IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 22.09.2022

Judgment Pronounced on : **28.09.2022**

CORAM :

THE HON'BLE MR.JUSTICE PARESH UPADHYAY
AND
THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

O.S.A.No.341 of 2019

M/s.Macro Marvel Projects Ltd.
Rep. by its Executive Director, Ragu Kumar .. Appellant

Versus

1. J.Vengatesh
2. A.R.Gomathi
3. V.Annalakshmi
4. S.Chockalingam
5. K.Natarajan
6. Soundarapandian .. Respondents

Prayer : Original Side Appeal filed under 37(2) of the Arbitration & Conciliation Act, 1996 r/w Clause 15 of the Letters Patent to set aside the judgment and decree of the learned Judge of the Original Side of this Court passed in O.P.No.235 of 2008, dated 19.08.2019 and allow the above appeal.

For Appellant : Mr.S.R.Raghunathan and
Mr.Vigneshwar Elango for
Mr.P.Elango

For Respondents : Mr.V.Raghavachari
for Mr.R.Veeramani, for RR-1 & 3

: Mr.P.L.Narayanan, for R2

JUDGMENT

D.BHARATHA CHAKRAVARTHY, J.

A. The Appeal :

This intra-Court appeal is filed against the order of the learned Judge, dated 19.08.2019, whereby, the learned Judge allowed the Original Petition filed by the respondents 1 to 3 under Section 34 of the Arbitration and Conciliation Act, 1996 and set aside the award, dated 21.01.2008 passed by the Arbitral Tribunal in favour of the appellant, which was in the nature of specific performance of the contract being the sale of plots and instead, awarded a sum of Rs.50,00,000/- to the appellant.

B. The Facts in brief :

2. The brief facts leading to the filing of this appeal are as follows:-

The appellant and the respondents 1 to 3 entered into an agreement of sale, dated 17.02.2004. As per the same, the respondents are the owners of

the property mentioned in the schedule to the agreement totally ad-measuring 8.21 acres in Manapakkam village, Sriperumbudur Taluk, Kancheepuram District. By the said agreement, they agreed to sell the same to the appellant or its nominees and the appellant will promote the project of independent residential houses. The sale consideration payable by the appellant/developer will be Rs.3,85,000/- per C.M.D.A approved ground of 2400 Sq.ft. The appellant/developer had also undertaken to pay a sum of Rs.1,00,00,000/- as advance to be adjusted in the sale consideration, which included a sum of Rs.35,00,000/- already paid by the appellant and the balance of Rs.65,00,000/- have to paid after the appellant/developer avails project finance from its bankers by mortgaging the schedule property. The appellant was also authorised to obtain building license and do all things necessary for the development of the project. The appellant/developer was also free to enter into the sale agreement for sale of the plots except a few plots which were specifically retained by the vendor. As per the agreement, any dispute arising out of the same shall be referred to arbitration and it is useful to extract clause No.17 which reads as follows:-

> " ***17.*** *Any dispute between the parties to this agreement in regard to the interpretation of this agreement and of any matter arising out of this agreement shall be referred to arbitration under*

the provisions of the Arbitration Act to abitrators - one nominated by each party. Any award given in any such arbitration proceedings shall be final and binding on the parties to this agreement. The venue of the arbitration proceedings shall be the City of Chennai only."

Thereafter, a supplementary agreement was also entered into between the parties on 12.05.2004, whereby, the sale consideration was increased from Rs.3.85 lakhs per plot to Rs.4.12 lakhs per plot. Pursuant to the agreement, development charges were paid to the Chennai Metropolitan Development Authority on 04.05.2005. Thereafter, on 26.09.2005, the respondents herein cancelled the Power of Attorney in favour of one *M.Arumugam* who was only dealing on their behalf with the appellant/developer. The said *Arumugam* is the father-in-law of the first respondent, husband of the second respondent and father of the third respondent. It seems as if there was *inter se* dispute arose between the respondents and said *Arumugam*, being the family members, leading to filing of the suit in O.S.No.911 of 2005 and ultimately on 24.11.2005, the said suit was dismissed as settled out of Court and on 07.04.2006, again, a fresh Power of Attorney was executed by the respondents in favour of the said *Arumugam*. On 12.04.2006, the said *Arumugam* executed gift deeds of the road and common areas in favour of Kundrathur panchayat union and on

