* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 03.02.2020
Pronounced on: 05.05.2020

\+ **FAO(OS) (COMM) 107/2018 & CMs. 20269/2018 & 49639/2019**

V4 INFRASTRUCTURE PVT LTD ..... Appellant

Through: Mr. Sandeep Sethi, Senior Advocate with Mr. S.K. Chaturvedi, Mr. AmitSood and Mr. Dinesh Singh, Advocates.

versus

JINDAL BIOCHEM PVT LTD ..... Respondent

Through: Mr. Sanjiv Anand, Mr. Amit Dubey, Mr. Vikas Kakkar, Advocates.

\+ **FAO(OS) (COMM) 108/2018 & CMs. 20272/2018 & 49347/2019**

V4 INFRASTRUCTURE PVT LTD ..... Appellant

Through: Mr. Sandeep Sethi, Senior Advocate with Mr. S.K. Chaturvedi, Mr. AmitSood and Mr. Dinesh Singh, Advocates.

versus

JINDAL BIOCHEM PVT LTD ..... Respondent

Through: Mr. Sanjiv Anand, Mr. Amit Dubey, Mr. Vikas Kakkar, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

SANJEEV NARULA, J.

1. By way of thisjudgement, weshall dispose of the above-noted appeals preferred against the common order dated 19.03.2018, whereby Appellant's (VIPL) objection petitionsunder Section 34 of the Arbitration and Conciliation Act, 1996, (hereinafter 'the Act')have been rejected, and common arbitral award dated 20.05.2017 stands confirmed.This impugned arbitralaward deals with two separate claim petitions preferred by the Appellant relating to respective Space Buyer Agreements(hereinafter 'arbitration agreements')concerning separate portions of same property. Since the objection petitions have been disposed of vide a common judgment, wealso consider it convenient to dispose of theappeals vide a common judgement.

Brief Facts:

2. The facts of the present case have been elaborately noted by the Sole Arbitrator in the impugned award and also by the learned Single Judge in the impugned judgment. Since there is not much dispute about the same, and furthermore as scope of the surviving controversy encapsulated hereinafter is narrow, we need not recount the entire facts and rather verbatim note from the impugned judgment only thosewhich are essential, for the disposal of the present appeals. The same read as follows:

> *"4. VIPL purchased the property bearing no. 228, Sector 9, Service Centre, Dwarka admeasuring 540 square meters in an auction conducted by the Delhi Development Authority (DDA). At the material time, VIPL was in the nature of a joint venture*

between two groups, namely, Attar Singh Group and Jindal Group. Both the said groups had equal representation on the Board of Directors of VIPL. Certain disputes arose between the two groups and the Jindal Group exited from the control and management of VIPL. VIPL further claims that the two share purchase agreements dated 25.08.2009 and 30.08.2009 were entered into between its shareholders of VIPL belonging to the said groups. It is further claimed that the said share purchase agreements have attained finality. However, the controversy, if any, relating to the said share purchase agreements is not relevant for the purposes of the present proceedings.

5. VIPL and JBPL entered into two Space Buyer Agreements in relation to the Property. The First Agreement pertains to the sale of three shops bearing Unit Nos. 1, 2 and 3 on the front side of the ground floor aggregating 936.409 square feet of covered area, which was agreed to be sold to the JBPL at a consideration of ₹4.25 crores. In terms of the Second Agreement, VIPL agreed to sell 1435.758 square feet on the second floor of the Property at a consideration of ₹3.15 crores.

6. Admittedly, JBPL paid the entire consideration as agreed under the two Space Buyer Agreements. JBPL claimed that VIPL had initially handed over the possession of the built up space purchased in terms of the said two agreements but had forcibly re-possessed the same by breaking open the locks. VIPL disputes the same and claims that the Property was completed and an occupancy certificate was granted on 19.04.2010 but the physical possession of the Property was not handed over to JBPL as JBPL failed and neglected to pay the maintenance charges and to execute the agreement for maintenance of the Property (Maintenance Agreement). VIPL further claims that JBPL also failed to pay proportionate charges for installation of a lift.

