

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 16TH DAY OF JULY, 2025

PRESENT

THE HON'BLE MRS. JUSTICE ANU SIVARAMAN

AND

THE HON'BLE DR. JUSTICE K.MANMADHA RAO

COMMERCIAL APPEAL NO.302 OF 2024

BETWEEN:

1 . MR. NAYEEM NOOR MOHAMED
S/O MR. NOOR MOHAMED
AGED ABOUT 57 YEARS
RESIDING AT No.88
MOSQUE ROAD, FRAZER TOWN
BENGALURU-560 005

2 . MR. AHMED MAHMOOD SAIT
S/O MR. MAHMOOD SAIT
AGED ABOUT 41 YEARS
R/AT No.19, RHENIUS STREET
LANGFORD ROAD
BASAPPA CIRCLE
BENGALURU-560 025

...APPELLANTS

(BY SRI. ANANTH MANDGI, SENIOR COUNSEL A/W.
SMT. AMIT A. MANDGI, ADVOCATE)

AND:

1 . MR. NAZIM NOOR MOHAMED
S/O MR. NOOR MOHAMED
AGED ABOUT 43 YEARS
R/AT No.4A, REGENCY PARK
24 HALL ROAD, RICHARDS TOWN
BENGALURU-560 005

2 . HON'BLE SHRI. JUSTICE B. PADMARAJ
 FORMER JUDGE
 OF HON'BLE HIGH COURT OF KARNATAKA
 ARBITRATION CENTRE-KARNATAKA
 (DOMESTIC AND INTERNATIONAL)
 KHANIJA BHVANA, No.49
 3RD FLOOR, EAST WING
 RACE COURSE ROAD
 BENGALURU-560 001

...RESPONDENTS

(BY SRI. PRAMOD NAIR, SENIOR COUNSEL A/W.
 SRI. PADYUMNA L.N., & SRI. SUMIT CHATTERJEE,
 ADVOCATES FOR C/R1;
 NOTICE TO R2 IS DISPENSED WITH
 V/O DATED 12.06.2025)

THE COMMERCIAL APPEAL IS FILED UNDER SECTION 13
 1(A) OF THE COMMERCIAL COURTS ACT, 2015 R/W SECTION
 37(1)(c) OF THE ARBITRATION AND CONCILIATION ACT, 1996,
 PRAYING TO (i). CALL FOR THE TRIAL COURT RECORDS IN THE
 PROCEEDINGS BEARING COMMERCIAL A.P.No.154/2023 ON THE
 FILE OF LXXXVI ADDITIONAL CITY CIVIL AND SESSIONS JUDGE
 AT BENGALURU (CCH No.87) VIDE ANNEXURE-A. AND (ii). SET
 ASIDE THE JUDGMENT DATED 27.07.2024 PASSED BY THE
 LXXXVI ADDITIONAL CITY CIVIL AND SESSIONS JUDGE AT
 BENGALURU (CCH No.87) IN PROCEEDINGS BEARING COM.
 A.P.No.154/2023 VIDE ANNEXURE-A HOLDING THAT THE
 APPLICATION FILED BY THE APPELLANTS UNDER SECTION 34 OF
 THE ARBITRATION AND CONCILIATION ACT, 1996 IS NOT
 MAINTAINABLE AND CONSEQUENTLY ALLOW THE SAID
 APPLICATION FILED BY THE APPELLANTS UNDER SECTION 34 OF
 THE ARBITRATION AND CONCILIATION ACT, 1996 AND ETC.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR
 JUDGMENT ON 12.06.2025 AND COMING ON FOR
 PRONOUNCEMENT OF JUDGMENT THIS DAY, **ANU SIVARAMAN
 J.**, PRONOUNCED THE FOLLOWING:

CORAM: HON'BLE MRS. JUSTICE ANU SIVARAMAN
 and
 HON'BLE DR. JUSTICE K.MANMADHA RAO

CAV JUDGMENT**(PER: HON'BLE MRS. JUSTICE ANU SIVARAMAN)**

The present Commercial Appeal is filed under Section 13(1)(a) of the Commercial Courts Act, 2015 read with Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 ('the Act' for short), challenging the Judgment dated 27.07.2024 passed by the LXXXVI Additional City Civil and Sessions Judge at Bengaluru, in Com. A.P.No.154/2023.

2. We have heard Shri. Anant Mandgi, learned Senior Counsel as instructed by Shri. Amit A.Mandgi, learned Advocate appearing for the appellants and Shri. Pramod Nair, learned Senior Counsel as instructed by Shri. Pradyumna L.N. and Shri. Sumit Chatterjee, learned Advocates appearing for Caveator/respondent No.1.

3. The facts of the case are as follows:

The appellant No.1 and respondent No.1 are brothers and appellant No.2 is their cousin. The appellants and respondent No.1 had constituted a partnership firm by name viz., "M/s.Tuscan Construction and Property Developers" under a Partnership Deed dated 01.12.2003. On

12.11.2011, a dispute arose between the appellants and respondent No.1 with respect to day-to-day management of the Firm. Subsequent to this, respondent No.1 took a non-cooperative outlook with respect to the Firm by refusing to attend the Firm's day-to-day activities and by refusing to sign any cheques to clear the Firm's outstanding payments to vendors and suppliers.

4. It is stated that on 15.02.2013, respondent No.1 requested the Firm's bankers to freeze the Firm's accounts. Having no other alternative, the appellants completed the Firm's ongoing projects at their own personal costs and by borrowing funds from family, friends, vendors, etc., without getting any support from respondent No.1. Although the Firm's duration was one at will of the partners, respondent No.1 did not issue any notice seeking dissolution of the Partnership when the disputes arose. Once the Firm had completed all its residential projects and had repaid all its loans, respondent No.1 had issued a notice asking for his share and thereafter instituted arbitration proceedings against the appellants as per the arbitration clause in the Partnership Deed.

