IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO.826 OF 2014

Kavis Fashions Private Limited … Petitioner
Vs.
Dimple Enterprises and others … Respondents

Mr. Shyam Mehta, Senior Advocate a/w. Mr. Bhavik Manek and Mr. Shehzad A. K. Najam-es-sani i/b. Maneksha & Sethna for Petitioner.

Mr. S. U. Kamdar, Senior Advocate a/w. Mr. Indranil Deshmukh, Mr. Vineet Unnikrishnan, Ms. Samhita Mehra, Ms. Vaidehi Chande i/b. Cyril Amarchand Mangaldas for Respondents.

CORAM : MANISH PITALE, J.
Reserved on : 24th MARCH, 2023
Pronounced on : 05th JUNE, 2023

ORDER :

. The petitioner is aggrieved by award dated 19.03.2014, passed by an arbitral tribunal constituted for resolving the disputes between the parties. The challenge to the said award in the present petition was amended to add further specific grounds of challenge in the light of an order passed by the arbitral tribunal on an amendment application in pursuance of an order dated 11.03.2019 passed by this Court (Coram: S. C. Gupte, J.), whereby power under Section 34(4) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Arbitration Act') was exercised for the tribunal to eliminate certain grounds raised on behalf of the petitioner for setting aside the arbitral award. As a consequence, the learned counsel for the parties addressed this Court, on the aspect of amendment of the statement of claim as sought by the petitioner and also on the merits of the matter. According to the petitioner, if this Court accepts its contentions on the aspect of the amendment of the claim being rejected by the tribunal, the impugned

award would have to be set aside only on that count, without the necessity of entering into the merits of the matter. But, this Court thought it fit to hear the learned counsel for the parties on all aspects of the matter, including the challenge on merits raised by the petitioner.

2. The facts in brief leading to filing of the present petition are that, the petitioner, which is in the business of manufacture and export of footwear, intended to set up an additional manufacturing facility and in that regard, it was looking for a plot of land for setting up such a facility. In July 2006, the petitioner entered into negotiations with respondent No.1 in the context of land bearing CTS No.710 F admeasuring 2087.2 square meters at Village Marol, Andheri (East), Mumbai, in which respondent No.1 claimed to have development rights. Respondent Nos.2 to 4 are partners of respondent No.1 firm. During the course of negotiations, respondent No.1 handed over documents to the petitioner and the parties exchanged emails and communications in that regard. On 18.08.2006, the respondents submitted an application before the competent authority for re-validation of existing sanctioned plans for development of the plot of land and deposited the requisite amount.

3. In this backdrop, on 31.08.2006, a Memorandum of Understanding (MoU) was executed between the parties in the context of the said plot of land. The MoU consisted of various clauses, specifying stages of payment to be made by the petitioner to the respondents. The total consideration was Rs.14,75,00,000/-. At the time of execution of the MoU, an amount of Rs.2 crores was paid to the respondents. It is this MoU, which is the central document of controversy between the parties. The terms of the MoU, as reflected in its various clauses, have been interpreted by the rival parties to further their own interests. While the petitioner claims that the MoU was a concluded contract, the respondents have claimed throughout that it was

nothing but an agreement to enter into an agreement. The mutual obligations under the MoU are interpreted by the parties in such a manner that the controversy between them can be resolved only by understanding the true purport of the said document.

4. Be that as it may, in furtherance of execution of the MoU dated 31.08.2006 and the petitioner having paid an amount of Rs.2 crores to the respondents, on 08.09.2006, the advocates of the respondents issued a title certificate. On 18.09.2006, the petitioner sent an email to respondent No.2 requesting for inclusion of certain matters in the title certificate and asked for copies of certain documents mentioned in the email, on the basis that the title certificate issued by the advocates of the respondents was not in accordance with the MoU. In the meanwhile, on 15.09.2006, the advocates of the head lessors of the plot of land in question issued a notice to respondent No.1, purporting to terminate and forfeit the indenture of lease dated 12.06.1958. It is the stated case of the petitioner that details of the said development were made known to the petitioner for the first time by the respondents only on 14.04.2007.

5. In the backdrop of the email sent on behalf of the petitioner to respondent No.2 in the context of the title certificate, on 19.09.2006, a meeting was held with the architects of respondent No.1, wherein the plans of the petitioner for the proposed building were discussed. Thereupon, on the same day, the petitioner sent the email to the said architects, requesting them to mail sketches to the petitioner at the earliest. On 27.09.2006, the petitioner received the plans from the said architects and the same were also delivered to the respondents. At this time, according to the petitioner, its bank had sanctioned loan for construction of the factory building on the said plot of land and a credit arrangement letter was also issued by the bank sanctioning working capital facility to the petitioner. On 05.10.2006, the petitioner sent an

email to the architects of the respondents, forwarding the revised plans. In this backdrop, on 21.10.2006, meeting was held between the parties and according to the petitioner, in the said meeting, respondent Nos.2 and 3 merely stated that there was some problem due to which the respondents may not be able to commence construction, although the details of the problems were not specified. The respondents have disputed this version and claimed that the petitioner was informed about the notice dated 15.09.2006, issued by the head lessors regarding termination of the indenture of lease.

