Olympus Superstructures Pvt. Ltd. vs Meena Vijay Khetan & Ors. on 11 May, 1999

Equivalent citations: AIR 1999 SUPREME COURT 2102, 1999 AIR SCW 1831, (1999) 3 ANDHLD 675, 2001 (4) COM LJ 370 SC, (2001) 4 COMLJ 370, 1999 (2) ARBI LR 695, 1999 (3) SCALE 587, 1999 (3) LRI 383, 1999 (6) ADSC 23, 1999 (5) SCC 651, (2000) 1 ARBILR 39, (1999) 3 JT 514 (SC), 1999 (2) UJ (SC) 997, 1999 (6) SRJ 383, (1999) 2 CIVILCOURTC 700, (1999) 3 MAD LW 1, (1999) 34 CORLA 99, (1999) 2 ARBILR 695, (1999) 5 SUPREME 338, (1999) 3 SCALE 587, (2000) 2 CIVLJ 109, (1999) 3 CURCC 9, (1999) 4 ANDH LT 1, (1999) 2 ANDHLT(CRI) 162, (1999) 4 BOM CR 355, 1999 (3) BOM LR 220, 1999 BOM LR 3 220

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Bench: M. Jagannadha Rao, S.N. Phukan

PETITIONER:
OLYMPUS SUPERSTRUCTURES PVT. LTD. ...

Vs.

RESPONDENT:
MEENA VIJAY KHETAN & ORS. ...

DATE OF JUDGMENT: 11/05/1999

BENCH:
M. JAGANNADHA RAO, & S.N. PHUKAN.

JUDGMENT:

M.JAGANNADHA RAO,J.

Leave granted.

These three Civil Appeals are directed against the Judgment of the Bombay High Court in A.Nos. 175-177 of 1998 dated 2.4.98 in Arbitration Petitions 281-283 of 1997. By virtue of this judgment dated 2.4.98, the decision of the learned Single Judge in Arbitration Petitions 281-283 of 1997 dated 12.1.1998 was confirmed. The learned Single Judge had, by his decision dismissed the objections filed by the appellant under Sections 5 and 34 of the Arbitration and Conciliation Act, 1996

(hereinafter called the `Act') to the awards and confirmed the three Awards passed by the Arbitrator on 13.11.1997. The learned Chief Justice of the Bombay High Court had appointed a retired Judge of that Court on 13.6.1997 as sole arbitrator and the said arbitrator had passed the three awards on 13.11.1997.

The facts are as follows:

> There were three main agreements dated 9.3.94, 9.3.94 and 29.6.1994 under which the appellant agreed to sell Flat Nos.

101-102, 201-202 and 301-302 on first, second and third floors of the proposed building Wembley at, Play ground Road, Vile Parle (East) Bombay to the respondents on the terms contained in the agreements. The consideration was Rs.76, 72 and 74 lakhs respectively. The possession of the flats was to be handed over alongwith amenities by 30.10.94. The terms of the contract provided the time- schedule for payments by the purchasers and said time was to be the essence of the contract and it was stated that failure to pay would entail termination of the agreement. The purchasers were to pay 21% interest in case of default. There were various other terms. Clause 7 provided that the power of termination should not be exercised by the appellant unless and until the appellant had given to the purchasers 15 days prior notice in writing of the intention to terminate the agreement and given the purchasers opportunity to set right the breaches, if any committed, within the said period. Clause 39 in each agreement contained an arbitration clause which read as follows:

> L.....I.....T.....T.....T.....T.....T.....T..J "39. All disputes of differences whatsoever which shall at any time hereafter (whether during the continuance and in force of this Agreement or upon or after it discharges or determination) arise between the parties hereto or their respective successors in title and assigns touching or concerning this Agreement or its interpretation or effect or as to the rights duties and liabilities of the parties and liabilities of the parties hereto or either of them under or by virtue of this Agreement or otherwise as to any other matter in any way connected with arising out of or in relation to the subject matter of this Agreement shall in accordance with the subject to the provisions of the Arbitration Act, 1940 or any statutory modification or re-

enactment thereof for the time being in force be referred to a single arbitrator if agreed upon by the parties or otherwise to the arbitration of two arbitrators to be appointed by each party to the dispute whose decision ins the matters shall be final and binding on the parties hereto."

