(2015) 6 AD 66

Delhi High Court

Case No: OMP Nos. 164, 166, 167 & 168 of 2013

Ridgeview Construction Pvt. Ltd. and Others		APPELLANT
	Vs	
Skyhigh Properties Pvt. Ltd.		RESPONDENT

Date of Decision: April 20, 2015

Acts Referred:
Arbitration Act, 1940 - Section 30, 33#Arbitration and Conciliation Act, 1996 - Section 11, 11(6), 34#Civil Procedure Code, 1908 (CPC) - Order 6 Rule 17#Limitation Act, 1963 - Section 22#Specific Relief Act, 1963 - Section 10, 20

Citation: (2015) 6 AD 66

Hon'ble Judges: Rajiv Shakdher, J

Bench: Single Bench

Advocate: Anil Sapra, Senior Advocate, Akshay Sapra, Rupali Kapoor, Sridul Yadav and Bhavtesh Aggarwal, for the Appellant; J.P. Sengh, Sr. Adv., Somesh Arora, Sumeet Batra and Zohaib, Advocates for the Respondent

Final Decision: Dismissed

Judgement

Rajiv Shakdher, J.
These are petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the

1996 Act) to assail a common award dated 19.11.2012. This award jointly deals with claims filed by four separate companies, the details of which

I would provide hereafter. The reason, the learned Arbitrator, appears to have passed a common award, is on account of the fact that pleadings

and the submissions made by both parties were identical, save and except with respect to few details, such as, payments made and the area on the

fifth floor of the concerned building (which I will be referring to as the Southern Park building), to be allocated to the respondent.

1.1. Before I deal with the grounds of challenge, raised by the petitioners herein, let me set out the broad contours of the facts obtaining in the

present case.

FACTS

2. The respondent herein, i.e., the Skyhigh Properties Pvt. Ltd., had pursuant to a duly approved scheme of amalgamation, got four companies

merged with it. These being: (i) Wales Properties Pvt. Ltd., (ii) Koshika Properties Pvt. Ltd., (iii) Pushp Vihar Properties Pvt. Ltd., and (iv)

Southlake Properties Pvt. Ltd. For the purposes of brevity the said companies will be referred to as, Wales, Koshika, Pushp and Southlake.

2.1. Prior to the merger of the aforementioned four companies, certain events occurred, which led to eruption of disputes between the parties.

2.2. The petitioner no. 1 herein (i.e., the original respondent), in an auction conducted by the Delhi Development Authority (DDA), on

29.09.2003, acquired rights to a commercial plot bearing no. D-2 situate in Saket place, Saket New Delhi. This plot admeasured 2500 sq.

metres, for which petitioner no. 1 paid a premium of Rs. 43.41 crores.

2.3. As per DDA''s bid form dated 29.09.2003, petitioner no. 1 was entitled to construct a building right up to the fifth floor, with two basements.

The total permissible FAR available to petitioner no. 1, as indicated in the bid form, was 14467.15 sq. metres.

2.4. In view of the above, a registered perpetual lease dated 01.07.2004 was executed in favour of petitioner no. 1 by the President of India, via

the DDA.

2.5. As per the terms of the perpetual lease deed, petitioner no. 1 was required to erect a building after obtaining due approvals, within a period of

two years, from 21.06.2004. This building was referred to as Southern Park.

2.6. Petitioner no. 1 did obtain the sanction of its building plans and commenced construction. The total gross area, i.e., the super area of the

building referred to as Southern Park, is spread out as follows on various floors :

(i). Ground floor: 2870 sq. ft; (ii). first floor: 33058 sq. ft; (iii). Second floor: 33063 ft: (iv). Third floor: 33063 sq. ft; (v). Fourth floor: 33063 ft;

and (vi). Fifth floor: 33063 sq. ft. The total gross area thus available was 1,94,017.16 sq. ft.

2.7. It appears that in terms of the perpetual lease deed dated 01.07.2004, while petitioner no. 1 is not entitled to sell, transfer, assign or otherwise

part with the possession of full or any part of the commercial plot, except with the previous consent in writing of the lessor, i.e., the DDA, and that

too on terms stipulated therein, which includes payment of 50% of unearned increase, it had permission to sell or transfer floors space in the

commercial building constructed thereon.

2.8. It is in this background that the four companies referred to herein, i.e., Southlake, Pushp Vihar, Koshika and Wales, decided to execute a

Joint Purchase Agreement (JPA) amongst themselves on 09.02.2005 to purchase the entire fifth floor in Southern Park building, having, as

indicated above, a total gross area of 33063.16 sq. ft., along with 17.041% of the proportionate, undivided, indivisible and impartible share in the

land underneath.

2.9. It was because the construction of Southern Park building was underway that under the JPA it was agreed that Southlake would book rights

in the fifth floor of the said building, and upon completion of construction each of the aforementioned four companies would identify the exact

portion, which they would wish to purchase and get allocated to themselves.

3. Accordingly, on 16.02.2005, Southlake, acting on behalf of itself and the other three companies, i.e., Pushp Vihar, Koshika and Wales, booked

the fifth floor in the Southern Lake building, for a consideration of Rs. 16,81,86,300/-. The said floor was booked by Southlake, based on several

representations and assurances given by petitioner no. 1, including the representation, which is referred to as clause O(vi) in the agreement to sell

dated 16.04.2007, which though, came to be executed subsequently.

