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

ARBITRATION APPEAL NO.62 OF 2007

1. Harkisandas Tulsidas Pabari
Venkatesh Chambers, 3rd floor,
Prescot Road, Mumbai – 400 001.

2 Manish Harkisandas Pabari
Venkatesh Chambers, 3rd floor,
Prescot Road, Mumbai – 400 001. ....Appellants

Versus

1 Rajendra Anandrao Acharya
(Deleted)

1(a) Sushant Rajendra Acharya
(Deleted)

1(a) Nikita Sushant Acharya
Legal heir of Respondent No.1
of Mumbai, Indian inhabitant
Residing at 9, 3rd floor,
Mayur Corner, Prabhat Lane No.4,
Near Deccan Gymkhana,
Pune 411 004.

2 Nandkishor Anandrao Acharya
(Deleted)

2(a) Alok Nandkishor Acharya
of Mumbai, Indian Inhabitant
Residing at A-1, A-3,Parnali
Society, Damle Path,
Off. Law College Road,
Erandwane, Pune – 411 004.

3. R.C. Sampat,
Arbitrator, Deccan Court,
259, S.V. Road, Bandra (West),
Mumbai – 400 050. ....Respondents

WITH
ARBITRATION APPEAL NO.63 OF 2007

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Prescot Road, Mumbai – 400 001.

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Versus

1 Nandkishor Anandrao Acharya
(Deleted since deceased)

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of Mumbai, Indian inhabitant
Residing at A-1, A-3,
Parnali Society, Damle Path,
Off Law College Road,
Erandwane, Pune – 411 004.

2 Rajendra Anandrao Acharya
(Deleted since deceased)

2(a) Nikita Sushant Acharya
Legal heir of Respondent No.2,
of Mumbai, Indian inhabitant
Residing at 9, 3rd floor,
Mayur Corner, Prabhat Lane No.4,
Near Deccan Gymkhana,
Pune – 411 004.

3 R.C. Sampat,
Arbitrator, Deccan Court,
259, S.V. Road, Bandra (West),
Mumbai – 400 050. ....Respondents

Dr. Virendra Tulzapurkar, Senior Advocte with Mr. Rajiv Narula and Mr. Milind Mane i/b M/s. Jhangiani, Narula & Associates *for the Appellants in Appeal No.62 of 2007.*

Mr. Rajiv Narula with Mr. Milind Mane i/b M/s. Jhangiani, Narula & Associates *for Appellants in Appeal No.63 of 2007.*

Mr. Rahul Sarda with Ms. Rajalakshmy Mohandas, Ms. Mukta Chorge and Ms. Nehal Farukh i/b M/s. Rajalakshmy Associates *for Respondent No.1A in Appeal No.62 of 2007 and for Respondent Nos.2A in Appeal No.63 of 2007.*

Mr. Abhijeet Joshi *i/by Chaitanya R. Kulkarni for Respondent No. 2A in Appeal No.62 of 2007 and for Respondent Nos. 1A in Appeal No.63 of 2007*

CORAM: ALOK ARADHE, CJ. &
SANDEEP V. MARNE, J.

RESERVED ON : 11 JULY 2025 &
17 JULY 2025.
PRONOUNCED ON : 22 JULY 2025.

JUDGMENT *(Per : Sandeep V. Marne, J.)*

A. THE CHALLENGE

1. These Appeals are filed by the Appellants challenging the order dated 11 October 2006 passed by the learned Single Judge of this Court allowing Arbitration Petition Nos.114 of 2006 and 119 of 2006 and setting aside the Award dated 21 September 2005 passed

by the learned sole Arbitrator. By the Award, claim filed by the Appellants for specific performance of the Memorandum of Understanding was allowed by the Arbitral Tribunal.

B. **FACTS**

2. A Memorandum of Understanding (**MoU**) dated 20 July 1994 was executed between the original Respondents and the Appellants under which the original Respondents Mr. Rajendra Acharya and Mr. Nandkishor Acharya agreed to sale their respective undivided shares, right, title and interest in the property situated at Paper Mill Lane, bearing City Survey Nos.1596 and 1597 at Girgaon Division, admeasuring 370 square meters (**said property**). The Memorandum of Understanding contemplated utilization of the entire FSI in respect of the said property as permitted by the local authorities. The consideration agreed for the transaction was Rs.18,00,000/- payable to the Respondents in equal proportion. On 20 July 1994, the General Power of Attorney was executed by the original Respondents authorizing the Appellants to do various acts, deeds and things for development of the said property and to negotiate with tenants and arrive at arrangements. Between 1994 to 1996 Appellants paid amount of Rs.7,50,000/- to the original Respondents. The Appellants apparently started negotiations with the tenants in January 1996 and were apparently successful in securing consent of two tenants. However, on 4 November 1996 original Respondent No.1 terminated the Memorandum of Understanding on the ground that the second installment of