05.05.2006, the C.M.D.A approved the lay out, in and by which, the 8.21 acres of the property was developed into 147 plots, comprising of 96 regular plots and 34 Economically Weaker Section plots and 17 plots with roman numbers. On 22.06.2006, again, the parties varied terms of the agreement, by which, the sale consideration was increased from Rs.4.12 lakhs to Rs.5,00,000/- and also, the appellant/developer agreed for the increased share of the land to be retained by the respondents i.e., from 12,000 Sq.ft to 17049 Sq.ft. As on 14.11.2006, it is seen that a total number of plots were sold and 40 regular plots and 9 plots with roman number remained unsold and at that point of time, a sum of Rs.99,46,000/- remained payable by way of sale consideration to the respondents by the appellant and a sum of Rs.24,88,000/- was remaining in the hands of the respondents as the adjustable advance amount.

3. While so, on 16.11.2006, the appellant received a telegram from the first respondent informing about the cancellation of Power of Attorney. On 17.11.2006, the appellant called upon the respondents and also the Power of Attorney, *Arumugam* to come and execute sale deeds on 20.11.2006. On 20.11.2006, the third respondent also issued a telegram

about the cancellation of Power of Attorney. On 16.11.2006, the first respondent also issued a legal notice not to deal with any of the unsold property and to return the original title deeds after payment of the loan amount to the bank. It is pertinent to note here that as agreed by the agreement of the sale, on 31.05.2004, the appellant/developer obtained project finance by mortgaging the title deeds of the subject matter property with United Bank of India, T.Nagar Branch and obtained a loan of Rs.3,00,00,000/- and paid a sum of Rs.80,00,000/- on various dates to the respondents.

C. The Arbitration & the Award :

4. Since the parties were at dispute as the respondents cancelled the Power of Attorney in favour of *Arumugam* and refused to execute any further sale deeds, the appellant/developer invoked arbitration and after due constitution of the Tribunal, during January, 2007 filed a claim statement. The appellant prayed for specific performance directing the respondents to execute and register sale deeds in favour of the claimant or the nominees in respect of the remaining plots on receipt of the sale consideration for the appropriate plots at the rate of Rs.5,00,000/- per ground and for damages of

Rs.1,20,250/- up to 06.01.2007 and thereafter, at the rate of Rs.2,405/- per day from 07.01.2007 till the date of completion of registration of the sale deeds and to pay a sum of Rs.2,25,000/- from 17.11.2006 to 06.01.2007 and to pay a sum of Rs.4,500/- from 07.01.2007 till the date of completion of the remaining sale deeds and for mandatory injunction directing the respondents to demolish the structure blocking the 30 feet main road entrance intended for ingress and egress of the plot owners and for costs. It is the case of the appellant/developer that it has been performing its obligations right from the efforts to obtain approval of lay out from C.M.D.A, marketing the plots, payment of sale consideration everything within time and the respondents have illegally terminated the agreement of sale and have committed breach of contract.

5. To the said claim statement in detailed common reply statement was filed by the respondents 1 to 3. It is the case of the respondents that they purchased the 8.21 acres from M/s.Ranganatha Brick Industries five sale deeds, dated 27.01.2004 and 05.02.2004. In view of the earlier execution of the project in Phase-I as Marvel Riverview County Phase-I, the respondents developed trust with their Power of Attorney, namely

Arumugam and the Managing Director of the appellant company and therefore entered into an agreement on 17.02.2004 without reading its terms and conditions. As per the agreement, the respondents have also lost 2,127 Sq.mts., of land for park, common area etc., and the respondents or their Power of Agent agent did not contemplate the escalation of price of land in that locality at the time of entering into agreement. Therefore, it is inequitable to enforce the specific performance of the agreement in question and the respondents want to retain the unsold property for their own use. Their Power of Attorney agent, *Arumugam*, has been signing sale deed without actually looking into the contents. The price escalated manifold in the locality. The memorandum of deposit of title deeds, dated 31.05.2004, was signed on the faith reposed in the Managing Director of the appellant Company. Taking advantage of the same, the appellant Company received a sum of Rs.3,00,00,000/- as loan. The revision of rates from Rs.4.12 lakhs to Rs.5,00,000/- was done by the Power of Attorney agent *Arumugam* and the appellant without consent of the respondents. Therefore, the Power of Attorney were cancelled and in any event before the cancellation of Power of Attorney, 88 plots have already been sold without the knowledge of the respondents and there is no equity in enforcing the agreement any further.

The adjustable advance of Rs.1,00,00,000/- has been adjusted by way of Rs.25,00,000/- in Phase-I and the balance of Rs.75,00,000/- in Phase-II. Therefore, the claim of the appellant/developer is untenable.

