
(2007) 03 SC CK 0069

In the Supreme Court Of India

Case No : Civil Appeal No. 1403 of 2007 (Arising out of SLP (C) No. 20126 of 2006)

Siddhivinayak Realities Pvt. Ltd.

APPELLANT

Vs

Tulip Hospitality Services Ltd. and Others

RESPONDENT

Date of Decision : 15-03-2007

Acts Referred:

Arbitration Act, 1940 — Section 37

Arbitration and Conciliation Act, 1996 — Section 11, 17, 28(3), 37, 9

Citation : AIR 2007 SC 1457 : (2007) 1 ARBLR 503 : (2007) 6 BomCR 771 : (2008) 1 CompLJ 244 : (2007) 8 JT 266 : (2007) 4 MLJ 772 : (2007) 4 SCALE 494 : (2007) 4 SCC 612 : (2007) 3 SCR 1123 : (2007) 1 UJ 441

Hon'ble Judges : AR. Lakshmanan, J;Altamas kabir, J

Bench : Division Bench

Advocate : Shyam Divam, Parimal K. Shroff, Bhagwati, Bina Gupta, Shweta Sharma and Inkle Barooah, for the Appellant; A.M. Singhvi Mahesh Agarwala, Amit Bhandari, Rishi Agarwala and E.C. Agrawala, for the Respondent

Final Decision : Dismissed

Judgement

Altamas Kabir, J.—Leave granted.

2. This appeal concerns a hotel known as Centaur Hotel situated at Juhu, Mumbai, which formerly belonged to the Hotel Corporation of India under the control of the Union Government. Pursuant to its policy of disinvestment, the Government of India transferred the said hotel to M/s. Tulip Hospitality Services Private Limited, being the respondent No.1 in this appeal.

3. By a Master Asset Purchase Agreement (referred to as 'MAPA') dated 31st March, 2005, the respondent No.1 agreed to sell and the appellants agreed to purchase the Centaur Hotel at Juhu, Mumbai, along with other assets for the price of Rs. 349.06 crores. Under the said Agreement, the parties agreed to make an escrow arrangement in order to secure the payment to be made by the appellants to the respondents as per the said Agreement. Accordingly, the

advocates of the respective parties, Mr. Anand Bhatt and Mr. Suresh Talwar were appointed as joint escrow agents and various documents were deposited by the respondents with them. The Agreement provided that in the event of default being committed by the respondents, the appellants would be entitled to invoke the escrow arrangement and the appellants would have various options, including the option to become a 50% share holder of respondent No.1-company and call upon the escrow agents to hand over to the appellants all the escrow documents relating to the respondent No.1- company and to transfer 22,00,000 shares of the respondent No.1-company held by the respondent No.3 in favour of the appellants. In addition, the appellants were entitled to receive the undated resignation letters, resolutions for appointment of Directors and transfer of shares in favour of the appellants with the right to appoint three Directors on the Board of the respondent No.1- company. Apart from the above, out of the four original Directors of the respondent No.1, two would resign and along with the three Directors to be appointed by the respondent No.1, there would in all be five Directors, three being the nominees of the appellants and two being the nominees of the respondent No.2.

4. The appellants paid a sum of Rs.75 crores to the respondent No.1 at the time of the signing of the Agreement. Subsequent to the said payment, a newspaper report was published in the "Times of India" titled "center refers City Centaur Deals to CBI" . On account of such publication, Mr. Anand Bhatt representing the appellants wrote to Mr. Suresh Talwar who was representing the respondents on 21st July, 2005 stating that in the light of the said Article a cloud had been cast on the title of the respondents to the Centaur property till such time as the CBI completed its probe and gave a clean chit to the transaction under which the Hotel Corporation of India disinvested the said hotel in favour of the respondent No.1

