not upon what the parties choose to say afterwards. Nor does subsequent conduct of the parties in the performance of the contract affect the true effect of the clear and unambiguous words used in the contract. The intention of the parties must be ascertained from the language they have used, considered in the light of the surrounding circumstances and the object of the contract. The nature and purpose of the contract is an important guide in ascertaining the intention of the parties”

109. Fact remains that Clause 5 of the Joint Development Agreement



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dated 09.04.2012 entered between the Respondents/Claimants contemplates a revenue sharing arrangement. It has been recognized in the Impugned Award. The preamble to the Joint Development Agreement, to which the learned Senior Counsel for the Petitioner alluded has to be read harmoniously with mechanics provided in Clause 5 of the Joint Development Agreement dated 09.04.2012 entered with the Respondents/Claimants.

110. I find no perversity in the conclusion arrived at by the Arbitral Tribunal to warrant its interference. Therefore, the Impugned Award does not call for any interference on the grounds raised.

111. That apart, the Arbitral Tribunal has also noted that the sale of undivided share is from the reconstituted land. In Paragraph 77 of the Impugned Award, the Arbitral Tribunal has also taken note of the fact that after the dispute was referred to Arbitral Tribunal, the Petitioner has effected sale by making it seem as it was restricting the sale of undivided share to buyers out of its share from the Joint Development Agreement dated 09.04.2012 with M/s.Chemisol Phenolics LLP and C.Savithri, under the Joint Development Agreement, dated 09.04.2012, after the dispute arose. The relevant portion of the Impugned Award



reads as under:-

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*“77. A reading of the sale deeds thus show the marked difference in the documentation ever since the dispute had arisen between the parties and in particular after the Section 9 order and in the course of the arbitration proceedings. With C Schedule in the document dated 05.12.2016, 26.09.2018 and 28.02.2019 described the subject of sale as the undivided share out of the B Schedule, which is the reconstituted lands consisting of the claimants and the Chemisols Group, the description and the executants of the documents executed pending disposal of the arbitration proceedings. It is not clear as to whether the vendors restricted the rights of the purchaser to the flats alone or included the common areas indoor and outdoor too same in the sale which fall under the reconstituted lands. Considering the fact that the plan submitted is on the reconstituted land and the project complex with all amenities to be enjoyed commonly by all the purchasers of the undivided share of the land as per the brochure filed, the reference to Chemisols Group as the absolute owners of B Schedule property in the sale deed of the year 2020 are all matters of concern which cannot be ignored as just plain unintended error. With third parties interest and title involved in the undivided share in the B schedule property conveyed. **Such a sudden shift in the description of the subject matter and ownership on the undivided share, and of the sale only shows that regardless of the interest of the third parties, the respondent appears to be too anxious and concerned to project the facts to suit stand in the proceedings herein...**”*

112. Therefore, it is clear that prior to the dispute, the description of the



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Property in the Sale Deeds executed in favour of purchasers, the Petitioner did not mention the undivided share of the land being sold as from out of the M/s.Chemisols Phenolics LLP and one C.Savithri share or from that of the Petitioner's share.

113. However, after the dispute arose in the sale of the undivided share of the land to the buyers, the Petitioner has stated that it was selling UDS only from the reconstituted lands of M/s.Chemisols Phenolics LLP and one C.Savithri or the Petitioner's share from the Joint Development Agreement dated 09.04.2012 with M/s.Chemisols Phenolics LLP and C.Savithri or from that with the Respondents/Claimants.

114. Therefore, the Petitioner has to sell remaining unsold stock and pay amounts to the Respondents/Claimants and thereafter, there has to be a reconciliation of accounts between them in proportion of the respective shares from overall Sales made by the petitioner under three Joint Development Agreements. As mentioned above, the parties have to arrange their affairs either with execution of Power of Attorney in favour of the Petitioner to achieve the underlying object under the Joint Development Agreement dated 09.04.2012 between the Petitioner and the Respondents/Claimants or the



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Respondents/Claimants should come forward to execute Sale Deeds in favour of the Petitioner or its nominee or prospective buyers.

115. In the result, the Impugned Award is upheld and the present Original Petition challenging the award is dismissed leaving it open for the Respondents/Claimants for enforcing the Award. No costs. Connected Applications are closed.

07.06.2024

Index : Yes/No
Internet : Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation : Yes/No
kkd/arb/jen

C.SARAVANAN, J.

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