Rs.7,50,000/- was not paid, in addition to raising issues of few other breaches allegedly committed by the Appellants. The Appellants disputed the contents of the said notice vide reply dated 2 December 1996. Respondents issued rejoinder dated 21 January 1997

3. In the above background, original Appellant No.1 referred the dispute to arbitration by addressing a letter dated 1 July 1997 to the nominated Arbitrator Mr. R.C. Sampat. Appellants filed statement of claim in October/November 1997, which was served on the Respondents on 15 November 1997. Original Respondent No.1- Mr. Rajendra Acharya requested the Arbitrator for supply of attested copy of papers and also forwarded a sum of Rs.1,500/- towards Arbitrator fees. In November 1997 Respondent No.1 Mr. Rajendra Acharya filed his written statement before the learned Arbitrator raising various defences. He also filed a Counterclaim seeking recovery of amount of Rs.30,00,000/- for mental agony. The learned Arbitrator proceeded to pass Award dated 1 April 1998 awarding the claim in favour of the Appellants. Respondents challenged the Award dated 1 April 1998 by filing Arbitration Petition No.225 of 1998. By order dated 28 September 1998 passed by this Court, the Award was set aside on the ground that notice of closure of arbitration proceedings was not given to the Respondents. The original records were sent back by this Court to the learned Arbitrator. Appellants approached the Arbitrator Mr. R.C. Sampat, who proceeded to fix date of hearing in arbitration proceedings vide

letter dated 31 October 1998. One of the Respondents objected to continuation of the learned Arbitrator vide letter dated 4 December 1998 alleging that he was biased against the Respondents. By another letter of 7 December 1998 objection to continuation of Mr. Sampat as arbitrator was raised. The objection was rejected by the learned Arbitrator on 18 December 1998. Respondent No.1-Shri Rajendra Acharya thereafter filed his Reply in Counter-Claim on 28 October 1999. Respondents also sought stay of arbitration proceedings, which application was rejected by the learned Arbitrator. Both the parties led oral evidence.

4. On 21 September 2005 the learned Arbitrator delivered award holding that the Memorandum of Understanding dated 20 July 1994 is binding on the parties. Respondents were directed to handover original documents and title deeds of the said property to the Appellants with further directions to comply the obligations under the Memorandum of Understanding. The Respondents were directed to get building plan sanctioned within a period of three months. Various other directions were also issued in the Award. Appellants were directed to pay balance consideration of Rs.7,50,000/- on sanctioning of the building plans, out of which the amount of Rs.2,75,000/- was already found to have been paid. It was therefore directed on payment of balance consideration of Rs.4,75,000/-, Appellants were directed to be put in possession of the said property. For ease of reference, the operative directions given in the above order dated 21 September 2015 are extracted below:

(a) That the Memorandum of Understanding dated 20.7.1994 entered and executed by the parties is binding upon the parties.

(b) The counter claim of Respondent no. 1 is rejected.

(c) I direct the Respondents to hand over the original documents and title deeds of the disputed property in their possession to the Advocate of the Disputants within two weeks from the receipt of the intimate of this award.

(d) I direct the Respondents to comply with their obligations under the said Memorandum of Understanding with the co-operation of Disputants in obtaining of the consent of the tenants/occupants of the property within one month from this Award.

(e) The Respondents shall get the building plans sanctioned as prepared by the Architect for the Disputants in consultation with the Disputants in accordance with the present Development Control Rules within three months from the date of the Award.

(f) I direct the Respondents to earmark a car parking space as shown in the sketch plan alongwith the report dated 20.02.2003 Architect H.M. Panchal in Shingne Building compound and hand over the same to the Disputants on consideration/payment of No. 10,000/-in lump sum at the time of Commencement certificate,

(g) I direct Respondents to make available a pathway passing over the Shingne Building property for ingress and egress purpose to the occupants of the building to be constructed on the said property as at time of commencement certificate as shown in the sketch plan alongwith the report dated 20.3.2002 and Architect H. M. Panchal.

(h) I direct Respondents to provide space for storage of construction materials in the Shingne Building property upto the completion of construction at the time of intimation of Disapproval, as shown in the sketch plan alongwith the report dated 20.2.2002 of Architect H.M. Panchal.

(i) The Disputants to pay sum of Rs.7,50,000/- each (min. Rs.2,75,000/- already paid) on the building plans being sanctioned.

(j) On payment of above sum of Rs.4,75,000/-the Respondents shall put the Disputants in possession of the property.

(k) Disputants to pay sum of Rs. 50,000/-in cash to the Respondents on execution of final deed of conveyance and relevant deeds and documents in favour of Disputants or in favour of nominee or nominees, within period of 6 months from the date of commencement Certificate.

(l) I direct the Disputants and Respondents to pay all out of pocket expenses including stamp duty and registration charges and relevant documents in equal share.