6. Apart from the reply, a counter claim was also lodged since the appellant/developer had obtained the money from the bank and the respondents claimed a sum of Rs.84,15,000/- together with interest at the rate of 13.5% per annum from 01.04.2007 till payment and costs. A rejoinder to the reply statement and the reply to the counter claim was also filed by the appellant/claimant. A rejoinder is also filed by the respondents 1 to 3 to the reply in respect of the counter claim.

7. On the said pleadings of the parties, the Arbitrators framed eight issues and two additional issues which are as follows:-

> " *1. Whether the termination of agreement of sale dated 17.2.2004 and the supplemental agreement dated 12.5.2004 by the respondents 1 to 3 is valid and binding?*
>
> *2. Whether the claimant was ready and willing to perform their part in respect of the agreements?*

3. Whether the breach was committed by the claimant or respondents ?

4. Whether the claimant is entitled for the relief of specific performance of the agreement of sale dated 17.2.2004 and supplemental agreement dated 12.5.2004 ?

5. Whether the claimant is entitled for damages as prayed for in para 30 (A), (B) and (C) of the claim statement ?

6. Whether the claimant is entitled for mandatory injunction as prayed for in para 30 (D) of the claim statement?

7. Whether the respondents 1 to 3 are entitled to counter claim as prayed for in the reply statement?

8. To what relief are the parties entitle to ?

ADDITIONAL ISSUES FRAMED ON 19.11.2007

1. Whether the Claimant committed breach of trust in obtaining loan from the United Bank of India and in executing the memorandum of deposit of title deeds pertaining to the property ?

2. Whether the agreement of sale dated 17.2.2004 and supplementary agreement dated dt. 12.5.2004 are vitiated on account of breach of trust."

8. No oral evidence was let in by the claimant or the respondents. The parties chose to mark their respective documents. On behalf of claimant, ***Exs.C-1*** to ***C-43*** were marked and on behalf of the respondents, ***Exs.R-1*** to ***R-17*** were marked. Thereafter, the Arbitral Tribunal proceeded to hear the learned Counsel for the parties and by an award, dated 21.01.2008, allowed the claim of the appellant/developer by directing the respondents to execute the sale deeds in favour of the claimant in respect of the remaining plots within a period of three months from the date of award and dismissed the counter claim filed by the respondents. The Arbitral Tribunal found that the agreements were duly entered and the entire family of the respondents knew about the agreement and received the amounts on various dates. Though there was some delay in obtaining sanction, the same was obtained and the respondents began to ask for rise in price and consideration was then raised from Rs.3.85 lakhs and Rs.4.12 lakhs and thereafter to Rs.5,00,000/-. The suit which is filed *inter se* between the parties and *Arumugam* in O.S.No.911 of 2005 is collusive and is part of their attempt of asking for higher price. Thereafter, again things settled and the sale deeds were being executed. There is no fraud in the action of the appellant/developer executing an equitable mortgage and the allegation of

fraud is also *per se* defamatory. The allegation of collusion of *Arumugam* with the appellant was not believed by the Tribunal. The Tribunal also reasoned that the 88 plots were sold and the said *Arumugam* was not examined by the respondents. The Tribunal also considered the fact that on behalf of the respondents, no one was prepared to give evidence in respect of their allegations that they did not know the clauses etc. The Tribunal found that there is no evidence at all to prove that the said *Arumugam* was cheated to sign documents in ***Exs.C-1*** and ***C-2***. There is no evidence for manifold increase in price in the locality. The claim of the respondents for increase in price rise has been agreed at Rs.5,00,000/- per ground. The respondents were committing violations of the agreement. The claim of damages by the appellant/claimant is untenable and so also the counter claim is also held to be untenable. On these findings, the Arbitral Tribunal rendered its award as stated supra.

D. The Section - 34 Petition :

9. Aggrieved by the same, the respondents 1 to 3 herein filed present O.P.No.235 of 2008 on the file of this Court under Section 34 of the Arbitration and Conciliation Act. The respondents prayed for setting aside

the award on the ground that the Arbitral Tribunal did not have jurisdiction for a grant of relief of specific performance and that too appointing an Advocate Commissioner in default to execute the sale deed as the arbitral award has to be executed as if it was a decree of the Court. The Arbitral Tribunal's award was tinted with bias and was predetermined mind. The discretion to pass an award of specific performance was not exercised by duly considering settled judicial principles under Section 20 of the Specific Relief Act and the Arbitral Tribunal failed to see the inequitable circumstances in the agreement, whereunder, the claimant has, by unfair means, raised a loan of Rs.3,00,00,000/- by mortgaging the property of the respondents and the fact that the claimant spent Rs.6,00,00,000/- cannot be true. It is the further contention of the respondents that the equities and delay was not properly appreciated by the Tribunal. It is his contention that the Tribunal should not have burdened the shoulders of the respondents of the proof and non-examination of *Arumugam* should have put against the appellant.

