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

+ **O.M.P. (COMM) 157/2024, I.A. 7966/2024, I.A. 7967/2024**

SPLENDOR BUILDWELL PVT LTD & ANR. Petitioners

Through: Mr. Siddharth Bhatli, Mr. Viplav Acharya, Mr. Abhishek Garg, Mr. Sarthak Bakshi, Mr. Apurva Praveen, Adv.

versus

RAJESH KUMAR PASRICHA

..... Respondent

Through: Mr. Ashish Dholakia, Sr. Adv. with Mr. Siddhant Asthana, Mr. Chhetarpal Singh, Mr. Subhoday Banerjee, Adv.

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Date of Decision: 09.04.2024.

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA, J. (Oral)

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 challenging an arbitral award dated 11.12.2023 passed by the learned Arbitrator.
2. Learned counsel for the petitioner submits that the learned arbitrator besides directing the execution of the sale deed/conveyance deed in favour of the petitioner also passed an award in the sum of Rs.

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1,98,71,978/- against the respondent with future interest @ 9% p.a., from the date of award dated 11.12.2023.

3. Learned counsel for the petitioner submits that this finding is in teeth of MOU, wherein Clause-32, it was specifically agreed upon between the parties that in no event and under no circumstances the maximum liability of the developer on any account whatsoever shall exceed the amount received by the developer from the intending allottee pursuant to the present document, nor the entitlement of the intending allottee on all the accounts together including refund/ interest/ damages shall exceed the amount paid by the intending allottee to the developer.
4. Learned counsel for the petitioner has further submitted that as per clause 2 of the MOU, the respondent has paid a total consideration of Rs. 1,61,55,000/- which included EDC, IDC, IFMS and all other costs/charges/expenses related to cost escalation on account of construction, power backup, furnishing etc. Except government levies and taxes as defined in clause No. 5 and 6 mentioned herewith. It has been submitted that therefore any amount beyond Rs. 1,61,55,000/- paid by the respondent to the petitioner is in the teeth of the agreement between the parties. Learned counsel submits that the same plea was taken in para 32 of the statement of the defence filed by the petitioner before the learned Arbitrator.
5. Learned counsel for the petitioner has also assailed the award on the ground of delay attributing to the petitioner by the learned Arbitrator. Learned counsel for the petitioner has argued that the inter alia finding of the learned Arbitrator that since the occupancy certificate has not



been furnished by the petitioner therefore in view of Clause-4 and 18 of the MOU the delay is attributed to the petitioner. Learned counsel further submits that completion has a different connotation than the occupancy certificate. The condition regarding the occupancy certificate has clearly been delineated in Clause 9.3 of the Space Buyers Agreement. Therefore, this finding is perverse.

6. Learned counsel for the petitioner submits that the learned Arbitrator has wrongly and illegally awarded the punitive interest at the rate of 18% p.a. It has further been submitted that assured return has been granted till April 2021, in violation of the order passed by this court. Learned counsel for the petitioner submits that the learned Arbitrator has though granted the assured interest up to April 2021, but ordered for the grant of punitive interest even beyond that period. Learned counsel submits that this is in contrast to the order passed by this court under Section 9 of the Arbitration and Conciliation Act petition bearing OMP (I)(COMM) 121/2021. Learned Counsel for the petitioner has relied upon *PSA Sical Terminals Pvt. Ltd. vs. The Board of Trustees of V.O. Chidambranar Port Trust, Tuticorin and Ors.* MANU/SC/0485/2021.
7. Learned counsel for the petitioner has also submitted that the award is bad in law as it is a settled position of law that no relief can be granted which can't be monitored by the court. Learned counsel for the petitioner submits that the learned Arbitrator has wrongly passed an award that the petitioner shall be entitled to pay the return till the property is leased out. Learned counsel submits that this direction



cannot be monitored and enforced and is therefore is in violation of Section 14(1)(D) of the Specific Relief Act. Learned counsel for the petitioner has relied upon *Her Highness Maharani Shantidevi vs. Savji bhai Haribhai Patel and Others* (2001) 5 SCC 101.

