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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION PETITION NO. 519 OF 2017

Bombay Textile Research Association

Petitioner

Versus

Nilkanth Enterprise

Respondent

Mr. Sarosh Bharucha a/w Mr. Rajendra Shah, Mr. Chirag Shah, Mr. Aakash Mehta and Mr. Divyang Salvi i/b. Mansukhlal Hiralal & Co., for Petitioner.

Mr. Janak Dwarkadas, Senior Counsel a/w Mr. Bhanu Chopra, Ms. Soumya Mishra, Mr. Jahan Ajay Chokshi, Mr. Adit Furia and Mr. Kavish Pandya i/b. KJAC & Associates for Respondent.

CORAM: SOMASEKHAR SUNDARESAN, J.

DATE: DECEMBER 12, 2025

JUDGEMENT :

Context and Factual Background:

1. This Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 ("***the Arbitration Act***") challenging an Arbitral Award dated August 5, 2017, granting specific performance of a Development Agreement discerned from a letter dated November 4, 2003 read with an unexecuted execution draft of a Development Agreement stamped in December 2004, further supplemented by

Minutes of Meeting dated December 20, 2005 (collectively, “**Enforced Agreement**”).

2. The contention of the Petitioner is that the Enforced Agreement could have never been the subject matter of specific performance inasmuch as what was referred to arbitration comprised a combination of instruments different from the combination of instruments that constitutes the Enforced Agreement.

3. Before dealing into the merits of the challenge, a brief factual over view would be appropriate :

(a) The Petitioner, Bombay Textile Research Association (“**BTRA**”) is a private non-profit organization set up in connection with the textile trade and industry. BTRA owns property admeasuring approximately 57,195 square meters of land located in Ghatkopar (West), Mumbai, which is more particularly described in the Impugned Award (“**Subject Property**”);

(b) By letter dated September 22, 2003 (“**September 2003 Letter**”), the Respondent, Nilkanth Enterprise (“**Nilkanth**”) expressed its interest to purchase and develop

the Subject Property. Nilkanth offered a price of Rs.53.50 Crores for the property admeasuring about 57,195 square meters, excluding one unoccupied building of 16 flats comprising of a ground floor and four storeys. Nilkanth identified the approximate development potential with a Floor Space Index (***FSI***) area of 15,000 square feet;

(c) This letter offered a payment by Nilkanth of Rs.1 Crore on confirmation of the offer which would be kept deposited with BTRA. Further payment of Rs.2 Crores was to be made on execution of a Memorandum of Understanding (***MOU***) which was meant to be effected within a period of thirty days from such confirmation. On receipt of permission from the Urban Land Ceiling (***ULC***) authorities, a further amount of Rs. 2 Crores towards part payment was offered. Thereafter, the balance sum of Rs.48.5 Crores was offered to be paid in five equal installments of Rs.9.7 Crores each, every six months after receipt of the ULC permission;

(d) By letter dated October 21, 2003 (***October 2003 Letter***) BTRA replied to the said letter and made a counter offer to Nilkanth. BTRA listed out the terms on which it

would accept Nilkanth's offer. BTRA stated that the letter of intent from the "Development Dept." of the Municipal Corporation of Greater Mumbai ("**MCGM**") for carving out the plot either for residential or commercial users would be necessary since the entire land had been reserved for activity of textile research. BTRA indicated that the sale would be for land admeasuring approximately 56,000 square meters, in terms of the area shown by one Mr. Parimal Parekh, an architect, in a plan ("**Parekh Plan**") after excluding one unoccupied building of 16 flats referred to in the September 2003 letter;

(e) The October 2003 letter also confirmed the price of Rs.53.50 Crores but stated that Rs.1.5 Crores should be paid on confirmation of the offer, after which, upon execution of an MOU within thirty days, a further sum of Rs.4 Crores would be payable to BTRA. After obtaining ULC permission, a further sum of Rs.4 Crores would be payable and the balance sum of Rs.44 Crores would be paid in eight quarterly installments of Rs.5.50 Crores each starting from September 1, 2004. The October 2003 letter further stated that, in addition, when Nilkanth constructs a residential building, in

one of the buildings, a three bedroom flat would need to be provided to BTRA on a cost basis;

(f) On November 4, 2003 (*“November 2003 Letter”*) Nilkanth responded to the counter offer by indicating that the sale would be of land admeasuring about 56,000 square meters in terms of the area shown in Parekh Plan excluding the said building. The price too was confirmed at Rs.53.50 Crores with Rs.1.51 Crores being paid along with November 2003 Letter. Cheques were enclosed, identifying the cheque numbers. The MOU was agreed to be executed within thirty days from the November 2003 Letter, with a commitment to pay a further sum of Rs. 3 Crores against the execution of the *“MOU/Development Agreement”*;

(g) Nilkanth undertook to pay a further sum of Rs.2 Crores after receiving the ULC permission, and the balance amount of Rs.47 Crores was proposed to be paid in eight quarterly instalments of Rs.5.875 Crores commencing from the expiry of six months from the date of receipt of the ULC permission. The November 2003 Letter confirmed that in one of the residential buildings to be constructed by Nilkanth,

a three bedroom flat would be provided to BTRA on cost basis;

(h) A cheque for Rs.1.51 Crores was indeed enclosed with the November 2003 Letter, and was also encashed by BTRA;