10. When the matter came up for arguments, the learned Counsel appearing on behalf of the respondents contended before the learned Single

Judge that the agreement is inequitable and the agreement itself is unfair and not capable of enforcement and by granting specific performance, Section 20 of the Specific Relief Act stood violated. It was the contention of the learned Counsel appearing on behalf of the respondents that the award suffers patent illegality and is in violation of fundamental policy of India. The appellant/developer justified and supported the award of the Arbitral Tribunal. The learned Judge, after considering the submissions made on either side, firstly, in paragraph No.13, framed a question as to whether the nature of agreement, relied upon by the parties, is capable of enforcement and in paragraph No.16, the learned Judge found that since no amount has been invested by the developer, even though it is mentioned as sale agreement by nomenclature, the main job of the developers is to identify the buyer and sell the land and pay consideration of Rs.3,85,000/- and the learned Judge found that the developer only is the beneficiary and not the seller. The agreement gives undue advantage to one of the parties, namely the appellant/developer. The learned Judge further found that no investment whatsoever has been made by the developer. The learned Judge found that the learned Arbitrators have not considered the provisions of the Specific Relief Act, namely Section 14(i) of the Act that the Court cannot supervise

the remaining transactions and therefore, the contract is not specifically enforceable. Since the appellant/developer, without making any investment, by paying only a small amount as consideration, gains unfair advantage as per Section 20(2) of the Specific Relief Act, the contract is not specifically enforceable. Merely because a part of the contract is enforced by the parties, that cannot be a sole ground for enforcement of the remaining part of the contract. Therefore, the award of the Arbitrators is in violation of public policy of India. The learned Judge further considered that the respondents are ready to give 25% of the remaining plots to the appellant/developer, while the appellant/developer insisted 50% of the remaining plots. In that view of the matter, the learned Judge directed a sum of Rs.50,00,000/- be paid to the appellant/developer by the respondents within a period of six months from the date of the order. Aggrieved by the same, the appellant/developer has filed the present intra-Court appeal.

E. The Submissions :

11. Heard *Mr.S.R.Raghunathan* and *Mr.Vigneshwar Elango*, learned Counsel for the appellant, *Mr.V.Raghavachari*, learned Counsel for the

respondents 1 and 3 and *Mr.P.L.Narayanan*, learned Counsel for the second respondent.

12. *Mr.S.R.Raghunathan*, learned Counsel appearing on behalf of the appellant, would submit that the learned Judge has appreciated the evidence, interpreted the agreement and has rendered findings as if it were a Original Suit or a First Appeal and would submit that all the findings of the learned Judge are way beyond the grounds for setting aside the arbitral award available to this Court under Section 34 of the Arbitration and Conciliation Act. The learned Counsel would submit that it may be seen that it is a clear case of agreement of sale to the appellant/developer or to its nominees. The agreement specifically states so. Even a cumulative reading of the clauses of the agreement would make it clear that it is an agreement of sale. The entire property was sold as if it were a project of the appellant/claimant. The appellant/claimant successfully completed Phase-I and therefore as Phase-II, the present land of 8.21 acres was entrusted only based on the reputation, work and marketing of the appellant. As it is a project, which is also duly named as the appellant's project, namely, Macro Marvel Project-II, the project took off. The appellant had undertaken the

exercise even though in the name of the respondents, by obtaining lay out approval and all other planning and other approval and executed and marketed the project. The appellant obtained project finance by duly mortgaging the subject matter property which is normal in any other project that too with the express provision in agreement between the parties. Of the advance sum of Rs.1,00,00,000/-, a sum of Rs.65,00,000/- was payable upon obtaining the project finance which was duly honoured by the appellant. Within a short span of time, 88 plots were sold and there was further time left. The appellant had duly honoured all its liabilities and obligations and was ready and willing to perform the balance of the contract. When the contract has been part performed, suddenly, when only 49 plots were remaining, only eyeing more profit, the respondents want to wriggle out of the contract. There was no pleading about the non-enforceability of the contract under Section 14 or 20 of the Act before the learned Arbitrators.

