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IN THE BOMBAY HIGH COURT

Equivalent Citations :

[Before : G.S. Patel, Gauri Godse]

V. Hotels Ltd. vs. Siddhivinayak Realties Pvt. Ltd. and Others

Case No. : Appeal No. 355 of 2014 In Arbitration Petition No. 667 of 2011

Date of Decision : 30-01-2023

ISSUE FOR CONSIDERATION

Whether the learned Single Judge was justified in setting aside the arbitral award dated 13th July 2011, which had declared the Master Asset Purchase Agreement (MAPA) terminated due to repudiation by the respondent and accepted by the claimants, and whether the learned Arbitrator's findings regarding the readiness and willingness of the parties to perform their obligations under the MAPA were correct.

LAW POINTS

1) The principles of repudiation and acceptance of repudiation must be clear and unequivocal as per Section 39 of the Indian Contract Act.

2) A party cannot claim frustration of contract if the frustrating event arises from its own conduct.

3) The scope of judicial review under Section 34 of the Arbitration and Conciliation Act is limited to patent illegality and violation of public policy.

HEADNOTE/S

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Arbitration and Conciliation Act, 1996 — Section 34 — Indian Contract Act, 1872 — Repudiation and acceptance of repudiation — Frustration of contract — Appeal against setting aside of arbitral award — The learned Single Judge quashed the arbitral award which declared the MAPA terminated due to repudiation by the respondent and acceptance by the claimants, holding that the respondent's letter did not constitute clear repudiation, and that the claimants failed to issue a notice of closure as required under the MAPA — The learned Single Judge found that the Arbitrator had ignored crucial evidence and mixed up the concepts of repudiation and frustration, leading to a patently illegal award — The appeal was dismissed, affirming the Single Judge's findings that the award was contrary to the provisions of the MAPA and the Indian Contract Act. (Paras: 1-70)

***Held**, The learned Single Judge rightly set aside the arbitral award due to its patent illegality and irrationality, as the findings of the learned Arbitrator were not plausible and ignored material evidence. (Paras: 60-67)*

Background Facts: The claimants (V. Hotels Ltd. and others) filed an arbitration claim against the respondent (Siddhivinayak Realties Pvt. Ltd.) regarding the termination of the MAPA, which was allegedly repudiated by the respondent due to a CBI inquiry affecting the title of the property involved. The Arbitrator ruled in favor of the claimants, leading to the respondent's challenge in the High Court. (Paras: 1-4)

***Parties Contentions:** The claimants contended that the respondent's letter constituted repudiation of the MAPA, which they accepted, while the respondent argued that the letter merely requested clarification on the title and did not amount to repudiation. The respondent also claimed that the learned Single Judge improperly re-evaluated the evidence and findings of the Arbitrator. (Paras: 27-36)*

***Disposition:** Appeal dismissed; the order of the learned Single Judge setting aside the arbitral award is upheld. (Para: 68)*

Cases Referred :

1. Associate Builders Vs Delhi Development Authority, (2015) 3 SCC 49 .
2. Associated Provincial Picture Houses v. Wednesbury corporation., (1948) 1 KB 223 (CA).
3. Atlanta Ltd. Vs Union of India, (2022) 3 SCC 739.

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4. Board of Control for Cricket in India Vs Deccan Chronicles Holdings Limited, 2021 SCC OnLine Bom 834 : (2021) 4 Bom CR 481.
5. Boothalinga Agencies Vs VTC Poriaswanmi Nadar, AIR 1969 SC110 .
6. Container Corporation of India Vs Kandla Cargo Handlers, (2019) SCC Online Bom 1245.
7. Delhi Airport Metro Express Pvt. Ltd Vs Delhi Metro Rail Corporation Limited, (2022) 1 SCC 131 .
8. Excise and Taxation Officer-cum- Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312.
9. Kuldeep Singh v.Commr. of Police[(1999) 2 SCC 10 : 1999 SCC (L&S) 429.
10. McDermott International Inc Vs Burn Standard Co Ltd, (2006) 11 SCC 181 .
11. MMTC Ltd. Vs Vedanta Ltd, (2019) 4 SCC 163 .
12. National Highways Authority of India Vs Oriental Structural Engineers Pvt. Ltd., 2018 SCC Online Del 10120.
13. Oil and Natural Gas Corporation Limited Vs Western Geco, (2014) 9 SCC 263 .
14. Oil and Natural Gas Corporation Limited vs. Saw Pipes Limited, (2003) 5 SCC 705 .
15. P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342.
16. Ramchandra Reddy and Co. Vs State of AP, (2001) 4 SCC 241 .
17. Ratnam Iyer Vs Jackie Shroff, (2022) 4 SCC 206 .
18. Satyabrata Ghose v Mugneeram Bangur & Co & Anr., AIR 1954 SC44 .
19. Ssangyong Engineering and Construction Company Limited Vs National Highways Authority of India (NHAI), (2019) 15 SCC 131 .
20. Vitol SA V Norelf Ltd., [1996] 1 WLR 65.

Advocates Appeared :
For the Appellant:- Mr Darius Khambata, Senior Advocate, with Zal Andhyarujina, Senior Advocate, Abhishek Swaroop, Shriraj Khambete, Karan Rukana, Ishani Khanwilkar, Syamantek Sen & Ananya Nair.
For the Respondent:- Mr Aspi Chinoy, Senior Advocate, with Somasekar Sundaresan, Parimal Shroff, DV Deokar, Sachin Pandey & D Parikh i/b Parimal Shroff & Co., Mr Amin Asriwala, with Farzeen C Pardiwalla & Nupur Shah.

Statutes Referred :

1. Arbitration and Conciliation Act -- S.11
2. Arbitration and Conciliation Act -- S.31
3. Arbitration and Conciliation Act -- S.34
4. Arbitration and Conciliation Act -- S.37
5. Arbitration and Conciliation Act -- S.39
6. Arbitration and Conciliation Act -- S.9

JUDGMENT/ORDER:

(Per Gauri Godse, J):-

FACTS IN BRIEF:

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1. This appeal is under ***Section 37 of the Arbitration and Conciliation Act 1996*** ("the Arbitration Act"). This appeal takes exception to the judgment and order dated 10th May 2013 passed by the learned Single Judge in Arbitration Petition No. 667 of 2011. By the impugned judgment, Arbitration Petition No. 667 of 2011 is allowed and the impugned award dated 13th July 2011 is set aside.

2. By the impugned award dated 13th July 2011, the learned Sole Arbitrator allowed the claim of the appellant and respondent nos. 2, 3 and 4 herein and declared that the Master Asset Purchase Agreement dated 31st March 2002 ("MAPA") stands terminated by repudiation on the part of the respondent no. 1 and acceptance of that repudiation by the claimants. Respondent in the arbitration claim is the petitioner in Arbitration Petition No. 667 of 2011 and respondent no. 1 in the present appeal. The arbitral award further directed that on the principles of restitution, the claimants shall refund a sum of Rs. 73,00,51,960/- to the respondent no. 1, within a period of 90 days from the date of the award. The award further directed that in case the amount was not accepted by the respondent no. 1, the claimants were directed to invest the said sum in a fixed deposit in a nationalized bank and keep the same invested subject to further orders of a court and that the said amount shall carry interest at 12% per annum till refund/deposit. The arbitral award further held that the respondent no. 1 was not ready and willing at all times to complete the terms of MAPA and therefore was not entitled to specific performance. Thus, the respondent no. 1 was held to be not entitled to claim damages and thus, its case of damages was not considered or dealt with. Accordingly, counter claim of the respondent no. 1 was dismissed. The arbitral award further awarded cost of Rs. 33 lakhs to be paid to the claimants by the respondent no. 1.

3. Being aggrieved and dissatisfied by the arbitral award, respondent no. 1 filed Arbitration Petition No. 667 of 2011 and prayed for quashing and setting aside the impugned Award dated 13th July 2011 and further prayed for dismissal of the claim of the claimants and prayed for allowing the counter claim filed by the respondent no. 1. The said arbitration petition was allowed on 13th July 2011 by the learned Single Judge. Feeling aggrieved by the impugned judgment and order passed by the learned Single Judge, the claimants have filed the present appeal.

4. V Hotels Ltd, Tulip Hotels Pvt Ltd, Tulip Star Hotels Ltd and Dr Ajit Kerkar are the claimants, who filed present Appeal. Subsequently Tulip Hotels Pvt Ltd, Tulip Star Hotels Ltd and Dr Ajit Kerkar were transposed as party respondent nos. 2, 3 and 4 in the Appeal. V Hotels Ltd, Tulip Hotels Pvt Ltd, Tulip Star Hotels Ltd and Dr Ajit

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Kerkar are hereinafter referred to as the claimants. Arbitration claim was filed against respondent no. 1 herein i.e. Siddhivinayak Realties Pvt Ltd, who is hereinafter referred to as the respondent.

CASE OF THE CLAIMANTS:

5. Claimants have raised their claim with respect to the property referred by them as subject property and more specifically described in the first, second and third schedule of MAPA. First schedule of MAPA describes land and structure of Centaur Hotel, which is presently known as Tulip Star. Second schedule of MAPA describes eleven flats and third schedule describes movable properties worth Rs. 14,06,00,000/-. These properties are hereinafter referred to as "the subject property".

