Vasantben Ramniklal Bhuta vs Ivory Properties And Hotels Pvt. Ltd. ... on 28 January, 2020

Author: R.D. Dhanuka

Bench: R.D. Dhanuka

carbp-350.17 & carbp-812.19.docx

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION NO. 350 OF 2017

Bhanumati Jaisukhbhai Bhuta
an Adult of Mumbai Indian Inhabitant
residing at Nagardas Mansion,
Bhagatsingh Road, Vile Parle (West)
Mumbai - 400 056. ... Petitioner

Versus

1. Ivory Properties & Hotels Private Limited
a Company registered under the
Companies Act, 1956 having its
registered office at Construction
House, "A", 24th Road, Khar (West),
Mumbai - 400 052.

2. Vasantben Ramniklal Bhuta
an Adult of Mumbai IndianInhabitant
residing at Nagardas Park
New Nagardas Road,Andheri (E),
Mumbai - 400 059. ... Respondents

ALONG WITH
COMMERCIAL ARBITRATION PETITION NO. 812 OF 2019

Vasantben Ramniklal Bhuta Age: 92 years,
Indian Inhabitant, residing at Nagardas Park,
New Nagardas Road, Andheri (E),
Mumbai - 400 059. ... Petitioner

Versus

1. Ivory Properties & Hotels Private Limited

a Company registered under the
Companies Act, 1956 having its
registered office at Construction
House, "A", 24th Road, Khar (West),
Mumbai - 400 052.

2. Bhanumati Jaisukhbhai Bhuta
residing at Nagardas Mansion,
Bhagat Singh Road, Vile Parle (West)
Mumbai - 400 056. ... Respondents

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Mr. T.N. Subramanian, Senior Counsel along with Mr. Rajesh Shah, Ms.Tanvi Gandhi, Mr. Chetan Yadav and Mr. Rubin Vakil, Ms. Nupur Desai i/by M/s. Markand Gandhi and Co., Advocates for the Petitioner in CARBP/350/2017 and Respondent No.2 in CARBP/812/2019.

Mr. Shailesh Shah, Senior Counsel along with Mr. Rohaan Cama and Mr.Aditya Udeshi, Mr. Sanjay Udeshi, Mr. Netaji Gawade, i/by M/s. Sanjay Udeshi & Co., Advocates for the Petitioner in CARBP/812/2019 and Respondent No.2 in CARBP/350/2017.

Mr. Rohit Kapadia, Senior Counsel along with Mr. Yash Kapadia, Ms.Hemlata Jain, Ms. Samidha Ajgaonkar i/by M/s. Maneksha & Sethna, Advocates for the Respondent No.1 in both Arbitration Petitions.

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CORAM : R.D. DHANUKA, J.

RESERVED ON : 15th OCTOBER, 2019

PRONOUNCED ON : 28th JANUARY, 2020

JUDGMENT :

By these two petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Arbitration Act', for short), the petitioners have impugned the Arbitral Award dated 14 th February, 2017 passed by the learned Arbitrator allowing the claim for specific performance of the Development Agreement and Memorandum of Understanding both dated 19th April, 1995 as modified by the draft carbp-350.17 & carbp-812.19.docx Supplemental Agreement filed by the respondent no.1. By consent of parties, both these arbitration petitions were heard

together and are being disposed of by a common order. Some of the relevant facts for the purpose of deciding these two petitions are as under:-

> 2. The petitioner in the Commercial Arbitration Petition No. 350 of 2017 was the original respondent no.1, whereas the petitioner in Commercial Arbitration Petition No. 812 of 2019 was the original respondent no.2 in the arbitration proceedings. The respondent no.1 in both these petitions was original claimant in the arbitral proceedings. Learned Counsel for the parties agreed that the facts of both these Commercial Arbitration Petitions are identical and thus this Court shall summarize the facts in the Commercial Arbitration Petition No. 350 of 2017 in the later part of this judgment. There is no conflict of interest between the petitioner and the respondent no.2.

Some of the relevant facts in the said Commercial Arbitration Petition No. 350 of 2017 are as under:-

> 3. The petitioner and the respondent no.2 are the owners of the immovable property bearing CTS No.6491, 6492, 650, 652, 652/1 and 655 admeasuring 5456.94 sq. mtrs. at village Gundavli, Andheri Kurla Road, Andheri (East), Mumbai 400 069. It is the case of the petitioner and the respondent no.2 that they had got the building plan approved in the year 1978 for construction of one building comprising of ground floor + 6 upper carbp-350.17 & carbp-812.19.docx floors on the said land by utilizing the FSI of the land as well as the compensatory FSI of 1677.79 sq. yards, equivalent to 14085 sq. mtrs.

granted to the petitioner and the respondent no.2 by the Mumbai Municipal Corporation of Greater Mumbai. The petitioner and the respondent no.2 obtained permission for construction of office premises and/or residential premises. The total saleable built-up area available on the said land was 82000 sq. ft. including the compensatory FSI. The petitioner and the respondent no.2 had obtained IOD on 18th April, 1978 and the Commencement Certificate on 19th April, 1978.

4. It is the case of the petitioner and the respondent no.2 that in the year 1978 they had constructed a building on the said land till third floor. There were other old structures on the said land. It is case of the petitioner and the respondent no.2 that the family members of the Directors of respondent no.1 Shri Lachmandas Sewaram and Ors. had filed a Suit bearing No.841 of 1979 in this Court alleging that the petitioner and the respondent no.2 had agreed to carry out a business in partnership in respect of the said land, as building contractors and as the dealers in real estate in name and style as "Rahul Development Corporation".

5. It was the case of the Directors of the respondent no.1 in the said suit that the petitioner and the respondent no.2 allegedly did not sign the alleged Partnership Deed. In the said suit, the plaintiff therein prayed for a carbp-350.17 & carbp-812.19.docx declaration that the alleged partnership firm stood dissolved and/or for dissolution of the alleged partnership business and for other reliefs. The plaintiff in the said suit ultimately withdrew the said suit.

6. It is the case of the petitioner and the respondent no.2 that the Directors of the respondent no.1 thereafter approached the husband of the petitioner and the respondent no.2 respectively in the year 1995 with a proposal for joint development of the suit property. On 19 th April, 1995, the parties accordingly executed Development Agreement in respect of the suit property. On 11th April, 1995, the parties also executed a Memorandum of Understanding. Under the said Development Agreement read with Memorandum of Understanding, the respondent no.1 agreed to construct the partly constructed building standing on the said property and a new building as a residential/shopping/commercial complex on the said land within 36 months from the date of commencement of the construction at their own cost.

7. It is the case of the petitioner and the respondent no.2 that the respondent no.1 agreed to bear all the municipal taxes and property taxes payable to the Government in respect of the said land and the said new building for the period commencing from the date on which the respondent no.1 would enter upon the said property as irrevocable licensee as provided in the said agreements and to bear various other expenses. The respondent carbp-350.17 & carbp-812.19.docx no.1 also agreed to furnish copies of the sanctioned plan to the petitioner and the respondent no.2 before starting construction and also in the event of there being any amendments/ modifications thereof and to furnish copies of the said plans before carrying out such amendments/modifications.

8. Under Clause 13 of the said Agreement, decisions in respect of development of the said land and construction of the said new building were to be taken by the respondent no.1 in consultation with the petitioner and the respondent no.2. The respondent no.1 had also agreed to provide the cost, charges and expenses for getting such occupants and encroachers vacated which encroachers were in one of the corner of the property. It is the case of the petitioner and the respondent no.2 that there was no other impediment or hindrance for the respondent no.1 to carry out the development on the said land.

9. Under the said Agreement entered into between the parties, the petitioner and the respondent no.2 had retained about 12500 sq. ft. built-up area in the building/s to be constructed on the suit land against the payment of cost of construction. Under Clause 17 of the said Agreement, the petitioner and the respondent no.2 were entitled to 25% each out of the gross sale proceeds of the land component comprises in the said new building. The respondent no.1 also agreed to pay a sum of Rs.1 Crore each to the petitioner and the respondent no.2 as interest free deposit, out of which, on execution, carbp-350.17 & carbp-812.19.docx Rs.75 lakhs each was paid to the petitioner and the respondent no.2 and the balance was agreed to be paid within 30 days from commencement of construction work.

10. Clause 33 of the said Agreement, recorded the Arbitration Agreement. It was agreed that all disputes or differences between the parties shall be referred to the arbitration of Shri Dilip Thakkar of Jayantilal Thakkar and Company, Charter Accountants. It was further provided in the said Clause that the arbitrator will have summary power.

11. The petitioner and the respondent no.2 executed two Power of Attorneys in favour of Mr. Neel Raheja and Sandeep Raheja, nominees of the respondent no.1 (i) to execute Agreement for Sale with

the purchasers of the premises in the new building and to admit execution etc. and (ii) to deal with public authorities in the matter of development of the suit property. By letter dated 19th April, 1995, the petitioner and the respondent no.2 permitted the respondent no.1 to enter upon the said property for carrying out the development work on the suit property. On 19th April, 1995, the respondent no.1 executed a Deed of Guarantee in favour of the petitioner and the respondent no.2 for performance of the said Agreement and Memorandum of Understanding both dated 19th April, 1995. It is the case of the petitioner that pursuant to the execution of the said Agreement and Memorandum of Understanding both dated 19th April, 1995, the respondent no.1 did not take carbp-350.17 & carbp-812.19.docx any steps for development of the said property.

12. The respondent no.1 by its letter dated 14 th February, 2002, allegedly invoked the arbitration clause recorded in Clause 33 of the Agreements dated 19th April, 1995 read with Memorandum of Understanding and sought to refer the dispute to the learned designated arbitrator Mr. Dilip Thakkar. It is the case of the petitioner and the respondent no.2 that the said alleged letter dated 14th February, 2002 alleged to have been addressed to the learned arbitrator was not served upon the petitioner and the respondent no.2 though a copy of the said alleged letter was alleged to have been marked to them. On 18 th October, 2002, the respondent no.1 called upon the learned arbitrator to call a preliminary meeting for passing appropriate directions in the matter. There was no response to the said letter from the learned arbitrator. The respondent no.1 thereafter by their advocate's letters dated 10th January, 2003, 15th July, 2003 and 17th December, 2004 called upon the learned arbitrator to fix the preliminary meeting.

13. By letter dated 10th January, 2005, the learned arbitrator fixed the preliminary meeting on 17th January, 2005. It is the case of the petitioner and the respondent no.2 that the learned arbitrator accordingly entered upon the reference only on 10th January, 2005 though the alleged letter invoking the Arbitration Agreement was allegedly served upon the learned arbitrator carbp-350.17 & carbp-812.19.docx by the respondent no.1 on 14th February, 2002. On 17th January, 2005, the learned arbitrator directed the respondent no.1 to file its statement of claim along with all the documents on or before 17th January, 2005 and directed the petitioner and the respondent no.2 to file statement of defence/written statement and counter claim, if any along with all documents within four weeks from the date of receipt of statement of claim from the respondent no.1. Though, the learned arbitrator had directed the respondent no.1 to file statement of claim along with all documents on or before 17 th January, 2005, it is the case of the petitioner and the respondent no.2 that the respondent no.1 did not file statement of claim for quite some time. The petitioner and the respondent no.2 through their advocate's letter dated 4 th April, 2006 addressed to the learned arbitrator requested the learned arbitrator to terminate the arbitration proceedings under Section 25(a) of the Arbitration Act.

14. The respondent no.1 by their advocate's letter dated 24 th December, 2008 to the petitioner and the respondent no.2 alleged that the suit land had been used and/or occupied by some third party which amounted to breach of agreement and called upon the petitioner and the respondent no.2 to remove all the alleged encroachments from the suit property. The petitioner and the respondent no.2 through their advocate's letter dated 13th January, 2008 denied those allegations made by the respondent no.1 and informed that the contractor of Mumbai Metro One carbp-350.17 &

carbp-812.19.docx Private Limited was constructing the Metro Rail, without their permission and knowledge and stocked material on the suit property, which was already removed on objection taken by the petitioner and the respondent no.2.

15. Some time in the month of April, 2009, the respondent no.1 forwarded a copy of the statement of claim filed by the respondent no.1 to the petitioner and the respondent no.2 inter-alia praying for specific performance of the Supplemental Agreement described in paragraphs 24 and 25 of the statement of claim. The petitioner and the respondent no.2 through their advocate's letter dated 11th April, 2009 informed the learned arbitrator and the respondent no.1 that the arbitration proceedings had already stood terminated way back in the year 2005 as the respondent no.1 had failed to file the statement of claim.

16. The respondent no.1 by its advocate's letter dated 19 th May, 2009 denied the contentions of the petitioner and the respondent no.2 that the arbitration proceedings were already terminated by the learned arbitrator due to non filing of statement of claim within the time prescribed. The respondent no.1 also contended that there was no such provision in the Arbitration Act providing for termination of arbitration proceedings due to non filing of statement of claim within the time prescribed.

17. On 12th June, 2009, petitioner and the respondent no.2 made an carbp-350.17 & carbp-812.19.docx application to the learned arbitrator to terminate the arbitration proceedings with costs. The respondent no.1 filed an affidavit in reply to the said application and contended that the statement of claim could not be filed earlier due to negotiations between the petitioner and the respondent no.2 on one hand and the respondent no.1 on the other hand going on.

18. On 11th December, 2010, the parties filed agreed 'point of determination' before the learned arbitrator. The petitioner and the respondent no.2 also made an application under Section 16 of the Arbitration Act before the learned arbitrator challenging the jurisdiction of the learned arbitrator to entertain, try and dispose of claims made by the respondent no.1 inter-alia praying for specific performance of the so called Supplemental Agreement described in paragraphs 24 and 25 of the statement of claim. The respondent no.1 filed its affidavit in reply contending that no such application could be made. The parties filed written submission before the learned arbitrator. By an order dated 23rd July, 2012, learned sole arbitrator rejected the application filed by the petitioner and the respondent no.2 and held that he had jurisdiction to decide the proceedings since the parties were allegedly aware of the existence of the Supplemental Agreement.

19. On 28th August, 2012, the respondent no.1 made an application for amendment of statement of claim and sought declaration that the Development Agreement and the Memorandum of Understanding both dated carbp-350.17 & carbp-812.19.docx 19th April, 1995 as modified by the alleged Supplemental Agreement was valid, subsisting and binding and also sought specific performance of the said Agreements as modified by the alleged Supplemental Agreement. The petitioner and the respondent no.2 filed its affidavit in reply dated 14 th March, 2013 to the said application inter-alia praying for amendment of statement of claim without prejudice to the rights of the petitioner and the respondent no.2 to challenge the order passed by the learned arbitrator on the

application of the petitioner and the respondent no.2 under Section 16 of the Arbitration Act.

20. In the affidavit in reply filed by the petitioner and the respondent no.2, they opposed the said application for amendment on various grounds including on the ground of limitation of the said application having been barred in view of Article 137 of the Limitation Act. It was contended that the statement of claim was filed on 1st April, 2009, whereas the alleged claim of the respondent no.1 which was being introduced in the amendment was a totally new and inconsistent case then what had been pleaded by the respondent no.1 in their notices invoking Arbitration Agreement as well as the statement of claim filed before the learned arbitrator. The respondent no.1 filed a rejoinder to the said affidavit in reply.

