Jumbo World Holdings Limited vs Embassy Property Developments Private ... on 10 January, 2020

Author: Senthilkumar Ramamoorthy

Bench: Senthilkumar Ramamoorthy

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on 28.11.2019
Judgment pronounced on 10.01.2020

CORAM

THE HONOURABLE Mr. JUSTICE SENTHILKUMAR RAMAMOORTHY

O.P. No.891 of 2015
and
A.Nos.2795 and 6816 of 2019

1.Jumbo World Holdings Limited,
Sea Meadow House,
Blackburne Highway, Road Town,
British Virgin Islands.

2.Dandavati Investments and
Trading Company Private Limited,
5th Floor, 'The International',
16, New Marine Lines, Cross Rd. No.1,
Church Gate, Mumbai – 400 020. ... Petitioners

Vs.

1.Embassy Property Developments Private Limited,
No.150, Embassy Point,
15, Infantry Road,
Bangalore – 560 001
Rep. by its Director
Mr.K.Y.Gobikrishnan

2.Mr.Justice V.N.Khare,

Former Chief Justice of India,
B-91, Sector – 27,
Noida – 201 901.

3.Mrs.Justice Sujata Manohar,
Former Judge, Supreme Court of India,
16, Walkeshwar Road,
Mumbai – 400 006.

4.Mr. Justice U.P. Singh
Former Chief Justice, Kerala High Court,
37, Patliputra Colony,
Patna – 800 013. ... Respondents

PRYER: Original Petition is filed under Section 34 of the Arbitration a

Conciliation Act, 1996 to set aside the Award dated 31.08.2015 passed b

the Arbitrators.

For Petitioner : Mr.Darius Khambatta, senior counse
for M/s.Anirudh Krishnan

For Respondent : Mr.Sudipto Sarkar, senior counse
for M/s.R.Parthasarathy

ORDER

The Petitioners are the controlling shareholders of a company, which was called Gordon Woodroffe Limited (GWL). The said company is said to be the owner of about 87 acres of land at Jameen Pallavaram. A Share Purchase Agreement dated 21 December 2005 (the SPA) was entered into between the Petitioners and the Respondent. In terms of the said SPA, the Petitioners agreed to sell a specified number of shares of GWL, which are defined as Sale Shares in the SPA, to the Respondent and http://www.judis.nic.in 2 of 27 the Respondent agreed to buy the same at the consideration specified in the SPA. In the SPA, the Petitioners, inter alia, provided a representation and warranty with regard to GWL's good and marketable title over the lands, without encumbrances. As a pre-requisite to closing/completion of the transaction, the Respondent was permitted to erect a fence around the immovable property of GWL. While such fencing was carried out, third-party obstructions were noticed by the Respondent. Therefore, the Respondent called upon the Petitioners, by letter dated 11.02.2006 (Ex. C-26), to clear such obstructions and ensure that the representation and warranty with regard to the immovable property holds good. In

response, by reply dated 20.02.2006 (Ex.C-27), the Petitioners provided two options to the Respondent, namely, (a) amend the SPA by excluding the representations, warranties and indemnities in respect of the contentious parcels of land (the Contentious Land Parcels), extend the scheduled closing date of 21.02.2006 by 15 calendar days for such purpose and close the transaction; or (b) close the transaction by relying on the indemnities in respect of the property. The Respondent, however, by rejoinder dated 24.02.2006 (Ex.C-28), insisted that the encumbrances should be cleared. In these circumstances, the Petitioners terminated the SPA on 18.05.2006 (Ex.C-33), by reference to Clause 12.3 thereof, and endeavoured to refund the advance of Rs.25 crores. In response, by reply dated 25.05.2006 (Ex.C-34), the Respondent stated that the termination http://www.judis.nic.in 3 of 27 is invalid and reiterated that it was and is ready and willing to consummate the transaction as per the terms of the SPA. This resulted in a dispute, which was referred to arbitration. In the arbitration, the Respondent requested for specific performance of the SPA and, by a subsequent amendment, in the alternative, claimed damages of approximately Rs.1223.2 crores. By majority award dated 31.07.2015 (the Award), specific performance was awarded on condition that the Respondent would waive the representation and warranty as also the indemnity in respect of 24 acres of land and, consequently, not make any claims on that basis. The Award is impugned in this Petition under Section 34 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act).