(i) Two cheques of Rs.1 Crore and Rs.1.5 Crores dated September 1, 2004 and September 8, 2004 were later issued by Nilkanth and also encashed by BTRA during the course of further negotiations between the parties of the draft of the proposed documentation. These cheques were handed over on August 31, 2004 and it is common ground that these amounts had actually been received, taking the total amounts paid by Nilkanth to BTRA to Rs.4.01 Crores;

(j) ULC permission for the Subject Property was obtained on November 10, 2004. The parties continued to engage and eventually settled on an execution draft of a Development Agreement which was stamped on December 2, 2005 (***“Execution Draft DA”***). The Execution Draft DA, on the face of it, is a finalised draft of a Development Agreement which records that the Subject Property would be a portion of

the entire property admeasuring 86,161 square meters or thereabouts. The land that would be developed pursuant to the Execution Draft DA was meant to be 57,195.66 square meters or thereabouts;

(k) The parties had a plan drawn up and the Subject Property was earmarked and annexed to the Execution Draft DA. Nilkanth was given the power to exploit the full development potential and also utilize additional FSI by obtaining Transferable Development Rights ("**TDR**"). The consideration for the grant of the right to develop the Subject Property, now confirmed to be admeasuring approximately 57,195.66 square meters, was for a lumpsum monetary consideration of Rs. 51.50 Crores. The Execution Draft DA recorded that a sum of Rs.4 Crores had already been paid as part of earnest money even prior to the execution of the said agreement and that a further sum of Rs.3.50 Crores would be paid as further earnest money against execution of the Execution Draft DA and that the balance sum of Rs.44 Crores would be payable in eight quarterly instalments of Rs.5.5 Crores each, commencing from October 8, 2005;

(l) The Execution Draft DA also recorded the adjoining flats of two bedrooms each of an aggregate area of 1400 square feet saleable area, with amenities and standard quality fixtures along with car parking space would be provided at cost, which was agreed to be Rs.2,000/- per square feet. This would be provided in such building as BTRA would choose, from the buildings to be constructed by Nilkanth. The Execution Draft DA recorded that simultaneously with the execution of the said agreement eight post-dated cheques for a sum of Rs.5.5 Crores each were meant be handed over. It was also agreed that the time for payment of each of the aforesaid instalments was the essence of the contract and in the event of two consecutive defaults for any reason whatsoever, the outstanding amounts would attract interest at the rate of 15% per annum until realization. That apart, out of the amounts paid until then, a sum of Rs.5 Crores would stand forfeited and the balance amount would be returned to Nilkanth and the agreement would stand terminated;

(m) By this time, BTRA had received from the Executive Engineer (Development Plan) of the MCGM, a no objection for development of the carved out portion, i.e., the subject

property admeasuring 57,195.66 square meters for residential zone. Nilkanth was to agree to abide by the terms and conditions imposed by the MCGM. Upon receipt of Rs. 7.50 Crores referred to in the first two steps of payment in the Execution Draft DA, Nilkanth was meant to have access to the Subject Property with full rights of a licensee to commence, carry on and complete the development of the Subject Property;

(n) Clause 6 of the Execution Draft DA set out the various rights and authorities meant to be conferred on Nilkanth. Clause 6(k) of the Execution Draft DA provided that Nilkanth would have the power to allot and sell flats, garages, parking spaces and other premises in the buildings to be constructed, on an ownership basis and the sale proceeds of such transactions would be appropriated absolutely by Nilkanth without any right to the same being inferred in favour of BTRA. The Execution Draft DA also recorded that there were three buildings on the Subject Property, of which two were occupied and one was vacant. Nilkanth was to provide alternate accommodation to the occupants of two buildings in 16 flats admeasuring

approximately 11,840 square feet carpet area including balcony area in the new buildings to be constructed by Nilkanth at its own costs and expenses and the same carpet area would be provided to BTRA on an ownership basis, free of costs which would then be utilized by the employees of BTRA who were then occupying the said 16 flats;

(o) Clause 15 of the Execution Draft DA provided that upon realization of payment of the first Rs.7.5 Crores, BTRA would execute a Power of Attorney in favour of Nilkanth authorizing Nilkanth to undertake all lawful acts, deeds and things pertaining to development of the subject property. Clause 16 of the Execution Draft DA provided that upon realisation of the payments meant to be made under the multiple instalments, a further Power of Attorney would be granted to Nilkanth to enable Nilkanth to execute the Deed of Transfer or a lease in favour of such Co-operative Society, Condominium or Company that may be formed by the purchasers of various premises constructed on the subject property. At this stage, Nilkanth was to also execute a Deed of Indemnity in favour of BTRA against the use of such Power of Attorney and these documents were meant to be kept in

escrow with a named solicitor firm, for release of the same to Nilkanth after the entire amounts payable by Nilkanth were received by BTRA;

(p) Clause 18 of the Execution Draft DA provided that the subject property would undergo sub-division so that multiple separate co-operative societies could be formed, one for each building. In such event, BTRA would agree to execute separate Deeds of Conveyance in favour of each society. Neelkanth could agree to join in such Deed of Conveyance as a confirming party if so required;

(q) The parties then held a meeting on December 20, 2005. There were marginal changes to the terms of contract, reduced to writing in Minutes of Meeting drawn up on that date ("**2005 MOM**"). In terms of these minutes, the flats meant for Directors of BTRA had been identified and agreed. Until the buildings were completed, BTRA would continue to use a motorable road between the staff quarters and the office and a gate would be constructed inside the land for this purpose. Nilkanth was to take into consideration permission from the Fire Brigade authorities, which would be required

for the approach road, in the course of the construction in terms of the redevelopment;