5. The Arbitral Tribunal heard the matter and passed an arbitral Award dated 23.02.2016 in A.C.No.76/2014. It was held by the Arbitral Tribunal that the Partnership Firm shall stand dissolved with effect from the date of the award. The respondents No.1 and 2 were directed to furnish the true and correct statement of accounts of the Firm from the year 2011 till the date of dissolution within one month from the date of the award, if they fail to do so, it was ordered that a commissioner or an independent Chartered Accountant shall be appointed to prepare the accounts of the Firm and conduct an enquiry into the valuation of the properties sold by respondents No.1 and 2 directly to various purchasers from the year 2011. The value of the share of the claimant (respondent No.1) shall be ascertained as on the date of the dissolution of the Firm and the claimant shall be paid his share within one month from the date of determination of accounts, failing which will attract interest at 18% p.a. till the date of payment. The reliefs sought for in paragraphs (c), (d), (e), and (f) of the claim statement and the counter claims made by the respondents were dismissed.

6. The arbitral Award was challenged by the appellants before the City Civil Court in A.S.No.42/2016, which came to be dismissed on 19.10.2020. The appellants then preferred an appeal before this Court in Com.AP.No.43/2021. The parties filed a joint memo. Accepting the joint memo, this Court passed the following order: (a) holding that Clauses 4 to 9 of the operative portion of the arbitral Award dated 23.02.2016 in A.C.No.76/2014 are set aside, while the rest of the award is maintained and (b) directing the dispute between the parties relating to determination of accounts of the Firm, valuation of the properties of the Firm and the decision with regard to the amount payable to the partners to be referred to an Arbitrator, who may so be appointed.

7. Thereafter, respondent No.2 was appointed as Sole Arbitrator. In the proceedings dated 27.07.2022, it was recorded that '*both the sides do not want to lead any further evidence in the matter, as it is a remanded matter*'. After directing the applicants to produce additional documents and charts of the pending projects, and after hearing the

arguments, the learned Arbitrator passed an arbitral Award dated 15.05.2023. In this award, respondent No.2 directed the appellants to pay an amount of Rs.4,13,95,193/- to respondent No.1 and rejected all other claims of respondent No.1. The appellants thereafter issued cheques and letters to satisfy the awarded sum to respondent No.1, who for reasons unknown, refused to accept the said sum.

8. Thereafter, respondent No.1 filed an application under Section 33(4) of the Act dated 24.06.2023 for additional claims made by the claimant, which according to respondent No.1, were raised before the Arbitral Tribunal but were omitted or not adjudicated by the Tribunal in its Award dated 15.05.2023. This Application was also filed to correct a few typographical and computational errors which had inadvertently crept into the Final Award. In the said application, respondent No.1 prayed for an additional Award to be issued based on the claims that he presented in his oral arguments and written submission before the arbitral Tribunal, which were omitted in the arbitral award dated 15.05.2023 such as (i) a direction of sale of property of the Firm and direction to the appellants herein to pay 1/3rd

share from the proceeds of it, to respondent No.1; (ii) in the alternate, to direct the appellants to pay a sum of Rs.92,47,000/- to respondent No.1 towards his share of property of the Firm, (iii) direction to the appellants herein to pay $\frac{1}{3}^{\text{rd}}$ share from the proceeds of the sale of the Firm's moveable properties, (iv) direction to the appellants to pay a sum of Rs.79,46,404/- to the claimant towards his share in the accumulated cash balance in the Firm's Bank account and (v) for correction of the share of the claimant to Rs.2,33,47,833.30/- in the properties sold by the respondent and to calculate the interest on the sum awarded.

9. The appellants filed objections to the said application dated 13.07.2023 contending that the relief claimed for in the application of respondent No.1, is not claimed in the Statement of Claims, but it is claimed in the written and oral arguments. The relief sought for amounts to modification and review of the arbitral award, which is beyond the scope of Section 33 of the Act. Once an arbitral Tribunal passes an award, its mandate comes to an end and becomes *functus officio*. It is also submitted that respondent

No.2 cannot modify the award on the reliefs claimed under Section 23 of the Act in the Application filed under Section 33 of the Act by respondent No.1.

10. All the claims of respondent No.1 have been rejected in the first award dated 23.03.2016 and again in the award dated 15.05.2023 in paragraph Nos.30, 31 and 32. It is also submitted that the prayers sought for by respondent No.1 in the present application is neither for correction of computational, clerical, typographical or other errors of a similar nature, nor is it for making an additional award on claims presented in the arbitral proceedings omitted from the arbitral award.

11. After hearing on either side, the learned arbitrator passed the impugned order dated 18.08.2023, wherein the said Application was allowed, and the directions were as follows:

- (a) *"The Claimant Petitioner may file again a Statement of Additional Claims in terms of sec. 33(4) of the Act with amount of such additional claim(s) specified in the same, within a period of 4 weeks from today.*

- (b) *The Respondents may file their Counter to the said Statement of Claims and Counter Claim if any, already raised and falling within the scope of sec. 33(4) of the Act within next 4 weeks, once the copy of the Additional Statement of Claims is served by the Petitioner claimant on them.*
- (c) *The parties will be entitled to rely and refer to the Evidence already on record and produce authentic copies of such evidence already on record and the additional evidence to support such additional claims will be admitted only subject to specific leave and permission of the Tribunal.*
- (d) *The Arbitration Centre on the basis of Additional Statement of Claims, and Counter Claims, if any, determine the Fees payable to the Arbitration Tribunal as per Schedule IV of the Act and the parties shall deposit their respective share of Fees with the Arbitration Centre within the stipulated time limit.*
- (e) *After the pleadings now to be filed as directed above, are completed, the Arbitration Centre may fix a hearing of the matter by taking advance information from this Arbitral Tribunal about the date of hearing of the case."*

