IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMMERCIAL APPEAL NO. 90 OF 2020
IN
COMMERCIAL ARBITRATION PETITION NO. 812 OF 2019

SHRADDHA KAMLESH TALEKAR

Digitally signed by SHRADDHA KAMLESH TALEKAR
Date: 2024.06.25 18:46:12 +0530

Ivory Properties & Hotels Private Limited, a Company registered under the Companies Act, 1956, having its registered office at Construction House, "A", 24th Road, Khar (West), Mumbai 400 052.].. Appellant]Original]Respondent]No.1)

Versus

1. Vasantben Ramniklal Bhuta since deceased through legal heirs :
1a) Jayshree Devendra Mehta 6, Sejal Society, Fatehgunj Post Office Street, Fatehgunj, Vadodara-390002.
1b) Shaila Hemant Gandhi Amarkunj, Cadell Road, Shivaji Park, Dadar, Mumbai-400 028.
1c) Bhavanaben Narendra Bhuta 501, Vasant Villa, B-15, Kapol Society, Opp. HSBC Bank, Vaikunthlal Mehta Marg, Juhu, Vile Parle (West), Mumbai – 400 049.
1d) Riddhi D/o. Narendra Bhuta Alias Riddhi Deven Mukhi, 501, Vasant Villa, B-15, Kapol Society, Opp. HSBC Bank, Vaikunthlal Mehta Marg, Juhu, Vile Parle (West), Mumbai – 400 049.]..(Respondent]Nos.1(a) to 1(d)-]Original]Petitioner

2. Bhanumati Jaisukhbhai Bhuta, residing at Nagardas Mansion, And]Respondent

::: Downloaded on - 28/06/2024 23:40:13 :::

Bhagatsingh Road, Vile Parle (West),]No.2 is original
Mumbai – 400 056.]Respondent No.2.

WITH
COMMERCIAL APPEAL NO. 91 OF 2020
IN
COMMERCIAL ARBITRATION PETITION NO. 350 OF 2017

Ivory Properties & Hotels Private Limited,]
a Company registered under the Companies].. Appellant
Act, 1956, having its registered office at]Original
Construction House, "A", 24th Road, Khar]Respondent
(West), Mumbai 400 052.]No.1)

Versus

1. Bhanumati Jaisukhbhai Bhuta,]
residing at Nagardas Mansion,]Respondent
Bhagatsingh Road, Vile Parle (West),]No.1 is original
Mumbai – 400 056.]Petitioner

2. Vasantben Ramniklal Bhuta]
since deceased through legal heirs :]

2a) Jayshree Devendra Mehta]
6, Sejal Society, Fatehgunj Post Office Street,]
Fatehgunj, Vadodara-390002.]
]

2b) Shaila Hemant Gandhi]
Amarkunj, Cadell Road,]
Shivaji Park, Dadar,]
Mumbai-400 028.]

2c) Bhavanaben Narendra Bhuta]
501, Vasant Villa, B-15, Kapol Society,]
Opp. HSBC Bank, Vaikunthlal Mehta Marg,]
Juhu, Vile Parle (West),]
Mumbai – 400 049.]

2d) Riddhi D/o. Narendra Bhuta]
Alias Riddhi Deven Mukhi,]
501, Vasant Villa, B-15, Kapol Society,]
Opp. HSBC Bank, Vaikunthlal Mehta Marg,]
Juhu, Vile Parle (West),]
Mumbai – 400 049.]..(Respondent
]Nos.2(a) to 2(d)-

::: Downloaded on - 28/06/2024 23:40:13 :::

]Original
]Petitioners

Mr.Rohit Kapadia, Senior Advocate *a/w. Yash Kapadia, Hemlata Jain, Kaiwan Kalyaniwalla, Sanidhaa Vedpathak, Nijam-S-Sher S. Sani, Pooja Shah and Nirav Barot i/b Maneksha & Sethna, Advocates for Appellant in both Appeals-COMAP-90-2020 and COMAP-91-2020.*

Mr.Shailesh Shah, Senior Advocate *a/w. Dibyajyoti Banerji, Aditya Udeshi, Netaji Gawade and Nayan Bhalekar i/b M/s. Sanjay Udeshi & Co., Advocates for Respondent Nos.1(a) to 1(d) in COMAP-90-2020 and for Respondent Nos.2(a) to 2(d) in COMAP-91-2020.*

Mr.T.N. Subramaniam, Senior Advocate *a/w. Rubin Vakil, Nupur Desai i/b M/s. Markand Gandhi & Co., Advocates for Respondent No.2 in COMAP-90-2020 and for Respondent No.1 in COMAP-91-2020.*

CORAM : B.P. COLABAWALLA & SOMASEKHAR SUNDARESAN, JJ.

Reserved on : March 05, 2024.

Pronounced on : June 25, 2024

JUDGMENT : (Per, Somasekhar Sundaresan, J.)

Introduction:

1. This judgement disposes of two separate and concurrent Commercial Appeals (*90 of 2020 and 91 of 2020*), which essentially flow from the same source – an arbitral award dated 14th February, 2017 ("***Arbitral Award***"). The Arbitral Award came to be set aside by a Learned Single Judge of this Court *vide* a common judgement

::: Downloaded on - 28/06/2024 23:40:13 :::

dated 28th January, 2020 ("***Impugned Judgement***"). The Impugned Judgement had disposed of Commercial Arbitration petitions under Section 34 of the *Arbitration and Conciliation Act, 1996* ("***the Act***").

2. The Appellant in these appeals *viz.* Ivory Properties & Hotels Private Limited (for convenience, termed as the "***Appellant***" throughout this judgement) was Respondent No. 1 in both the arbitration petitions before the Learned Single Judge.

3. Each of the Respondents in these appeals *viz.* Ms. Bhanumati Jaisukhbhai Bhuta and Ms.Vasantben Ramniklal Bhuta (for convenience, collectively termed as "***Respondents***" throughout this judgement) was the Petitioner and the second Respondent respectively in the arbitration petitions before the Learned Single Judge. The former was the Petitioner in Commercial Arbitration Petition No. 350 of 2017. The latter was the Petitioner in Commercial Arbitration Petition No. 812 of 2019.