(r) Operational issues such as uninterrupted power supply and alternate arrangements for rehousing BTRA's power house and the annexation of the Parekh Plan to the agreement was finalised. The parties agreed that in Clause 4 of the Execution Draft DA, it would be agreed that Nilkanth would not have any right to further transfer its rights without the consent of BTRA. Likewise, it was agreed that a clause would need to be inserted providing that Nilkanth would play by the rule book and not disturb the normal peaceful residence, movement and functioning of BTRA staff and residents of the quarters;

(s) After the aforesaid activity, the transaction appears to have hit a roadblock. This led to Nilkanth filing Suit No. 876 of 2009 (*"Suit 876"*) seeking specific performance of the Execution Draft DA read with 2005 MOM. On November 27, 2013 Nilkanth and BTRA executed Consent Terms essentially setting out the terms on which the disputes and differences between them would stand referred to arbitration. A Learned

Single Judge of this Court took the Consent Terms on record and passed an order in terms of the Consent Terms on December 2, 2013 appointing an arbitrator agreed upon by mutual consent. The reference to the Arbitral Tribunal was of all disputes covered by Suit 876;

(t) After Nilkanth filed its Statement of Claim on January 31, 2014, BTRA filed an application on February 24, 2014 seeking rejection of the claim on the premise that the claim was beyond the scope of the Consent Decree and therefore beyond the jurisdiction of the Learned Arbitral Tribunal. It was also prayed that Nilkanth should be directed to clarify the purported agreement of which specific performance was being sought; and

(u) The Learned Arbitral Tribunal directed, on March 12, 2014, that such application would be heard along with the merits of the disputes. The Statement of Defence was then filed in April 7, 2014 and on November 17, 2016 hearings were concluded and judgement was reserved. However, on November 22, 2016, Nilkanth filed an application before the Learned Arbitral Tribunal seeking to amend the Statement of

Claim, which was opposed on December 6, 2016 by BTRA. However, on December 13, 2016, the Learned Arbitral Tribunal allowed the amendment. On January 24, 2017 BTRA filed an additional Statement of Defence. This led to further hearings between January 2017 and July 2017 and eventually the Impugned Award was passed on August 5, 2017.

Contentions of the Parties:

4. Against this backdrop, I have heard at significant length, submissions made by Mr. Sarosh Bharucha, Learned Advocate on behalf of BTRA and Mr. Janak Dwarkadas, Learned Senior Advocate for Nilkanth. With their assistance, I have perused the agreed joint compilations of documents filed by them, one of which is titled “Joint Compilation” and the other is “JCOD -A”. Both the parties have also filed written submissions ahead of their submissions, which has been of vital assistance for assessing the material on record in order to adjudicate the challenge to the Impugned Award.

5. Mr. Sarosh Bharucha, essentially, pressed the following grounds to assail the Impugned Award:

(a) The Enforced Agreement is beyond the terms of reference and thereby outside the jurisdiction of the Arbitral Tribunal, inasmuch as the composition of the instruments that collectively constitute the Enforced Agreement is not what the parties had agreed to refer to arbitration;

(b) The Impugned Award has granted specific performance of an Agreement different from what has been prayed for;

(c) The Impugned Award results in a vague and non-executable relief owing to the dichotomy underlying the aforesaid objections;

(d) The Impugned Award contains inherent contradictions, rendering it perverse. The finding in the Impugned Award of a sale of land having been transacted is perverse and inconsistent with the transaction involving development of the Subject Property; and

(e) The Impugned Award does not deal with that the argument of privilege in relation to reliance upon an opinion obtained from the then Advocate General of Maharashtra.

The reliance on the internal documents of the Petitioner is inappropriate. While these contentions were set out in the written submissions filed in advance, in verbal submissions these were not pressed into service.

6. Mr. Bharucha has essentially contended that the terms of reference, which are reduced to writing in the Consent Terms, essentially recorded an Arbitration Agreement in respect of the agreement sought to be enforced in Suit 876. Towards this end, he would point to Paragraph 28 of the plaint in Suit 876 and referred to two Exhibits, namely Exhibit “J” and Exhibit “O” which were identified by Nilkanth as the purportedly agreed terms of which specific performance had been sought. Exhibit “J” was essentially the Execution Draft DA, while Exhibit “O” was the 2005 MOM. These two instruments were collectively referred to as “Suit Agreement” in the plaint. Mr. Bharucha would also point me to the prayers in the plaint, which essentially sought specific performance of the “Suit Agreement” which comprises an amalgam of the Execution Draft DA and the December 2005 MOM. However, he would point to the Impugned Award, to indicate that the specific performance granted by the Learned Arbitral Tribunal is essentially of an Agreement comprising the

November 2003 Letter read with the Execution Draft DA, further read with the 2005 MOM.

7. Therefore, Mr. Bharucha would submit, the agreement of which specific performance has been awarded, varies from the agreement of which specific performance had been sought in Suit 876, which agreement alone would be the subject matter of the reference to arbitration. The upshot of his submission is that the Learned Arbitral Tribunal has exceeded jurisdiction by roping into the mix the November 2003 Letter. Further, the implication of this line of submission is that there is a dichotomy between the reliefs sought and the relief granted, inasmuch as the amendment made to the Statement of Claim after judgment had been reserved, leading to further pleadings and submissions to rope in all three instruments that preceded the Execution Draft DA.