21. By an order dated 17th December, 2013, the learned arbitrator allowed the said amendment application and awarded cost of Rs.25,000/- to carbp-350.17 & carbp-812.19.docx be paid to the petitioner and the respondent no.2. The learned arbitrator permitted the petitioner and the respondent no.2 to file additional written statement. The petitioner and the respondent no.2 accordingly filed additional written statement without prejudice to their rights to challenge the order of the learned arbitrator on the said application filed under Section 16 of the Arbitration Act. The petitioner and the respondent no.2 returned the said cheque of Rs.25,000 to the respondent no.1 since the petitioner and the respondent no.2 did not agree to accept the said order dated 17 th December, 2013 passed by the learned arbitrator.

22. On 12th August, 2014, Mr. G. G. Kukreja on behalf of the respondent no.1 filed his affidavit in lieu of oral examination-in-chief along with compilation of documents. The said Mr. G. G. Kukreja was cross- examined by the petitioner. The said Mr. G. G. Kukreja was called upon to produce the Minute's Book and the entire resolution dated 6 th February, 2009 relied upon by the said witness to show that he had been authorized to lead evidence on behalf of the respondent no.1. The respondent no.1 however through its advocate's letter raised an objection that paragraph 37 of the statement of claim referred to the said resolution. The petitioner and the respondent no.2 however had not dealt with the said paragraph. It was contended by the respondent no.1 that the petitioner was not entitled to call upon the witness of the respondent no.1 to produce entire resolution dated 6 th February, 2009, unless in the written statement, factum of the said resolution carbp-350.17 & carbp-812.19.docx was challenged by the petitioner.

23. The petitioner accordingly filed an application dated 31st August, 2014 to amend the written statement dated 15th October, 2010. The respondent no.1 filed its reply to the said application on 11 th November, 2014. The petitioner was allowed to cross-examine the said Mr. G. G. Kukreja on his authority to file evidence on behalf of the respondent no.1 to file application for amendment of written statement and to cross-examine on the authority of Mr. G. G. Kukreja to lead evidence and on merits. After conclusion of evidence of Mr. G. G. Kukreja, Mr. Jaisukhbhai Bhuta, husband of the petitioner led the evidence on behalf of the petitioner on 12 th August, 2014, who was cross-examined by the advocate for the respondent no.1. His cross-examination was concluded thereafter on 8th December, 2015.

24. On 14th February, 2017, the learned arbitrator made an arbitral award and held that the Development Agreement and the Memorandum of Understanding dated 19th April, 1995 as modified by the draft Supplemental Agreement was valid, legal and subsisting. It was held that the respondent no.1 had been ready and willing to carry out its obligation under the Development Agreement and Memorandum of Understanding both dated 19th April, 1995 and was entitled to specific performance of those two documents modified by the Supplemental Agreement. Being aggrieved by carbp-350.17 & carbp-812.19.docx the said arbitral award dated 14 th April, 2017 passed by the learned arbitrator, the petitioner and the respondent no.2 have filed two separate Commercial Arbitration Petitions bearing Nos. 350 of 2017 and 812 of 2019 respectively.

25. Mr. T.N. Subramanian, learned Senior Counsel for the petitioner in Commercial Arbitration Petition No. 350 of 2017 and for the respondent no.2 in Commercial Arbitration Petition No. 812 of 2019 invited my attention to various correspondence exchanged between the parties, various provisions of the Development Agreement and Memorandum of Understanding. It is submitted by the learned Senior Counsel that the respondent no.1 had filed statement of claim after four years of the directions issued by the learned arbitrator and thus the learned arbitrator ought to have allowed the application filed by the petitioner and the respondent no.2 inter-alia praying for termination of the arbitration proceedings under Section 25(a) of the Arbitration Act. No justification was made by the respondent no.1 for gross delay of four years in filing the statement of claim along with documents before the learned arbitrator. He submits that the settlement talks between the parties had already failed as far back as in the year 2005, which was also recorded in the letters dated 19 th January, 2008 and 11th April, 2009 addressed by the advocates representing the petitioner and the respondent no.2.

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26. It is submitted by the learned Senior Counsel that only in the statement of claim filed by the respondent no.1 on 1 st April, 2009 in paragraphs 23 to 25 thereof, the respondent no.1 referred to the so called Supplemental Agreement between the respondent no.1 on one hand and the petitioner and the respondent no.2 on the other hand and had prayed for declaration that the said alleged Supplemental Agreement was valid, subsisting and binding on the petitioner and the respondent no.2 and prayed for specific performance thereof. He submits that in the said statement of claim, no relief for declaration and specific performance in respect of the Development Agreement as well as Memorandum of Understanding both dated 19th April, 1995 was sought by the respondent no.1.

27. It is submitted that since there was no such Supplemental Agreement entered into between the parties, there was no question of referring the dispute to arbitration in respect of the said alleged Supplemental Agreement. He submits that the arbitration clause recorded in the Clause 33 of the Development Agreement dated 19 th April, 1995 could not apply for resolution of alleged dispute under the said alleged Supplemental Agreement as sought to be referred by the respondent no.1 to the learned arbitrator. He submits that the entire dispute raised by the respondent no.1 arising under the said alleged Supplemental Agreement by invoking arbitration clause under Section 33 of the Development Agreement was thus without jurisdiction. He submits that the finding of the learned carbp-350.17 & carbp-812.19.docx arbitrator that he had jurisdiction to decide the claims

filed by the respondent no.1 in respect of Supplemental Agreement is totally perverse and is rendered without recording any specific reasons as to how clause 33 of the Development Agreement conferred jurisdiction in the learned arbitrator to decide the dispute in respect of Supplemental Agreement.

28. Learned Senior Counsel for the petitioner submits that the said alleged Supplemental Agreement relied upon by the respondent no.1 was even otherwise only a draft and was never agreed by and between the parties. The reference to the said Supplemental Agreement was made for the first time in the statement of claim filed by the respondent no.1 much belatedly. In the said alleged Supplemental Agreement, there was no Arbitration Agreement recorded by and between the parties. He submits that the finding of the learned arbitrator recorded in paragraph 4(c) of the order dated 23rd July, 2012 that the parties were aware of the existence of the Supplemental Agreement is ex-facie perverse. The learned Senior Counsel invited my attention to the relevant paragraphs of the written statement filed by the petitioner and the respondent no.2 dated 15th October, 2010 denying the existence of the said alleged Supplemental Agreement. He submits that the respondent no.1 did not lead any evidence to prove the existence and contents of the said Supplemental Agreement though the petitioner had disputed the existence of the said alleged Supplemental Agreement in the application filed under Section 16 of the Arbitration Act.

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29. It is submitted that the onus was on the respondent no.1 to prove that the said alleged Supplemental Agreement existed and was valid and subsisting. The finding of the learned arbitrator that all parties were aware of such Supplemental Agreement is ex-facie perverse and contrary to the stand taken by the petitioner and the respondent no.2 in the written statement. He submits that it was also not the case of the respondent no.1 at any point of time atleast prior to the date of invoking the Arbitration Agreement, the parties had agreed to execute any such alleged Supplemental Agreement. The so called reference to the said draft Supplemental Agreement in the annexure to the notice invoking Arbitration Agreement itself was never served upon the petitioner and the respondent no.2.

30. Learned Senior Counsel for the petitioner submits that admittedly the respondent no.1 had claimed for a declaration in the statement of claim only in respect of the alleged Development Agreement and Memorandum of Understanding as described in the paragraphs 24 and 25 of the statement of claim as valid and binding upon the petitioner and the respondent no.2. He submits that the respondent no.1 thus had considered the said so called Supplemental Agreement and the terms recorded therein as independent from the Development Agreement and the Memorandum of Understanding both dated 19th April, 1995. The learned arbitrator did not have jurisdiction to adjudicate upon the disputes pertaining to the existence carbp-350.17 & carbp-812.19.docx and validity of the said so called Supplemental Agreement under the Arbitration Agreement recorded in Clause 33 of the Development Agreement dated 19th April, 1995.

31. Learned Senior Counsel invited my attention to the letters dated 18th October, 2002, 10th January, 2003, 15th July, 2003, 17th December, 2004 addressed to the learned arbitrator and the

petitioner and the respondent no.2 by the respondent no.1 through its advocate, invoking the Arbitration Agreement recorded in Clause 33 of the Development Agreement dated 19 th April, 1995 and would submit that the dispute referred to the learned arbitrator in those notices pertained only in respect of the Development Agreement and the Memorandum of Understanding both dated 19 th April, 1995. There was no reference made to the said alleged Supplemental Agreement in those notices invoking Arbitration Agreement. Learned Senior Counsel invited my attention to the allegations made in paragraph 20 of the statement of claim by the respondent no.1 and would submit that the allegations made by the respondent no.1 in respect of the alleged Supplemental Agreement were totally vague and without any details.

32. It is submitted that similarly the allegations made in paragraph 22 of the statement of claim referring to a copy of the draft modified terms alleged to have been handed over to the respective husbands of the petitioner and the respondent no.2 are also totally vague and without particulars. The carbp-350.17 & carbp-812.19.docx respondent no.1 had already got the plan sanctioned without consulting the petitioner and the respondent no.2. The respondent no.1 did not produce any proof of delivery of the said draft modified terms before the learned arbitrator though had examined Mr. G. G. Kukreja as its witness. The alleged meetings referred in paragraph 24 of the statement of claim are also without any proof or documentary evidence.

33. Learned Senior Counsel invited my attention to the letter dated 14th February, 2002 alleged to have been addressed by respondent no.1 to the learned arbitrator. He submits that the list of annexures to the said alleged notice dated 14th February, 2002 referred to the said alleged draft of Supplemental Agreement. He invited my attention to the allegations made in unamended paragraph 32 of the statement of claim and would submit that the respondent no.1 had pleaded its readiness and willingness to perform their part of the allegation only in respect of the alleged Supplemental Agreement and not the Development Agreement and the Memorandum of Understanding. Only in the amended statement of claim carried out much later, the respondent no.1 prayed for specific performance of the Development Agreement and the Memorandum of Understanding both dated 19th April, 1995 as modified by the alleged Supplemental Agreement. He submits that in the paragraph 35 of the amended statement of claim, the respondent no.1 alleged that the parties had agreed to Supplemental Agreement in October, 1999.

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34. It is submitted that there was no such date of the alleged Supplemental Agreement mentioned in paragraph 32 of the unamended statement of claim. In paragraph 23 and 24 of the statement of claim, it was alleged by the respondent no.1 that it was in the month of November, 2000, the parties agreed that the Supplemental Agreement would be executed. The terms were allegedly agreed to and the respondent no.1 prepared a document titled Draft Supplemental Agreement recording the terms allegedly orally agreed upon by and between the parties. He submits that the alleged date of execution of the alleged Supplemental Agreement mentioned in the pleadings of the respondent no.1 itself is inconsistent and even otherwise without any proof.

35. Learned Senior Counsel invited my attention to the averments made by the petitioner and the respondent no.2 in paragraphs 3 and 6 of the amended written statement and would submit that the application for amendment was made by the respondent no.1 only after the petitioner and the respondent no.2 had made an application raising an issue of jurisdiction under Section 16 of the Arbitration Act. The said application for amendment was made after four years of the date of invocation of Arbitration Agreement. He submits that the said application for the amendment itself could not have been allowed by the learned arbitrator. He submits that in any event the said amendment allowed by the learned arbitrator would not relate carbp-350.17 & carbp-812.19.docx back to the date of invoking Arbitration Agreement or even to the date of filing of statement of claim by the respondent no.1 before the learned arbitrator.

36. It is submitted by the learned Senior Counsel that the said application for amendment fell under Article 137 of the Limitation Act, 1963 and thus any application for amendment could be made within three years from the date of the alleged notice dated 14 th February, 2002 invoking the Arbitration Agreement by the respondent no.1. He submits that the said application for amendment was thus ex-facie barred by law of limitation and thus could not have been allowed by the learned arbitrator.

37. Learned Senior Counsel invited my attention to the order passed by the learned arbitrator on 23rd July, 2012 rejecting the application filed by the petitioner and the respondent no.2 under Section 16 of the Arbitration Act and would submit that no evidence was led by the parties when the said order was passed by the learned arbitrator on 23rd July, 2002 under Section 16 of the Arbitration Act. The petitioner and the respondent no.2 had specifically averred in the written statement that the said alleged notice dated 14th February, 2002 addressed by the respondent no.1 to the petitioner was not even served upon the petitioner and the respondent no.1. The respondent no.1 did not bother to lead any oral evidence to prove the factum of delivery of the said notice dated 14th February, 2002 upon the petitioner and the carbp-350.17 & carbp-812.19.docx respondent no.2. Learned Senior Counsel invited my attention to the Note of proceeding before the learned arbitrator held on 3rd December, 2010 and 31st December, 2011. He submits that since the order passed by the learned arbitrator under Section 16 itself was illegal and without application of mind, the learned arbitrator could not have allowed the said application for amendment of the pleadings subsequently.

38. Learned Senior Counsel invited my attention to the order dated 17th December, 2013 passed by the learned arbitrator on the application filed by the respondent no.1 for amendment to the statement of claim dated 1 st April, 2009 and in particular paragraphs 9, 10, 14(a) and 15 of the said order. He submits that the said order passed by the learned arbitrator shows perversity. The said order is contrary to the Section 21 and 23(3) of the Arbitration Act. The respondent no.1 in its statement of claim had not referred to Supplemental Agreement and had not even pleaded that it was an inadvertent prayer on the part of the respondent no.1 in not referring to the alleged Supplemental Agreement in the original statement of claim.

39. Learned Senior Counsel placed reliance on the letter dated 19 th April, 1995 addressed by the petitioner and the respondent no.2 to the respondent no.1 and would submit that it was made clear

by the petitioner and the respondent no.2 in the said letter that they had permitted the respondent no.1 to enter upon the suit property for carrying out development carbp-350.17 & carbp-812.19.docx work. The said statement of the petitioner and the respondent no.2 was confirmed by the respondent no.1 by making an endorsement to that effect on the said letter.

40. It is submitted that Mr. G. G. Kukreja who was examined as witness by the respondent no.1 was not at all concerned with the suit transaction till 1998. In support of this submission, learned Senior Counsel invited my attention to the cross-examination of the said Mr. G. G. Kukreja and in particular his reply to question no. 14 and would submit that the said witness had admitted that he was associated with the project for the first time in the year 1997-1998.

41. It is submitted that though the said Mr. G. G. Kukreja was not familiar with the disputes between the parties and the facts, he had signed the statement of claim. The Director of the respondent no.1 who was familiar with the facts of this matter admittedly did not enter the witness box. There was no correspondence between the parties before addressing the said alleged letter dated 14th February, 2002. He submits that under Clause 3 of the Memorandum of Understanding, the respondent no.1 was required to make payment for removal of encroachment from the suit land. The respondent no.1 however did not make any such payment. No correspondence was addressed by the respondent no.1 for removal of encroachment to the petitioner.

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42. Learned Senior Counsel invited my attention to the finding rendered by the learned arbitrator in paragraph 9(ii) of the arbitral award and would submit that the said finding rendered by the learned arbitrator is without any evidence. He invited my attention to paragraph 11 of the impugned award and would submit that the finding of the learned arbitrator that the petitioner and the respondent no.2 through their respective husband wanted to some how get out of the agreement with the respondent no.1 is based on the presumption and surmises and not based on evidence. He submits that the learned arbitrator himself in the said paragraph had mentioned that he had gut feeling that the petitioner and the respondent no.2 herein through their respective husband wanted to some how get out of the said agreement with the respondent no.1, may be because of phenomenal increase in market value of the plot in the interim. He submits that the witness examined by the respondent no.1 did not have any personal knowledge of the dispute between the parties.