4. The dispute among the parties was essentially based on a Development Agreement dated 19th April, 1995 ("***Development Agreement***"), and a Memorandum of Understanding of the same date ("***MoU***"). Under these instruments, the Appellant, as a developer, had agreed to develop immovable property owned by the

::: Downloaded on - 28/06/2024 23:40:13 :::

Respondents, which is situated on land bearing CTS No. 649/1, 649/2, 650, 652, 652/1 and 655 admeasuring 5456.94 sq. mtrs. at village Gundavali; Andheri Kurla Road, Andheri (East), Mumbai 400 069 ("***Subject Property***").

5. The bone of contention, however, is a "draft Supplemental Agreement", which document, although not executed, the Appellant asserts, is a record of what was orally agreed between the parties about the development of the Subject Property. The Arbitral Award had concluded that the Development Agreement and the MoU had been validly amended by the draft Supplemental Agreement and that they lent themselves to specific performance. The Learned Single Judge, on the basis of the material on record, concluded that such a finding was patently illegal and manifestly arbitrary, and therefore, set aside the Arbitral Award in terms of Section 34 of the Act.

6. For reasons set out in this judgement, we are in agreement with the Impugned Judgement. We conclude that the two appeals filed under Section 37 of the Act, do not deserve to be allowed. In holding so, we have been conscious of the fact that under the Act, the scope of review permitted to the Learned Single Judge under

::: Downloaded on - 28/06/2024 23:40:13 :::

Section 34 of the Act was a very narrow one, with no room for re-appreciation of evidence. Therefore, we examined the record with such narrow scope in mind, refraining from weighing any portion of the evidence. We have refrained from setting up competing potential conclusions from the evidence, in order to make a choice. Instead, we find from a mere examination of the material on record, that there was no Supplemental Agreement among the parties, which is the core contract that the Arbitral Award purported to specifically enforce. We find that the so-called Supplemental Agreement was merely a "draft" (as termed even by the Appellant itself) and that it was not even executed. We also find that, assuming it had been an oral agreement reduced to writing without signature, since some of its core and material contents were blank, the parties were not *ad idem* in terms of coming to an agreed position of a mutual bargain, for such instrument to lend itself to enforcement by law. In short, the Arbitral Award, is untenable and the Impugned Judgement deserves no interference.

7. In the process, we find that the manner in which the Learned Sole Arbitrator has drawn inferences and conclusions in the Arbitral Award, escapes qualification as a measure of judicial application of

::: Downloaded on - 28/06/2024 23:40:13 :::

mind to appreciate the evidence. It is difficult not to conclude that as the final adjudicator of fact, the Learned Sole Arbitrator has failed to meet the basic standard of appreciation of evidence, which is why the Learned Single Judge is right in finding the Arbitral Award to be patently illegal. For these and other reasons articulated below, we dismiss the two appeals before us.

Factual Background and the Controversy:

8. At the threshold, it would be important to have an overview in greater specificity, of the factual matrix at hand, and the same is set out below: -

A) The Development Agreement was executed on ***19th April, 1995*** for joint development of the Subject Property, whereby the parties would construct two buildings – a new one and a vertical expansion on an existing structure that was standing on the Subject Property;

B) The MoU (also dated ***19th April, 1995***) entailed an agreement between the parties pursuant to which the Respondents were to get occupants and encroachers on the

::: Downloaded on - 28/06/2024 23:40:13 :::

Subject Property, vacated at the Appellant's cost;

C) On the same date (***19th April, 1995***), the Respondents wrote to the Appellant permitting the Appellant to enter the Subject Property. The Respondents also executed two powers of attorney in favour of one Mr. Neel Raheja and another Mr. Sandeep Raheja, nominees of the Appellant;

D) Under the Development Agreement, the Respondents had retained about 12,500 square feet of built-up area in the buildings to be constructed on the Subject Property. The Respondents were also entitled to 25% of the gross revenues from the sales in the new building. A sum of Rs. 1 crore was to be paid by the Appellant as an interest-free deposit to each of the Respondents, of which Rs. 75 lakh was paid, and the balance was agreed to be paid within 30 days of commencing construction work;

E) In ***October 1998***, the policy under municipal law governing development of properties underwent a material change – vertical extension of an existing building was no longer an option. Until this time, no plan for the development had been submitted by the Appellant and there had been no

::: Downloaded on - 28/06/2024 23:40:13 :::

action pursuant to the Development Agreement, MoU and the attendant documents that had been executed on 19th April, 1995;

F) On ***9th December, 1998***, the Appellant claims, plans were submitted to the municipal authorities for approval, but based on the old policy (prior to the amendment in October 1998);

G) On ***3rd July, 1999***, the Appellant claims, the municipal authorities informed the Appellant that the plans are not in conformity with the amended policy. Therefore, on ***8th July, 1999***, the Appellant claims to have filed amended plans, which are claimed to have been approved on ***30th July, 1999***;

H) In ***October 1999***, the Appellant claims, the parties agreed to execute a draft Supplemental Agreement. This claimed event lies at the heart of these proceedings, as will be seen from this judgement. According to the Appellant, the parties had agreed that the existing building would be demolished and the area of the flats to be constructed was modified, with the Respondents having agreed to receive a lower size of developed area. According to the Appellant, a draft Supplemental Agreement to this effect was sent in ***November***

::: Downloaded on - 28/06/2024 23:40:13 :::

2000 by the Appellant to the Respondents;

I) According to the Appellant, in ***November 2001***, the Respondents repudiated the draft Supplemental Agreement, which had allegedly been agreed to earlier, orally;

J) On ***14th February, 2002***, the Appellant claims to have invoked arbitration in reliance upon the arbitration agreement contained in Clause 33 of the Development Agreement, and drawing reference to the draft Supplemental Agreement. The Respondents claim never to have received such letter of invocation. This event of invocation is strongly contested between the parties and was required to be adjudicated in the arbitration proceedings;

K) Thereafter, on ***18th October, 2002***, ***10th January, 2003***, ***15th July, 2003***, and ***17th December, 2004***, four different letters to the Learned Sole Arbitrator are said to have been written by solicitors of the Appellant requesting that a preliminary meeting for arbitration be scheduled – none of these letters contain a whisper of a reference to any Supplemental Agreement, although all of them are dated after the disputed letter of 14th February, 2002. While these letters were sent by the solicitors