7. VIPL terminated the two Space Buyer Agreements by letter dated 19.08.2011 on the alleged ground of failure on the part of JBPL to pay the proportionate charges for installation of the lift and to execute the Maintenance Agreement.

8. In the aforesaid context, the disputes between the parties were referred to arbitration. In the Statement of Claims filed before the Arbitral Tribunal, JBPL claimed for specific performance of the Space Buyer Agreements as well as damages for failure to handover possession of the Property along with interest. JBPL also sought rendition of accounts. In the alternative, JBPL claimed refund of the entire sale consideration paid for the Property (₹4.25 crores and ₹15 lacs pertaining to the ground floor and₹3.15 crores alongwith ₹20 lacs paid towards the second floor) along with interest at the rate of 24% per annum.

9. In addition to the above, JBPL also claimed refund of certain amounts on account of difference in the area as stated in the Space Buyer Agreements and as agreed to be allotted by VIPL.

10. After considering the pleadings of the parties, the Arbitral Tribunal framed several issues. One of the principal issues was whether the notice dated 19.08.2011 issued by the VIPL for terminating the Space Buyer Agreements in question was legal and whether JBPL had failed to discharge any of its obligations under the said agreements. The Arbitral Tribunal considered the said issue and found that the JBPL had not committed any breach of the Space Buyer Agreements as alleged by VIPL in its termination notice dated 19.08.2011. Accordingly, the Arbitral Tribunal held the termination notice to be illegal.

11. The Arbitral Tribunal also concluded that JBPL had not only paid the entire consideration of₹7.4 crores (₹3.15 crores for the second floor and₹4.25 crores for the ground floor) but had also paid a sum of₹35 lacs over and above the said consideration as proportionate charges for development of the external facade.

12. Insofar as the issue regarding the construction of basement is concerned, the Arbitral Tribunal found that the construction was not as per the sanctioned plan dated 12.03.2008. The said basement had been constructed after the building had been raised. The basement had been approved by the DDA in

March/April 2010 subject to the payment of compounding charges. The Arbitral Tribunal found that notwithstanding that the construction of the basement was subsequently approved by the DDA, the same was in violation of Clauses (c) and (e) of the Space Buyer Agreements, wherein VIPL had represented that it had observed the terms and conditions of the sanctioned plan and the construction was being done in accordance with the sanctioned plan.

13. In view of the above, the Arbitral Tribunal rendered an award for refund of the amount paid by JBPL being ₹37.40 crores plus ₹35 lacs along with interest at the rate of18% per annum from the date of payment, till the date of actual realization."

Summary of proceedings:

3. An essential fact, emanating from the record that stands out and is worthyof mentioning is that prior to the commencement of the arbitration proceedings, on petitionspreferred by the Respondentunder Section 9 of the Act, this court vide order dated 16.09.2011directed parties to maintain status quo in respect of the properties in dispute. The interim stay in favour of the Respondent was made absolute vide order dated 10.01.2014. Thereafter,arbitration proceedings commenced between the parties and culminated in the arbitral award in favour of the Respondent. During this period, the abovenoted interim order continued to bind the parties. The Appellant assailed the award under Section 34 of the Act, *inter alia*, on the ground that the premise of the award was intrinsically flawed. The learned arbitratorgranted relief of return of the consideration amount along with interest on an erroneous premise that Respondent had not claimed specific performance of the agreements. The learned Single Judge,

however,dismissed the objection petitionsand upheld the award holding that there is no infirmity in the same.

4. In the appeals before us, at the stage of admission, the Appellant expressed itsinclination to settle the matter and stated that it was ready and willing to pay Rs.7.40crores [principal amount] along with interest in instalments, with reasonable reduction in the rate of interest. Taking note of thisstand, Court issued notice to the Respondent. In the proceedings that followed, the Appellant honoured its commitment and proceeded to make payments,which wasalso accepted by the Respondent without prejudice to its rights and contentions. As a result, on the date of final hearing of the present case, the Appellant had paid the principal amount awarded by the Arbitral Tribunal, and the balance that remains due is towards damages and interest awarded @ 18% p.a.