8. Learned counsel for the petitioner in support of his contention has relied upon *Indian Oil Corporation Limited Vs. Shree Ganesh Petroleum Rajgurunagar* (2022) 4 SCC 463, *Rajasthan State Mines & Minerals Ltd vs Eastern Engineering Enterprises and Another* (1999) 9 SCC 283, *Bharathi Knitting Company v. DHL Worldwide Express Courier Division of Airfreight Ltd.* (1996) 4 SCC 704.
9. Sh. Ashish Dholakia, learned senior counsel for the respondent has appeared on the advance notice and submits that this plea taken by the petitioner that the learned Arbitrator has passed an award more than the maximum liability as provided in Clause-32 of the MOU was never taken by the petitioner before the learned Arbitrator and has been taken for the first time before this court. Learned senior counsel submits that in the statement of defence, Clause-32 was merely reproduced and was never pressed before the learned Arbitrator.
10. Learned senior counsel has further submitted that the issue regarding the occupancy certificate and completion certificate of the project was also not taken specifically during the proceedings and was taken for the first time during the arguments. Learned senior counsel has referred to para 90 of the award. It has been further submitted that in the award learned Arbitrator has not left any ambiguity in regard to the grant of interest at the rate of 18% p.a. and has given detailed reasoning for the



same on the basis of Section 31 of the Arbitration and Conciliation Act as well taking into account the settled law and the covenants of the agreement between the parties.

11. Learned senior counsel has further submitted that the learned Arbitrator has granted the pre-assured return in terms of Clause-4 of the MOU dated 04.10.2017. Learned senior counsel submits that the jurisdiction of the court under Section 34 of the Arbitration and Conciliation Act, 1996 is very limited and it cannot be extended to examining the impugned award as an Appellate Court.
12. Learned counsel for the respondent in support of his contention has relied upon *Konkan Railway Corporation Ltd vs. Chenab Bridge Project undertaking* (AIR 2023 SC 4049), *UHL Power Company Limited v. State of Himachal Pradesh* (2020) 4 SCC 116, *Axis Bank Ltd v. UV Assets Reconstruction Co* 2020: DHC:1407.
13. The scope and ambit of challenging the arbitral award under Section 34 of the Arbitration and Conciliation Act is very limited. This principle is succinctly outlined in numerous cases. The Supreme Court in *MC Dermott International Inc. v Burn Standard Co. Ltd and Others*, (2006) 11 SCC 181 inter-alia held that:

“58. In *Renusagar Power Co. Ltd. v. General Electric Co.* [1994 Supp (1) SCC 644] this Court laid down that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression “public policy” was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can,



however, be noticed from the decision of this Court in *ONGC Ltd. v. Saw Pipes Ltd.* [(2003) 5 SCC 705] (for short “ONGC”). This Court therein referred to an earlier decision of this Court in *Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly* [(1986) 3 SCC 156: 1986 SCC (L&S) 429 : (1986) 1 ATC 103] wherein the applicability of the expression “public policy” on the touchstone of Section 23 of the Indian Contract Act and Article 14 of the Constitution of India came to be considered. This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Indian Contract Act. In *ONGC* [(2003) 5 SCC 705] this Court, apart from the three grounds stated in *Renusagar* [1994 Supp (1) SCC 644] , added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.

59. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merits of the matter.

60. What would constitute public policy is a matter dependant upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties



and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government. (See State of Rajasthan v. Basant Nahata [(2005) 12 SCC 77] .)

61. In ONGC [(2003) 5 SCC 705] this Court observed: (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 [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.”

14. Similarly, in **PSA SICAL Terminals (P) Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin**, 2021 SCC OnLine SC 508, inter-alia held that:

“43. It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and reappraise the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act.

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



be permissible on the ground of patent illegality appearing on the face of the award.”

15. Further in, in **MMTC Limited v. Vedanta Limited**, 1 (2019) 4 SCC 163, it was inter-alia held as under:

“11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) ...”

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts.”

14. 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.”