Aggrieved by the impugned order dated 18.08.2023, the appellants herein preferred an Application under Section 34 of the Act in Com. AP. No.154/2023 along with I.A.No.1 under Section 36(2) and (3) of the Act to stay the operation

of the arbitral order before the LXXXVI Additional City Civil and Sessions Judge, Bangalore (CCH 87), to set aside the impugned order dated 18.08.2023 passed by respondent No.2 and to dismiss the Application under Section 33 of the Act filed by respondent No.1.

12. On 13.10.2023, the trial Court passed an interim order allowing I.A.No.1 filed by the appellants and upheld the maintainability of the Application filed by the appellants. Subsequently on 27.07.2024, the trial Court, ignoring the previous order dated 13.10.2023 passed by its predecessor, dismissed the Application filed under Section 34 of the Act by the appellants herein on the ground that the said Application is not maintainable before it. The impugned judgment dated 27.07.2024 was brought to the attention of the arbitral Tribunal which provided a month's time to the appellants to exercise the right to appeal available to them under the Arbitration Act before the arbitral Proceedings resume. Hence, the present appeal has been preferred before this Court.

13. The learned senior counsel for the appellants submitted that the impugned judgment passed by the trial Court in Com.AP.No.154/2023 is completely perverse, without application of mind, contrary to principles of law and earlier judgments pronounced by various High Courts and the Apex Court, and is therefore liable to be set aside.

14. It is submitted that the arbitral award specifically stated that all the claims which were not granted in the award stood rejected. In the circumstances, the application preferred under Section 33 of the Act by the respondent was in effect a direct challenge to the award and was not maintainable under the professed provision of law. It is submitted that the respondent who had not challenged the arbitral award at any stage and had permitted it to become final could not have reopened the proceedings by preferring an application under Section 33 of the Act.

15. Further, the learned senior counsel submits that the trial Court has erred in concluding that the additional Award dated 18.08.2023 passed by respondent No.2 in A.C.No.76/2014 is not an 'award' but rather an 'interlocutory

order' and hence cannot be set aside by invoking Section 34 of the Act. It is submitted that the trial Court has erred gravely in failing to appreciate that any order passed by the learned Arbitrator under Section 33 of the Act cannot be an interlocutory order since Section 33 does not provide for passing interlocutory orders, but rather contemplates passing of an additional Award within 60 days from the date of receipt of request.

16. It is further submitted that the impugned judgment dated 27.06.2024 passed by the trial Court is liable to be set aside on the ground of *res judicata*. The trial Court while passing the impugned judgment has failed to consider the order dated 13.10.2023 passed by it's the then predecessor. While allowing an Application under Section 36(2) and (3) of the Act to stay the operation of the arbitral order dated 18.08.2023, the trial Court considered the objection raised by the learned counsel for respondent No.1 that the Application filed by the claimants under Section 36 is premature on the ground that it was not an additional Award and further while passing the stay order on 13.10.2023 came to the conclusion that the application filed

by the appellants under Section 34 of the Act was maintainable. The order was not challenged by respondent No.1 and has become final. Therefore, once the issue of maintainability of the Section 34 application has been decided, the Court cannot dwell into this question again as it is *res judicata*. The trial Court has not considered the decisions of the Apex Court in cases like ***S Ramachandra Rao v. S Nagabhushana Rao and others*** reported in ***2022 SCC OnLine SC 1460***, which have held that '*the Doctrine of res judicata is attracted not only in separate subsequent proceedings but also at any subsequent stage of the same proceedings and hence, the concluded orders passed earlier in this matter is binding on the parties.*'

17. It is submitted by learned senior counsel that the trial Court failed to consider that if respondent No.1 was aggrieved by the order dated 13.10.2023; respondent No.1 had ample time and opportunity to challenge the same in a Court of Appeal. It is submitted that by raising the contention now, subsequent to a change in the Presiding Officer, respondent No.1 is effectively seeking to circumvent the principle of *res judicata* so that he can mislead the trial

Court into issuing a verdict based on preliminary points that have already been heard and adjudicated upon. It is submitted that the trial Court failed to consider that the arbitral Award dated 18.08.2023 cannot be termed to be an interlocutory order under Section 33 of the Act. Any order passed by the Arbitrator under Section 33 is contemplated to be an additional Award. Therefore, the impugned judgment passed by the trial Court is liable to be set aside.

18. It is submitted by the learned senior counsel that the finding of the trial Court is in contravention to Section 17 of the amended Act, amended as on ACT 33 of 2019, S.4 (w.e.f. 30.08.2019), wherein the amendment has taken away the power under Section 17. Earlier, an arbitral Tribunal could pass an interim order at any time after making the arbitral award but before it is enforced in accordance with Section 36 of the Act. This has been omitted by the 2019 amendment, and therefore the arbitral Tribunal cannot pass any interim order after passing an arbitral Award. Thus, it is submitted that the finding of the trial Court that the order dated 18.08.2023 is an

Interlocutory order is in contravention to the Act as amended up to date.