It will have to be noticed that the above clause did not refer to any specific named arbitrator or arbitrators.

Considerable amounts were paid under the above said three main agreements to the appellant. The appellant would contend there was default on part of the respondents while the respondents would contend that there was no progress in the construction.

There were three other separate agreements dated 9.3.94, 9.3.94 and 29.6.94 (hereinafter called the Interior Design Agreements) between the appellant and the same identical purchasers in which the appellant was appointed as `Interior Designer' for carrying out renovation and interior designing and decorating the respective flats and the exterior area and to provide/install the special amenities in the flats for a lumpsum payment of Rs.10 lakhs each. No amount was, however, paid to the appellant under these three agreements before or at the time of executing of these three agreements. There is again a separate arbitration clause in each of these three agreements. It reads as follows:

> "5. All disputes and difference which may arise between the parties hereto in connection with this agreement of interpretation and effect thereof or in connection with the rights and obligations of the parties hereto shall be referred to the Joint Arbitration of Shri P.N. Nanavati (Solicitor) and Mr.Rashmi Mehta (Solicitor). If the aforesaid Arbitrators then and in such event such disputes and differences shall be referred to arbitration of two arbitrators, one to be appointed by each of the parties hereto. The Arbitrators so appointed shall appoint an umpire before entering upon the reference. The Arbitrators of the umpire as the case may be shall be governed by the provisions of the Indian Arbitration Act, 1940 or any statutory modification or re-enactment thereof from time to time in force."

It will be noticed that this clause required reference to specific named arbitrators.

On 24.4.95, the respondent wrote to the appellant seeking information as to the stage of the construction and as to when the appellant would be handing over possession of the flats. The appellant replied on 6.6.95 complaining default on the part of the purchasers as some cheques were dishonored and stated that he was terminating the three agreements giving 15 days notice. On 22.6.95 the respondents wrote to the appellant that considerable amounts were paid under each of the main agreements and that the appellant had not cared to inform the respondents about the progress of the construction, that the story of default was false, that the dishonored cheques had been substituted by Banker's cheques or cash and that the termination was invalid. The respondents were ready and willing to complete the contract. On 21.10.95 the respondents wrote to the appellant giving details of payments and the mode of payment of the balance under the main and the Interior Design Agreements and stating that 10 lakhs were paid under each of the three Interior Design Agreement, by way of cash to the appellant's solicitor, that only 6 lakhs remained to be paid after the 6th slab was laid and that the termination of the main agreement was bad in law etc. The appellant was called upon to withdraw the contention regarding termination and was asked as to when the 6th of the slabs would be laid so that the payment of Rs. 6 lakhs could be made. The appellant did not send any reply. The respondent then gave a notice on 19.3.96 making various allegations against the appellant. A reply was sent by the appellant on 27.7.96 limited to the allegations in the said letter dated 19.3.96. A final notice was given by the respondents on 8.7.96 stating that as there were several disputes and differences between the parties in relation to the agreements dated 9.3.94, 9.3.94 and 29.6.1994, they should be referred to one out of the three retired Judges whose names were suggested by the respondents. As the appellant failed to reply agreeing for arbitration, one of the respondents moved the Court on 9.8.96 seeking interim protection before the filing of a regular petition under the Arbitration and Conciliation Act, 1996. Thereafter a regular petition for