(m) I direct that the Disputants do execute an indemnity bond in favour of Respondents during the period of construction.

(n) The Disputants and Respondents Nos. 1 & 2 to bear their own and their respective Advocates costs."

5. Respondents filed Arbitration Petition Nos.114 of 2006 (Nandkishor Anandrao Acharya) and Arbitration Petition No.119 of 2006 (Rajendra Anandrao Acharya) challenging the Award dated 21 September 2005. By impugned order dated 11 October 2006, the learned Single Judge has allowed both the Arbitration Petitions and has set aside the Award dated 21 September 2005 with direction to the Appellants to pay costs of the Arbitration Petitions to the Respondents. Aggrieved by the common judgment and order dated 11 October 2006 passed by the learned Single Judge in Arbitration Petition Nos.114 of 2006 and 119 of 2006, the Appellants have filed the present Appeals under provisions of Section 37 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**).

C. SUBMISSIONS

6. Dr. Tulzapurkar, the learned counsel appearing for the Appellants in Appeal No.62 of 2007 would submit that the learned Single Judge has clearly exceeded the jurisdiction conferred under Section 34 of the Arbitration Act while interfering in the Award. That the learned Single Judge has acted as an Appellate Authority over the Award of the learned Arbitrator, which is clearly beyond the scope of grounds enumerated for setting aside the Award under Section 34 of the Arbitration Act. He would submit that the learned Single Judge misread the contract while holding that the parties were not sure whether the entire building was to be demolished or reconstructed or whether only additional floors were to be built. That the learned Single Judge has erroneously held that there is no concluded contract between the parties ignoring the fact that the Memorandum of Understanding dated 20 July 1994 provided for the sale of the property. That various clauses of the Memorandum of Understanding clearly contemplated execution of Deed of Conveyance or a perpetual lease in favour of the Appellants. The Memorandum of Understanding clearly described the property which was supposed to be served together with agreed amount of consideration and therefore the contract was capable of specific performance. In support he would rely upon judgment of the Hon'ble Apex Court in ***Kollipara Sriramulu vs. T. Aswathanarayan and ors.***[1]. That there was no necessity of specifying as to whether the building was to be demolished for reconstruction or mere floors were required to be added. That it was for the Appellants to decide

1 (1968) 3 SCR 387

whether to reconstruct the property or raise additional floors. That the learned Judge has misread the contract and got struck over totally erroneous unwarranted and untenable eventualities. That there was no obligation in clause 5 of the Memorandum of Understanding to obtain tenant's consent. It was the obligation of the Respondents to secure consent of the tenants and that therefore performance of the agreement did not depend on Appellants securing consent of the tenants.

7. Dr. Tulzapurkar would further submit that the learned Single Judge has erroneously set aside the Award on the ground that the same cannot be performed. That the direction of the Arbitrator to secure consent of the tenants is in consonance with covenant in clause 5 of the Memorandum of Understanding. That mere failure to carry out certain obligations cannot render a contract void or unenforceable. That the learned Judge has erroneously held that the rights of the tenants would be affected ignoring the fact that the Memorandum of Understanding itself required securing consent of the tenants while no directions have been given to the tenants. He would submit that specific performance cannot be denied merely because of the difficulties for one of the parties to carry out his obligation. Non-grant of consent by tenants is a hypothetical situation, erroneously assumed by the learned Judge while setting aside the Award.

8. Dr. Tulzapurkar would further submit that the learned Single Judge has erroneously held that there was non-compliance of

provisions of Section 21 of the Arbitration Act on account of failure to give notice before proceeding with arbitration. That this ground was never raised in the Arbitration Petition and could not have been held in favour of the Respondents by the learned Single Judge. But even otherwise Respondents have participated in the arbitration proceedings without any demur and that therefore they cannot be permitted to turn around and question commencement of arbitration proceedings before the learned sole Arbitrator. Provisions of Section 21 of the Arbitration Act are not mandatory and the requirements can clearly be waived. In support, he would rely upon judgments of this Court in ***Malavika Rajanikant Mehta and others vs. Jess Constuction***[2] and ***Veena wd/o Naresh Seth vs. Seth Industries Ltd.***[3] and the judgment of the Apex Court in ***Milkfood Limited vs. GMC Ice Cream Pvt. Limited***[4]. Dr. Tulzapurkar would accordingly pray for setting aside the order passed by the learned Single Judge and for upholding the Award dated 21 September 2005.

9. Mr. Narulla, the learned counsel appearing for Appellant in Appeal No.63 of 2007 would adopt the submissions canvassed by Dr. Tulzapurkar.