6. Thereafter, a series of meetings took place between the parties from October 2006 to January 2007. The rival parties have their own respective versions as to what transpired in such meetings. In any case, further steps in terms of the MoU, which would have led to construction of the factory could not be undertaken. On 19.01.2007, respondent No.1 sent a letter to the petitioner stating that the MoU had come to an end and enclosed a cheque of Rs.2 Crores in favour of the petitioner. According to the respondents, the said letter was returned by the postal authorities with the remark ‘refused’ and hence, it had to be sent again on 27.01.2007.

7. In this backdrop, on 13.02.2007, the petitioner sent a notice through its advocates to the respondents, to which the respondents sent a reply on 28.02.2007. On 28.03.2007, the petitioner sent a letter to the respondents, replying to the aforesaid reply notice dated 28.02.2007 and invoked arbitration clause contained in the MoU. At this stage, the petitioner filed Arbitration Petition No.143 of 2007 before this Court claiming certain interim reliefs.

8. On 27.04.2007, this Court dismissed the aforesaid petition, which was challenged by filing an appeal before the Division Bench of this

Court.

9. In the meanwhile, the architects of the respondents submitted plans before the competent municipal authority for construction of an information technology park on the said plot of land. On 14.08.2007, the competent municipal authority issued a commencement certificate for construction of the information technology park. In this backdrop, the matter went to arbitration before the three-member arbitral tribunal. The first meeting was held on 19.12.2007. Thereafter, pleadings were filed and arbitration proceedings commenced. On 08.07.2008, the Division Bench of this Court disposed of the appeal, clarifying that the observations made by the learned Single Judge of this Court in the order dated 27.04.2007, dismissing Arbitration Petition No.143 of 2007 would not be taken into consideration by the arbitral tribunal and that the tribunal shall not be influenced by such observations.

10. In this backdrop, on 22.07.2008, the petitioner filed application under Section 17 of the Arbitration Act seeking certain interim reliefs. On 02.08.2008, the tribunal passed an order by consent of parties directing the respondents to handover amount of Rs.2 Crores to the advocates of the petitioner to be kept invested pending further orders of the tribunal. On 27.08.2008, the tribunal passed an order restraining the respondents from creating third party rights in the plot in question and the reasons for issuing such a direction were contained in a separate order dated 09.09.2008.

11. During the pendency of the arbitration proceedings before the tribunal, on 06.12.2008, the respondents made a “with prejudice” offer to the petitioner to complete the transaction under the MoU by accepting the title of the respondents on as is where is basis and to approve the plans within 15 days, only with such changes in the plans as were

permissible in law. The tribunal recorded the aforesaid offer in the minutes of the meeting dated 06.12.2008. In furtherance of the said "with prejudice" offer made on behalf of the respondents, the petitioner through its advocates, asked the respondents to furnish copies of certain documents, including documents pertaining to suits pending before the Small Causes Court at Mumbai. The said documents pertaining to the proceedings pending before the Small Causes Court were forwarded on 16.12.2008 and it was decided that a joint meeting would be held between the parties. A series of meetings and exchange of communications took place between the parties, and on 06.03.2009, a joint letter was addressed to the arbitral tribunal on behalf of the parties to adjourn the matter as the parties were at an advanced stage of negotiations and settlement.

12. There was a further series of communications exchanged between the parties, indicating that common ground could not be found. Although a draft agreement for sale was forwarded on behalf of the petitioner to the advocates for the respondents, on 07.01.2010, the advocates for the respondents addressed a letter to the advocates for the petitioner alleging that the petitioner had inordinately delayed the negotiations as also circulation of the draft agreement for sale, thereby terminating the without prejudice negotiations. It was further informed that the respondents would request the arbitral tribunal to convene a meeting for taking up the proceedings further. On 12.01.2010, the advocates for the petitioner sent a letter to the advocates for the respondents denying the allegations made against the petitioner. Thereafter, from 02.07.2010 onwards, the cross-examination of witness of the petitioner commenced.

13. On 28.08.2010, the petitioner filed an application for amendment of the statement of claim, to bring on record the entire correspondence

and the events that had transpired after the "with prejudice" offer made on behalf of the respondents. On 06.09.2010, the tribunal dismissed the application for amendment and for de-marking certain documents that had been exhibited.

14. On 19.03.2014, the tribunal passed the impugned award. The majority award rendered by two members dismissed the claims of the petitioner and directed the petitioner to pay to the respondents costs of arbitration quantified at Rs.20 lakhs. It was further directed that the petitioner was entitled to be paid forthwith the amount of Rs.2 crores that was deposited by the respondents with the advocates of the petitioner. The Chairman of the tribunal rendered the minority award, granting specific performance of the MoU in favour of the petitioner with consequential directions. The essential difference in the findings rendered by the majority and the minority awards was that, while the majority award held that the MoU was not a binding contract, being an agreement to enter into an agreement, the minority award held that the MoU was indeed a binding contract, specific performance of which could be granted.

15. Aggrieved by the impugned award, the petitioner filed the present petition before this Court. On 11.03.2019, this Court (Coram: S. C. Gupte, J.) passed an order after hearing learned counsel for the parties at some length. It was recorded in the said order dated 11.03.2019 that the learned counsel for the parties had agreed for adjourning the hearing of the present petition for a period of six months and that in the meanwhile, the proceedings could be remitted to the arbitral tribunal for resumption of arbitration proceedings at the stage when the amendment application was filed by the petitioner on 28.08.2010. This Court set aside the decision of the arbitral tribunal dated 06.09.2010, whereby the amendment application of the petitioner was dismissed and observed

that the matter stood remitted to the tribunal for resumption of the reference to consider the amendment application on merits so as to eliminate the grounds of objection to the award raised on behalf of the petitioner on account of non-consideration of the amendment application on merits. This Court further recorded that the parties had agreed that after the amendment application is decided afresh by the arbitral tribunal, the present arbitration petition could be brought back to this Court for further hearing and orders. It was recorded that if the amendment application stood rejected by the tribunal, further challenge to the award may be heard on merits by this Court and if on the one hand, the tribunal allowed the amendment application, the impugned award could be set aside and the whole reference could be remitted to the tribunal from the stage of allowing the amendment application onwards for a fresh hearing in accordance with law.