8. Mr. Bharucha would submit that the specific performance sought in the amended Statement of Claim is specific performance of an Agreement emanating from the September 2003 Letter; the October 2003 Letter; November 2003 Letter; the Execution Draft DA and the 2005 MOM. Since this was the combined scope of relief sought by Nilkanth, in addition to the submission that the Impugned Award is

beyond jurisdiction, it would also follow that specific performance granted is different from the specific performance sought. The Statement of Claim originally invoked all the aforesaid five instruments as representing the agreement of which specific performance is sought. The amended Statement of Claim pleaded a case seeking a relief that, should the Learned Arbitral Tribunal arrive at a conclusion that the Execution Draft DA and the 2005 MOM were not binding on BTRA, then the Letter dated November 4, 2003 may be treated as the Agreement between the parties and that ought to be specifically performed. However, the Impugned Award adopts a different composition of the agreement of which specific performance is being granted, and provides for specific performance of November 2003 Letter read with the Execution Draft DA read with 2005 MOM.

9. Therefore, Mr. Bharucha would contend, such a finding and an approach is perverse and liable to be struck down in terms of Section 34(2A) of the Arbitration Act. Mr. Bharucha would seek to rely on the judgment of the Supreme Court in *Ganesh Shet'* in this regard.

10. Mr. Bharucha would submit that the Impugned Award is also perverse because the November 2003 Letter represents a sale transaction as is seen from the subject under reference in it, while the

¹ *Ganesh Shet vs. Dr. C.S.G.K. Setty And Others (1998) 5 Supreme Court Cases 381*

Execution Draft DA represent a Development Agreement resulting in Impugned Award being vague and non-executable, and thereby perverse. Mr. Bharucha would also submit that a finding that the Execution Draft DA did not change the nature of the transactions, which continued to be transactions for sale of the property, is perverse because the Clauses 6(k), 16 and 18 of the Execution Draft DA would show that this draft was for the ultimate transfer of the property to Nilkanth or its nominees. He would submit that the Execution Draft DA is a standard Development Agreement and therefore a finding that the transaction remained one of sale of the Subject Property would be rendered entirely perverse and irrational.

11. He would further submit that the Impugned Award contains inherent contradictions. The question of whether there was a concluded contract between the parties had been specifically framed as an issue and positively answered by the Learned Arbitral Tribunal. It was also held that Nilkanth should be regarded as having been ready and willing to perform the agreement even while stating that non-payment of amounts payable under the agreement need not be expected from Nilkanth since Execution Draft DA had not been signed or executed by BTRA. Mr. Bharucha would submit that the aforesaid submissions evidently demonstrate that different yardsticks have been applied to

measure the conduct of each party. The readiness and willingness of Nilkanth has been discerned despite non-payment of the amounts said to have been contracted, even while non-performance by BTRA has been found worthy of the relief of specific performance.

12. Mr. Bharucha would further submit that the Impugned Award holds that Nilkanth expended energy and resources to obtain the ULC permission at its own cost and that this advantage that has accrued to the Subject Property is incapable of being valued monetarily. Such finding is not backed by reasons, thereby rendering the Impugned Award perverse for being devoid of reasons.

13. The written submissions tendered by Mr. Bharucha also contain a contention that Nilkanth had obtained a written opinion from the then Advocate General of Maharashtra. This was objected to by the BTRA stating that the legal opinion obtained was *ex facie* privileged and Nilkanth ought not to be allowed to place reliance on the same in the course of the arbitration proceedings. The Learned Arbitral Tribunal has held that no claim of confidentiality was argued at the relevant stage, and the Learned Arbitral Tribunal has returned no finding on the aspect of privilege which has been raised as an objection, although the question of confidentiality and privilege was kept open during the

course of cross-examination for arguments by the parties. Mr. Bharucha also found fault with reliance by the Learned Arbitral Tribunal on various internal documents of BTRA such as minutes of various meetings of the Board of Directors of BTRA to support the conclusion that there has been a concluded contract between the parties in BTRA's mind, and that the Learned Arbitral Tribunal had overlooked Nilkanth's own pleaded case that the Agreement had been concluded by the December 2005 MOM. Therefore, material from the internal records of BTRA after such date could not have been relied upon by the Learned Arbitral Tribunal

14. Mr. Bharucha would present a table comparing the contents of the plaint, the original Statement of Claim and the amended Statement of Claim to buttress the aforesaid submissions and also submit a table showing the differences across the five instruments in question namely September 2003 Letter; the October 2003 Letter; November 2003 Letter; the Execution Draft DA; and 2005 MOM, to point out that the reference in the correspondence of the Letters indicated reference to a sale whereas the Execution Draft DA and the 2005 MOM evidently referred to a development project and not an outright sale. He would also point to the difference in area referred to across these instruments and to the variation in a consideration amount referred to across these

instruments as also the schedule of payments and the provision of the flats at cost basis that was negotiated between the parties.

15. In sharp contrast, Mr. Janak Dwarkadas on behalf of Nilkant would submit that all the correspondence that preceded the Execution Draft DA got moulded and crystallised into the Execution Draft DA and was eventually modified marginally by the December 2005 MOM. He would point to the contents of these instruments to show that the contents of the instruments would show that development of the Subject Property was always the subject matter of the transaction between the parties. Merely because the word “*sale*” was used as the subject matter of the earlier correspondence, it would not follow that the nature of the transaction across the aforesaid five instruments underwent any material dichotomy for specific relief being incapable of being granted. He would point to the content of each instrument to indicate that the transaction in question was always one of development of the Subject Property.