6. As narrated in MAPA, on 31st May 2002 Tulip Hospitality Services Limited acquired Centaur Hotel from Hotel Corporation of India (HCI). Case of the claimants as pleaded in the statement of claim is that on 31st May 2002, claimant no. 1 acquired Centaur Hotel from HCI and renamed it as Tulip Star (Hotel). Claimant no. 1 concluded an agreement dated 21st June 2003 and supplementary agreement dated 17th October 2003 with Nirmal Lifestyle Ltd (Nirmal) with respect to some part of the subject property, for setting up a shopping mall/shops on the ground floor and first floor and a super market in the basement of the Hotel. Mr Vikas Oberoi, Mr Shahid Balwa and Mr Vinod Goenka expressed their interest to Dr Ajit Kerkar for acquiring the subject property either directly or by acquisition of claimant no. 1. Consortium was to be formed with Mr Dharmesh Jain of Nirmal in order to purchase the said subject property. On 8th March 2005, a term sheet was executed between Tulip Hotels Pvt Ltd (claimant no. 2) and Tulip Star Hotels Ltd (claimant no. 3) and the respondent i.e. Siddhivinayak Realties Pvt Ltd for a sale of the subject property. As per the said term sheet executed, respondent paid an amount of Rs. 38 crores to claimant no. 1.

7. On 31st March 2005, MAPA was entered into between Tulip Hospitality Services Limited as Vendor, claimants as confirming parties and respondent as purchaser for transfer of the subject property to the respondent. Clause 7 of MAPA contained the terms of consideration. The aggregate net consideration payable by the respondent to the vendor was Rs. 349.06 crores, in the manner provided in clause 7 of MAPA. In addition to the consideration of Rs. 349.06 crores, the respondent was required to make payment of an additional sum of Rs. 7.84 crores to the claimant no. 1 (vendor) in favour of the concerned authorities as balance premium

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on the basis of the letter dated 1st December 2003. As against the agreed consideration respondent paid an amount of Rs. 73 crores which was less than 20% of the agreed consideration as per MAPA. Tremac India Private Limited ("Tremac") had filed a petition for winding up of the claimant no. 1 on account of non-payment of their dues. Respondent was under obligation to release amounts in respect of the discharge of the liabilities in relation to the consent terms of 19th April 2005 filed in the petition of Tremac. However, by the month of May 2005, it had become clear that the respondent was not ready to perform the contract.

8. Arbitration Petition No. 100 of 2005 was filed by Nirmal group in Bombay High Court under ***section 9 of the Arbitration Act.*** On 6th June 2005 Bombay High Court passed an injunctive order restraining alienation and transfer with respect to the basement, ground floor, and first floor of the subject property to any third party. This order was subsequently confirmed by Order dated 27th September 2005.

9. By email dated 30th June 2005, the respondent had forwarded draft of two letters. One was "no claim letter" to preclude any claim by claimant no. 3. The other letter titled "side letter relating to replacement of shares" purported to amend MAPA.

10. Respondent addressed a letter dated 21st July 2005 through its escrow agent Mr Anand Bhatt intimating claimant no. 1 that in view of CBI inquiry, title of Centaur hotel will be under a cloud until CBI completes its probe. Hence, respondent will be in a position to complete the transaction as contemplated by MAPA only after the probe by CBI was completed and CBI confirms that purchase of Centaur hotel from HCI was not irregular or the CBI does not pass any adverse ruling that would affect the title of Centaur property.

11. By letter dated 26th July 2005 claimants put on record rejection of the said two letters. Thereafter, on 4th August 2005 respondent through its escrow agent called upon claimant no. 1 to issue 'Notice of Closure'. On 25th August 2005 another letter was issued by Mr Bhatt on behalf of respondent forwarding draft of no- claim letter and a letter regarding replacement of the escrow shares with 22 lakh shares of Tulip Hotels. However, claimant no. 3 refused to sign as the letters were beyond the terms of the agreement. Claimant no. 3 never agreed to sign such letters.

12. On 27th September 2005, Arbitration Petition No. 100 of 2005 filed by Nirmal against the claimants was disposed of. By the said order, interim order dated 6th July 2005 directing the parties to maintain status-quo was continued until further orders with liberty to the parties to apply before the Arbitrator. By letter dated 6th

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October 2005, claimants through their advocate communicated to the respondent that in view of repudiation, claimant no. 1 was discharged from performing the terms of MAPA. The claimants had ended MAPA in exercise of their statutory right arising from the repudiatory breach committed by the respondent. As an alternative the claimants stated that they stood discharged in view of frustration of MAPA. Thus, claimants invoked arbitration clause contained in MAPA. By advocate's letter 24th October 2005, respondent replied stating that invocation of arbitration clause by claimants was premature and that the matter should be referred to the joint escrow agents for decision under clause 14 of MAPA. By letter dated 25th October 2005 the claimants reverted stating that joint escrow arrangement was no longer applicable in view of the resignation of one of the escrow agents. Since the notice for invocation of arbitration clause was not acted upon, claimant no. 1 filed an application under ***section 11 of the Arbitration Act*** for constitution of arbitral tribunal. Respondent through their advocate's letter 12th December 2005 again purported to refer the matter to joint escrow agents. However, by letter dated 14th December 2005 claimants informed the respondent about filing of section 11 petition and asking them to refrain from acting upon clause 14 of MAPA. Thereafter, respondent filed Arbitration Petition No. 434 of 2005 under section 9 of the Arbitration Act. By order dated 23rd December 2005 in the said Arbitration Petition parties were directed to maintain status quo. Thereafter, by order dated 24th January 2006 passed in the said Arbitration Petition the escrow agents were directed to decide the matter under clause 14 of MAPA.

13. By order dated 3rd March 2006 in the Arbitration Petition filed by the claimants, sole arbitrator was appointed. On 8th March 2006 the earlier interim order dated 24th January 2006 was confirmed by granting liberty to the parties to approach the learned Arbitrator. The claimants thereafter filed interim application before the learned Arbitrator for restraining further proceedings before the joint escrow agents. However, the same was dismissed by the learned Arbitrator. The said dismissal was challenged in the High Court and the matter was remanded for fresh hearing. After rehearing the learned Arbitrator by order dated 23rd June 2006 restrained further proceedings before the joint escrow agents.

14. On 11th August 2006, claimants filed statement of claim and prayed for a declaration that the parties were no longer bound by continuing with MAPA and the same stood terminated pursuant to repudiatory breach committed by the

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respondent. There was a claim made for damages. The claimants prayed for various alternative reliefs, which are reproduced below.

CASE OF THE RESPONDENT:

15. The respondent filed a written statement and counter claim in arbitration. Respondent contended that under the terms of MAPA and particularly under clause 14 of the term sheet read with clause 7.1 of MAPA, respondent was required to pay to the claimant no. 1 an aggregate sum of Rs. 349.06 crores and out of the same respondent was required to pay Rs. 127 crores or less (as reduced by increase in liabilities that affected or were likely to affect the transaction of transfer of the property in question “free from all encumbrances” with clear and marketable title). Respondent till the date of filing the written statement had already paid Rs. 75 crores to the claimant no. 1 and had also taken over obligation of Rs. 30.60 crores and Rs. 7.85 crores arising from two documents of claimants with Nirmal and for premium to the Government for additional FSI as referred in MAPA. Respondent had paid all the instalments payable under Clause 7.2 (a),(b),(c) and (d) payable under MAPA and the amount due and payable by the respondent to claimant no. 1 was only Rs. 274.06 crores against completion of transfer of the subject property involved in MAPA, subject to claimant no. 1 paying and discharging various liabilities and making out clear and marketable title as per MAPA to the subject property.

16. Respondent contended that the claimants failed to give notice of closure to the respondent as set out in clause 6 read with clause 13 of MAPA. Though the respondent admitted with respect to the negotiations between the claimant no. 4 and Mr Vikas Oberoi of the Oberoi group, Mr Shahid Balwa and Mr Vinod Goenka of the Conwood group of the sale of the subject property either directly or through acquisition of 100% share of claimant no. 1, the respondent contended that same was always to be at the enterprise value as agreed under clause 14 of the term sheet dated 8th March 2005. However, the respondent received notice of the “undisclosed” term sheet dated 27th September 2004 and other documents between claimant no. 1, Mr Dharmesh Jain and Nirmal Hospitality. Respondent was forced to negotiate with Mr Dharmesh Jain of Nirmal Group for overall settlement and thereupon Mr Jain in principle agreed to cancel all transactions with the claimants for total amount of Rs. 40 crores to be paid to Nirmal and same was to be brought back to the respondent to take 33.33% equity shares of the respondent and to make investment in the respondent company. However, said in principle agreement did not result into or fructify in written or executed documents.

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After the term sheet dated 8th March 2005, MAPA was executed and even in clause 5 of MAPA, reference to the Nirmal transaction for 250000 square feet BUA was made. It was further provided that on payment of aggregate consideration under clause 7, the obligation undertaken by claimant no. 1 qua Nirmal shall continue to be the responsibility of claimant no. 1. In clause 5.3 of MAPA, it was clarified that the respondent shall from the date of execution of MAPA have the right to negotiate and arrive at settlement with Nirmal and for this purpose claimant no. 1 shall do all such acts as may be necessary to give effect to the same. Respondent was not aware of exact complete nature of transaction between Nirmal and the claimants. The term sheet also mentioned the transaction with the respondent subject to Nirmal transaction (250000 square feet BUA development) between claimant no. 1 and Nirmal. Respondent contended that the transaction was arrived at for Rs. 387.50 crores under the term sheet and thereafter under the MAPA for Rs. 349.06 crores. That was on the basis of strength and reputation of the respondent of which Mr Oberoi, Mr Balwa and Goenka groups were the only shareholders. Till 8th March 2005, Mr Dharmesh Jain of Nirmal was nowhere on the scene and reference to the contrary made in para 8 of the claim was false to the knowledge of the claimants.