5. In his reply dated 6th October, 2005, the learned advocate for the respondents while referring to the media reports in respect of the CBI enquiry, also referred to an agreement entered into by the respondent No.1 with Nirmal Lifestyle Limited for the development of a shopping mall and supermarket in the hotel complex. It was stated that the appellants were fully aware of the existence of the Agreement between the respondent No.1 and Nirmal Lifestyle and that Nirmal Lifestyle was a part of the joint venture of the appellants. A reference was made to the arbitration petition filed by Nirmal Lifestyle against the respondent No.1 and an order of injunction dated 6th June, 2005 passed against the respondent No.1 from selling the hotel property. It was further stated that the action taken by Nirmal Lifestyle made it impossible for the respondent No.1 to proceed with its obligations under MAPA and that the contract stood frustrated in view of such injunction. The respondents stated that they stood discharged from fulfilling their obligations under MAPA and that the amounts received by the respondents from the appellants would be refunded to the appellants after deduction of a sum of Rs. 2 crores within a reasonable time. The respondents requested the appellants either to agree to such a course of action or to concur

with their appointment of an arbitrator.

6. In reply to the aforesaid letter of 6th October, 2005, the learned advocate for the appellants wrote back on 24th October, 2005, denying all the allegations contained in the said letter of 6th October, 2005. It was also mentioned in the said letter that in terms of MAPA the parties had agreed that in case of any default, the Escrow Agents would be entitled to decide jointly the dispute involved and whether any default had been committed which could trigger the escrow arrangement.

7. At this juncture, it could be profitable to refer to the escrow arrangement contained in Clause 13 of the Terms Sheet dated 8th March, 2005, which preceded the execution of MAPA. The same reads as follows:

13. Escrow Arrangement. For the purpose of securing the Purchaser for the payments made/to be made prior to the Closing Date (or the Extended Closing Date, as the case may be), a separate Escrow Letter has been simultaneously executed on the Signing Date pursuant to which the following documents ("Escrow Documents") are being handed over by the Company and Tulip Star to the joint Escrow Agents i.e Mr. Suresh Talwar and Mr. Anand Bhatt, to be retained by them in escrow on the terms and conditions as set out thereunder:

(a) Escrow Documents relating to the Company

Undated resignation letters of all the directors of the Company.

Circular Resolutions passed by the Board of Directors of the Company accepting the resignation of the Directors of the Company.

Circular Resolutions passed by the Board of Directors of the Company appointing the nominees of the Purchaser as Directors of the Company.

Circular Resolution passed by the Board of Directors of the Company approving the transfer of 22 lakh Tulip Star Shares in favour of the Purchaser.

All statutory registers of the Company.

Irrevocable Power of Attorney authorizing the Purchaser to do all acts, deeds, matters and things to comply with the obligations of the Company in the event that the Company does not comply with the same.

However it is clarified that the Power of Attorney shall automatically come to an end after the Company has complied with all its obligations under this Term Sheet.

Common Seal of the Company.

(b) Escrow Documents relating to Tulip Star

Original Allotment Letters relating to 22 lakh Tulip Star Shares.

Undated duly executed share transfer forms in respect of the 22 lakh Tulip Star

Shares.

Irrevocable Power of Attorney in favour of the Purchaser relating to transfer of the 22 lakh Tulip Star Shares.

However it is clarified that the Power of Attorney shall automatically come to an end after the Purchaser becomes the legal and beneficial owner of the 22 lakh Tulip Star Shares.

It is clarified that instead of original allotment letters in respect of the 22 lakh Tulip Star Shares referred to in (b) above, only photo copies have been handed over to the Escrow Agents on the Signing Date, on the specific representation and warranty given by the Company, the Shareholders and the Promoter Group that the original allotment letters will be handed over to the Escrow Agents immediately on receipt of the same from Saraswat Bank, which shall be complied with within a maximum period of three working days from the Signing Date. Further, on or before 19th March 2005, Tulip Star shall replace the original allotment letters with the original share certificates in respect thereof and shall hand over the said original share certificates to the escrow agents.

It is further clarified that from and out of the initial payment of Rs. 38.00 crore being made on the Signing Date, a sum of Rs.7.50 crore has been handed over to the Escrow Agents, which balance sum will be handed over by the Escrow Agents to the Company only upon receipt by the Escrow Agents of the original allotment letters in respect of the 22 lakh Tulip Star Shares.

