
(2022) 08 BOM CK 0091

In the Bombay High Court

Case No : Commercial Arbitration Petition (L.) No.10242 Of 2021, Interim Application (L) No.16963 Of 2021

Dhiraj Lakhamashi Shah & Anr

APPELLANT

Vs

Madhav Hari Karmarkar & Anr

RESPONDENT

Date of Decision : 23-08-2022

Acts Referred:

Code Of Civil Procedure, 1908 — Order 12 Rule 6
Arbitration And Conciliation Act, 1996 — Section 17, 31(3), 31(6), 34, 34(2A), 34(2)(b), 3(2)(b)(ii)
Specific Relief Act, 1963 — Section 21, 21(4)
Indian Contract Act, 1872 — Section 73, 74, 75, 81
Amendment Act, 2015 — Section 28(3)

Citation : (2022) 08 BOM CK 0091

Hon'ble Judges : G. S. Kulkarni, J

Bench : Single Bench

Advocate : Anoshak Daver, Shenoy Bodhanwalla, Sakshi Sharma, M. S. Bodhanwalla, Sanjiv Sawant, Pankaj Kode, Abhishek Matkar

Final Decision : Dismissed/Disposed Of

Judgement

G.S. Kulkarni, J

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, "the Act") whereby an interim award dated 21 February, 2020 passed by the learned sole arbitrator has been assailed. The operative portion of the award reads thus:-

" INTERIM AWARD

(i) The Claimant No.1, i.e. Madhav Hari Karmarkar, would be entitled to an amount of Rs.1,04,45,000/- (Rupees One Crore Four Lakhs Forty Five Thousand only) being the principal amount calculated in terms of clause 9 of the PAAAs from the dates shown in the chart.

(ii) The Claimant No.1, i.e. Madhav Hari Karmarkar, would be entitled to interest

at the rate of 9% per annum on the amount due per year upto 31st May 2020 and thereafter upto the date of payment.

(iii) The Claimant No.2, i.e. Sai Madhav Karmarkar, would be entitled to an amount of Rs.1,04,45,000/- (Rupees One Crore Four Lakhs Forty Five Thousand only) being the principal amount calculated in terms of clause 9 of the PAAAs from the dates shown in the chart.

(iv) The Claimant No.2, i.e. Sai Madhav Karmarkar, would be entitled to interest at the rate of 9% per annum on the amount due per year upto 31st May 2020 and thereafter upto the date of payment.

(v) Both the Claimants would be paid the amount of Rs.80,000/-and Rs.75,000/-per month henceforth in terms of clause 9 of the PAAAs till the possession of Permanent Alternate Accommodation is handed over to them.

(vi) The amounts due under clauses (i) to (iv) above to be paid to the Claimants on or before 31st May 2020.

(vii) Monthly payment in terms of clause (v) above to be made latest by 10th of each month."

2. Disputes and differences have arisen between the parties under a contract dated 10 June, 2010 titled as "Indenture of Assignment" and two other agreements titled as "Permanent Alternate Accommodation Agreements" dated 15 June, 2010 (for short, "PAAAs"). The disputes are in regard to a property admeasuring 835.88 sq. yards situated on Plot No.153-A of Dadar Matunga Estate which housed a building known as 'Nandadeep' and one more structure, standing thereon (hereinafter referred to as "the property").

3. In pursuance of these agreements, the respondents who are the owners of the said property, handed over the possession of the property to the petitioners for its redevelopment. The redevelopment of the property was to be undertaken as per and under the assignment agreement, whereunder the respondent was to be entitled to permanent alternate premises, as agreed under the said PAAA. Disputes had arisen between the parties as the petitioners as per the terms and conditions of the agreement had not commenced construction for more than three years, after entering into the said agreements. This caused the respondents to approach this Court by institution of a Civil Suit (Suit No.114 of 2015). In such suit, an interim order was passed by a learned Single Judge of this Court on 22 February, 2019, recording a statement as made on behalf of the petitioners that no third party rights in respect of the property would be created by the petitioners pending the proceedings of the suit. Thereafter, by an order dated 23 July 2019 passed in the Suit, the disputes between the parties were referred for adjudication in arbitral proceedings. The statement as made on behalf of the petitioners and as noted above, was ordered to operate till the arbitral tribunal decides the interim application.