17. Respondent contended that as contemplated under clause 7 of MAPA, respondent agreed to pay Rs. 349.06 crores to claimant no. 1 on enterprise value basis inclusive of value of liabilities agreed to be discharged that existed and as may arise until transfer of the subject property including increase in existing liabilities, if any. The claimants were therefore entitled to receive maximum of about Rs 127 crores or less under MAPA, had they discharged their obligations as per MAPA and discharged their liabilities as undertaken by them in MAPA well in time and by giving notice of closure. Respondent had paid aggregate sum of Rs. 75 crores to the claimants. Respondent paid Rs. 7.50 crores though not due and payable out of Rs. 75 crores as per clause 7(d) to claimant no. 1 and the same was kept as mutually agreed with the escrow agents. After claimants having withdrawn several amounts as per escrow arrangement, the balance sum of Rs. 2,31,18,959/- was still lying with the joint escrow agents. The payment of Rs. 7.84 crores was premium for FSI payable to government/corporation and not to the claimants. Respondent was always ready and willing to make payment of the same. The payment of Rs. 274.06 crores under clause 7.2(e) of MAPA was due and payable on the closing date and only on discharge of all obligations by the claimants under the MAPA. Claimants were required to give notice of closure under MAPA, however

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no such notice was given by the claimants which was agreed to be given by the end of May 2005.

18. Respondent specifically denied the allegations made by the claimants that respondent had no means of payment of sale consideration as required under MAPA. Respondent by their advocate's letter dated 24th October 2005 invoked the provisions of moving the escrow agent for securing the payment made as provided in MAPA. Respondent contended that the reference to the CBI inquiry was for the first time made on 21st July 2005 in the news report published in the Times of India and thus the same was for the first time made subject matter of the letter dated 21st July 2005. Thus, the respondent denied that there was any discussion with respect to the CBI inquiry in the meeting held on 8th May 2005 as alleged by the claimants. Respondent contended that the amount of Rs. 7.50 crores paid by the respondent to the escrow agent under clause 7.2 (d) in May 2005 was not fully utilized by the joint escrow agents and that Rs. 2,31,18,959/- were lying in the joint escrow agents' account opened in HDFC Bank, Fort branch. The amounts paid under clause 7.2 (c) was also not due and was much less than the instalment under clause 7.2(d). The entire sum of Rs. 75 crores to be paid before the closure notice was already paid by respondent and balance consideration was due and payable only on closure date for which the claimants failed to give any notice as per the terms of MAPA. Therefore, the question of any payment after 21st July 2005 did not arise. Respondent specifically denied the contentions raised by the claimants with respect to meeting on 11th August 2005. Respondent contended that the meeting was with regard to "no claim letter" to be executed by the claimants.

19. After execution of the term sheet on 8th March 2005 and after the respondent learnt about "undisclosed" term sheet dated 27th September 2004 between the claimants and Dharmesh Jain and Nirmal Hospitality Services Private Limited, the respondent then negotiated with Nirmal for becoming co-promoter of the respondent and to take 33.33% equity shares of the respondent and become Additional Director in the respondent company and to terminate all documents with claimants for agreed credit of Rs. 40 crores to be given to Nirmal group in lieu thereof. Respondent contended that from the conduct of claimants itself it was clear that the claimants were all along aware that Nirmal was not part of the respondent company and that had never intended to take any shares of the respondent company.

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20. The respondent denied that there was any repudiation of MAPA which discharged the claimants from its obligation under MAPA. Respondent denied that it had committed any repudiatory breach of MAPA which entitled the claimants to any kind of statutory right of claiming any discharge as alleged by the claimants. In fact, the claimants were under obligation to make out clear and marketable title to the subject property as agreed under MAPA and that the claimants were not entitled to plead either impossibility of performance or frustration of MAPA which was contrary to the terms of MAPA. There was no repudiation of MAPA by the respondent by letter dated 21st July 2005. In fact, thereafter in letter dated 4th August 2005, there was a reference to inter alia non- receipt of notice of closure from the claimants on or before 15th May 2005 and of closing of transaction on/or before 1st June 2005. Respondent conveyed its readiness and willingness to complete the transaction in no uncertain terms to the claimants. Thus, the respondent contended that there was no repudiation of MAPA by the respondent either made or intended by the letter dated 21st July 2005.

21. Respondent stated that the claimants addressed letter dated 19th August 2005 inter alia asking for release of balance amount of Rs. 2 crores at the earliest as lying in escrow account with them which can be utilized by the claimants to deposit with the Bombay High Court in the Tremac Petition and other employee related payments. Respondent therefore stated that assuming but not conceding that for the sake of argument if letter 21st July 2005 was treated as a letter of repudiation as alleged by the claimants, then the claimants had waived said repudiation by their letter dated 19th August 2005. Thus, the claimants were estopped from claiming any discharge based on letter dated 21st July 2005. Claimants after having agreed to execute “no claim letter”, wrongly and dishonestly refused to execute the same subsequently after causing the respondent to part with Rs. 22 crores on execution of MAPA.

22. Respondent contended that though the closure date was agreed as 1st June 2005, the claimants failed to issue any such notice. Claimants were not ready and willing to complete the transaction and thus there was no question of claimants suffering any loss in the performance of MAPA as alleged by the claimants. Claimants have admitted that they had incurred net loss of Rs. 36.74 crores in 2002 - 2003 and Rs. 39.79 crores in 2003 - 2004 and continued to make losses and hence the claimants had no option but to proceed even prior to the term sheet to systematically take steps to close down the hotel business. Respondent thus

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contended that the respondent had no role to play in the same as alleged by the claimants.

23. Respondent specifically denied that MAPA stood terminated as alleged by the claimants. Respondent contended that the claimants neither performed their obligations under the term sheet nor MAPA. Claimants did not use the monies paid by the respondent as required and agreed and assured to be utilized to discharge their liabilities in the first instance, which were affecting the transaction between the claimants and the respondent. Hence, as a result of which it was agreed in MAPA and finally decided on 19th April 2005 to open escrow account jointly by the advocates of the respondent and advocates for the claimants. Respondent thus stated that defaults by the claimants were responsible for depositing the amount of Rs. 7.50 crores in joint escrow account on 5th May 2005. Claimants failed to carry out their obligations in MAPA and particularly clause 6.2 of MAPA as a result of which balance consideration payable under clause 7.2(e) also was not payable to the claimants. Under clause 6 of MAPA and particularly clause 6.1, the claimants were under obligation to make out marketable title and under clause 10 and 11 read with Clause 13.3 claimants were under obligation to obtain a title certificate from M/s Crawford Bayley & company as at closing date certifying the title of claimant no. 1 to the subject property as clear and marketable, save and except in relation to the said Nirmal transaction. However, no such certificate was ever given to the respondent.

24. Respondent denied that it made any public disclosure as alleged by the claimants. Respondent had already addressed letter dated 4th August 2005 to the advocate for the claimants expressing their readiness and willingness to complete the transaction and had called upon the claimants as regards issuance of notice of closure of transaction. Thus, the claimants could not be held discharged or absolved from performance of their obligations under the contract and that the claimants are thus not entitled to damages as claimed by them.

25. Respondent contended that it was the view of advocates of the respondent that CBI inquiry was a cloud on the title of claimant no. 1 to the subject property. However, there was no reply from the claimants as regards their responsibility thereof. Instead, the claimants wrongfully claimed frustration of contract and repudiatory breach of contract without any legal or factual basis. Respondent by letter dated 4th August 2005 had called upon the claimants as regards to the issuance of notice of closure and specifically expressed readiness and willingness to complete the same. Claimant no. 1 did not reply or refer to letter dated 21st July

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2005 till 6th October 2005 though in the meanwhile the claimants demanded release of Rs. 22 crores (Tremac) and Rs. 2 crores from the joint escrow agent on 10th August 2005 and 19th August 2005 respectively. Thus, the respondent contended that the claimants were not entitled to claim any repudiation of contract and/or frustration of contract. Respondent contended that there was no provision in MAPA to make payment by the respondent for the company petition of Tremac on behalf of claimants but in fact the same was obligation of the claimants to comply with on/or before 10th April 2005. Thus, the respondent could not be held responsible for any losses or expenses incurred by the claimants. In the alternative, the respondent also contended that the claimants prevented the respondent to complete the transaction by wilful breach and wrongful termination of MAPA and thus the respondent would hold the claimants responsible for all acts and omissions on the part of claimants in respect of Nirmal transaction. Claimants failed to certify the title of claimant no. 1 to the subject property as agreed in terms and conditions of the MAPA. Thus, the respondent denied that MAPA was either frustrated or that there was any question of repudiation. Respondent further denied that MAPA had become impossible to perform. Respondent had paid Rs. 75 crores to the claimants and there was nothing due and payable by the respondent to the claimants except balance amount of Rs. 274.06 crores payable on closing date as stipulated in MAPA. Therefore, the claimants were not entitled to forfeit any amount as claimed by them. Thus, the respondent prayed for rejection of the claim of the claimants. Respondent further made a counter claim and prayed for specific performance of MAPA.

ARBITRAL PROCEEDINGS:

26. In arbitration proceedings, learned Arbitrator framed as many as 29 issues. Both parties led documentary as well as oral evidence. Respondent examined 5 witnesses and the claimants examined 2 witnesses. By its final Award, Arbitral Tribunal declared that MAPA stood terminated by repudiation on the part of respondent and acceptance thereof by the claimants. Thus, the Arbitral Tribunal directed the respondent to refund Rs. 73,00,51,960/- within a period of 90 days of the Award. Arbitral Tribunal also held that the respondent was not ready and willing at all times to complete the terms and conditions of the MAPA due to the CBI inquiry and therefore prayer for specific performance was not allowed. Thus, the learned Arbitrator dismissed the counter claim of the respondent.