::: Downloaded on - 28/06/2024 23:40:13 :::

of the Appellant, without any reference to the draft Supplemental Agreement, the letter dated 14th February, 2002 (sent not by the solicitors, but by the Appellant directly, enclosing the draft Supplemental Agreement), has been called into question;

L) Eventually, on ***10th January, 2005***, the Learned Sole Arbitrator is said to have scheduled a preliminary meeting for ***17th January, 2005*** – on this date, the Appellant was asked to file a Statement of Claim by ***17th February, 2005***, with the Respondents having to file a Statement of Defence within four weeks of receipt of the Statement of Claim;

M) The Statement of Claim was eventually filed four years later, on ***2nd April, 2009***. The Statement of Claim sought specific performance of the Supplemental Agreement. The Statement of Claim did not seek specific performance of the Development Agreement and the MoU, which had been overtaken by the amended policy on redevelopment. According to the Respondents, this is the first time they got to hear about the Supplemental Agreement, which lies at the heart of the controversy in these proceedings;

::: Downloaded on - 28/06/2024 23:40:13 :::

N) On ***11th December, 2010***, the parties filed agreed "point of determination" before the Learned Sole Arbitrator. The Respondents filed an application under Section 16 of the Act challenging the jurisdiction of the Learned Sole Arbitrator to entertain, try and dispose of claims made by the Appellant *inter alia* praying for specific performance of the purported Supplemental Agreement;

O) By an order dated ***23rd July, 2012***, the Learned Sole Arbitrator rejected the application under Section 16 of the Act, ruling that he had jurisdiction to adjudicate the dispute. In his view, the parties were aware of the existence of the Supplemental Agreement. This finding in this order of 23rd July, 2012 was the basis on which the Arbitral Award does not adjudicate the issue at all. The Learned Sole Arbitrator took a stance that he had already ruled on the in this order dated 23rd July, 2012;

P) On ***28th August, 2012***, the Statement of Claim was sought to be amended, now stating that the claim for specific performance related to performance of the Development Agreement and the MoU, as amended by the Supplemental

::: Downloaded on - 28/06/2024 23:40:13 :::

Agreement. The amendment application was allowed *vide* an order dated ***17th December, 2013***, with costs of Rs. 25,000 being directed to be paid to the Respondents. The Respondents returned the cheque for Rs. 25,000 on the premise that they did not accept the order allowing the amendment and would reserve the right to challenge the eventual award based on such amendment;

Q) The various steps taken during the arbitration proceedings, including the recording of evidence and the cross-examination, are not being summarised here, but where found relevant or necessary, such steps are dealt with, later in this judgement;

R) Eventually, the Arbitral Award came to be passed, which was set aside by the Impugned Judgement.

Arbitral Award – Key Findings:

9. The approach to the conclusions drawn in the Arbitral Award and the conclusions drawn thereon may be summarized as follows:-

A) The Powers of Attorney executed by the Respondents

::: Downloaded on - 28/06/2024 23:40:13 :::

are valid till date and are not revoked or cancelled[1];

B) Permission had been granted by the Respondents to the Appellant to enter upon the Subject Property to carry out developmental work, but the Respondents' witness has confirmed that possession had been taken back by the Respondents[2];

C) In view of the Respondents' assertion that there was no Supplemental Agreement, the findings given by the Learned Arbitrator in the interim order dated 23rd July, 2012, are very relevant[3];

D) Although, the Respondents assert that there is no document to indicate that the draft of the Supplemental Agreement was ever handed over to the Respondents, the letter dated 14th February, 2002 included a copy of the draft Supplemental Agreement and this fact has not been denied by the Respondents. The Respondents' argument that the conduct of the Appellant subsequent to 2001 is relevant to indicate that there was no Supplemental Agreement between the parties

1 *Paragraph 17(a)*
2 *Paragraph 17(b)*
3 *Paragraph 17(c)*

::: Downloaded on - 28/06/2024 23:40:13 :::

deserves rejection, because the letter dated 14th February, 2002 is very clear in the matter[4];

E) The Respondents' assertion that the Appellant took no steps of any nature until their solicitors' first letter dated 18th October, 2002 to the Arbitral Tribunal invoking arbitration (which letter too, makes no reference to the so-called Supplemental Agreement) is factually incorrect because the arbitration was invoked by the earlier letter dated 14th February, 2002 and not by the letter dated 18th October, 2002. It is not necessary that all subsequent communications should repeatedly mention the Supplemental Agreement[5];

F) The Appellants' witness has asserted in its affidavit that the Respondents, through their husbands, had agreed to sign a draft Supplemental Agreement, but the Respondents have not cross-examined the witness on this issue[6];

G) Clause 30 of the Development Agreement obligated the Respondents to sign such a Supplemental Agreement[7];

4 *Paragraph 17(f)*

5 *Paragraph 17 G*

6 *Paragraph 18(f)(i)*

7 *Paragraph 18(f)(ii)*

::: Downloaded on - 28/06/2024 23:40:13 :::

H) The Respondents' witness has been inconsistent and at times contradictory, while the Appellant's witness has been consistent and to the point[8].