4. Before the arbitral tribunal, the respondents in addition to the statement of

claim moved an application for an interim award, contending that there was a clear, unequivocal and unambiguous admission made by the petitioners in regard to the amounts due and payable to the respondents as agreed in clause 9 of the PAAAs. The respondents accordingly prayed for the following reliefs in the said application, as filed before the arbitral tribunal:-

“(f) In the alternative to prayers (a) to (e) above:

(i)

(ii)

(iii) that this Hon’ble Court be pleased to order and decree the Defendants, jointly and/or severally, to pay to the Plaintiffs an amount of Rs. 1,46, 35,726/- as per particulars of claim annexed at “Exhibit-F” to the Plaint along with interest thereon at the rate of 18% per annum from the date hereof till payment and/or realization;

(iv) that this Hon’ble Court be pleased to order and decree the Defendants to pay to the Plaintiffs an amount of Rs.80,000/- per month for each flat along with interest accrued on every monthly payment at the rate of 18% per annum from June 15, 2013 till such time as quiet, vacant and peaceful possession of the Permanent Alternate Accommodation is not handed over by the Defendants to the Plaintiffs in accordance and compliance with the Permanent Alternate Accommodation Agreements being “Exhibit-C” and “Exhibit-D” to the Plaint;

(v) that this Hon’ble Court be pleased to order and decree the Defendants to pay to the Plaintiffs an amount of Rs.75,000/- per month for each flat as compensatory damages along with interest accrued on every monthly payment at the rate of 18% per annum from June 15, 2015 till such time as quiet, vacant and peaceful possession of the Permanent Alternate Accommodation is not handed over by the Defendants to the Plaintiffs in accordance and compliance with the Permanent Alternate Accommodation Agreements being “Exhibit-C” and “Exhibit-D” to the Plaint.”

5. The respondents’ claim for an interim award was primarily on the premise that the parties had unequivocally agreed in clause 9 of the PAAAs for a fixed amount of Rs.80,000/- per month in advance for a period of 24 months, to be paid by the petitioners to the respondents, in event of the permanent alternate accommodation being not handed over to the respondents within a period of 36 months, and a further sum of Rs.75,000/- per month in advance as penal charges till the permanent alternate accommodation was handed over to the respondents. It would be necessary to note clause 9 of the PAAA which reads thus:-

“9. The Tenants will at their own costs procure temporary alternate accommodation for use and occupation of the Tenants and for the members of his family. It is agreed that the Tenants have agreed to this clause on the condition that the Owners shall complete the Permanent Alternate

Accommodation within a period of 60 months from the date of execution of the present agreement subject to the Tenants vacating their tenanted premises within a period of 15 days from the execution hereof. The Owners shall not be liable to pay rent to the Tenants for a period of 36 months after vacating their said premises for Temporary Alternate Accommodation. It is further agreed that in the event of the said Permanent Alternate Accommodation not being handed over to the Tenants within a period of 36 months, the Owners shall pay to the Tenants a sum of Rs.80,000/- p.m. for the further period of 24 months (after the period of 36 months) in advance and in the event of the new Permanent Alternate Accommodation not being handed over even after the expiry of the said further period of 24 months, the Owners shall besides the amount of Rs.80,000/- p.m. also pay to the Tenants sum of Rs.75,000/- p.m. as penal charges till the said Permanent Alternate Accommodation is handed over to the Tenant, every month in advance.”

(emphasis supplied)

6. The respondents contended before the arbitral tribunal, that at no point of time the petitioners had taken a position, so as to dispute the petitioners liability to pay the amounts as agreed in clause 9 of the PAAA. The respondents contended that, moreover, from the correspondence entered between the parties, as also from the reply affidavit filed by the petitioner before the arbitral tribunal, the petitioners never disputed the said liability.