27. Feeling aggrieved by the award of the Arbitral Tribunal, the respondent had filed Arbitration Petition No. 667 of 2011 under Section 34 of the Arbitration Act.

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Respondent also filed a separate Arbitration Petition No. 629 of 2022 under Section 9 of the Arbitration Act for claiming restraining orders against the claimants. Both the Petitions were heard and decided by a common Judgment by the learned Single Judge on 10th May 2013. By the Judgment and Order dated 10th May 2013, learned Single Judge quashed and set aside the arbitral award dated 13th July 2011. Hence, the claimants filed the present Appeal.

SUBMISSIONS ON BEHALF OF APPELLANT/ CLAIMANTS:

28. It is submitted on behalf of the claimants that the learned Single Judge has impermissibly re-appreciated the facts and evidence in the matter and has erroneously overturned the findings recorded by the Arbitral Tribunal on repudiation and its acceptance. The learned Single Judge decided the issue of readiness and willingness of the parties to perform MAPA and that the learned Single Judge has rather substituted his own interpretation for the interpretation by the Arbitral Tribunal. The learned Single Judge wrongly interfered with the application of law by the Arbitral Tribunal. The learned Single Judge has recorded that findings of the Arbitral Tribunal are perverse, however, the learned Single Judge has not recorded any reasons for holding the findings of the learned Arbitrator to be perverse. The Arbitral Award was perfectly correct in appreciating the facts as well as in application of law. The approach of the learned Single Judge is impermissible in law and beyond the scope of ***section 34 of the Arbitration Act.***

29. It was also submitted on behalf of the claimants that the learned Single Judge referred to the evidence of Mr Anantharaman, witness examined by the claimants, however ignored other evidence of the witness and admissions of witness examined by the respondent. Thus, the finding recorded by the learned Single Judge was misconceived. The learned Single Judge has done wholesale re-appreciation of evidence and has given his own views on facts, evidence and law, which is beyond the scope of section 34 of the Arbitration Act. The letter dated 6th October 2005 unequivocally accepted the repudiation. Thus, an opponent can accept the repudiation on any ground other than the one given by the other party claiming repudiation. Mr Khambata, the learned senior counsel for the claimants, submitted that the learned Single Judge did not apply test of perversity and the position that construction of a contract is within the jurisdiction of an arbitrator as laid down by Hon'ble Supreme Court in the case of ***Associate Builders Vs Delhi Development Authority, (2015) 3 SCC 49 . McDermott International Inc Vs Burn Standard Co Ltd, (2006) 11 SCC 181 . Ratnam Iyer Vs Jackie Shroff, (2022) 4 SCC 206 . Atlanta Ltd. Vs Union of India, (2022) 3 SCC 739 and Oil and Natural Gas***

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Corporation Limited Vs Western Geco, *(2014) 9 SCC 263* for coming to any conclusion about the findings of the award. There is no finding of miscarriage of justice or that the findings were perverse, irrational in sense of Wednesbury reasonableness, arbitrary, capricious, whimsical or based on extraneous considerations. The learned Single Judge has drawn untenable inferences. On the point of miscarriage of justice and the scope of interference under section 34 of the arbitration Act, Mr Khambata, relied upon the decision of Delhi High Court in the case of ***National Highways Authority of India Vs Oriental Structural Engineers Pvt. Ltd., 2018 SCC Online Del 10120***. The learned senior counsel submitted that if a finding of lack of judicial approach or perversity required re- appreciation of evidence then even before the 2015 amendment to the Arbitration Act, that was not permissible for a section 34 court.

He relied upon a decision of this Court in case of ***Board of Control for Cricket in India Vs Deccan Chronicles Holdings Limited, 2021 SCC OnLine Bom 834 : (2021) 4 Bom CR 481*** in support of his submission that if an award reflects any consideration of a piece of evidence, a court could not interfere with it, as it would amount to re-appreciation of evidence. He also relied upon the decision of the Hon'ble Supreme Court in case of ***Delhi Airport Metro Express Pvt. Ltd Vs Delhi Metro Rail Corporation Limited,*** *(2022) 1 SCC 131* and ***Ramchandra Reddy and Co. Vs State of AP,*** *(2001) 4 SCC 241* to submit that the approach of the learned Single Judge of re-appreciating evidence and reassessing factual aspects is deprecated by the Hon'ble Supreme Court.

30. The learned senior counsel on behalf of claimants, relied upon the decision of Hon'ble Supreme Court in case of ***Ssangyong Engineering and Construction Company Limited Vs National Highways Authority of India (NHAI),*** *(2019) 15 SCC 131* to submit that the importance of the correct approach of a section 34 Court remains relevant post the 2015 amendment in view of the fact that perversity is now held to be part of the ground of patent illegality. In support of the submission on repudiation of contract, he relied upon decisions of House of Lords in the case of ***Vitol SA V Norelf Ltd., [1996] 1 WLR 65.*** He submitted that it is well settled that repudiation can be by conduct e.g. a refusal to make payment of the amounts due as required under a contract. Section 39 of Contract Act does not prescribe any form or manner in which the promisee must communicate his acceptance of repudiation to the repudiating promisor. Thus, he submitted that the learned Arbitrator rightly found that although the letter dated 6th October 2005 did not specifically mention acceptance of repudiation by letter dated 21st July 2005, the

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letter dated 6th October 2005 did communicate that the respondent was treating the MAPA at an end. Thus, it was submitted that the learned Single Judge has erred in interfering with the award of the learned Arbitrator on facts as well as on application of law.

31. The learned senior counsel on behalf of claimants further submitted that the Hon'ble Supreme Court in case of ***MMTC Ltd. Vs Vedanta Ltd, (2019) 4 SCC 163*** has defined the boundaries of a court's jurisdiction under section 37 of the Arbitration Act, while reviewing an order passed by a section 34 court, the appeal court cannot travel beyond the restrictions laid down under section 34 and that the court in appeal must be extremely cautious and slow to disturb concurrent findings. He relied on the decision of this Court in case of ***Container Corporation of India Vs Kandla Cargo Handlers, (2019) SCC Online Bom 1245*** which relied upon the decision in *MMTC Ltd*.

SUBMISSIONS ON BEHALF OF RESPONDENT:

32. Mr Aspi Chinoy, learned senior counsel on behalf the respondent, submitted that the arbitration petition challenging the award was filed prior to the Arbitration and Conciliation (Amendment) Act, 2015 coming into force. Hence, the standard of scrutiny was a one applicable prior to the Amendment of 2015. The applicable scope of review under section 34 of the Arbitration Act was laid down by Hon'ble Supreme Court in *ONGC Limited* and *Associate Builder*. Learned senior counsel also relied upon the decision of the Hon'ble Supreme Court in case of *Ratnam Iyer*. Thus, it was submitted that the learned Arbitrator was to have a judicial approach and the decision had to be fair, reasonable and objective. Learned Arbitrator could not act in any arbitrary, capricious or whimsical manner. That a decision which was perverse or so irrational that no reasonable person would have arrived at, should not be sustained. Perversity or irrationality of the Arbitrator's decision needs to be tested on the touchstone of Wednesbury principle of reasonableness. Thus, if on facts, the learned Arbitrator failed to draw inference which ought to have been drawn or if had drawn inference which was on the face of it untenable resulting in miscarriage of justice, the adjudication in the arbitral award would be open to challenge. In support of the said submission the learned senior counsel for the respondent relied upon the decision of the Hon'ble Supreme Court in the case of *Ssangyong Engineering.*

33. It was thus submitted that, if a finding of fact needs to be considered as perverse, it must so outrageously defy logic as to suffer from the vice of

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irrationality. The learned Arbitrator had concluded that the respondent had repudiated the contract by advocate's letter dated 21st July 2005 and that the claimant no. 1, had by letter dated 6th October 2005 accepted such repudiation and treated the contract as at an end. The arbitral award had concluded that the question to be determined was whether letter dated 21st July 2005 constituted a repudiation of the contract and whether letter dated 6th October 2005 could have been said to accept such repudiation. Arbitral award accordingly concluded that the stipulation by the respondent in letter dated 21st July 2005 stating that the respondent would perform the contract only on the CBI probe being completed and CBI giving clean chit, was contrary to MAPA and inconsistent therewith. On the basis of the said finding learned Arbitrator had concluded that the letter dated 21st July 2005, constituted repudiation by the respondent on MAPA. The award had concluded that although the claimants in their letter dated 6th October 2005 had not even referred to letter dated 21st July 2005 nor made any reference to any repudiation by respondent, it had in fact stated that the contract was at an end by reason of *frustration and the same could be treated as acceptance of repudiation by the claimants*. Thus, the conclusion in the award on the issue of repudiation was erroneous.

34. Learned senior counsel thus supported the findings recorded by the learned Single Judge that MAPA required claimants to make out clear and marketable title to the subject property. By letter dated 21st July 2005, the respondent had not 'repudiated' the MAPA but had only requested the claimants to give clear title in respect of the subject property by waiting till the CBI inquiry was completed. The learned Single Judge rightly held that the inquiry about good and marketable title by the respondent before completion of the deal was not inconsistent with the terms and conditions of the MAPA and thus could not have amounted to repudiation of contract or refusal on the part of the respondent to complete other part of obligation. Thus, learned Single Judge was right in holding that the learned Arbitrator had mixed up repudiation (and acceptance of repudiation) with termination on the ground of frustration. It was thus submitted on behalf of the respondent that learned Single Judge has rightly held that the conclusion and decision by learned Arbitrator that by letter dated 21st July 2005, respondent had repudiated MAPA and that such repudiation was accepted by the claimants by letter dated 6th October 2005 was neither a plausible nor a possible view on the issue and thus demonstrates patent illegality on the face of the award.