5. Given the fact that the discord which survives our consideration relates only to the rate of interest and damages, parties were encouraged to explore a possibility of settlement. Since there was no resolution,we proceeded to hear the appeals.During the course of hearing, considering the conspectus of circumstances, we had also called upon the counsel for the Respondent to take instructions as to whether the Respondent would be willing to settle the matterif the rate of interest is reduced from 18% p.a.to 9% p.a. Likewise, we had also called upon the counsel for the Appellant to confirm the above option. While the Appellant agreed to the above proposition, the Respondent declined and as a consequence, we are now deciding the appeals on merits.

Submissions on behalf of the Appellant:

6. Mr.Sandeep Sethi, learned senior counsel for the Appellant argued that the award of rate of interest @18% is exorbitant, unreasonable and unjustifiable in the facts of the case. He submits that the interest calculated @18%, as on date, is much more than the principal amount. Elaborating this submission, Mr.Sethi argued that thelearned arbitratoras well as the learned Single Judge havecompletely ignored the fact that the Respondent had filed claim seeking relief of specific performance, and then without there being any abandonment and relinquishment of the said relief,the learned arbitratorhas proceeded to award the alternate relief of refund of consideration with damages and interest. He submits that although the Sole Arbitratorwas within his jurisdiction to award the alternate relief of damages, but for granting the same there must be factual foundation in the pleadings or in the proceedings. Notably, the proceedings before the learned arbitratordo not indicate that there was express declaration by the Respondent modifying its claim to this effect. Thus, the entire premise for awarding the interest is flawed and unsustainable.

7. Mr.Sethifurthersubmitted that the Sole Arbitrator andlearnedSingle Judge have given contradictory findings. On one hand, the learnedSingle Judge has observed that theRespondent has prayed for specific performance of the agreements, whereas on the other hand, it is observed that the said relief was not pressed as no issue was framed in this regard. The learned Single Judgeobservesthat the learned arbitratorhas wide discretion to see whether to award specific performance of the agreements or to award

damages in lieu thereof, yet, ignores the fact that the entire findings in the award are based on the erroneous foundation that Respondent has not claimed relief of specific performance and is,instead,seeking refund of the sale consideration with interest,in alternative to the relief of specific performance.

8. Mr. Sethi also argued that the learnedSingle Judge failed to correctlyappreciate that the letter dated 19.08.2011, terminating the agreements, was withdrawn / superseded by subsequent letters [dated 23.09.2011, 26.09.2011 and 05.05.2012] , issued by the Appellant. Even prior to the termination letter dated 19.08.2011, Appellant offered execution of the sale deed for the suitproperties by letters dated 05.05.2011 and 04.07.2011. If the Respondent was interested in the alternate claim for refund of the amount paid in terms of the agreements, then it ought to have accepted Appellant's offer contained in the letter dated 19.08.2011.During the entire arbitration proceedings,Respondent never gave up the claim of specific performance. Even during cross examination held on 25.09.2015, the Respondent reiterated its stand and expressed willingness for execution of sale deed,although with certain caveats, that were beyond pleadings. Thelearned arbitratorhas failed to take into consideration the above noted aspects and rendered an award that is beyond pleadings and evidence on record.

9. Mr. Sethialso arguedthat the grant of refund with interest of 18% is incomprehensible, in view of the fact that the Appellant was prevented from deriving any benefit from the property, at the instance of the Respondent.