10. The operative part of the Arbitral Award is extracted below :

> ***Now, having heard both the Parties, the Claimant and Respondent Nos. 1 & 2 and taking into consideration their oral and written submissions, I give my final Award as follows which has to be read along with my three previous interim orders dated 12th July 2010, 23rd July 2012 and 17th December 2013 which form part of my final Award.***
>
> *1) The Development Agreement and the Memorandum of Understanding both dated 19th April, 1995* ***stand modified by the draft Supplemental Agreement and they are valid and subsisting****.*
>
> *2) The Claimant have been ready and willing to carry out their obligations under the Development Agreement & MoU dated 19th April, 1995* ***as modified by the draft Supplemental Agreement****.*
>
> *3) The conduct of the Respondents in the following matters also show that the said Agreement and MoU are subsisting and binding.*
>
> > *a) The deposit of Rs. 1.5 crores given by the Claimant to the Respondents is still retained by the Respondents and they have not returned to the Claimant.*
> >
> > *b) Title Deeds of the disputed property are still with Shri Kirit Damania & have not been recalled by the Respondents.*
> >
> > *c) The Two Power of Attorney given to the nominees of the Claimant by the Respondents*

[8] *Paragraph 18(h)*

::: Downloaded on - 28/06/2024 23:40:13 :::

> *are still valid and have not been cancelled or revoked by the Respondents.*
>
> *4) The **Claimants are entitled to Specific Performance of the said Development Agreement and MoU dated 19th April, 1995 as modified by the draft Supplemental Agreement**. Hence the alternative Claim of the Claimants for refund interest, damages etc is not awarded.*
>
> *5) **The claim of the Claimant has not become barred by limitation**.*
>
> *6) Both the parties, the Claimant and the two Respondents are hereby directed to carry out their respective obligations and complete the development work.*
>
> *7) Parties will bear their own costs.*
>
> ***[Emphasis Supplied]***

Supplemental Agreement and its blanks:

11. It will be seen from the foregoing that one of the core existential questions in these proceedings is whether the draft Supplemental Agreement constitutes an agreement between the parties. The Arbitral Award directs the specific performance of this purported agreement. If such agreement did not exist, it would erode the substratum of the Arbitral Award. If such agreement did exist, its contents would have to be precise, finite and lend themselves to the ingredients of agreements that are capable of specific relief.

::: Downloaded on - 28/06/2024 23:40:13 :::

12. It is common ground that this was not an executed document, but it is trite law that even oral agreements can be specifically enforced. Assuming for the sake of argument that the Supplemental Agreement had been executed, its core contents are necessarily noteworthy – these provide context to the foundational element of the dispute between the parties.

13. Recital (f) of the draft Supplemental Agreement purports to record the "set-back area" to be handed over the municipal authorities to avail benefits of floor space index, which was not envisaged earlier, and the size of such area is left blank. Clause 3 of the draft Supplemental Agreement purports to modify and replace the Second Schedule of the Development Agreement by the Second Schedule set out in the draft Supplemental Agreement, which was meant to set out the built-up area to be retained by the Respondents.

14. The Second Schedule in the draft Supplemental Agreement contains two items – the first item was meant to set out the area to be retained by the Respondents in the "front wing of the Shopping Complex cum Officer building", and the area meant to be retained is left blank. Likewise, the second item was meant to set out the floor of the building and the area in such floor to be retained by each of

::: Downloaded on - 28/06/2024 23:40:13 :::

the Respondents, and both the floor and the area in such indeterminate floor to be retained, was also left blank.

15. Clause 4(a) of the draft Supplemental Agreement was intended to record the area on the ground floor of the Shopping Complex to be retained by each of the Respondents, and such area was meant to be demarcated in red colour in the plan that was meant to be attached. Admittedly, the size of area stipulated in that clause is blank and no demarcation in any plan is found.

16. Clause 4(b) of the draft Supplemental Agreement was meant to record the area on a floor to be identified in the office premises to be development, and retained by each of the Respondents, and such area was meant to be demarcated in blue colour in the plan that was meant to be attached. Admittedly, neither the floor number nor the size of the area on such floor is set out – these are left as blanks, and no demarcation in any plan is found.

17. To see how stark this would appear on the very face of the record, the aforesaid provisions are extracted:-

> *3) The Owners have agreed to retain to themselves total built-up area of about 11,000 square feet (Built-up area in the Building to be constructed on the said land as per sanctioned building plans, the copies of which are attached hereto. In the circumstances,* ***the Second***

::: Downloaded on - 28/06/2024 23:40:13 :::

> ***Schedule to the said Agreement dated 19th April, 1995 stands modified and replaced as mentioned in the Second Schedule hereunder written.***
>
> *4) a) The **Built-up area on the Ground Floor to be retained by each of the First Owner and Second Owner**, comprised in the Shopping Complex **will have _____ square feet built-up area each respectively**, which is shown **demarcated in red colour** on the plan attached hereto.*
>
> *b) **____ square feet of built-up area on the ____ Floor**, being the Office premises to be retained by each of the First Owner and Second Owner is shown **demarcated in blue colour** on the plan attached hereto.*
>
> ***The Second Schedule above referred to :-***
> ***(Details of built-up area retained by Owners)***
>
> *1) **____ square feet of built-up area on the Ground Floor in front wing of the Shopping Complex cum Office building to be retained by each of the First Owner and Second Owner** since the Ground Floor is comprised of Shopping area. The **Owners jointly will have ____ square feet shopping area** in the front wing of the Shopping Complex cum Office building:*
>
> *i.e **____ x 2** = ____ square feet built-up area.*
>
> *2) **____ square feet of built-up area on the ___ Floor** to be retained by each of the First Owner and the Second Owner:*
>
> *i.e **____ x 2** = **_____**square feet built-up area.*
>
> ***[Emphasis Supplied]***

18. Therefore, on the face of it, it would have been a challenge for any reasonable person, without having to be a judicially experienced expert, to conclude that a mutually agreed bargain among the

::: Downloaded on - 28/06/2024 23:40:13 :::

parties, capable of being enforced by law, was in existence. The Learned Single Judge has rightly found fault with the manner in which the Learned Sole Arbitrator has gone about discerning the existence of a contracted bargain, in the teeth of such yawning gaps in the instrument under consideration (the draft Supplemental Agreement).

Invocation Claimed as of 14th February, 2002:

19. The challenge to the very existence of the Supplemental Agreement takes us to the relevance of the letter dated 14th February, 2002, which purports to invoke arbitration. The dispute over the very existence of the Supplemental Agreement extends into the dispute over the receipt of such letter dated 14th February, 2002. The said letter, which forms part of the record, indicates that the Appellant drew reference to the Development Agreement and the MoU, and complained that even seven years after these agreements were signed, the Respondents had not permitted entry to the Appellant into the premises. Consequently, arbitration under Clause 33 of the Development Agreement was invoked, and the stated objective was to resolve "the differences amicably in the intent of both the parties". This letter purports to enclose the draft

::: Downloaded on - 28/06/2024 23:40:13 :::

Supplemental Agreement.

