



bdp

wpl-9105.21.doc

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION (STAMP) NO. 9105 OF 2021

Tirupati Shopping Centre Premises
Co-op. Society Limited,
a society registered under the provisions of the
Maharashtra Co-operative Societies Act, 1960
having its registered Office at C.T.S. Nos. 308
and 309, S. V. Road, Santacruz (West),
Mumbai – 400 054.

... Petitioner

Versus

Shabayesha Construction Company Private Limited
a Company incorporated under the provisions of the
Companies Act, 1956 and deemed to be incorporated
under the Companies Act, 2013 having its Registered
Office at A. N. House, 1st Floor, 31st Road, TPS III,
Bandra (West), Mumbai – 400 050.

... Respondent

Dr. Veerendra Tulzapurkar, Senior Advocate a/w Mr. Sanjay Kadam
and Mr. Rohan Kadam, i/by M/s. Kadam & Company, Advocates for
the Petitioner.

Mr. Sanjay Jain a/w Mr. Nishant Sasidharan, Mr. Darshan Mehta,
Ms. Shrushtri Dalal and Ms. Apeksha Sharma, Advocates for the
Respondent.

**CORAM : R. D. DHANUKA &
V. G. BISHT, JJ.**

RESERVED DATE : 12th APRIL, 2021

PRONOUNCED DATE : 22nd APRIL, 2021

JUDGMENT (Per R. D. Dhanuka, J.) :-

. By this Writ Petition filed under Articles 226 and 227 of the
Constitution of India, the petitioner has impugned the order dated 19th

January, 2021 passed by the learned Arbitrator dismissing the Application filed by the petitioner under Section 16 of the Arbitration and Conciliation Act, 1996 (for short 'the Arbitration Act') and holding that the Arbitral Tribunal has jurisdiction to entertain claims laid down by the respondent.

Some of the relevant facts for the purpose of deciding this Writ Petition are as under :-

2. Mr. Sanjay Jain, learned counsel for the respondent at the threshold raised a preliminary objection that this writ petition filed under Articles 226 and 227 of the Constitution of India impugning the order passed by the Arbitral Tribunal rejecting the application filed by the respondent in such arbitral proceedings raising a plea of jurisdiction raised by such respondent is not maintainable. The remedy, if any, of the petitioner (original respondent) would be to challenge the said order passed by the Arbitral Tribunal along with final award, if the petitioner is aggrieved by the final order under Section 34 of the Arbitration Act. Learned counsel invited our attention to various paragraphs of the judgment of the Hon'ble Supreme Court in case of ***Deep Industries Limited v/s. Oil and Natural Gas Corporation and Limited and Anr., (2020) 15 SCC 706.***

3. Dr. Veerendra Tulzapurkar, learned senior counsel for the petitioner, on the other hand, would contend that the writ petition filed by his client under Articles 226 and 227 of the Constitution of India is maintainable in view of the principles of law laid down by the Hon'ble Supreme Court in case of ***Deep Industries Limited*** (supra) and other subsequent judgments. In view of these rival submissions made by the learned counsel for the parties, we shall decide the issue of

maintainability of this writ petition impugning the order passed by the Arbitral Tribunal rejecting the application filed by the petitioner under Section 16 of the Arbitration Act and holding that the Arbitral Tribunal has jurisdiction to adjudicate upon the claims made by the respondent (original claimant).

4. It was the case of the petitioner society that the respondent had executed agreements for sale with the unit purchasers in the year 1995 and agreed to form a society within the timeline prescribed under Rule 8 of the Maharashtra Ownership Flats (Regulations of the Promotion of Construction, Sale Management and Transfer) Rules, 1964 (for short 'MOFA Rules'). The respondent had also covenanted that it would execute a conveyance of the property within four months of the registration of the society. It was the case of the petitioner that the respondent did not disclose any further construction that was proposed to be carried out on the said property at the time of entering into the agreements for sale with various unit purchasers, though, under Clause 6 of the agreement for sale, the respondent had expressly covenanted that the residential FSI from the property would be available only to the society after its registration.

5. It was the case of the petitioner that since the respondent failed to execute a Deed of Conveyance in favour of the petitioner society inspite of receiving full consideration from the flat purchasers even after expiry of eight years after execution of the Memorandum of Understanding (for short 'MOU'), in the year 2016, the petitioner filed an application bearing no. 59 of 2016 before the Competent Authority under Section 11 of the Maharashtra Ownership Flats Act, 1963 (for short 'MOFA') for a unilateral Deemed Conveyance. The said

application was resisted by the respondent. The said application was dismissed by the Competent Authority on 22nd February, 2017 on account of the fact that there was no occupation certificate issued in respect of the building. Liberty was however granted to the petitioner to file another application.