13. As a matter of fact, such a plea was also not specifically taken in the petition filed under Section 34 of the Act. For the first time, only during the arguments, such pleas were taken. The plea of contract, being non-

enforceable as per Section 14 of the Act, is, on the face of it, untenable because the prayer is to execute the sale deed in favour of the appellant/developer or its nominees within the period as mentioned by the Tribunal and therefore, on the very next day, the sale deed can be executed in favour of the appellant/developer and there is no question of any monitoring by the Court/Arbitral Tribunal. As far as the second plea, under Section 20 of the Act is concerned, the learned Counsel would submit that the respondents themselves are real estate dealers having purchased the property only in the year 2004 and if the price with which they purchased the land, when it is compared with the price which was originally offered and increased by the appellant, the agreement can never by said as inequitable. With eyes wide open, with clear understanding, by considering the market value prevailed at the time of entering into the agreement, the sale consideration was agreed. The learned Counsel would submit that a clear and complete reading of the agreement and the subsequent conduct of the parties can never lead to any interference that the transaction was inequitable or was unfair to the respondents.

14. He would submit that further findings of the learned Judge as if the transaction is not agreement of the sale at all and was only an agreement to find buyers, is not even the plea raised by the respondents either before the Arbitrator or before the learned Single Judge and the learned Single Judge erred in rendering such a finding. The learned Counsel would rely upon the judgment of the Hon'ble Supreme Court of India in ***SSanyong Engineering and Construction Company Limited Vs. National Highways Authority of India (NHAI)***[1], more specifically relying upon the paragraph Nos.34 to 41 of the said judgment to contend that the scope of interference under Section 34 of the Act especially after the amendment is only restricted to patent illegality and the term patent illegality is also clearly delineated and explained by the Hon'ble Supreme Court of India and none of the contentions raised by the appellant can be a ground for setting aside the arbitral award. The learned Counsel would also rely upon the judgments of Hon'ble Supreme Court of India in ***Associate Builders Vs. Delhi Development Authority***[2], ***PSA SICAL Terminals Pvt. Ltd. Vs. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Ors.***[3] and ***Delhi***

1 (2019) 15 SCC 131
2 (2015) 3 SCC 49
3 2021 SCC OnLine SC 508

Airport Metro Express Pvt. Ltd. Vs. Delhi Metro Rail Corporation Ltd.[4], in support of his contentions.

15. Per contra, *Mr.V.Raghavachari*, learned Counsel appearing on behalf of the respondents 1 & 3, would submit that this is a case, where, by not investing even a single rupee, the appellant/developer has lead the innocent respondents 1 to 3 into the transactions, whereby, even the advance amount of Rs.1,00,00,000/- is paid only by mortgaging the respondents' own property. Even the expenses for lay out and charges etc., are to be borne only by the respondents. In that view of the matter, when everything is done by the respondents and it is only the marketing of the plots which is done by the appellant/developer, then the contract is no more than a brokerage contract or contract of agency, which cannot be specifically enforced. Therefore, he would submit that the learned Judge was right in giving a finding that the very contract is not in the nature of a sale agreement to be specifically enforced.

16. He would further submit that by mere payment of a paltry sum, the entire property of 8.21 acres was attempted to be knocked off while the

4 2021 SCC OnLine SC 695

sale price was soaring. The sale agreement in every aspect is to the complete disadvantage of the respondents and inequitably creates windfall and unfair advantage to the appellant/developer. In that view of the matter, the learned Judge has rightly concluded that the agreement is not specifically enforceable under Section 20 of the Specific Relief Act and also under Section 14 of the Specific Relief Act. He would submit that only unamended Section 20 of the Specific Relief Act would apply to the instant case and therefore, the learned Judge has correctly rendered the finding.