The Escrow Agents will hold and release the Escrow Documents as per the terms set out in the Escrow Letter.

8. From the aforesaid arrangements, it would be evident that the parties to the Agreement placed reliance on their solicitors to function as the Joint Escrow Agents and both the parties agreed to their appointment as Escrow Agents to secure either party. In the subsequent agreement (MAPA) which followed on 31st March, 2005 the duties to be performed by the Escrow Agents have been indicated. One of the duties to be performed by the Joint Escrow Agents is set out in Clause 14 of the MAPA which reads as follows:

14. DEFAULT PROVISIONS. In case of an event of default being triggered, under the provisions of this Agreement, either by the Purchaser or by the Vendor:

(a) the fact as to whether an event of default has been so triggered; and

(b) the default provisions which will come into effect on such default, as more particularly set out hereunder,

shall be decided jointly by the solicitors of the Vendor and the Purchaser i.e. Mr. Suresh Talwar and Mr. Anand Bhatt. The two solicitors would be free to consult any third person, if so desired and deemed necessary.

9. The consequence of default as mentioned in paragraph 14 is set out in

paragraph 15.3 of the Agreement and reads as follows:

15.3 In the event that the Vendor and the Confirming Parties do not repay the amounts as mentioned hereinabove, the Purchaser shall have two options as set out hereunder:

To continue with the contemplated transaction under this Master Asset Purchase Agreement, in which case the provisions as set out in Clause 15.3.1 below will be triggered;

OR

to become the 50% shareholder of the Vendor, in which case the provisions as set out in Clause 15.3.2 below will be triggered.

10. In the event the purchaser (the appellants herein) chose to become 50% share holder of the vendor company (the respondent No.1 herein), certain consequences were to follow as contained in paragraph 15.3.2:

15.3.2 The Purchaser may exercise its option to become the 50% shareholder of the Vendor, in which case the Default Consequences shall be as under:

The Escrow Agents will hand over to the Purchaser the Escrow Documents relating to Tulip Star Hotels Limited and the Purchaser shall be entitled to transfer the 22 lakh shares of the Vendor held by Tulip Star Hotels Limited in favour of the Purchaser or its nominees.

With regard to the original Escrow Documents relating to the Vendor, the same shall be returned to the Vendor save and except the undated resignation letters, resolutions for appointment of Directors, resignation of Directors and transfer of shares in favour of Purchaser or its nominees which shall be handed over to the Purchaser.

The Purchaser will nominate and the Vendor will appoint three directors on the Board or the Vendor.

From and out of the four original directors of the Vendor, two of the directors will resign from the Board of the Vendor.

As a result the Board of the Vendor will comprise five directors, three being nominees of the Purchaser and two being nominees of Tulip Hotels Private Limited.

On account of the letter written on behalf of the respondents on 6th October, 2005, the appellants objected to the appointment of an arbitrator in terms of paragraph 19 of MAPA and called upon the respondents by their advocate's letter dated 24th October, 2005, to fix a time for appearing before the Joint Escrow Agents.

11. In reply to the appellants' letter dated 24th October, 2005, the respondents in their letter of 27th October, 2005 contended that though Joint Escrow Agents

had been appointed in September 2005, one of the said agents, namely, Mr. Anand S. Bhatt representing the appellants had resigned from his position as one of the Escrow Agents. The respondents also indicated that they were unwilling to give consent to Mr. Bhatt's reinstatement as Escrow Agent along with Mr. Suresh Talwar. The respondents also insisted that as the contract had been frustrated and/or rendered impossible to implement due to change in circumstances, the issues could not be resolved by the Escrow Agents. The respondents once again requested the appellants to appoint and to communicate the name of their Arbitrator.