6. On 3rd March, 2018, the petitioner filed an application bearing no. 33 of 2018 for a unilateral Deemed Conveyance against the respondent before the Competent Authority under Section 11 of the MOFA. On 10th August, 2018, the Competent Authority passed an order allowing the said application filed by the petitioner. In the said order, the Competent Authority held that the respondent builder had made a claim in respect of two basements, open parking, unsold premises and balance FSI/TDR in the said building. However, as per various Courts citations, developer does not get any rights besides on the unsold flats and balance FSI/TDR after prescribed period of four months after registration of society. Therefore, claim made by the builder in respect of common spaces and TDR was false. The builder has rights in respect of unsold premises/shops only in the said building. The objections raised by the builder in this regard are not legal. The Competent Authority directed the concerned Sub-Registrar or any other appropriate Registration Officer under the Registration Act, 1908 to register *ex-parte* Deemed Conveyance Deed conveying right, title and interest of the developer in property described in Deemed Conveyance Certificate in the name of the society, after adjudication by Collector of Stamp.

7. It was ordered by the Competent Authority that the said Deemed Conveyance application filed by the society in respect of Survey No.

41, CTS No.308-309, S. V. Road, Santacruz (West), Mumbai-400 054 was allowed by granting *ex-parte* Deemed Conveyance. Pursuant to the said order dated 10th August, 2018, the Competent Authority and Deputy District Registrar, Co-operative Society-III, Mumbai issued a certificate under Section 11(4) of the MOFA and certified that this case was proper for *ex-parte* execution of Conveyance Deed of the right, title and interest of the promoters of the land of area 1718.2 sq. mtrs. of description TPS No. 4, Santacruz, CTS H/309, Division H Ward, City Survey Officer Bandra limit, Tal. Andheri, Mumbai Suburban District in the name of the petitioner society. The respondent did not challenge the said order passed by the Competent Authority dated 10th August, 2018 or the said Deemed Conveyance Certificate issued under Section 11(4) of the MOFA.

8. The dispute arose between the parties which was referred to Arbitration under the Arbitration clause forming part of the Agreement entered into between the parties. On 21st August, 2020, the petitioner filed a statement of claim before the Arbitral Tribunal against the petitioner *inter-alia* praying for various reliefs. The petitioner filed an application in the month of September 2020 in the said Statement of Claim before the Arbitral Tribunal under Section 16 of the Arbitration Act *inter-alia* praying for dismissal of the said claim for want of jurisdiction. The said application under Section 16 was opposed by the respondent. The Arbitral Tribunal passed the impugned order dated 19th January, 2021 rejecting the said application filed by the petitioner and holding that the Arbitral Tribunal has jurisdiction to entertain and adjudicate upon the claims made by the respondent.

9. Dr. Tulzapurkar, learned Senior Counsel for the petitioner

invited out attention to various provisions of the Agreement entered into between the parties, the correspondence exchanged between the parties, averments made in the statement of claim and in the pleadings filed by the parties in the application filed by his client under Section 16 of the Arbitration Act before the Arbitral Tribunal. It is submitted by the learned senior counsel that the petitioner had filed an application under Section 11 of the MOFA before the Competent Authority seeking an order for Deemed Conveyance in view of the respondent having failed to comply with its duties and obligations to execute a Deed of Conveyance in favour of the petitioner society within the time prescribed. The Competent Authority has already passed a quasi-judicial order granting Deemed Conveyance in favour of the petitioner. The Competent Authority has also issued a Deemed Conveyance Certificate in favour of the petitioner society. The said order passed by the Competent Authority under Section 11 was a quasi-judicial order which has attained finality. The respondent could not have claimed in the arbitral proceedings effectively seeking a reversal of the said quasi-judicial order granting Deemed Conveyance by reserving the FSI/TDR in respect of the plot which was subject matter of the said order of Deemed Conveyance in favour of the petitioner.

10. It is submitted that the Arbitral Tribunal can never examine the validity or nullity of a quasi-judicial order passed under a statute. Such claim for specific performance, if any, can only be maintained before the Courts and not before the Arbitral Forum. The Competent Authority has already decided the title in respect of the said property in favour of the petitioner. The said order passed by the said quasi-judicial authority would operate in rem and thus no such arbitral proceedings as filed by the respondent in respect of such title certificate

which operated in rem were at all maintainable before the Arbitral Tribunal. The Arbitral Tribunal has assumed jurisdiction on a perverse finding that the MOFA does not confer any adjudicatory function of the Competent Authority. Since, the Arbitral Tribunal has committed a fundamental and patent error in the impugned order, this writ petition filed by the petitioner under Article 226 read with Article 227 of the Constitution of India is thus maintainable. It is submitted that it was a case of lack of inherent jurisdiction of the Arbitral Tribunal in deciding a right in rem. This Court has thus ample power in such case to exercise powers under Article 226 or 227 of the Constitution of India.

11. It is submitted that the Arbitral Tribunal itself had no jurisdiction to entertain any such claim which would nullify the effect of the said quasi-judicial order which has already attained finality. Learned senior counsel placed reliance on the judgment of Supreme Court in case of **Booz Allen and Hamilton Inc. v/s. SBI Home Finance Limited and Ors., (2011) 5 SCC 532** in support of this submission. He invited our attention to paragraphs 15 to 24 of the judgment of the Hon'ble Supreme Court in case of **Deep Industries Limited** (supra) and would submit that since it was clear case of inherent lack of jurisdiction of the Arbitral Tribunal to entertain the claims made by the respondent which if awarded would nullify the effect of an order of Deemed Conveyance of the property passed in favour of the petitioner, this petition filed under Articles 226 and 227 of the Constitution of India is maintainable.