43. Learned Senior Counsel invited my attention to the findings rendered by the learned arbitrator in paragraph 15(a) of the arbitral award and would submit that the finding of the learned arbitrator that since the party had shown interest in settling the matter, it could not be said that the respondent no.1 was unwilling to fulfill their part of the agreement is ex- facie perverse and without application of mind. He submits that the finding carbp-350.17 & carbp-812.19.docx in paragraph 15(c) of the arbitral award that the petitioner and the respondent no.2 herein in their affidavit dated 14 th February, 2014, had recognized the notice of invocation of Arbitration Agreement dated 14 th February, 2002, which has reference to the draft Supplemental Agreement as an enclosure is totally perverse.

44. It is submitted that petitioner and the respondent no.2 had specifically denied the receipt of any such alleged notice dated 14 th February, 2002 issued by the respondent no.1 to the learned arbitrator purporting to invoke the Arbitration Agreement. Learned Senior Counsel invited my attention to the interim order dated 12 th July, 2010 passed by the learned arbitrator and more particularly paragraph 2.7 thereof and would submit that the observations made therein are ex-facie perverse and contrary to the evidence on record.

45. Learned Senior Counsel invited my attention to the letter dated 26th April, 2005 from the Director of the respondent no.1 to advocates of the petitioner making a proposal for consideration. The learned arbitrator did not consider the said letter dated 26th April, 2005 in the impugned award. It is submitted that since the petitioner as well as the respondent no.2 had not received copy of the said letter dated 14 th February, 2002 alleging Supplemental Agreement at any point of time prior to the date of service of statement of claim, there was no question of the petitioner or the respondent carbp-350.17 & carbp-812.19.docx no.2 being aware of existence of the said alleged Supplemental Agreement. There was no cross-examination of the witness examined by the petitioner on this issue. The respondent no.1 did not lead any evidence to prove the delivery of the said letter dated 14th February, 2002. The onus was on him to prove the factum of delivery of the said letter upon the petitioner and the respondent no.2.

46. The learned Senior Counsel invited my attention to the paragraphs 18 and 28 of the written statement filed by the petitioner and the respondent no.2 and would submit that the petitioner and the respondent no.2 had specifically denied the service of the said alleged letter dated 14 th February, 2002 or that the said letter could be termed as invocation of Arbitration Agreement even by the learned arbitrator. Learned Senior Counsel invited my attention to the affidavit in lieu of examination-in-chief filed by the husband of the respondent no.2 Mr. Jaisukhbhai Bhuta dated 24 th March, 2015 and in particular deposition in paragraphs 20 to 24 of the said affidavit of evidence to depose that the petitioner as well as the respondent no.2 neither had agreed to the alleged terms of the alleged Supplemental Agreement nor agreed to the execution of the said alleged Supplemental Agreement with the respondent no.1.

47. It is submitted that Mr. G. G. Kukreja had never approached the said witness or to the husband of the petitioner in relation to the respondent carbp-350.17 & carbp-812.19.docx no.1 for discussing the matter about execution of alleged Supplemental Agreement or for recording the terms and conditions of the Development Agreement as well as Memorandum of Understanding. He submits that there was no cross-examination on this crucial part of the deposition made by the witness examined by the petitioner and the respondent no.2. The learned arbitrator could not have rendered any finding that the said letter dated 14 th February, 2002 was served upon the petitioner and the respondent no.2. The said alleged letter dated 14th February, 2002 was not at all confronted to the witness examined by the petitioner before the learned arbitrator by the respondent no.1. No suggestion was put to the witness by the said respondent no.1 that the said letter was served upon the petitioner or the respondent no.2. Learned Senior Counsel invited my attention to the answer given by the witness examined by the petitioner in cross-examination and would submit that the evidence of the said witness was not shattered by the respondent no.1 in cross-examination.

48. Learned Senior Counsel for the petitioner submits that in the cross-examination of the witness examined by the petitioner and respondent no.2, the said witness had clearly deposed and more particularly in reply to the question nos. 38 to 40 that the respondent no.1 only had license to enter the suit property and that the possession of the respondent no.1 in respect of the suit property was only as a licensee.

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49. Learned Senior Counsel invited my attention to the cross- examination of the said Mr. G. G. Kukreja who was examined as a witness by the respondent no.1 and in particular reply to the question nos.14, 39, 43 to 65 in support of the submission that the said witness had no personal knowledge regarding the suit property. He submits that neither the petitioner nor the respondent no.2 had any connection or relation with the said Mr. G. G. Kukreja who only was examined by the respondent no.1 in support of its case. None of the Directors or the persons who were concerned with the said project had personal knowledge were examined by the respondent no.1 as witnesses.

50. The respondent no.1 had submitted plans for development only on 9th December, 1998. Even if the date 14 th February, 2002 was considered as the date of invocation of the Arbitration Agreement, the claim for specific performance made by the respondent no.1 was ex-facie barred by law of limitation. Learned Senior Counsel invited my attention to the letter dated 3 rd October, 1998 filed by Mr. Neel C. Raheja the Constituted Attorney to the petitioner and the respondent no.2 addressed to the Commissioner of Mumbai Municipal Corporation. He submits that the signature of Mr. Neel C. Raheja was identified by Mr. G. G. Kukreja on the said affidavit.

51. Learned Senior Counsel invited my attention to the finding rendered by the learned arbitrator and more particularly in paragraph 17(d) carbp-350.17 & carbp-812.19.docx that the evidence produced before him proved that Mr. G. G. Kukreja was dealing with this matter all throughout. He submits that this finding of the learned arbitrator is ex-facie perverse and ignoring the crucial and material evidence on record including the cross-examination of the said Mr. G. G. Kukreja himself.

52. Learned Senior Counsel also invited my attention to the cross- examination of the petitioner's witness and in particular his reply to the question no.92. The said witness was asked by the learned Senior Counsel for the respondent no.1 as to whether he knew Mr. G. G. Kukreja. The said witness examined by the petitioner and the respondent no.2 deposed that he knew Mr. G. G. Kukreja from the time that he was attending the matter in arbitration proceedings. He did not know Mr. G. G. Kukreja before the arbitration proceedings had commenced. He also invited my attention to the reply of the said witness to the question no. 153 when the suggestion was put to him whether it was correct that at a school function, he had invited Mr. G. G. Kukreja, he deposed that he had never invited Mr. G. G. Kukreja. The learned arbitrator overlooked this part of the crucial evidence and has rendered a perverse finding.

53. The learned Senior Counsel for the petitioner invited my attention to the finding rendered by the learned arbitrator in paragraph 15(e) of the arbitral award and would submit that no resolution was produced by carbp-350.17 & carbp-812.19.docx the respondent no.1 authorizing Mr. G. G. Kukreja,

to deal with the said project or to represent the respondent no.1 and file statement of claim and to lead evidence. He submits that the said Mr. G. G. Kukreja was authorized to sign statement of claim and documents by the respondent no.1 only by resolution dated 6th February, 2009. The question of any authority to the said Mr. G. G. Kukreja by the respondent no.1 to invoke an Arbitration Agreement therefore did not arise. The invocation of the Arbitration Agreement by the said alleged letter dated 14th February, 2002 by Mr. G. G. Kukreja on behalf of the respondent no.1 itself was illegal and without any authority.

54. Learned Senior Counsel invited my attention to the finding rendered by the learned arbitrator in paragraph 17(f)(ii) and would submit that the finding that the letter dated 14 th February, 2002 includes a copy of the draft Supplemental Agreement and the said fact is not denied by the petitioner and the respondent no.2 is ex-facie perverse. He submits that in the voluminous evidence and the pleadings produced by the petitioner and the respondent no.2, they had all throughout disputed the existence of any negotiations between the parties or execution of the said alleged Supplemental Agreement or in respect of any such draft of the alleged Supplemental Agreement. Except in question nos. 93 and 153 which were asked to the witness examined by the petitioner and the respondent no.2, there was no other question on the existence of Supplemental Agreement.

carbp-350.17 & carbp-812.19.docx Even those two questions would not prove the case of the respondent no.1. He submits that in the letters addressed by the solicitor firm on behalf of the respondent no.1 also did not refer to the said alleged notice dated 14 th February, 2002. He submits that the finding of the learned arbitrator that the said draft Supplemental Agreement was annexed to the said notice dated 14 th February, 2002 is ex-facie perverse.

55. In so far as the issue of frustration of contract is concerned, learned Senior Counsel invited my attention to the finding of the learned arbitrator in paragraph 17(j) and (k) of the arbitral award and would submit that neither there was any plea raised by the respondent no.1 that it was ready and willing to perform its part of the obligation nor any such alleged readiness and willingness on the part of the respondent no.1 was proved before the learned arbitrator. The finding thus rendered by the learned arbitrator is totally perverse.

56. It is submitted by the learned Senior Counsel that power of attorney cannot be contrary to the Development Agreement to empower the respondent no.1 to change the Agreement. The finding of the learned arbitrator that the respondent no.1 was ready and willing to perform its part of the obligation is based on no evidence and is without reasons.

57. It is submitted by the learned Senior Counsel that the relief of carbp-350.17 & carbp-812.19.docx specific performance granted in favour of the respondent no.1 in respect of the oral Agreement and that also without any evidence is totally perverse and even otherwise contrary to the provisions of Specific Relief Act, 1963. The claims made by the respondent no.1 for specific performance was ex-facie barred by law of limitation. He submits that the finding of the learned arbitrator that the Agreement did not stand frustrated and it was not possible or unlawful to carry it out and contrary to Section 56 of the Indian Contract Act, 1872, even though there was change in policy is ex-facie perverse. He submits that Clause 2 of the Development Agreement was totally ignored by the

learned arbitrator. No modification of the plan was permissible.

58. It is submitted by the learned Senior Counsel that the finding of the learned arbitrator that Mr. G. G. Kukreja was not cross-examined by the petitioner or respondent no.2 on the deposition that the husbands respectively of the petitioner and the respondent no.2 had agreed, signed the draft Supplemental Agreement is ex-facie perverse and contrary to the evidence on record. In this regard, learned Senior Counsel invited my attention to the cross-examination of Mr. G. G. Kukreja by the learned Senior Counsel for the petitioner and the respondent no.2 and more particularly to question nos. 83 to 100 and 224 in support of his submission that the finding of the learned arbitrator is overlooking the crucial and material peace of evidence on record and thus the award shows patent illegality.

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59. Learned Senior Counsel for the petitioner and the respondent no.2 invited my attention to paragraph nos. 20 to 24 and 35 of the statement of claim filed by the respondent no.1 and would submit that the respondent no.1 has given different and conflicting dates of drafting of the alleged Supplemental Agreement, which were totally false, inconsistent and misleading. Learned Senior Counsel invited my attention to the cross- examination of the husband of respondent no.2 by the learned Senior Counsel for the respondent no.1 and more particularly to question nos. 72 and 73. The said witness deposed that the petitioner and the respondent no.2 had given title deeds of the suit property to Mr. Kirit Damania and had never demanded the said title Deeds since they had alleged relationship with Mr.Kirit Damania and never had the need for the title Deeds.

60. It is submitted that the respondent no.1 did not examine any RCC specialist before the learned arbitrator. The letter of the RCC specialist was not produced by the respondent no.1 before the learned arbitrator. The respondent no.1 did not produce any evidence to show that there was any consultation between the petitioner and the respondent no.2 on one hand and the respondent no.1 on the other hand before the commencement of any differences of dispute between the parties.

61. Learned Senior Counsel invited my attention to the finding of carbp-350.17 & carbp-812.19.docx the learned arbitrator in paragraph 19(5) of the arbitral award on the issue of limitation and would submit that the learned arbitrator has rejected the plea of limitation overlooking the evidence on record produced by the petitioner and respondent no.2 and without disclosing any reasons and has taken a very casual approach on the matter on the said plea of limitation. It is submitted that the claim for specific performance of the Development Agreement executed in the year 1995 was already time barred in the year 1998 and thus there was no question of execution of any alleged Supplemental Agreement.

62. Learned Senior Counsel submits that considering the status of the construction of the suit property, the learned arbitrator could not have granted specific performance of the Development Agreement, Memorandum of Understanding read with the alleged Supplemental Agreement. The terms and conditions of the alleged Supplemental Agreement were not even agreed by and between the parties. No specific performance thus of such Supplemental Agreement could have been granted

and that also contrary to Section 14 of the Specific Relief Act, 1963. Learned Senior Counsel submits that since the entire award is totally perverse and has been passed in ignorance of the crucial, vital evidence, it shows patent illegality and thus deserves to be quashed and set aside.

63. In support of the aforesaid submissions, learned Senior Counsel for the petitioner placed reliance on the following judgments :-

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i) The judgment of Supreme Court in case of Ssangyong Engineering & Constructions Co. Ltd. v/s. National Highways Authority of India (NHAI), 2019 SCC OnLine SC 677.

ii) The judgment of Supreme Court in case of Associate Builders v/s.

Delhi Development Authority, (2015) 3 SCC 49.

iii) The judgment of Supreme Court in case of Ouseph Varghese v/s.

Joseph Aley and Others, 1969 (2) SCC 539.

iv) The judgment of this Court in case of Smt. Pramila Lalbhai Dabhoya and Anr. v/s. Dr. Harish Lalbhai Dabhoya, in First Appeal No. 1104 of 2000.

v) The judgment of this Court in case of Gill and Company Pvt. Ltd., Mumbai v/s. Patodia Ginning Factory, Malegaon, 2016 (3) Mh. L.J.890.

vi) The judgment of this Court in case of Pradyumn Kumar Sharma and Another v/s. Jay Agar M. Sancheti and Others, 2013 SCC OnLine Bom 453.

vii) The judgment of Supreme Court in case of Satyabrata Ghose v/s.

Mungneeram Bangur & Co. and Another, 1954 SCR 310.

viii)The judgment of Calcutta High Court in case of A.E.G. Carplet carbp-350.17 & carbp-812.19.docx v/s. A. Y. Derderian, 1960 SCC OnLine Cal 44.

ix) The judgment of this Court in case of Jagmohan Singh Gujral of Indian v/s. Satish Ashok Sabnis and Another, 2003 SCC OnLine Bom 335.

x) The judgment of this Court in case of Bombay Intelligence Security (India) Ltd. v/s. Oil & Natural Gas Corporation Limited in Arbitration Petition No. 822 of 2012.

xi) The judgment of Supreme Court in case of Municipal Committee, Hoshiarpur v/s. Punjab State Electricity Board and Others, (2010) 13 SCC 2016.

xii) The judgment of this Court in case of Prajapati Gunwant Keshavlal v/s. Union of India and Another in Commercial Arbitration Petition No. 36 of 2016.

xiii)The judgment of this Court in case of Board of Trustees of the Port of Mumbai v/s. Afcons Infrastructure Limited, 2016 SCC OnLine Bom 10037.

64. Mr. Shailesh Shah, learned Senior Counsel for the respondent no.2 in Commercial Arbitration Petition No. 350 of 2017 and for the petitioner in Commercial Arbitration Petition No. 812 of 2019 adopts the submission made by Mr. T.N. Subramanian, learned Senior Counsel for the carbp-350.17 & carbp-812.19.docx petitioner in Commercial Arbitration Petition No. 350 of 2017 and made additional submissions. He submits that the plans were allegedly submitted by the respondent no.1 (original claimant) for the first time on 9 th December, 1998. Prior to the date of submission of plan, the policy framed by the Municipal Corporation permitted extension. No steps however were taken by the respondent no.1 during the period 1995 to 1998 for extension of the building. Under the said agreement dated 19th April, 1995, construction was to be completed within 36 months, which expired on 19 th April, 1988 before change of the policy framed by the Municipal Corporation whereby extension was not permissible. The alleged application for amendment of plan was made by the respondent no.1 only on 8th July, 1999.