appointment of arbitrator was moved under section 11 of the Act on 3.6.97 and an order dated 13.6.97 was passed by the learned Chief Justice appointing a sole arbitrator on 7.7.97. The learned Arbitrator fixed a preliminary meeting on 14.7.97. On that day the arbitrator issued certain directions. On 29.7.97, the respondents filed their claim before the arbitrator. The appellant took several adjournments on 19.8.97, 23.9.97 and 3.10.97 and raised an objection on 9.10.97 regarding the continuance of the arbitrator which objection was dismissed on 16.10.97. On 16.10.97 the appellant's new counsel sought time to challenge the order of the arbitrator dated 9.10.97. Adjournment was refused. The arbitrator took up the matter for evidence. On 16.10.97, the respondents (i.e. claimants before arbitrator) examined their witnesses in chief and the appellant's counsel partly cross-examined them and sought time and the matter was adjourned for 21.10.97. There were some winding up proceedings against the appellant and a provisional liquidator was appointed on 30.4.97. On an application by the respondents, the arbitrator, after hearing the counsel for the parties, passed an order on 22.10.97 that no leave of the company court was required at the stage of appointment of a provisional liquidator. The appellant's advocate sought further time and the same was refused. The appellant's advocate then filed three IAs for condoning delay in filing the written statement dated 22.10.97 in all three matters. Delay was condoned. Further adjournment sought by appellant was refused. On 27.10.97 evidence was recorded but there was no cross examination by the appellants' counsel and the evidence was closed. On 13.11.97, the award was passed granting relief of specific performance in respect of the three main agreements and also in respect of the three Interior Design Agreements.

The appellant challenged the three awards under Section 34 by filing three applications in December 1997 and these were dismissed by a learned Single Judge on 12.1.98 and by the Division Bench on 2.4.98. It is against these judgments that the present appeals have been filed.

Learned counsel for the appellant Sri H.L.Tiku raised various contentions. He contended that the reference to arbitration was based upon the three main agreements dated 9.3.94, 9.3.94 and 29.6.94 and therefore the arbitrator could not have decided the disputes regarding the three other Interior Design agreements dated 9.3.94, 9.3.94 and 29.6.94 and there was neither a prayer nor a reference of the disputes under the three latter Interior Design agreements. It was pointed out that the arbitration clauses in the main agreements could not supersede the separate arbitration clauses under the Interior Design Agreements which provided for named arbitrators. Merely, because the appellant remained ex parte before the arbitrator after a stage, the arbitrator could not assume the correctness of the pleas of the respondents and he ought to have insisted on proof of the pleas raised by the respondents. A point was raised in the grounds in this Court that an arbitrator could not grant specific performance of an agreement and hence section 34(2)(b)(i) of the Act was attracted. It was also contended that in respect of the main agreements, the respondents had committed default, that respondents were not ready and willing, that the termination of the main agreement by the appellant was valid and that, on facts, an award for specific performance could not have been granted. In any event, as provided in the agreements, the respondents should have been directed to pay interest on the balance at consideration 21%.

On the other hand, the learned senior counsel for the respondents Sri D.R.Dhanuka and Sri K.K.Venugopal pointed out that under the arbitration clause contained in the main agreements, it

was permissible to refer to arbitrator not only disputes and differences under the main agreements but also in respect of "connected" matters, that the appellant never raised any point relating to jurisdiction under Section 16 of the Act, that the arbitrator could not decide the dispute concerning the Interior Design Agreements and that the point was not also raised before the learned Single Judge. For the first time the point was raised before the Division Bench. The same could not be permitted to be raised after the award. An arbitrator could grant specific performance of an agreement of sale. So far as the other points raised on the merits of the award were concerned, the same could not have been raised in view of the narrow scope of objections permitted by sub-clause (2)(b) of Section 34 of the new Act. It was contended that the challenge to the award was rightly rejected by the High Court. It was prayed that the appeals be dismissed. On these contentions, the following points arise for consideration:

(1) Whether the appellant is right in contending that the arbitration clause 39 in the main agreement did not permit the arbitrator to deal with the disputes relating to the Interior Design Agreement which contained a different arbitration clause and whether the award, in respect of the Interior Design Agreement was void?

(2) Whether the appellant who did not raise any question of jurisdiction under Section 16 of the Act in relation to the disputes under the Interior Design Agreements, could have raised a question of jurisdiction of the arbitrator or of his power to deal with issues arising under the said Agreements at the stage of section 34?