12. It is submitted by the learned senior counsel that the Hon'ble Supreme Court in the said judgment in case of **Deep Industries Limited** (supra) has distinguished its earlier judgment in case of **SBP and Company v/s. Patel Engineering Ltd. and Anr., (2005) 8 SCC**

618. He submits that the judgment of Hon'ble Supreme Court in case of ***Deep Industries Limited*** (supra) thus would apply to the facts of this case. Learned senior counsel also relied upon the judgment of Hon'ble Supreme Court in case of ***Vidya Drolia and Ors. v/s. Durga Trading Corporation, (2021) 2 SCC 1*** in support of the aforesaid submission.

13. Mr. Sanjay Jain, learned counsel for the respondent, on the other hand, invited our attention to various provisions of the MOU entered into between the petitioner and the respondent and various averments made in the statement of claim filed by his client before the Arbitral Tribunal. It is submitted by the learned counsel that the respondent has not challenged the impugned order passed by the Competent Authority under Section 11 of the MOFA before the Arbitral Tribunal. The respondent has prayed for declaration that the agreement dated 6th June, 2008 entered into between the parties is valid, subsisting and binding on the petitioner herein and has prayed for a specific performance of the said agreement. He invited our attention to the prayer clauses in the said statement of claim and would submit that his client has also prayed for a monetary reliefs in the sum of Rs.75,00,000/- in prayer clause (d), in the sum of Rs.529,99,25,925/- in prayer clause (e) which was in alternate and without prejudice to prayer clauses (b) to (d) and also has claimed an amount of Rs.584,36,19,879/- in prayer clause (f) which is in the alternate and without prejudice to the prayer clauses (b) to (d).

14. Learned counsel for the respondent also invited our attention to the statements made by the respondent herein before the Arbitral Tribunal and recorded in paragraphs 10.3 and 10.4 of the impugned order. The respondent had made it clear before the Arbitral Tribunal

that the prayers sought by the respondent herein was an action in personam and not in action in rem. The respondent has sought several obligations under the said MOU and the claim was adjudicable before the Arbitral Forum. The respondent had made it clear that the respondent was not in any manner seeking any relief to set aside or nullify the certificate issued under Section 11 of the MOFA, however it was open to the respondent to seek adjudication in respect of subordinate rights under the MOU which were denied by the petitioner. No prayers or reliefs sought by the respondent would in any manner affect the vesting of title in the petitioner. However, in view of the recognition of the rights and acceptance of the obligation and promises and counter promises incorporated in the MOU, respondent was entitled to have the same adjudicated before the Arbitral Tribunal.

15. The respondent had also prayed for damages in addition to or in alternate to the reliefs of specific performance. The Arbitral Tribunal has jurisdiction to entertain the claim and adjudicate in accordance with law.

16. Learned counsel for the respondent submits that the order passed by the Competent Authority under Section 11 of the MOFA does not adjudicate upon the title in respect of any property but such order is subject to the final adjudication of title by a Civil Court. He submits that all the proceedings which can be decided by a Civil Court can be also decided by the Arbitral Forum unless specifically barred for want of jurisdiction. Reliefs sought by the respondent in the statement of claim are not barred from adjudication by the Arbitral Tribunal. Though the order in respect of the title of a party in a property operates in rem, the other arrangements which are in the nature of subsidiary

rights can still be adjudicated upon by the Arbitral Forum.

17. Learned counsel invited our attention to various *prima-facie* findings rendered by the Arbitral Tribunal on the issue whether the order passed by the Competent Authority under Section 11 of the MOFA decides the title in respect of any property in favour of the society or not and is final in all respect or not. He relied upon the judgments referred before the Arbitral Tribunal in paragraphs 15 to 23 of the said order passed by the Arbitral Tribunal. He submits that the respondent has not challenged the order of Deemed Conveyance passed by the Competent Authority in the statement of claim. He relied upon various paragraphs of the judgment of Supreme Court in case of **Booz Allen and Hamilton Inc.** (supra) in support of argument that the Arbitral Tribunal has power to decide the subsidiary rights of a party.

18. Learned counsel for the respondent invited our attention to paragraphs 4, 5, 16 to 22, 45 and 46 of the judgment of the Hon'ble Supreme Court in case of **Deep Industries Limited** (supra) and would submit that the Hon'ble Supreme Court has not considered in the said judgment that a writ petition was maintainable under Articles 226 and 227 of the Constitution of India against an order passed by the Arbitral Tribunal rejecting an application under Section 16 of the Arbitration Act. He submits that in the said judgment the Hon'ble Supreme Court has considered the facts where application under Section 16 filed by the respondent in the arbitral proceedings was dismissed by the Arbitral Tribunal. The claimant had also filed an application under Section 17 of the Arbitration Act before the learned Arbitrator. The learned Arbitrator had stayed the operation of the order passed under Section 17 of the Arbitration Act.