65. It is submitted that the said letter dated 14th February, 2002 allegedly addressed by the respondent no.1 to the learned arbitrator purporting to invoke arbitration agreement was never received by his client. He submits that in the correspondences addressed by the respondent no.1 on 18th October, 2002, 10th January, 2003, 15th July, 2003 and 17th December, 2004, there was no reference made by the respondent no.1 to the said alleged Supplemental Agreement. There was a reference made to the alleged Supplemental Agreement only in the statement of claim filed by the respondent no.1 before the learned arbitrator.

66. It is submitted by the learned Senior Counsel for the petitioner carbp-350.17 & carbp-812.19.docx that under clause 2 of the Development Agreement, the respondent no.1 was granted a licence to enter upon the suit property as a developer for limited purpose. No grievance was made by the respondent no.1 till the date of filing statement of claim that it was not allowed to enter the suit property by the petitioner in both the arbitration petitions. Learned Senior Counsel relied upon clause 14(a) of the Development Agreement and would submit that the respondent no.1 had not filled Form 37-I under the provisions of Income Tax Act, 1961. He submits that under the Memorandum of Understanding entered into between the parties, encroachment was to be removed by the respondent no.1. The respondent no.1 did not contribute any amount for removal of encroachment. The petitioner was not called upon to remove any encroachment by the respondent no.1. No allegations of alleged breaches were made against the petitioner or against the respondent no.2 by the respondent no.1 for 14 years.

67. It is submitted by the learned Senior Counsel that the respondent no.1 had failed to show the readiness and willingness to comply with its part of obligation under the said Development Agreement. In so far as the alleged Supplemental Agreement is concerned, it is submitted by the learned Senior Counsel that the said alleged agreement even otherwise was frustrated in view of the new policy framed by the Municipal Corporation. It was not the case of the respondent no.1 that any such alleged Supplemental Agreement was signed by and between the parties. It was the case of the respondent carbp-350.17 & carbp-812.19.docx no.1 itself that there was an alleged proposed Supplemental Agreement to be arrived at between the parties.

68. Learned Senior Counsel invited my attention to the answer of Mr. G. G. Kukreja the witness examined by the respondent no.1 in his cross- examination and more particularly to question no. 83 to 101 and 224 and would submit that the said witness also did not give any details of the alleged oral Supplemental Agreement nor such details were given even in the statement of claim filed by the respondent no.1. He invited my attention to the averments made in paragraphs 17, 18 and 23 of the written statement filed by his client thereby denying the existence of the said alleged Supplemental Agreement. He also invited my attention to the deposition of witness of his client and more particularly in paragraph 22 to 24 of the affidavit of evidence disputing the alleged Supplemental Agreement and also to the cross-examination of the said witness recorded in paragraph 92 and

153.

69. The said witness had deposed that he did not know Mr. G. G. Kukreja. No further question was put to the said witness on that issue. No suggestion was put to the said witness by the respondent no.1 that the petitioner was aware of such alleged Supplemental Agreement. No authority in favour of Mr. G. G. Kukreja to file statement of claim or to give evidence was produced by the respondent no.1 or to deal with the arbitration carbp-350.17 & carbp-812.19.docx proceedings filed by the respondent no.1. He submits that since Mr. G. G. Kukreja was not authorized to represent the respondent no.1 or to file statement of claim or to give oral and documentary evidence, the statement of claim itself was thus liable to be dismissed on that ground itself.

70. Learned Senior Counsel invited my attention to the finding of the learned arbitrator recorded in paragraph 15(b) of the impugned award and would submit that the learned arbitrator had not recorded any reasons as to how and when the parties became aware that the alleged Supplemental Agreement was existing. Learned Senior Counsel also invited my attention to the findings rendered by the learned arbitrator in paragraph 4(c) of the order dated 23rd July, 2012 under Section 16 of the Arbitration Act and would submit that even in the said order the learned arbitrator has not recorded any reasons as to how the parties were aware of the alleged Supplemental Agreement and the basis for recording such finding.

71. It is submitted that Mr. G. G. Kukreja had come in picture, in so far as the subject matter of the dispute is concerned, only in the year 1998 and not having knowledge about the alleged cause of action for dispute prior to 1998 could not have led any evidence to prove the facts prior to 1998. He submits that there was no evidence produced by the respondent no.1 that the petitioner did not allow the respondent no.1 to enter into the possession of the suit property. No correspondences were

produced in support of such carbp-350.17 & carbp-812.19.docx allegation. No bank account was opened to deposit the sale proceeds as contemplated under the Development Agreement. He submits that in reply to the question no. 148 in his cross-examination Mr. G. G. Kukreja admitted that no agreement was prepared for sale of flats by the respondent no.1. No evidence was led by the respondent no.1 in support of the plea that the petitioner committed any breaches of the Development Agreement. He submits that the claim for refund could not be granted as was ex-facie barred by law of limitation. However, the said plea of limitation was rejected by the learned arbitrator without recording any evidence and shows perversity. No case for specific performance of the Development Agreement read with Memorandum of Understanding and alleged Supplemental Agreement was made out by the respondent no.1.

72. Learned Senior Counsel invited my attention to the averments made in paragraph 20 to 22 of the statement of claim filed by the respondent no.1 and would submit that it was admitted by the respondent no.1 itself that the agreement was frustrated. He also invited my attention to the deposition of Mr. G. G. Kukreja in paragraphs 14 and 15 of the affidavit of evidence and his cross-examination recorded in question nos. 159 to 196 and 202 to 218 and would submit that the said witness examined by the respondent no.1 had admitted that the project in question was not viable. The learned arbitrator overlooked these crucial evidence and has awarded relief of specific performance in favour of the respondent no.1, which shows total carbp-350.17 & carbp-812.19.docx perversity in the impugned award.

73. It is submitted that even according to the respondent no.1, the alleged Supplemental Agreement was terminated in the year 2001. Alleged arbitration notice was purported to have been issued in 2002, the existence whereof was not proved before the learned arbitrator. A reference to that alleged Supplemental Agreement was made only in the year 2009 in the statement of claim filed before the learned arbitrator. He submits that the limitation in respect of the said Supplemental Agreement would not stop on receipt of alleged notice dated 14th February, 2002. He submits that under the said Supplemental Agreement relied upon by the respondent no.1, the total area coming to the share of the petitioner under the Development Agreement was reduced. He submits that since the award shows patent illegality, the same deserves to be set aside.

74. Mr. Rohit Kapadia, learned Senior Counsel for the respondent no.1 invited my attention to the provisions of the Development Agreement and Memorandum of Understanding both dated 19th April, 1995. He submits that the petitioner as well as the respondent no.2 had failed to comply with their obligations under the said Development Agreement and Memorandum of Understanding. The parties had agreed to enter into a Supplemental Agreement. He invited my attention to the original prayers in the statement of claim filed by his client and also the amendment sought by his client by carbp-350.17 & carbp-812.19.docx an application for amendment. He submits that after considering the application for amendment filed by his client, the learned arbitrator allowed the said application for amendment and permitted his client to seek specific performance also of Development Agreement and Memorandum of Understanding.

75. Learned Senior Counsel invited my attention to the averments made by the petitioner and the respondent no.2 in paragraph 1, 5, 9(e) and 11 of the written statement filed by them and would

submit that it was their case that the respondent no.1 did nothing under the said two agreements entered into between the parties. The plea of limitation raised by the petitioner was for claims arising out of the parent agreement and not arising out of Supplemental Agreement. He submits that the amendment was sought by his client only to fill in the lacuna. The parent agreement was modified by the Supplemental Agreement by the parties. The amendment sought by his client was only in the nature of clarification.

76. Learned Senior Counsel invited my attention to the the 'points for determination' as well as the 'additional points for determination' framed by the learned arbitrator after hearing both the parties. He submits that issue no.1 did not survive in view of the Supplemental Agreement entered into between the parties. In so far as issue of limitation raised by the petitioner and the respondent no.2 in Commercial Arbitration Petition No. 350 of 2017 carbp-350.17 & carbp-812.19.docx are concerned, learned Senior Counsel invited my attention to clause 2 of the Development Agreement and would submit that time to complete construction within 36 months was to commence from the date of commencement of construction and not from the date of execution of the Development Agreement. The petitioner and the respondent no.2 had partly constructed the suit property 16 years back. There were encroachment on the suit property. There were existing agreements between some of the flat buyers and the petitioner and respondent no.2.

77. Learned senior counsel relied upon clause 27 of Development Agreement and would submit that the Conveyance Deed was to be executed by his client only after completion of the new buildings and on completing sale of all the premises and on receipt of the purchase price in respect of those premises. He submits that the petitioner and respondent no.2 had already executed the power of attorneys in favour of his client. The agreement entered into between the parties was for transfer of property.

78. Learned Senior Counsel placed reliance on Article 54 of the Schedule I to the Limitation Act, 1963 and would submit that if no date is fixed for performance of the contract, limitation for specific performance commences when the performance is refused by the other party. In support of this submission, learned Senior Counsel placed reliance on the judgment of Supreme Court in case of Ahmmadsahab Abdul Mulla (deceased by carbp-350.17 & carbp-812.19.docx L.R.s) v/s. Bibijan & Ors., AIR 2009 SC 2193 and in particular paragraph 1 and 4 to 7 thereof.

79. Learned Senior Counsel invited my attention to clause 5 of the Memorandum of Understating dated 19th April, 1995 and would submit that reference was already made to the pending suit between the petitioner, respondent no.2 and others. The respondent no.1 was required to settle the suit with those litigants which suit was pending since 1979. He submits that the said suit was in respect of the partnership dispute in which the petitioner Vasantben Bhuta was the defendant. The said suit was in respect of the same property. He invited my attention to the averments made in the statement of claim to the effect that the said suit was settled between those parties.

80. Learned Senior Counsel invited my attention to the deposition made in paragraph 4 of the affidavit of evidence filed by the witness examined by the petitioner and respondent no.2 deposing that the said suit was withdrawn by them. He also invited my attention to the answer of the said

witness in the cross-examination and more particularly to question nos. 13 to 23, 26, 27 and 30 to demonstrate that the suit which was pending on the date of execution of the Development Agreement was withdrawn.

81. Learned Senior Counsel invited my attention to the plea raised by the petitioner and respondent no.2 in paragraph 26 of the written carbp-350.17 & carbp-812.19.docx statement, in so far as the limitation in respect of refund of Rs.1.50 crores is concerned and would submit that the said plea itself would indicate that the refund of the said amount was within a period of limitation and was not barred. He invited my attention to clause 22 of the Development Agreement, in so far as the deposit of Rs.1 Crore was concerned. He submits that the money deposited did not became payable in 1998 but became payable only when the respondent no.1 would have demanded the said amount. The respondent no.1 did not demand the said deposit from the petitioner and the respondent no.2. The amount deposited by the respondent no.1 was not returned by the petitioner or by the respondent no.2.

82. Learned Senior Counsel invited my attention to the finding rendered by the learned arbitrator on the issue of limitation in paragraph 18 of the impugned award and would submit that the learned arbitrator after considering the facts and evidence, rightly held that the claims made by the respondent no.1 were within the period of limitation. He submits that the deposits made by the respondent no.1 are still with the petitioner and the respondent no.2. The title deeds in respect of the suit property are still lying with the Solicitor Kirit Damania and Company. The power of attorney executed in favour of the respondent no.1 by the petitioner and respondent no.2 are still valid.

83. Learned Senior Counsel placed reliance on the cross-

carbp-350.17 & carbp-812.19.docx examination of the witness examined by the petitioner and more particularly his reply to question nos. 71 and 72 in support of the submission that the said witness admitted that the title deeds were given to Kirit Damania and Company Solicitors by the petitioner and respondent no.2. He submits that the said witness also admitted that the title deeds were never demanded by the petitioner or by the respondent no.2 from Kirit Damania and Company. The relations of the petitioner and respondent no.2 with the said Kirit Damania and Company Solicitors were cordial. He also placed reliance on the correspondence between the solicitors of the petitioner, respondent no.2 and the respondent no.1 annexed at page 377, 379 and 380 of the compilation of documents.

84. It is submitted that the evidence of Mr.J.N. Bhuta led by the petitioner and respondent no.2 was totally inconsistent. The learned arbitrator has rightly held that the evidence of Mr. G. G. Kukreja was consistent all throughout. The learned arbitrator has appreciated the evidence led by both the parties and has rightly held that the contractual relationship between the partnership was valid and subsistence. This Court cannot re- appreciate the evidence appreciated by the learned arbitrator.

85. It is submitted by the learned Senior Counsel that the learned arbitrator has rightly rendered a finding in the impugned award that the power of attorneys executed by the petitioner and respondent no.2 in favour carbp-350.17 & carbp-812.19.docx of the respondent no.1 were still valid

and not cancelled or revoked by the petitioner and respondent no.2. He submits that since the relationship between the parties under the agreement entered into between the parties was subsisting, the claim of the respondent no.1 even otherwise could not be declared as time barred.

86. In so far as the issue as to whether Supplemental Agreement relied upon by the respondent no.1 was subsisting and binding on the petitioner or respondent no.2 or not is concerned, the learned Senior Counsel invited my attention to the deposition of the witness examined by the petitioner and respondent no.2 and more particularly in paragraph 24. He submits that the existence of the letter dated 14 th February, 2002 addressed by the respondent no.1 to the learned arbitrator is admitted by the petitioner and the respondent no.2 in the said evidence led by them and thus it cannot be urged by the petitioner or by the respondent no.2 that the said letter dated 14th February, 2002 invoking the Arbitration Agreement was not served upon them or that the said letter even did not exist. He submits that in the said letter dated 14th February, 2002, at Sr. No. 5, the draft of the Supplemental Agreement was already referred. He submits that the petitioner or the respondent no.2 thus cannot be allowed to dispute the existence of the said letter as well as the existence of the annexure thereto which includes draft Supplemental Agreement.

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87. It is submitted that the Development Agreement and the Memorandum of Understanding was not given a go bye by the parties but were continued to be in force and were to be read with Supplemental Agreement. Learned Senior Counsel invited my attention to the finding rendered by the learned arbitrator in paragraph (f)(ii) at page 75 of the petition and would submit that the learned arbitrator has rightly held that the said letter dated 14th February, 2002 included a draft Supplemental Agreement, which was not denied by the petitioner or by the respondent no.2. A copy of the said letter dated 14th February, 2002 was also furnished to the petitioner and respondent no.2 by the respondent no.1. The petitioner and respondent no.2 had never terminated the contract executed with the respondent no.1. He submits that in the facts and circumstances of this case, the learned arbitrator has rightly granted the relief of specific performance in respect of the Development Agreement, Memorandum of Understanding and Supplemental Agreement. The petitioner and respondent no.2 had already agreed to the terms and conditions of the Supplemental Agreement also.

88. It is submitted by the learned Senior Counsel that the respondent no.1 was not required to cross-examine the witness of the petitioner and respondent no.2 on the existence of the Supplemental Agreement as the petitioner and respondent no.2 had admitted the existence thereof along with the draft Supplemental Agreement referred in the said letter dated 14th February, 2002. The learned Senior Counsel invited my attention to carbp-350.17 & carbp-812.19.docx paragraphs 3 and 10 of the affidavit filed by the petitioner and the respondent no.2 opposing the application for amendment filed by the respondent no.1 and would submit that in the said affidavit, existences of the said notice dated 14th February, 2002 along with draft Supplemental Agreement was admitted by the petitioner and respondent no.2.