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35. The learned Single Judge thus rightly held that the intention of the party who alleges repudiation of the contract must be absolutely clear from the letter alleging repudiation of contract and the surrounding circumstances. Thus, learned Single Judge has correctly held that by letter dated 21st July 2005, the respondent has affirmed the provisions of MAPA and had not repudiated MAPA. It was submitted on behalf of the respondent that the decision of the learned Single Judge holding that the finding of the learned Arbitrator that the letter dated 21st July 2005 constituted a repudiation of contract and letter dated 6th October 2005 constituted an acceptance by the claimants of said repudiation, being neither plausible or possible view, was well within the principle of Wednesbury reasonableness and thus the learned Single Judge rightly set aside the arbitral award on that basis. It was submitted that the claimants were not correct in submitting that the learned Single Judge had exercised the appellate review of the award. According to the respondent, the learned Single Judge has reviewed the MAPA, letters dated 21st July 2005 and 6th October 2005 and the conclusions of the learned Arbitrator regarding the same, only with a view to consider whether the conclusions of the learned Arbitrator were within the principle of Wednesbury reasonableness. It was thus submitted that such an approach by the learned Single Judge was clearly permissible under section 34 of the Arbitration Act as it stood prior to the amendment of 2015.

36. It was submitted on behalf of the respondent that it is well settled law that a repudiation must (i) be clear and unambiguous and (ii) must be shown to have been accepted. Otherwise, it has no legal effect. Although no particular form of acceptance is required, the termination communicated must necessarily relate to and be in the context of repudiation and its acceptance. In the present case, the letter dated 6th October 2005, which is sought to be treated as an acceptance of the alleged repudiation does not even refer to any repudiation of the contract by the respondent. It was thus submitted that the letter dated 6th October 2005 does not treat the letter dated 21st July 2005 as a repudiation of the contract. On the contrary, the letter treats the respondent's demand for awaiting the completion of the CBI inquiry as a frustration of the MAPA. Mr Chinoy, submitted that repudiation and frustration could not treated as synonymous as the learned Arbitrator had done and therefore the learned single Judge was justified in terming the said finding as perverse. The submission on behalf of the respondent was that the learned Single Judge had rightly set aside the finding of the learned Arbitrator that the CBI enquiry had made the performance of the contract impossible and had

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resulted in frustration of MAPA as being contrary to the law laid down by the Hon'ble Supreme Court in the case of ***Satyabrata Ghose v Mugneeram Bangur & Co & Anr., AIR 1954 SC 44 .*** Thus, the submission was that the event which was by its very nature of a temporary character could not be said to have made the performance of contract impossible. Thus, the learned Single Judge rightly held that the CBI enquiry was by its very nature of a temporary character and it was in fact completed during the pendency of the arbitration. There was, thus, neither repudiation nor frustration, let alone any question of treating the two as one or of holding that there was both repudiation and frustration. Thus, learned Single Judge rightly held that the learned Arbitrator's conclusion that specific performance of contract had become impossible was *ex-facie*, contrary and *dehors* the terms of MAPA.

37. It was submitted on behalf of the respondent that despite there being no pleading in the statement of claim the learned Arbitrator considered the mere oral submission of the claimants that MAPA had become 'impossible to perform' and that specific performance could not be granted. Learned senior counsel for the respondent submitted that there was complete misapplication of law on the findings of frustration of contract. By relying upon the law laid down by the Hon'ble Supreme Court in *Associate Builders* it was submitted that it is not only the decision making process but also the conclusion of the Award that needs to be tested. The learned Single Judge correctly set aside Arbitral Award by applying permissible ambit and scope of review under section 34 of the Arbitration Act as it stood prior to amendment Act of 2015.

REASONING AND FINDINGS:

38. We have heard both the sides at length. Written notes of arguments were tendered on behalf of the claimants. Arguments were concluded on 12th October 2022. As per the liberty granted written notes of arguments were filed on behalf of respondents on 21st October 2022.

39. Before dealing with the submissions made on behalf of both the parties, it is necessary to examine the basic facts. The claimants made six alternative claims before the learned Arbitrator. On the basis of the pleadings of the parties, the learned Arbitrator framed as many as 29 issues. Perusal of these issues show that basically the claimants' prayer was that the MAPA had come to an end. All the alternative prayers of the claimants ultimately resulted in wanting to put an end to the contract between the parties. After dealing with all the issues framed, the

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learned Arbitrator granted various reliefs. The various alternative reliefs sought for by the claimants, the 29 issues framed and the reliefs granted by the learned Arbitrator are very complex in nature. Hence, for better understanding of the controversy between the parties, we find it appropriate to reproduce all the alternative reliefs sought by the claimants, the 29 nine issues framed by the learned Arbitrator with the answers and the reliefs granted by the learned Arbitrator.

40. Following prayers were made by the claimants in the statement of claim:

> “Re First Alternative Case
>
> (i) Declaration that parties are no longer bound by the MAPA as it stands terminated pursuant to the repudiatory breach committed by the Respondent and a direction to the Respondent to pay the Claimant No.1 damages for the said breach in the amount of Rs. 180 crores.
>
> Re Second and Third Alternative Cases
>
> (ii) In the event the Tribunal does not grant the prayer in clause (i) above then, as an alternative to (i), the Claimants request for a Declaration that parties are no longer bound by the MAPA as it has become void under s.32-35 and/or s. 56 and the Respondent is not liable to refund any amounts.
>
> Re Fourth Alternative Case
>
> (iii) In the event the Tribunal does not grant the prayer in clause (i) and (ii) above then, as an alternative to (i) and (ii), the Claimants request for a Declaration that the Respondent is in default of payment of sale consideration and consequently (.lie Claimant is entitled to exercise his right under clause 15-1 of MAPA, the time period for refund of 90% consideration/free of interest/starting on the date of award.
>
> Re Fourth Alternative Case
>
> (iv) In the event the Tribunal does not grant the prayer in clause (i), (ii) and (iii) above then/as an alternative to prayers (i), (ii) and (iii), the Claimants request for a Declaration that as the Respondent was not ready and willing to perform the contract/ it is not entitled to Specific Performance of cl. 16B or cl. 15.3.2.
>
> OTHER RELIEFS

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(v) Respondent be directed to pay a sum of rupees twenty crores as damages towards breach of contract in relation to the newspaper disclosures.

(vi) Respondent be directed to pay a sum of rupees two crores as damages for breach in relation to non-disbursal of monies for discharge of liabilities in relation to Tremac.

Re Sixth Alternate case

(iv-A) In the event the Tribunal does not grant the prayer in case (i), (ii), (iii) and (iv) above, the claimant prays for a declaration that the claimant has property exercised its option under 15.1 and direction to the Respondents to accept the payments made therein. Respondents also prays for a declaration that after such payment being made, the MAPA stands terminated with neither party having any right and/or claim against the other of whatsoever nature particularly set out in paragraph 98 of the Statement of Claim.

(vii) Declaration that the Respondent is liable to indemnify and keep indemnified the Claimant No.1 against all losses and expenses of all kinds incurred in relation to the Nirmal Lifestyle transaction.

CONSEQUENTIAL RELIEFS

(viii) Appropriate directions be issued to the parties to take necessary steps for getting the Joint Escrow Agents to dispose of the documents and monies held by them in trust, in accordance with the final determination of this controversy by the Hon'ble Tribunal.

Interest and Costs

(ix) Respondent be directed to pay the amounts that they may be found liable to pay to the Claimant No.1 at an interest rate of 18% PA, to be applied from the period 21st July 2005 till the date of actual payment.

(x) Respondent be directed to pay the Claimant No.1 the costs incurred by them in prosecuting the present Arbitration proceedings. Residuary

(xi) Any other appropriate order be passed in the interest of a justice and in the interest of a final, effectual and expeditious determination of the controversy.

41. Following is the table showing the issues framed and the answers recorded by the learned Arbitrator:

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ISSUES	ANSWERS
(1) Whether the Respondents have committed any default in making payments as alleged in paragraph 17 of the State of Claim, and if so, whether any of the defaults amount to a repudiatory breach of MAPA?	Respondents had committed default in deposit of Rs. 7.84 Crores but same did not amount to a repudiatory breach of MAPA Rs. 7.5 crs was deposited with Escrow Agents and question of payment of balance did not arise because of repudiation.
(2) Whether the Respondents have committed repudiatory breach of MAPA by paying less than 25% of the sales consideration and refusing to pay the balance till CBI enquiry was completed favourably?	Respondents had committed repudiatory breach by refusing to pay the balance till CBI enquiry was completed favourably.
(3) Whether the Claimants were ready	Does not arise in view of
and willing to perform their obligations under MAPA?	repudiation by Respondents.
(4) Whether the Respondents represented that Mr. Dharmesh Jain/Nirmal Lifestyles would be part of the consortium of the Respondents as alleged in paragraph 8 of the Statement of Claim?	In the Negative.
(5) Whether the Respondents committed repudiatory breach of MAPA since one of the proposed consortium partner's viz., Nirmal Lifestyles filed Arbitration Petition	In the Negative.