2. I heard the learned senior counsel, Mr. Darius Khambatta, assisted by Mr.Anirudh Krishnan for the Petitioners and the learned senior counsel, Mr.Sudipto Sarkar, assisted by Mr. Madhan Babu for the Respondent.

3. The learned senior counsel for the Petitioners submitted that the Respondent was provided the option of electing either part or full performance and that the Respondent elected full performance. Consequently, it was not open to the Respondent to subsequently do a volte face and claim part performance, whereas that is precisely the http://www.judis.nic.in 4 of 27 situation in this case. In this connection, he referred to Section 12 of the Specific Relief Act, 1963 (the SRA) and, in particular, clause 3 thereof which enables such part performance. In view of the refusal of the Respondent to accept part performance, he pointed out that the Petitioners were constrained to terminate the SPA because it was not possible-and, indeed, it was beyond the Petitioners' control-to ensure that the encroachments/encumbrances were cleared as demanded by the Respondent.

4. In this regard, he referred to the letter dated 11.02.2006 from the Respondent, whereby the Petitioners were called upon to clear the encumbrances. He also referred to the letter dated 20.2.2006 (Exhibit C 27), whereby the Petitioners offered two options, namely, (a) to amend the SPA and exclude the Contentious Parcels of Land from the representations, warranties and indemnities and, thereafter, proceed with closing; or (b) proceed with closing by relying on the indemnities in respect of the Contentious Parcels of Land. In response, he pointed out that, by letter dated 24.02.2006, the Respondent insisted on the removal of all obstructions and encumbrances as a condition precedent for completion or closure of the transaction. According to the learned senior counsel, the said letter constituted an unequivocal election of full performance instead of part performance of the SPA. As regards the http://www.judis.nic.in 5 of 27 termination of the SPA, he referred to Clause 12.3 of the SPA and the termination letter dated 18.05.2006, which, according to

the learned senior counsel, was in conformity with Clause 12.3 of the SPA.

5. The learned senior counsel relied heavily on the judgment of the Hon'ble Supreme Court in Surjit Kaur v. Naurata Singh (2000) 7 SCC 379 (Surjit Kaur), which was effectively the sheet anchor of his contentions. The said judgment dealt with an agreement to sell immovable property by execution of the sale deed by the appellant on 30 June 1981. The agreement, in that case, further provided that the appellant would get her name mutated in the record of rights and also give possession of the land to the first respondent. A civil suit was filed by the second respondent against the appellant and the first respondent claiming ownership of the land and an interim order was obtained in the said suit preventing alienation of the land by the appellant. In the circumstances, the appellant stated that she was not in a position to deliver possession as agreed to in the agreement for sale. On these facts, the Supreme Court concluded that the appellant was ready and willing to execute the sale deed but the first respondent was not willing to accept the transaction unless all the conditions, including transfer of mutation in favour of the appellant and delivery of possession also took place. In effect, the Supreme Court concluded that the first respondent elected not http://www.judis.nic.in 6 of 27 to accept part performance of the agreement to sell. After noting the above factual position, in paragraph 13, the Supreme Court concluded as under:

> "…. it is settled law that in cases of part performance of contracts once an election is made then that party cannot at a later date resile or get out of the election. Once the first respondent elected not to accept part performance it was no longer open to him, on finding that he could not get the specific performance of the whole, to claim part performance at a later date. If this was to be permitted then all vendees would not pay the consideration amount on the dates fixed for performance. Whilst such dates may not be of the essense of the contract, they still have some meaning. If this was to be permitted then vendees would withhold payments by first refusing to accept part performance and then after years of litigation agree to accept part performance at the appellate stage…."

6. According to Mr.Khambatta, Surjit Kaur, undoubtedly, applies to this case and constitutes a binding precedent. More importantly, he contended that section 12 (3) of the SRA was not applicable on account of the election of full performance and, therefore, part http://www.judis.nic.in 7 of 27 performance of the SPA should not have been granted by the Arbitral Tribunal as Section 12(1) of the SRA prohibits the grant of specific performance in such situation. In this connection, he also submitted that disregarding a binding judgment of the Supreme Court constitutes a violation of public policy as per the judgment of the Hon'ble Supreme Court in Associate Builders v. DDA (2015) 3 SCC 49 (Associate Builders). In particular, he referred to paragraph 27 of Associate Builders, wherein it was held as under:

> "…. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law."