20. A statement (said to be annexed to the said letter) purporting to show the gist of the differences between the parties, admittedly stated that the original bargain entailed in the Development Agreement needed to undergo a change due to revised law and also due to changes in the market for demand for a shopping centre and office premises. The said gist claimed that the Appellant was proposing a change of the 12,500 square feet to which the Respondents were entitled under the Development Agreement, and that that entitlement ought to be revised to 11,000 square feet. The gist asserted that the Respondents had provided several assurances and promises to execute the Supplemental Agreement but were avoiding the execution, and that the Respondents were continuing to avoid permission for the Appellant to enter the property for development.

21. This letter of invocation purports to have been addressed to the Learned Sole Arbitrator and is copied "for information" to the Respondents. Admittedly, there is no confirmation or acknowledge-ment of receipt on the face of the record. A hand-written note of the Appellant, is found against the names of the Respondents to whom

::: Downloaded on - 28/06/2024 23:40:13 :::

the letter was intended to be copied, stating that the Respondents had been served by hand delivery at the residence of one of the Respondents on 14th February, 2002 at 12:15 pm. It is stated in the handwritten note that person who accepted the notice refused to sign acknowledgement of receipt, but subsequently, the two Respondents had confirmed receipt over the phone.

22. The version of events set out in the Appellant's handwritten note, is seriously contested by the Respondents, who claim that the letter dated 14th February, 2002 was never sent to them and they were unaware of its existence or the inherent reference in it, to the draft Supplemental Agreement. According to the Respondents, they became aware of it when this letter dated 14th February, 2002 was annexed to the Statement of Claim, which was eventually filed on 2nd April, 2009. Put differently, according to the Respondents, the purported existence of a letter of 14th February, 2002, enclosing the purported draft Supplemental Agreement, came to the Respondents' knowledge another seven years later (through the Statement of Claim dated 2nd April, 2009).

23. Admittedly, there is no acknowledgement of receipt of this

::: Downloaded on - 28/06/2024 23:40:13 :::

notice of invocation. It is a matter of record that Maneksha & Sethna, the firm of solicitors that represented the Appellant, wrote multiple letters to the Learned Sole Arbitrator in connection with the Development Agreement and the MoU *viz.* letters dated 18th October, 2002, 10th January, 2003, 15th July, 2003, and 17th December, 2004, calling upon him to conduct a preliminary meeting to schedule the arbitration. Each of these letters refers to the earlier letter(s) from Maneksha & Sethna, and repeatedly reminds the Learned Sole Arbitrator to act on the arbitration that had been invoked. The third letter is titled "REMINDER". None of these letters from Maneksha & Sethna refers to any Supplemental Agreement. None of these letters contains a whisper of a reference to the letter dated 14th February, 2002 that is said to have been written by the Appellant directly without involving its solicitors.

24. The first letter from the Learned Sole Arbitrator is dated 10th January, 2005, scheduling a preliminary meeting for 17th January, 2005, invoking the Development Agreement. It makes no reference to the Supplemental Agreement and indeed is silent about any letter of invocation. On 18th January, 2005, the Learned Sole Arbitrator called for a Statement of Claim within four weeks. As seen above, no

::: Downloaded on - 28/06/2024 23:40:13 :::

such Statement of Claim was filed until 2nd April, 2009 (four years later).

25. Against this backdrop, the Learned Sole Arbitrator, ought to have adjudicated and ruled on the existence of the draft Supplemental Agreement (even in its incomplete form), and then considered if the parties had been *ad idem* on its contents, to see whether such core document that is sought to be specifically performed, lends itself to specific performance. Instead, in the Arbitral Award, the Learned Sole Arbitrator has summarily concluded that the draft Supplemental Agreement was annexed to the letter dated 14th February, 2002, and has jumped to the conclusion that the Respondents have not denied its existence. Such a finding, according to the Learned Single Judge, was evidently perverse and riddles the Arbitral Award with inherent conflicts inasmuch as the Arbitral Award itself records that the Respondents had seriously contested the existence of the Supplemental Agreement (for instance, Paragraph 8(e) of the Arbitral Award).

26. Yet, the very same Arbitral Award concludes that the Supplemental Agreement had not been denied by the Respondents. The Learned Sole Arbitrator has returned a finding that since the

::: Downloaded on - 28/06/2024 23:40:13 :::

letter dated 14th February, 2002 was the letter that referred the disputes to arbitration, the Respondents could not deny the existence of the draft Supplemental Agreement. Such an approach indeed lends itself to the Arbitral Award being tainted by the vice of "patent illegality" since, by this approach, the Arbitral Award does not address even the most basic notions of adjudicating a contentious point of fact that is in dispute.

27. The Learned Single Judge has rightly noticed that the witness examined by the Appellant has not even provided a firm date by which the Supplemental Agreement had been reached. Likewise, whether even the letter dated 14th February, 2002 had actually been served on the Respondents, was not even sought to be proved (for demonstrating knowledge of the Respondents, which is the foundation of the Learned Sole Arbitrator confirming the existence of such agreement). The pleadings of the parties are replete with strong contentions on this issue, and the adjudication of such a fundamental foundation of the dispute has been done in an evidently perverse manner.

28. We agree with the Learned Single Judge that the Arbitral Award is *ex facie* contrary to the pleadings that the Learned Sole

::: Downloaded on - 28/06/2024 23:40:13 :::

Arbitrator had to contend with. The Arbitral Award has shirked adjudicating the dispute in question, with reasons – the core foundational element of whether the Supplemental Agreement at all existed. The summary conclusion that the existence of the Supplemental Agreement is not disputed, renders the finding of the existence of the core agreement that was to be adjudicated upon, to be arbitrary and devoid of reason. Worse, the Learned Sole Arbitrator does not even deal with this issue in the Arbitral Award, but has chosen to rely upon his interim order dated 23rd July, 2012, holding that the Supplemental Agreement is valid, binding and admitted to by the Respondents in the following words (in Paragraph 4(c) of that interim order):-

> "*Since the parties hereto were aware of the existence of the Supplementary (sic) Agreement, which is supplementary to the main Agreement dated 19th April, 1995, and which is in writing but not signed, is valid in view of several judgements of various courts relied upon during the proceedings before me.*"
>
> *[Emphasis Supplied]*

29. Based on the foregoing "finding", the Learned Sole Arbitrator has repeatedly stated in the Arbitral Award that he had already found in favour of the Appellant about the Supplemental Agreement. Be that as it may, there is not a whisper in the Arbitral Award as to

::: Downloaded on - 28/06/2024 23:40:13 :::

what component of the built-up area and which floor of the commercial building with how much area, would be the entitlement of the Respondents (since the draft Supplemental Agreement has multiple blanks on these facets). Evidently, the Learned Single Judge was right in concluding that the Arbitral Award did not lend itself to non-interference. On the face of it, the aforesaid approach shows an evident lack of basic notions of adjudicatory approach, that would be foundational to the core essentials of how contracts may be enforced as a matter of law.