The property remained under status quo from 16.09.2011 till passing of arbitration award on 20.05.2017, in terms of order passed in OMP no.700-701/2011. If the Respondent was not interested in seeking specific performance of the agreements, and preferred pursuing the relief of refund with damages and interest, then it should not have sought an injunction against sale of the disputed properties, against the Appellant. The injunction prevented the Appellant from disposing off the two disputed properties free of any trappings to a third party at the then prevailing market price. The Appellant could have profitably utilised the sale proceeds and, in that eventuality, the Appellant would have been able to service the interest awarded by the learned arbitratorin favour of the Respondent. The Respondent should also bear the burden of its own conduct. Mr. Sethi submits thatthe learned arbitratorgranted high rate of interest without any justification and the learned Single Judge erred in approving the same by ignoring the above-noted aspects.

Submissions on behalf of the Respondent:

10. On the other hand, Mr. Sanjiv Anand, learnedcounsel for the Respondent argued that the damages and the interest awarded by the learned arbitratoris valid in law, since the Respondent has suffered hardship for many years on account of the Appellant. Even after making the full payment for the disputed properties, the Respondent was prevented from enjoying the same. The Appellant, on the contrary, has been using the outer area of the property all throughout and was not inconvenienced by the status quo order. It was also argued that the scope of judicial review while exercising jurisdiction under Sections 34 and 37 of the Act is limited, and the

impugned judgment does not suffer any perversity that would invite interference by this court within the confines of the above noted provisions.

Analysis:

11. We have heard learned counsels at length.The sole surviving dispute that requires adjudication lies in a narrow compass and relates to the rate of interest awarded by the learned arbitratoron the amount awarded. Ordinarily,we would have not interfered on this aspect considering that the fact that our jurisdiction under Section 37 of the Act is restricted. But,since there areinherent and glaring contradictionsbetween the claim made by the Respondent/claimant and the relief granted by the Arbitral tribunalwhich awardsinterest @ 18% p.a.in addition to the damages, we are inclined to step in. In our opinion, the award of interest @ 18% p.a. is wholly unjustified and the sameshocks our conscience and prompts us to intervene for the reasons discussed hereinafter.

12. The Claim Petition preferred before the learned arbitratorsoughtprimary relief of specific performance of the Space Buyer Agreements dated 07.10.2009.The relief of refund of the sale consideration was made only in the alternative. This is clearly spelt in the relevant claims,extracted as hereunder:

> *"**Claim No. 1:- Declare the Respondent Notice dated 19.08.2011 alongwith all other consequential letters issued by the Respondent pursuant thereto as null & void whereby the Respondent cancelled both the Space Buyer Agreement dated 07.10.2009 on false, baseless and frivolous grounds.***

Claim No. 2:- Declare that construction of the Basement by the Respondent in already built-up building as unauthorized and illegal as when on 25,03.2008 the building plan was sanctioned by the authority there way neither any provision nor any approval for raising the basement.

Claim No. 3:- The Claimant claim Specific Performance of Space Buyer Agreement dated 07.10.2009.

Claim No. 4:- The Claimant claims a sum of Rs.4.50 lacs (Rupees Four Lacs Fifty Thousand) as damages for each month from 21.10.2009 alongwith interest @ 24% p.a. till its actual payment by which date the property was to completed by the Respondent and the possession was to be handover to the Claimant but the Respondent failed in doing so.

… … …

Claim No, 7:- ***In alternate of claim No. 1 to 6****, the Claimant is claiming Refund of the entire sale consideration (Ground Floor)i.e. sum of Rs.4.25 crore and Rs. 15.00 Lacs (paid towards cost ofconstruction) alongwith interest accrued on the said amounts @24% per annum from the respective dates of payment till its actualpayment."*

(emphasis supplied)

13. The learned arbitratorproceeded to render theaward*inter alia* in the following terms:

"55. Therefore, it comes to be concluded that the payments were made by the Claimant of the areas 1450 sq. feet and 950 sq. feet respectively of the second floor and ground floor, and would thus be entitled to refund of the excess amounts of Rs.3.56 lakhs and 6,65,959/-. The issues areaccordingly decided in favour of the Claimant and against theRespondent. ***<u>However, since the Claimant has not sought the relief ofspecific performance and is being granted alternative relief of refund ofentire payments</u>****, this relief is not available to the Claimant.*