7. The learned senior counsel also relied upon the above judgment to contend that vital evidence was disregarded, in this case, by the Arbitral Tribunal. In specific, he reiterated that the letter dated 24 February 2006 (exhibit C 28) constituted an unequivocal rejection of part performance and that this document and its implications were disregarded by the Arbitral Tribunal. For this purpose, he invited my attention to paragraph 31 of the judgment, wherein the Supreme Court held that an arbitral award could be set aside if vital evidence is disregarded. http://www.judis.nic.in 8 of 27

8. In response to a question as to whether the request for waiver of a specific representation and warranty as regards the Contentious Parcels of Land would qualify as an offer of part performance of the SPA, he pointed out that the representation and warranty is required to be true and correct not only on the date of execution of the SPA but also on the closing date. More importantly, he pointed out that Clause 5.2 of the SPA stipulates that the acquirer shall be liable to acquire the sale shares from the sellers as per the SPA only if all the sellers' representations and warranties continue to be true and correct as on the date of closing. As a result of the aforesaid clause, he contended that the representations and warranties attain the status of a condition precedent to closing, if full performance is insisted upon. In this context, he reiterated that the letter dated 20 February 2006 constituted an offer of part performance and the reply dated 24 February 2006 constituted an unequivocal rejection of such part performance.

9. He, thereafter, referred to the relevant paragraphs of the Award of the Arbitral Tribunal. In particular, he referred to the finding at paragraph 56 of the Award that the claimant/Respondent herein was at all times ready and willing to comply with the SPA. In light of the offer of part performance by the Petitioners, as held in paragraph 15 of Surjit Kaur, he submitted that readiness and willingness should have been tested in http://www.judis.nic.in 9 of 27 respect of part performance and not full performance given the fact that the Arbitral Tribunal awarded part performance. If so tested, he contended that the letter dated 24.02.2006 and subsequent correspondence and the pleadings would negate the claim of readiness and willingness. He also referred to paragraphs 77-86 of the Award so as to establish that the Arbitral Tribunal clearly awarded part performance by accepting the relinquishment of a part of the claim by the Respondent. By making a specific reference to paragraph 78, he pointed out that it is the admitted position that such relinquishment was made belatedly in the course of arguments. In order to substantiate the contention that this course of conduct was impermissible, he relied upon the judgment of the Supreme Court in Bachhaj Nahar v. Nilima Mandal (2008) 17 SCC 491 (Bachhaj Nahar), wherein, at paragraphs 10-17, the object and purpose of pleadings and issues were elucidated and the Supreme Court re-stated the proposition that evidence cannot be looked at in support of a plea that was not pleaded. According to the learned senior counsel, the conclusions of the Arbitral Tribunal with regard to part performance are directly contrary to Surjit Kaur, wherein the earlier judgements to the effect that a party may elect part performance even at the appellate stage were adverted to before concluding that such election may be done, even at the appellate stage, provided the party concerned had not previously made an election. As in Surjit Kaur, in this case also, he reiterated that http://www.judis.nic.in 10 of 27 the Respondent made such election previously, i.e. by letter dated 24.02.2006, and therefore, should not have been granted part performance. He also relied upon the judgment of the Supreme Court in Mumbai International Airport Private Limited v. Golden Chariot Airport (2010) 10 SCC 422 in support of and to

underscore the contention that the unequivocal communication of the choice, as between multiple options, to the counter party is an election and that such election cannot be resiled from later.

10. The conclusions in paragraphs 45 and 46 of the Award were adverted to next. In paragraph 45, the Arbitral Tribunal concluded that time was not of the essence of the SPA and that parties, by their conduct, proceeded on the basis that time was not of the essence. According to the learned senior counsel, this conclusion is patently erroneous and contrary to the documents on record. In specific, he pointed out that the letter dated 20.02.2006 attaches significance to the scheduled closing date of 21.02.2006. He also pointed out that the conclusions at paragraph 46 are evidently fallacious because they proceed on the basis that the contract prescribes the standard of impossibility of performance, whereas the appropriate test or standard is inability to perform and not impossibility of performance. According to the learned senior counsel, the Petitioners established their inability to perform the http://www.judis.nic.in 11 of 27 specific representation and warranty with regard to the Contentious Parcels of Land.