19. It is submitted by the learned senior counsel that the trial Court has gravely erred in concluding that the order dated 18.08.2023 passed by the learned Arbitrator cannot be termed as an award. It is submitted that the trial Court has failed to consider that in an Application filed under Section 33(4) of the Act, the learned Arbitrator cannot direct the parties to file a fresh Statement of Claims. Under Section 33(4), the Arbitrator has to pass an additional Award as to claims which were presented in the arbitral proceedings but which were omitted from the arbitral Award when it receives a request from the other party. The additional Award has to be passed by the Arbitrator within 60 days from the date of receipt of such request. It is submitted that since fresh Claim Statements along with counter claims and additional evidence were called for, the learned Arbitrator has passed an order contrary to the provisions of Section 33 of the Act, and hence an Application under Section 34 is maintainable in law.

20. Further, it is submitted by the learned senior counsel that the trial Court has failed to consider that under Section 34(3) of the Act, recourse to a Court against an arbitral Award may be against a request that has been made under Section 33 of the Act, provided that it is done so within thirty days after the disposal of such request. Respondent No.1 filed his application under Section 33 on 24.06.2023, requesting for an additional Award to be passed. This request was disposed of by respondent No.2 vide its order dated 18.08.2023. It is submitted that the learned Arbitrator does not have the power to pass an interlocutory order on such a request but can only allow or reject the request made under Section 33 of the Act by respondent no.1. Therefore, under the provisions envisaged in Section 33(4) of the Act, the application filed by the appellants under Section 34 is maintainable.

21. In light of the above-mentioned facts and arguments, the appellants pray that the judgment dated 27.07.2024 by the LXXXVI Additional City Civil and Sessions Judge at Bengaluru in Com. AP.No.154/2023 may be set

aside, consequently allowing the Application filed by the appellants under Section 34 of the Act.

22. In support of the above contentions, the learned senior appearing for the appellants has relied upon the following judgments:-

- ***S. Ramachandra Rao v. S. Nagabhushana Rao and Others***, reported in **2022 SCC OnLine SC 1460**; and
- ***Gyan Prakash Arya v. Titan Industries Limited***, reported in **(2023)1 SCC 153**.

23. *Per contra*, it is submitted by the learned senior counsel appearing for the first respondent that the arbitral Tribunal in its initial arbitral Award dated 15.05.2023, failed to consider a number of assets and properties of the Firm while directing for dissolution and distribution of profits among the three partners. It is submitted that without discussing and distributing the assets which were not considered by the arbitral Tribunal, such assets will effectively be left orphaned, and neither the appellants nor the respondent No.1 will be able to enjoy any benefits from such assets, viz., the office property, the cars and the two-

wheelers in the name of the Firm and the monies in the Bank accounts.

24. It is contended that the trial Court had specifically considered the contentions of the appellants and had come to the specific conclusion that the arbitral Tribunal is empowered to pass additional award invoking Section 33(5) of the Act. Once such additional award is passed, the appellant would have the right to challenge the award so passed and not the interlocutory order passed by the arbitral Tribunal under Section 33 of the Act. The trial Court had also left open the contentions of the parties on all counts to be decided by the Arbitrator. Further, it is contended that the rejection of other claims by the Arbitrator without considering them on merits was a clear defect which could be rectified under Section 33(4) of the Act. It is further contended that the impugned order being only an interim arbitral award as defined under Section 2(1)(c) of the Act and no application under Section 34 of the Act would lie.

25. The learned senior counsel further submitted that the appellants refused to respond to the Statement of

Additional claims filed by respondent No.1 and have preferred to challenge the order of the Commercial Court dated 27.07.2024 on frivolous grounds, which were validly dismissed by the Commercial Court on the ground of maintainability. It is submitted that such tactics employed by the appellants are to delay the conclusion of the dispute.

26. It is further contended that the observations of the trial Court in its order dated 13.10.2023, wherein, in respect of an application for interim relief and will not operate as *res judicata* when the matter is being heard finally.

27. In support of this contentions, the learned senior counsel relies on the decision of the Apex Court in ***Amresh Tiwari v. Lalta Prasad Dubey and Another*** reported in ***2000 (4) SCC 440***. It is contended that in ***S. Ramachandra Rao***'s case (*supra*), is not applicable to the facts of the case, where the first order is passed only with regard to the interim relief and not as a decision on the maintainability of the application.

28. In support of the above contentions, the learned senior counsel appearing for the first respondent has relied upon the following judgments:-

- ***Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products***, reported in **(2018) 2 SCC 534**;
- ***ONGC Petro Additions Limited v. Technimont S.P.A. and Another***, reported in **2019 SCC OnLine Del 8976**;
- ***Harinarayan G. Bajaj v. Sharedeal Financial Consultants Pvt. Ltd. and Another***, reported in **2003 (2) Mh.L.J**;
- ***Municipal Corporation of Delhi v. Narinder Kumar***, reported in **2023 SCC OnLine Del 435**;
- ***Vil Rohtak Jind Highway Pvt. Ltd. v. National Highways Authority of India (Nahi)***, reported in **2022 SCC OnLine Del 4670**;
- ***South Eastern Coalfields Ltd v. State of M.P. and Others***, reported in **(2003) 8 SCC 648**;
- ***Zenit Mataplast Private Limited v. State of Maharashtra and Others***, reported in **(2009) 10 SCC 388**;
- ***D.N. Krishnappa v. Deputy General Manager***, reported in **2022 SCC OnLine SC 1709**;
- ***Kanshi Ram v. Bansi Lal***, reported in **1976 SCC OnLine HP 38**;

- ***Amresh Tiwari v. Lalta Prasad Dubey and Another***, reported in ***(2000) 4 SCC 440***, and
- ***Asma Lateef and Another v. Shabbir Ahmad and Others***, reported in ***(2024) 4 SCC 696***.