10. Mr. Sarda, the learned counsel appearing for Respondent No.1A in Appeal No.62 of 2007 and for Respondent No.2A in Appeal No.63 of 2007 would oppose the Appeal submitting that

2 2022 SCC OnLine Bom 920
3 2011 (2) Mh.L.J. 226
4 (2004) 7 SCC 288

interference is not warranted in well considered decision of the learned Single Judge. That the learned Single Judge has rightly held that the Award was passed in ignorance of contractual and statutory provisions and that the Award was based on no evidence ignoring the vital piece of evidence demonstrating breach of material terms of Memorandum of Understanding on behalf of the Appellants. That the learned Single Judge has correctly applied the tests under the Specific Relief Act, 1963 applicable to the issue of grant of specific performance. On the contrary, the learned Arbitrator had ignored the provisions of Specific Relief Act, 1963. That the Arbitrator had re-written contract between the parties. That the order passed by the learned Single Judge duly conforms to the provisions under Section 34 of the Arbitration Act. It is not necessary for the Judge exercising power under Section 34 of the Arbitration Act to repeat the words of the section and what needs to be examined is whether the Arbitrator has examined the Award within the parameters laid down in Section 34 of the Arbitration Act. That the impugned Award clearly suffered from the vice of perversity and has been rightly set aside by the learned Single Judge. That the learned Single Judge has rightly held that there is no concluded contract between the parties, neither consent of the tenements was obtained nor there is any contract between the parties on the aspect of parking.

11. Mr. Sarda would further submit that continuation of arbitration proceedings before the learned Arbitrator after remand order made by this Court is clearly without jurisdiction. While

remanding the proceedings, this Court did not constitute the same Arbitrator, which had made the first Award. That mere forwarding of documents to the learned Arbitrator did not mean that mandate was given to conduct fresh arbitration proceedings after remand. That Respondents had objected to continuation of the arbitral proceedings by the learned Arbitrator right since inception by addressing letters dated 3 December 1998 and 7 December 1998. That the Award clearly suffered from absence of jurisdiction as the learned Arbitrator unilaterally assumed jurisdiction while making the impugned Award. Lastly, he would submit that the jurisdiction of this Court under Section 37 of the Arbitration Act is even more circumscribed than the one which can be exercised under Section 34 of the Arbitration Act by the learned Single Judge. That in absence of any element of perversity in the order of the learned Single Judge, the Appeals deserve to be dismissed.

12. Mr. Joshi, the learned counsel appearing for Respondent No.2A in Appeal No.62 of 2007 and Respondent No.1A in Appeal No.63 of 2007 would additionally submit that the learned Arbitrator improperly assumed jurisdiction after remand order made by this Court. That since the Award was set aside, parties were expected to take steps for fresh constitution of Arbitral Tribunal. That therefore reference to the earlier Arbitrator had come to an end. No letter was issued by the claimant to the Respondents under Section 21 of the Arbitration Act for commencing the arbitral proceedings. That the learned Single Judge has rightly held that the Memorandum of

Understanding does not constitute a concluded contract. That the agreement is neither development agreement nor agreement for sale. That the agreement was otherwise repudiated by the claimant himself. That the Administrator was biased and was predetermined to decide the arbitral proceedings against the Respondents. That direction given for specific performance of the Memorandum of Understanding or otherwise incapable of performance. That the Award rightly been set aside by the learned Single Judge by invoking valid grounds of non-issuance of notice under Section 21 of the Arbitration Act, Memorandum of Understanding was repudiated and therefore arbitration agreement came to an end and that the subject matter is not capable of being resolved by arbitration. Mr. Joshi would accordingly pray for dismissal of the Appeal.

D. REASONS AND ANALYSIS

13. The learned Single Judge has set aside the award of the arbitral Tribunal on three grounds of (i) lack of authorisation to the learned Arbitrator to recommence the arbitration proceedings, (ii) MoU not constituting a concluded contract, (iii) impossibility of specifically performing the MoU through execution of the award.

D.1 AUTHORISATION TO THE SAME LEARNED ARBITRATOR TO RECOMMENCE THE ARBITRAL PROCEEDINGS

14. We would first take up the issue of lack of authorisation to the learned Arbitrator to recommence the arbitration proceedings. As

observed above, the learned arbitrator has made an award dated 1 April 1998 awarding the claim in favour of the Appellants. Respondents had challenged the Award dated 1 April 1998 by filing Arbitration Petition No. 225 of 1998 in this Court. By order dated 28 September 1998 passed by this Court, the Award was set aside on the ground that sufficient opportunity was not given to the Respondents by the learned Arbitrator. This Court found that the learned Arbitrator did not give notice of closure of proceedings to the Respondents that the proceedings would proceed *exparte* and that therefore they did not have a fair opportunity of leading evidence. Relevant part of the order dated 28 September 1998 reads thus:

> "6. The short question, therefore, is whether the notice dated 5th January, 1998 can be said to be a sufficient opportunity given to the petitioners to present their. Even under the provisions of the Arbitration Act, 1940 before the Arbitration closed the proceedings, the Arbitrator was duty bound to give notice of closure of the proceedings, as the case law has evolved pursuant to the judgment of various courts. This is for the purpose that the parties would have a fair opportunity of leading evidence if they have not so led before the proceedings are closed. In the present case the Arbitrator having not given the notice that the proceedings would proceed exparte nor decided the procedure for conducting the arbitral proceedings. I am of the considered view that the petitioner did not have sufficient opportunity to present their case. In that context the impugned award is liable to be quashed and set aside and the same is accordingly set aside."