(3) Whether an arbitrator is not entitled to pass an award directing specific performance of an agreement of sale and the subject matter of the dispute is not capable of arbitration under section 34(2)(b)(i) of the Act?

(4) Whether the appellant could question factual findings relating to default, time being essence, readiness and willingness etc. before the arbitrator under Section 34 of the Act?

Points 1 and 2:

From the facts mentioned, it would be noticed that there were two sets of agreements, namely the main set of three agreements dated 9.3.94, 9.3.94 and 29.6.94 and the three other agreements of the same dates dealing with Interior Designing. Each of main agreements contained an arbitration clause (clause 39) of a general nature which did not specify any particular arbitrator's name while the Interior Design Agreements in each case contained a separate arbitration clause (clause 5) mentioning the name of specified arbitrators. It was the case of the appellant that the notice given on 8.7.96, the petition under Section 11 of the Act for appointment of an arbitrator and the reference covered only disputes and differences arising under the main agreements and there was no reference in respect of the disputes and differences arising out of Interior Design Agreements. It is contended

> for the appellant that the order appointing the arbitrator dated 13.6.97 specifically dealt with disputes and differences under the main agreements only and not those under the Interior Design Agreements.

Before we go into the interpretation of the arbitration clauses, we have to refer to the conduct of the appellant which is very much relevant for purposes of section 16 of the Act. The respondents had referred in their claim statement before the arbitrator dated 29.7.97 to the disputes and differences arising under the Main agreements as well as under the Interior Designer Agreements. The appellant filed its written statement dated 22.10.97 but no objection was raised that the disputes and differences contained in the three Interior Design Agreements were not intended to be referred to the arbitrator or that the same could not be decided by the arbitrator appointed under the main agreement. The appellants' counsel had cross-examined the respondents' witnesses upto a stage and even then no such objection as to scope of reference was raised. The arbitrator referred in his award to the sole contention of the appellant before him so far as the Interior Design Agreements were concerned and that was that the said agreements were void inasmuch as no amount was paid at the time of the agreements (though Rs.10 lakhs each was agreed to be paid). That was the only contention concerning these three Interior Design agreements. No dispute as to the power of the arbitrator to deal with disputes under these three agreements was raised. That means that the appellant accepted that disputes under these agreements were also covered by the reference. In the objections to the award filed in the Court under section 34 no such point was raised except a general ground (j) that the entire proceedings of arbitration were illegal and bad in law, null and void and that the award was liable to be set aside. In the order of the learned Single Judge in para 5 it was stated that only 3 points were raised and we find that this was not one of those points argued before the learned Single Judge. For the first time this point relating to the scope of the reference was raised/argued before the Division Bench and the same was rejected.

In our view, learned senior counsel for the respondents are right in contending that if parties before the arbitrator had any objections to the arbitrator's Jurisdiction, the same must be raised before the arbitrator as provided in sub-clauses (2) and (3) of section 16. (We are, however, not deciding the consequences of not raising the said question at that stage). Section 16 of the Act reads as follows:

> "16. Competence of arbitral tribunal to rule on its jurisdiction - (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for the purpose,-
>
> (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
>
> (b) a decision by the arbitral that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
>
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or

participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub- section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."

Section 16 is based on Article 16 of the UNCITRAL model law. Sub-clause (1) of section 16 corresponds to sub-clause (1) of Article 16. Sub-clauses (2) and (3) of section 16 of the Act correspond substantially to sub-clause (2) of Article 16. The words `not later than' and `as soon as may be' in sub-clause (2) of Article 16 of the Model Law occur in sub- clauses (2) and (3) of section 16 of the Act. It will be noticed that under the Act of 1996 the arbitral tribunal is now invested with power under sub-clause (1) of section 16 to rule on its own Jurisdiction including ruling on any objection with respect to the existence or validity of the arbitration agreement and for that purpose, the arbitration clause which forms part of the contract shall be treated as an agreement independent of other terms of the contract and any decision by the arbitral tribunal that the contract is null and void shall not entail ipso Jure affect the validity of the arbitration clause. This is clear from sub-clause (b) of Section 16(1) which states that a decision by the arbitral tribunal that the main contract is null and void shall not entail ipso Jure the invalidity of the arbitration clause.

