IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO.508 OF 2021

Bhupatbhai Ravjibhailukhi
Purchaser-Cum-Developer & Partner
Of Lukhi Associates & Ors. ....Petitioners

Versus

Tormal Dedraj Sainik @ Mali (Deceased)
Through Legal Heirs & Anr. ....Respondents

Dr. D.S. Hatle *a/w Mr. Deepak Jamsandekar and Ms. Nigmiti K. Lawane, for the Petitioners.*

Mr. Ram Upadhyay *a/w Mr. Santos Kumar Dube and Mr. Anuj Pande i/b. Law Competere Consultus, for Respondent Nos.1(a), 1(b) & 2.*

Mr. Yajuvendra Singh, *for Respondent No.1(c).*

CORAM : SOMASEKHAR SUNDARESAN, J.

RESERVED ON : MARCH 27, 2025

PRONOUNCED ON : NOVEMBER 25, 2025

JUDGEMENT:

Context and Factual Background:

1. This is a Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 ("***the Act***") challenging an arbitral award dated December 21, 2020 ("***Impugned Award***") in connection with

disputes and differences between the parties under a Development Agreement dated October 20, 2010 ("***Development Agreement***").

2. The Petitioners No. 1 to 3 are partners of Petitioner No. 4, Lukhi Associates (collectively, "***Developer***"), which undertook the development work under the Development Agreement. The Respondents are Mr. Rajendra Tormal Saini, Mr. Ashok Tormal Saini, Mr. Basant Tormal Saini, who are all legal heirs of Late Mr. Tormal Dedraj Saini (collectively, "***Tormal***") and Mr. Mahesh Dadraj Saini ("***Mahesh***"). One Kailash Dedraj Saini ("***Kailash***"), a sibling of Tormal and Mahesh too owned the land in question but he assigned all his right and interest in the property to the Developer for a consideration of Rs. 1.90 crores and is not party to the dispute.

3. Disputes and differences between the Developer and the Landowners led to the proceedings and eventually to the Impugned Award. The core dispute was about the claim of the Landowners that they were given possession of flats that were not in conformity with their entitlements under the Development Agreement, and the claim of the Developer that the difference in the area of the land covered by the Development Agreement led to a lesser development potential, which entitled the Developer to proportionately reduce the entitlement of the Landowners.

4. Under Clause 5 of the Development Agreement, Tormal was entitled to four flats aggregating to 2,500 square feet of "built up area wall to wall" while Mahesh was entitled to three flats aggregating to 2,270 square feet of "built up area wall to wall". One Deepak Chirangilal Saini ("***Deepak***") was entitled to one flat of 230 square feet. In all, the entitlements towards such flats aggregated to 5,000 square feet.

5. However, Deepak reached a settlement with the Developer and his entitlements were not part of disputes dealt with in the arbitration. For purposes of this judgement, for convenience, Mahesh and Tormal are referred to as "***Landowners***". Although entitlements of Kailash and of Deepak, as applicable, would be subsumed in entitlements and obligations of all the owners of the land, all references to such entitlements and obligations of Landowners in this judgement shall mean the proportionate entitlements and obligations of Tormal and Mahesh.

6. The Developer was free to purchase transferable development rights ("***TDR***") and load it on to the project to exploit it. However, any enhanced development potential that became available on the land was to be equally shared in proportion to the share of the property among the parties – the Landowners too made a claim for

two-thirds share of an alleged increase in floor space index ("***FSI***") that they claimed became available on the land.

7. Outgoings including property taxes were to the account of the Landowners until completion of the development, and thereafter to the account of the Developer. The building was to be constructed within 24 months. The Landowners were to be paid Rs. 8.4 lakh rent for the first 12 months and Rs. 9.24 lakhs for the next 12 months. If the development were still not completed with the possession of the flats due to the Landowners aggregating to 5,000 square feet being handed over within deadline, there would be a 10% escalation in the rent every year or after 36 months, the Developer would need to pay Rs. 1 crore for every year's delay.

8. The Developer was to conduct a survey, prepare plans and develop the property. The Schedule describing the property in the Development Agreement recorded that the land involved admeasured *1,053 square yards equivalent to 880.31 square metres*". The Schedule explicitly recorded that while the actual measurement was 880.31 square metres, the area shown in the property card was 819.30 square metres.