19. The claimant had also applied for amendment to the statement of claim as well as the said application under Section 17 to challenge the order dated 15th February, 2018. The learned Arbitrator had allowed the said application for amendment by order dated 10th March, 2018. The said order dated 9th May, 2018 disposing of the application filed by the claimant under Section 17 was disposed of by the learned Arbitrator in which he had granted stay of the operation of the order dated 15th February, 2018 on the condition that two years ban/black listing would only operate, if the claimant ultimately loses any final arbitration proceedings as impugned before the City Civil Court, Ahmedabad. The City Civil Court disposed of the said appeal against the order passed by the learned Arbitrator under Section 17 of the Arbitration Act, upholding the order passed by the learned Arbitrator and dismissed the said appeal.

20. That order passed by the City Civil Court, Ahmedabad in the appeal under Section 37 was challenged before the Gujarat High Court by invoking Article 227 of the Constitution of India. The Gujarat High Court without deciding the jurisdictional issue allowed the said writ petition and set aside the order passed by the City Civil Court, Ahmedabad.

21. It is submitted by the learned counsel for the respondent that a seven Judge bench of the Hon'ble Supreme Court in case of **SBP and Company** (supra) has held that a party aggrieved by an order of Arbitral Tribunal under Section 16 of the Arbitration Act, unless has a right of appeal under Section 37 of the Act has to wait until the award is passed by the Arbitral Tribunal. The object of minimizing judicial intervention while the matter is arbitrated upon, will be defeated if the

High Court could be approached under Article 227 or under Article 226 of the Constitution of India against every order made by the Arbitral Tribunal. It is submitted that the facts before the Hon'ble Supreme Court in the said judgment in case of **Deep Industries Limited** (supra) were totally different and are clearly distinguishable.

22. Learned counsel for the respondent invited our attention to paragraph 228 of the judgment of Hon'ble Supreme Court in case of **Vidya Drolia and Ors.** (supra) and would submit that the Hon'ble Supreme Court in the said latest judgment has already held that the Arbitral Tribunal has been given jurisdiction to decide on the subject matter of arbitrability. They are required to identify specific public policy in order to determine the subject matter arbitrability. Merely, because a matter verges on a prohibited territory, should not by in itself stop the Arbitrator from deciding the matter. He should be careful in considering the question of non-arbitrability.

23. It is submitted that it was not the case of the petitioner that the prayer for specific performance in the statement of claim filed by the respondent cannot be granted by the Arbitral Tribunal. The Arbitral Tribunal has recorded finding that the reliefs claimed by the respondent are an action in personam and not right in rem. The reliefs seeking specific performance of the provisions of MOU are arbitrable. Such findings rendered by the Arbitral Tribunal being not perverse cannot be interfered by this Court. The petitioner has remedy available under Section 34 of the Arbitration Act by impugning the impugned order passed by the Arbitral Tribunal under Section 16 of the Arbitration Act along with final award, if the petitioner is aggrieved by such final award by filing a petition under Section 34 of the Arbitration Act.

24. The petitioner has been delaying the arbitral proceedings filed by the respondent on one or the other ground. The petitioner has now filed a statement of defence and has also filed a counter claim before the Arbitral Tribunal for damages under the said MOU without prejudice to the contentions raised in the application filed under Section 16 of the Arbitration Act. The pleadings are now already completed in the arbitral proceedings before the Arbitral Tribunal. The Trial is likely to start any moment.

25. Dr. Tulzapurkar, learned senior counsel for the petitioner in his rejoinder argument clarified that it was not the case of the petitioner that all the cases of specific performance are actions in rem. Since, the Competent Authority has already declared the petitioner as the owner and a title is conferred upon the petitioner by the said order passed under Section 11 of the MOFA, the proceedings filed by the respondent before the Arbitral Tribunal are an action in rem and thus issue of jurisdiction raised by the petitioner was rightly raised and ought to have been decided in favour of the petitioner. The respondent has challenged the said order of Deemed Conveyance directly or indirectly in the statement of claim.

26. Mr. Sanjay Jain, learned counsel for the respondent placed reliance on the order passed by the Supreme Court on 5th March, 2021 in Civil Appeal No. 1098-1099 of 2021 in Case of **Navayuga Engineering Company v/s. Bangalore Metro Rail Corporation Limited** and the order dated 18th September, 2020 in Special Leave to Appeal (C) No. 8482 of 2020 in case of **Punjab State Power Corporation Limited v/s. Emta Coal Limited and Anr.** and would submit that the case of the petitioner would not fall under the patent

lack of inherent jurisdiction of the Arbitral Tribunal. He submits that the Hon'ble Supreme Court in the said two orders have clearly held that the Court under Article 227 of the Constitution of India in a writ petition arising out an order passed by the Arbitral Tribunal can exercise powers only if the order passed is so perverse that the only possible conclusion is that there is a patent lack in inherent jurisdiction which requires no argument whatsoever. Perversity in the order must be such that must stare one in the face. The writ jurisdiction can be exercised only in case of exceptional rarity or cases which are stated to be patently lacking in inherent jurisdiction and not otherwise.

27. It is submitted that the petitioner has not made out any such case within such exception made by the Hon'ble Supreme Court even in case of ***Deep Industries Limited*** (supra), in case of ***Navayuga Engineering Company*** (supra) and in case of ***Punjab State Power Corporation Limited*** (supra).