16. In **Associate Builders v. DDA** (2015) 3 SCC 49, wherein it was inter-alia held that:

“31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or



- (ii) *an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or*
- (iii) *ignores vital evidence in arriving at its decision, such decision would necessarily be perverse”*
17. In the present case, it is pertinent to mention here that the learned Arbitrator had passed an order under Section 17 of the Arbitration and Conciliation Act dated 17.11.2021 as referred by the learned senior counsel for the respondent wherein the learned Arbitrator passed the direction to deposit the assured return by way of FDR. It is a matter of record that this order was challenged before this court. This court vide order dated 19.04.2022 set aside the order dated 08.11.2021 passed by the learned Sole Arbitrator. However, this was challenged by the respondent in SLP (Civil) No. 8643/2022 wherein the Apex Court modified the impugned judgment and the order of this court and directed the petitioner to deposit the original title deed or some other immovable property as a security before the Sole Arbitrator. The order of the Apex Court specifically states that it has not gone into the merits of the case.
18. Learned Arbitrator while granting the relief has given enough reason as reflected in the following paragraphs:

“90. Ld. Counsel for the Respondents contended that as per clause 9.2 of the SBA, the tower in which the said units were located was to be completed within 42 months with a grace period of 6 months from the date of execution of the SBA or the date when the construction starts, whichever is later. He argued that since the Occupation Certificate for Tower-D was granted on 06.09.2019 on filing application dated 26.11.2018 and their Architect's Completion Certificate



dated 25.09.2018, the construction was completed within the stipulated time as per clause 9.2 of the SBA and the Claimant is not entitled to the Assured Returns. This ground has been taken for the first time at the time of final arguments and does not find mention in the pleadings. In fact, in their SOD, the Respondents have relied upon clause 4 of the MoU and pleaded in para 22 of the para-wise reply that "Thus, the Respondent No. 1 is not liable to pay any assured return to the Claimant, as admittedly, the Respondent No.1 has completed the construction of the said Unit within the prescribed time in terms of Clause 4 of the said MOU." Even Mr. Manish Prakash (RW-1) has stated in para 8 of his affidavit in evidence that "the Respondent/Counter Claimants had completed their contractual obligations including but not limited to construction of the said project within the time frame provided in the said MOU...". The Respondent in their Reply dated 29.12.2020 to the Claimant's Legal Notice dated 12.11.2020 have stated that "It is stated that our Clients completed the said project within the stipulated period of time as such in terms of the aforementioned Clause 4 of the said MOU...". Therefore, it is clear that it was never the Respondents' case that the time for completion of the building was as per clause 9.2 of the SBA and it was always their case that the time for completion of the building was as per clause 4 of the MoU.

91. The judgments in Sahebzada's case and Tehri Hydro's case make it clear that if there is any ambiguity as to the construction of a contract, the contract has to be interpreted against the party which drafted the contract. In the present case, there is a clear contradiction between clause 4 of the MoU which contains the assured returns scheme and states that the time period for completion of the building to be of 12 months from the date of signing of the MoU while clause 9.2 of the SBA states that the tower in which the said units were located was to be completed within 42 months with a grace period of 6 months from the date of execution of the



SBA or the date when the construction starts, whichever is later. Clause 9.2 of the SBA was never resorted to by the respondent in reply to the legal notice or in the pleadings, The contract has to be interpreted against the respondents and the time for completion will be calculated as per clause 4 of the MoU.

98. The claimant has claimed interest @ 18% p.a. from October 2018 till 30.06.2021 of Rs.32,38,813/- against the respondents. He also prayed for grant of pendent lite and future interest @ 18% p.a. against the respondents. There is no provision in the MoU and SBA for award of interest on the arrears of assured returns. Clause 5.5 of the SBA provides charging interest of 18% p.a. by the respondents from the claimant in case the claimant fails to make payment at any specified time for the period of delay in making such payment. Here it would be relevant to refer to section 31 (7) (a) of the Act which provides for grant of interest from the date of cause of action till the date of award:

“31. Form and contents of Arbitral Award-

(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.”