89. Learned Senior Counsel placed reliance on the deposition made by Mr. G. G. Kukreja and more particularly in paragraphs 15 and 16 of his affidavit in lieu of examination-in-chief and would submit that the said witness had clearly deposed that the petitioner and respondent no.2 had agreed to the terms recorded in the Development Agreement, Memorandum of Understanding and the Supplemental Agreement but did not execute the said Supplemental Agreement. He also strongly placed reliance on the cross- examination of the said witness examined by the respondent no.1 and more particularly in reply to question nos. 83, 87 to 101. He submits that in so far as the existence of Supplemental Agreement is concerned, case of the parties is based on word against word. The learned arbitrator has appreciated the evidence in toto and thus sufficiency of evidence cannot be gone into by this Court in this petition filed under Section 34 of the Arbitration Act. He submits that the Development Agreement as well as the Memorandum of Understanding had not come to an end even on 14th February, 2002.

90. In so far as the issue no.5 is concerned, it is submitted by the carbp-350.17 & carbp-812.19.docx learned Senior Counsel that in clause 2 of the Development Agreement, it was clearly contemplated that the lesser area could be developed by the respondent no.1. The petitioner and respondent no.2 had agreed to execute further documents, if necessary to carry out and complete the obligations under the Development Agreement under clause 30 of the said agreement and thus there was no question of any frustration of contract.

91. Learned Senior Counsel for the respondent no.1, invited my attention to the Arbitration Agreement and would submit that doctrine of incorporation under Section 7(5) of the Arbitration Act would not apply to the facts of this case. Learned Senior Counsel placed reliance on the Law Lexicon by Ramanatha Aiyar, 6th Edition, on the expression "in pursuance of". He also placed reliance on the judgment of Supreme Court in AIR 1996 SC 3501 and in particular paragraph 4 interpreting the expression "in pursuance of".

92. Learned Senior Counsel invited my attention to clause 33 of the Development Agreement which records Arbitration Agreement and would submit that under the said Arbitration Agreement, the learned arbitrator has summary powers to decide the dispute between the parties. He also placed reliance on the judgment of Supreme Court in case of Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49 and in particular paragraphs 27 to 33 and 40 and in case of Ssangyong Engineering & carbp-350.17 & carbp-812.19.docx Constructions Co. Ltd. v/s. National Highways Authority of India (NHAI), 2019 SCC OnLine SC 677 and would submit that the findings of facts rendered by the learned arbitrator cannot be interfered with by this Court under Section 34 of the Arbitration Act.

93. Learned Senior Counsel for the respondent no.1 invited my attention to the answers of the witness examined by the petitioner and respondent no.2 in question nos. 56, 86 to 88, 116 and 118 to 125 and would submit that the said witness examined by the petitioner and respondent no.2 could not produce the books of accounts though was repeatedly called upon by the respondent no.1 to produce during the course of the evidence. The said witness deposed that those files were mixed up with other documents. The said witness did not know anything about the books of accounts. The learned arbitrator thus rightly drew adverse inference against the petitioner and respondent no.2.

Learned Senior Counsel invited my attention to the reply of the witness examined by the petitioner and respondent no.2 to question nos. 49 to 54 and would submit that the said witness had admitted various breaches on the part of the petitioner and respondent no.2 and thus the learned arbitrator rightly allowed the claims made by the respondent no.1.

94. Mr. Subramanian, learned Senior Counsel for the petitioner in Commercial Arbitration Petition No. 350 of 2017 in rejoinder submits that carbp-350.17 & carbp-812.19.docx the respondent no.1 has tried to justify the impugned award by supplanting various reasons during the course of his arguments by referring to various documents which were neither referred by the learned arbitrator nor dealt with in the impugned award. The reasons recorded by the learned arbitrator cannot be allowed to be supplanted by the affidavit in reply or by relying upon the documents which did not form part of the award. In support of this submission, learned Senior Counsel placed reliance on the judgment of this court in case of Board of Trustees of the Port of Mumbai (supra) and in particular paragraphs 292 of 295.

95. It is submitted that the learned arbitrator could not have ignored plea of limitation even while allowing the application for amendment made by the respondent no.1. The award is vitiated on this ground itself. He invited my attention to the provisions of Memorandum of Understanding entered into between the parties and would submit that admittedly there was no progress of work for three years by the respondent no.1 from the date of the said Memorandum of Understanding. It was the case of the respondent no.1 itself that the petitioner and respondent no.2 were in alleged breach of terms of the Development Agreement and Memorandum of Understanding and thus the limitation would commence from the date of such alleged breaches of Development Agreement and Memorandum of Understanding.

96. Learned Senior Counsel invited my attention to the reply of carbp-350.17 & carbp-812.19.docx Mr.G. G. Kukreja in his cross-examination and in particular to question no. 151 and would submit that the said witness had admitted before the learned arbitrator that the petitioner and respondent no.2 were not consulted by the respondent no.1 before seeking amendment to the plans submitted to the Municipal Corporation. He submits that in the year 1995 itself, the respondent no.1 was fully aware that the building existing on the suit property had to be demolished and thus respondent no.1 cannot be allowed to urge that the respondent no.1 was asked to demolish the building by the petitioner or by the respondent no.2. No steps were taken by the respondent no.1 of any nature whatsoever for the projects under the said Development Agreement and the Memorandum of Understanding. If there was no time prescribed in the contract for carrying out performance on the part of any of the parties, the same is to be carried out within reasonable period.

97. It is submitted that in this case, the respondent no.1 had got the plan sanctioned after four years and that also without consulting the petitioner as well as respondent no.2. In support of this submission, he also relied upon para 14 of the affidavit of evidence filed by Mr. G. G. Kukreja on behalf of the respondent no.1. The respondent no.1 had not addressed any letter to the petitioner and respondent no.2 alleging any breaches of their obligations at any point of time. There was no readiness and willingness on the part of the respondent no.1 to perform its part of obligation under the said Development Agreement and Memorandum of Association. The learned carbp-350.17 &

carbp-812.19.docx arbitrator refused to grant any relief for refund in favour of the respondent no.1, which refusal is admittedly not challenged by the respondent no.1.

98. Learned Senior Counsel distinguished the judgment of Supreme Court in case of Ahmmadsahab Abdul Mulla (deceased by L.R.s) (supra). He relied upon paragraph 7 of the said judgment and would submit that the facts before the Supreme Court in the said judgment were totally different.

99. In so far as the submission of Mr. Kapadia, learned Senior Counsel for the respondent no.1 on the issue of existence of the Supplemental Agreement is concerned, learned Senior Counsel for the petitioner invited my attention to paragraph 24 of the affidavit in lieu of examination-in-chief of the witness examined by the petitioner and would submit that whole paragraph has to be read and not particular sentence in isolation. It was not the evidence of the respondent no.1 that any of the petitioner or the respondent no.2 had refused to accept service of the said alleged letter dated 14th February, 2002. He submits that though the learned arbitrator had framed an issue of jurisdiction, he did not bother to decide the said issue in the impugned award. Learned Senior Counsel invited my attention to the paragraphs 3, 9 and 10 of the affidavit of Mr. J.N. Bhuta filed on behalf of the petitioner and would submit that the petitioner as well as the respondent no.2 had categorically denied the receipt of alleged letter dated 14th February, 2002 or the existence of the alleged Supplemental carbp-350.17 & carbp-812.19.docx Agreement.

100. Learned senior counsel also strongly placed reliance on the deposition made in paragraphs 2 and 4 of the affidavit of evidence filed by the witness examined by the petitioner. He submits that no case was put to the said witness by the respondent no.1 that the said alleged letter dated 14 th February, 2002 was served upon the petitioner as well as the respondent no.2. He invited my attention to the averments made by the petitioner and respondent no.2 in paragraphs 1, 12, 15 to 18 and 28 of the statement of defence filed by them and would submit that the existence of alleged Supplemental Agreement was categorically denied by them.

101. There were inconsistencies in the pleading filed by the respondent no.1 through Mr. G. G. Kukreja and the evidence led by the said witness about the alleged existence of the Supplemental Agreement. He also relied upon the answer of the said witness to reply to question no. 83 in his cross-examination and would submit that the said answer was contrary to the allegations made in paragraph 35 of the statement of claim filed by the respondent no.1. In reply to question no. 87, the witness examined by the respondent no.1 deposed that he did not remember when oral agreement between the respondent no.1 and the husbands of the petitioner and respondent no.2 was arrived at in connection with the alleged Supplemental Agreement. The said witness could not give any precise date on which the carbp-350.17 & carbp-812.19.docx said alleged Supplemental Agreement was arrived at. He submits that the learned arbitrator has totally ignored the pleadings and evidence filed by the petitioner as well as respondent no.2 in the impugned award.

102. In so far as the submission of Mr. Kapadia, learned Senior Counsel for the respondent no.1 that under the Arbitration Agreement, the learned arbitrator was granted summary powers by the parties is concerned, it is submitted by the learned Senior Counsel for the petitioner that it is not the case of the respondent no.1 that in view of the said summary powers, the learned arbitrator was not bound

to record any reasons in the impugned award. He submits that even while exercising summary powers, the learned arbitrator could not decide contrary to law and could not have ignored the vital evidence led by the petitioner and respondent no.2.

103. On the issue as to whether the contract awarded to the respondent no.1 by the petitioner and respondent no.2 was frustrated or not, learned Senior Counsel invited my attention to recital D of the Development Agreement dated 19th April, 1995 and would submit that it was clearly mentioned in the said document that the totally saleable built-up area available in the said building as per the approved building plan was 82,000 sq. ft. approximately. The petitioner and respondent no.2 had retained to themselves total built-up area about 12,500 sq. ft. (built-up) in the buildings to be constructed on the said land. The petitioner and respondent no.2 had carbp-350.17 & carbp-812.19.docx agreed to pay to the respondent no.1 the cost of construction at Rs.600/- per sq. ft. of the built-up area for the area retained by the petitioner and respondent no.2 i.e. 12,500 sq. ft. (built-up). He relied upon the answers given by the witness examined by the respondent no.1 and in particular to the question nos. 160, 161 and 189 to 198 and would submit that the said witness had clearly admitted that the area supposed to be constructed was substantially reduced. He submits that the learned arbitrator ought to have considered such ground before granting any relief of specific performance in favour of the respondent no.1.

104. In so far as the submission of learned Senior Counsel for the respondent no.1 that arbitration clause referred in Development Agreement was wide is concerned, he submits that the said clause would not include the dispute arising under the alleged Supplemental Agreement. The alleged Supplemental Agreement was never executed by and between the parties nor was agreed at any point of time.

105. Learned Senior Counsel distinguished the judgment of Supreme Court in case of Aircraft Employees Housing Co-operative Society Ltd. v/s Secretary, Rural Development and Panchayat Raj, Government of Karnataka, AIR 1996 SCC 3501 and would submit that the said judgment would not apply to the facts of this case since the said judgment had dealt with a statutory interpretation, which principles would not apply to the carbp-350.17 & carbp-812.19.docx interpretation of a contract. He referred to paragraphs 4 of the judgment.

106. In so far as the judgment of Supreme Court in case of Associate Builders (supra) is concerned, learned senior counsel placed reliance on paragraphs 28 and 29 of the said judgment and would submit that the impugned award is contrary to the principles laid down by the Supreme Court in the said judgment. He strongly placed reliance on the judgment of Supreme Court in case of Ssangyong Engineering & Constructions Co. Ltd. (supra). He submits that the learned arbitrator is a Chartered Accountant and ought to have applied his mind to the dispute raised before him by the parties and ought to have appreciated and considered the evidence led by the parties in right perspective. He submits that the finding of the learned arbitrator that the petitioner and the respondent no.2 had received the letter dated 14th February, 2002 and had not disputed the said letter is totally perverse and is in ignorance of the vital documents and evidence produced by the petitioner and respondent no.2.

107. It is submitted by the learned Senior Counsel that the allegations now made across the bar by the respondent no.1 that there were disputes prior to 1979 in respect of the suit property and such disputes were existing on the date of execution of the Development Agreement and Memorandum of Understanding were not put to the witness examined by the petitioner and respondent no.2. There was no such plea raised even in the statement of carbp-350.17 & carbp-812.19.docx claim filed by the respondent no.1.

108. It is submitted by the learned Senior Counsel that since the alleged letter dated 14th February, 2002 invoking Arbitration Agreement was not served upon the petitioner as well as the respondent no.2, there was no valid invocation of the Arbitration Agreement and thus the learned arbitrator did not have jurisdiction to decide the disputes filed by the respondent no.1.

109. Mr. Shailesh Shah, learned Senior Counsel for the petitioner in Commercial Arbitration Petition No. 812 of 2019 and respondent no.2 in Commercial Arbitration Petition No. 350 of 2017 submits that there was no prayer for specific performance of the Development Agreement and Memorandum of Understanding initially when the statement of claim was filed by the respondent no.1. The respondent no.1 had prayed for specific performance only in respect of the alleged Supplemental Agreement. If according to the respondent no.1, the respondent no.1 had prayed for specific performance of the Development Agreement and Memorandum of Understanding even in the original statement of claim, there was no need for the respondent no.1 to apply for amendment to the statement of claim and to seek prayer of specific performance in respect of the Development Agreement and Memorandum of Understanding. He submits that the main agreement stood frustrated even according to the respondent no.1 and thus the learned arbitrator could not have granted any specific performance in carbp-350.17 & carbp-812.19.docx respect of the said Development Agreement and Memorandum of Understanding. The alleged Supplemental Agreement was not proved by the respondent no.1 and thus no specific performance thereof could be granted by the learned arbitrator.

110. Learned Senior Counsel invited my attention to the cross- examination of the said witness examined by the respondent no.1 and more particularly reply to question no. 39 and would submit that the said witness admitted that the respondent no.1 had knowledge that the petitioner and the respondent no.2 had allegedly refused to perform their part of obligation in the year 1995 itself, the period of limitation thus had commenced from such date itself. The period of three years had expired on 19 th April, 1998. The alleged letter dated 14th February, 2002 invoking the Arbitration Agreement was itself alleged to have been issued after expiry of period of limitation.

111. It is submitted by the learned Senior Counsel that the prayer for specific performance of the Supplemental Agreement, which was allegedly agreed in the month of October, 1999 was also barred by law of limitation. There was no reference to the said alleged Supplemental Agreement in the respondent advocate's letter issued on 18th October, 2002. The statement of claim was filed on 1st April, 2009 in which there was a reference to the said Supplemental Agreement for the first time.

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112. In so far as the prayer for refund of deposit of Rs.1.5 crores is concerned, it is submitted by the learned Senior Counsel that cause of action for specific performance of the Development Agreement, Memorandum of Understanding and for demand of refund of the amount was same. He placed reliance upon Article 22 of Schedule I of the Limitation Act, 1963 in support of this submission. He submits that even in the said alleged letter dated 14th February, 2002, the respondent no.1 itself had suggested that the said alleged Supplemental Agreement was a draft. He submits that the order passed by the learned arbitrator rejecting the application filed by the petitioner and respondent no.2 under Section 16 of the Arbitration Act is without recording any reasons. He lastly submits that the entire award shows perversity and patent illegality and thus shall be set aside by this Court.