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No. 100 of 2005 in the Bombay High Court and obtained an injunction on sale of the property?	
(6) Whether the filing of the Arbitration Petition No. 100 of 2005 by Nirmal Lifestyles Ltd. frustrates MAPA as alleged in the Statement of Claim?	In the Negative, but makes grant of Specific Performance impossible.
(7) Whether the initiation of enquiry by CBI has resulted in MAPA becoming impossible to perform and if so whether the Claimants are entitled to declaration that MAPA is void in accordance with Section 56 of the Indian Contract Act?	MAPA has come to an end by repudiation otherwise CBI enquiry would frustrate MAPA
(8) Whether on the facts of the case, the Claimants are entitled to invoke Clause 15.1 of the MAPA?	On repudiation MAPA comes to an end
(9) Whether the Respondents committed repudiatory breach of MAPA by claiming that the transaction contemplated in MAPA would only be completed after probe by CBI is completed favourably?	In the affirmative
(10) If answer to above issue is in the affirmative then whether the repudiation by the Respondents was	Initially yes, but repudiation was accepted subsequently
waived by the Claimants and/or whether the Claimants are estopped from accepting the	

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repudiation as alleged in the Written Statement?	
(11) Whether the Claimants accepted the repudiation of MAPA as alleged in the Statement of Claim?	In the Affirmative
(12) In the event of it being held that the Claimants are entitled to repudiate MAPA and/or the MAPA has been frustrated whether the Claimants are entitled to offset the amounts received against the payment made by them under the contract?	In the Negative
(13) Whether the Claimants are entitled to recover a sum of Rs. 30 Crore or any other amount by way of exposure to fixed liabilities in terms of employee liabilities and loan service liabilities as alleged in the Statement of Claim?	In the Negative
(14) Whether the Claimants are entitled to recover the sum of Rs. 130 Crores or any other amount by way of profits which the Hotel Business would have generated if it had continued as alleged in the Statement of Claim?	In the Negative
(15) Whether the Claimants are entitled to recover a sum of Rs. 20 Crores or any other amount by way of start-up costs as alleged in the Statement of Claim?	In the Negative

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(16) Whether the Claimants are entitled to recover a sum of Rs. 2 Crores or any other amount by way of compensation for the TREMAC liabilities or as additional interest liabilities as alleged in the Statement of Claim?	In the Negative
(17) Whether the Respondents were at all material times and even now are ready and willing to perform their part of MAPA as alleged in the Counter Claim?	In the Negative
(18) Whether the Respondents are entitled to specific performance of MAPA as alleged in the Counter Claim?	In the Negative
(19) Whether the Respondents are entitled, in addition to specific performance of MAPA, to recover a sum of Rs. 19,91,93,000/- or any other amount as damages or compensation, by way of costs incurred or loss of interest on the amounts paid by the Respondents to the Claimants under MAPA as alleged in the Counter Claim?	In the Negative
(20) Whether the Respondents are entitled, in addition to specific performance of MAPA, to recover a sum of Rs. 150 crores or any other amount as damages or compensation by way of escalation in the costs of redevelopment of the Suit Property and/or loss of	In the Negative

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business and profits as alleged in the Counter Claim?	
(21) Whether the Respondents are entitled to recover the sum of Rs. 350/- crores or any other amount by way of compensation in lieu of specific performance or as damages for breach of contract by the Claimant as alleged in the Counter Claim?	In the Negative
(22) Whether the Respondents are entitled to recover in lieu of specific performance of MAPA, a sum of Rs. 750 Crores or any other amount by way of loss of profit for a period of 25 years	In the Negative
as alleged in the Counter Claim?	
(23) Whether the Respondents are entitled to a charge on the property described in the First Schedule, Second Schedule and Third Schedule of MAPA for the amounts, if any, found due and payable to them by the Claimants?	In the Negative
(24) Whether the Respondents are entitled to the documents kept deposited in escrow with the joint escrow agent and the remaining 22 lakhs shares of Claimant No. 1 held by Claimant No. 2 as alleged in the Counter Claim?	In the Negative
(25) Whether the Respondents are entitled to offset, against the sum of Rs. 274.06 Crores payable by the	Does not arise

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Respondents under MAPA, the liabilities which may be outstanding for completion of clear and marketable title to the said property in favour of the Respondents, as alleged in paragraph 15 of the Counter Claim of the Respondents?	
(26) Whether the Claimants are liable to discharge all liabilities arising out of the transaction with Nirmal Lifestyles Limited and/or transactions of Hotel Corporation of India Limited and/or liabilities in excess of the sum of Rs. 274.06 crores, as alleged in paragraph 15 of the Counter Claim?	Does not arise
(27) Whether the Claimants are entitled to any interest, and if so, what amount?	In the Negative
(28) Whether the Respondents are entitled to any interest, and if so, what amount?	As per Award
(29) And Generally.	As per Award

42. Following are the reliefs granted by the Learned Arbitrator:

> *"Accordingly, there will be an Award declaring that MAPA stands terminated by repudiation on the part of the Respondents and acceptance of that repudiation by the Claimants. On the principles of restitution the Claimants shall refund a sum of Rs. 73,00,51,960/- to the Respondents within a period of 90 days of this Award. In case the amount is not accepted by the Respondents the Claimant to invest the said sum in a fixed deposit in a nationalized Bank and keep the same invested subject to further Orders of a Court.*

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If this sum is not refunded/deposited within 90 days, it shall carry interest @ 12% p.a. till refund/deposit.

It is further held that the Respondents were not ready and willing, at all times, to complete MAPA and are therefore not entitled to specific performance. The Respondents having repudiated are not entitled to claim any damages.

Thus their case on damages need not be considered or dealt with. Accordingly, the Counter Claim will stand dismissed with no Order as to costs.

Both parties had applied for costs. The Respondents have claimed a sum of Rs. 6,42,26,892/- as costs. The Claimants have claimed a sum app. Rs. 3,28,50,354/- as costs. Both sides have included costs incurred by them in the Court proceedings. In my view only the costs incurred in this Arbitration proceeding, towards Arbitrators fees, costs of venue, typing charges etc. can be awarded. As the Claimants have succeeded they are entitled to costs. From the figures given by the Claimants it is seen that they have spent Rs. 33,12,862/- for the above. This is more or less the same as that spent by the Respondents on this count. In my view it would be sufficient if the Claimants are Awarded a sum of Rs. 33,00,000/- as costs. There will therefore be an Award of costs in favour of the Claimants and against the Respondents in a sum of Rs. 33,00,000/-."

43. The learned Single Judge recorded his reasons and conclusions by framing following points:

1) Whether there is frustration or repudiation?

2) Whether MAPA has become impossible to perform?

3) Whether either party has to be blamed for the situation?

BROAD QUESTIONS FOR CONSIDERATION IN THE APPEAL:

44. Following broad questions amongst others arise for consideration in this appeal.

i) Whether issuance of letter dated 21st July 2005 amounts to repudiation of contract by the respondent and letter dated 6th October 2005 amounts to acceptance of repudiation by the claimants ?

ii) Whether there was frustration of contract as contended by the claimants ?

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iii) Whether respondent is entitled to specific performance of contract ?

iv) Whether the impugned judgment and order by the learned Single Judge is within the scope of section 34 of the Arbitration Act, as it stood prior to the amendment of 2015 ?

Consideration of submissions on points (i) and (ii):

45. There is no dispute with respect to the terms and conditions of the contract between the parties. Careful examination of the entire voluminous record shows that the entire controversy revolves around the two letters exchanged between the parties. First letter is dated 21st July 2005 by the respondent to the claimants and the second letter is dated 6th October 2005 by the claimants to the respondent. The respondent by the letter dated 21st July 2005 intimated claimant no. 1 that in view of CBI inquiry, title of the subject property (Centaur Hotel) will be under a cloud until CBI completes its probe. Hence, respondent intimated that it will be in a position to complete the transaction as contemplated by MAPA only after the probe by CBI was completed and CBI confirms that purchase of Centaur Hotel from HCI was not irregular and no adverse ruling was passed that would affect the title of Centaur property. By letter dated 6th October 2005, claimants through their advocate communicated to the respondent that in view of repudiation claimant no. 1 was discharged from performing the terms of MAPA. The claimants had ended MAPA in exercise of their statutory right arising from the repudiatory breach committed by the respondent. As an alternative the claimants stated that they stood discharged in view of frustration of MAPA.

46. Learned Arbitrator held that the respondent by issuing letter dated 21st July 2005, had committed repudiatory breach by refusing to pay the balance amount till CBI enquiry was completed favourably. According to the learned Arbitrator such a condition for payment imposed by the respondent was contrary to the terms of MAPA and inconsistent therewith. The learned Arbitrator was of the view that by letter 6th October 2005 the claimants accepted the repudiation. On perusal of the record we find that there is no dispute that the claimants had agreed to give clear and marketable title of the subject property to the respondent. There is also no dispute that the respondent had paid an amount of Rs. 75 crores as agreed in MAPA. The learned Single Judge examined the question as to whether the respondent had repudiated MAPA by letter dated 21st July 2005 and if so whether the repudiation of MAPA by the respondent was accepted by the claimants by letter dated 6th October 2005 and whether the same was in accordance with

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section 39 of the Contract Act. For the purpose of examining whether the view taken by the learned Arbitrator was a possible or plausible view and whether the arbitral award satisfied the conditions of ***section 31 of the Arbitration Act***, the learned Single Judge examined the findings recorded by the learned Arbitrator.

47. The learned Single Judge has held that by letter dated 4th August 2005 addressed by the respondent to the escrow agent of the claimants the respondent's stand was clear that the closing date was on or before 1st June 2005 and though notice of closure was to be given on or before 15th May 2005, the claimants had not given the closure notice. Thus, the learned Single Judge held that the respondent showed readiness and willingness to make payment of balance consideration amount on the closing date as per the terms and conditions of MAPA. The learned Single Judge also referred to letter dated 10th August 2005 from the claimants to the escrow agent which sought deposit of Rs. 122.10 lakhs and also called upon the respondent to pay the balance amount for payments of salaries and other dues of the company. By letter dated 19th August 2005 the claimants called upon the escrow agent to release amount Rs.2 crores for depositing it in the court in the case filed by Tremac. Thus, the learned Single Judge held that the claimants were in fact insisting for compliance of the provisions of MAPA.