12. The aforesaid contents of the letter written by the respondents on 27th October, 2005 were denied by the appellants who by their letter dated 25th November, 2005 categorically stated that at no point of time had Mr. Anand Bhatt resigned from his position as an Escrow Agent. There was, therefore, no question of his reinstatement as Escrow Agent. The appellants also disputed the contention that MAPA had been frustrated. It was particularly mentioned that the respondents could not take advantage of their own wrong and/or their inability to perform their obligation under the MAPA. The appellants, therefore, once again called upon the respondents to fix a meeting with the Escrow Agents to enable them to perform their duties as contemplated under the agreement.

13. The respondents thereafter informed the appellants by their letter of 28th November, 2005 that since the appellants had failed to appoint an Arbitrator, the said respondents had moved the High Court for appointment of an Arbitrator u/s 11 of the Arbitration and Conciliation Act, 1996. It was also contended that since the appellants had refused to perform their obligations as a result of the CBI enquiry, the said issue could not be decided by the Escrow Agents.

14. Notwithstanding the aforesaid circumstances, the appellants wrote to the Joint Escrow Agents on 12th December, 2005 and called upon them to fix a time for a meeting and to indicate the venue of the meeting with notice to the respondents. The respondents by their letter of 14th December, 2005 informed the Joint Escrow Agents that they had already applied to the High Court for the appointment of an Arbitrator on 29th November, 2005 and that the Joint Escrow Agents should not, therefore, take any action in terms of Clause 14 of MAPA as the fact at issue in the dispute between the parties was beyond their scope. In view of the aforesaid letter dated 14th December, 2005 written by the respondents, Mr. Anand Bhatt, one of the Joint Escrow Agents by his letter dated 19th December, 2005 expressed his inability to call a meeting or to take any action under Clause 14 of MAPA. Having regard to the stand taken by Mr. Bhatt, the appellants filed an Arbitration Petition u/s 9 of the Arbitration and Conciliation Act for various reliefs. On 24th January, 2006, the High Court passed the following ad- interim order in Arbitration Petition No. 434 of 2005:

that pending the Arbitral Proceedings between the petitioners and the respondents and passing of the Award, the respondents, their servants and agents be restrained from in any manner impeding or obstructing the Joint

Escrow Agents from acting in accordance with the terms of Master Assets Purchase Agreement dated 31st March, 2005, copy whereof is annexed as Exhibit "F" to the petition.

The aforesaid petition was disposed of on 8th March, 2006, with the order dated 24th January, 2006, being treated as final with liberty to the parties to apply to the Arbitrator for cancellation or modification of the order.

15. Pursuant to the aforesaid order passed by the High Court on 24th January, 2006, the appellants' learned Advocate called upon the Escrow Agents to fix a meeting to take action on the letter dated 12th December, 2005. The Escrow Agents by their letter dated 13th February, 2006 fixed 16th February, 2006 for passing of necessary direction. In response to the aforesaid notice given by the Escrow Agents, the respondents' advocate by his letter dated 15th February, 2006 informed the Escrow Agents and the appellants that the respondents had filed an appeal against the aforesaid order dated 24th January, 2006 and prayed for an adjournment for a period of six weeks. Since no one appeared for the respondents before the Escrow Agents on 16th February, 2006, the matter was adjourned till 28th February, 2006 for direction. Once again an adjournment was sought for by the respondents but pursuant to the direction given by the Escrow Agents on 28th February, 2006, the appellants filed their statement of claim.

16. Soon thereafter, an Arbitrator was appointed on the basis of the application filed by the respondents u/s 11 of the Arbitration and Conciliation Act. On the other hand, the order passed by the High Court on 24th January, 2006 in Arbitration Petition No.434 of 2005 was confirmed on 8th March, 2006 with liberty to the parties to apply before the Arbitral Tribunal for cancellation or modification of the order dated 24th January, 2006.

Pursuant to the above on 27th March, 2006, the respondents filed an application for interim orders before the Tribunal u/s 17 of the Arbitration and Conciliation Act for restraining the Escrow Agents from acting under Clause 14 of MAPA.