30. The Learned Single Judge is also right, in our view, in the conclusions he has drawn about whether the letter dated 14th February, 2002, which is said to have been issued to the Learned Sole Arbitrator, was at all served on the Respondents. As a matter of first principles, just as the onus of proving the existence of the disputed Supplemental Agreement was on the Appellant, so was the onus of proving the service of the disputed notice of 14th February, 2002.

Witness indeed Cross-Examined:

31. The Learned Sole Arbitrator has also returned a finding that the Respondents have not cross-examined the Appellant's witness

::: Downloaded on - 28/06/2024 23:40:13 :::

about his sworn testimony that the Respondents, had through their husbands, agreed to sign the draft Supplemental Agreement. From a bare perusal of the record, we find that such a finding itself is not accurate since, indeed, the witness had been cross-examined on the issue. Questions were indeed posed about the Supplemental Agreement by the Respondents' counsel during the arbitration proceedings. Specifically, the witness was asked whether an agreement to execute the Supplemental Agreement was oral or written, to which the witness replied that it was the oral understanding. To a query as to who agreed with whom orally, the witness replied that it was an agreement between the husbands of the Respondents on one side and the witness himself on the other, acting on behalf of the Appellant. When asked whether anyone else was present when the oral agreement was reached, the answer was that he did not remember. So also, when asked if there was any precise date by which the agreement had been arrived at, the witness replied in the negative.

32. Thereafter, each of the four letters namely the letters dated 18th October, 2002, 10th January 2003, 15th July 2003, and 17th December, 2004 were shown to the witness and he was asked

::: Downloaded on - 28/06/2024 23:40:13 :::

whether these letters addressed by the solicitors of the appellant to the Learned Sole Arbitrator made any reference whatsoever to the oral agreement constituting the Supplemental Agreement. The witness confirmed that none of this contemporaneous correspondence contained any reference to the oral agreement claimed to have been reached. In that view of the matter, the finding of the Learned Sole Arbitrator that there had been no cross-examination at all on the subject, is untenable and perverse. To say this, we do not have to appreciate evidence but have to just see whether on the face of the record, there is an evident breakdown in applying basic notions of justice and adjudication on the part of the Learned Sole Arbitrator. The record discloses that the Arbitral Award could have never returned a finding that there had been no cross-examination on the question. Worse, the Arbitral Award could have never used the alleged absence of cross-examination as the basis to return a finding that the Supplemental Agreement (in itself incomplete) had been reached.

33. Besides, the Learned Sole Arbitrator has relied on Clause 30 of the Development Agreement to return a finding that the Respondents were required to sign such Supplemental Agreement,

::: Downloaded on - 28/06/2024 23:40:13 :::

and that the Development Agreement stood modified by the draft Supplemental Agreement. However, there is not even a whisper of how to deal with the inchoate nature of the draft Supplemental Agreement and how, with all its blanks, one could return a finding that there was a contract for specific performance contained in it.

Scope of Interference with Arbitral Awards:

34. Mr. Rohit Kapadia, Learned Senior Counsel representing the Appellant would argue that the Learned Sole Arbitrator was the last forum for findings of fact. The existence (or the lack of it), of the Supplemental Agreement was a case of "word against word", he would argue, and the Learned Sole Arbitrator was entitled to draw his conclusions, without the same being interfered with under Section 34 of the Act, which had very limited scope for challenge of arbitral awards. We are unable to accept this submission, since it is not the intent and scope of the Act that an evidently and manifestly arbitrary finding of fact that is arrived at without even the basic notions of adjudication being applied, would have to be upheld on the premise that the arbitrator has the last word on facts. The very fact that a challenge under Section 34 of the Act has been provided for, taking care to ensure that there should not be any fresh

::: Downloaded on - 28/06/2024 23:40:13 :::

consideration of merits, would indicate that the scope for interference under Section 34 would bring within its ambit, a manifestly arbitrary arbitral award that is arrived at without any application of basic notions of justice and adjudication.

35. The reasons articulated by us earlier about the approach of the Learned Sole Arbitrator in returning a finding that the Respondents never questioned the existence of the Supplemental Agreement or that the Arbitral Award has abdicated the duty of adjudication of the issue, on the premise that a "finding" had already been arrived at in an interim order, are adequate, in our opinion, to form a reasonable view that the Arbitral Award is perverse, illogical and arbitrary. Even if one were to assume for the sake of argument that the draft Supplemental Agreement is indeed a record of the agreed bargain between the parties, what the amended entitlements of the parties are under the said draft Supplemental Agreement is evidently inchoate and inconclusive, rendering its performance impossible.

Examination of the Record vs. Weighing of Evidence:

36. We have consciously refrained from weighing evidence and considering if competing views are possible from the appreciation of

::: Downloaded on - 28/06/2024 23:40:13 :::

evidence. We are conscious that it is outside our purview to appreciate evidence under our jurisdiction under Section 37 of the Act. Likewise, it was not open to the Learned Single Judge too to appreciate evidence, and the Impugned Judgement indeed does not indulge in such an exercise. What we find is that the Learned Single Judge's views conform to the framework of Section 34 of the Act inasmuch as the Impugned Judgement is well within the narrow scope for interference with the Arbitral Award. The manifestly arbitrary and non-judicial approach adopted by the Learned Sole Arbitrator is in conflict with basic notions of adjudication and justice that it is in conflict with fundamental policy of Indian law. Without reviewing the merits, and merely by noticing the record, it is apparent that the Arbitral Award was deservedly set aside by the Learned Single Judge.