29. We have considered the contentions advanced on either side. We notice that the litigation between the parties has reached the third stage; two earlier arbitrations have already taken place. In the first round of arbitration, the dissolution of the partnership was ordered. The learned arbitrator had delegated the valuation of the properties and distribution of assets to a Chartered Accountant after dissolving the firm. The appellants herein had filed a petition under Section 34 of the Act which came to be dismissed. The appellants approached this Court under Section 37 of the Act. The parties had filed a joint memo before this Court and the matter was relegated to arbitration for distribution of the assets. A second round of arbitration ensued, where the parties had raised their claim with regard to distribution. A detailed award was passed on 15.05.2023.

30. We notice that the arbitration was initially concluded by award dated 23.02.2016. The award reads as follows:-

- "1. *The claimant is entitled to seek dissolution of the Partnership Firm "M/s Tuscan Constructions and Property Developers", and settlement of the accounts;*
2. *It is hereby declared that the partnership business of the firm "M/s Tuscan Constructions and Property Developers", constituted or formed under the Partnership Deed Ex.P1 dated 01.12.2003 shall stand dissolved as from the date of this Award i.e., 23.02.2016, and it is ordered that the dissolution thereof as from that day be advertised either in the newspaper (prominent) having a wide circulation in the State or in the official gazette at the expense of the parties. If the claimant pays the entire expenses of such publication, he can recover the proportionate expenses thereof from the respondents. The Claimant's share is declared to be 1/3rd and of respondent Nos. 1 and 2 as 1/3rd share each;*
3. *The Partnership business of the firm "M/s Tuscan Constructions and Property Developers", constituted under the Deed of Partnership dated 01.12.2003 stands dissolved with effect from the date of this Award, which shall be the date of dissolution;*
4. *The Respondents No.1 and 2 are hereby directed to furnish/render the true and correct statement of*

accounts of the Firm for the period from 2011 till its dissolution to the claimant. If the respondents fail to furnish the true and correct statement of accounts of the Firm for the period from 2011 till the date of dissolution, within one month from the date of this Award, the accounts of the said Firm be taken by a commissioner/independent chartered accountant, who shall determine the accounts of the Firm, and on the basis of that the claimant shall be paid the amount which will come to his share (1/3rd share). It is however, made clear that the commissioner/the chartered accountant that may be appointed in the case may make an enquiry into the valuation (market value) of the various properties sold by the respondents No.1 and 2 directly to several purchasers subsequent to the date 12.11.2011 and to decide the share of the claimant and the same may be paid to the claimant within one month from the date of such determination, failing which it shall carry interest at the rate of 18% per annum from that date till payment. It is further made clear that the commissioner/the independent chartered accountant that may be appointed in the case to take true and correct account of the firm, may conduct enquiry into the valuation (market value) of the properties of the firm that were sold by the respondents No.1 and 2 directly to the various purchasers from 2011 onwards for determination of the value of the share of the claimant and if need be, he may take the assistance of any such person who has an expertise to determine the market value of the said properties, and both the

claimant and the respondents No.1 and 2 shall bear all such expenses that may be incurred for the appointment of the commissioner/independent chartered accountant as also an expert to determine the market value of the properties sold;

5. The value of the share of the claimant shall be ascertained as on the date of dissolution after taking the true and proper accounts of the Firm from 2011 till the date of dissolution. The value of the share of the claimant on the date of dissolution of the firm could be regarded as debt with effect from that date;
6. The respondents No.1 and 2 are hereby directed to pay to the claimant of his entitlement from 2011 till date i.e., till the date of dissolution of the firm. On determination of the accounts of the Firm, the respondents do pay to the claimant the amount which shall come to his share (which may be found due to him);
7. The claimant is entitled to claim the value of his $1/3^{\text{rd}}$ share as on this date i.e., the date of dissolution of the firm from the respondents No.1 and 2 (from 12.11.2011 to 23.02.2016) with interest at the rate of 18% per annum till the payment was made;
8. The claimant is only entitled to claim the value of his $1/3^{\text{rd}}$ share as on this date i.e., the date of dissolution of the firm from the respondents No.1 and 2 from the date of dissolution with interest thereon at the rate of Rs.18% per annum till the payment is made. It is however made clear that

the value of the share of the claimant shall be ascertained/determined as on the date of the dissolution of the firm after taking account of the firm from 2011 till its dissolution;

9. *The respondents No.1 and 2 do hereby jointly and severally pay the amount of Rs.30,00,000/- (Rupees Thirty Lakhs only) to the claimant (the loan amount advanced by the claimant to the Firm as per the admission made by RW.1 in his evidence), within one month from the date of this Award, failing which, it shall carry interest at the rate of 18% per annum from the date of the Award till payment of the entire sum and accordingly they are hereby directed to pay Rs.30,00,000/- (Rupees Thirty Lakhs Only) to the claimant within one month from the date of this Award, failing which it shall carry interest at the rate of 18% per annum from the date of this Award till realisation of the entire sum;*
10. *The claimant is however, not entitled to any other claim or reliefs other than the claims that are awarded to him. The statement of claims shall stand dismissed with regard to the other reliefs;*
11. *The reliefs set out in Paras (c), (d), (e) and (f) of the statement of claims filed by the claimant are hereby dismissed. He is not entitled to any such claims;*
12. *The counter claims made by the respondents against the claimant are hereby dismissed,*

13. *The claim of the claimant is allowed only to the extent as indicated above and the counter claims of the respondents are rejected,*

14. *Each party to bear their own costs."*

31. The application preferred by the claimant/appellant herein under Section 34 of the Act against the award was dismissed on 19.10.2020. An appeal was preferred under Section 37 of the Act as COMAP No.43/2021. In the said COMAP, the parties filed a joint memo. This Court accepted the joint memo and disposed of the COMAP by its order dated 31.03.2021, which reads as follows:-

"A joint memo has been tendered across the bar signed by the learned counsel appearing for the appellants and the learned counsel for the first respondent.