17. The learned Counsel would rely upon the judgment in ***Ratnam Sudesh Iyer Vs. Jackie Kakubhai Shroff***[5], in and by which, the Hon'ble Supreme Court of India had categorically held that the amended Section 34 of the Act and the decisions of ***SSanyong Engineering and Construction Company Limited*** (cited supra) etc., rendered on the amended provision, will not be applicable for a setting aside petition which is filed before the date of amendment i.e., before 23.10.2015. Admittedly, the present set aside application is of the year 2008 and therefore, only the pre-amended Section 34 of the Act is to be applied. As per the pre-amended Section 34 of the Act, the interpretation given by the Hon'ble Supreme Court of India in

5 2021 SCC OnLine SC 1032

ONGC Vs. Western Geco International Ltd.,[6] is applicable, as per which, if the Arbitral Tribunal did not have a judicial approach i.e., if the decision is not fair, reasonable or objective, the same would be against the fundamental policy of India and therefore, is a ground to interfere. Therefore, when the Arbitral Tribunal has ignored the legal provisions and also the settled legal position in respect of the grant of the specific reliefs, the learned Judge was well within the powers under Section 34 of the Act to set aside the same and has accordingly set aside the same.

18. *Mr.P.L.Narayanan*, the learned Counsel appearing on behalf of the respondent No.2, while supporting the contentions of the other respondents, would further point out by reading the order of the learned Judge, whereby the learned Judge had categorically found that even the necessary permits and change of zone of land etc., were the responsibilities of the respondents. The learned Counsel would draw the attention of the Court to paragraph No.13 of the order of the learned Judge, whereunder, the learned Judge has took into the account the conduct of the parties from the beginning and had considered the issue in the right perspective of Section 20 of the Specific Relief Act. The learned Counsel would also submit that

6 (2014) 9 SCC 263

as between the same parties, in respect of yet another transaction, the Arbitrars denied specific performance, which was approved by this Court. The Hon'ble Supreme Court of India also approved the said decision by ordering compensation of Rs.50,00,000/- with 12% interest. Therefore, he would submit that in the present case also, the order of the learned Judge, granting a sum of Rs.50,00,000/- to the appellant, is in tune with the order of the Hon'ble Supreme Court of India in the earlier S.L.P.No.243 of 2020 and therefore, prays for dismissal of the appeal.

F. The Points for Consideration :

19. We have considered the rival submissions made on behalf of either side and perused the material records of this case. Upon consideration, the following questions arise for determination in the present case:-

> *(i) Whether the learned Judge was right in ordering a sum of Rs.50,00,000/- in lieu of specific performance?*
>
> *(ii) On what grounds arbitral award can be interfered with in the present proceedings and if so, whether the grounds on which the learned Judge had interfered are within the ambit of the power of this Court to set aside the arbitral award?*

G. Question No.1 :

20. The interference or variance or modification of the award and grant of any new/additional/modified reliefs are totally out of the question while considering the application under Section 34 of the Arbitration Act. This position is no longer *res integra*. The same has been categorically laid down by the Hon'ble Supreme Court of India in ***Project Director, National Highways No.45 E and 220 National Highways Authority of India Vs. M.Hakeem and Anr.***[7]. It is useful to extract the paragraph Nos.31 and 42 which reads as follows:-

> " ***31.*** *Thus, there can be no doubt that given the law laid down by this Court, Section 34 of the Arbitration Act, 1996 cannot be held to include within it a power to modify an award. The sheet anchor of the argument of the respondents is the judgment of the learned Single Judge in* ***Gayatri Balaswamy [Gayatri Balaswamy v. ISG Novasoft Technologies Ltd., 2014 SCC OnLine Mad 6568 : (2015) 1 Mad LJ 5****] . This matter arose out of a claim for damages by an employee on account of sexual harassment at the workplace. The learned Single Judge referred to the power to modify or correct an award under Section 15 of the Arbitration Act, 1940 in para 29 of the judgment. Thereafter, a number of judgments of this Court were referred to in which awards were modified by this Court, presumably under the powers of this Court under Article 142 of the Constitution of India. In para 34, the*

7 (2021) 9 SCC 1

learned Single Judge referred to para 52 in ***McDermott case [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181]*** *and then concluded that since the observations made in the said para were not given in answer to a pointed question as to whether the court had the power under Section 34 to modify or vary an award, this judgment cannot be said to have settled the answer to the question raised finally.*

.....

42. *It can therefore be said that this question has now been settled finally by at least 3 decisions* ***[McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181]*** *,* ***[Kinnari Mullick v. Ghanshyam Das Damani, (2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106]*** *,* ***[Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd., (2021) 7 SCC 657]*** *of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the Uncitral Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the "limited remedy" under Section 34 is co-terminous with the "limited right", namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996."*

(emphasis supplied)

Therefore, this question is answered that the learned Judge was not right modifying the award in ordering a sum of Rs.50,00,000/- to the appellant as the same was beyond the scope of powers under Section 34 of the Arbitration and Conciliation Act, 1996.