In the present context sub-clauses (2) and (3) of Section 16 are relevant. They refer to two types of pleas and the stages at which they can be raised. Under sub-clause (2) a plea that the arbitral tribunal does not have Jurisdiction shall be raised not later than the submissions of the statement of defence: however, a party shall not be precluded from raising such a plea merely because he has appointed or participated in the appointment of, an arbitrator. Under sub- clause (3) a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority, is raised during the arbitral proceedings. These limitations in sub-clauses (2) and (3) are subject to the power given to the arbitrator under sub-clause (4) of Section 16 that the tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3) - admit a later plea if it considered the delay justified. Sub-section (5) requires the arbitral tribunal to decide on the pleas referred to sub-section (2) or sub-section (3) at that stage itself. It is further provided that if either of the pleas is rejected and the arbitral tribunal holds in favour of its own Jurisdiction, the tribunal will continue with the arbitral proceedings and proceed to make the arbitral award. Then comes sub- clause (6) which states that the party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section

34.

Section 34 of the Act deals with the filing of an application for setting aside the award and reads as follows. Sub-clause (1) and (2) are relevant for our purpose and they read 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
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> (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) of clause (b), 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."

Section 34 of the Act is based on Article 34 of the UNCITRAL Model Law and it will be noticed that under the 1996 Act the scope of the provisions for setting aside the award is far less the same under Section 30 or Section 33 of the Arbitration Act of 1940.

It will be noticed that under sub-clause 2(a) (iv) of Section 34, the arbitral award may be set aside by the Court if the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitrator or if it contains a decision on matters beyond the scope of the submission to arbitration. The proviso to clause (iv) deals with severability.

The word `terms of the submission to arbitration' in Section 34 (2)(a)(iv) in our view, refer to the terms of the arbitration clause. This appears to be the meaning of the word if one refer to Section 28 which uses the word `dispute submitted to arbitration' and to Section 43 (3) which uses the word `submit'future dispute to arbitration.

A question arises whether in view of the provisions of Section 16(2) which uses the word `not later than', any such objection as contained in Section 16(2) not raised before the arbitrator can be permitted to be raised for the first time under Section 34. Similarly a question arises whether in view of the proviso of Section 16(3) which uses sthe word `as soon as' any objection as contained in Section 16(3), cannot be raised for the first time under Section 34.

It may be argued on one side that the time limits set in Arbitration Clause (2) and (3) of Section 16 are mandatory and do not permit the said question to be raised at a later point of time even under Section 34. An opposite view could be that these being Juridictional issues, the fact that they were not raised earlier could not preclude the questions being raised under Section 34 inasmuch as consent, express or implied could not confer jurisdiction.

We do not think it necessary to decide this question in view of the fact that though Section 16 was referred to during the course of the hearing, the learned senior counsel for respondents had argued on merits that the arbitrator had Jurisdiction to decide the disputes/differences concerning the Interior Design agreements also and that even if the appellant could be permitted to raise these issues at the stage of Section 34, there was no substance in the said contentions.

We shall, therefore, proceed to decide the question of jurisdiction on the assumption that the appellant is not precluded from raising these questions at the stage of Section 34 though these issues have not been raised before the arbitration as per sub-clause (2) and (3) Section 16. Before we do so, we shall advert to a recent decision of this Court in Rajinder Krishan Khanna vs. Union of India [1998 (7) SCC 129] wherein this Court referred to Section 16 and Section 34 (2)(a)(iv) of the Act. In that case a reference was made to arbitrators when the appeal was being heard by this Court. The appellant was the claimant. The opposite party raised a specific plea before the arbitrators that they