15. After setting aside the Award dated 1 April 1998, this Court considered the issue as to whether the proceedings were required to be remanded to the said same Arbitrator. This Court however held that sending back the proceedings to the same Arbitrator was permissible only under the provisions of Sections 33 and 34(4) of

the Arbitration Act and that the said power is to be exercised before an Award is set aside. Since this Court had set aside the Award, it did not go into the issue of remand of the proceedings to the same Arbitrator. This Court however observed that it would be open to the parties to move afresh, in which event, the time taken would be saved by virtue of Section 43(4) of the Arbitration Act (*though in the typed copy of the order dated 28 September 1998, section 43(a) is reflected, the same appears to be a typographical error*). The operative portion of directions issued by this Court in paragraphs 7 to 10 of the order dated 28 September 1998 read thus:

> "7. The question did arise in the circumstances, after quashing the award whether the matter is to be remitted back to the same Arbitrator. The only provisions are section 33 and 34 (a). That power is to be exercised before an award is set aside. I do not propose to go into that question in these matters as I am setting aside the Award.
>
> 8. It is however, made clear that it is always, open to the parties to ***move afresh*** in which event the time taken would be save by virtue of section 43(4) of the Arbitration and Conciliation Act, 1996.
>
> 9. In the circumstances, of the case there shall be no order as to costs.
>
> 10. **Office is directed to sent back the original records to the Arbitrator.**
>
> *(emphasis and underling added)*

16. After the Award was set aside on 28 September 1998 and liberty was granted to the parties to move afresh, Appellants directly moved before the same Arbitrator without any notice to the Respondents and the same Arbitrator commenced the proceedings by issuing notice to the Respondents on 31 October 1998. Both Shri Rajendra Acharya as well as Shri Nandkumar Acharya raised

objections to continuation of the same Arbitrator. While the objection raised by Shri Rajendra Acharya was restricted to the allegation of bias, Shri Nandkumar Acharya raised specific objection about lack of authority of the learned Arbitrator to recommence arbitration proceedings, in addition to raiding the allegation of bias. Thus, the jurisdiction of the learned Arbitrator to recommence the proceedings after passing of order dated 28 September 1998 was specifically raised by one of the Respondents. The learned Arbitrator however proceeded to reject the said objection and continued the arbitration proceedings, leaving no option for the Respondents to participate in the same.

17. The learned Single Judge, in the impugned order dated 11 October 2006, has dealt with this aspect as under:

> "6. …
>
> Thus, this Court has set aside the award and left the parties to their remedy for initiating fresh arbitration Therefore, it can be safely assumed that the arbitration clause between the parties did not come to an end and continued to exist and therefore, in terms of paragraph 8 of the order of this Court quoted above, the arbitration proceedings are to be commenced afresh and therefore, in my opinion, section 21 of the said Act has to be complied with. Section 21 reads as under:-
>
> > *"21. Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which request for that dispute to be referred to arbitration is received by the respondent."*
>
> Perusal of section 21 shows that in order to commence the arbitral proceedings, the claimant has to make a request to the respondent for referral of the dispute to arbitration and the date on which that request is received by the respondent is the date commencement of the arbitral proceedings. In the present case, an objection regarding jurisdiction of the Learned Arbitrator to recommence the arbitral proceedings was raised. The arbitrator made an order on 18th December 1998. Paragraphs 2 and 3 of that order are relevant which read as under :-

> *"In the light of clause 13 of Memorandum of understanding dated 20.07.84 and in view of the observation of Hon'ble High Court in its order dated 28.09.98,* ***it appears that the Hon'ble Court has not changed the Arbitrator appointed by all the parties and hence original record have been sent back to me in order to enable the parties to move afresh before me.***
>
> *Hence I am unable to accept the request of the said Acharyas of not conducting arbitration meeting before me. I now Fix arbitration meeting before me on Wednesday, the 6th January 1999 at 4 p.m. at my office."*

It is clear from the above that according to the Learned Arbitrator, as the High Court has not changed the Arbitrator and as this Court has sent back the record to the Arbitrator, he has jurisdiction to recommence the arbitral proceedings. Same thing is repeated by the Learned Arbitrator in the award in paragraph 11(b). Paragraph 11 (b) reads as under :-

> *"11(b) Accordingly the notices were issued to both the parties and the correspondence also made before and after commencement of arbitration proceeding, which is on record and award also made on 01/04/1998 date but the same was set aside on technical ground and the papers have been sent back to me."*