16. Pursuant to the said order passed by this Court, the arbitral tribunal took up the amendment application. By an order dated 20.08.2021, the tribunal again rejected the amendment application. As a consequence, the petitioner was permitted to amend the present petition to add grounds raising grievance as against the said order dated 20.08.2021 passed by the tribunal. It is in this backdrop that the present petition came up for hearing before this Court. Since the petition was filed prior to the amendment of the Arbitration Act in the year 2015, as per law laid down by the Supreme Court in the case of *Ssangyong Engineering and Construction Company Limited Vs. National Highway Authority of India*, **(2019) 15 SCC 131**, the present petition will have to be considered on the basis of the provisions of the Arbitration Act prior to the amendment brought about in the year 2015 and the position of law clarified by the Supreme Court in that regard.

17. Mr. Shyam Mehta, learned senior counsel appearing for the

petitioner, before making submissions on the merits of the matter, invited attention of this Court to the aforementioned order dated 11.03.2019, passed by this Court, whereby the proceedings were remitted to the arbitral tribunal on the limited aspect of amendment of the statement of claim of the petitioner. It was submitted that the order / minutes of meeting of the tribunal dated 06.09.2010 was set aside and the tribunal was requested to reconsider the application for amendment filed by the petitioner. It was submitted that the tribunal considered the said aspect afresh but, unfortunately by order dated 20.08.2021 again rejected the amendment application. It was submitted that if the petitioner is able to convince this Court that the amendment application could not have been rejected and that it ought to have been allowed, the impugned arbitral award would stand set aside on the said ground alone. Therefore, learned senior counsel appearing for the petitioner first made submissions on the aforesaid aspect of the matter.

18. Attention of this Court in that context was invited to the initial order dated 06.09.2010, passed by the tribunal, whereby the application for amendment filed by the petitioner was rejected and thereafter, to the aforesaid order dated 20.08.2021, passed by the tribunal, reiterating such rejection after the matter was remitted to the tribunal. In the context of the first order dated 06.09.2010, it was submitted that the tribunal completely failed to appreciate the nature and scope of power that ought to be exercised by the tribunal under Section 23(3) of the Arbitration Act. It was submitted that, for a comprehensive consideration of the contentions of the petitioner in the light of the “with prejudice” and “without prejudice” negotiations between the parties, midway through the arbitration proceedings, such amendment ought to have been allowed. In respect of the subsequent order dated 20.08.2021, the learned senior counsel appearing for the petitioner submitted that the

tribunal failed to consider the merits of the matter, such consideration being limited to the last paragraph of the said order. It was submitted that from paragraphs 1 to 20 of the said order dated 20.08.2021, the tribunal had unfortunately commented upon the approach adopted by this Court while exercising power under Section 34(4) of the Arbitration Act and remitting the matter to the limited extent of deciding the amendment application. According to the learned senior counsel appearing for the petitioner, in effect, there was no consideration of the merits of the contentions of the petitioner in that regard.

19. It was submitted that the Supreme Court in the case of *State of Goa Vs. Praveen Enterprises*, **(2012) 12 SCC 581** categorically held that amendment to a claim or a counter-claim ought to be granted by an arbitral tribunal in the interest of justice. It was contended that a proper reading of Section 23(3) of the Arbitration Act would show that the opposing party could raise only the objection of delay in the context of an amendment application before the tribunal. On this basis, it was submitted that the tribunal, in the present case, erred in rejecting the amendments. Reference was also made to the judgement of the Supreme Court in the case of *Rajesh Kumar Aggarwal Vs. K. K. Modi*, **(2006) 4 SCC 385** on the general power available under Order VI, Rule 17 of the CPC for amendment of pleadings.

20. Thereupon, the learned senior counsel for the petitioner referred to and relied upon the communications exchanged between the parties pursuant to the offer made on behalf of the respondents on 06.12.2008 in the midst of the arbitral proceedings. It was submitted that the tribunal had erroneously permitted some documents to be marked as exhibits, while ignoring vital documents during the process of “without prejudice” negotiations between the parties. This prompted the petitioner to file the amendment application with a further direction for taking on

record all the documents that formed part of the "without prejudice" negotiations between the parties. According to the petitioner, the said amendment ought to have been allowed to bring on record the conduct of the parties, particularly in the context of the aspect of readiness and willingness on the part of the petitioner to abide by the conditions of the MoU. By not permitting such an amendment, the tribunal committed a fatal flaw vitiating the entire proceedings. On this basis, the learned senior counsel for the petitioner submitted that the impugned award deserved to be set aside. Reliance was placed on certain English judgements *viz.*, *Burnell Vs. British Transport Commission*, **(1955) 1 Q.B. 187**, *Great Atlantic Insurance Co. Vs. Home Insurance Co. and others*, **(1981) 1 W.L.R. 529** and *Somatra Limited Vs. Sinclair Roche & Temperley*, **(2000) 1 W.L.R. 2453**.