REASONS AND CONCLUSION :-

28. It is not in dispute that the respondent had not executed the Deed of Conveyance in favour of the petitioner society under the provisions of MOFA. The petitioner society had filed an application under Section 11 of the MOFA before the Competent Authority. The Competent Authority has allowed the said application filed by the petitioner and directed that execution of Deed of Conveyance of the right, title and interest of promoters in the land in building under the name of the society through the Sub-Registrar or any other appropriate Registration Officer be executed *ex-parte*. It is held by the Competent Authority that agreement had been executed between the members of the petitioner society and the respondent in respect of the sale of

premises and building constructed as per building plan on land of area 1718.2 sq. mtrs. as described in the said agreement. The said Competent Authority has already issued a certificate of Deemed Conveyance in favour of the petitioner.

29. The respondent has not impugned the said order of Deemed Conveyance in favour of the petitioner passed by the Competent Authority. The respondent filed statement of claim *inter-alia* praying for specific performance of the MOU dated 6th June, 2008 entered into between the parties and for various monetary claims. The respondent had made it clear before the Arbitral Tribunal that the claim made by the respondent was entirely based on the said MOU dated 6th June, 2008, which was a contract between the petitioner and the respondent. The said MOU provided for certain promises, reciprocal premises, obligations and counter obligations relating to the immovable property for which the certificate under Section 11 of the MOFA was issued. The respondent did not dispute that the petitioner was neither entitled to the Conveyance of the land described in the agreement entered into under Section 4 of the MOFA with the members of the petitioner nor that the Competent Authority under Section 11 had jurisdiction to issue the certificate for grant of Deemed Conveyance under Section 11 of the MOFA.

30. It was the case of the respondent that the said agreement further recommenced and admits the rights of the respondent herein to further develop the property and confers additional rights. Those Acts in the MOU are to be verified only after completion of the development of the building of the petitioner. It was the case of the respondent that under the said MOU, further rights were conferred upon the respondent

herein independent of the agreement under Section 4 of the MOFA entered into by the respondent with the flat purchasers. The Arbitral Tribunal also recorded the statement made by the respondent that the respondent was not in any manner seeking any relief to set aside or to nullify the certificate issued under Section 11.

31. In our view, in view of such statement made in the statement of claim and in view of the statements made by the respondent clarifying the reliefs sought by the respondent before the Arbitral Tribunal that the respondent was not seeking any reliefs which would nullify the order of Deemed Conveyance granted in favour of the petitioner society passed by the Competent Authority, the Arbitral Tribunal was right in rejecting the said application filed by the petitioner under Section 16 of the Arbitration Act. The apprehension of the petitioner that respondent had filed arbitration proceedings to nullify the order passed by the Competent Authority is baseless and imaginary.

32. Dr. Tulzapurkar, learned senior counsel for the petitioner fairly admitted that it was not the case of the petitioner society that such order of Deemed Conveyance passed by the Competent Authority under Section 11 of the MOFA could not be adjudicated upon by a Civil Court. He however urged before this Court vehemently that the Arbitral Tribunal cannot go into the validity of such order of Deemed Conveyance under Section 11 in respect of the title of the property in favour of the petitioner.

33. In our view, the Arbitral Tribunal has jurisdiction to decide all the claims which can be decided by a Civil Court unless the same is specifically barred either expressly or by necessary implication. The Hon'ble Supreme Court in case of **Booz Allen and Hamilton Inc.**

(supra) has held that the Arbitral Tribunals are private forum chosen voluntarily to adjudicate their dispute in place of Courts and Tribunals which are public fora constituted under the Laws of the Country. However, Civil or Commercial dispute whether contractual or non-contractual which can be decided by a Court, are in principle capable of being adjudicated and resolved by Arbitral Tribunal unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public forum as a matter of public policy. Certain other categories of cases, either not expressly reserved for adjudication by public forum (Courts and Tribunals), may by necessary implication have been executed from the purview of private forum.

34. The Hon'ble Supreme Court in the said judgment also held that a right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Action in personam referred to actions determining the rights and interest of the parties themselves in the subject matter of the case, whereas actions in rem referred to actions determining the title to property and the rights of the parties, not merely among themselves but also against persons of any time claiming an interest in that property. In paragraph 38 of the said judgment, the Hon'ble Supreme Court clarified that disputes relating to subordinate rights in personam arising from rights in rem always have been considered to be arbitrable.

35. In the MOU entered into between the parties, the respondent claims various rights of development on the said property after

completion of the construction of the building for the petitioner. All these rights claimed by the respondent in the statement of claim are subordinate rights in personam arising from rights claimed by the petitioner in the said property. These principles laid down in the judgment of the Hon'ble Supreme Court in case of **Booz Allen and Hamilton Inc.** (supra) squarely apply to the facts of this case. The claims made by the respondent in the statement of claim are relating to subordinate rights in personam under the said MOU and thus are arbitrable. No case is made out by the petitioner in this case to show that the reliefs sought by the respondent in the statement of claim could be exclusively tried only by a Civil Court and not by the Arbitral Tribunal and are barred from being tried by the Arbitral Tribunal by any express or necessary implication.