It thus appears that the learned Arbitrator has held that he has jurisdiction to resume the proceedings because the records have been sent back him. **Merely because the original record which was called by the Court for perusal, because of request made by one of the parties are sent back to the Arbitrator from whom they were received after setting aside the award, would not authorise the Learned Arbitrator to resume the arbitration proceedings. Therefore, the reason that has been given in the award for holding that he has jurisdiction to recommence the arbitral proceedings cannot be said to be proper.** But it appears that before the learned Arbitrator resumed the proceedings, the respondents had written a letter dated 12th October 1998 to the learned Arbitrator. On the basis of this letter, it was contended that though this letter is not addressed to the petitioners and is addressed to the Arbitrator, this letter should be treated as a letter issued under section 21 of the said Act. Therefore, it becomes necessary to refer to that letter. Perusal of that letter shows that in paragraph 1 reference is made to the memorandum of understanding between the parties and the award made by the learned Arbitrator. Then in paragraph 2 it is stated thus:-

> *"2. However, on the petitions of the said Rajendra A. Acharya and the said Nandkishore A. Acharya bearing No.225 of 1998*

> *and 295 of 1998 respectively, the Hon'ble High Court set aside the said 'Award passed by you on the ground that no reasonable opportunity was given to the said Rajendra A. Acharya and Nandkishore A. Acharya, but the Hon'ble High Court refused to grant the request of the said Rajendra A. Acharya and Nandkishore A. Acharya of not referring back the said matter to you once again, but on the contrary the Hon'ble High Court by sending back the original records to you clearly indicated and clearly expressed that the parties or any of them should move you the Arbitrator afresh. We are herewith sending you a copy of the Order dated 28th September 1998 of the Hon'ble High Court which speaks for itself."*

It is clear from what is stated above that according to the respondents, because the Court did not accept the request of the petitioners to change the Arbitrator and because the Court directed that the record should be sent back to the Arbitrator and because the Court had directed that the parties should move the Arbitrator afresh, the Arbitrator was requested to start the arbitral proceedings afresh and he was asked to give notice to the parties. Section 21 has been quoted above. It contemplates that there shall be a request made by claimant to the respondents for referring the dispute to arbitration. Reading of this letter from any point of view would not show that this letter contains a request made by the respondents to the petitioners to refer their disputes to the Arbitrator. The tenor of the letter is that because the High Court has not changed the Arbitrator and because the High Court has directed that the record shall be sent back, the learned Arbitrator is entitled to resume the proceedings. I have already found that this position cannot be said to be correct position in law. Even assuming that strict compliance of provisions of section 21 is not necessary and that substantial compliance is enough, then also the letter dated 12th October 1998, in my opinion, cannot be termed as even an attempt made to substantially comply with the provisions of section 21. In my opinion therefore for this reason also, the award is liable to be set aside.…

(emphasis and underlining added)

18. The learned Single Judge of this Court thus held that twin errors had crept in the exercise of jurisdiction by the learned Arbitrator. Firstly, it is held that this Court had not remanded the proceedings to the same Arbitrator and that mere remittance of the

original records to the learned Arbitrator did not mean that he had an authority to resume the arbitration proceedings. Secondly, it is held that Appellants did not complete the procedure mandated in Section 21 of the Arbitration Act and no request was made to the Respondents for commencement of the arbitration proceedings.

19. So far as the first aspect of absence of authorisation to the learned Arbitrator is concerned, this Court had specifically considered the issue of remand of proceedings in paragraph 7 of the order dated 28 September 1998. After observing that the Award was set aside, this Court examined the possibility of remitting back the proceedings to the same arbitrator. However, this Court has held that the proceedings could not be remitted back to the same arbitrator as procedure for remand is envisaged only under provisions of Sections 33 and 34(a) *(sic)* of the Arbitration Act and recourse for the said provisions could be made only before passing of award. Thus, the suggestion for remitting back the proceedings to the same arbitrator was thus not accepted by this Court in order dated 28 September 1998. Remission back of the proceedings to the same arbitrator cannot be done after the award was set aside. Therefore this Court granted liberty to the parties to move afresh, meaning thereby to commence the proceedings afresh. This could obviously be done by appointing the same arbitrator by serving notice to the Respondents under Section 21 of the Act. However, in the present case, Appellants never requested the Respondents for commencing the arbitral proceedings afresh by suggesting the name of the same arbitrator. If such suggestion was made and if the