11. In response and to the contrary, submissions were made on behalf of the Respondent by the learned senior counsel, Mr. Sudipto Sarkar. He opened his submissions by pointing out that the Petitioners made contradictory and incompatible submissions. On the one hand, the Petitioners contended that they were entitled to terminate the SPA under clause 12.1, which enables termination by the sellers if the acquirer fails to close the transaction in spite of the sellers being fully compliant with their obligations. On the other, the Petitioners relied on clause 12.3, which enables termination if a party is unable to perform its obligations for reasons beyond its control and not on account of its wilful default. In this case, he pointed out that the Petitioners pleaded that they were entitled to terminate the SPA both under clauses 12.1 and 12.3. By referring to the finding at paragraph 27 of the Award, he contended that the Petitioners did not comply with their obligations under clause 12.1. He also referred to the finding at paragraph 28 that they gave up the contention based on clause 12.3. He further pointed out that the Arbitral Tribunal concluded, at paragraph 46, that there was no evidence of inability to perform and also held, at paragraphs 57 to 59, that there was wilful default by the Petitioners in fulfilling their obligations. http://www.judis.nic.in 12 of 27

12. With regard to the two options that were provided by the Petitioners by letter dated 20.02.2006, he pointed out that the said options were given a go-by by the parties as recorded in paragraphs 53, 55 and 56 of the Award. On this aspect, he also adverted to paragraphs 23 and 24 of the statement of claim and paragraphs 33 to 34 and 37 of the statement of defence so as to establish that the alleged election was a non-issue as between the parties. He also submitted that the scope of dispute is confined to the Contentious Parcels of Land, i.e. item 1 of schedule D of the SPA relating to the assets of GWL. Therefore, he contended that section 12 (3) of the SRA is not applicable. In fact, by referring to the cross examination of Mr.Virmani, he pointed out that there was no cross-examination at all on part performance.

13. Mr.Sarkar also submitted that Section 63 of the Indian Contract Act, 1872 (the Contract Act) enables a party to waive its rights under a contract and that under Section 28 of the SRA, a contract can be rescinded even after a decree is obtained. With greater reason, he contended that waiver is permissible at the stage of arguments in the arbitration.

14. In support of his submissions, the learned senior counsel referred to and relied upon the judgments that are set out below along with context and principle:

> http://www.judis.nic.in 13 of 27
>
> (i) Dr. Jiwan Lal v. Brij Mohan Mehra (1972) 2 SCC 757 (Jiwan Lal), where, in the context of an agreement to sell immovable property, conditions in the agreement for sale that the sale deed shall be executed and registered by the vendor in favour of the purchasers within three months from the date when the premises are vacated by the income tax authorities provided they are not requisitioned by the government prior to the registration of the sale deed, were held, at paragraph 11, to be conditions for the exclusive benefit of the purchasers, which could, therefore, be waived by the purchasers.

(ii) Surinder Singh v. Kapoor Singh (2005) 5 SCC 142 (Surinder Singh), where, the Hon'ble Supreme Court held that the relinquishment of a part of the claim as per section 12 (3) (ii) of SRA need not be specifically pleaded and further held, in paragraph 16, that such relinquishment could be made by way of a statement at the bar.

(iii) Rachakonda Narayana v. Ponthala Parvathamma (2001) 8 SCC 173, wherein, at paragraph 10, it was held that part performance could be ordered even if such amendment is requested at the appellate stage.

15. He concluded his submissions by pointing out that the amendment made to section 34 of the Arbitration Act by the Arbitration and Conciliation (Amendment) Act, 2015 would apply to the present case. http://www.judis.nic.in 14 of 27 Consequently, the ground of patent illegality, as contained in Section 34(2-A) of the Arbitration Act would not apply because this is an international commercial arbitration. For this purpose, he relied upon the judgments of the Hon'ble Supreme Court in Hindustan Construction Company Limited v. Union of India, Writ Petition (Civil) No. 1074 of 2019 (Hindustan Construction) and the Board of Control for Cricket in India v. Kochi Cricket Club Private Limited (2018) 6 SCC