16. Mr. Dwarkadas would submit that the September 2003 Letter was an initial offer while the October 2003 Letter was BTRA’s counter offer. The November 2003 Letter, he would submit, was the updated and accepted counter to the counter offer, against which a payment of

Rs.1.51 Crores was made by Nilkanth and accepted by BTRA. He would also submit that it is common ground that thereafter, a further sum of Rs.2.5 Crores had indeed been received by BTRA, which indicated that the parties were active in furtherance of the transaction that had been finalised between them. He would further point to the franking and stamping of the Execution Draft DA on December 2, 2005 being a pointer to the parties having concluded the terms on which they had agreed to transact in the said draft, which then underwent a final round of minor, non-material modifications that were reduced to writing in the 2005 MOM. By this time, the parties had a concluded contract, evidently reduced to writing. It was the refusal to perform the same that led to Suit 876 being filed, and eventually, the reference to arbitration. The upshot of this submission is that the dispute in question related to the very same specific relief and there is no material difference across the multiple instruments for the Impugned Award to be incapable of specific performance.

17. Mr. Dwarkadas would also point to the various observations and findings in the Impugned Award and juxtapose them with the material before the Learned Arbitral Tribunal to indicate that the Impugned Award returned a reasonable and plausible set of findings that ought not to be disturbed by the Section 34 Court. He would

further submit that the Learned Arbitral Tribunal was accurate in its manner of reference to the material on record and that it has returned findings that are eminently capable of being enforced, with no confusion that the performance that has been directed is the performance of a Development Agreement. Towards this end, he would submit that the reference to the word “sale” in the November 2003 Letter is not absolute in its terms, inasmuch as that very letter also refers to “development”.

Analysis and findings:

18. Having heard the Learned Counsel for the parties and having examined the record with their assistance, I find that the Impugned Award contains a detailed and cogent analysis of the material on record to return a rational basis for the conclusions it has made. Indeed, it is apparent that the amended Statement of Claim referred to the correspondence preceding the Execution Draft DA as an alternative prayer should the Learned Arbitral Tribunal be unwilling to accept that the Execution Draft DA read with the December 2005 MOM does not represent a binding contract. The riders permitted pursuant to the amendment are contained in pages 344 and 347 of the amended Statement of Claim and it is seen that an alternative prayer was sought

to be added without prejudice to what had been originally contained in the Statement of Claim.

19. Indeed, the amended prayer in the Statement of Claim was for performance of the Agreement contained in the November 2003 Letter as an alternative to potential findings that the Execution Draft DA read with the 2005 MOM did not constitute an Agreement amenable to specific performance. In my opinion, the combination formulated by the Learned Arbitral Tribunal by bringing in the November 2003 Letter into the mix of the other two instruments, namely the Execution Draft DA and the 2005 MOM does not present a dichotomy or skewness of a nature that renders the Impugned Award perverse and incapable of specific performance. The contention that the November 2003 Letter dealt with a sale whereas the Execution Draft DA and the 2005 MOM represented the Development Agreement does impress me because all along right from the September 2003 Letter, it is crystal clear that what as envisaged was development of the Subject Property. Towards that end, the language used in the correspondence by making a reference to "sale" in the subject line, is not an absolute characterisation of only a sale transaction but evidently it was always a sale in the nature of what would translate into a committed transaction for development of the Subject Property.

20. Even a plain reading of the contents of the Execution Draft DA would show that, by the operation of the provisions reduced to writing, the ownership of BTRA over the Subject Property and its development potential would eventually stand conveyed to the respective Co-operative Societies, Condominium or Company that would eventually acquire the redeveloped premises and the land on which such premises stand. Individual apartments and premises would be sold to the individual purchasers, whereas the land on which the structures stand would be sold to the respective collectives, i.e., Co-operative Society, Condominium or Company that would be formed by such purchasers.

21. Therefore, in my opinion the distinction sought to be drawn between the nature of the transaction discernible from the preceding correspondence, the Execution Draft DA, and the 2005 MOM is not of a nature that renders either the understanding of the parties to have been disrupted or that the specific performance as granted by the Learned Arbitral Tribunal being rendered incapable of execution. The inclusion of the November 2003 Letter into the mix, in my opinion does not result in any difference between what was prayed for and what has been granted, in a manner that renders the eminently plausible and well-reasoned findings of the Impugned Award being rendered perverse.

22. It is also noteworthy that the Execution Draft DA does not contain any clause providing that it represented the entire agreement between the parties, superseding and overriding all prior letters and correspondence between the parties. Seen from that perspective too, the instruments in question were one continuum and the findings of the Learned Arbitral Tribunal do not lend themselves to being regarded as incoherent and perverse.