Respondents were not to object to the said suggestion, the same learned arbitrator could conduct the fresh arbitration proceedings. However, there was fundamental flaw on the part of the Appellants and the arbitrator in comprehending the order passed by this Court. Both erroneously presumed that this Court had remitted back the arbitral proceedings to the same arbitrator. This presumption was drawn by the arbitrator on twin reasons of (i) this Court not changing the arbitrator and (ii) this Court sending back the original records to the arbitrator. Both the reasonings adopted by the learned arbitrator are flawed. There was no occasion for this Court to change the arbitrator as this Court had granted liberty to the parties to '*move afresh*'. This meant that the parties were expected to take steps for fresh commencement of the proceedings and in the event of parties not agreeing on a name of the arbitrator, proceedings under Section 11 would be necessary. The second reason of this Court sending back the proceedings to the arbitrator, did not mean that there was a mandate for the same arbitrator to recommence the proceedings. Since the proceedings travelled to the Court from the arbitrator, the same were apparently directed to be sent back to him. Thus, both the reasons recorded by the learned arbitrator for recommencing the arbitral proceedings are flawed. In the light of this position, we agree with the findings recorded by the learned Single Judge that it was impermissible for the learned Arbitrator to resume the arbitration proceedings.

20. There is yet another reason why the learned Arbitrator could not have resumed the arbitration proceedings. The learned

Single Judge, while granting liberty to the parties to '*move afresh*', specifically directed that the intervening period would be saved by virtue of provisions of Section 43(4) of the Arbitration Act. Section 43(4) of the Arbitration Act provides thus:

> "(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted."

21. Thus, under provisions of sub-section (4) of Section 43 of the Arbitration Act, where the arbitral Award is set aside, the period between commencement of arbitration and the date of the order of the Court needs to be excluded in computing the time prescribed by the Limitation Act for 'commencement' of the proceedings. Thus Section 43(4) of the Arbitration Act applies only when arbitration proceedings are to be freshly commenced. Therefore reference made by this Court while setting aside the award to provisions of Section 43(4) of the Act again makes the position clear that what was contemplated was commencement of fresh proceedings and not remand of proceedings to the same arbitrator.

22. When it comes to 'commencement' of proceedings under Section 43(4) of the Act, provisions of Section 21 become relevant. Section 21 of the Arbitration Act provides thus:

> "21. **Commencement of arbitral proceedings.-**
> Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which

> request for that dispute to be referred to arbitration is received by the respondent."

Thus for 'commencement' of the arbitral proceedings after setting aside of the Award by taking benefit of limitation under Section 43(4) of the Arbitration Act, the procedure under Section 21 becomes mandatory.

23. In our view therefore, the order passed by this Court on 28 September 1998 setting aside the previous arbitral Award dated 1 April 1998 warranted commencement of arbitral proceedings afresh and not resumption of the arbitration proceedings by the same Arbitrator.

24. As observed above, the arbitral proceedings would commence after passing of order dated 28 September 1998 only in accordance with provisions of Section 21 of the Arbitration Act, under which it was mandatory for the claimants to make a request to the Respondents for reference of the dispute for arbitration. The fact that this Court envisaged application of provisions of Section 43(4) of the Arbitration Act would itself indicate that the fresh arbitration proceedings were required to be commenced. If arbitration proceedings were merely required to be resumed by the same Arbitrator there would have been no question of application of period of limitation. The fact that this Court envisaged that limitation will have to be computed, it clearly meant commencement of fresh arbitral proceedings after setting aside of the Award.

25. The contention raised on behalf of the Appellants that the Award was not challenged on the ground of failure to issue notice under Section 21 of the Arbitration Act, does not any ice. Failure to serve notice under Section 21 of the Arbitration Act is merely an additional defect as the very act of the Arbitrator in recommencing the proceedings is found to be erroneous. One of the Respondents had clearly raised an objection to continuation of arbitration proceedings by the same learned Arbitrator, both before the Arbitrator as well as in the Petition filed under Section 34 of the Arbitration Act.

26. In our view therefore, the learned Single Judge has rightly held the Award to be vitiated on account of improper constitution of the arbitral Tribunal.

D. 2 NON-COMPLIANCE WITH PROVISIONS OF SECTION 21

27. Coming to the aspect of non-fulfillment of requirements of Section 21 of the Arbitration Act, it is an admitted position that the Appellants never requested Respondents to refer the disputes to arbitration after passing of order dated 28 September 1998. The Appellants unilaterally wrote to the arbitrator on 12 October 1998 for resumption of the arbitral proceedings by representing to the arbitrator that "…*but the Hon'ble High Court refused to grant the request of the said Rajendra A. Acharya and Nandkishore A. Acharya of not referring back the said matter to you once again, but on the contrary the Hon'ble High Court by sending back the original records to you clearly*

indicated and clearly expressed that the parties or any of them should move you the Arbitrator afresh.' The Arbitrator acted on this representation made by the Appellant and straightaway proceeded to fix a date of hearing of the arbitral proceedings by issuing letter to the Respondents. On account of fundamental flaw in comprehension of the order passed by this Court and by erroneously presuming that this Court directed remission of proceedings to the same arbitrator, the Appellants failed to follow the procedure prescribed in Section 21 of the Act.