37. The challenge by the Appellant to the Impugned Judgment is fundamentally premised on the proposition that an Arbitrator should be allowed to have the last word on findings of fact and that the Learned Single Judge had erred by concluding that the Arbitral Award suffered from patent illegality. Mr. Kapadia was at pains to point out that the Learned Single Judge ought not to have returned a

::: Downloaded on - 28/06/2024 23:40:13 :::

finding that the Learned Sole Arbitrator had committed patent illegalities in the manner in which evidence is appreciated in Arbitral Proceedings. According to him, the finding of fact in the Arbitral Award that the Supplemental Agreement existed was essentially a finding of fact based on the evidence led by Mr. Bhuta, the Respondents' witness, who allegedly admitted to the existence of the letter dated 14th February, 2002.

38. Mr. Kapadia would argue that findings of fact could never be assailed as being patently illegal. He would argue that the Impugned Judgment is legally infirm since, according to him, it proceeds on the basis of re-appreciation of the evidence which is not permissible. He would also submit that the Appellant was entitled to rely on the admission that the proceedings had been invoked by the letter dated 14th February, 2002.

39. The aforesaid submissions do not lend themselves to acceptance by us. On the face of it, the Arbitral Award contains sweeping findings that are *ex facie* contrary to the record and even contrary to the other portions of the very same Arbitral Award – inasmuch as it indicates that the Respondents have admitted to the Supplemental Agreement, and that there is no contention about the

::: Downloaded on - 28/06/2024 23:40:13 :::

invocation of arbitration purportedly made on 14th February, 2002, enclosing the Supplemental Agreement. We have already expressed above, our views on such a finding being in direct conflict with the material on record.

40. On the other hand, Mr. T.N. Subramaniam and Mr. Shailesh Shah, Learned Senior Counsels representing the Respondents, have rightly submitted that the Learned Single Judge was perfectly accurate in his conclusion that the Arbitral Award overlooked the basic pleadings in the written statement, whereby the existence of the Supplemental Agreement and indeed receipt of the purported notice dated 14th February, 2002 invoking arbitration have been explicitly disputed. According to them, the Learned Single Judge has not ruled that a finding about a copy of the draft Supplemental Agreement being an annexure to the letter dated 14th February, 2002, is a patent illegality. Instead, the Learned Single Judge has found that the conclusion of the Learned Sole Arbitrator that the Supplemental Agreement had been entered into, and indeed that a letter dated 14th February, 2002 had been delivered, are both *ex-facie* inconsistent with the pleadings and the material on record. It is such a conjectural finding without adjudicating the issue and

::: Downloaded on - 28/06/2024 23:40:13 :::

without drawing a reasonable inference along with reasons, and making that the substratum of the Arbitral Award that constitutes patent illegality. We agree with them. They are right in pointing out that a finding of fact based on no evidence at all is a finding that suffers from a patent illegality. Both Mr. Subramaniam and Mr. Shah would point out that the draft of the Supplemental Agreement was riddled with blanks showing that it could never have constituted even a purported agreement. Treating such a document as a concluded contract which, on the face of it, does not even contain the bargain agreed upon by the parties, is what constitutes the perversity in the manner of appreciation of evidence, and thereby has culminated in a patent illegality.

41. In a nutshell, Mr. Subramaniam and Mr. Shah would argue that the Learned Single Judge has not at all re-appreciated any piece of evidence. According to them, the Impugned Judgment has only pointed out how the Arbitral Award has overlooked vital evidence, and how the Arbitral Award has returned summary findings of fact which are unsustainable because of complete lack of evidence. According to them, it is such conduct of the Learned Sole Arbitrator that renders the Arbitral Award to be tainted by patent illegality. We

::: Downloaded on - 28/06/2024 23:40:13 :::

are in full agreement with their submission.

42. It would suffice to draw from the articulation of the law on the subject from the judgement of the Hon'ble Supreme Court – in the case of ***SsangYong Engineering & Construction Co. Ltd. Vs. National Highways Authority of India***[9] (paragraphs 40, 41 and 42 thereof) read with the law declared in ***Associate Builders vs. Delhi Development Authority***[10] (paragraphs 42 to 45 thereof).

43. It is now settled law that contravention of substantive law of India would not sound the death-knell for an arbitral award, but if the arbitrator gives no reason for the award, it would constitute patent illegality, warranting that the award be set aside. Construction of a contract is primarily the domain of the arbitrator, unless the arbitrator were to construe a contract in a manner that no fair-minded or reasonable persons could do. Put differently, if the view taken by the arbitrator is not even a possible view to take, the award would be liable to be set aside. So also, a finding based on no evidence at all or an award that ignores vital evidence in arriving at its decision, would be perverse and liable to be set aside on the ground of patent illegality.

9 *2019 SCC OnLine SC 677*
10 *(2015) 3 SCC 49*

::: Downloaded on - 28/06/2024 23:40:13 :::

44. Applying the aforesaid principles, in our opinion, the Arbitral Award suffers from patent illegality since no reasonable person could have arrived at a conclusion that the Respondents had admitted to the execution of the draft Supplemental Agreement and had not contested the receipt of the Supplemental Agreement on 14th February, 2002. That being the foundation of the Arbitral Award, refraining from adjudicating the core controversy and returning findings as if the core dispute that lay at the heart of the controversy did not even exist, it would be inappropriate to interfere with the Impugned Judgement, which rightly set aside the Arbitral Award.

Limitation issue:

45. Having concluded as above, it is not strictly necessary for us to delve into the issue of limitation and the direct conflict between the Arbitral Award (it holds there was no time-barring of the Appellant's claim) and the Impugned Judgement (it holds that the Appellant was hopelessly time-barred). However, we think it appropriate to express ourselves on the same since it is an important issue although nothing would turn on it in view of the foregoing findings in this judgement.