H. Question No.2 :

21. The learned Counsel for the appellant places strong reliance on the amended Section 34(2)(a) of the Act and its proviso and the judgment of the Hon'ble Supreme Court of India in ***SSanyong Engineering and Construction Company Limited*** (cited supra). But, however, as rightly contended by the learned Counsel appearing on behalf of the respondent, the Hon'ble Supreme Court of India in ***Ratnam Sudesh Iyer***'s case (cited supra) has categorically held that the amendment is prospective in nature and will not be applicable to the application for setting aside, which is prior to the amendment. In this case, the Original Petition is of the year 2008 and therefore, undoubtedly prior to the amendment. Therefore, the law as it remained prior to the amendment of the Arbitration and Conciliation Act

vide Act 3 of 2016 will apply. The pre-amended Section 34 of the Act stood as follows:-

> " ***34. Application for setting aside arbitral award. –***
>
> *(1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).*
>
> *(2) An arbitral award may be set aside by the court only if-*
>
> > *(a) The party making the application furnishes proof that-*
> >
> > > *(i) A party was under some incapacity, or*
> >
> > > *(ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or*
> >
> > > *(iii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*
> >
> > > *(iv) The arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond*

the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) The court finds that-

(i) The subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) ***The arbitral award is in conflict with the public policy of India****.*

Explanation. -*Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.*

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

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

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

22. The grounds for challenge of the arbitral award prior to the amendment had been delineated and explained by the Hon'ble Supreme Court of India in ***Associate Builders*** case (cited supra), whereunder, the concept of 'Public Policy of India' was explained under the heads (i) Fundamental Policy of Indian law; (ii) Interest of India; (iii) Justice and

Morality; and (iv) Patent Illegality in paragraph Nos.27 to 45 which clearly lay down each and every ground that was available for the Court to interfere with the decision of an Arbitral Tribunal.

23. The first ground, on which, the arbitral award is interfered is that the Arbitral Tribunal did not go into the nature of agreement as to whether it is an agreement of sale or an agreement of agency/brokerage. In this regard, it is to be seen that the plea relates to construction of the agreement. The law relating to the same has been laid down by the Hon'ble Supreme Court of India in ***Khedut Sahakari Ginning & Pressing Society Ltd. Vs. State of Gujarat***[8]. It is useful to extract the relevant paragraph of the said judgment which reads as hereunder:-

> " ***5.*** *Whether a particular agreement is an agency agreement or an agreement of sale depends upon the terms of the agreement. For deciding that question, the terms of the agreement have got to be examined. The true nature of a transaction evidenced by a written agreement has to be ascertained from the covenants and not merely from what the parties choose to call it. The terms of the agreement must be carefully scrutinised in the light of the surrounding circumstances — see the decision of this Court in* ***Rohtas Industries Ltd. v. State of Bihar [12 STC 615]*** *. In that decision, this Court*

8 (1971) 3 SCC 480

further held that for considering whether a particular transaction is a sale or not, what the court has to consider is whether as a result of the transaction, the property in the goods passed to the assessee in return for price and whether the assessee sold those goods as its own. Bearing in mind these principles, we shall now proceed to examine the provisions of the Act as well as the relevant bye-laws which take the place of agreement between the parties. It is not the case of the State that the society had in any manner acted in contravention of the bye-laws. Therefore all that we have to find out is the true effect of the bye-laws."

24. According to the claimant/appellant, the agreement is for development and sale of land to the appellant/developer or to its nominees at the rate of Rs.3,85,000/- per ground (which is subsequently increased). If the respondents want to plead that the agreement is not an agreement of sale, they have to take specific stand to that effect that the property was not projected in any manner as that of the appellant/developer. The appellant/developer worked only as an agent of the respondents. The appellant/developer contends that the project itself is named as the appellant's project and it had absolute freedom to determine the purchaser, sale consideration etc., and had no obligation to render any accounts etc. The agreement in question clearly reads that it is an agreement of sale of

land. Therefore, the said ground, considered by the learned Judge, relates to construction of agreement and appreciation of the evidence on record and cannot be said to be relating to Public Policy of India under any of the heads and that in the absence of any pleading or framing of issue, the award of the Tribunal cannot be termed as any patent or blatant illegality. The respondents themselves did not choose to take such a stand in their reply statement and the only plea which is taken is the escalation of price and equity. Therefore, we hold that the ground as to the nature of agreement, taken into account by the learned Single Judge, is firstly not taken by the parties before the Arbitrators or before the learned Single Judge and secondly, even if taken, cannot be a possible ground for interference under Section 34 of the Arbitration and Conciliation Act, 1996 in the facts of the present case.