21. Without prejudice to the aforesaid contentions on the aspect of amendment being rejected by the tribunal, the learned senior counsel for the petitioner addressed this Court on the merits of the matter. It was submitted that the tribunal committed a grave error in interpreting the terms of the MoU to conclude that it was not a binding contract and that it was an agreement to enter into an agreement, specific performance of which could not be granted. The terms of the MoU were referred to in detail and it was submitted that the intention of the parties was evident from the plain words used in the MoU, which indicated that it was nothing but a concluded and binding contract between the parties. It was submitted that although the majority award devoted a number of paragraphs on the said aspect of the matter, the terms of the MoU, in the context of the evidence of the parties and admissions given by the witnesses of the respondents, were not appreciated in the correct perspective to hold against the petitioner in that regard. Reliance was placed on judgement of the Supreme Court in the case of *K. Sriramulu*

Vs. Aswatha Narayana, **AIR 1968 SC 1028**, to contend that the execution of agreement to sell in the context of the MoU was nothing but a formality and that the MoU itself was clearly a binding contract. According to the petitioner, the minority award correctly found in favour of the petitioner on the said aspect of the matter.

22. The learned senior counsel for the petitioner also placed reliance on the judgement of the Supreme Court in the case of *Dakshin Haryana Bijli Vitran Nigam Limited Vs. Navigant Technologies Private Limited*, **(2021) 7 SCC 657**, to contend that the minority award of an arbitral tribunal could certainly be relied upon by a party challenging an arbitral award of the tribunal to demonstrate as to why the majority award deserved to be set aside. On this basis, the learned senior counsel appearing for the petitioner relied upon the minority award in the present case.

23. It was further submitted that on the aspect of readiness and willingness of the petitioner to perform its part of the contract as per the MoU, there was sufficient evidence available on record that while the petitioner did perform and was ready to perform its obligations as per the terms of the MoU, it was the respondent, who backtracked and refused to take necessary steps in terms of the MoU as a binding contract. Copious references were made to the exchange of communications between the parties as well as evidence of the witnesses, including answers given in cross-examination by the witnesses of the respondents, to contend that the evidence on record was completely ignored, in order to render adverse findings against the petitioner on the aspect of readiness and willingness. It was submitted that the respondents could not have unilaterally communicated to the petitioner in January 2007 that the MoU had come to an end. This aspect was not properly appreciated by the tribunal in its majority award, while

on the other hand, the minority award properly appreciated the oral and documentary evidence on record to reach the only possible conclusion, which was in favour of the petitioner. On this basis, it was contended that this Court ought to interfere with the impugned arbitral award, to set aside the same by exercising power under Section 34 of the Arbitration Act.

24. It was emphasized that since the present petition was filed prior to the amendment brought about in the Arbitration Act in the year 2015, the scope and jurisdiction available to this Court was wide in terms of the law laid down by the Supreme Court in its judgements in the case of *ONGC Limited Vs. Saw Pipes Limited*, **(2003) 5 SCC 705** and *Associated Builders Vs. Delhi Development Authority*, **(2015) 3 SCC 49**, which included applying the *Wednesbury* test in the present case. Thus, it was submitted that the impugned award deserved to be set aside on both counts i.e. for the error in rejecting the amendment application and even on merits.

25. On the other hand, Mr. Kamdar, learned senior counsel appearing for the respondents submitted, firstly, on the aspect of the rejection of the amendment application by the tribunal. It was submitted that both the orders of the tribunal i.e. order dated 06.09.2010 and the subsequent order dated 20.08.2021, were in accordance with law. The learned senior counsel appearing for the respondents relied upon the judgement of the Calcutta High Court in the case of *Lindsay International Private Limited Vs. IFGL Refractories Limited*, **2021 SCC OnLine Cal 1979**, wherein it was held that the petitioner cannot claim that under Section 23(3) of the Arbitration Act, the respondent could have objected to amendment only on the ground of delay. It was submitted that the words used in the said provision are ‘having regard to the delay in making it’, in contradistinction to the words such as ‘having regard only to’. On this

basis, it was submitted that the respondents were entitled to object to the amendment sought by the petitioner on merits, which they had indeed raised before the tribunal. It was further submitted that rejection of an amendment application could never be challenged under Section 34 of the Arbitration Act. It was submitted that the grounds raised in the petition and the subsequent grounds added by way of amendment to challenge the order dated 20.08.2021 in the present petition were misplaced. Reliance was placed on judgement of the Delhi High Court in the case *Container Corporation of India Limited Vs. Texmaco Limited*, **2009 SCC OnLine Del 1594**, as also judgment of this Court in the case of *Punj Lloyd Limited Vs. ONGC*, **2016 SCC OnLine Bom 3749**, to contend that challenge to rejection of an amendment application during the course of an arbitral proceedings cannot be raised under Section 34 of the Arbitration Act. On this ground also, it was submitted that this Court ought not to consider the contentions raised on behalf of the petitioner in this regard.

26. Insofar as the merits of the two orders rejecting the amendment application are concerned, it was submitted that the tribunal was justified in rejecting the application and the real grievance of the petitioner stood addressed by the order dated 06.09.2010. It was submitted that by the said order, not only was the proposed amendment rejected, but the tribunal specifically demarked documents marked as exhibit R-9 (Colly) from the record of the arbitral proceedings. Thus, none of the documents pertaining to the negotiations between the parties, during the pendency of the arbitral proceedings, remained on record. The impugned award does not refer to any such documents, and therefore, the petitioner suffered no prejudice in that regard.