had no Jurisdiction to decide about the value of the potentiality of the land and that the claim petition before the arbitrator could not have included the above claim, which was outside the reference and outside the writ petition and the Civil Appeal from which the reference arose by consent. It was argued for the appellant in reply that the respondents did not have a specific issue framed by the arbitrators in regard to the scope of the reference and the respondents were estopped from contending that the arbitrators could not have dealt with the question. This Court held that this case was not a case where no objection was raised by the respondent before the arbitrators as to the scope of the reference. A specific objection was raised in the written statement of the respondents that the potentiality of the land was not one of the questions referred to the arbitrators. This Court held that the fact that an issue was not framed by the arbitrtators that the item was not covered by the reference did not raise any estoppel. The said question as to the scope of the reference could therefore be permitted to be raised under Section 34(2)(a)(iv) in the objections to the award. It is true that on the facts of the case before us, the objection as to the scope of the reference was not raised in the written statement of the appellant. But as already stated, we are not deciding the question whether the appellant is precluded at the stage of section 34 from raising the question relating to the scope of the reference. We shall assume, for the purpose of this case, that the said contention can still be raised under Section 34(2)(a)(iv). We shall accordingly deal with the merits of the question of Jurisdiction of the arbitrator.

It is true that there are two agreements in each of the three appeals before us. One is the main agreement relating to construction of flats and the arbitration clause 39 there is general and does not refer to any named arbitrator. It is also true that there is a separate arbitration clause 5 in the Interior Design Agreement which gives the names of specific arbitrators. But it must be noticed that clause 39 permits reference to arbitration not only of issues arising under the main agreement but also those disputes or differences which are "connected" with disputes arising under the main agreement. The following words in the main agreement are important.

> "Otherwise as to any other method in any way connected with, arising out of or in relation to the subject matter of this agreement."

In other words, clause 39 refers to the `subject matter' of the main agreement and also to `any other matters' and these `any other matters' if they are "connected" with or arise out of or are in relation to the subject matter of the main agreement, the disputes and differences concerning those `other matters' can also be referred to arbitration under clause 39 of the main agreement. In other words, parties intended arbitration in respect of the main disputes and connected disputes before one arbitral tribunal.

As to the meaning of the words "connected with, arising out of or in relation thereto", we may refer to Renusagar Power Co.Ltd. vs. General Electric Co. [1984 (4) SCC 679]. It was held that these words "are of the widest amplitude and content and include even questions as to the existence and effect (scope) of the arbitration agreement.

Question is whether the disputes and differences arising under the Interior Design Agreement are integrally "connected with" the disputes and differences arising from the main contract? In our

view, they are. The main agreement refers to the payment of the last instalment of Rs.17 lakhs against `taking of possession' of the flats. Therefore the main agreements extended upto the time of taking of possession by the purchasers. Para 8 of the main agreement states that the fixtures, fittings and ameneties to be provided by the Developers in the said building and the flat/unit are those that are set out in Annexure E annexed to the main agreement. Now annexure E refers not only to the building but to the type of doors, corridors, fixtures, the nature of the flooring, the bathroom tiles and fittings, the Kitchen, the W.C. and the nature of the Electric Wiring. When we come to the Interior Design Agreement, Annexure A itself refers to the element of designs, Interior finishes/fittings/services and deals with the Walls, Balcony, type of Main Door and Internal Doors, External Doors. It also deals with the type of staircase, the flooring (Italian marbles for Hall room, Bed rooms and passages), Toilet (Italian Marbles, Designed Basin Ceiling Valve plassstering, Bath tub/Ja cuzzi all hardware fitting inclusively Germany range), Marble skirting, Lobby & Entrance (Italian Marble Flooring), Plumbering, Gas system, Electrical (Heavy Duty ISI quality concealed copper wiring) etc. Thus it will be noticed that there are several items in Schedule E of the main agreement which overlap the items in Schedule A of the Interior Design Agreement. In view of the overlapping, in our opinion it has to be said that several items in the Schedule A of the Interior Design Agreement are in modification/substitution of the items in the Main Agreement. Therefore the coverage of the two agreements makes it clear that the execution of the Interior Design Agreement is `connected with' the execution of the main Agreement. It may also be noted that the date of the main agreement and the Interior Design Agreement is the same in each of the three cases and clause 3 of the Interior Design Agreement states specifically that `the work of the said renovation, designing and installation shall commence from the execution thereof' which means that the execution of the Interior Design agreement and the main agreement is to be simultaneous.