REASONS AND CONCLUSION

113. I shall first decide the issue whether the respondent no.1 had proved the existence of alleged Supplemental Agreement between the respondent no.1 and the petitioner and the respondent no.2 in the arbitral proceedings or not.

114. The respondent no.1 had filed statement of claim before the learned arbitrator affirmed on 1st April,2009 inter alia praying for a declaration that the Supplemental Agreement as described in paragraphs 24 and 25 of the statement of claim was valid and subsisting and binding on the petitioner and the respondent no.2. The respondent no.1 had also prayed for carbp-350.17 & carbp-812.19.docx the specific performance of the Supplemental Agreement mentioned in those paragraphs of the statement of claim. In paragraphs 23 and 24 of the statement of claim, it was alleged by the respondent no.1 that the respondent no.1 had requested the petitioner and the respondent no.2 to enter into a Supplemental Agreement to revise the terms and conditions of the said agreement and Memorandum of Understanding.

115. After various meetings with the petitioner and the respondent no.2, it was allegedly proposed to execute the Supplemental Agreement between the respondent no.1, the petitioner and the respondent no.2. In or about November 2000, it was alleged to have been agreed that the Supplemental Agreement would be executed. The terms were allegedly agreed to and the respondent no.1 prepared a document title during the Supplemental Agreement recording the terms duly agreed. It was further alleged in the said claim that the respondent no.1 prepared the draft Supplemental Agreement and furnished the same to the petitioner and the respondent no.2 after numerous meetings and telephonic conversations. In or about November 2000, the petitioner and the respondent no.2 and their respective husbands informed Mr.G.G. Kukreja, representative of the respondent no.1 that the petitioner and the respondent no.2 would sign the Supplemental Agreement in terms of the draft allegedly sent to the claimant.

116. Prior to the date of the filing of the said statement of claim, the carbp-350.17 & carbp-812.19.docx respondent no.1 had allegedly sent a notice 14th February,2002 to Mr.Dilip Thakkar invoking clause 33 of the agreement and Memorandum of Understanding both dated 19th April,1995 entered into between the respondent no.1, petitioner and the respondent no.2 and informed Mr.Dilip Thakkar that the respondent no.1 desired to present before him to resolve the difference arose due to the fact and circumstances as per the annexures to the said letter for the

development of the property. It was the case of the respondent no.1 before the learned arbitrator that by the said notice, the respondent no.1 had invoked the arbitration agreement under clause 33 of the agreement dated 19th April,1995 and Memorandum of Understanding of even date. At the bottom of the said letter, the respondent no.1 had allegedly annexed a draft of the Supplemental Agreement suggested.

117. On the other hand it was the case of the petitioner and the respondent no.2 that the said alleged letter dated 14th February, 2002 was not even served upon them including any annexures thereto or otherwise. The existence of the said alleged Supplemental Agreement was vehemently denied by the petitioner and the respondent no.2 in the written statement. It was the case of the petitioner and the respondent no.2 that the said alleged Supplemental Agreement was annexed only in the said statement of claim filed before the learned arbitrator affirmed on 1st April,2009.

118. It is an admitted position that the said alleged Supplemental carbp-350.17 & carbp-812.19.docx Agreement was not signed by the parties including the respondent no.1 itself. There were several blanks in the said alleged Supplemental Agreement. Admittedly, there was no arbitration clause recorded even in the said alleged Supplemental Agreement. A perusal of the written statement filed by the petitioner and the respondent no.2 dated 15th October,2020 clearly indicates that the existence of the said alleged Supplemental Agreement was denied by the petitioner and the respondent no.2. The petitioner and the respondent no.2 had also filed an application under section 16 of the Arbitration Act raising a preliminary objection of jurisdiction to decide the claim made under the said alleged supplemental agreement before the learned arbitrator.

119. In the said alleged notice invoking arbitration agreement dated 14th February,2002 also there was no reference to alleged Supplemental Agreement alleged to have been entered into prior to 14 th February,2002. It was not the case of the respondent no.1 that there existed any arbitration agreement in the said alleged Supplemental Agreement and the said alleged arbitration agreement was invoked by the said notice dated 14th February,2002. It was the specific case of the petitioner and the respondent no.2 that the said so called letter dated 14 th February,2002 along with the annexures thereto was not served upon the petitioner and the respondent no.2.

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120. A perusal of the averments made in the paragraphs 23 and 24 of the said statement of claim clearly indicates that those allegations were totally vague and without particulars. It was the specific case of the petitioner and the respondent no.2 that a copy of the said Supplemental Agreement was received by the petitioner and the respondent no.2 only along with statement of claim served upon by them.

121. In the impugned award, the learned arbitrator summarized the plea raised by the petitioner and the respondent no.2. In paragraph 8(3) of the impugned award, the learned arbitrator recorded the plea of the petitioner and the respondent no.2 raised in the written statement that the respondent no.1 to prove that the petitioner and the respondent no.2 had agreed to enter into so called supplemental agreement and that the same was valid, subsisting and binding on the petitioner and

the respondent no.2.

122. The respondent no.1 had examined Mr.G.G.Kukreja as the sole witness to prove its case. On 11th December,2010, the learned arbitrator framed various points for determination. Under point no. (6) for determination, onus was on the respondent no.1 to prove that the petitioner and the respondent no.2 had agreed to enter into so called Supplemental Agreement in terms of Ex.'H' to the statement of claim as alleged in paragraph (24) of the statement of claim. In point no.7, the onus was on the respondent no.1 to prove that the so called Supplemental Agreement was carbp-350.17 & carbp-812.19.docx valid, subsisting and binding on the petitioner and the respondent no.2. Point No.8 cast onus on the respondent no.1 'whether the respondent no.1 was ready and willing to carry out their obligations under the so called Supplemental Agreement'. Point no.9 was 'whether the respondent no.1 was entitled to relief of specific performance of so called Supplemental Agreement'.

123. The learned arbitrator framed additional points for determination on 24th July, 2014 as under :-

> 1. Whether the Development Agreement and Memorandum of Understanding both dated 19th April, 1995 are modified by the Supplemental Agreement ?
>
> 2. Whether the Development Agreement and Memorandum of Understanding both dated 19th April,1995 as modified by Supplemental Agreement are valid, subsisting and binding ?
>
> 3. Whether the Claimants have always been ready and willing to carry out their obligations under the Development Agreement and Memorandum of Understanding both dated 19th April, 1995 as modified by Supplemental Agreement ?

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4. Whether the Claimants are entitled to specific performance of the said Development Agreement and Memorandum of Understanding both dated 19th April, 1995 as modified by Supplemental Agreement ?

124. On behalf of the respondent no.1, Mr.G.G. Kukreja filed affidavit in lieu of examination-in-chief dated 12th August,2014. The said witness deposed in the said affidavit that he was authorized by the respondent no.1 by virtue of the resolution passed by the respondent no.1 on 6th February,2009 to sign the said claim and all other documents and writings and/or to appoint the arbitrator for and on behalf of the respondent no.1 in that matter. In paragraph (2) of the said affidavit, he deposed that he had been associated with the respondent no.1's group companies since 1983 and worked as executive with various departments. He had filed the said affidavit of evidence on behalf of the respondent no.1 on the basis of the record which was available with the respondent no.1 and on the basis of his personal knowledge.

125. Insofar as alleged Supplemental Agreement is concerned, in paragraph (16) of the said affidavit of evidence, the said witness deposed that on 21st October, 1999, the said witness handed over to the respective husbands in the presence of the respondent no.2 sets of the certified copies of the sanctioned plans together with a copy of the draft modified terms and carbp-350.17 & carbp-812.19.docx conditions of the agreement with a request to allow the respondent no.1 to enter upon the said property for development pending the hearing of the appeal for floating FSI. He alleged that during the said meeting, he allegedly explained the main facts necessitating the changes in development and hence the necessity of executing Supplemental Agreement. The respondent no.1 allegedly requested the petitioner and the respondent no.2 to enter into a Supplemental Agreement for revising the terms and conditions of the said agreement and the Memorandum of Understanding.

126. It was deposed in the said affidavit that at the request of the petitioner and the respondent no.2, the respondent no.1 prepared a document titled draft Supplemental Agreement recording the terms orally agreed. The witness deposed in the said examination-in-chief that the said draft Supplemental Agreement had been prepared under his instructions in accordance with what was agreed with the petitioner and the respondent no.2. The said draft Supplemental Agreement was allegedly forwarded to the petitioner and the respondent no.2. In or about November 2000, at a meeting held in the respondent no.1's office, the petitioner and the respondent no.2 and their respective husbands committed to the said witness that they were agreeable to sign the draft Supplemental Agreement as forwarded to them.

127. The said witness deposed that at the end of November 2001, the petitioner and the respondent no.2 through their respective husbands carbp-350.17 & carbp-812.19.docx informed the witness that the plans had to be sanctioned as per original agreement dated 19th April,1995 for the total saleable area of 82,000 sq.ft. The said witness examined by the respondent no.1 was cross examined by the petitioner and the respondent no.2's counsel. In reply to question no.4, the said witness replied that he was employed sometime by the respondent no.1 company. Thereafter he remained employee of various K. Raheja Group of Companies from time to time. He admitted that he was not employee of the respondent no.1 company at the relevant time but he was employee of K. Raheja Group of Companies. He deposed that during the year 1983-1984-1985, he was an employee of the respondent no.1 company as an executive.

128. In reply to question no.14, he deposed that as far as this project is concerned, he got first associated with in the year 1997-98 as an executive. In reply to question no.83, the witness deposed that the petitioner and the respondent no.2 had agreed to execute the Supplemental Agreement around November 2000 orally. The said oral agreement was allegedly between the husbands of both the respondents on one hand and the witness of the respondent no.1 on the other side on behalf of the respondent no.1. He did not remember whether anybody was present at the time of the said alleged oral agreement. The said witness could not give precise date on which the said Supplemental Agreement was arrived at.

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129. The attention of the witness examined by the respondent no.1 was invited to the letter dated 18th October,2002 addressed on behalf of the respondent no.1 to the learned arbitrator. The witness admitted that in the said letter, there was no reference to the oral agreement, propounded by the respondent no.1. Even in the letter dated 10th January,2003, addressed by the learned advocate for the respondent no.1 to the learned arbitrator, there was no reference to the alleged oral agreement/supplemental agreement.

130. On behalf of the husband of the respondent no.2 Mr. Jaisukhbhai Bhuta filed his affidavit in lieu of examination-in-chief dated 24 th March,2015. In paragraphs 20 to 24 of the said affidavit of evidence, he deposed that neither the petitioner nor the respondent no.2 had agreed to the alleged terms of the Supplemental Agreement nor agreed to execute any such agreement with the respondent no.1. Mr.G.G. Kukreja had never approached the said witness or husbands of the respondent no.1 in relation to the or discussing the matter about execution of the alleged Supplemental Agreement or for modifying the terms and conditions of the Development Agreement as well as Memorandum of Understanding.

131. A perusal of the cross-examination of the said witness clearly indicates that there was hardly any cross-examination of the said witness by the respondent no.1's counsel. In the order passed by the learned arbitrator on the application under section 16 of the Arbitration Act filed by the carbp-350.17 & carbp-812.19.docx petitioner and the respondent no.2, the learned arbitrator held that the arbitration agreement as contained in paragraph (33) of the agreement dated 19th April,2015 was signed by both the parties and thus the same was valid arbitration agreement. The learned arbitrator accordingly has jurisdiction to proceed with the arbitration proceedings under the said agreement. Insofar as alleged Supplemental Agreement is concerned, the learned arbitrator held in the said order that since the parties were aware of the existence of the Supplemental Agreement which was allegedly supplemental to the agreement dated 19th April,1995 and which was in writing but not signed, is valid in lieu of sufficient judgments of various courts relied upon during the proceedings before him.

132. In the said order dated 23rd July, 2012, the learned arbitrator referred to the Note on the proceedings before him on 3rd December, 2010 and 31st December, 2011. In the said Note dated 23 rd July, 2012, the learned arbitrator summarized as to how the matter was proceeded before him by the parties during the period between 3rd December, 2010 and 31st December, 2011.

133. In so far as the issue as to whether the said alleged Supplemental Agreement existed or not is concerned, in the award dated 14 th February 2017, learned arbitrator has recorded a finding that letter dated 14th February 2002 allegedly addressed by the respondent no.1 to the learned arbitrator carbp-350.17 & carbp-812.19.docx with a copy to the petitioner and the respondent no.2 included a copy of the draft Supplemental Agreement and the same had not been denied by the petitioner and the respondent no.2. In my view, the finding of the learned arbitrator that the letter dated 14th February 2002 includes the copy of the Supplemental Agreement and that the same had not been denied by the petitioner and the respondent no.2 shows patent illegality. The petitioner and the respondent no.2 in their written statement had clearly disputed the existence of the letter dated 14th February 2002 and also copy of the draft Supplemental Agreement.

134. In paragraph 8(e) of the impugned award, learned arbitrator himself has summarized the objection raised by the petitioner and the respondent no.2 in the written statement and calling upon the respondent no.1 to prove that the petitioner and the respondent no.2 had agreed to enter into the so called Supplemental Agreement and that the same was valid, subsisting and binding on the petitioner and the respondent no.2. The impugned award thus shows non-application of mind on the part of the learned arbitrator. Learned arbitrator had overlooked the pleadings and evidence led by the parties while recording the finding that the petitioner and the respondent no.2 had not denied the letter dated 14 th February 2002 including a copy of the draft Supplemental Agreement.

135. The finding recorded by the learned arbitrator that the petitioner carbp-350.17 & carbp-812.19.docx and the respondent no.2 have not denied the said letter dated 14 th February 2002 in the alleged Supplemental Agreement is inconsistent with paragraph 8(e) of the impugned award. The respondent no.1 did not lead any evidence to prove the existence and contents of the said alleged Supplemental Agreement. In my view, the onus was only on the respondent no.1 to prove that the said alleged Supplemental Agreement existed and was valid and subsisting. The finding of the learned arbitrator that all the parties were aware of the Supplemental Agreement is also ex facie perverse and overlooking the pleadings and evidence led by the petitioner and the respondent no.2.

136. It was not the case of the respondent no.1 that the said Supplemental Agreement was handed over to the petitioner and the respondent no.2 along with any covering letter. In my view, even if there was any reference to the said alleged Supplemental Agreement in the letter dated 14th February 2002, unless the respondent no.1 would have proved the delivery of the said letter dated 14th February 2002 upon the petitioner and the respondent no.2, the learned arbitrator could not have rendered a finding that the parties were aware of the existence of the said alleged Supplemental Agreement. Though a specific plea was raised by the petitioner and the respondent no.2 in the written statement denying the existence and contents of the said notice dated 14th February 2002 and also the alleged Supplemental Agreement, the witness examined by the petitioner and the carbp-350.17 & carbp-812.19.docx respondent no.2 did not prove the service of the said notice dated 14 th February 2002 or the said alleged Supplemental Agreement. Learned arbitrator could not have drawn an inference that the parties were aware of such notice or such alleged Supplemental Agreement. In paragraph 17(g)(i), learned arbitrator had held that the so called disputes between the respondent no.1, the petitioner and respondent no.2 arising under the Agreement dated 19th April 1995 were referred to the learned arbitrator by the said notice dated 14th February 2002.