7. The arbitral tribunal has observed that there are repeated categorical admissions of such liability and obligation on the part of the petitioners to pay such amounts as agreed in Clause 9 of the PAAA. To this effect findings of fact have been recorded by the arbitral tribunal of clear admissions of the petitioners to make payment of such amounts, to the respondents as per Clause 9 of the PAAA. This is also clearly seen from a legal notice dated 12 April, 2014 issued by the Advocates of the petitioners, the written statement filed by the petitioners in Suit No.114 of 2015, reply affidavit filed in Notice of Motion No.191 of 2015 in the said suit and the reply affidavit dated 4 November, 2019 filed in the Section 17 application as noted by the arbitral tribunal. Referring to such categorical admissions as contained in these documents the learned arbitrator has observed that the petitioners never disputed the liability and the quantum of the amounts as agreed between the parties in clause 9 of the PAAA. The arbitral tribunal in extenso has referred to the letter dated 12 April, 2014, the extract of the written statement as also the extract of the reply affidavit as filed on behalf of the petitioners to the notice of motion, as also the reply affidavit of the petitioners to the Section 17 application, in recording a finding of fact, that the petitioners always accepted the liability to pay such amounts to the respondents. The arbitral tribunal considering the entire material on record has made the following observations which are necessary to be extracted:-

“22. It is required to be noted that the stand of the Respondents had been consistent over a period of time, i.e. from 12th April 2014 till as recently as the

filing of the reply to Section 17 application dated 4th November 2019. The said admission of the Respondents, as can be seen, is after the termination of the suit contract by the Claimants. The Respondents have therefore accepted that the liability under clause 9 of the PAAAs is absolute and unqualified. The Respondents have therefore clearly, unequivocally and unambiguously accepted the liability in terms of clause 9 of the PAAAs to pay monies to the Claimants which are payable under the said clause 9.

23. It is required to be noted that the liability imposed by clause 9 of the PAAAs triggers of once the condition mentioned therein is satisfied, namely possession of PAA not being handed over to the Claimants within 36 months. The said liability therefore cannot be interfered with by making it conditional on something which is not provided for in the Agreement which the Respondents are now seeking to do. The same is also prohibited by clause 41 of the PAAAs under which PAAAs are self-contained Code. The Respondents therefore by making the liability conditional are wanting a situation of "heads I win and tails you lose" meaning thereby that the Respondents are winners either way.

Even assuming that the Respondents are entitled to make the payment conditional, the said condition can be said to have been satisfied in view of the Claimants now not pressing / deleting prayer clauses (a) to (e) of the Statement of Claim and also making a statement before this Tribunal through their counsel about the withdrawal of termination. The non-withdrawal of the averments from the Statement of Claim is merely technical as otherwise, as submitted by the learned counsel for the Claimants, the Claimants have by not pressing prayer clauses (a) to (e) abandoned the reliefs claimed vide prayer clauses (a) to (e) of the Statement of Claim which, according to him, is referable to Order XXIII Rule 1 of the Code of Civil Procedure.

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25. In the facts and circumstances of the case, as stated hereinabove, this Tribunal has reached the conclusion that the admission of the Respondents in the legal notice dated 12th April 2014 and the pleadings are clear, unequivocal and unambiguous. The said admission meets the tests laid down by the High Courts and the Apex Court as to when a decree on admission can be passed. In the light of the judgment of the learned Single Judge of the Bombay High Court in Deccan Chronicle Holdings Ltd. v. Tata Capital Financial Services Ltd. (supra), the Claimants are entitled to their application under Section 31(6) of the 1996 Act being allowed. Since the Claimants have been denied the amounts payable under clause 9 of the PAAAs for no justifiable reason, it would be a travesty if the Claimants are denied the reliefs in terms of clause 9 of the PAAAs especially bearing in mind the fact that they had parted with the suit property with the sanguine hope that they would be provided with PAA in the new building by the Respondents within a particular time frame.

It is clarified that the observations / findings recorded in the instant order are

restricted to the application made under Section 31(6) of the 1996 Act.”