36. Supreme Court in case of **Vidya Drolia and Ors.** (supra) has held that as per the mandate of sub-Section 5 of Section 16 of the Arbitration Act when objection to the jurisdiction under sub-Sections 2 and 3 are rejected, the Arbitral Tribunal can continue with the proceedings and make the arbitration award. A party aggrieved is at liberty to file application for setting aside such arbitral award under Section 34 of the Arbitration Act after completion of proceedings. It is held that the Arbitration and Conciliation Act, 1996 does not in specific terms, exclude any category of dispute – Civil or Commercial – from Arbitrability.

37. It is held that under Section 16 of the Arbitration Act, the Arbitral Tribunal is empowered to rule on its own jurisdiction, including ruling on any objections with respect to the existing or validity of the Arbitration Agreement. It is held that the arbitrators,

like Courts, are legally bound to resolve the disputes in accordance with public policy of the law.

38. Hon'ble Supreme Court in case of ***Deep Industries Limited*** (supra) has dealt with an appeal arising out of the order passed by the High Court in a Writ Petition under Article 227 of the Constitution of India. The appellant before the Hon'ble Supreme Court had filed a claim petition before the learned Arbitrator challenging the termination of the contract/show-cause notice and also claiming damages. During the pendency of the said arbitral proceedings, the appellant was blacklisted by the ONGC for a period of two years. The appellant had filed an application under Section 17 before the learned Arbitrator. The appellant had also filed an application to amend the arbitration claim. The said application for amendment was allowed by the learned Arbitrator.

39. The respondent in the meanwhile filed an application under Section 16 before the learned Arbitrator on the ground that the arbitration notice was confined only to termination of the agreement and blacklisting outside the arbitrator's ken. The said application under Section 16 was dismissed by the learned Arbitrator holding that the notice was not merely confined to termination of contract but was also in respect of two years ban/blacklisting that was sought to be imposed at that time. The learned Arbitrator by a separate order disposed of the application filed by the appellant under Section 17 thereby staying the operation of the order dated 15th February, 2018 thereby black listing the appellant by the ONGC. An appeal was filed before the City Civil Court, Ahmedabad under Section 37 of the Arbitration Act. The City Civil Court passed an order in the said

appeal under Section 37 in the Arbitration Act dismissing the said appeal.

40. The aggrieved party filed an application under Article 227 of the Constitution of India before the High Court of Gujarat impugning the order passed by the City Civil Court, Ahmedabad. The High Court of Gujarat referred to the two preliminary contentions raised on behalf of the petitioner that the petition under Article 227 of the Constitution of India should be dismissed at a threshold as it did not raise any jurisdictional issue. The High Court however without answering the said question then went on to state that the ban order had in fact been passed under a General Contract Manual mainly and not under the provisions of the agreement and as a result of which serious disputes arose as to the jurisdiction of the arbitrator to deal with the same.

41. The Gujarat High Court also held that on reading of a notice for arbitration that the notice did not raise the issue of the ban for two years and was confined only to illegal termination. The Gujarat High Court held that no stay could be possibly granted under Section 17 of the ban order as an injunction cannot be granted in the cases where the party can be compensated later in damages. The Gujarat High Court accordingly allowed the said writ petition and was pleased to set aside the order passed by the City Civil Court, Ahmedabad.

42. The said order passed by the Gujarat High Court was challenged before the Hon'ble Supreme Court in the said judgment in case of **Deep Industries Limited** (supra). In paragraph 17 of the said judgment, the Hon'ble Supreme Court held that there is no doubt whatsoever that if petitions were to be filed under Articles 226 and 227 of the Constitution of India against the orders passed in appeals under Section

37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, the Court cannot forget that Article 227 is a constitutional provision which remains untouched by the non-obstante clause of Section 5 of the Arbitration Act. In these circumstances, what is important to note is that the petitions can be filed under Article 227 against the judgment allowing or dismissing the first appeals under Section 37 of the Arbitration Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account, the statutory policy as adumbrated by the Hon'ble Supreme Court in the said judgment so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction.

43. In paragraph 19 of the said judgment, the Hon'ble Supreme Court referred to the judgment of the Constitutional Bench in case of **SBP and Company** (supra) holding that under Section 34, the aggrieved party has an avenue for ventilating its grievances against the award including any in between orders that might have been passed by the Arbitral Tribunal acting under Section 16 of the Act. The party aggrieved by any order of the Arbitral Tribunal unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Arbitral Tribunal. This appears to be scheme of the Act. The Hon'ble Supreme Court in the said judgment in case of **SBP and Company** (supra) also held that the object of minimising judicial intervention while the matter is in process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 or under Article 226 of the Constitution of India against every order made by the Arbitral Tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the Arbitral

Tribunal, parties have to wait until the award is pronounced, unless, ofcourse, a right of appeal is available to them under Section 37 of the Act even at a particular stage.

44. In paragraph 20 of the said judgment, the Hon'ble Supreme Court however held that the statement of law in the said judgment in case of **SBP and Company** (supra) does not directly apply on the facts of the case in hand before the Hon'ble Supreme Court in the said judgment. The Hon'ble Supreme Court also distinguished the judgment of **Punjab Agro Industries Corporation Limited v/s. Kewal Singh Dhillon, (2008) 10 SCC 128** on the ground that in the case in hand in case of **Deep Industries Limited** (supra), the jurisdiction had been exercised by the High Court only after the first appeal provided under Section 37 of the Arbitration Act was dismissed.