But then, we have to explain the purpose of the arbitration agreement contained in clause 5 of the Interior Design Agreement? Is it wholly superfluous?

If there is a situation where there are disputes and differences in connection with the main agreement, and also disputes in regard to "other matters" "connected" with subject matter of the main agreement then in such a situation, in our view, we are governed by the general arbitration clause 39 of the main agreement under which disputes under the main agreement and disputes connected therewith can be referred to the same arbitral tribunal. This clause 39 no doubt does not refer to any named arbitrtators. So far as Clause 5 of the Interior Decorator Agreement is concerned, it refers to disputes and differences arising from that agreement which can be referred to named arbitrators and said clause 5, in our opinion, comes into play only in a situation where there are no disputes and differences in relation to the main agreement and the disputes and differences are solely confined to the Interior Design Agreement. That, in our view, is the true intention of parties and that is the only way by which the general arbitration provision in clause 39 of the main agreement and the arbitration provision for named arbitrator contained in clause 5 of the Interior Design Agreement can be harmonised or reconciled. Therefore, in a case like the present where the disputes and differences cover the main agreement as well as the Interior Design Agreement, - (that there are disputes arising under the main agreement and the Interior Design Agreement is not in dispute) - it is the general arbitration clause 39 in the main agreement that governs because the questions arise also in regard to disputes relating to the overlapping items in the Schedule to the

main agreement and the Interior Design Agreement, as detailed earlier. There cannot be conflicting awards in regard to items which, overlap in the two agreements. Such a situation was never contemplated by the parties. The intention of the parties when they incorporated clause 39 in the main agreement and clause 5 in the Interior Design agreement was that the former clause was to apply to situations when there were disputes arising under both agreements and the latter was to apply to a situation where there were no disputes or differences arising under the main contract but the disputes and differences were confined only to the Interior Design Agreement. A case containing two agreements with arbitration clauses arose before this Court in Aggarwal Engineering Co. vs. T.H. Machine Industries [AIR 1977 S.C. 2122]. There were arbitration clauses in two contracts one for sale of two machines to the appellant and the other appointing the appellant as sales-representative. On the facts of the case, it was held that both the clauses operated separately and this conclusion was based on the specific clause in the sale contract that it was the "sole repository" of the sale transaction of the two machines. Krishna Iyer,J. held that if that were so, then there was no jurisdiction for travelling beyond the sale contract. The language of the other agreement appointing the appellant as sales representative was prospective and related to a sales agency and `later purchases', other than the purchases of these two machines. There was therefore no overlapping. The case before us and the above case exemplify contrary situations. In one case the disputes are connected and in the other they are distinct and not connected. Thus, in the present case, clause 39 of the main agreement applies. Points 1 and 2 are decided accordingly in favour of the respondents.

Point 3: This point becomes relevant because if the arbitrators cannot grant specific performance, a point can be raised under Section 34(2)(b)(i) that the subject matter of the dispute is not capable of arbitration.

One of the points raised in the grounds in this Court is that the grant of specific performance is discretionary and the discretion to grant or not to grant specific performance has been conferred by the Specific Relief Act, 1963 on the Civil Court and hence the arbitrator cannot be deemed to have been empowered to grant such a relief.

We may point out that the Punjab High Court in Laxmi Narayan vs. Raghubir Singh [AIR 1956 Punjab 249] the Bombay High Court in Fertiliser Corporation of India vs. Chemical Construction Corporation [ILR 1974 Bombay 856/858 (DB)] and the Calcutta High Court in Keventer Agro Ltd. vs. Seegram Comp. Ltd. [Apo 498 of 1997 & Apo 449 of (401)] (dated 27.1.98) have taken the view that an arbitrator can grant specific performance of a contract relating to immovable property under an award. No doubt, the Delhi High Court in M/s PNB Finance Limited vs. Shital Prasad Jain & Others [AIR 1991 Del. 13] has however held that the arbitrator cannot grant specific performance. The question arises as to which view is correct.