(emphasis supplied)

8. Accordingly, the arbitral tribunal has passed the interim award as noted above.

9. Mr. Daver, learned counsel for the petitioners has limited submissions in assailing the impugned interim award. Mr. Daver would not dispute that the permanent alternate accommodation, was too far to see the light of the day as no construction could be put up much less completed within a period of 60 months as agreed between the parties. Further Mr. Daver is not in a position to dispute that the petitioner absolutely becomes liable to pay rent and penalty as agreed between the parties in Clause 9 of the agreement, as the 36 months period had lapsed within which the respondents should have been put into possession of the permanent alternate accommodation. Despite this clear factual position, Mr. Daver contends that the entire basis of the arbitral tribunal to pass an interim award is contrary to law in as much as what has been awarded is a claim for damages and that too without such damages being proved by the respondents. It is Mr. Daver’s submission that such compensation could not have been awarded by the arbitral tribunal considering the clear provisions of Section 21 of the Specific Relief Act, 1963, more particularly as sub-section (4) of Section 21 would require that the principles specified in Section 73 of the Indian Contract Act, 1872 become applicable whereby even in seeking a relief for specific performance of the contract, the respondents were under an obligation to prove their claim for damages, failing which, no compensation could have been awarded by the arbitral tribunal. In support of his contention Mr. Daver has placed reliance on the decision of the learned Single Judge of this Court in the case of Punj Lloyd Ltd. vs. IOT Infrastructure and Energy Services Ltd. Arbitration Petition No. 1323 of 2012 decided on 14.12.2018, 2018 SCC Online Bom 19741. There are other submissions raised on merits of the matter which in my opinion, need not be adverted considering the nature of the interim award as passed. These are matters relevant to the final award.

10. On the other hand, Mr. Sawant, learned counsel for the respondents/original claimants would contend that there is no perversity whatsoever in the tribunal passing the impugned arbitral award. He submits that no ground is made out by the petitioners for interference in the impugned award, within the limited scope which is available for interference under Section 34 of the Act. It is his submission that none of the requirements of Section 34 in the present case stand satisfied so as to challenge the interim award passed by the arbitral tribunal for the entitlement of the respondents to claim the amounts as agreed between the parties under clause 9 of the PAAA. He would submit that in fact the petitioners contention that the claim of the respondents in their application filed under Section 31(6) of the Act praying for an interim award, was a claim for compensation being in the nature of damages, was never a plea before the arbitral tribunal much less asserted and proved. It is his submission that in the absence of such plea or any material to support such plea before the arbitral

tribunal, it would not be permissible for the petitioners to urge such plea in Section 34 proceedings for the first time. Mr. Sawant would accordingly submit that the interim award would not deserve any interference.

11. I have heard Mr. Daver and Mr. Sawant, learned counsel for the parties and with their assistance I have perused the impugned interim award as also the documents on record.

12. At the outset, in regard to the directions as contained in clause (ii) and (iv) of the impugned interim award which pertain to award of interest at the rate of 9% per annum, both the learned counsel agree that the parties would jointly approach the arbitral tribunal for reconsideration of these directions. The parties accordingly have consented for setting aside these directions with liberty to the respondents to urge the plea on interest by moving a separate application. As the respondents have consented, by consent of the parties, the said directions are set aside and the respondents are permitted to move an appropriate application to claim the interest in the interim award. All contentions in that regard are expressly kept open including in regard to the date from which the interest would be calculated.

13. Now coming to the principal bone of contention of Mr.Daver in assailing the impugned award namely in the facts and circumstances of the case as to what has been awarded by the impugned interim award as agreed between the parties in terms of clause (9) of the PAAA, is in the realm of damages, which has not been proved by the respondents and on such count the impugned award deserves to be quashed and set aside.

14. Mr.Daver's submission is to the effect that the amounts of interim rent and the penal charges as agreed between the parties in Clause (9) is in fact a claim of the respondents for damages and such claim could have been granted only in the event the respondents were able to prove such damages as per the requirement of Section 21 of the Special Reliefs Act which encompasses the application of Section 73 of the Indian Contract Act.

15. In my opinion, the contention of Mr.Daver is wholly untenable for more than one reason. Firstly, it clearly appears from the record that a plea that such assertion of the petitioners that the claim of the respondents and subject matter of the impugned interim award being in the realm of damages and the same was required to be proved by the respondents as per the provisions of Section 73 of the Contract Act was never the plea taken by the petitioners before the arbitral tribunal in any of the pleadings / statement of defence as filed to the application of the respondent under Section 31(6) of the Arbitration and Conciliation Act,1996. This apart, although not relevant but for that matter such a plea was also not taken in the written submission which was filed on behalf of the petitioners, as pointed by Mr.Sawant. It therefore, clearly appears that such a plea is a legal ingenuity of the petitioners before this Court for the first time in the present proceedings.