*99. Here it would be relevant to refer to the judgment in **Morgan Securities & Credits (P) Ltd. v. Videocon Industries Ltd., (2023) 1 SCC 602** in which the **Hon'ble Supreme Court** had held that:*

“25. Section 31(7)(a) confers a wide discretion upon the arbitrator in regard to the grant of pre-award interest. The arbitrator has the discretion to determine the rate of



reasonable interest, the sum on which the interest is to be paid, that is whether on the whole or any part of the principal amount, and the period for which payment of interest is to be made -whether it should be for the whole or any part of the period between the date on which the cause of action arose and the date of the award...” (Emphasis Supplied)

100. Keeping in mind the facts and circumstances of the present case, it would be appropriate to award interest @ 18% p.a. to the claimant on the amount of Rs. 1,15,50,810/- from October 2018 till 30.06.2021 which comes to Rs.32,38,813/- and pendent lite interest @18% p.a. on Rs.1,15,50,810/- from 01.07.2021 till the date of the award which comes to Rs.50,24,602/-. Thus the total interest awarded to the claimant against the respondents till date of award comes to Rs.82,63,415/-

101. In this manner, the claimant would be entitled to recover Rs.1,15,50,810/- as the amount of assured returns till 06.04.2021 as awarded under issue no. ii and interest @ 18% p.a. of Rs.83,21,168/- from the date of the cause of action till the date of award, total Rs.1,98,71,978/- against the respondents jointly and severally.

102, It would be pertinent to refer to the judgment of the **Hon'ble Supreme Court in UHL Power Co. Ltd. v. State of H.P., (2022) 4 SCC 116** in which it has been held that the Tribunal can award post-award interest on the total sum awarded which includes pre- reference and pendent-lite interest. The relevant part of this judgment is reproduced below:

“5. By now, the aforesaid aspect has been set at rest by a three-Judge Bench of this Court in Hyder Consulting (UK) Ltd. v. State of Orissa (2015) 2 SCC 189, that has overruled the verdict in S.L. Arora [State of Haryana v. S.L. Arora & Co., (2010) 3 SCC 690: (2010) 1 SCC (Civ) 823]. The majority view is that post-award interest can be



granted by an arbitrator on the interest amount awarded. Writing for the majority, Bobde, J. (as his Lordship then was) has held thus: (Hyder Consulting case (2015) 2 SCC 189:

“21. In the result, I am of the view that S.L. Arora case [State of Haryana v. S.L. Arora & Co., (2010) 3 SCC 690 is wrongly decided in that it holds that a sum directed to be paid by an Arbitral Tribunal and the reference to the award on the substantive claim does not refer to interest pendente lite awarded on the "sum directed to be paid upon award" and that in the absence of any provision of interest upon interest in the contract, the Arbitral Tribunal does not have the power to award interest upon interest, or compound interest either for the pre- award period or for the post-award period. Parliament has the undoubted power to legislate on the subject and provide that the Arbitral Tribunal may award interest on the sum directed to be paid by the award, meaning a sum inclusive of principal sum adjudged and the interest, and this has been done by Parliament in plain language.” (Emphasis Supplied)

103. Therefore, the claimant shall be entitled to recover Rs.1,98,71,978/- from the respondents jointly and severally with future interest @ 9% PA from the date of award till realization of the awarded amount. Issues no. iii & iv are decided accordingly.”

19. The perusal of the findings of the learned Arbitrator makes it clear that the Arbitral Tribunal has minutely examined the various clauses of the agreement and has given a conclusive finding based on reasons. Learned Arbitral Tribunal has duly noted the contradictions in the clauses of the agreement as well as the pleas taken by the petitioner. The interest has also been granted taking into account the statutory



provisions and the settled law.

20. It is no more *res integra* that the court while exercising jurisdiction under Section 34 of the Arbitration and Conciliation Act cannot appreciate or re-examine the findings of the learned Arbitrator. The grounds for challenge of an award passed by a learned Arbitrator are very limited as has been discussed in the judgment as referred to above. For an award to be set aside either it has to be perverse or against the fundamental policy of India. Merely because another view is possible, the view taken by the learned Arbitral Tribunal cannot be substituted. Learned Arbitral Tribunal was well within its jurisdiction to interpret the relevant clauses of the agreement. The award passed by the learned arbitrator is found to be in accordance with the law.
21. In view of the above, the present petition is dismissed along with the pending applications.

DINESH KUMAR SHARMA, J

APRIL 9, 2024/AR/AK