16. By way of rejoinder, Mr. Darius Khambatta submitted that the Respondent did not pay the stipulated consideration in light of the refusal to accept part performance. As a consequence, such consideration was not paid in the year 2006, as required under the SPA, or at any reasonable time thereafter. In this connection, he emphasised the fact that the value of the Jameen Pallavaram land was about Rs. 216 crore out of the sale consideration of about Rs.228 crore under the SPA. Subsequently, when the Award was pronounced, the market value of the said land was about Rs.1232 crores. After electing not to accept part performance and deriving the benefit of not paying the sale consideration for so many years, he submitted that it is most inequitable to permit the Respondent to pay the stipulated consideration in 2015 after the value of the underlying assets increased from about Rs.216 crores to about http://www.judis.nic.in 15 of 27 Rs.1232 crores. In this context, he reiterated that the requirement under Clause 8 (g) read with Clause 5.2 was at the heart of the SPA and, therefore, the offer under letter dated 20 February 2006 amounted to an offer of

part performance, which was unequivocally rejected by the Respondent.

17. As an alternative contention, he pointed out that time was of the essence of the SPA and that, therefore, the SPA was avoidable by the Petitioners because it was not performed in time. He also pointed out that a Division Bench of this Court held in IOCL v. Bhagwan Balasai Enterprises 2017 SCC Online Mad 37266, at paragraph 4 (o), that voidable contracts are determinable in nature. Consequently, he contended that specific performance should not have been awarded as per Section 14 of the SRA.

18. The records were examined and the oral and written submissions of the learned senior counsel were considered carefully. At the outset, it may be noted that Section 34 of the Arbitration Act, as amended by the Arbitration and Conciliation (Amendment) Act 2015, would apply to this case because the Section 34 petition was filed after the amendment came into force. This position emerges from paragraph 15 of Ssyangyong Engineering and Construction Co. Ltd. v. NHAI http://www.judis.nic.in 16 of 27 2019 SCC Online 677 (Ssyangyong) read with Hindustan Construction. Therefore, the validity of the Award should be tested with reference to public policy and not patent illegality given that this is a Petition arising out of an international commercial arbitration.

19. As stated earlier, the bed rock of the Petitioners' case is that part performance was offered under letter dated 20.02.2006 and that such offer of part performance was unequivocally rejected by reply dated 24.02.2006. In order to test this contention, therefore, the first port of call should be the letter dated 20.02.2006. The said letter reads, in relevant part, as under:

> " The claims by third parties to the portions of the property are baseless and false. However, the fact is that they have been made and as you are aware, claims of this nature take a long time to sort out.
>
> We do understand your apprehensions in view of the current development and consequently suggests the following way forward.
>
> (a) In terms of the claims raised by third parties against certain portion of properties, we would like to amend the agreement dated 21.12.2005 to exclude the representations,warranties and indemnities with respect to those plots of land in the property for which third parties are claiming adverse title. This can be done by a suitable notation in http://www.judis.nic.in 17 of 27 Schedule D, Sr. No.1, "Status/ comments" column.

(b) Alternatively, you can close the transaction as contemplated in the agreement dated 21.12.2005 and rely on the indemnities given by us in the said agreement with respect to the property.

In the event you choose option (a) above then we hereby agree to extend the scheduled closing date of 21.2.2006 by 15 calendar days. If you choose option (b) above then we request you to close the transaction as per the scheduled closing date of 21.2.2006."

Upon closely examining the letter, I find that, undoubtedly, the words part performance are not used therein. Is a request for part performance, nevertheless, implied therein? When the two options provided therein are scrutinized, I find that option (a) is for an amendment of the SPA by excluding the representations, warranties and indemnities with respect to the Contentious Parcels of Land. The said representations and warranties were provided at the time of execution of the SPA and, in effect, the Petitioners requested the Respondent to agree to the amendment and, consequently, not do the following as regards the Contentious Parcels of Land: (i) not sue for misrepresentation or breach of warranty; (ii) waive the requirement under Clause 4.1 (a) (i) to provide a certificate that the said representation and warranty holds good as on closing; and (iii) not insist on the said representation and warranty holding good as on closing http://www.judis.nic.in 18 of 27 as a condition precedent for closing as per Clause 5.2. The indemnities, however, are actionable only upon closing and, therefore, as regards the Contentious Parcels of Land, the request is to waive the right to enforce the indemnity. Upon such amendment, even in the prevailing facts and circumstances, the amended SPA could have been performed or implemented in full. Therefore, option (a) is clearly a request for an amendment and not a request for part performance of the SPA, as executed, and the reply dated 24.02.2006 is a refusal to accept the request for an amendment of the SPA. As regards option (b), it is a request to proceed to closing and sue on the indemnity, if required. This is, without doubt, not an offer of part performance.