In our opinion, the view taken by the Punjab, Bombay and Calcutta High Courts is the correct one and the view taken by the Delhi High Court is not correct. We are of the view that the right to specific performance of an agreement of sale deals with contractual rights and it is certainly open to the partiess to agree - with a view to shorten litigation in regular courts - to refer the issues relating to specific performance to arbitration. There is no prohibition in the Specific Relief Act, 1963 that

issues relating to specific performance of contract relating to immovable property cannot be referred to arbitration. Nor is there such a prohibition contained in the Arbitration and Conciliation Act, 1996 as contrasted with Section 15 of the English Arbitration Act, 1950 or section 48(5)(b) of the English Arbitration Act, 1996 which contained a prohibition relating to specific performance of contracts concerning immoveable property.

It is stated in Halsburys' Laws of England 4th Ed., (Arbitration Vol.2 para 503) as follows:

> "Nature of the dispute or difference: The dispute or difference which the parties to an arbitration agreement agree to refer must consist of a justiciable issue triable civilly. A fair test of this is whether the differences can be compromised lawfully by way of accord and satisfaction (Cf. Bacon's Abidgement and Award A)."

Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, (say) physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (Keir vs. Leeman) (1846) 9 Q.B. 371. Similarly, it has been held that a husband and wife may, refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter (Soilleux vs. Herbst) (1801) 2 Bos & p. 444; Wilson vs. Wilson (1848) 1 HL Cas 538; (Cahill vs. Cahill) (1883) 8 App Cas 420(HL).

Further, as pointed in the Calcutta case, merely because there is need for exercise of discretion in case of specific performance, it cannot be said that only the civil court can exercise such a discretion. In the above case, Ms.Ruma Pal,J. observed:

> ".....merely because the sections of the Specific Relief Act confer discretion on courts to grant specific performance of a contract does nto means that parties cannot agree that the discretion will be exercised by a forum of their choice. If the converse were true, then whenever a relief is dependent upon the exercise of discretion of a court by statute e.g. the grant of interest or costs, parties chould be precluded from referring the dispute to arbitration."

We agree with this reasoning. We hold on Point 3 that disputes relating to specific performance of a contract can be referred to arbitration and Section 34(2)(b)(i) is not attracted. We overrule the view of the Delhi High Court. Point 3 is decided in favour of respondents.

Point 4: This point concerns the issues between the parties on the merits of the award relating to deafult, time being exercise, readiness and willingness etc. These are all issues of fact. If we examine section 34(2) of the Act, the relevant provisions of which have already been extracted under Point 1 and 2, it will be seen that under sub-clause (b) of section 34(2), interference is permissible by the Court only if

(i) the subject matter of the dispute is non capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral amount is in conflict with the public policy in India.

The Explanation to the provisions says that without prejudice to the generality of sub-clause (ii) of clause (b), it is declared for the avoidance of any doubt, that an award is to be treated as 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 sections 75 or 81. Section 75 deals with confidentiality while section 81 deals with admissibility of evidence in other proceedings. We do not have any such situation before us falling within section 34(2)(b)(ii). The factual points raised in the case before us, to which we have referred to earlier, do not fall within Section 34(2)(b)(ii). Coming to Section 34(2)(b)(i) we have already held that the subject matter of the dispute is not incapable of settlement by arbitration under the law for the time being in force. Nor is any point raised that the arbitral award is in conflict with the public policy of India. We are, therefore, of the view that the merits of the award, on the facts of the case do not fall under Section 34(2)(b) of the Act. Point 4 is held accordingly against the appellant.

For the aforesaid reasons, the appeals fail and are dismissed but in the circumstances without costs.