16. Apart from what is observed above, the basis of Mr.Daver's argument is simplicitor on a plea that what has been claimed by the respondents is a compensation in terms of what Section 21 of the Specific Relief Act,1963 would provide, qua the award of compensation by the Court in a suit for specific performance of a contract as an alternative relief. It is in the context of what sub-section (4) of Section 21 of the Specific Relief Act provides, is the foundation of Mr.Daver's argument. To appreciate such contention, it would be appropriate to note the provisions of Section 21 which reads thus:-

"21. Power to award compensation in certain cases.—

(1) In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance.

(2) If, in any such suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.

(3) If, in any such suit, the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

(4) In determining the amount of any compensation awarded under this section, the court shall be guided by the principles specified in section 73 of the Indian Contract Act, 1872 (9 of 1872).

(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint: Provided that where the plaintiff has not claimed any such compensation in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation.

Explanation.—The circumstance that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section."

(emphasis supplied)

17. In considering Mr.Daver's contention, at the outset, it needs to be observed that apart from no plea being raised before the arbitral tribunal, an extremely vague plea is raised in paragraph 10(a) of the present petition. Be that as it may, Mr.Daver may not be correct on such contention, as his argument is oblivious to what has been provided specifically by the parties in Clause 9 of PAAA, which is in fact an estimate of damages as the parties have agreed. Once the parties agree on an amount of such damages which is in the nature of liquidated damages, it would be a situation which would fall under Section 74 of the

Contract Act, which provides compensation for breach of contract where penalty is stipulated for. Section 74 reads thus:

"74 Compensation for breach of contract where penalty stipulated for:- When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for. Explanation. — A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

(Exception) — When any person enters into any bail-bond, recognizance or other instrument of the same nature or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.— A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested."

18. Thus, even if Section 74 of the Contract Act is to be applied, considering the settled law that when a party agrees for an amount due and payable as liquidated damages in case of breach of terms and conditions of the contract, the claimant is required to prove the damages in a general sense for the reason that the contract made by the parties estimating their damages, is in itself, an evidence on the quantum of such damages. Thus, applying such test, Clause 9 of the PAAA was an evidence on behalf of the respondents-claimants proving such damages. Thus, it was necessary for the petitioners, at the threshold, to meet the test as Section 74 of the Contract Act would postulate, namely, to urge and place material before the arbitral tribunal, to dislodge the respondents case that the said evidence and/or the amounts as claimed by the respondents as agreed between the parties in Clause 9 of the PAAA, was not a reasonable pre-estimate of the damages, which the respondents could claim. If such specific plea was to be averred in its pleadings and asserted by the petitioners, then the burden would have shifted on the respondents to prove, that in fact what was agreed between the parties in Clause 9 of the PAAA was a reasonable pre-estimate of the damages, being suffered by the respondents. Thus, the basic and the foremost requirement of the petitioners pleading such case, that such amount as agreed in Clause 9 of the PAAA is not a reasonable pre-estimate of the damages, itself was not fulfilled by the petitioners. Thus, the plea of such nature, which is certainly a plea in fact and law being taken for the first time before this Court in the present proceedings, filed under Section 34 of the Act, cannot be accepted. This more particularly, when even otherwise there was abundant material before

the arbitral tribunal as noted above, pointing out that at no point of time the petitioners disputed their liability or for that matter did not raise a whisper of the amounts as set out in clause 9 of the PAAA being an unreasonable compensation, in terms of what was agreed between the parties.