… … …

57. The details of these payments are given by the Claimant' in statementEx.P8, and which as seen above is not disputed. ***Since the Claimant isseeking refund of amounts with interest as alternative to the reliefs of damages etc., and is also not claiming the relief of specific performance*** *and as the said amount was also offered by the Respondent to theClaimant vide termination notice, I do not see any impediment in grantingthis relief to the Claimant. Though I have chosen to record my reasonsunder the other issues, but all that becomes academic in view of theClaimant seeking and being granted relief of refund of his payments withinterest, Thus, the Claimant is held to be entitled to the amounts paidtowards sale consideration i.e. Rs.4.25 crore and Rs.3.15 crore beside costof remaining construction viz. Rs.15/- lakhs and Rs.20/- lakhs withinterest @ 18% p.a. from the date of payment as specified in Ex.P8 till thedate of actual realization. Consequently, both issues are decided in favourof the Claimant."*

(emphasis supplied)

14. The above observations and findings reveal that the learned arbitratorproceeded on the footing that the Respondent had not set up a claim for specific performance. In these circumstances, he proceeded togrant damages of Rs. 35 lacs, apart from the refund of the principal amount alongwith interest @ 18% p.a. from the date of payment till the date of actual realization. The impugned award even records that there is no need to delve into the justification for the award of damages. The relevant portion recording this observation reads as follows:

"From all this it comes out to be that the Claimant was to be entitled to some compensation because of its having been deprived of the user of the premises for no fault of its. ***But in***

view of the fact that though Claimant has not set up claim of specific performance and has rather in alternate of claims No. 1 to 6 sought refund of Rs.4.25 crore and Rs.3.15 crore beside Rs. 15/- lakhs and Rs.20 lakhs, I need not labour on the aspect of entitlement of compensation / damages. Therefore, both these issues are decided accordingly."

(emphasis supplied)

15. The above noted findings are *ex-facie* incorrect and contrary to the pleadings and evidence on record. The claim petition,as filed, was for specific performance, as is apparent from the pleadings extracted above. Pertinently, on this basis, prior to the constitution of the arbitral tribunal, the Respondent by way of a petition under Section 9 of the Act, obtained an interim order in its favour to the following effect:-

"Issue notice. Mr. Batra accepts notice on behalf of therespondent. The parties shall maintain status quo in relation to theproperty in question till the next date.

It appears that the disputes between the parties fall in a verynarrow compass. Mr. Kaul, learned senior counsel for the petitioner, oninstructions, submits that the petitioner is ready and willing to executethe maintenance agreement with the respondent. He submits that therespondent may be required to provide the same to the petitioner.

Let the maintenance agreement be provided by therespondent to thepetitioner within a week.

Mr. Batra submits that the maintenance charges would be payablefrom June 2010 onwards, apart from the proportionate share for theexpenses borne by the respondent towards installation of the lift. Mr. Batra, on instructions submits that the original possession letter ofthe property in question is with the respondent.

The respondent shall indicate the names and particulars of theirnominee in whose favour they would desire the petitioner to execute thetransfer documents in relation to the Karkardooma property.

The parties are agreeable to resolve their minor differences,including in relation to another property developed by the respondent,situated at Karkardooma, by referring the matter before the Delhi HighCourt Mediation Centre. Accordingly, let the parties appear for theDelhi High Court Mediation Centre on 27.092011 at 4:30 p.m. List thematter before the Court on 20.102011."

16. The aforesaid order was made absolute and continued till the conclusion of the arbitration proceedings between the parties, in the following terms:

"Learned counsel for both the parties have informed thatcross petitions under Section 11 of the Arbitration andConciliation Act, 1996 are pending before the bench of Hon'ble Mr. Justice Vipin Sanghi. As far as the presentpetitions are concerned, both the parties are agreeablethat the status quo order passed on 16th September, 2011may continue till the arbitration between the parties isconcluded. Ordered accordingly. The present petitionsare disposed of in view of the statement made by thelearned counsel for the parties."