20. In light of the above discussion, a follow through question arises for consideration: is Section 12 of the SRA intended or designed to take within its ambit any request for amendment or waiver of contractual commitments by treating the same as a request for part performance? The Petitioners agreed to and, in fact, provided the representations and warranties when they executed the SPA. Indeed, they even agreed to and provided an indemnity in respect of breach of representations and warranties. As a corollary, if there were a misrepresentation or breach of warranty, the Respondent would have been entitled to sue for rescission or claim damages. Similarly, a claim could have been made for indemnification so as to enforce the indemnity. Indeed, in the context of http://www.judis.nic.in 19 of 27 the above discussion, it is clear that only an amendment or waiver would serve the purpose of absolving the Petitioners of liability and, therefore, an amendment and not part performance was requested. To put it differently, the Respondent was not required to and would not be suing for specific performance for the above purposes. An action for specific performance would lie only in respect of unfulfilled obligations or covenants, under a contract, which cannot be adequately compensated monetarily, provided other requirements under the SRA are satisfied for seeking specific relief. In this case, for instance, the Respondent sued for specific performance because the Petitioners refused to transfer the sale shares to the Respondent and, in fact, issued a termination letter as regards the SPA. If the Respondent had sued for specific performance in respect of a part of the sale shares, it would have amounted to a request for part performance. In fact, even if one considers the SPA as no more than an ostensible agreement for sale of shares with the real object and purpose of effecting a change in the ownership of underlying assets, the removal of a part of such assets from the scope of the action for specific relief would, probably, qualify as part performance. Consequently, I am of the view that, in this case, there was a request for and refusal of amendment of the SPA with regard to specific contractual rights qua the Contentious Parcels of Land and not a request for and refusal of part performance as per Section 12 of the SRA.

http://www.judis.nic.in 20 of 27

21. Another fundamental question arises for consideration, namely, whether a party - arguably and, perhaps, probably, in breach of particular provisions of a contract- would be justified in requesting for an amendment of the contract so as to delete those clauses and, thereafter, contend that the refusal to accede to the request for amendment disentitles the counter party from subsequently waiving those contractual requirements. Given that specific performance is an equitable remedy, in my view, a party in breach could offer part performance and rely on the refusal to accept such part performance, provided it can establish that its inability to perform, in full, is for reasons beyond its control. In this case, the Arbitral Tribunal recorded definitive factual findings, inter alia, in paragraphs 46 and 76, that the Petitioners failed to establish that the failure to offer full performance is for reasons beyond their control. By contrast, the affected party can, in such situation, offer to accept part performance by foregoing its entitlement to full performance. Otherwise, one would be putting a premium on non-adherence to contractual commitments. This interpretation is also in conformity with the judgment in Surjit Kaur. From paragraphs 3-5 of the said judgment, it is clear that the inability to provide possession was on account of a court order of injunction and the affected party was a party to the suit in which such order was obtained. In those circumstances, the court held, in paragraph 15, that readiness and willingness, in the context of a contract that is not http://www.judis.nic.in 21 of 27 capable of being performed as a whole, is the readiness and willingness to accept part performance. For reasons set out in the preceding paragraphs, I am of the view that there was no offer of part performance, in this case, and, in any event, the request for amendment by letter dated 20.2.2006 and the refusal to accede to such request did not foreclose the right of the Respondent to waive its contractual rights subsequently as held in Jiwan Lal and Surinder Singh.