27. Insofar as the merits of the matter are concerned, the learned senior counsel appearing for the respondents relied upon judgements of

the Supreme Court in the cases of **ONGC Limited Vs. Saw Pipes Limited** (*supra*), *Rajasthan State Industrial Development and Investment Corporation Vs. Diamond & Gem Development Corporation Limited*, **(2013) 5 SCC 470**, *Food Corporation of India Vs. Abhijit Paul*, **2022 SCC OnLine SC 1605**, *NHAI Vs. ITD Cementation India Limited*, **(2015) 14 SCC 21** and *Dresser Rand S.S. Vs. Bindal Agro Chem Limited*, **(2006) 1 SCC 751**, to contend that the tribunal in the majority award correctly found that the MoU could not be said to be a binding contract and that it was indeed an agreement to enter into an agreement, which could not be specifically performed. It was submitted that the tribunal did not ignore any of the terms of the MoU and on the other hand discussed the terms threadbare to come to a reasonable conclusion, which was certainly a possible view in the matter, thereby indicating that even as per the wider jurisdiction available to this Court under Section 34 of the Arbitration Act, prior to amendment in the year 2015, no ground was made out for interference in the said finding recorded by the tribunal. It was submitted that when the terms of the MoU were clear, there was no question of even looking at the oral evidence given by the witnesses of the rival parties. In this context, reliance was placed on English judgement in the case of *Von Hatzfeldt-Wildenburg Vs. Alexander*, **(1912) 1 Chancery Division 284**, to emphasize that the MoU was not a binding contract and that, further requirement of execution of the agreement to sell was not a mere formality in the facts and circumstances of the present case.

28. On the aspect of readiness and willingness, it was submitted that once the arbitral tribunal had taken a view in the matter, it amounted to a factual finding in which this Court cannot interfere under Section 34 of the Arbitration Act. It was submitted that as per law settled by the Supreme Court in this regard, the arbitral tribunal being the master of

the quantity and quality of evidence, there was no question of re-appreciating the same, as this Court is not sitting in appeal over the impugned award. Reliance was placed in this regard on judgements of the Supreme Court in the cases of *Olympus Superstructures Private Limited Vs. Meena Vijay Khetan*, **(1999) 5 SCC 651**, *Arosan Enterprises Limited Vs. Union of India*, **(1999) 9 SCC 449**, *Ravindra Kumar Gupta and Company Vs. Union of India*, **(2010) 1 SCC 409** and **Associate Builders Vs. DDA** (*supra*). On this basis, it was submitted that the present petition deserved to be dismissed.

29. Having heard the learned counsel for the rival parties, before considering the rival submissions on the aforesaid aspects of the matter, it would be appropriate to first appreciate the position of law clarifying the scope of jurisdiction of this Court under Section 34 of the Arbitration Act to interfere with the impugned arbitral award. It is significant to note that in the case of **Ssangyong Engineering and Construction Company Limited Vs. National Highway Authority of India** *(supra)*, in paragraph 19, the Supreme Court has declared that the amendment would apply only to applications filed under Section 34 of the Arbitration Act on or after 23.10.2015 i.e. the date on which the amendment was brought into force. It is undisputed that in the present case, the petition was filed prior to 23.10.2015, and that therefore, the regime of law clarified by the Supreme Court from its judgement in the case of **ONGC Limited Vs. Saw Pipes Limited** (*supra*) till the judgement in the case of **Associate Builders Vs. DDA** (*supra*) shall apply. Such jurisdiction is comparatively wider than the jurisdiction now available to the Court under Section 34 of the Arbitration Act, post its amendment. Being conscious of the said aspect of the matter, this Court shall now look at the scope available to interfere with the impugned award on both the aspects of the matter i.e. the question of rejection of

the amendment application of the petitioner by the tribunal and also on the merits of the findings rendered in the impugned award.

30. As regards rejection of the amendment application of the petitioner, much has been argued on behalf of the petitioner to indicate that such an amendment in the facts of the present case ought to have been allowed for a comprehensive assessment and decision on the claims made by the petitioner. Much emphasis was placed on the necessity of allowing the amendment to highlight the conduct of the parties so as to arrive at findings pertaining to the aspect of readiness and willingness on the part of the petitioner. If the petitioner is right in contending that such an amendment ought to have been allowed, it would follow that the impugned award would stand set aside only on the said count. Thus, this aspect assumes significance in the matter.

31. The arbitral tribunal in its order dated 06.09.2010 rejected the amendment application of the petitioner, observing that the application was based on the grievance that while certain documents pertaining to the "without prejudice" negotiations between the parties were taken on record and marked as Exhibit R9 (Colly), other documents were not taken on record. After appreciating the rival contentions, the tribunal in the said order found it appropriate to demark the documents at Exhibit R9 (Colly). As a consequence, none of the documents pertaining to the "without prejudice" negotiations between the parties remained on record. The amendment application stood rejected in this backdrop. This Court is of the opinion that considering the said approach adopted by the tribunal, the grievance raised on behalf of the petitioner by relying upon the English judgements in the cases of **Burnell Vs. British Transport Commission** *(supra)*, **Great Atlantic Insurance Co. Vs. Home Insurance Co. and others** *(supra)* and **Somatra Limited Vs. Sinclair Roche & Temperley** *(supra)*, is found to be misplaced. It is significant

to note that while the tribunal in the majority award, in paragraphs 50 and 51, did refer to the "with prejudice" offer made by the respondents on 06.08.2008, in the midst of the arbitral proceedings and also the fact that the negotiations between the parties continued for considerable time after the 15 days period of the "with prejudice" offer expired, no reference was made to any of the documents that were exchanged between the parties during the course of such negotiations.