9. It is common ground that construction was completed and possession was taken by the Landowners in September 2017, the

occupation certificate having been obtained on August 24, 2017. The core dispute between the parties revolves around whether the flats, of which possession was taken by the Landowners, are in conformity with the stipulations in the Development Agreement, and whether the Developer's claim that the development potential of the land has suffered owing to a lesser area being capable of development, thereby justifying a lower area having to be handed over to the Landowners.

10. The Landowners contended that the area given to them is lesser by 1,212 square feet and towards this end, they made a monetary claim for Rs. ~3.27 crores, computed at the rate of Rs. 27,000 per square foot of such lesser area. The Developer contended that the actual area of land capable of development fell short by 61.01 square metres, and as a result, the developed area fell short by 1,772 square feet, which at Rs. 27,000 per square foot would lead to a credit for Rs. 4.78 crores in favour of the Developer. It is common ground of the parties that the rate to be applied for their respective claims is Rs. 27,000 per square foot.

11. The Developer contended that he was entitled to deduct the proportionate area from the 5,000 square feet contracted to be provided to the Landowners, but proportionately he needed to have given only 4,343 square feet, and yet he has delivered 4,427.60 square

feet. The Developer also raised the standard applicable for computing such area, which he indicated was "built up" area, although stated to be "wall to wall" and not "carpet area".

12. Disputes were also raised on the amount payable for the delay beyond 36 months from the time possession of the land had been handed over on May 2, 2011. Likewise, the Landowners also claimed that they were entitled to additional FSI and sought a further sum of Rs. 4.05 crores applying Rs. 27,000 per square foot on the additional area of 1,500 square feet claimed. The Learned Arbitral Tribunal has emphatically ruled against the Landowners on these counts and they have not mounted any challenge to such finding. Therefore, it is unnecessary to discuss these facets in this judgement.

Impugned Award:

13. The core findings of the Impugned Award challenged in this Petition may be summarised thus:

a) The term "built up wall to wall" effectively means carpet area and the 5,000 square feet towards the flats to be delivered to the Landowners by the Developer ought to have conformed to such stipulation – essentially such area shall exclude the area covered by the walls and it would conform to usable floor area of the flat; and

b) The variance between the actual area of land (880.31 square metres) and the land depicted in the property card (819.30 square metres) which would impact the development potential was clearly identified and depicted in the Development Agreement. The Developer could not feign surprise at having been unable to develop the land to the potential he purportedly anticipated. Effectively, the Developer's justification for which a smaller area was applicable to the flats to be handed over to the Landowners was rejected.

Core Elements of Challenge:

14. The challenge to the Impugned Award is essentially founded on the following premises:

a) The area of land not in existence in the property card cannot be sold by projecting that the physical measure of land is higher, to seek benefits of development on the larger and actual measure of the land; and

b) The Learned Arbitral Tribunal has erred in interpreting the term "built up area wall to wall" as meaning "carpet area" and that such an interpretation has resulted in granting relief beyond what is prayed for – at Rs. 27,000 per square foot on

1,310.34 square feet while the claim itself was for applying such rate to 1212 square feet; and

c) There are other inheritors and heirs to the property of the mother of Tormal and Mahesh and they are all necessary parties who have to be joined and the proceedings are vitiated by non-joinder of necessary parties;

15. In the written submissions, a personal attack has been mounted on the Learned Arbitral Tribunal, alleging a conflict of interest, but there is not a whisper of it in the pleadings. A belated attack on the arbitrator without any pleading, either before the Learned Arbitral Tribunal or in the Section 34 Petition, is worthy of deprecation. I leave it at that and choose to focus on the core elements of the grounds pleaded in the Petition and in the verbal submissions.

Analysis and Findings:

16. I have heard Learned Advocates for the parties, and examined the record closely with the aid of the submissions made, both verbal and in writing.

Difference in Land Area Capable of Development:

17. At the heart of the contentions of the Developer is that the area of land capable of being developed has a shortfall of 61.01 square

metres. The development potential of the land is linked to only 819.30 square metres as recorded in the property card, and disconnected with the actual area of 880.31 square metres. This, according to the Developer, necessitates a readjustment of the consideration underlying the Development Agreement, and that the Learned Arbitral Tribunal had erred in its findings in this regard.