17. The Tribunal, however, refused to modify the order dated 24th January, 2006 and rejected the interim application filed by the respondents by order dated 27th April, 2006. The said order of the Tribunal was challenged by the respondents in Arbitration Petition (L) No.218/06 and the High Court by its order dated 4th May, 2006 set aside the order passed by the Arbitrator on 27th April, 2006 and requested the Arbitrator to reconsider the application made by the respondents afresh on its own merits without being influenced by the earlier orders dated 24th January, 2006 or 8th March, 2006. The interim application filed by the respondents u/s 17 of the Arbitration and Conciliation Act, 1996 was thereafter heard by the Tribunal on 16th June, 2006 and by its order dated 23rd June, 2006 the Tribunal went into and decided the question of bias which had been disregarded in the earlier orders and expedited the arbitration proceedings upon restraining the appellants herein from proceeding before the Escrow Agents pending the arbitration.

18. The aforesaid order of the Arbitral Tribunal dated 23rd June, 2006 was thereafter challenged by the appellants herein by way of Arbitration Petition No.308 of 2006 in the Bombay High Court. Before the Bombay High Court also the main contention of the respondent was with regard to the possibility of bias on the part of Mr. Anand Bhatt while functioning as one of the Joint Escrow Agents. Although it was submitted on behalf of the appellants that the Escrow Agents had been appointed knowingly by the respective parties when the initial agreement was signed, the High Court was of the view that since Mr. Anand Bhatt had already expressed some views in the matter, the reasonable apprehension of bias and/or suspicion of bias could not be overlooked. It could not be said that Mr. Anand Bhatt was not likely to be unconsciously biased when he would be required to examine the materials and the submissions made before him.

On the basis of the aforesaid findings, the Bombay High Court dismissed the appellants' application u/s 37 of the Arbitration and Conciliation Act and chose not to interfere with the finding arrived at by the Tribunal. The instant appeal has been filed by the appellants before the High Court against the aforesaid judgment and order passed by the Bombay High Court on 4th September, 2006.

19. Appearing for the appellants, Mr. Shyam Divan submitted that the High Court had wrongly endorsed the view expressed by the Arbitrator regarding the possibility of bias on behalf of Mr. Anand Bhatt, one of the joint Escrow Agents. He urged that having regard to the facts as disclosed, the High Court was not justified in coming to a finding that it could not be said that Mr. Anand Bhatt was not likely to be unconsciously biased when he would examine the material and/or submissions placed before the Joint Escrow Agents. On such erroneous construction of the Terms Sheet and MAPA, the High Court had come to the finding that no case had been made out u/s 37 of the Arbitration Act and even otherwise to interfere with the findings arrived at by the Arbitral Tribunal.

20. Mr. Divan reiterated the case made on behalf of the appellants before the learned Arbitrator as also the High Court and submitted that the parties had quite willingly and consciously appointed their respective solicitors as the Joint Escrow Agents since they were the persons who were most familiar with the details of the transaction and could be trusted with the documents which were to be handed over to the respective parties after the completion of the transaction. Mr. Divan urged that the bias now being sought to be attributed to Shri Anand Bhatt on account of the fact that he was a partner of the firm which had acted on behalf of one Nirmal Lifestyle Ltd. with whom an agreement had been entered into by the respondent No.1 for the development of a shopping mall and super market in the complex, was not available to the respondent No.1 which had knowledge of the said fact even at the time of the execution of the Terms Sheet and MAPA. It no doubt appears from the facts as disclosed that Mr. Anand Bhatt's firm had acted to safeguard the interests of Nirmal Lifestyle Ltd., but since the relationship between the said firm and Nirmal Lifestyle Ltd. was known to the

parties prior to the signing of the Terms Sheet, the allegation of bias was unfounded and had obviously been made by the respondents to wriggle out of the Escrow Arrangement.

21. Mr. Divan submitted that from the order passed by the High Court in Arbitration Petition No.434/2005 on 24th January, 2006, it would be evident that the High Court was also of the view that the agreement between the parties casts an obligation on both the sides. It was observed that an Escrow Arrangement is in place to see that both the parties are performing their obligations as per the contract and that merely because an arbitration clause had been invoked, the power given to the Escrow Agents by Clause 14 of the Agreement did not get suspended and, therefore, though the arbitration clause had been invoked, the Escrow Agents would be entitled to decide the question as to whether a default had been committed and as to which party has committed the default. Subsequently, when the matter was taken up by the learned Arbitrator, he was of the view that in view of the aforesaid order of the High Court, he could not prevent the Escrow Agents from proceeding.