17. The foundation of the arbitration claim for specific performance of the agreements is based on alleged breach on the part of the Appellant and it's failure to fulfil the contractual obligations.The Respondent attempted to demonstrate that it was ready and willing to go forward with the Agreement, and it was the Appellant who is attempting to wriggle out of the commitments made therein. The Respondent, therefore, sought specific performance of the agreements to sell as a primary relief. It appears that at

some stage, Respondents had a change of mind and, instead, they became interested in pursuing the remedy of refund of the consideration amount. Perhaps purchasing the property was no longer commercially viable in view of the falling real estate values. We cannot say much on this aspect and it may not even be a relevant factor for the disposal of the appeal. However, what is conspicuous is the absence - or lack of material on record, to show that the Respondent decided to change tack midway, during the course of arbitration.Strangely, the arbitral recorddoes not reveal that the Respondent abandoned it's claim for specific performance. On the contrary at the stage of recording evidence, Respondent's witness Mr. Rajinder Kumar Jindal during his examinationrecorded on 25.09.2015, before the learnedarbitrator, admitted that he is seeking specific performance of the contract. The relevant portion of his statement is reproduced herein:

> *"Q9. Are you ready and willing to get the Sale Deed executed in your favour in respect of your share in the building as on date?*
> *Ans. I am prepared to do so provided the building is in consonance of the Bye Laws and as per original settlement and I am also compensated of the damages suffered by us."*

18. Pertinently, on 23.07.2010, prior to the ripening of the dispute, the Respondent sent a letter to the Appellant, where it requested execution of the sale deed in its favour, since the entire consideration in terms of the agreements had already been paid. The subject of the letter read as *"Execution of Sale Deed as per Space Buyer Agreement Dated 07-10-2009 w.r.t.1435.458 sq.ft of the entire Second floor of the building developed on*

*plot of land bearing no. 228, sector-9, Dwarka New Delhi-110075."*The relevant part of the letter is as follows:

> *"That since the entire formalities are over, the execution of Sale Deed is imminent and should be done at the right earnest, thus you are requested to kindly execute the Sale Deed and get the same registered on immediate basis in the name of Jindal BiochemPvt. Ltd. We are ready and willing even for tomorrow for execution and registration of Sale Deed, if tomorrow is not suitable kindly inform me other date not later than three, days from tomorrow as the matter is urgent and cannot be delayed further."*

19. Appellant herein,on the contrary,conveyed to the Respondent that it was ready to disburse the amount of refund to the Respondent, pursuant to the termination notice sent by the Appellant. The relevant portion of the letter dated 19.08.2011 has been extracted hereinbelow:

> *"By our letter dated 05/05/2011 as last and final opportunity we requested you to discharge your obligations as agreed in Space Buyer Agreementdated 07/10/2009 but you failed to do the needful which has left us with nooption but to discuss this issue in the meeting of the Board of Directors of thecompany and the Board of directors of the company after taking countenance of all the facts and circumstances particularly your completenon-corporation and persistence non-compliance of terms, decided to cancelthe Space Buyer Agreement dated 07/l0/2009 by serving the presentcancellation notice. It has been further decided to refund Rs. 7.75 crore received from you.*
>
> *<u>You are requested to please visit our office on any day with prior intimation to execute necessary documents and to receive the cheques for the refundof Rs. 7.75 crore.</u>"*
>
> *(emphasis supplied)*