32. Therefore, it cannot be said that the tribunal took into consideration the documents marked as Exhibit R9 (Colly), while ignoring the other documents, simply for the reason that by the order dated 06.09.2010, the documents at Exhibit R9 (Colly) stood demarked.

33. This Court finds substance in the contention raised on behalf of the respondents that since the "without prejudice" negotiations between the parties never fructified into an agreement, there was no question of the communications exchanged between the parties and the documents pertaining to the "without prejudice" negotiations being brought on record before the tribunal. Such negotiations clearly met with failure. It is to be noted that the petitioner has nowhere claimed that such negotiations indeed fructified into a new agreement or that there was novation in the present case. In such a situation, it cannot be said that the tribunal erred in rejecting the amendment application. There can be no quarrel with the proposition that the tribunal does have power to allow amendment under Section 23(3) of the Arbitration Act, as recognized by the Supreme Court in its judgement in the case of **State of Goa Vs. Praveen Enterprises** *(supra)*. Similarly, the general principles governing amendment under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (CPC) recognized by the Supreme Court in the case of **Rajesh Kumar Aggarwal Vs. K. K. Modi** *(supra)* cannot be disputed. But, since the "without prejudice" negotiations between the parties

admittedly did not fructify into an agreement, there was no question of the said documents being relevant to examining the aspect of readiness and willingness in the context of the MoU.

34. This Court is not in agreement with the respondents that rejection of an amendment application cannot be challenged in the present petition filed under Section 34 of the Arbitration Act. Reliance placed on the judgement of the Delhi High Court in the case of **Container Corporation of India Limited Vs. Texmaco Limited** (*supra*) and that of this Court in the case of **Punj Lloyd Limited Vs. ONGC** *(supra)*, is misplaced. A proper reading of the said judgements would show that the order rejecting the amendment application in itself may not be an interim award for being challenged by an independent petition under Section 34 of the Arbitration Act, but after the arbitral proceedings are disposed of and the final award is under challenge, grounds for challenging such rejection of an amendment application can certainly be raised in the petition filed under Section 34 of the Arbitration Act. In fact, in paragraph 27 of the judgement of this Court in the case of **Punj Lloyd Limited Vs. ONGC** *(supra)*, this Court has indeed made such observation.

35. This Court is also not in agreement with the contention raised on behalf of the petitioner that under Section 23(3) of the Arbitration Act, a party opposing the amendment application can oppose the same only on the ground of delay. This Court is in agreement with the judgement of the Calcutta High Court in the case of **Lindsay International Private Limited Vs. IFGL Refractories Limited** *(supra)*, wherein it is held that such a party can oppose the amendment on various grounds, including the ground of delay. It is significant that Section 23(3) uses the words ‘having regard to the delay in making it’ in contradistinction to the words ‘having regard only to’. Thus, the respondents were entitled to

oppose the application for amendment filed by the petitioner on all available grounds.

36. Even if the judgement of the Supreme Court in the case of **K. Sriramulu Vs. Aswatha Narayana** *(supra),* relied upon by the petitioner is to be taken into consideration, it does not necessarily come to the aid of the petitioner. In the said judgement also, while commenting upon the aspect as to whether a document could be construed as a binding contract or an agreement to enter into a future contract, it is specifically observed that such a question depends upon the intention of the parties and the special circumstances of each case.

37. As regards the subsequent order dated 20.08.2021, passed by the arbitral tribunal upon the matter being remitted on that score, a perusal of the same would show that in paragraph 21 of the said order, the tribunal did record its opinion that the documents sought to be brought on record were wholly irrelevant to the reliefs sought by the petitioner. No error can be attributed to the said approach adopted by the tribunal, in view of the observations made herein above. Nonetheless, there is some substance in the contention raised on behalf of the petitioner that the arbitral tribunal ought not to have made observations from paragraphs 1 to 20 in the said order dated 20.08.2021, with regard to the manner in which this Court (Coram: S.C. Gupte J.) exercised power under Section 34(4) of the Arbitration Act, while passing the order dated 11.03.2019. The arbitral tribunal was clearly not sitting in appeal over the aforesaid order dated 11.03.2019, passed by this Court. The arbitral tribunal was required to consider the amendment application upon the same being remitted by this Court. It would be appropriate to leave the said aspect of the matter, without any further comments.

38. This Court is also not impressed by the submissions made on

behalf of the petitioner that since this Court, by its order dated 11.03.2019 had set aside the order dated 06.09.2010, the documents at Exhibit R9 (Colly), which were demarked, had come back on record and that this aspect was ignored by the tribunal while passing the subsequent order dated 20.08.2021. Suffice it say that it was for the tribunal to consider whether the amendment was justified in the facts and circumstances of the present case. Since this Court has already expressed its opinion that the entire set of documents pertaining to the "without prejudice" negotiations between the parties were irrelevant as the negotiations never fructified into an agreement between the parties, nothing would turn on the order dated 06.09.2018, being set aside by this Court.