22. Mr. Divan submitted that apart from executing the Terms Sheet on 8th March, 2005, and MAPA on 31st March, 2005, an Undertaking-cum-Indemnity had also been executed by the parties on 31st March, 2005, in favour of the Joint Escrow Agents specifying the functions of the Joint Escrow Agents and it was reiterated that the duties of the Joint Escrow Agents would be limited to holding of the escrow documents and handing over the same in the circumstances set out in the escrow letter. The decision as to whether the events contemplated had been triggered would be independently decided by the Joint Escrow Agents. Further the Joint Escrow Agents would not be bound by the provisions of MAPA, as defined therein, save and except under the provisions of the escrow letter. Mr. Divan submitted that the appellants were always ready and willing to perform their obligations under MAPA but having regard to the newspaper report appearing in the Times of India on 21st July, 2005, it had informed the respondent No.1 that since a cloud had been cast on the title of the respondent No.1, it would be in a position to complete the transaction as contemplated under the MAPA only after the probe by the CBI was completed and the CBI confirmed that the purchase of the Centaur property from Hotel Corporation of India was not irregular. Without responding to the said letter immediately, the respondent No.1 on 6th October, 2005, contended that the MAPA had stood frustrated and that respondent No.1 stood discharged from performing their obligations under MAPA.

23. Mr. Divan submitted that the said dispute involved the question of default in complying with the terms of the Agreement which under the Agreement was a matter to be decided only by the Joint Escrow Agents. Although in a wider sense, the learned Arbitrator would also be entitled to decide such question, it was left to the discretion of the parties to choose to trigger the escrow arrangement and as had been held both by the High Court as well as by the learned Arbitrator, the

appointment of the Arbitrator would not preclude the parties from also taking recourse to the escrow arrangement.

24. Referring to the decision of this Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., , Mr. Divan urged that this Court in the said decision had held that the jurisdiction or the power of the Arbitral Tribunal is prescribed under the Act and if the award is de hors the said provisions, it would be on the face of it, illegal. The decision of the Tribunal must be within the bounds and its jurisdiction conferred under the Act or the contract. In exercising jurisdiction, the Arbitral Tribunal cannot act in breach of some provision of substantive law or the provisions of the Act. Mr. Divan sought to contend that u/s 28(3) of the 1996 Act, the Arbitral Tribunal has to decide in accordance with the Terms of the Contract, which in the instant case, included the Escrow Arrangement. Mr. Divan urged that it was not for the Arbitral Tribunal to invalidate the Escrow Arrangement which the parties to the agreement had themselves agreed to. In fact, from the various correspondence disclosed, it would be clear that all the parties were fully aware even at the time of the signing of the agreement, that Nirmal Lifestyle Limited was being represented by M/s. Wadia Ghandy and Company and it was nothing but a further attempt to wriggle out of the Escrow Arrangement that the question of bias had been raised on behalf of the respondent No.1 but without any substance. Mr. Divan urged that the learned Arbitrator had exceeded his jurisdiction in restraining the parties to the Agreement from taking recourse to Clause 14 thereof, which the parties had jointly agreed could be triggered even in spite of the arbitration agreement contained in Clause 19.

25. Mr. Divan's submissions were strongly opposed by Mr. Abhishek Manu Singhvi, learned senior advocate for the respondents. It was urged by him that the arbitration clause was wide enough to include all disputes within its width, including the question as to whether any default had been committed and if so, by whom. It was urged that instead of serving any useful purpose, the invocation of two parallel powers for deciding the same controversy could lead to conflicting decisions which was to be avoided in the interest of the parties. Mr. Singhvi submitted that only after a decision had been given on the question of default, could the consequential relief follow and such a decision should be left to the learned Arbitrator instead of the Joint Escrow Agents who, as pointed out by the learned Arbitrator having acted as the solicitors of the respective parties, there would be a reasonable apprehension that Mr. Anand Bhatt would not be in a position to decide independently and fairly. Furthermore, since many of the correspondences had been addressed by Mr. Anand Bhatt, he would have to be examined by the parties and, could not, therefore, also function as an adjudicator in that regard.