48. The learned Single Judge further examined the case of the claimants that in view of the injunction orders passed in the case initiated by Nirmal, it had become impossible for the claimants to proceed with the performance of their obligation under MAPA and thus the claimants were entitled to treat themselves as discharged under MAPA. The learned Single Judge observed that the said letter dated 6th October 2005 issued by the claimants, did not refer to the respondent's letter dated 21st July 2005 (sought to be treated as letter of repudiation) and 4th August 2005 (for issuing notice of closure). The learned Single Judge has referred to the findings of the learned Arbitrator by which the learned Arbitrator has held that the condition for clean chit from CBI indicated by the respondent by letter dated 21st July 2005 was contrary to the provisions of MAPA and thus caused frustration of MAPA. The learned Single Judge has also referred to the finding of the learned Arbitrator that the claimants did not immediately act on the respondent's letter dated 21st July 2005, as also the finding that by letter dated 6th October 2005 the claimants had fully accepted repudiation. The learned Single Judge also referred to questions posed by the learned Arbitrator to the witness of the respondent as to whether the CBI enquiry would be a cloud on the title, to

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which the witness had answered in the negative. Thus, the learned Single Judge observed that bare perusal of all the aforesaid letters showed that the respondent never repudiated the contract, but had only called upon the claimants to get the title cleared, which even otherwise the claimants were under obligation to do under the MAPA.

49. The learned Single Judge further correctly held that the learned Arbitrator totally ignored the crucial evidence on record by witness Mr Anantraman examined by the claimants who had admitted that the claimants were not in a position to issue notice of closure as required by MAPA. Ignoring such a crucial evidence on the part of the witness of the claimants which goes to the root of the matter demonstrates patent illegality on the face of the Award.

50. Thus, we agree with the view expressed by the learned Single Judge that the entire award passed by the learned Arbitrator ignored or overlooked material evidence on record. Thus, we do not find any merit in the submission made on behalf of the claimants that the findings recorded by the Learned Single Judge were misconceived and that he has done wholesale re-appreciation of evidence. We find that the entire endeavour of the learned Single Judge was to find out if by any stretch of imagination the view taken by the learned Arbitrator was a plausible or a possible view.

51. The learned Single Judge further observed that even if letter dated 21st July 2005 was treated as a repudiation, it is clear that the parties had acted upon the provisions of MAPA even after the said letter and thus there was no acceptance of repudiation by the claimants. The learned Single Judge has thus rightly observed that the learned Arbitrator had mixed up the issue of repudiation and frustration. On perusal of the reasonings recorded by the learned Arbitrator, we agree with the observations recorded by the learned Single Judge that the interpretation of the learned Arbitrator in respect of letter dated 21st July 2005 and 6th October 2005 for holding that the respondent had repudiated the contract and the claimants had accepted the repudiation or that it amounted to frustration of contract is neither a possible nor a plausible view and thus it demonstrates the patent illegality on the face of the Award.

52. The learned Single Judge by relying upon the proposition laid down by the Hon'ble Supreme Court in the case of *Satyabrata Ghose* held that if and when there is frustration the dissolution of the contract occurs automatically and that it does not depend as does rescission of contract on the ground of repudiation or breach

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or choice of election of either party. Thus, in view of the learned Single Judge the finding recorded by the learned Arbitrator that letter dated 21st July 2005 addressed by the respondent to the escrow agent amounted to repudiation of MAPA, and that the letter dated 6th October 2005 from the claimants to the respondent amounted to acceptance of repudiation is contrary to the provisions of section 39 of the Contract Act.

53. The learned Single Judge correctly observed that the learned Arbitrator failed to appreciate that before the respondent issued letter dated 21st July 2005 the claimants ought to have issued a closure notice for complying their part of the obligation but had failed to do so and thus in view of section 39 of the Contract Act there must be not only categorical refusal to perform by the promisor of its promises in their entirety but also in acceptance of repudiation to put an end to the contract. Thus, the learned Single Judge was right in concluding that a mere notice of communication to break the contract cannot amount to repudiation under Section 39 of the Contract Act and that there must be two parties to put an end to the contract. Acceptance or repudiation must be unequivocal and must be communicated to the party in breach. Thus, we agree with the observations of the learned Single Judge that the finding of the learned Arbitrator on the issue of repudiation was totally inconsistent and showed patent illegality on the face of the Award.

We find that the learned Arbitrator had completely missed the only and most obvious conclusion that can be drawn on a plain reading of the correspondence between the parties, which is also supported by pleadings and evidence on record. Since the view of the learned Arbitrator is on the face of it is not a possible view, the learned Single Judge within the limited jurisdiction of section 34 of the Arbitration Act rightly set aside the Award. We do not find any merit in the submission made by the claimants that the learned Single Judge has not recorded any reasons to hold that the award is perverse. Perusal of the reasons recorded by the learned Single Judge in fact shows that detailed reasons are recorded by the learned Single Judge to hold that the award was perverse and patently illegal.

Consideration of submissions on point (iii):

(iii)Whether respondent is entitled to specific performance of contract?

54. The learned Arbitrator held that the respondent was not ready and willing to perform MAPA due to CBI inquiry and therefore not entitled to specific performance and hence dismissed the counter claim of the respondent. The

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learned Single Judge dealt with the relevant clauses of MAPA. In case of any default by the claimants in complying with its obligations, clause 16A(iii) of MAPA gave an option to the respondent to continue with the transaction and to deduct costs of amount paid towards the transaction or any such obligation particularly set out in clause 6 and 13 of MAPA from the amount payable by the respondent towards consideration. Clause 15.3 provided an option to the respondent to continue with the contemplated transaction under MAPA in case of default in making refund of 90% of the amount paid by the respondent to the claimants towards consideration. Thus, according to the learned Single Judge in view of these terms of MAPA while considering the plea of the respondent for specific performance of MAPA, the learned Arbitrator could have either directed the claimants to get the injunction orders in case of Nirmal vacated or could have permitted the respondent to settle with those creditors by making payment and to deduct the amount paid from the consideration payable by the respondent to the claimants under clause 16(A)(iii) of MAPA, which eventuality was contemplated under the provision of MAPA. Thus, in view of the learned Single Judge even if the injunction orders were not vacated specific performance could not have been refused on the ground that the same would frustrate the transaction.

55. The learned Single Judge is right in holding that the Arbitral Award was in total ignorance and in dehors of clause 16A(iii) of the MAPA and thus was in conflict with the public policy of India. Thus, the learned Single Judge correctly held that grant of injunction orders and continuation thereof was self induced situation on the part of the claimants. We agree with the conclusions recorded by the learned Single Judge that if a party which is itself responsible for such self-induced frustration cannot take a plea that contract is frustrated. Section 56 of the Contract Act would not apply to such a situation. The learned Single Judge by relying on the proposition of law laid down by the Hon'ble Supreme Court in the case of ***Boothalinga Agencies Vs VTC Poriaswanmi Nadar,*** ***AIR 1969 SC 110*** held that section 56 of the Indian Contract Act cannot be applied to self- induced frustration. The Hon'ble Supreme Court held that doctrine of frustration to the contract cannot apply where the event which is alleged to have frustrated the contract arises from the act or election of a party. Thus, the learned Single Judge held that the finding of the learned Arbitrator that there was frustration of MAPA was contrary to section 56 of the Contract Act and thus was in conflict with the public policy of India. In fact, such a finding is clearly perverse. The learned Single Judge observed that the record clearly showed that the respondent had already deposited the initial sum of

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Rs. 75 crores with the escrow agents in terms of the MAPA and that the balance amount was payable only on the claimants complying with their part of reciprocal obligation or on issuance of notice of closure. Though the respondent by letter dated 4th August 2005 had called upon the claimants to issue notice of closure and it also offered to pay the balance amount there was no response from the claimants. We thus, agree with the view of the learned Single Judge that the issue of readiness and willingness on the part of the respondent was required to be considered along with reciprocal obligations on the part of the claimants under the terms of MAPA.

56. The learned Single Judge observed that the party to a contract cannot be absolved from the liability to perform the part of the contract merely because on account of uncontemplated terms of events, performance of the contract may become onerous. Thus, according to the learned Single Judge, when MAPA was executed none of the parties had contemplated a CBI inquiry. It was even the case of the claimants that the CBI inquiry had no impact on the MAPA. Thus, we agree with the view of the learned Single Judge that CBI inquiry was temporary in character and would not have any effect on MAPA. The learned Single Judge held that the submission on behalf of the claimants that there was a collusion on part of the respondent and Nirmal and that the injunction orders obtained by Nirmal would frustrate MAPA was not acceptable. We concur with the view of the learned Single Judge that the finding on this issue recorded by the learned Arbitrator was totally contrary to the provisions of MAPA and the admitted facts on record. The learned Single Judge thus rightly held that the arbitral award totally ignored various crucial aspects and material evidence while taking a view that injunction orders passed by various courts would frustrate MAPA and contract under section 56 of the Contract Act. We agree with the view of the learned Single Judge that the respondent was right in submitting that the issuance of a direction by the learned Arbitrator for a restitution by directing the claimants to refund the amount showed a patent contradiction in the impugned award. On the one hand, the learned Arbitrator held that the respondent had repudiated MAPA which was accepted by the claimants and as a result thereof the respondent had abandoned the contract and had refused to comply with their part of the obligation; and, on the other hand, the learned Arbitrator ordered restitution of the same. Thus, the learned Single Judge was correct in observing that the award showed inconsistency and patent illegality on the face of the Award. Thus, we agree with the learned Single Judge

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that such directions issued by the learned Arbitrator cannot be termed as equitable order as sought to be argued on behalf of the claimants.