45. In paragraph 22 of the said judgment, the Hon'ble Supreme Court held that the drill of Section 16 of the Arbitration Act is that where a Section 16 application is dismissed, no appeal is provided and the challenge under Section 16 application being dismissed must await the passing of a final award at which stage it may be raised under Section 34. It is held that for that reason alone, the judgment of the Gujarat High Court under appeal needs to be set aside. It is held that even otherwise, entering into the general thicket of the disputes between the parties does not behove a Court exercising jurisdiction under Article 227, where only jurisdictional errors can be corrected. It is held that the Arbitral Tribunal was well within its jurisdiction in referring to the contract and the ban order and than applying the law and finally issuing the stay order. The High Court judgment thus could not be sustained and came to be set aside.

46. In paragraph 23 of the said judgment, the Hon'ble Supreme Court held that what becomes clear is that had the High Court itself disposed of the first appeal in that case, no petition under Article 227 could possibly lie and all that could perhaps have been done was to file an LPA before a Division Bench of the same High Court. The Hon'ble Supreme Court allowed the said Civil Appeal by setting aside the order passed by the High Court exercising writ jurisdiction under Article 227 of the Constitution of India. In our view, the said judgment of the Hon'ble Supreme Court is clearly distinguishable in the facts of this case. In this case petitioner has challenged the order passed by the Arbitral Tribunal rejecting an application under Section 16 of the Act.

47. Be that as it may, in paragraph 22 of the said judgment, the Hon'ble Supreme Court has held that the drift of Section 16 of the Act is that where a Section 16 application is dismissed, no appeal is provided and the challenge to the Section 16 application being dismissed must await the passing of the final award at which stage it may be raised under Section 34. In our view, the said judgment of the Hon'ble Supreme Court holding that the party whose application under Section 16 of the Arbitration Act is rejected must await the passing of a final award at which stage it may be raised under Section 34 would assist the case of the respondent and not the petitioner.

48. The Hon'ble Supreme Court in the order dated 5th March, 2021 in case of *Navayuga Engineering Company* (supra) had considered the facts where arbitral award was already made in favour of the appellant allowing some of the claims. The Arbitration petitions filed under Section 34 of the opponent was pending before the City Civil and Session's Judge, Bengaluru. The execution of the said award was

stayed on certain conditions. Both the parties filed writ petition against the said order staying execution of award on certain conditions. The writ petition filed by the appellant was dismissed whereas the writ petition filed by the respondent was allowed in which the deposit of 50% of the amount was ordered. The said order was impugned before the Hon'ble Supreme Court in that matter.

49. The Hon'ble Supreme Court in paragraph 4 of the said order observed that despite the Supreme Court repeatedly referring to Section 5 of the Arbitration Act in particular and the Arbitration Act in general and despite the Supreme Court having laid down in case of **Deep Industries Limited** (supra) that the High Court under Articles 226 and 227 should be extremely circumspect in interference with orders passed under Arbitration Act, such interfering being only in cases of exceptional, rarity or cases which are stated to be patently lacking in inherent jurisdiction, the Supreme Court found that High Courts are interfering with deposit orders that have been made. That was not a case of exceptional rarity or any patent lack in inherent jurisdiction. The Hon'ble Supreme Court accordingly set aside the order passed by the High Court exercising writ jurisdiction in such a situation.

50. The Hon'ble Supreme Court in an order dated 18th September, 2020, in case of **Punjab State Power Corporation Limited** (supra) considered a situation where the order passed by the Arbitral Tribunal was challenged only after 2½ years by filing writ petition after the arguments had concluded before the Arbitral Tribunal. The writ petition filed under Article 227 was dismissed by the High Court directly against a Section 16 application. After adverting to the judgment in case of **Deep Industries Limited** (supra), the Hon'ble

Supreme Court held that a foray to the Writ Court from a Section 16 application being dismissed by the arbitrator can only be if the order passed was so perverse that the only possible conclusion is that there is a patent lack of inherent jurisdiction requires no arguments whatsoever it must be the perversity of the order that must stare one in the face. The Hon'ble Supreme Court observed that unfortunately parties are using this expression in the judgment in case of **Deep Industries Limited** (supra), to go to the Writ Court under Article 227 in matter which did not suffer from a patent lack of inherent jurisdiction. This is one of them.

51. It is held by the Hon'ble Supreme Court that instead of dismissing the writ petition on the ground stated, the High Court could have done well to have referred to the judgment in case of **Deep Industries Limited** (supra) and to dismiss the petition under Article 227 on the ground that there was no such perversity in the order which need to be a patent lack of inherent jurisdiction. High Court ought to have discouraged similar litigation by imposing heavy cost. The High Court did not choose to do either of these two things. The Hon'ble Supreme Court dismissed the said Spl. Leave Petition with costs of Rs.50,000/- to be paid to the Supreme Court Legal Service Committee.