19. Even otherwise it is not tenable for the petitioners to raise such a plea considering the settled position in law and more so, in the absence of any foundation as noted above. In such context, it would be useful to refer to the decision of the Division Bench of this Court in "Ultratech Cement Ltd. Vs. Sunfield Resources Pty.Ltd. (2017)7 Bom.CR 133" in which considering the law laid by the Supreme Court in Fateh Chand Vs. Balkishan Das, 1964 SCR (1) 515, Maula Bux V. Union of India (UOI), 1970(1) SCR 928, ONGC Ltd. Vs. Saw Pipes Ltd., (2003)5 SCC 705 and Kailash Nath Associates V. DDA (2015)4 SCC 135, it was held that when a party agrees for an amount due and payable as liquidated damages in case of breach of the terms and conditions of the contract, the claimant is required to prove damages in general sense as the contract made by the parties estimating their damages is in itself an evidence on the quantum of such damages, unless there is some other evidence to show that the subject claim was unreasonable. It was held that when the parties agreed to an amount to be paid in case of breach, in such a case there may not be any necessity of leading evidence for proving the damages unless the Court arrives at a conclusion that no loss was likely to occur because of such breach. This more particularly, when an agreement is executed between the parties who are experts in the field and when an agreement is so arrived in their commercial wisdom, it cannot be construed that the intention of the parties was different from what they had agreed in having such a stipulation of a measure of losses in the contract. In such a situation, it was held that in the event if a party contends that the stipulated amount in the agreement is not a reasonable compensation, in that event the burden is on such a party who contends that such stipulated amounts in the agreement is not a reasonable compensation, would be required to prove the same based on materials. The Division Bench held that the expression as used in Section 74 of the Indian Contract Act namely "whether or not actual damage or loss is proved to have been caused" would mean where there is possible to prove actual loss or damage caused, such proof is not dispensed with and only in cases where loss or damage is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded as held in paragraph 46.6 of the decision of the Supreme Court in Kailash Nath Associates Vs. DDA.(supra). It would be appropriate to note the observations of the Division Bench in paragraph 85 which read thus:-

"85. Thus advertent to the enunciation of law as laid down in the above decisions it is clear that in the context of liquidated damages as agreed between the parties, when the contract is broken, the party who suffers by such breach would be entitled to receive compensation for any loss which would naturally arise in the usual course of things from such breach. The claimant would be required to

prove his damage in general sense as the contract made by the parties estimating their damages is in itself evidence, unless there is some other evidence to show that the subject claim was unreasonable. The parties when agree to an amount to be paid in case of a breach, in such a case, there may not be any necessity of leading evidence for proving damages, unless the Court arrives at a conclusion that no loss is likely to occur because of such breach. More particularly when an agreement is executed by the experts in the field and when an agreement is so arrived in their commercial wisdom, it cannot be construed that the intention of the parties was different from what they have agreed in having such a stipulation in the contract. The burden in such a case would be on the party who contends that the stipulated amount in the agreement is not reasonable compensation, to prove the same. (see para 46 "ONGC Vs. Saw Pipes" (supra)). The expression as used in Section 74 "whether or not actual damage or loss is proved to have been caused, thereby", means that where it is possible to prove actual damage or loss, such proof is not dispensed with and that only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded. (see para 46.6 Kailash Nath Associates Vs. DDA)"

20. A Special Leave Petition filed against the decision of the Division Bench has also been dismissed by the Supreme Court in Special Leave Petition (C) No.6046 of 2017 by its order dated 23 February 2017.

21. Mr.Daver's reliance on the decision in Punj Lloyd Ltd. Vs. IOT Infrastructure and Energy Services Ltd. (supra) would also not assist the petitioners. Even in the said decision, the learned Single Judge following the decision in Kailash Nath Associates Vs. DDA.(supra) has held that in case the Court finds that the liquidated amount named in the contract is a genuine pre-estimate of damage or loss contractually made by the parties, the Court may award such amount as reasonable damage in its discretion.

22. It also needs to be stated that such a plea as raised by the petitioner is a plea to the effect that what has been agreed between the parties in Clause (9) of the PAAA, ought not to be accepted and awarded by the arbitral tribunal. In my opinion, such a plea, even otherwise on first principles is untenable for the reason that necessarily, such an argument of the petitioners is an argument against a specific term of the Contract (Clause 9) as agreed between the parties and the binding effect and the obligation as contractually created by such clause inter se between the parties, could be displaced only on specific plea and materials being urged by the petitioners before the arbitral tribunal in a manner as recognised by law and not otherwise.

23. In my opinion, the arbitral tribunal has proceeded on the materials on record and several admissions as already contained in the correspondence between the parties. Also the pleadings before this Court as also before the arbitral tribunal categorically demonstrate that the petitioners never disputed their liability to

make the payments as agreed between the parties in clause 9 of the PAAA. Once the petitioners have not disputed their liability or brought any contrary material to dispute such damages before the arbitral tribunal, then, such claims for damages as made by the respondents become an appropriate and an undisputed liability/claim. Thus, there cannot be any perversity in the arbitral tribunal accepting the case of the respondents to award such sums once the petitioners themselves admit their liability in that regard, which is also not being disputed by Mr.Daver.