57. On the issue of readiness and willingness of the parties in complying with the respective obligations under MAPA, the learned Arbitrator had observed that the same was not material and not necessary to consider whether or not the respondent could have raised finance. The learned Arbitrator also held that under normal circumstances, the respondent could have raised such finance at short notice but after the Capital CAG Report of 5th May 2005 and since the CBI inquiry was looming large, financial institutions were reluctant to grant finance. The learned Arbitrator had recorded a prima facie finding that the repudiation was because the respondent had found it difficult to raise finance due to CBI inquiry. According to the learned Single Judge, these findings recorded by the learned Arbitrator were totally inconsistent with each other which showed patent illegality on the face of the Award. We agree with the observations of the learned Single Judge that merely on the basis of prima facie finding the learned Arbitrator could not have come to the conclusion that the respondent committed repudiatory breach of the contract or termination of the contract.

58. On the issue as to whether the respondent had committed any breach in making payment of balance consideration it was not in dispute that the respondent had already deposited payment of Rs. 75 crores under Clause 7.2.(a) to (d) which ought to have been sufficient for the claimants to discharge their obligation which was a condition precedent to the issue of notice of closure. The learned Single Judge, thus rightly held that the learned Arbitrator failed to consider the crucial part of evidence led by the parties and also the provisions under Clause 6.1 (a) (b) and (d) of MAPA while holding that the respondent had committed breach by not paying balance consideration.

59. We agree with the conclusions recorded by the learned Single Judge that the balance consideration was payable by the respondent only on the claimants issuing notice of the closure. The learned Arbitrator refused specific performance to the respondent on the ground that MAPA was repudiated by the respondent and accepted by the claimants and on the ground that MAPA was frustrated due to CBI inquiry. The learned Single Judge thus held that only if the learned Arbitrator concluded that the respondent had made out a case of specific performance the question of discretion would arise as to whether inspite of such conclusion it would have been proper to grant specific performance. Perusal of the award shows that the learned Arbitrator totally failed to consider the provisions of MAPA which

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consisted of reciprocal obligations on part of both the parties. It was clearly provided in MAPA that the balance consideration payable by the respondent was entirely conditional upon claimants complying with their obligation including in their issuance of notice of closure. It was not in dispute that the respondent had already paid

Rs. 75 crores which was due and payable by the respondent initially for clearing some of the liability as per provisions of MAPA and that the balance consideration was payable only after the claimants complied with their obligations and submitted a notice of closure. The learned Single Judge was right in holding that since the claimants did not issue a notice of closure, there was no obligation on the part of the respondent to pay the balance amount. Thus, we find that the learned Arbitrator erroneously refused to grant specific performance as prayed by the respondent.

CONCLUSIONS:

60. The Learned Single Judge considered the limited scope of section 34 of the Arbitration Act. The learned Single Judge observed that there was no proposition that the Court should be slow to interfere with the arbitral award even if the conclusions were perverse and even when the very basis of the arbitral award was wrong. According to the learned Single Judge it was open to the court exercising jurisdiction under Section 34 of the Arbitration Act to consider whether the award was on the specific terms of the contract and if so interfere with it on the ground of patent illegality and opposed to the public policy of India.

61. Thus, according to the learned Single Judge the award which was on the face of it patently in violation of the statutory provisions cannot be said to be in public interest. The learned Single Judge relied upon the law laid down by the Hon'ble Supreme Court in the case of ***Oil and Natural Gas Corporation Limited vs. Saw Pipes Limited, (2003) 5 SCC 705*** that in certain cases the court can set aside the award if it is contrary to the fundamental policy of Indian Law or the interest of India or justice or morality or is patently illegal or is so unfair and unreasonable that it shocks the conscience of the court. Thus, the learned Single Judge rightly held that if any perverse award is passed then the court is not powerless to interfere with such a perverse Award. Thus, the learned Single Judge held that the award of the learned Arbitrator was not based on the interpretation of the terms of the contract and/or provisions of the Contract Act but the same was dehors to the terms of contract and was contrary to sections 39 and 56 of the Contract Act. Thus, in view of the learned Single Judge the arbitral award if contrary to the

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provisions of MAPA and contrary to the Contract Act as well as ignoring material piece of evidence led by the parties was patently illegal and thus the learned Single Judge found it fit to interfere under section 34 of the Arbitration Act. Thus, the learned Single Judge set aside the award of the learned Arbitrator by exercising powers under Section 34 of the Arbitration Act.

62. The scope of interference by section 34 court is summarized by the Hon'ble Supreme Court in the decision of *Associate Builders* in the following paragraphs:

> *"29. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.*
>
> *30. The audi alteram partem principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act. These sections read as follows:*
>
> *"18.Equal treatment of parties.—The parties shall be treated with equality and each party shall be given a full opportunity to present his case.*
>
> *****
>
> *34.Application for setting aside arbitral award.—(1)****
>
> *(2) An arbitral award may be set aside by the court only if—*
>
> *(a) the party making the application furnishes proof that— ****
>
> *(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;"*
>
> *31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:*
>
> *(i) a finding is based on no evidence, or*
>
> *(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or*

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(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In ***Excise and Taxation Officer-cum- Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312]*** *, it was held: (SCC p. 317, para 7)*

"7. … It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

In ***Kuldeep Singh v.Commr. of Police[*** *(1999) 2 SCC 10* ***: 1999 SCC (L&S) 429****] , it was held: (SCC p. 14, para 10)*

"10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:" General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right,

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although your reasons may be very bad, or essentially wrong". It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In ***P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342]*** *, this Court held: (SCC pp. 601-02, para 21) "21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted.*

Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye- law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

34. It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood."

(Emphasis applied)

63. Thus, the learned Arbitrator is the last word on facts, only if the approach of the Arbitrator is not arbitrary or capricious. We find that on the basic facts the approach of the learned Arbitrator cannot be termed as reasonable. The reasons recorded above clearly show that the Award suffers from patent illegality and perversity, as the issue of repudiation and frustration are mixed up in the Award. Once it is clear on facts that there was no repudiation in clear terms by the claimants, there was no question of acceptance of repudiation by the claimants. Even otherwise, on a plain reading of the admitted facts there is neither any

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semblance of indication of repudiation of contract by the respondent nor there is any acceptance of repudiation in clear terms by the claimants. Hence, reliance of the claimants upon decision of House of Lords in the case of *Vitol SA,* is of no assistance to the claimants. Admittedly claimants have received part payment of the agreed consideration. There is no clear finding recorded by the learned Arbitrator that it was impossible to perform the contract, hence there was no question of frustration of contract. The terms of the contract clearly created an obligation on the part of the claimants to issue a notice of closure, which was admittedly not given, hence the stage of readiness and willingness on the part of the respondent had not arisen for refusing specific performance to the respondent. Thus, we find that the award is completely dehors the admitted facts and terms of the contract. Hence, the conclusions arrived at by the learned Arbitrator are unreasonable, defy logic and suffer from the vice of irrationality, which makes the Award patently illegal.

64. The scope of interference by the court in the jurisdiction under section 34 of the Arbitration Act is narrow. The scope of interference by the Appellate Court under section 37 of the Arbitration Act is also restricted. In the decision of *MMTC Ltd,* relied upon by the claimants, Hon'ble Supreme Court has explained scope of sections 34 and 37 of the Arbitration Act in the following paragraphs:

> "11. As far as Section 34 is concerned, the position is well- settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(*b*)(*ii*) i.e. if the award is against the public policy of India. *As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [**Associated Provincial Picture Houses v. Wednesbury corporation., (1948) 1 KB 223 (CA**)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.*

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> 14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34; *In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision.*
>
> Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."
>
> (Emphasis applied)

65. We find that the reasons recorded by the learned Single Judge are in conformity of the test of perversity to be applied as laid down by Hon'ble Supreme Court in the case of *Associate Builders, McDermott International Inc, Ratnam Iyer, Atlanta Ltd.,* and *Western Geco*. The decision of Hon'ble Supreme Court in case of *Ssangyong Engineering* relied by the claimants to submit that the importance of the correct approach of a section 34 Court remains relevant post the 2015 amendment, is of no assistance as the approach of the learned Single Judge satisfies the scope of interference as permissible prior to the amendment of 2015 to section 34 of the Arbitration Act. Mr Chinoy for the respondent is right in submitting that the learned Single Judge had applied the standard of scrutiny as applicable prior to the Amendment of 2015 and the applicable scope of review under section 34 of the Arbitration Act as laid down by Hon'ble Supreme Court in case of *Associate Builder*. Thus, we find that the learned Single Judge had tested the approach of the learned Arbitrator on the touch stone of Wednesbury principle of reasonableness.

66. We find that the learned Single Judge has rightly exercised the powers under section 34 of the Arbitration Act, by recording valid reasons for holding that (i) the impugned Arbitral Award is patently illegal (ii) ignores material evidence on record (ii) is perverse and (iii) the view of the learned Arbitrator is neither a possible nor a plausible view. Thus, we do not find any merit in the submissions made by the claimants.

67. For the reasons recorded above the Appeal is dismissed.

68. There will be no order as to costs.

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69. In view of dismissal of Arbitration Appeal, Interim Application (L) No. 15376 of 2021 is dismissed.

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