22. The other aspect that remains to be considered is whether time is of the essence of the SPA and, therefore, whether the Petitioners were entitled to avoid the SPA as per Section 55 of the Contract Act. In this connection, upon appraisal of evidence, the Arbitral Tribunal concluded that time is not of the essence. In addition, the Arbitral Tribunal also held that the Petitioners were in breach of their obligations under the SPA and, therefore, could not insist on the consummation of the transaction within the stipulated time limit. I see no reason to interfere with these factual findings as per applicable legal principles. As regards the contention that the SPA is not specifically enforceable because it is in its nature determinable, I set out below my analysis from an earlier order dated 26.11.2019 in O.P. No.698 and 711 of 2012 on this issue:

> http://www.judis.nic.in 22 of 27 “16. On examining the judgments on Section 21(d) of SRA 1877 and Section 14(c) of the Specific Relief Act, as applicable to this case, i.e. before Act 18 of 2018, I am of the view that Section 14(c) does not mandate that all contracts that could be terminated are not specifically enforceable. If so, no commercial contract would be specifically enforceable. Instead, Section 14(c) applies to contracts that are by nature determinable and not to all contracts that may be determined. If one were to classify contracts by placing them in categories on the basis of ease of determinability, about five broad categories can be envisaged, which are not necessarily exhaustive. Out of these, undoubtedly, two categories of contract

> would be considered as determinable by nature and, consequently, not specifically enforceable: (i) contracts that are unilaterally and inherently revocable or capable of being dissolved such as licences and partnerships at will; and
>
> (ii) contracts that are terminable unilaterally on “without cause” or “no fault” basis. Contracts that are terminable forthwith for cause or that cease to subsist “for cause” without provision for remedying the breach would constitute a third category. In my view, although the Indian Oil case referred to clause 27 thereof, which provided for termination forthwith “for cause”, the decision turned on clause 28 thereof, which provided for “no fault” termination, as discussed earlier. Thus, the third category of contract is not determinable by nature;

nonetheless, the relative ease of determinability may be http://www.judis.nic.in 23 of 27 a relevant factor in deciding whether to grant specific performance as regards this category. The fourth category would be of contracts that are terminable for cause subject to a breach notice and an opportunity to cure the breach and the fifth category would be contracts without a termination clause, which could be terminated for breach of a condition but not a warranty as per applicable common law principles. The said fourth and fifth categories of contract would, certainly, not be determinable in nature although they could be terminated under specific circumstances. Needless to say, the rationale for Section 14(c) is that the grant of specific performance of contracts that are by nature determinable would be an empty formality and the effectiveness of the order could be nullified by subsequent termination.”

23. On examining Clause 12 of the SPA, I find that it does not enable either party to terminate the contract on a "no-fault" basis. Equally, it cannot be concluded that the SPA is inherently unilaterally determinable like a licence or a partnership at will. Therefore, I am of the view that it is not a contract which is determinable in nature as per Section 14 of the SRA. Consequently, it cannot be said that the SPA cannot be specifically enforced.

http://www.judis.nic.in 24 of 27

24. The inequity of the waiver after the prices of the underlying assets escalated manifold was also canvassed by the learned senior counsel for the Petitioners and this contention would have merited close attention if the Petitioners had continued to offer performance of the SPA subject to the third party claims and, in response, if the Respondent refused continually over a long period of time before making a volte face. Instead, the Petitioners purported to terminate the SPA fairly swiftly on 18 May 2006 and, consequently, triggered an action for specific performance, which ran its course over time. Therefore, in my view, the adverse monetary consequences that are entailed by the order of specific performance appear to be a self-inflicted wound.

25. In fine, the Petitioners have failed to make out a case for interference with the Award as per established principles, in this regard, including those laid down in Associate Builders and Ssyangyong. Consequently, the Petition to set aside the Award is dismissed. In the facts and circumstances of the case, there will be no order as to costs. By an earlier order dated 15.10.2019,

A.No.6642 of 2019 was disposed of on the basis of affidavits dated 04.10.2019 and 14.10.2019 of the Petitioners and the Respondent, respectively. A.No.6816 of 2019 is a similar application by another third party and is, consequently, disposed of on the same basis by treating the order in A.No.6642 of 2019 as a part and http://www.judis.nic.in 25 of 27 parcel of the order in A.No.6816 of 2019. A.No.2795 of 2019 is filed by the Respondent, in the O.P., against the third party applicant in A.No. 6642 of 2019 for clarification of an order and this application is closed in view of and in terms of the earlier order in A.No.6642 of 2019.

10.01.2020 Speaking order Index: Yes Internet: Yes rrg http://www.judis.nic.in 26 of 27 SENTHILKUMAR RAMAMOORTHY, J.

rrg Pre Delivery order in 10.01.2020 http://www.judis.nic.in 27 of 27