24. In any event, in my opinion, the petitioners' ingenuity that the claim for damages is granted by the arbitral tribunal without being proved, would be required to be regarded as totally unacceptable in the factual conspectus. The Court would be required to accept the holistic view taken by the arbitral tribunal which can be little amplified considering such issues repeatedly reaching the Courts. The Court cannot be oblivious to the hard realities and the facts, as in the present case. It is almost common that in development agreements the parties agree to such compensatory clauses, providing for payment of interim rent, charges, penal rent etc. to be paid by a party to the agreement till the redevelopment project is complete. The amounts in such clauses are certainly based on commercial considerations, more particularly, when one of the party is a hard-core businessman, and hence as a matter of general and common understanding, such clauses cannot be ill-conceived unless proved otherwise on glaring materials. The obvious consequence being that the beneficiaries of such terms of an agreement namely those who are entitled to receive such rent, charges, penal rent etc. cannot be deprived to the benefits of such amounts only to be left in a lurch and to litigate claiming such amounts, much less on pleas lacking a foundation, akin to what is being urged by the petitioners. In the present case, Clause 9 of the PAAA is based on such principle that a party who is intended to be dis-housed till the redevelopment is complete, should be adequately compensated. Thus, in recognising such object behind such clause in the said agreement, certainly the respondents cannot be deprived of the interim rent and/or compensation in the manner as agreed between the parties. When the nature of such agreement is founded on such object and principle, it was not legitimate and appropriate for the petitioners to disown such liability, by resorting to a plea based on the provisions of Section 73 and/or Section 74 of the Indian Contract Act and that too for the first time before this Court. In my opinion, such plea has no legs to stand when tested legally, apart from being totally an unfair and unpalatable approach on the part of the petitioners. The Court cannot overlook the requirement of justice in such matters, even when the Court considers commercial transactions when it applies commercial principles. It would be too drastic as also untenable to urge such case for the first time in Section 34 proceedings, considering the well settled principles of law governing interference in arbitral awards.

25. As held in the decision of the Supreme Court in "Ssangyong Engineering & Construction Co. Ltd. VS. NHAI" (2019) 15 SCC 131, no ground whatsoever of

patent illegality as envisaged under sub-section (2-A) of Section 34 of the Act has been made out nor argued by Mr.Daver. The concept of patent illegality has been explained by the Supreme Court in its decision to mean that when a ground of patent illegality is taken, the party making such complaint needs to demonstrate that there is patent illegality appearing on the face of the award, referring to such illegality which would go to the root of the matter, which would not amount to mere erroneous application of law. Mr.Daver's contention is of the arbitral tribunal erroneously applying the law. The Supreme Court in such context has observed thus:-

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while 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. Additionally, 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.”

26. In the present situation, the arbitrator’s reliance on the decision of this Court in *Deccan Chronicle Holdings Limited v Tata Capital Financial Services Ltd* (2016 SCC Online Bom 5319) for payment of money in an interim award also cannot be faulted. In the facts of such case, the petitioner i.e Deccan Holdings had availed of a term loan facility of Rs. 100 crores from the respondent and had admitted their liability to pay the amounts to the respondent through several documents, inter alia being a flash report submitted before the High Court of Andhra Pradesh as also documents filed before this Court. The petitioner was given ample opportunity to explain the admissions made by it before the Tribunal, however, the petitioner chose not to explain their admission and acknowledgment of their liabilities towards the respondent nor did they dispute the contents of the documents. The Court after considering that the petitioner had acknowledged and admitted the liability towards the respondent and that such an admission was clear and unambiguous held that in such a circumstance, the arbitral tribunal is empowered to pass an award directing payment of money under Section 31(6) of the Act by applying the principles of Order 12 Rule 6 of the Code of Civil Procedure. The relevant observations of the Court in that regard need to be noted which read thus:

“24. In my view based on the admission in the balance sheet of a company, a court is empowered to pass a decree on admission by applying the provisions of Order 12 Rule 6 of the Civil Procedure Code, 1908. In this case the petitioners have not disputed the contents of such documents which were filed by the petitioners. Be that as it may, though the petitioners had ample opportunities given by the learned arbitrator to explain such admission and acknowledgment of such liability in the said application filed by the respondent under section 31(6) of the Arbitration Act, a perusal of the affidavit in reply filed by the petitioners in the said application clearly indicates that the petitioners have not chosen to explain their admission and acknowledgment of the liabilities towards the respondent. On the contrary, the petitioners have not even disputed the contents of those documents.