::: Downloaded on - 28/06/2024 23:40:13 :::

46. A perusal of the Statement of Claim (as duly amended to bring in the Development Agreement since originally, the claim was based only on the draft Supplemental Agreement) indicates that the Appellant had prayed for a declaration that the Development Agreement and the MoU, both dated 19th April, 1995, as modified by the Supplemental Agreement was valid, subsisting and binding on the Respondents, and of which the Appellant sought specific performance. Article 54 of the Schedule to the Limitation Act, 1963 (which applies to any claim seeking specific performance of a contract) provides for a period of limitation of three years, which period commences from the dated fixed for the performance. Where no such date is fixed, such period would commence when the claimant notices that performance has been refused. Article 58 of the Schedule to the Limitation Act, 1963 (which applies to any claim for seeking any declaration), provides for a period of limitation of three years, which period begins when the right to sue first accrues.

47. The Appellant has alleged in the Statement of Claim that despite repeated requests by the Appellant, the Respondents did not allow the Appellant to enter the Subject Property. The Appellant was entitled to enter the Subject Property under the Development

::: Downloaded on - 28/06/2024 23:40:13 :::

Agreement and the MoU. The material on record would show that according to the Appellant, right in 1995, the Respondents had refused to perform this obligation of letting the Appellant enter the Subject Property (Question No. 39 of the Appellant's witness). Therefore, the Appellant would be said to have had knowledge of the breach in 1995. That being so, the period of three years would begin to run from 1995 under Article 54. Therefore, the Appellant invoking the arbitration (even if as claimed, it had done so on 14th February, 2002), would have to be regarded as being barred by limitation.

48. Faced with this position, the Appellant argued that refusal to permit entry cannot be the point at which the timing under the limitation law must commence its count. According to Mr. Kapadia, the Development Agreement included a whole bundle of obligations on either side and failure to perform one of the obligations is not a refusal to perform the agreement in order to attract Article 54 of the Limitation Act, 1963. Mr. Kapadia would argue that not only is a sum of Rs.1.5 crores deposited by the Appellant still lying with the Respondents but also the Title Deeds of the Subject Property are still lying with the attorney designated by the Appellant, and therefore,

::: Downloaded on - 28/06/2024 23:40:13 :::

the agreement is still alive. Consequently, the cause of action of the Appellant has not become time-barred.

49. Mr. Kapadia would argue that one would not be expected to litigate on every single breach of a contract, and one should see whether the right under a contract that is violated is so pivotal that it can be regarded as having given rise to the cause of action complained of. It is the Appellant's case that in 2002, it was conscious that for seven years there had been a refusal to perform the contract. We need not get into whether the limitation period is to be reckoned after 2002 and before 2009, when the Statement of Claim was first filed, since the Learned Single Judge has rightly held that the question of when arbitration was invoked is moot. The Learned Single Judge has observed, and in our opinion, rightly, that even if one were to take the date of 18th October, 2002, when the notice that contained no reference to the letter dated 14th February, 2002 (or its purported enclosure of the draft Supplemental Agreement) was issued, the claim had been barred by limitation.

50. Similarly, the limitation of three years for seeking declaration under Article 58, would start from the date when the right to sue first accrues – yet again, from 1995. The Learned Single Judge has

::: Downloaded on - 28/06/2024 23:40:13 :::

held that whether the arbitration commenced on 14th February, 2002 (when arbitration was purportedly invoked); or on 1st April, 2009 (when the Statement of Claim was affirmed), is moot, since by either measure, the claim was *ex facie* hopelessly barred by limitation.

51. However, we wish to reiterate that even assuming that the issue of limitation is kept aside, and there is no time-barring of the claim, the claim for specific performance could never have been allowed, for the reasons spelt out above – the failure of basic due process in adjudicating the dispute, and the manner of drawing conjectural and arbitrary conclusions, are adequate to render the Arbitral Award to be against the basic notions of justice and the fundamental policy of Indian law.

52. In the result, the Appeals fail and the Impugned Judgement is upheld.

Costs:

53. Since these proceedings are in the nature of commercial disputes, we are statutorily required to apply out mind to costs. Taking into account the long-drawn litigation, the expansive scope

::: Downloaded on - 28/06/2024 23:40:13 :::

of pleadings and arguments made on various points and sub-points, seeking to turn every minor facet of the matter into a pivotal factor of distinction, to our mind, this litigation demonstrates the Appellant taking a chance with the litigation in the teeth of a well-reasoned and articulate Impugned Judgement that cogently demonstrates how the Arbitral Award deserves to be set aside. Therefore, costs must follow the event of the action and the entitlement of the successful party to recover costs from the unsuccessful party deserves to be upheld.

54. The costs submitted by the Respondent No. 1 is in the sum of Rs. 55,66,776/-. We believe, it would be appropriate to treat this as a reasonable benchmark of costs that would have had to be incurred by both the Respondents and not just one of them. We do not find any contributory failure on the part of the Respondents to warrant any adjustment on account of their conduct. However, we feel it would be appropriate to truncate the costs awarded to Rs. 40,00,000/- towards both the Respondents collectively, and thereby direct the Appellant to pay costs of Rs. 20,00,000/- to each of the Respondents. The costs shall be payable within a period of four weeks from today, failing which they would be recoverable as arrears

::: Downloaded on - 28/06/2024 23:40:13 :::

of land revenue under the Maharashtra Land Revenue Code, 1966.

55. With these directions, the two appeals *viz.* Commercial Arbitration Appeal No. 90 of 2020 and Commercial Arbitration Appeal No. 91 of 2020 are hereby dismissed with costs as above.

56. This judgement will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this judgement.

[SOMASEKHAR SUNDARESAN, J.] **[B.P. COLABAWALLA, J.]**

57. After the order was pronoucned, Mr. Yash Kapadia, the Learned Counsel appearing on behalf of the Appellant stated that the Appellant might be desirous of challenging this order before the Hon'ble Supreme Court. He, therefore, requested that the payment of costs as directed by this order, be stayed for a period of eight weeks.

58. Considering that the Appellant wants to challenge the aforesaid order, we accede to his request and grant a stay on the payment of costs for a period of eight weeks from today.

[SOMASEKHAR SUNDARESAN, J.] **[B.P. COLABAWALLA, J.]**

::: Downloaded on - 28/06/2024 23:40:13 :::