23. As regards the contention that the Arbitration Agreement had terms of reference different from what has been ruled upon by the Learned Arbitral Tribunal, it is noteworthy that although the plaint referred to the Execution Draft DA read with 2005 MOM, the plaint also contains pleadings about the preceding correspondence and articulates and recites events in the run up to the Execution Draft DA. Specifically, in Paragraph 30 of the plaint, Nilkanth had indeed referred to each of the three preceding letters and had articulated that these letters followed by the Execution Draft DA and the 2005 MOM represented one continuum and the composite, valid and binding contract between the parties. Indeed, in the Statement of Claim, there is a reference to the October 2003 Letter and other correspondence exchanged between the parties. On a careful comparison and the Statement of Claim, it cannot be said that the reference to the October 2003 Letter had been inserted

for the very first time in the Statement of Claim on amendment, since there always was a reference to all the three instruments in the correspondence alluded to prior to the Execution Draft DA

24. Equally, it is noteworthy that in BTRA's Statement of Defence, there is a statement in Paragraph No.24(C) that on Nilkanth tendering the payment of Rs.1.51 Crores as a deposit, an agreement had been reached on the terms set out in the November 2003 Letter. It is stated by BTRA that such agreement constituted an Agreement for Sale of BTRA's property of about 56,000 square meters of land for a price of Rs.53.5 Crores which had to be made on stipulated dates. The MOU was to be executed within 30 days. The contention is that since an MOU had not been executed, and against such MOU further sums were to be paid, Nilkanth could not be said to have accrued any rights in its favour against BTRA. It appears that this is the pleading that lead to the eventual amendment of the Statement of Claim which was permitted by the Learned Arbitral Tribunal. In my opinion, the distinction sought to be drawn does not lead to any material difference for rendering the findings of the Impugned Award perverse. According to the Learned Arbitral Tribunal, there is no material difference between the two sets of pleadings, except that the language used in the two is different, but in essence they both seek specific performance of the contract that was

initially concluded by the correspondence that preceded the Execution Draft DA.

25. The Learned Arbitral Tribunal's reliance upon the Minutes of Meetings of the Governing Council of the BTRA cannot be faulted. If the Learned Arbitral Tribunal has indeed alluded to Paragraph 24 (C) in the Statement of Defence, where the pleadings indicate that, by BTRA's own showing, an agreement had been reached. Towards this end, the Learned Arbitral Tribunal relied on Minutes of Meetings of the Governing Council after such date and pointed to the agreed position within the BTRA's own governance mechanism being that an agreement had been reached.

26. While certain fresh terms were also agreed which marginally modified the originally agreed terms, in my opinion, the mere inclusion of the November 2003 Letter into the scope of the Agreement on which specific relief has been granted does not really vary a reasonable finding that an agreement had been contracted between the parties. The reference to the meetings of the Governing Council held on January 22, 2004 and April 4, 2005 and the correspondence between the parties, are reasonable findings which cannot be simplistically disturbed on the grounds presented by the BTRA. It is seen from these meetings that

clearly BTRA's own understanding was that an Agreement had been reached. Such material forming part of the record could not have been ignored. On the contrary, ignoring such material would have led to the charge that the Impugned Award is arbitrary, inasmuch as the relevant material stood ignored.

27. All the attendant facts and circumstances and the evidence available on record need to be collectively and harmoniously construed to arrive at a view as to whether an agreement capable of specific performance had been arrived at. The Learned Arbitral Tribunal has returned such a finding, and in my opinion, such finding is eminently reasonable and cannot be disturbed.

28. The Learned Arbitral Tribunal has taken pains to also examine other attendant circumstantial evidence, namely an objection taken by the Textile Commissioner to the transfer of such land. The Textile Commissioner had indicated that the transaction contracted by BTRA with Nilkanth would need its prior written permission, which led to Nilkanth filing a Writ Petition, in the course of which it was eventually confirmed that no such permission would be needed. It is in this context that the opinion of the then Learned Advocate General of Maharashtra had been taken. That opinion has been referred to and

extracted by the Learned Arbitral Tribunal in the Impugned Award. However, in my opinion, the controversy sought to be raised as to whether such opinion could have been relied upon and whether it is a breach of privilege is unnecessary. It is an opinion taken by BTRA when totally aligned with Nilkanth. In the Writ Petition filed by Nilkanth, BTRA was admittedly purely a “proforma” party and not a contesting party. Its interests were evidently aligned with Nilkanth in asserting to the Writ Court that there had been a concluded contract and this could not be interdicted by the Textile Commissioner.

29. Be that as it may, in my opinion, the contention that the Learned Arbitral Tribunal has not squarely dealt with the facet of privilege does not lead to perversity of the nature that would cut to the root of the Impugned Award and render its findings implausible.

30. The contentions about inherent contradictions in the Impugned Award do not inspire confidence. The fact that Nilkanth was ready and willing to perform its part of the bargain is writ large from the material on record. What the Learned Arbitral Tribunal has found is that BTRA could not claim that Nilkanth was in default in making payments as scheduled when it was BTRA’s own case in the arbitration proceedings that no contract had come into existence, and BTRA

refused to perform when Nilkanth was seeking performance. There is nothing on record to show that Nilkanth was unwilling or incapable of performing its part of the bargain. This contention too does not present a case of any inherent contradiction, but effectively a finding that one of the parties was not ready and willing to perform and could not expect the other party to be accused of non-performance when BTRA did not desire to perform and indeed did not even call for performance by Nilkanth. Since it was BTRA's own case that an agreement had been reached by the November 2003 Letter, the absence of an MOU, shorn of any particulars as to why the MOU was not executed, and indeed for no fault on Nilkanth's part, would not present a case of inherent contradictions to interfere with the Impugned Award.