2. The learned Senior Counsel appearing for the appellants and the learned Senior Counsel for the first respondent are seeking disposal of the appeal in terms of the joint memo by consent of the appellants and the first respondent.

3. In view of what is stated in the joint memo, we pass the following order:

(i) Clauses 4 to 9 of the operative portion of the award dated 23rd February 2016 passed by the second respondent in Arbitration

proceedings bearing A.C.No.76/2014 are hereby set aside. The rest of the award is maintained;

- (ii) Accordingly, the judgment and order dated 19th October 2020 in COM.A.S.No.42/2016 is modified in above terms;*
- (iii) In view of the agreement recorded in paragraph 4 of the joint memo by the appellants and the first respondent, we direct that the dispute between them relating to determination of the accounts of the Firm Tuscan Construction and Property Developers, valuing the properties of the Firm and deciding the amount payable to the partners of the Firm shall be referred to an Arbitrator who may be appointed by the Arbitration and Conciliation Centre, Bengaluru (Domestic and International) in accordance with the Rules;*
- iv) Needless to add that the learned Arbitrator can always exercise his power under Section 26 of the Arbitration and Conciliation Act, 1996;*
- v) As paragraph 4 of the joint memo records the agreement between the appellants and the first respondent, a copy of the joint memo signed by the appellants and the first respondent shall be filed on record within a period of two weeks from today;*
- (vi) The appeal is disposed of in the above terms.*

4. At this stage, the learned Senior Counsel for the appellants made a submission that the appellants may be permitted to withdraw the amount of Rs.30,00,000/- (Thirty Lakhs) deposited by the first appellant. The submission of the learned Senior Counsel for the first respondent is that to enable the first respondent to seek appropriate interim directions from the learned Arbitrator, the amount may be retained in this Court for a reasonable time. The learned Senior Counsel appearing for the appellants is not agreeable

with this submission and he submits that the amount must come back in view of the setting aside of clause 9 of the arbitral award.

5. Clause 9 of the arbitral award contains a direction issued to the appellants to pay a sum of Rs.30,00,000/- (Thirty Lakhs) with interest. It is obvious that this Court had passed an order on 1st March 2021 recording the submission of the learned Senior Counsel appearing for the appellants to deposit a sum of Rs.30,00,000/- (Thirty Lakhs) in this Court for the purpose of securing the direction contained in Clause 9 of the award. As Clause 9 of the award has been set aside by consent, the Registry will permit the appellants to withdraw the said amount of Rs.30,00,000/- (Thirty Lakhs) with interest, if any, accrued thereon."

32. Thereafter, the parties appeared before the Sole Arbitrator on 27.07.2022 and it was recorded that both sides do not want to lead any further evidence in the matter as it is a remanded matter. Thereafter, the award was passed on 15.05.2023. The operative portion of the award reads as follows:-

32. "That in view of the aforesaid all claims of the petitioner will be deemed to have been covered and decided for the dispute period of the Respondent Firm and any other claim, if any of the claimant will be deemed to have been rejected. At the same time, none of the counter claims of the Respondents has been accepted and the counter

claim made in the pleadings will be deemed to have been rejected by this Arbitral Tribunal and the entire dispute regarding rendition of accounts decided and the guidelines of the Hon'ble High Court while remanding the case back for arbitration of the dispute remaining to be adjudicated in terms of Joint Memo dt.31.3.2021 and the Hon'ble Court's order dt.31.3.2021 will be deemed to have been complied with by the aforesaid discussion, findings and conclusions of this Arbitral Tribunal. The parties are left to bear their own respective costs incurred for these proceedings. No order as to costs.

33. Thus the Award in favour of the Claimant Petitioner is given as under:-

Sl. No.	Particulars	Amount in Rupees
A	Share of Profits from 2011 till 23.2.2016, Date of Dissolution of Firm	2,31,25,759/-
B	Interest @ 75% p.a. on the Award Sum as per Chart-2	1,75,70,434/-
C	Refund of Capital Contribution with interest @ 12% p.a. vide para no.30 of the Award	6,99,000/-
	Total:	Rs.4,13,95,193/-

33. The application which was filed under Section 33 of the Act was filed on 24.06.2023, the relief reads as follows:-

"27. Therefore, in light of the aforesaid reasons, the Claimant requests this Hon'ble Tribunal to pass an additional Arbitral Award in the present matter, and grant the following reliefs to the Claimant:

- (a) Direct the sale of the office property located at 4th Floor, Tuscan Signature, HBR Layout-560 084 under the supervision of this Hon'ble Tribunal, and direct the Respondents to pay 1/3rd share from the proceeds of the said sale to the Claimant;
- (b) Alternatively, direct the Respondents to pay a sum of Rs.92,47,000/- to the Claimant towards its share in the office property of the Partnership Firm;
- (c) Direct the Respondents to pay 1/3rd share from the proceeds of the sale of the Firm's movable properties (as provided in the table in Paragraph of the present Application) to the Claimant;
- (d) Direct the Respondents to pay a sum of Rs.79,46,404/- to the Claimant towards his share in the accumulated cash balance in the Firm's bank accounts;

28. The Claimant also humbly requests this Hon'ble Tribunal to exercise its powers under section 33(1) of the Arbitration Act, and correct the share of the Claimant in the sale of the properties by the Respondents to Rs.2,33,47,883.3/- (as per Chart I of the Final Award). The Claimant also requests that this Hon'ble Tribunal may be pleased to calculate the interest on the sum awarded to the Claimant after accounting for the correct share of Rs.2,33,47,883.3/- in the Final Award."