26. Mr. Singhvi urged that bias did not necessarily mean conscious bias but would also include bias which creeps in unconsciously without any deliberate and wilful intention of such bias and since M/s. Wadia Ghandy had acted on behalf of Nirmal Lifestyle Limited and had obtained an injunction against the respondents

to prevent them from completing the sale, the question of bias assumes real proportions and could not be lightly brushed aside. It was urged that while, on the one hand, Mr. Anand Bhatt was acting in support of the Terms Sheet and MAPA, on the other hand, his firm was trying to prevent its execution. Mr. Singhvi urged that this in itself was sufficient for the learned Arbitrator and also the High Court to arrive at a conclusion that it would not be fair to the parties to allow the triggering of the Escrow Arrangement. It was also urged that since two courts had decided the matter, there was all the more reason for the parties to maintain status quo to allow the learned Arbitrator to proceed in the matter.

27. In support of his aforesaid submission, Mr. Singhvi first referred to the decision of the Court of Appeal in *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon and Ors.* reported in (1968) 3 W.L.R. 694, wherein in considering a question of bias it was observed that a man may be disqualified from sitting in a judicial capacity on one of two grounds. First, a "direct pecuniary interest" in the subject-matter. Second, "bias in favour of one side or against the other". In that context, it was *inter alia* observed by Lord Denning as follows:

So far as bias is concerned, it was acknowledged that there was no actual bias on the part of Mr. Lannon, and no want of good faith. But it was said that there was, albeit unconscious, a real likelihood of bias. This is a matter on which the law is not altogether clear: but I start with the oft-repeated saying of Lord Hewart C.J. in *Rex v. Sussex Justices, Ex parte McCarthy* (1924) 1 KB 256 'It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.' (at page 707).

28. Reference was also made to a decision of this Court in the case of *Rattan Lal Sharma Vs. Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School and others*, where the maxim '*Nemo debet esse iudex in propria causa*' (no man shall be a judge in his own cause) was considered and it was held that the deciding authority must be impartial and without bias which could take the form of an apprehend bias even though such bias had not in fact taken place.

29. Mr. Singhvi submitted that undoubtedly the parties had agreed to an Escrow Arrangement, but the ground of bias arose on the basis of facts that had transpired subsequent to the appointment of the Escrow Agents and the subsequent correspondence entered into by Mr. Anand Bhatt. Referring to Halsbury's Laws of England (Vol.48) 4th Edn. Paragraph 835 at page 445) Mr. Singhvi submitted that a trustee "must not be a partisan of one of several beneficiaries. He referred to paragraph 829 which reads as follows:

829. Fidelity to the trust. "A trustee must not connive at or knowingly facilitate any act or conduct of another person which would involve a breach of trust or occasion loss or risk to the trust property. He must not set up or abet an adverse title or claim of another person against his beneficiaries, or undertake a duty or

put himself in a position which is inconsistent with his duty as trustee, or act in a manner inconsistent with that duty. A trustee must perform the trust that he has undertaken and must assume the validity of the title of his beneficiaries, even if it is doubtful, until it is actually negated. At the same time, he has a right to know the title of those who pretend to be his beneficiaries, and, if he receives notice of an adverse claim and of an intention to hold him liable if he disregards it, he may obtain a decision of the court as to his course of action.

Mr. Singhvi urged that having regard to the finding of the learned Arbitrator that there was a possibility of Mr. Anand Bhatt's acting in a biased manner which finding was accepted by the High Court, it was not open to the appellant-company to insist that despite such findings of bias the Escrow Arrangement should be allowed to be triggered.