18. I am unable to agree with this foundational element of challenge in the Petition. The Learned Arbitral Tribunal has rightly noted that the Schedule to the Development Agreement explicitly recorded the dichotomy between the actual area and the area depicted in the property card and that the difference is 61.01 square metres. The Developer was entitled to conduct a survey. A survey was indeed carried out but the Developer simply did not bring on record the survey plan. The Developer knew of the aforesaid difference when the Development Agreement was executed, and after the survey, when the development plan was submitted to the Municipal Corporation of Greater Mumbai ("***MCGM***"). The Developer claiming to have been taken by surprise would not inspire confidence in any reasonable mind reading the material on record.

19. That apart, the Learned Arbitral Tribunal has found that this issue was never raised contemporaneously. In my view, it is evident

that it could not have been raised because of the explicit contents of the Development Agreement. The defence on the premise of a lower development potential due to a shortfall of 61.01 square metres was mounted for the first time in the arbitration. This appears to be a contention raised advisedly, on the premise of appealing to the equities of the case rather than the facts and the law. The Learned Arbitral Tribunal also found that the Developer would not be justified in unilaterally truncating the area of the flats that he was obliged to hand over to the Landowners.

20. The findings of the Learned Arbitral Tribunal are in conformity with the material on record and the reasons are sound and logical. No fault can be found with these findings. That apart, the Development Agreement, which has facially been styled as a "sale-cum-development agreement" is an agreement consciously executed by consenting adults who are men of commerce and understand what they are contracting. It is explicit in its terms. The Learned Arbitral Tribunal is correct in its findings that the bargain in the Development Agreement was executed with eyes open and there was no scope of being taken by surprise. Therefore, in my opinion, the premise of development potential being truncated because of a shortfall of 61.01 square metres in the property card is devoid of merit and the rejection of this ground adopted by the Developer calls for no interference.

Built up Area Wall to Wall:

21. The next issue is that whether the "built up area wall to wall" has been reasonably interpreted by the Learned Arbitral Tribunal to mean "carpet area". It is indeed true that the term "*wall to wall*" is preceded by the words "*built up*". The Developer's contention that when the phrase "built up" is used, there is no scope to contend that it means "carpet area" is attractive. Equally, the words "wall to wall" cannot be wished away.

22. To aid construction of the Development Agreement, the Learned Arbitral Tribunal has reproduced the definitions of the terms "built-up area" and "carpet area" in the Development Control Regulations. The extant regulations import the term "carpet area" from the Real Estate Regulation (Regulation and Development) Act, 2016 and that definition too has been extracted. Essentially, "built-up area" is the area covered on all floors excluding areas exempted for purposes of computing FSI. So also, "carpet area" means the usable area excluding areas covered by external walls, service shafts, balcony, *verandah* and open terrace area, but including the area covered by internal partition walls.

23. The Learned Arbitral Tribunal's finding, namely, that for purposes of the Development Agreement, the term "built up area wall

to wall" essentially means "carpet area", in my opinion, is a plausible opinion. Indeed, the parties could have used the term "carpet area" which they have not. Equally, the parties have not simply adopted the term "built up area" by reference to any legal definition and have qualified it to mean the area as measured wall to wall. This would point to the usable area. When ambiguities arise in a phrase in a contract, it would be appropriate to examine what would be a commonsensical view that the parties could have been reasonably expected to have intended.

24. In my opinion, what the Learned Arbitral Tribunal has found would draw sustenance from the principle of giving commercial contracts a commercial commonsensical interpretation. The usage of the term "built up" which covers the area covered on all floors alongside the phrase "wall to wall" has necessitated the Learned Arbitral Tribunal to examine what would be the commercially commonsensical approach to interpreting this term of the Development Agreement. The very usage of "wall to wall" would point to usable area. The fact that the parties chose not to adopt or incorporate by reference, any statutory definition of these terms would justify the approach of the Learned Arbitral Tribunal. In doing so, the Learned Arbitral Tribunal has not simply inflicted its own view arbitrarily. By making reference to the contemporaneously applicable statutory definitions, the Learned

Arbitral Tribunal has found that it is reasonable to conclude that what the parties meant by "built up area wall to wall" is that they meant the usable area, which is the carpet area. In my opinion, this is a plausible view and I must not lightly interfere with it.

25. It is also noteworthy that the primary justification by the Developer is that he was actually entitled to deliver a lesser area to proportionately discount the development potential that he discovered to be lesser owing to the depiction of area in the property card. That has been rightly rejected by the Learned Arbitral Tribunal. The next step is to examine how the requirement of delivery of the 5,000 square feet of built up area wall to wall must be interpreted. The reasoning and approach of the Learned Arbitral Tribunal is not implausible and I see no reason to interfere with it.