39. On the merits of the matter, the rival parties have made submissions on the question as to whether the MoU was a concluded and binding contract or it was only an agreement to enter into an agreement, as also on the aspect of readiness and willingness of the petitioner to perform its part of the contract, thereby justifying grant of an order of specific performance.

40. The terms of a document executed between the parties are to be interpreted on a plain reading of the same. If such a reading brings out the intention of the parties with sufficient clarity, there is no necessity of looking into any oral evidence that might have been led by the parties. It is only when there is ambiguity in the terms of such a document that oral evidence may be resorted to.

41. It is equally a settled position of law that if the arbitral tribunal considers the terms of such a document, in this case the MoU, and interprets the terms in a reasonable manner, to arrive at a possible view in the matter, no interference would be warranted under Section 34 of

the Arbitration Act. It is only if the tribunal arrives at a perverse view or a view, which cannot be said to be a possible view in the facts and circumstances of the case, that jurisdiction under Section 34 of the Arbitration Act could be exercised to interfere with the arbitral award.

42. In the case of **Rajasthan State Industrial Development and Investment Corporation Vs. Diamond & Gem Development Corporation Limited** *(supra)*, the Supreme Court held as follows:-

> "23. A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however is reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without giving any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely. (Vide: United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal and Polymat India P. Ltd. & Anr. v. National Insurance Co. Ltd.)."

43. In the case of **Dresser Rand S.S. Vs. Bindal Agro Chem Limited** *(supra)*, the Supreme Court held that the terms of the document in question will have to be interpreted to examine the intention of the party entering into a contract or agreeing to enter into a contract in the future.

44. In the case of **Food Corporation of India Vs. Abhijit Paul** *(supra)*, the Supreme Court held as follows:-

> "27. Interpretation of contracts concerns the discernment of the true and correct intention of the parties to it. Words and expressions used in the contract are principal tools to ascertain

> such intention. While interpreting the words, courts look at the expressions falling for interpretation in the context of other provisions of the contract and also in the context of the contract as a whole. These are intrinsic tools for interpreting a contract. As a principle of interpretation, courts do not resort to materials external to the contract for construing the intention of the parties. There are, however, certain exceptions to the rule excluding reference or reliance on external sources to interpret a contract. One such exception is in the case of a latent ambiguity, which cannot be resolved without reference to extrinsic evidence. Latent ambiguity exists when words in a contract appear to be free from ambiguity; however, when they are sought to be applied to a particular context or question, they are amenable to multiple outcomes. This position is well-explained in the following passage of Halsbury's:
>
> *"Latent ambiguity: When the instrument appears on its face to be free from ambiguity but, upon the endeavour being made to apply it to persons or things indicated, it appears that the words are equally applicable to two or more persons, or two or more things, either without any inaccuracy or with a common inaccuracy..."*

45. This Court is of the opinion that the terms of the MoU dated 31.08.2006, clearly bring out the intention of the parties. There is also no latent ambiguity in the document. Therefore, detailed reference to the oral evidence of the parties is rendered unnecessary. Yet, the tribunal in the present case, not only referred to the terms of the MoU, but also made references to the oral evidence, including answers given in cross-examination by the witnesses of the rival parties. Upon appreciating such material, the tribunal, in the majority award, came to the conclusion that the MoU could not be said to be a binding contract and that subsequent execution of the agreement to sell could not be said to be a mere formality. While reaching such conclusions, the tribunal made copious references to the terms of the MoU. It cannot be said that the view adopted by the majority award of the tribunal is not even a possible view in the facts and circumstances of the present case. In fact, the approach is found to be reasonable, particularly in the light of the fact

that the amount of Rs.2 Crores paid by the petitioner to the respondents was specifically recorded in the MoU as constituting only a security deposit and it would become part of the consideration only upon execution of the agreement to sell. This is a crucial term forming part of the MoU, which could not be ignored. Although the minority award takes a different view in the matter, at best, it demonstrates that two views were possible in the present case. In this situation, the law laid down by the Supreme Court in the case of **NHAI Vs. ITD Cementation India Limited** *(supra)* comes to the aid of the petitioner, wherein it is laid down that the Court under Section 34 of the Arbitration Act does not sit in appeal over the findings of the arbitral tribunal as to the manner in which a contract is to be construed, unless it is shown that no fair minded or reasonable person could have reached the conclusion rendered by the arbitral tribunal. The Supreme Court has also laid down in the case of **Associate Builders Vs. DDA** (*supra*) as follows:-

> "33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. …"

46. It would have been a different matter if the majority award of the tribunal had ignored vital terms of the MoU to reach its findings or that the view adopted in the majority award could not be said to be even a possible view in the facts of the case. This Court is unable to reach such a conclusion, and therefore, it cannot be said that the majority award committed an error in holding that the MoU was an agreement to enter into an agreement, specific performance of which could not be granted.

47. In the light of the findings given hereinabove, the aspect of readiness and willingness strictly would not be required to be gone into. But, since the learned senior counsel for the rival parties have made detailed submissions on the said aspect of the matter also, it would be appropriate to consider the same. It is the case of the petitioner that the findings rendered on readiness and willingness are erroneous, for the reason that ample oral and documentary evidence was on record to demonstrate that the petitioner was always ready and willing to perform its part of the obligations under the MoU and that the respondents could not have unilaterally communicated in January 2007 that the MoU stood terminated, while returning the amount of Rs.2 Crores.