30. On a careful consideration of the submissions made on behalf of the respective parties, the materials on record and the law on the subject, we must confess that there is much to be said on both sides of the spectrum. There is no doubt that an Escrow Arrangement was agreed to between the parties and the Joint Escrow Agents were entrusted with certain specific functions under the Agreement. The agreement between the parties and in particular the Undertaking-cum-Indemnity Bond in favour of the Joint Escrow Agents executed by the parties on 31st March, 2005 indicate that the decision as to whether any default had been committed by either of the parties to the agreement, thereby triggering the Escrow Arrangement, was to be independently decided by the Joint Escrow Agents. It was also specified that the Joint Escrow Agents would not be bound by the provisions of the MAPA, save and except under the provisions of the escrow letter. Clause 14 of MAPA makes the provision even more clear.

31. While it is no doubt true that the question of default can also be gone into by the learned Arbitrator, the consequences of setting in motion the Escrow Arrangement has certain consequences which the appellant herein are entitled to take advantage of in order to safeguard their interests. The Escrow Arrangement was inserted into the agreement knowingly by both the parties despite the inclusion of a separate arbitration clause. If it was the intention of the parties to only provide for arbitration, there would have been no need whatsoever to include such an arrangement in the agreement. However, as has been pointed out by Mr. Singhvi even the Escrow Arrangement could be avoided by the parties if it could be shown that one of the Escrow Agents was biased or was likely to be biased in deciding the question entrusted to the Escrow Agents jointly.

32. An escrow arrangement is normally arrived at in order to safeguard the interest of the parties for the purpose of a contract and the Escrow Agents are normally persons who are trusted by the parties to act fairly and without bias notwithstanding their relationship with the respective parties. Mr. Singhvi does not appear to be correct in saying that the question of bias crept up long after the agreement had been signed, on account of certain acts performed by one of the Joint Escrow Agents, who had acted on behalf of a party whose interests

were adverse to that of the parties to the present agreement. In fact, both the parties were aware that one of the Joint Escrow Agents was representing such 3rd party and an understanding had been given that the said 3rd party would not proceed with the court proceedings initiated by it. At a later stage, to contend that the said Joint Escrow Agent would be biased in dealing with the dispute, or that there was a likelihood of bias is, in our view, misplaced and unacceptable.

33. Left to the aforesaid circumstances, we would have had no hesitation in upholding the contention of the appellant- company that it was entitled to take recourse to the escrow arrangement. The circumstances which however dissuade us from doing so is the possibility of Mr. Anand Bhatt, one of the Joint Escrow Agents, being examined on the very question on which he as one of the Escrow Agents is required to adjudicate. In this context, the letter written by him (Anand Bhatt) on 21st July, 2005 to the other Joint Escrow Agent, Mr. Suresh Talwar, in his capacity as the solicitor of the respondent No.1 indicating that in view of the newspaper report regarding the CBI investigation, it would not be possible for the appellant-company to complete the transaction as contemplated in the MAPA, assumes significance. The disinclination of the appellant to complete the transaction in terms of the MAPA is directly connected with the issue of default which is required to be decided by the Joint Escrow Agents. Since the said letter has been authored by Shri Anand Bhatt, there is little doubt that he will be subjected to extensive cross-examination with regard to the same. He cannot, therefore, be called upon to decide the dispute in which he himself becomes a party, in violation of the well-known maxim that a person cannot be a judge in his own cause. It is only on such consideration that the submissions made on behalf of the respondents have to be accepted even though we are not inclined to fully accept the views expressed both by the learned Tribunal and the High Court on the question of bias.

The decisions cited on behalf of both the parties only lay down the legal proposition relating to the concept of bias which does not require any elaboration in the facts of this case.

34. In the aforesaid circumstances, we are not inclined to interfere with the judgment of the learned Arbitral Tribunal as confirmed by the High Court and the instant appeal stands dismissed accordingly. We, however, make it clear that if the learned Arbitrator finds that there has been a default in working out the MAPA by either of the parties to the agreement, the parties will be entitled to enforce the consequences arising out of the Escrow arrangement irrespective of the award of the learned Arbitrator on all other aspects of the disputes between the parties. There will be no order as to costs.