26. In ***Nabha Power***[1] the Supreme Court noticed various earlier judgements on how to give commercial sense to terms in a contract that may not lend themselves to a clear unequivocal meaning, in the following terms:

> ***49.*** *We now proceed to apply the aforesaid principles which have evolved for interpreting the terms of a commercial contract in question.* ***Parties indulging in commerce act in a commercial sense. It is this ground rule*** *which is the basis of The Moorcock [The Moorcock,*

1 Nabha Power Ltd. v. Punjab SPCL – (2018) 11 SCC 508

(1889) LR 14 PD 64 (CA)] test of giving "business efficacy" to the transaction, as must have been intended at all events by both business parties. ***The development of law saw the "five condition test" for an implied condition to be read into the contract including the "business efficacy" test. It also sought to incorporate "the Officious Bystander Test"*** *[Shirlaw v. Southern Foundries (1926) Ltd. [Shirlaw v. Southern Foundries (1926) Ltd., (1939) 2 KB 206 : (1939) 2 All ER 113 (CA)]]. This test has been set out in B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings [B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings, 1977 UKPC 13 : (1977) 180 CLR 266 (Aus)]* ***requiring the requisite conditions to be satisfied****: (1)* ***reasonable and equitable****; (2)* ***necessary to give business efficacy*** *to the contract; (3)* ***it goes without saying*** *i.e. the Officious Bystander Test; (4)* ***capable of clear expression****; and (5)* ***must not contradict any express term of the contract****. The same penta-principles find reference also in Investors Compensation Scheme Ltd.v. West Bromwich Building Society [Investors Compensation Scheme Ltd. v. West Bromwich Building Society, (1998) 1 WLR 896 : (1998) 1 All ER 98 (HL)] and Attorney General of Belize v. Belize Telecom Ltd. [Attorney General of Belize v. Belize Telecom Ltd., (2009) 1 WLR 1988 (PC)]* ***Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regard to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract.***

[Emphasis Supplied]

27. In coming to the foregoing view, the Supreme Court endorsed and reiterated what had been stated in a long line of judgements that had endorsed these principles including in the cases of ***Dhanrajamal Gobindram***[2] (paragraph 19); ***D.N. Revri***[3] (paragraph 7); and ***Satya Jain***[4] (paragraphs 33 to 35).

28. In my opinion, effectively what the Learned Arbitral Tribunal has found is clearly justifiable on the aforesaid parameters.

29. As regards the contention about the variance between what was prayed for in relation to the shortfall (1,212 square feet) and what has been granted (1310.34 square feet), I find that the Learned Arbitral Tribunal has not strayed outside the scope of the contract or rewritten the contract. What was up for consideration was how to interpret the term "built up area wall to wall" and the Learned Arbitral Tribunal interpreted it in concept and rendered the computation as the master of the evidence before it and arrived at the justifiable relief. What was to be delivered out of the 5,000 square feet to Tormal was 2,500 square feet (against which 2,098.08 square feet of built up area was claimed to have been delivered by the admitted position of the Developer) and to Mahesh was 2,270 square feet (against which 2,328.08 square feet of

2 Dhanrajamal Gobindram v. Shamji Kalidas and Co. – (1961) 3 SCR 1020 : AIR 1961 SC 1285
3 Union of India v. D.N. Revri & Co. – (1976) 4 SCC 147
4 Satya Jain v. Anis Ahmed Rushdie – (2013) 8 SCC 131

built up area was claimed to have been delivered by such admitted position). The shortfall aggregating to 573 square feet of built up area translated into a shortfall of 1,310.34 square feet as against the earlier projected shortfall of 1,212 square feet.

30. I find that the determination of the area of shortfall at 1,310.34 square feet is a product of application of the declaratory determination by the Learned Arbitral Tribunal to the facts of the case. This is a corollary and a logical extension of the finding on how to interpret the term "built up area wall to wall". Such a finding cannot be simplistically regarded as being outside the scope of the contract or the claim, but instead it is a logical extension and consequence of a declaratory finding in the Impugned Award, that is well within the jurisdiction of the Learned Arbitral Tribunal. In the context of the scale of the claim and counter-claim made by the parties, the difference in value between the area of 1212 square feet and 1310.34 square feet is also *de minimis* — at Rs 27,000 per square foot. The difference is barely Rs 26.55 lakhs. In any case, for the reasons set above, the aforesaid distinction does not turn the needle in favour of disregarding the well reasoned Arbitral award.