34. The appellants herein filed a memorandum of objections to the application specifically pointing out that the

prayers raised in the application under Section 33(4) of the Act had been specifically raised, considered and rejected in the award. The specific paragraphs of the arbitral award, where the said prayers have been considered and rejected had been pointed out by the appellants. The learned Arbitrator after extracting the written submissions of the parties found that sub-Section (4) of Section 33 permits adjudication of claims which were raised but omitted to be decided by the Tribunal. It was further held as follows:-

"17. In the present case, the partnership firm was dissolved w.e.f.23.2.2016 and unless all the assets of the partnership firm are fully and properly distributed amongst the partners as per the partnership deed, the process of Dissolution is not complete. The present case of dispute between the partners has already had two rounds of arbitration and is going on in the arbitration proceedings since 2014. The disputes arose in 2011 and after 12 years in 2023 also, if the alternative dispute resolution by way of Arbitration does not correctly and fully decide and adjudicate all the claims, it would be indeed unfortunate and incomplete. Ought one know, this case was required to be re-adjudicated in the second round of arbitration, as the part of earlier Award was set aside by the Hon'ble High Court on a Joint Memo, as both the parties were not satisfied by the earlier Award and even in second round, the compilation, scrutiny of

the complete accounts were not possible for various reasons, mainly the failure of the Respondents to present complete accounts duly audited and all the facts and figures being made available and the Petitioner claimant was out of management and business since 2011. Despite special inspection of accounts allowed by the Arbitration Tribunal, due to non-cooperation of the Respondents, the complete and correct & complete data of accounts could not be compiled. In such a situation, a fair estimate of the profits was made by the Tribunal by assuming the sale of 26 flats at 50% higher than the Guidance Value, over and above the sale value declared in the registered sale deed. Besides, this computation of share of profits, another issue of Rs.30,00,000/- about value of one car in the possession of the Petitioner claimant and alleged advance of Rs.30,00,000/- was decided by this Tribunal in Para 25 to 30 of the Award dated 15.5.2023.

18. *For the other claims, though it was stated in para 32 that such claims will be deemed to be covered and deemed to be rejected, that was not the correct way to deal with the additional claims and issues and there is no gain saying that for whatever reasons such omission or non-adjudication happened, even due to the fault of the counsels in pointing out in details all such issues or the fault of the Tribunal, the purpose of sec. 33(4) is precisely to undo that defect and render a complete adjudication on such additional claims, though raised earlier but not consciously decided by reasoned findings and conclusions."*

35. It was therefore found that the further consideration is neither a review nor a modification of the award dated 15.05.2023 but would be an "additional adjudication" (emphasis supplied), if the Tribunal is satisfied about the merit of such additional claims within the scope of Section 33 of the Act. The application was therefore allowed and the following directions were issued:-

"22. Accordingly, the present Application u/s 33 of the Act is allowed. The following directions are consequently issued.

- (a) The Claimant Petitioner may file again a Statement of Additional Claims in terms of sec. 33(4) of the Act with amount of such additional claim(s) specified in the same, within a period of 4 weeks from today.*
- (b) The Respondents may file their Counter to the said Statement of Claims and Counter Claim if any, already raised and falling within the scope of sec. 33(4) of the Act within next 4 weeks, once the copy of the Additional Statement of Claims is served by the Petitioner claimant on them.*
- (c) The parties will be entitled to rely and refer to the Evidence already on record and produce authentic copies of such evidence already on record and the additional evidence to support such additional claims will be admitted only subject to specific leave and permission of the Tribunal.*
- (d) The Arbitration Centre on the basis of Additional Statement of Claims, and Counter*

Claims, if any, determine the Fees payable to the Arbitration Tribunal as per Schedule IV of the Act and the parties shall deposit their respective share of Fees with the Arbitration Centre within the stipulated time limit.

- (e) *After the pleadings now to be filed as directed above, are completed, the Arbitration Centre may fix a hearing of the matter by taking advance information from this Arbitration Tribunal about the date of hearing of the case."*

36. It is contended that the order passed by the learned Arbitrator is not an award in the strict sense of the term. However, we notice that the said order is definitely beyond the scope of Section 33(4) of the Act, which permits only an additional award in respect of matters which are raised but omitted to be considered in the arbitral award. Section 33 of the Act specifically reads as follows:-

"33. Correction and interpretation of award; additional award.-(1) *Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties,-*

- (a) *party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;*
- (b) *if so agreed by the parties, a party, with notice to the other party, may request the*

arbitral tribunal to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

(3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(emphasis supplied)

(5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).

(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section."

37. Section 32(1) of the Act provides that the arbitral proceedings shall be terminated by the final arbitral award or by orders under sub-Section (2) of Section 32 of the Act. Sub-Section (3) of Section 32 of the Act makes it clear that subject to Section 33 and sub-Section (4) of Section 34, the mandate of the Arbitral Tribunal shall terminate with the termination of the Arbitral proceedings. In the instant case, there is no challenge to the award as contemplated in Section 34 of the Act. Therefore, the mandate of the arbitrator stands terminated subject to the provisions of Section 33 of the Act. It is only an exercise which is permitted under Section 33 of the Act *stricto sensu* which can prolong the mandate of the Arbitrator, and that too, specifically for the purpose as provided therein.