137. The finding of the learned arbitrator that it is established fact that the draft Supplemental Agreement was enclosed with the letter dated 14th February 2002 invoking the arbitration agreement and that was known to the petitioner and the respondent no.2 and the said alleged fact was recognised by the petitioner and the respondent no.2 is also overlooking the pleadings and evidence led by the parties. The averments made in the statement of claim by the respondent no.1 and more particularly paragraphs 22 and 23 thereof in respect of the alleged Supplemental Agreement were totally vague and without particulars. The witness examined by the respondent no.1 had given different dates of execution of the alleged Supplemental Agreement in the cross-examination. The learned arbitrator thus could not have overlooked such vital piece of evidence and the pleadings while rendering a finding that the parties were aware of such

Supplemental Agreement.

carbp-350.17 & carbp-812.19.docx

138. No finding is rendered by the learned arbitrator that any such Supplemental Agreement was executed by and between the parties, when and on what terms and conditions. Learned arbitrator, however, has granted specific performance of the Development Agreement and Memorandum of Understanding both dated 19th April 1995 as modified by the alleged draft Supplemental Agreement. In my view, even otherwise since there was no arbitration agreement recorded in the alleged Supplemental Agreement, the dispute arising out of the said alleged Supplemental Agreement were not referred to the learned arbitrator. The impugned award allowing the claim arising under such alleged Supplemental Agreement is thus ex facie without jurisdiction. Learned arbitrator has not recorded the reasons as to how he came to the conclusion that he had jurisdiction to entertain the claim arising out of alleged draft Supplemental Agreement.

139. Mr.G.G. Kukreja who was examined as a sole witness by the respondent no.1 did not have any personal knowledge about the subject matter of the dispute before the learned arbitrator and was not concerned with the agreement entered into between the parties till 1998. The said witness in his cross-examination admitted that he was associated with the project for the first time in the year 1997-98. Statement of claim was signed and verified by Mr.G.G.Kukreja who had no personal knowledge about the subject matter of the disputes before the learned arbitrator. The said carbp-350.17 & carbp-812.19.docx Mr.G.G.Kukreja could have neither filed statement of claim before the learned arbitrator nor could have been examined as a witness by the respondent no.1. The respondent no.1 did not examine any other witness who had personal knowledge about the subject matter of the disputes before the learned arbitrator. Learned arbitrator thus could not have considered the evidence filed by Mr.G.G.Kukreja who was examined on behalf of the respondent no.1.

140. In my view, the finding of the learned arbitrator that Mr.G.G. Kukreja was not cross-examined by the petitioner or respondent no.2 on the deposition that the respective husbands of the petitioner and the respondent no.2 had agreed and signed the draft Supplemental Agreement is also overlooking the pleadings and evidence led by the petitioner and the respondent no.2. The said witness was cross-examined thoroughly on this issue in question nos.83 to 100 and 224.

141. A perusal of the record indicates that in the correspondence addressed by the respondent no.1 on 18 th October 2002, 10th January 2003, 15th July 2003 and 17th December 2004, there was no reference made by the respondent no.1 to the said alleged Supplemental Agreement. The witness examined by the petitioner and the respondent no.2 replied to question no.52 that he did not know Mr.G.G. Kukreja. No further question was put to the said witness on this issue. Mr.G.G. Kukreja had not even produced any carbp-350.17 & carbp-812.19.docx authority letter authorising him to represent the respondent no.1 to file statement of claim or to give evidence on his behalf to file before the learned arbitrator.

142. In so far as the submission of Mr. Kapadia, learned senior counsel for the respondent no.1 that the existence of the letter dated 14 th February 2002 addressed by the respondent no.1 to the learned arbitrator was admitted by the petitioner and the respondent no.2 is concerned, there is no merit in this submission of the learned senior counsel. The petitioner and the respondent no.2 all throughout had disputed the existence and contents of the said alleged Supplemental Agreement and also the delivery of the said letter dated 14th February 2002. There is no merit in the submission of the learned senior counsel for the respondent no.1 that the respondent no.1 was not required to cross-examine the witness of the petitioner and respondent no.2 on the existence of the Supplementary Agreement on the ground that the petitioner and respondent no.2 had allegedly admitted the existence thereof along with the draft Supplementary Agreement referred in the said letter dated 14th February 2002. This submission of the learned senior counsel is contrary to the pleadings and evidence led by the petitioner and the respondent no.2 on record before the learned arbitrator.

143. There is no merit in the submission of the learned senior counsel for the respondent no.1 that the case of both the parties on the existence of carbp-350.17 & carbp-812.19.docx the alleged Supplemental Agreement is based on words against words. There is no merit in the submission of the learned senior counsel for the respondent no.1 that in the facts and circumstances of this case, this cannot go beyond the sufficiency of the evidence. In my view, the learned arbitrator has overlooked the pleadings and the vital piece of the evidence in the impugned award. It shows patent illegality and thus on that ground itself, such arbitral award can be interfered with by this Court under Section 34 of the Arbitration Act.

144. In so far as the deposition in paragraph 25 of the affidavit in lieu of examination-in-chief filed by the witness examined by the petitioner and the respondent no.2 is concerned, in my view, Mr.Subramanian, learned senior counsel for the petitioner is right in his submission that the whole paragraph has to be read and not a particular sentence in isolation. The entire award of the learned arbitrator is on the premise that the petitioner and the respondent no.2 had admitted the existence of the letter dated 14 th February 2002 which allegedly referred to draft Supplemental Agreement shows patent illegality.

145. In my view, since the respondent no.1 had failed to establish the existence and contents of the said alleged Supplemental Agreement, the finding rendered and the conclusions drawn by the learned arbitrator that the said alleged Supplemental Agreement was not denied by the petitioner and carbp-350.17 & carbp-812.19.docx the respondent no.2 or that they were aware of the Supplemental Agreement and granting specific performance thereof shows patent illegality and also without jurisdiction. Neither it was pleaded by the respondent no.1 nor it is held by the learned arbitrator that there was a separate arbitration agreement recorded in the said alleged Supplemental Agreement. It was neither pleaded by the respondent no.1 nor held by the learned arbitrator that the reliefs arising out of the said Supplemental Agreement also could be granted under the arbitration clause recorded in the Agreement dated 19 th April 1995. Learned arbitrator did not decide this issue in the impugned award though plea of jurisdiction was specifically raised by the petitioner and the respondent no.2.

146. I shall now decide the issue whether notice dated 14th February 2002 alleged to have been issued by the respondent no.1 invoking arbitration agreement was at all served upon the petitioner and the respondent no.2 and if served along with statement of claim for the first time, what is the effect thereof on the issue of limitation.

147. It was the case of the respondent no.1 before the learned arbitrator that a notice invoking arbitration agreement was issued for the first time on 14th February 2002 by addressing a letter to the learned arbitrator. In the written statement filed by the petitioner and the respondent no.2, there was specific denial of the receipt of the said notice dated 14 th February 2002.

carbp-350.17 & carbp-812.19.docx The onus was thus on the respondent no.1 to prove the existence and delivery of the said notice upon the petitioner and the respondent no.2. Though the respondent no.1 had examined Mr.G.G. Kukreja as a sole witness, the said witness did not even depose that the said notice dated 14 th February 2002 was also served upon the petitioner and the respondent no.2. No proof of delivery of the said notice was produced before the learned arbitrator by the said witness. Under Section 21 of the Arbitration Act which has to be read with Section 43, unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

148. There was no other date fixed in the arbitration agreement for commencement of arbitral proceedings recorded between the parties. There was no dispute referred in the said alleged notice arising out of the alleged Supplemental Agreement. In view of Section 43(2) of the Arbitration Act, an arbitration shall be deemed to have commenced on the date referred in Section 21 of the Arbitration Act i.e. when a request for referring the dispute to arbitration is received by the respondent. The arbitral proceedings in respect of such dispute would commence only when such notice is received by the respondent. When such notice for referring the dispute was received by the respondent, the arbitral proceedings in respect of such dispute commence and the limitation in respect of such dispute stops. The onus was carbp-350.17 & carbp-812.19.docx thus on the respondent who had alleged to have issued such notice on 14 th February 2002 to prove that such notice in respect of such dispute referred in the said notice was received by the petitioner and the respondent no.2. The respondent no.1, however, failed to prove the factum of the delivery of the said notice dated 14th February 2002 upon the petitioner and the respondent no.2. In my view, the arbitral proceedings thus in respect of such dispute which were referred in the said notice dated 14 th February 2002 had commenced only when the statement of claim was filed by the respondent no.1 before the learned arbitrator.

149. I shall now consider whether considering the date of filing of statement of claim by the respondent no.1 before the learned arbitrator, any of the claims made by the respondent no.1 before the learned arbitrator were within the period of limitation under various Articles applicable to the said claims under the provisions of the Limitation Act, 1963 or not.

150. A perusal of the original statement of claim filed by the respondent no.1 on 1st April 2009 clearly indicates that the respondent no.1 had applied for declaration that the Supplemental

Agreement as described in paras 24 and 25 of the statement of claim is valid, subsisting and binding on the petitioner and the respondent no.2 and also praying for specific performance of the Supplemental Agreement mentioned in the said Statement of Claim. Even in the said notice dated 14 th February 2002, there carbp-350.17 & carbp-812.19.docx was no dispute referred arising out of the said alleged Supplemental Agreement. Limitation in respect of the claim arising out of the said Supplemental Agreement thus would stop only when the said Statement of Claim was filed by the respondent no.1. In the written statement filed by the petitioner and the respondent no.2, there as a specific plea raised by the petitioner and the respondent no.2 disputing the existence of the said alleged Supplemental Agreement and also raising a plea of limitation in paragraphs 1, 2, 3, 22 and 23 of the written statement dared 15th October 2010.

151. The alleged Supplemental Agreement according to the allegations made in the statement of claim was agreed in the month of November 2000. The respondent no.1 had neither pleaded nor proved about the time allegedly agreed by and between the parties for performance of the agreement by either party under the said alleged Supplemental Agreement before the learned arbitrator. Statement of Claim was admittedly filed only on 1st April 2009. In paragraph 35 of the amended statement of claim, it was alleged by the respondent no.1 that the parties had agreed to execute Supplemental Agreement in October 1999 which was repudiated in November 2001 when the petitioner and the respondent no.2 refused to execute Supplemental Agreement and failed to perform their part of the obligation.

152. In my view, since the arbitral proceedings in respect of the carbp-350.17 & carbp-812.19.docx alleged Supplemental Agreement even if considered as in existence had commenced on the date of filing Statement of Claim dated 1 st April 2009 in this case, the said alleged notice dated 14 th February 2002 issued by the respondent no.1 to the learned arbitrator for appointing him for adjudication of dispute mentioned in the said notice would be of no significance and would not be the date of commencement of arbitration proceedings arising out of alleged Supplemental Agreement. Under Section 21 of the Arbitration Act, arbitral proceedings commence in respect of such dispute not when the said notice was served upon the learned arbitrator, but would commence when the said notice is received by the respondent. Even if such notice dated 14th February 2002 was served upon the learned arbitrator immediately that would not stop limitation in respect of such dispute which was referred in the notice invoking arbitration agreement till such time the said notice is served on the respondent. In my view, the relief granted by the learned arbitrator in respect of the claim arising out of the said Supplemental Agreement was ex facie barred by limitation and could not have been awarded by the learned arbitrator.

153. It is not in dispute that by an order dated 23rd July 2012 passed by the learned arbitrator, an application under Section 16 of the Arbitration Act made by the petitioner and the respondent no.2 raising plea of jurisdiction disputing the existence of the alleged Supplemental Agreement was already decided. The respondent no.1 made an application for carbp-350.17 & carbp-812.19.docx amendment of Statement of claim only on 23 rd August 2012 after disposal of the application filed by the petitioner and the respondent no.2 under Section 16 of the Arbitration Act by an order dated 23 rd July 2012. On 23rd August 2012, the respondent no.1 had applied for amendment of claim. In paragraph 2 of the said application, it was alleged that the respondent no.1, the petitioner and the

respondent no.2 herein proposed to enter into a Supplemental Agreement which was to be executed between the parties to make some modifications in the original Development Agreement and Memorandum of Understanding both dated 19th April 1995. However, the petitioner and the respondent no.2 refused to sign the Supplemental Agreement as a result of which the respondent no.1 had initiated arbitral proceedings against the petitioner and the respondent no.2 on 1st April 2009.

154. In paragraph 3 of the said application, it was alleged that inadvertently the respondent no.1 had only sought final reliefs with respect to the Supplemental Agreement and not with respect to the Development Agreement and the Memorandum of Understanding both dated 19 th April 1995 as modified by the Supplemental Agreement. There was a reference made to the application under Section 16 of the Arbitration Act by the petitioner and the respondent no.2 dated 11th December 2010 challenging the jurisdiction of the learned arbitrator to entertain, try and dispose of the claims made by the respondent no.1.

carbp-350.17 & carbp-812.19.docx

155. By the said application for amendment, the respondent no.1 prayed for replacement of Paragraphs 32, 33 and 35 by other paragraphs set out in the schedule appended to the said application and prayed for declaration that the Development Agreement and the Memorandum of Understanding both dated 19th April 1995 as modified by the Supplemental Agreement was valid, subsisting and binding on the petitioner and the respondent no.2 and had prayed for specific performance thereof. The said application for amendment was vehemently opposed by the petitioner and the respondent no.2 by filing an affidavit dated 14th March 2013. The petitioner and the respondent no.2 also raised a plea that the said proposed amendment was beyond the reference made to the learned arbitrator.

156. By an order dated 17th December 2013, the learned arbitrator allowed the said application for amendment dated 23rd August 2012. Learned arbitrator has held that in this case, arbitral proceedings had commenced on 14th February 2002 and once the arbitral proceedings had commenced, any amendment, not being a fresh matter not referred to in the notice of arbitration, can be amended, if necessary without getting barred by law of limitation. The gross delay in submission of the amendment application is a matter of fact.

157. The petitioner and the respondent no.2 through their learned senior counsel had also raised a plea of limitation which was recorded in carbp-350.17 & carbp-812.19.docx paragraph 12(a) of the said order. In paragraph 15 of the said order dated 17th December 2013, learned arbitrator has held that according to Section 21 and 23(3) of the Arbitration Act, the arbitral proceedings had commenced on 14th February 2002 and once so commenced, any amendment which is not a fresh matter not referred to in the notice of arbitration can be amended as per Section 23(3) of the Act without getting barred by law of limitation. Learned arbitrator allowed the said application subject to payment of costs of Rs.25,000/-. In my view, since the respondent no.1 had failed to prove the factum of delivery of the said notice dated 14 th February 2002 upon the petitioner and the respondent no.2, date of issuance of the said notice dated 14th February 2002 itself could not have

considered the date of commencement of the arbitral proceedings in respect of such dispute.

158. In my view, the learned arbitrator therefore, could not have allowed the said application for amendment of the Statement of Claim and to insert prayer for declaration and specific performance in respect of the Development Agreement and the Memorandum of Understanding both dated 19th April 1995. Though under Section 23(3) of the Arbitration Act, either party is entitled to amend or supplement his claim or defence during the course of the arbitral proceedings, such application for amendment of claim or written statement would not save the period of limitation with retrospective effect. The finding of the learned arbitrator in this case that the arbitral proceedings commenced on 14th February 2002 itself shows patent carbp-350.17 & carbp-812.19.docx illegality and deserves to be set aside.