25. As regards the second ground of interference as per Section 14 of the Specific Relief Act, the relief granted by the Arbitrators is to sell the land to the appellant/developer or its nominees. Therefore, on the face of if, we do not find that there is anything for the Court to continuously monitor

the specific performance of the parties. Therefore, we are unable to agree with the findings of the learned Single Judge in this regard.

26. As far as the next ground of violation of Section 20 of the Specific Relief Act by holding that the agreement is inequitable and holds out an unfair advantage to the appellant is concerned, the rival contentions of the parties and can be tabulated as follows:-

The contentions of the respondents	The contentions of the appellant/developer
Absolutely, no money is invested by the appellant/developer. Even the advance amount is paid only by mortgaging the respondents' property. All the developments are done only by the respondents.	Only after the successful completion of the Phase-I, considering the profits made, the parties entered into the present agreement of Phase-II. Even as per the agreement, it can be seen that the developer had already paid a sum of Rs.35,00,000/- in the earlier agreement, which was part of the advance. Even if the balance advance agreement is to be paid, the project phase was permitted to be shown as security for rising finance and it is the liability of the appellant/developer by obtaining loan from its own bankers and therefore, it is the appellant, who has paid the advance amount.
The market price was huge and the price had risen and the appellant/developer wanted to knock off the property for a meager consideration.	Even considering the price rise, the sale consideration rose from Rs.3.85 lakhs per plot to Rs.4.12 lakhs and thereafter, to Rs.5,00,000/-. The property was purchased by the respondents vide ***Exs.C-7*** to ***C-11***,

	sale deeds, dated 27.01.2004 and 05.02.2004 and if the sale consideration in the sale deeds is taken and the sale consideration which the respondents received by way of the present arrangement, it can never be said that the transaction was inequitable as it has caused huge profits to the respondents.
The respondents did not know the contents of the agreement and the respondents as well as the Power of Attorney were cheated by the appellant/developer.	The respondents 1 to 3 and the Power of Attorney are the family members and among them only, to rise the price, a collusive suit was initially filed and later, it was withdrawn as settled out of Court and once again, a Power of Attorney was executed in favour of the said *Arumugam* after the hike in price was agreed.

Thus, it can be seen that there are rival contentions between the parties which require appreciation of the evidence and taking into account the conduct of the parties during the transaction and when the Arbitral Tribunal had appraised the evidence and rendered its findings upon consideration of the facts that it is a case of specific performance, interference, once again on the ground of inequitable nature or unfair advantage would only be to sit on appeal over the arbitral award and therefore, was not possibly a ground available for the learned Judge to interfere with the award.

27. When the the parties have chosen the arbitration as their forum by a valid arbitration clause, the autonomy of the parties has to upheld and the

award of the Arbitral Tribunal shall be final unless it can be set aside under any one of the specific grounds available under Section 34 of the Act and the Courts will not interfere or set aside the award, merely because an alternative view is possible and have to adopt an hands-off approach. Therefore, we have no other option than to interfere with the Order of the Learned Judge in allowing the Original Petition.

28. It is now brought to our notice that this appeal was dismissed for default and thereafter was restored to file. In the interregnum, there was no interim order. The respondents had paid off the mortgage amount due to the appellant's bankers and they also sold four plots. The four plots have been sold to third parties who are not parties to arbitration or these proceedings. Therefore, it would be open for both the sides to claim the validity, amounts, set off etc., appropriately in the manner known to law. The above observations are made by us only because the above events have happened pending this Original Side Appeal.

I. The Result :

29. In the result :

(i) This Original Side Appeal is allowed;

(ii) The order of the learned Single Judge of this Court in O.P.No.235 of 2008 and A.No.7797 of 2017 and O.A.No.1198 of 2018, dated 19.08.2019 is set aside. Consequently, O.P.No.235 of 2008 on the file of this Court stands dismissed;

(iii) Considering the nature and circumstances of this case, there will be no order as to costs.

(iv) Consequently, C.M.P.Nos.27502 and 27500 are closed.

(P.U., J.) (D.B.C., J.)
28.09.2022

Index : yes
Speaking order
grs

PARESH UPADHYAY, J.
and
D.BHARATHA CHAKRAVARTHY, J.

grs

Pre-Delivery Judgment in

O.S.A.No.341 of 2019

28.09.2022