25. A perusal of the arbitration petition filed by the petitioners also clearly indicates that no ground is raised by the petitioners that the petitioners had only mentioned the fact of having availed of having loan from the respondent but the same was not payable to the respondent or that the statement made in their proposal before CDR Cell or the documents annexed to the company application were false or incorrect. The petitioners have also not raised any ground

challenging the findings rendered by the learned arbitrator holding that the contents of those documents were not disputed by the petitioners.

26. I am not inclined to accept the submission of the learned counsel for the petitioners that the petitioners could have explained such alleged admission and acknowledgment of liability only at the stage of oral evidence and not while at the stage of deciding the application filed by the respondent for interim award under section 31(6) of the Arbitration Act. A perusal of section 31(6) of the Arbitration Act clearly indicates that the arbitral tribunal is empowered to make an arbitral award at any time during the arbitral proceedings in any matter in respect to which it may make a final arbitral award. It is not in dispute that the respondent had made a claim against the petitioners in the arbitral proceedings and had prayed for recovery of more than Rs. 100 crores. In my view the principles of Order 12 Rule 6 of the Civil Procedure Code, 1908 can be applied by the learned arbitrator for making an interim award under section 31(6) of the Arbitration Act if the learned arbitrator comes to the conclusion that the respondent in the arbitration proceedings has admitted and acknowledged their liability to the petitioners which admission and acknowledgment of the liability is clear and unambiguous. In this case since the petitioners had not even disputed the contents of the documents which documents were the documents of the petitioners themselves and having not explained the admission and acknowledgment of the liability inspite of opportunity having given by the learned arbitrator, the learned arbitrator in my view was right in making an interim award against the petitioners in the sum of Rs. 100 crores."

27. Thus, in the present case, considering several admissions as made on behalf of the petitioners in respect of their undisputed liability to pay the respondents in terms of clause 9 of the PAAA, the petitioners' case that the impugned award be set aside, is required to be rejected as no ground whatsoever for interference in the limited jurisdiction of this Court under Section 34 of the Act has been even remotely made out. The petition would be required to be dismissed, as none of the grounds has set out under Section 34 of the Act, firstly that a party was under some incapacity; or the arbitration agreement is not valid under the law to which the parties have subejcted it or, failing any indication thereon, under the law for the time being in force; or the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; read with the proviso to sub-clause (iv) of sub-section (2); or the composition of the arbitral tribunal interalia or the arbitral procedure was not in accordance with the agreement of the parties. As also the other ground in clause (b) of sub-section (2) of Section 34 that the nature of the dispute was such that it is not capable of settlement by arbitration under the law for the time being in force, or the arbitral award is in conflict with the public policy of India, as understood in the Explanation 1 below clause (b) (ii) of sub-

section (2) of Section 34 namely that making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or it is in contravention with the fundamental policy of Indian Law, or it is in conflict with the most basic notions of morality or justice, has not been remotely made out by the petitioner. Even applying the test as to whether it is in conflict with public policy of India or is in contravention to the fundamental policy of India law, as explained that it ought to be in contravention of Indian Law, no case was made out. There is no perversity or any patent illegality whatsoever in the arbitral tribunal making the impugned arbitral award.

28. Thus, the petition is accordingly dismissed, however, on the issue of interest, accepting the consent of the parties as recorded in paragraph 12 of the judgment, by permitting the respondents to move an appropriate application to that effect before the arbitral tribunal. All contentions of the parties in that regard are expressly kept open. No costs.

29. The office is directed to permit the respondents to withdraw the amount with accrued interest. Formalities in that regard be completed within a period of one week from today.

30. Interim Application also would not survive. It is accordingly disposed of.