31. The Learned Arbitral Tribunal has presented a detailed analysis of the material and a summary of its findings in Paragraph No. 56 of the Impugned Award. I have carefully examined the contents of the same and reviewed the material on record referred to by the Learned Arbitral Tribunal in arriving at those findings. Having done so, in my opinion, there is no basis to render a finding that the Impugned Award is perverse or contrary to or outside the scope of the contract or for that matter outside the scope of the reference. The contentions that the efforts in obtaining ULC permission not being capable of being

monetarily valued are not one, even if accepted, inexorably leads to the Impugned Award being devoid of reasons warranting an intervention under Section 34 of the Act.

32. The reliance on ***Ganesh Shet*** by Mr. Bharucha would need to be dealt with. Mr. Bharucha would point to this decision to indicate that the discretion of a Court in granting specific performance in terms of Section 20 of the Specific Relief Act, 1963 is a matter of judicial discretion and not merely an enforcement of a simple legal right. I have already analysed above the manner in which the Statement of Claim is not different in any material particular from the plaint in Suit 846. On the contrary, the instruments executed between the parties form part of one continuum and therefore it would follow that the foundation of the reliance on ***Ganesh Shet*** stands undermined inasmuch as the relief granted is not different from the reliefs sought. Towards this end, the following extracts from ***Ganesh Shet*** are noteworthy :

19. ***Fry on Specific Performance (6th Edn.), (pp. 298-302) deals with the exact point in issue before us. The author refers to four types of cases: (1) where the defendant admits the contract alleged; (2) where the defendant denies the contract as alleged and the plaintiff supports his case by one witness only; (3) where the defendant denies the contract as alleged and the evidence proves a contract, but different from that***

alleged by the plaintiff; and (4) where the defendant denies the contract as alleged and admits another contract.

20. On the assumption that plaintiff has proved an agreement at Bangalore on 28-4-1984 (which question we shall deal with under Point 4), it is obvious that we are here concerned with category (3) mentioned by Fry. In regard to that category, Fry says (p. 299) (paras 634 to 638) as follows:

"(3) In considering the case in which a variation has arisen between the contract alleged and that proved, it must be borne in mind that the burthen of proving his case rests, of course on the plaintiff, and therefore, if there be any such conflict of evidence as leaves any uncertainty in the mind of the court as to what the terms of the parole contract were its interference will be refused.

Fry also refers to a case where one contract has been alleged in the bill, another has been proved by the plaintiffs' one witness and a third contract has been admitted by the two defendants and where initially specific performance has been granted as per the contract set up by the answers. Fry says:

"but Lord Rosslyn considered that in strictness the bill ought to have been dismissed. In a more recent case, where one contract was alleged and another proved, the bill was dismissed without prejudice to the filing of another bill; the fresh bill was filed. The inclination of Lord Cottenham's mind seems to have been to struggle with apparently conflicting evidence rather than to dismiss the bill, where there had been part performance'.

In one case Turner, L.J observed that there are cases in which the court will go to a great extent in order to do justice between the parties when possession has been taken, and there is an uncertainty about the terms of the contract. In the case of part performance, it is said, similar views

were expressed in the Privy Council by Sir William Erle as follows:

"With respect to the supposed vagueness of the memorandum of agreement, their Lordships propose to consider what is the true construction of that memorandum, having regard to the terms of the instrument and, and to the surrounding circumstances, and also in reference to this suit for specific performance, and to the conduct of the parties in the interval between the making of the agreements and the commencement of the suit".

Fry also refers to *Hart vs. Hart* (Ch.D. at p. 685) in that context. The author then refers to cases where the variation between the contract alleged and proved is an immaterial variation and says that in such cases, the bill is granted. He says (p. 301) that this is the position under the old practice of the Court of Chancery but the High Court can permit amendment to put that contract in issue; but

"that if there was not (i.e. amendment), it will generally give judgment for the defendant, without reserving any right to the plaintiff to institute fresh proceedings. **But the circumstances will govern the discretion of the Court in each case which may arise**".

23. It is stated in *Corpus Juris Secundum* (Vol. 81-A, *Specific Performance*), (para 189) as follows:

"In accordance with general rules, the relief awarded in a suit for specific performance would be based on the issues raised by the pleadings and supported by the proof. More specifically, relief awarded for the plaintiff must be authorised by or be in conformity with his pleading in respect of the contract to be enforced and the parties thereto".

[Emphasis Supplied]

33. Applying the aforesaid principles extracted from *Ganesh Shet* to the facts of this case, no dichotomy having been found between the sets of instruments in question and no difference having been found between what was pleaded and the relief granted, in my opinion, it would not be appropriate at all for this Court, in exercise of its jurisdiction under Section 34 of the Arbitration Act, to disturb and set aside the Impugned Award.

34. Finally, in the rejoinder, Mr. Bharucha also contended that there has been a material change in the underlying property's value between the time the transaction was contracted and the current market value, and that the Court ought to have regard to the same while examining whether specific performance must be granted. I am afraid this contention does not lend itself to accept more so even the nature of jurisdiction under Section 34 of the Arbitration Act. Section 34 jurisdiction is not an appellate jurisdiction and this Court cannot do a merits-based reconsideration of the issues involved and substitute the Learned Arbitral Tribunal's view with the Court's view. It is trite law that Section 34 Court can adjudicate whether the grounds of interference under Section 34 of the Act have been made out for an intervention into the Impugned Award. Once it is found that the Impugned Award does not lend itself to be set aside, further discretion

cannot be exercised by this Court taking into account the change in market value between the time the contract was contracted and the time when the contract was enforced.