48. Here again, the scope of jurisdiction available under Section 34 of the Arbitration Act assumes significance, for the reason that the finding on the aspect of the readiness and willingness is held to be a finding of fact. In the case of **Olympus Superstructures Private Limited Vs. Meena Vijay Khetan** *(supra)*, the Supreme Court held as follows:-

> "37. This point concerns the issues between the parties on the merits of the award relating to default, time being exercise, readiness and willingness etc. These are all issues of fact. If we examine Section 34(2) of the Act, the relevant provisions of which have already been extracted under Point 1 and 2, it will be seen that under sub-clause (b) of Section 34(2), interference is permissible by the Court only if -
>
> (i) the subject matter of the dispute is non capable of settlement by arbitration under the law for the time being in force, or
>
> (ii) the arbitral amount is in conflict with the public policy in India.
>
> The explanation to the provisions says that without prejudice to the generality of sub-clause (ii) of clause (b), it is declared for the avoidance of any doubt, that an award is to be treated as in conflict with the public policy of India if the making of the award was induced or affected by fraud, or corruption or was in violation of Sections 75 or 81. Section 75 deals with confidentiality while section 81 deals with admissibility of

> evidence in other proceedings. We do not have any such situation before us falling within Section 34(2)(b)(ii). The factual points raised in the case before us, to which we have referred to earlier, do not fall within Section 34(2)(b)(ii). Coming to Section 34(2)(b)(i) we have already held that the subject matter of the dispute is not incapable of settlement by arbitration under the law for the time being in force. Nor is any point raised that the arbitral award is in conflict with the public policy of India. We are, therefore, of the view that the merits of the award, on the facts of the case do not fall under Section 34(2)(b) of the Act. Point 4 is held accordingly against the appellant."

49. In the case of **Arosan Enterprises Limited Vs. Union of India** *(supra)*, the Supreme Court held as follows:-

> "39. In any event, the issues raised in the matter on merits relate to default, time being the essence, quantum of damages - these are all issues of fact, and the Arbitrators are within their jurisdiction to decide the issue as they deem it fit - the Courts have no right or authority to interdict an award on a factual issue and it is on this score the Appellate Court has gone totally wrong and thus exercised jurisdiction which it did not have. The exercise of jurisdiction is thus wholly unwarranted and the High Court has thus exceeded its jurisdiction warranting interference by this Court. As regards issues of fact as noticed above and the observations made herein above obtains support from a judgment of this Court in the case of Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan."

50. In the case of ***Ravindra Kumar Gupta and Company Vs. Union of India*** (*supra*), the Supreme Court held as follows:-

> "14. In this case, the Supreme Court notice the earlier judgment in the case of Ispat Engineering & Foundry Works vs. SAIL, wherein it was held as follows:
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> "4. Needless to record that there exists a long catena of cases through which the law seems to be rather well settled that the reappraisal of evidence by the court is not permissible. This Court in one of its latest decisions (Arosan Enterprises Ltd. v. Union of India) upon consideration of decisions in Champsey Bhara & Co. v. Jivraj Balloo Spg. & Wvg. Co. Ltd., Union of India v. Bungo Steel Furniture (P) Ltd., N. Chellappan v. Kerala SEB, Sudarshan Trading Co. v. Govt. of Kerala, State of

> Rajasthan v. Puri Construction Co. Ltd. as also in Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan has stated that reappraisal of evidence by the court is not permissible and as a matter of fact, exercise of power to reappraise the evidence is unknown to a proceeding under Section 30 of the Arbitration Act, 1940. This Court in *Arosan Enterprises* categorically stated that in the event of there being no reason in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, interference would still be not available unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. This Court went on to record that in the event, however, two views are possible on a question of law, the court would not be justified in interfering with the award of the arbitrator if the view taken recourse to is a possible view. The observations of Lord Dunedin in *Champsey Bhara* stand accepted and adopted by this Court in *Bungo Steel Furniture* to the effect that the court had no jurisdiction to investigate into the merits of the case or to examine the documentary and oral evidence in the record for the purposes of finding out whether or not the arbitrator has committed an error of law. The court as a matter of fact, cannot substitute its own evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties."

51. This Court has already quoted the relevant paragraph of the Supreme Court's judgement in the case of **Associate Builders Vs. DDA** (*supra*), which indicates that the arbitral tribunal is the ultimate master of the quantity and quality of evidence and that a possible view of the arbitral tribunal, must necessarily pass muster in a challenge raised under Section 34 of the Arbitration Act. This Court is not sitting in appeal over the findings rendered by the arbitral tribunal. This Court is of the opinion that the tribunal discussed each and every aspect of the matter, including the oral and documentary evidence on record, on the question of readiness and willingness, while rendering adverse findings against the petitioner. The findings rendered by the tribunal in that regard constitute a possible view in the matter, and therefore, no interference is warranted in the facts and circumstances of the present

case. Even if the *Wednesbury* test is to be applied, it does not come to the aid of the petitioner to successfully challenge the findings of the tribunal in that regard. Therefore, this Court finds that the petitioner has failed to make out a case in its favour for interfering with the impugned award and the present petition is found to be devoid of merit.

52. In view of the above, the petition is dismissed with no order as to costs. All pending applications stand disposed of in view of the dismissal of the petition.

(MANISH PITALE, J.)