52. In this back drop, we shall decide whether the petitioner has made out a case of patent lack of inherent jurisdiction which requires no arguments whatsoever and demonstrates the perversity in the order which stare on in the face and whether this case would fall in cases of exceptional rarity or not. The Arbitral Tribunal in this case has recorded a finding that the dispute between the parties arising out of MOU dated 6th June, 2008 is an action in personam alone and not an

action in rem. The Arbitral Tribunal has also considered large number of judgments of this Court in paragraph 15 of the impugned order holding that mere issuance of certificate does not bar the aggrieved party to adopt such legal appropriate proceedings to establish its claim under the contract.

53. This Court in case of **Zainul Abedin Yusufali Massawala and Ors. v/s. Competent Authority** and in case of **Shree Chitanmani Builders v/s. State of Maharashtra**, in case of **Tushar Jivram Chauhan v/s. State of Maharashtra, (2015) 4 Mh.L.J.** and in case of **Mazda Construction Company v/s. Sultanabad Darshan CHS Ltd., 2012 SCC OnLine Bom 1266** has held that jurisdiction of the Civil Court is not barred, despite a document of Deemed Conveyance is placed on record and relied upon before the Civil Court dealing with the right, title and interest of the petitioner in the larger property by independently applying its mind and on a total appraisal of the oral and documentary evidence before it.

54. In our view, the Arbitral Tribunal has rightly held that parties are neither stopped nor there is bar under the provisions of law to establish its right, title or interest, independent of such Deemed Conveyance Certificate. Such certificate will have no bar in the matter where the right, title and interest of any party is adjudicated before a forum which is conferred with such jurisdiction to adjudicate and deal with after perusing the oral and documentary evidence and decide the dispute between the parties. Such adjudication is clearly independent of the Act performed under Section 11 of the MOFA. The aforesaid judgments relied upon by the Arbitral Tribunal on this issue applies to the facts of this case.

55. In our view, the proceedings under Section 11 of the MOFA are filed in view of the default committed by the promoter to execute a Deed of Conveyance in favour of the society by complying with its application under the provisions of the MOFA by executing a Deed of Conveyance. The Competent Authority is thus empowered to pass an order of Deemed Conveyance *ex-parte*. Such order passed by the Competent Authority does not create title in respect of such property conclusively in favour of the society. Such an order of Deemed Conveyance is subject to the final adjudication of title in the appropriate Civil proceedings either before the Civil Court or by Arbitral Tribunal in case of their being an Arbitration Agreement between the parties. There is no such provision under MOFA that the order passed by the Competent Authority under Section 11 of the MOFA is final in all respect including on the issue of title in the property and bars the Civil Court or the Arbitral Tribunal from deciding the issue of title independently.

56. In our view, there was thus no question of any inherent lack of jurisdiction of the Arbitral Tribunal in considering a claim for specific performance of the MOU and various monetary claims including claim for damages which was for enforcement of subordinate rights in the nature of an action in personam. The Arbitral Tribunal has jurisdiction thus to entertain, try and adjudicate upon such claims arising out of not in action in rem. In our view, such claims as made by the respondent could be adjudicated upon only by the Arbitral Tribunal in view of there being an Arbitration Agreement and not barred expressly or by necessary implication. There was thus no question of inherent lack of jurisdiction in the Arbitral Tribunal to decide those claims.

57. The petitioner has also not made out a case under an exception carved out by the Hon'ble Supreme Court in case of **Navayuga Engineering Company** (supra) for interfering with the orders passed under the Arbitration Act by a Writ Court under Articles 226 and 227 i.e. interference being only in cases of exceptional rarity. In our view, this was a clear case of exclusive jurisdiction of the Arbitral Tribunal to decide such claims as made by the respondent and thus the impugned order passed by the Arbitral Tribunal cannot be impugned in a writ petition under Articles 226 and 227 of the Constitution of India.

58. The Hon'ble Supreme Court in the said order in case of **Punjab State Power Corporation Limited** (supra) has noticed the misuse of the said expression 'patent lack of inherent jurisdiction' expressed by the Hon'ble Supreme Court in case of **Deep Industries Limited** (supra) by the parties invoking writ jurisdiction under Article 227 in the matters where there is no lack of inherent jurisdiction and has strongly observed that though there was no patent lack of inherent jurisdiction, the High Court who ought to have dismissed the writ petition on such ground, the High Court dismissed the writ petition directly against order under Section 16 without following the drill of Section 16 of the Arbitration Act. The Hon'ble Supreme Court has set aside the judgment of the Punjab and Harayana High Court with cost quantified at Rs.50,000/-. In our view, the writ petition filed by the petitioner under Articles 226 and 227 of the Constitution of India in the facts of this case is a gross abuse of process of law and has been filed with a view to delay the outcome of the arbitral proceedings which have to be disposed of expeditiously. The writ petition thus deserves to be dismissed with exemplary cost.

59. We accordingly pass the following order :-

- (a) Writ Petition is dismissed with cost quantified at Rs.50,000/-, which shall be paid by the petitioner to Maharashtra Legal Service Authority within two weeks from today without fail and shall produce an original receipt for perusal of Associate of this Court within one week from the date of such payment.

(V.G. BISHT, J.)

(R.D. DHANUKA, J.)