Non-Joinder of Parties:

31. As regards the contention about joinder of parties, I find the contention entirely misconceived. The Development Agreement was among those defined as "Vendors" who were in turn referred to as heirs of the mother of Tormal and Mahesh. The "Vendors" were Tormal, Mahesh and Kailash. The pursuit of the cause of action was by Tormal and Mahesh. Tormal expired and his legal heirs were brought on record. Mahesh was very much alive. Kailash did not pursue any grievance while Deepak who was to be given a flat also settled with the Developer. Besides, the multiple offspring of the "Vendors" have executed the Development Agreement as "Confirming Parties". The grievance of the Developer is that each and every signatory including the Confirming Parties ought to be joined as parties to the arbitration. The Learned Arbitral Tribunal analysed this position and found that the claim is about the delivery of the specific flats covered in Clause 5 of the Development Agreement. That claim was pursued by Tormal and Mahesh. The other Confirming Parties are not at all necessary parties for such a claim, as has been rightly noted by the Learned Arbitral Tribunal.

Scope of Review under Section 34:

32. I cannot lose sight of the scope of jurisdiction under Section 34 of the Act – it is well covered in multiple judgements of the Supreme Court including ***Dyna Technologies***[5], ***Associate Builders***[6], ***Ssyangyong***, ***Konkan Railway***[7] and ***OPG Power***[8]. Even implied reasons that are discernible, may be inferred by the Section 34 Court, to support the just and fair outcome arrived at in arbitral awards. To avoid prolixity, I do not think it necessary to burden this judgement with quotations from these judgements.

33. Suffice it to say (to extract from just one of the foregoing), in ***Dyna Technologies***, the Supreme Court held thus:

> *"24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts.* ***We need to be cognizant of the fact that arbitral awards should not be interfered with*** *in a casual and cavalier manner,* ***unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award****. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction.* ***The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to***

5 Dyna Technologies Private Limited v. Crompton Greaves Ltd – (2019) 20 SCC 1
6 Associate Builders vs. Delhi Development Authority – (2015) 3 SCC 49
7 Konkan Railways v. Chenab Bridge Project Undertaking – 2023 INSC 742
8 OPG Power vs. Enoxio – (2025) 2 SCC 417

> ***interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.***
>
> *25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists.* ***The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act****."*
>
> ***[Emphasis Supplied]***

Summary of Conclusions:

34. On an overall analysis, it is clear that the consideration payable to the Landowners under the Development Agreement was three-fold – the sums paid upfront for the development rights; the rentals payable for the period of displacement; and the delivery of the flats as contracted. The short question is whether the delivery of flats was in conformity with the contract. The area admittedly delivered is lower than 5,000 square feet, which is sought to be justified by the Developer by reference to the development potential linked to the area depicted in the property card. The next justification is on the standard to be deployed for computation of the area by interpreting the term "built up area wall to wall". This has been reasonably interpreted by the Learned Arbitral Tribunal. Even where the Developer makes an

arguable point, it would at best be a means of canvassing for the substitution of one plausible view with another. That is not permissible within the jurisdiction of Section 34 of the Act.

35. In the result, the Impugned Award does not lend itself to being set aside in terms of Section 34 of the Act. I must mention that the Impugned Award also holds in the Developer's favour on a number of counts. I have alluded to this in the opening portion of this judgement. For instance, the Learned Arbitral Tribunal has found in the Developer's favour on the outgoings payable by the Respondents after September 2017 and that the claim for additional sums of Rs. 1 crore for every 12 months delay after the first 36 months as not being maintainable. Those findings have not been challenged and have therefore attained finality. I have restricted my analysis to the ambit of the challenge presented in the Petition.

Costs:

36. Considering the nature of the conduct of the Landowners, including attempt at invoking criminal law in what is a civil and computational dispute and the fact that there are strong elements of the other claims made by the Landowners against the Developer being rejected by the Learned Arbitral Tribunal, in my opinion, it is not

necessary to impose costs on the Developer under the principle of costs having to follow the event.

37. This petition is ***finally disposed of*** in the aforesaid terms and Interim Applications, ifany, shall also stand disposed of accordingly. Amounts deposited, if any, in this Court along with accruals thereon shall stand released within a period of four weeks from the upload of this judgement on the Court's website.

38. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]