20. Respondentnever accepted that offer of the Appellant and, instead, initiated legal proceedings to specifically enforce the agreements. If the Respondent was genuinely interested in the alternate claim for refund of the amount paid in terms of the agreements, then it would have accepted the offer of the Appellant contained in the letter dated 19.08.2011.On the basis of the record produced before us, there is also no clarity as to how the transformation or variation was introduced during the course of the arbitration. There is no application filed by the Respondent giving up the claim of specific relief and pressing only for refund of the entire sale consideration. Nevertheless, the issues as framed by the learned arbitrator seem to suggest that the Respondent's claims revolved around the claim of refund of the consideration amount. Thus midstream, the arbitration claims got altered and were adjudicated for refund of money not as an alternate, but as a primary relief. There is also nothing to show that the Respondent ever abandoned the claim of specific performance, just as there is nothing to show that it did not press for specific performance before the Arbitrator. This vital aspect has been completely ignored by the learned arbitrator.Respondent's claims were adjudicated on the erroneous premise that specific performance could not be granted. Curiously, the award is completely silent on the reasoning forarriving atthis conclusion or for permitting the Respondent to proceed on this basis. In this situation,the dynamics of the claims were radically and substantively changed, and the reason for award of interest as made out in the award are on a wrong substratum, rendering award of interest @ 18% as perverse, unjustifiableand contrary to the record.

21. It is also conspicuous that during the pendency of the arbitration proceedings, the property in dispute continued to be subjectedto the status quo order at the instance of the Respondent. As a result, the property could not be sold off and was lying vacant. The order of status quo was obtained by the Respondent for preservation of the property in question, till thefinal adjudication of the reliefof specific performance of the agreement. However, if the Respondent's ultimate relief was only to be refund of the consideration amount, the nature and extent of the interim order would be vastly different. In money claims relating to refund of consideration, courts ordinarily do not grant status quo and entangle the property in dispute. This is because in such situations, there is no need to preserve the property in dispute. At the highest, the amount – of which refund is sought, is directed to be secured. In the present case, the Appellant was deprived of the right to deal with the properties in question, solely at the instance of the Respondent and on account of the status quo order obtained by the Respondent on a claim of specific performance.During the course of proceedings, the goalpost was changed. Though the claim petition was for specific performance, the relief granted was for recovery or money/damages without any express relinquishment of the relief of specific relief. The reason for this remains a mystery and grant of interest @ 18% p.a. has had huge ramifications on the final relief granted by the learned arbitrator. We are not suggesting that the Respondent did not have the right to seek damages, recovery of money with interest. In fact,undeniably the law and, in particular the unamended Section 21of the Specific Relief Act, 1963,applicable to the facts of the case enables the Respondent to choose its relief and confine it to one for recovery of compensation, instead of specific performance. However, in such

circumstances, the nature of the interim order obtained by the Respondent was not justified, and the Respondent should also bear the consequences of seeking and obtaining interim relief which was not commensurate with the final relief sought.This, surely,is akey considerationto be taken into accountwhile awarding the final relief. This fundamental change in the circumstances would be a mitigating feature to be weighed with by the court for granting the final relief. If the property would not have been the subject matter of the status quo order, it would have enabled the Appellant to dispose of the same to its benefit. We therefore cannot find the rationale of awarding interest @ 18% p.a. to the Respondent on the refunded amount.

22. We are strengthened in our view by the judgement of the Supreme Court in ***Best Sellers Retail (India) Pvt. Ltd. v. Aditya Birla Nuvo Ltd. And Ors.,*** (2012) 6 SCC 792, where it has been held that an injunction would not lie in a suit for specific performance, where the alternate remedy of refund has been claimed in the suit. If the alternate remedy is to be granted by the court in finality, then the injury suffered on account of refusal of injunction cannot be said to be irreparable. In the said case, the Respondent had claimed specific performance for certain agreements with alternate relief of expenses and losses amounting to Rs. 20 crores. The Respondent also prayed for temporary injunction restraining the plaintiffs from alienating the suit property, which was granted by the Additional City Civil Judge and approved by the High Court. Sitting in appeal, the Supreme Court vacated the injunction since the Respondent could not satisfy that any irreparable harm would be caused to him if the injunction was refused. The Supreme Court noted that the High Court had erred in approving the injunction since

if the Respondent ultimately succeeded in getting the alternate relief, no irreparable injury could have been suffered by the Respondent.