159. A perusal of original Statement of Claim duly amended indicates that the respondent no.1 had prayed for declaration that the Development Agreement and the Memorandum of Understanding both dated 19 th April 1995 as modified by the Supplemental Agreement was valid, subsisting and binding on the petitioner and the respondent no.2 herein and for specific performance thereof. Article 58 of the Schedule to the Limitation Act applies to the claim for seeking any declaration which provides for period of limitation of three years which period begins when the right to sue first accrues. Article 54 of the Schedule to the Limitation Act prescribed for three years in case of specific performance of the contract. The said period of three years commence from the date fixed for the performance, or, if no such date is fixed, when the plaintiff had noticed that performance is refused.

160. In paragraph 19 of the Statement of Claim, it was alleged by the respondent no.1 that inspite of repeated request made by the respondent no.1 (original claimant), the petitioner and the respondent no.2 till the date of filing of Statement of Claim did not allow the respondent no.1 to enter the suit property in terms of the Development Agreement and the Memorandum of Understanding. A perusal of the reply of the witness examined by the respondent no.1 and in particular reply to question no.39 indicates that even according to the said witness, the respondent no.1 had knowledge that the carbp-350.17 & carbp-812.19.docx petitioner and the respondent no.2 had allegedly refused to perform their part of the obligation in the year 1995 itself.

161. The period of limitation thus prescribed under Article 54 for seeking specific performance would commence when the plaintiff had noticed that performance is refused. Since according to the respondent no.1, the petitioner and the respondent no.2 had refused to perform their part of the obligation in the year 1995 itself, the respondent no.1 could not have invoked the arbitration agreement even by the said alleged notice dated 14 th February 2002 after expiry of period of limitation. The claim for specific performance was thus barred by law of limitation much prior to the date of invocation of the said alleged notice dated 14th February 2002. Similarly, the limitation for seeking declaration under Article 58 which has to be filed within three years from the date when the right to sue first accrues also in this case, would apply from 1995. In my view, whether the date of commencement of the arbitral proceedings is considered as the date of filing Statement of Claim or even if the date as the date of notice dated 14 th February 2002 invoking arbitration agreement, the claim for specific performance was ex-facie barred by law of limitation.

162. Reliance placed by Mr.Kapadia, learned senior counsel for the respondent no.1 on Clause 2 of the Development Agreement in support of the submission that time to complete construction within 36 months was to carbp-350.17 & carbp-812.19.docx commence from the date of commencement of construction and not from the execution of the Development Agreement would not assist the case of the respondent no.1. Since in this case, even according to the respondent no.1, the petitioner and the respondent no.2 allegedly committed breaches on their part of the obligations in the year 1995 itself, limitation for seeking specific performance would not commence from the date of expiry of completion period of construction, but would commence when the performance of the obligations under the Agreement was refused for the first time. Judgment of the Supreme Court in case of Ahmmadsahab Abdul Mulla (deceased by L.R.s) v/s. Bibijan & Ors. (supra) relied upon by Mr.Kapadia, learned senior counsel for the respondent no.1 thus would not assist the case of the respondent no.1 and is distinguishable in the facts of this case.

163. A perusal of the impugned award in so far as the issue of limitation is concerned indicates that the learned arbitrator has held that the claims made by the respondent no.1 were not barred by law of limitation. In my view, even if the date of notice dated 18 th October, 2002 is considered as the date of commencement of the arbitral proceedings invoking arbitration agreement, even on that date, the claims made by the respondent no.1 were barred by law of limitation. Learned arbitrator has not recorded the reason as to why, according to the learned arbitrator, claims made by the respondent no.1 were barred by law of limitation. In my view, the findings of the learned arbitrator that the claims were not barred by law of limitation shows carbp-350.17 & carbp-812.19.docx patent illegality and overlooking the evidence led by the parties.

164. The learned arbitrator in the impugned award has held that the Development Agreement and Memorandum of Understanding were subsisting and binding. The learned arbitrator has granted relief of specific performance in respect of the said Development Agreement and Memorandum of Understanding both dated 19th April, 1995 allegedly modified by the alleged Supplemental Agreement. In so far as the Supplemental Agreement is concerned, it is not in dispute that the said alleged agreement was not signed by any of the parties. In my view, since the existence of the said Supplemental Agreement was not even proved by the respondent no.1 before the learned arbitrator, the learned arbitrator could not have granted specific performance of the said alleged Supplemental Agreement also along with Development Agreement and Memorandum of Understanding.

165. It was the case of the respondent no.1 in the statement of claim that due to various reasons, the terms and conditions of the Development Agreement and Memorandum of Understanding were required to be revised by entering into a Supplemental Agreement and thus the parties had alleged to have orally agreed to enter into the said Supplemental Agreement in the end of November, 2001. The said alleged Supplemental Agreement purported to have agreed was also an alleged draft Supplemental Agreement.

carbp-350.17 & carbp-812.19.docx Even according to the respondent no.1, by the said alleged Supplemental Agreement, the terms and conditions of the Development Agreement and the Memorandum of Understanding were substantially revised. The area of the construction of the building was substantially reduced. The area of 15000 built up area which was to be retained by the

petitioner and the respondent no.2 were allegedly reduced to 11000 sq.ft. built up area in the building to be constructed on the suit land. In the said alleged Supplemental Agreement, it was provided that due to the difference in the development potential and corresponding increase in the expenditure to be incurred by the respondent no.1, the parties had allegedly agreed to enter into the said alleged Supplemental Agreement. There were several blanks in the said alleged Supplemental Agreement. It is thus clear that even according to the respondent no.1, it was not possible to proceed with the Development Agreement and the Memorandum of Understanding in view of the subsequent events.

166. The learned arbitrator thus in these circumstances could not have granted specific performance of the Development Agreement as well as Memorandum of Understanding also. In my view, the finding of the learned arbitrator in paragraph 17(i) and (k) of the Arbitral Award is also totally perverse. There was neither any pleading nor was it proved that the respondent no.1 was ready and willing to perform its part of obligation under the said Development Agreement or Memorandum of Understanding. The carbp-350.17 & carbp-812.19.docx respondent no.1 had applied for sanction of plan itself after expiry of 4 years from the date of execution of those agreements and had applied for revision of the said sanction plan after about 9 years.

167. There was gross delay on the part of the respondent no.1. No steps were taken by the respondent no.1 during the period between 1995- 1998 for extension of the building. Prior to the date of submission of the plan, the policy framed by the Municipal Corporation was permitting extension of the structure on the terms and conditions set out therein. Time to complete the construction provided under the Development Agreement had already expired before change of the policy framed by the Municipal Corporation prohibiting extension. The respondent no.1 also did not file any Form 37-I under the provisions of Income Tax Act, 1961.

168. A perusal of the cross-examination of Mr. G. G. Kukreja and more particularly his reply to the question no.148 clearly indicated that no agreement was prepared for sale of flats by the respondent no.1. No evidence was led by the respondent no.1 in support of the plea that the petitioner or the respondent no.2 had committed any breaches of the Development Agreement. In my view, considering the subsequent events and the nature of the terms and conditions of the Development Agreement and Memorandum of Understanding, the learned arbitrator even otherwise could not have awarded the relief for specific performance in breach of carbp-350.17 & carbp-812.19.docx Sections 14 of the Specific Relief Act, 1963. The performance of the Development Agreement would involve the performance of a continuous duty which the Court cannot supervise and thus no relief of specific performance could be granted by the learned arbitrator.

169. Even according to the respondent no.1, the proceedings filed by one of the tenant in respect of the same property was pending for quite sometime. The said suit was subsequently withdrawn. The respondent no.1 while submitting the application for amendment of the plans to the Municipal Corporation did not even consult the petitioner or the respondent no.2. This factual position was admitted by the witness examined by the respondent no.1 in his cross-examination and more particularly in reply to the question no.151. At no point of time the respondent no.1 had addressed any letter to the petitioner or the respondent no.2 alleging any breach of any obligation under the

said Development Agreement or the Memorandum of Understanding. Even according to the alleged Supplemental Agreement, the saleable built up area available in the building as per approved building plan was substantially reduced. The petitioner and the respondent no.2 had never agreed to such reduction of the area. On this ground itself, the learned arbitrator could not have granted relief for specific performance.

170. Though the learned arbitrator had not given reasons while deciding various issues raised by the petitioner and the respondent no.2 in carbp-350.17 & carbp-812.19.docx the written statement and during the course of oral arguments duly summarized in the written arguments, the respondent no.1 tried to supplant those reasons in the arbitral award by filing affidavit in reply to the arbitration petitions and also during the course of arguments by inviting my attention to the various documents forming part of the record and also by referring to some part of the oral evidence led by the parties which were not considered by the learned arbitrator while allowing the claims made by the respondent no.1. In my view, the arbitral award should itself disclose all the reasons while coming to a conclusion on a disputed question of fact or law. The award should speak for itself. A party who has succeeded before the Arbitral Tribunal cannot be permitted to supplant those reasons in support of the conclusion drawn by the learned arbitrator.

171. This Court cannot probe into the mind of the learned arbitrator by referring to the documents, pleadings and evidence which were neither referred to nor relied upon by the learned arbitrator in the impugned award and to come to a conclusion that on the basis of such pleadings, documents and evidence also the conclusion of the learned arbitrator would be correct. This Court cannot read the additional reasons deduced from such pleadings, documents and evidence not considered by the learned arbitrator in the impugned award. In my view, this recourse is not permissible under Section 34 of the Arbitration and Conciliation Act, 1996. The aforesaid view of this Court is supported by the judgment of this Court in case of Bombay carbp-350.17 & carbp-812.19.docx Intelligence Security (India) Ltd. (supra) which squarely apply to the facts of this case.

172. The Supreme Court in case of Ssangyong Engineering & Constructions Co. Ltd. (supra) has held that an award is perverse, is no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. It is also held that a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse. Supreme Court in case of Associate Builders (supra) also laid down the principles to be considered while considering a petition filed under Section 34 of the Arbitration Act.

173. The principles laid down by the Supreme Court in case of Ssangyong Engineering & Constructions Co. Ltd. (supra) and in case of Associate Builders (supra) would apply to the facts of this case. The learned arbitrator has totally overlooked the crucial and vital evidence led by the petitioner and the respondent no.2 before the learned arbitrator and has also ignored the admissions on the part of the witness examined by the carbp-350.17 & carbp-812.19.docx

respondent no.1 in the impugned award and thus shows patent illegality.

174. Supreme Court in case of Ouseph Varghese (supra) has held that the onus is on the party to prove an oral agreement who was propounded such oral agreement. If such onus is not discharged, no specific performance can be granted in respect of such oral agreement. In my view, the respondent no.1 had failed to prove the existence and contents of the alleged Supplemental Agreement and thus no specific performance thereof could be granted by the learned arbitrator. The principles laid down by the Supreme Court in case of Ouseph Varghese (supra) will apply to the facts of this case.

175. This Court in case of Gill and Company Pvt. Ltd., Mumbai (supra) has held that where arbitrator has rendered an award though there was no Arbitration Agreement between the parties, arbitrator is held to have exceeded his jurisdiction and such award is liable to set aside. If alleged contract was not signed by one of the parties, if the Arbitration Agreement is contained in same document, it will fall under Section 7(4)(a) and not under Section 7(5). In my view, the learned arbitrator thus could not have exercised his alleged jurisdiction under alleged Supplemental Agreement while deciding the claim for specific performance of the said Supplemental Agreement.

carbp-350.17 & carbp-812.19.docx

176. This Court in case of Pradyumn Kumar Sharma and Another (supra) has held that a document which is disputed by a party and if not proved, cannot be considered by the arbitrator to be on record or as a piece of evidence. Such document if considered in the award, it would be in violation of principles of natural justice and such award deserves to be set aside. The principles laid down by this Court in the said judgment would apply to the facts of this case. In this case, the petitioner and the respondent no.2 had disputed the existence and contents of the alleged Supplemental Agreement and had also denied the factum of delivery of the alleged notice dated 14th February, 2002 from the respondent no.1. Though the respondent no.1 could not prove the existence and contents of the said Supplemental Agreement and factum of delivery of the said notice dated 14 th February, 2002, the learned arbitrator has drawn adverse inference against the petitioner and the respondent no.2 that both these documents were to the knowledge of the petitioner and the respondent no.2 or were deemed to be aware thereof. The findings rendered by the learned arbitrator relied upon these two unproved documents was in gross violation of principles of natural justice and showed patent illegality.

177. This Court in case of Jagmohan Singh Gujral of Indian (supra) has held that the purpose of giving reasons is to enable the Court to know that the arbitrator has correctly addressed himself to the controversy in issue or has considered the material on record or ignored relevant material or carbp-350.17 & carbp-812.19.docx applied the correct principles and thereafter on appreciation of the evidence has given reasons for the findings and the conclusions. In this case, the learned arbitrator has not recorded reasons while rejecting most of the submission made by the petitioner and the respondent no.2. In my view, the entire award is contrary to the principles laid down by this Court in the said judgment in case of Jagmohan Singh Gujral of Indian (supra). This Court in an unreported judgment in case of Prajapati Gunwant Keshavlal (supra) has followed the principles of

law laid down by the Supreme Court in case of Ssangyong Engineering & Constructions Co. Ltd. (supra) and has held that since the Arbitral Tribunal has totally ignored the vital evidence produced by the petitioner, such award deserves to be set aside. The principles laid down by this Court in the said judgment apply to the facts of this case.

178. In so far as the judgment of Supreme Court in case of Ahmmadsahab Abdul Mulla (deceased by L.R.s) (supra) relied upon by the learned senior counsel for the respondent no.1 on the issue of limitation is concerned, it is held by the Supreme Court that the expression 'date fixed for the performance' is a crystallized notion. This is clear from the fact that the second part 'time from which period begins to run' refers to a case where no such date is fixed. When date is fixed it means that there is a definite date fixed for doing a particular act. In view of the fact that in this case even according to the respondent no.1, the petitioner and the respondent no.2 had carbp-350.17 & carbp-812.19.docx already alleged to have committed the breaches of their respective obligation under the Development Agreement and the Memorandum of Understanding much prior to the date of expiry of the fixed period for performance and refused performance, this judgment of the Supreme Court would not assist the case of the respondent no.1 and is clearly distinguishable in the facts of this case. Reliance placed by the learned senior counsel on the dictionary meaning 'in pursuance of' from the 'Advanced Law Lexicon' by P Ramanatha Aiyer also would not assist the case of the respondent no.1.

179. In so far as the judgment of Supreme Court in case of Aircraft Employees Housing Co-operative Society Ltd. (supra) relied upon by the learned senior counsel for the respondent no.1 to emphasize the meaning of 'in pursuance of' would not assist the case of the respondent no.1. In my view, the said judgment would not even remotedly apply to the facts of this case.

180. In so far as the judgment of Supreme Court in case of Associate Builders (supra) relied upon by the learned senior counsel for the respondent no.1 is concerned, in my view, there is no dispute about the principles laid down by the Supreme Court in the said judgment. The said judgment would however assist the case of the petitioner and respondent no.2 and not the respondent no.1 in the facts of their case. In my view, the findings rendered and the conclusion drawn by the learned arbitrator in the impugned award carbp-350.17 & carbp-812.19.docx shows patent illegality and thus deserves to be set aside.

181. I therefore pass the following order :-

> (i) Impugned award dated 14th February, 2017 and interim orders dated 12th July, 2010, 23rd July, 2012 and 17th December, 2013 passed by the learned Arbitrator are set aside.
>
> (ii) Commercial Arbitration Petition Nos. 350 of 2017 and 812 of 2019 are allowed in terms of prayer clause (a).
>
> (iii) There shall be no order as to costs.

(R.D. DHANUKA, J.)