Section 28(1)(a) of the Act reads as follows:-

"28. Rules applicable to substance of dispute.-(1) *Where the place of arbitration is situate in India,-*

(a) *in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"*

38. The Section 34 Court as well as this Court, exercising powers under Section 37 of the Act are Courts having inherent powers to which the principles of Section 151 of Code of Civil Procedure, 1908 would apply.

Section 34 of the Act reads 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 sub-section (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 1. *For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-*

- (i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or*
- (ii) it is in contravention with the fundamental policy of Indian law; or*
- (iii) it is in conflict with the most basic notions of morality or justice.*

Explanation 2. *For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]*

[(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]

(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.

[(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice

referred to in sub-section (5) is served upon the other party.]"

Section 37 of the Act reads as follows:-

"37. Appealable orders.- (1) *An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely,-*

- [(a) refusing to refer the parties to arbitration under Section 8;*
- (b) granting or refusing to grant any measure under Section 9;*
- (c) Setting aside or refusing to set aside an arbitral award under Section 34.]*

(2) An appeal shall also lie to a Court from an order of the arbitral tribunal,-

- (a) accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16; or*
- (b) granting or refusing to grant an interim measure under Section 17.*

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

39. It is clear from a reading of the provisions of the Act as well as the decisions of the Apex Court and the various High Courts considering the provisions of the said Act that the strict language limiting the nature and scope of the challenge to an arbitral award or the proceedings in

arbitration are intended to see that arbitral proceedings do not become long drawn out proceedings as in the case of conventional litigations. The purpose of such strict provisions relating to challenge to arbitral awards and the strict interpretation given by Courts of law is to prevent unnecessary delays in the process of dispute resolution through Arbitration.

40. It is indeed true that the recourse provided under Section 34 of the Act for filing an application is for setting aside an award. The Arbitral award can be set aside only on the grounds as provided in sub-Section (2) and (2-A) of the Act. Section 37 also provides for an appeal from an order setting aside or refusing to set aside an arbitral award under Section 34. It is indeed true that the challenge against arbitral awards or orders passed by the arbitrator would lie only as provided under Section 34 or Section 37 of the Act as the case may be. The Apex Court has clearly held that a writ petition under Article 226 or Article 227 of the Constitution of India would be incompetent to intervene in matters arising for arbitration proceedings particularly when the orders of arbitral Tribunal are interim in nature.

41. Section 2(c) of the Act provides that arbitral award includes an interim award. An interim award is one which has the character of a full-fledged award and would have an independent existence apart from being part of the final award. In the instant case, the decision of the arbitrator to reopen the arbitration on the basis of the application preferred under Section 33(4) of the Act has all the characteristics of an interim award and would have an existence of its own. The legality or otherwise of the order passed by the arbitrator is capable of being considered independently as well. It is pertinent to note here that an appeal under Section 37 of the Act is also maintainable against an order accepting a plea referred to in sub-Section (2) or (3) of Section 16 of the Act, that is, the acceptance of a plea that the arbitral Tribunal does not have jurisdiction or is exceeding its jurisdiction.

42. In the instant case, if interference in the order of the learned arbitrator is declined on the technical ground that the order impugned before Section 34 Court is not an award, the result would be that the further process of arbitration would result, and thereafter, the award so passed

would again have to be subjected to a challenge on the very same grounds that are now raised before this Court as well as the Section 34 Court.

43. We are of the opinion that the learned Arbitrator was in error in having passed an order in the nature of reopening the Arbitration on an application under Section 33(4) of the Act. The scope of Section 33 of the Act being limited to a correction of clerical or similar mistake or a re-computation or a consideration of a claim presented in the arbitral proceedings but omitted from the arbitral award, there is no scope for an "additional adjudication" under Section 33 of the Act. Even if it is accepted that a Section 34 application would lie only as against an Arbitral Award, we find that the order of the Commercial Court refusing to interfere with the completely unwarranted exercise of power by the Arbitrator would lead to a situation where the appellant would be dragged into further Arbitral proceedings which is not warranted under the provisions of Section 33(4) of the Act. The claimant, who had not chosen to challenge the Arbitral Award in both the instances, cannot be now permitted to broaden the scope of the Arbitration or seek a

further Arbitration in the guise of a petition under Section 33(4) of the Act.

44. In the above circumstances, we are of the opinion that the order passed by the Arbitrator in the instant case amounts to an interim award and the validity of the said order deserves a consideration, if not in the Section 34 proceedings, at least before this Court in the Section 37 proceedings.

45. In the above view of the matter, we are of the opinion that the exercise of reopening of the Arbitration and calling for fresh claims, documents etc., by the Arbitrator is completely unwarranted. The Arbitrator can act at best only within the confines of the statute as warranted under Section 33(4) of the Act.

46. In the result:-

- (i) The Commercial Appeal is **allowed**.
- (ii) The impugned order dated 27.07.2024 passed by the Commercial Court in Com.AP.No.154/2023, is set aside.
- (iii) The order of the Arbitrator dated 18.08.2023, is also set aside.

- (iv) The application is remanded to the Arbitrator for consideration strictly in accordance to Section 33(4) of the Act. Appropriate orders shall be passed by the Arbitrator on the Section 33 application strictly within the confines of the provision, taking note of the contentions of the parties and after examining whether the issues raised have already been concluded by the Arbitral Award.
- (v) All contentions of the parties are left open.
- (vi) Necessary shall be done within a period of two months from the date of receipt of a copy of the judgment. To enable the arbitrator to consider the application, the parties shall mark appearance before the Arbitrator on a date to be specified by the Arbitrator.

Pending interlocutory applications, if any, shall stand disposed of.

**Sd/-
(ANU SIVARAMAN)
JUDGE**

**Sd/-
(DR. K.MANMADHA RAO)
JUDGE**

cp*