28. Both the above aspects have been correctly appreciated by the learned Single Judge while setting aside the impugned Award. Even if the requirement provided under Section 21 of the Arbitration Act is held to be directory, still the impugned Award did not pass the muster of authorization for the arbitral Tribunal to resume the arbitration proceedings.

29. In our view therefore, since there was improper constitution of the arbitral Tribunal, the learned Single Judge was justified in setting aside the Award.

D. 3 MoU Not a Concluded Contract And Impossibility of Specific Performance Thereof

30. Having held that the constitution of the arbitral tribunal itself was erroneous warranting setting aside of the award, it is not really

necessary to go into the merits of the award. However, since the learned Single Judge has recorded detailed findings on merits of the Award, we proceed to briefly deal with the same. While holding that the MoU did not constitute a concluded contract between the parties, the learned Single Judge has taken into consideration the fact that the building was occupied by tenants/occupants and that the vendors (Respondents) were entitled to construct or reconstruct additional floors on the existing building by consuming and exploiting the additional FSI. The vendors sold their respective 50% undivided share in the property together with right to exploit, utilise, consume and take advantage of FSI in respect of the property to the Appellants. Under clause 5 of the MoU, the responsibility of obtaining consent of tenants/occupants was put on the vendors. Such consent was to be obtained for either reconstructing the building or for constructing additional floors on the existing building. The learned Single Judge took note of clauses 3 and 5 of the MoU, under which the purchasers had the option of either reconstruction of the entire building or construction of additional floors thereon. The learned Single Judge held that in the event of Appellants opting for reconstruction option, tenants were required to vacate the structures which would have incurred liability of payment of interim rent. If on the other hand only additional floors were to be constructed, vacation of premises by tenants was not necessary. The learned Single Judge therefore held that the proposed course of action of either reconstructing the building or constructing additional floors was not clearly set out and parties were yet to agree on this vital aspect. It is for this reason

that the learned Single Judge held that the parties did not arrive at a concluded contract.

31. The learned Single Judge then took into consideration the direction given by the learned Arbitrator to the Respondents to comply with their obligations under the MoU by securing consent of tenants/occupants within one month from the award. The learned Single Judge therefore held that specific performance of the MoU was impossible as the same depended on grant of consent by the tenants.

32. This is how the learned Single Judge has set aside the Award of the arbitral tribunal on the grounds of MoU not constituting a concluded contract and impossibility of execution of directions issued by the Arbitrator. We again do not find any element of perversity in the findings recorded by the learned Single Judge. The Award of the arbitral tribunal was rendered by excluding the relevant material of clauses 3 and 5 of the MoU and this was a fit ground for setting aside the Award.

33. Though it is sought to be suggested that the learned Single Judge has acted as an Appellate Court while reversing findings of the Arbitrator, it is seen that the learned Single Judge has also dealt with the issue as to whether the operative directions issued by the Arbitrator could at all be executed. Specific performance of the MoU would require procurement of consent of the tenants by the Respondents. If tenants were to refuse consent and were to not

vacate possession of their premises, how the transaction of sale would be executed has not really been examined by the learned Arbitrator. So far as the nature of MoU is concerned, the learned Single Judge has noticed that the exact course of action to be adopted of either reconstruction of building or addition of floors was not finalized between the parties and that therefore MoU could not be treated as a concluded contract. This vital material was excluded by the learned Arbitrator, who merely concentrated on acceptance of part consideration by the Respondents. Exclusion of vital material by the learned Arbitrator constitutes a valid ground for setting aside the arbitral Award under Section 34 of the Arbitration Act. We are therefore, not inclined to interfere in the findings recorded by the learned Single Judge about MoU not constituting a concluded contract and impossibility of specific performance thereof.

34. In fact, the submissions canvassed on behalf of the Appellants before us are as if we are exercising power of first Appellate Court over the findings recorded by the learned Single Judge. Strenuous attempt is made to demonstrate as to how the findings recorded by the learned Single Judge about MoU not constituting concluded contract are erroneous. We are afraid, our jurisdiction under Section 37 of the Arbitration Act is same as that of the jurisdiction of the learned Single Judge under Section 34 of the Arbitration Act. Appellants have made an attempt to urge before us that recording of different conclusion of MoU constituting concluded contract is also

possible as was done by the arbitrator. However, the same was done by excluding the vital material on record. The learned Single Judge has not exceeded the boundaries prescribed under Section 34 of the Arbitration Act.

E. CONCLUSIONS

35. After considering the overall conspectus of the case, we do not find that any valid ground is made out by the Appellants for interference in the Order passed by the learned Single Judge in the present Appeals. The learned Single Judge, while exercising power under Section 34 of the Arbitration Act, has acted within the bounds of its jurisdiction. The order passed by the learned Single Judge is unexceptionable.

F. ORDER

36. We accordingly do not find any substance in the Appeals. The Appeals are accordingly **dismissed.**

(SANDEEP V. MARNE, J.) **(CHIEF JUSTICE)**