23. In the final analysis, lets view this controversy from another angle. Is the award of award of interest by way of damages at exceptionally high rate of interest in comparison to the prevalent market rate, sustainable? In a suit for specific performance, the Court is empoweredto award compensation in certain cases as provided under Section 21 of the Specific Relief Act, 1963. As on the date of passing of the award, the unamended Section 21(1) of the Specific Relief Act, 1963 provided that in a suit of specific performance of a contract, the plaintiff may also claim compensation for its breach either in addition to, or in substitution of such performance. Section 21(2) of the Specific Relief Act, 1963 provides that in a suit where the Court decides that specific performance ought not to be granted, but there is a contract between the parties which has been broken by the Respondent, the plaintiff is entitled to compensation for that breach and it shall award him such compensation accordingly. Further, Section 21(3) of the Specific Relief Act, 1963 stipulates that in such a suit where the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly. Section 21(4) of the Specific Relief Act, 1963 further stipulates that the award of compensation shall be governed by the principles specified in Section 73 of the Indian Contract Act, 1872. Further Section 21(5) of the Specific Relief Act, 1963 stipulates that no compensation shall be awarded unless the plaintiff had claimed such

compensation in the plaint. Thus, the award of compensation in terms of the Specific Relief Act, 1963,is inherently linked to the claim for specific performance of a contract.In these circumstances, even if we were to hold that refund of the consideration amount is an exercise of discretionary power in a proceedings pertaining to specific performance, yet the compensation/damages awarded would have to withstand the test laid down for grant of compensatory relief under Section 73 of the Indian Contract Act. In the instant case the arbitrator has not only awarded damages of Rs. 35 lakhs, but also awarded interest on the principal amount @18% p.a. The learned arbitrator had to be mindful of the fact that under the agreement in question, there is no specified rate of interest. In fact, there is no stipulation under the agreement which enables the Respondent to seek refund of the consideration amount. There is also merit in the stand of the Appellant that if the Respondent was genuinely interested in the refund of the consideration, it should have accepted the offer extended to it vide letter dated 19.08.2011, and the controversy would have been put to rest or, at least, narrowed down. If the learned arbitrator was to award refund of the amount, as an alternate relief under Section 21 of the Specific Relief Act,1963it was imperative to first come to a conclusion that the facts of the case did not justify thegrant of specific performanceand, instead, the relief of compensation would be the appropriate relief. This is obviously not the way the claims have to be adjudicated.Ergo, the award of interest by way of damages had to be tested and examined on a different yardstick- Section 73/74 of the Indian Contract Act.In this exercise the claim had to be examined and adjudicated having regard to the terms and conditions of the agreement which, as noted above, are silent as to the contractual right to

seek refund. We, therefore, find that the learnedarbitrator has committed a perversity which has gone unnoticed by the learned Single Judge.There are contradictory findings in the arbitral award and the impugned order.On one hand, learned Single Judge has observed that even though the Respondent in its statement of claim had sought the relief of specific performance of the agreements, but on the other hand, it is observed that the said relief was not pressed as no issue was claimed in this regard and it would be the discretion of thelearned arbitrator as to whether to award specific performance of the agreement, or to award damages in lieu thereof. Thelearned arbitrator proceeded on a wrong premise, assuming that the Respondent had not claimed relief of specific performance and was instead seeking refund of the sale consideration with interest as a primary relief of damages.

Conclusion

24. In view of above noted discussion, we are inclined to interfere with the rate of interest awarded on the refund amount. Having regard to the fact that the banking rate of interest at all relevant times and even as on dateis much lower than the rate of interest awarded by the learned arbitrator and further, in absence of any evidence placed on record that could justify grant of interest @18%, we are inclined to take into account the market rates and trade practice. Accordingly, we hold the award of interest @ 18% p.a. to be unreasonable, irrational, unjustified and reduce the same to 9% p.a. for the same period as has been awarded by the learned arbitrator. The award stands modified to the above extent. The appeals are allowed in the above terms.

SANJEEV NARULA, J

VIPIN SANGHI, J

MAY 05,2020
V