35. The reliance by Mr. Bharucha on the case of *Ferrodous Estates (Pvt.) Ltd.*² is not relevant when exercising the jurisdiction under Section 34 of the Arbitration Act. In the said judgment, the Supreme Court was examining a decree of specific performance, not in arbitration but in a suit which had travelled up the appellate hierarchy and eventually reached the Supreme Court. In any case, following extracts from *Ferrodous Estates (Pvt.) Ltd.* would be relevant.

28. The Division Bench judgment is also wholly incorrect in stating that for no fault of the appellant, since the court process has taken 27 years to decide the specific performance suit, specific performance being a discretionary relief ought not to be granted. Section 20 of the Specific Relief Act, 1963, prior to its substitution by the Specific Relief (Amendment) Act, 2018, read as follows:

20. Discretion as to decreeing specific performance.

(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

² *Ferrodous Estates (Pvt.) Ltd. vs. P. Gopirathnam (Dead) & Ors.*, Civil Appeal No. 13516 of 2015.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation I. Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

Explanation II. The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff, subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party.

Section 20, as it then stood, makes it clear that the jurisdiction to decree specific performance is discretionary; but that this discretion is not arbitrary but has to be exercised soundly and reasonably, guided by judicial principles, and capable of correction by a court of appeal see section 20(1). Section 20(2) speaks of cases in which the court may properly exercise discretion not to decree specific performance. Significantly, under clause (a) of sub-section (2), what is to be seen is the terms of the contract or the conduct of the parties at the time of entering into the contract. **Even other circumstances under which the contract was entered into refers only to circumstances that prevailed at the time of entering into the contract. It is only then that this exception kicks in and this is when the plaintiff gets an unfair advantage over the defendant.** Equally, under clause (b) of sub-section (2), **the hardship involved is again at the time of entering into the contract which is clear from the expression which he did not foresee. This is made clear beyond doubt by Explanation II of section 20 which states that the only exception to the hardship principle contained in clause (b) of sub-section (2) is where hardship results from an act of the plaintiff subsequent to the contract.** In this case also, the act cannot be an act of a third party or of the court the act must only be the act of the plaintiff. Clause (c) of sub-section (2) again refers to the defendant entering into the contract under circumstances which makes it inequitable to enforce

specific performance. Here again, the point of time at which this is to be judged is the time of entering into the contract.

[Emphasis Supplied]

36. With no default or breach on the part of Nilkanth being shown from the record, the aforesaid analysis would undermine any interference at this stage and that too by a Section 34 Court.

37. Multiple judgements extracted in the aforesaid decision state that mere delay by itself, without more, cannot be the sole factor to deny specific performance. What has been endorsed by the Supreme Court is the law declared in ***Mademsetty Satyanarayana***³ and ***K.S. Vidyadnam***⁴ states that if property prices have risen dramatically within a period of two and a half years “***before***” filing of the suit for specific performance, and it is coupled with violation of the agreement by the plaintiff who seeks specific performance, specific performance will not be decreed.

38. So also, the declaration of the law in ***Saradamani Kandappan***⁵ has also been reiterated essentially to state that time can be said to be of essence in the facts of the given case and if the purchaser does not take steps to complete the sale within the stipulated period and where the

³ *Mademsetty Satyanarayana* v. *G. Yelloji Rao* – (1965) 2 SCR 221

⁴ *K.S. Vidyadnam* v. *Vairavan* – (1997) 3 SCC 1

⁵ *Saradamani Kandappan* vs. *S. Rajalakshmi*, (2011) 12 SCC 18.

vendor is not responsible for any delay, the steep rise in price within the stipulated time would be a circumstance that would make it inequitable to grant the specific performance.

39. When it has been validly found that there indeed existed an agreement for specific performance, which existence is well borne out from the material on record including BTRA's own understanding of the record, and a suit for specific performance was filed well within time, with Nilkanth having demanded specific performance proximate to the repudiation by the BTRA, the decision in *Ferrodous Estates (Pvt.) Ltd.* would be of no assistance to BTRA.

40. I have already ruled out the difference in jurisdiction between an Appeal Court and the Section 34 Court and in any event, as a matter of law, this Court would have no jurisdiction to exercise the discretion on the nature of the relief impugned in this Petition. This Court can only uphold or set aside the Impugned Award and cannot interfere with the contents of the Impugned Award to make any modification to the Impugned Award. The law in this regard is well declared in *Gayatri Balaswamy*⁶ and to avoid further prolixity, I have refrained from extracting the law in this judgement.

⁶ *Gayatri Balasamy vs. M/s ISG Novasoft Technologies Limited - 2025 INSC 605*

41. In the result, the *Petition is dismissed* and the Impugned Award is upheld. Interim Applications, if any, also stand *finally disposed of* in the aforesaid terms. Costs have already been factored in by the Learned Arbitral Tribunal and in the specific facts of the case I believe that a total cost of Rs. 2,50,000 would suffice to deal with the costs for this round of litigation.

42. After pronouncement, a request for stay of the Judgement has been made by the Learned Counsel for the Petitioner. Considering the vintage of the matter and the fact that the Impugned Award had been passed on August 5, 2017 and the execution proceedings are still not registered, there would be adequate time to seek interim relief from the Section 37 Court. For the reasons set out in the Judgement, the request of any stay on this Judgement is rejected.

43. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]