3.1. As would be evident from a perusal of clause O(vi), extracted in paragraph 8.2 hereafter, it was incumbent upon petitioner no. 1 to obtain

freehold rights in the commercial plot by applying and getting the necessary approval for conversion from DDA. This conversion, though, was

required to be obtained by petitioner no. 1 on or before 31.10.2005 or, within two months from the date it obtained a completion certificate qua

the Southern Park building. The predecessor-in-interest of the respondent though, was required to bear and pay its share of conversion charges on

a pro rata basis. Petitioner no. 1 was, however, responsible for payment of conversion charges qua all other buyers/ owners/ occupants of other

portions of Southern Park building, in the event other buyers/ owners/ occupants failed to pay their pro rata share of the conversion charge. In

other words, petitioner no. 1 was required to bridge the gap and have the commercial plot converted into a freehold property.

3.2. Continuing with the narrative, pursuant to the JPA, a Bifurcation Agreement (BA) dated 06.03.2006 was executed, amongst, Southlake,

Pushp Vihar, Koshika and Wales. By this agreement, Southlake was allocated: 17403.66 sq. ft; Push Vihar was allocated: 9235.96 sq. ft;

Koshika was allocated 4780.07 sq. ft. and Wales was allocated 1643.49 sq. ft. In addition, each of the four companies were also allocated seven

(7) reserved, exclusive car parking spaces in a contiguous block on the first, and second level basement of the Southern Park building.

3.3. It is in this background that four agreement to sell of even date dated 16.04.2007, were executed between petitioner no. 1 and each of the

four companies referred to above, Southlake, Pushp Vihar, Koshika and Wales. The agreements are identical. The record would show, each of

the parties have paid 90% of their share of the total consideration allocated to them, and also their respective pro rata share of conversion charges.

3.4. All told, out of the total consideration of Rs. 16,81,86,300/-, a sum of Rs. 15,48,97,040/- has been paid to petitioner no. 1. What remains to

be paid is a sum of Rs. 1,37,24,278/-. This, according to the respondent, is to be paid at the time of execution of the sale deed.

3.5. The break-up of the area allocated to the aforementioned four companies, the amount paid by them out of the total consideration, the amount

payable at the time of execution of the sale deed, and lastly, the pro rata amount paid towards conversion, towards their share of the property,

from leasehold to freehold, is set out in the table below:

3.6. The record would show that conversion charges were paid by the four companies referred to in the table above, vide four cheques of even

date, i.e., 15.05.2007, which were handed over to petitioner no. 1 along with covering letters of even date, i.e., 25.05.2007. Admittedly, these

cheques were accepted and encashed by petitioner no. 1.

3.7. It appears that because petitioner no. 1 failed to take steps in getting the subject property converted to freehold, and have a sale deed

executed qua the same, the predecessor-in-interest of the respondent, were compelled to serve a legal notice dated 23.12.2010 upon petitioner

no. 1.

3.8. By virtue of the said legal notice, the arbitration mechanism was triggered by the predecessor-in-interest of the respondent, and in line with the

same, they proposed the appointment of Sh. S.M. Chopra, former ADJ, as the arbitrator. This notice was responded to, by petitioner no. 1 vide

letter dated 11.01.2011. Apart from denying the assertions made in the legal notice, petitioner no. 1 also indicated its disagreement with the

proposal made to appoint Sh. S.M. Chopra, as the arbitrator in the matter. The net result was that upon an application being moved by the

predecessor-in- interest of the respondent, under Section 11 of the Act, this court vide order dated 05.01.2012, appointed Hon''ble Mr. Justice

S.N. Kapoor, a former Judge of this court, as the arbitrator in the matter.

3.9. Before the learned arbitrator, each of the four companies, referred to above, i.e., Southlake, Pushp Vihar, Koshika and Wales, filed their

statement of claims. These claims were registered separately. The reference numbers allocated by the learned arbitrator, are as follows: (i). Wales:

Case Ref. No. DAC/114/02-12; (ii). Koshika: Case Ref. No. DAC/115/02-12; (iii). Pushp Vihar: Case Ref. No. DAC/116/02-12; and (iv).

Southlake: Case Ref. No. DAC/117/02-12.

4. It appears that an application for amendment of the statement of claims was moved by the predecessor-in-interest of the respondent to bring on

record the fact that upon amalgamation, as indicated above, the said four companies merged in the respondent herein, i.e., Skyhigh Properties Pvt.

Ltd.

4.1. It is because of this reason that the claimant, which is the respondent herein, in each of the four cases, in the cause title of the award, is shown

as Skyhigh Properties Pvt. Ltd.

SUBMISSIONS OF COUNSELS

5. In the background of the aforesaid facts, arguments have been advanced by the petitioners by Mr. Anil Sapra, senior advocate, while those on

behalf of the respondent, have been advanced by Mr. J.P. Sengh, senior advocate.

6. Mr. Sapra, broadly, made the following submissions on behalf of the petitioner.

(i) That the respondent had sought to place reliance on clause O(vi) of the agreement to sell dated 16.04.2007, which in effect forms part of the

JPA, which is dated 16.02.2005. The JPA stood superseded by the agreement to sell dated 16.04.2007, and therefore, no relief could be claimed

on the basis of clause O(vi). The relevant clause in the agreement to sell dated 16.04.2007, was clause CC(v); the respondent, however, had not

sought to enforce the same and seek relief in terms thereof.

(ii) Assuming without admitting, that petitioner is allowed to seek enforcement in terms of clause CC(v), no relief could have been granted by the

learned arbitrator, as the respondent"s action was barred by limitation. Clause CC(v) required petitioner no. 1 to have the subject property

converted from lease hold to freehold within a period of three months from the date of execution of the agreement to sell. The period of three

months having expired on 15.07.2007, the period of limitation commenced from that date and expired in consonance with the provisions of Article

54 of the Limitation Act, 1963 (in short Limitation Act) in July, 2010. To drive home the point, reference was made to the fact that notice for

appointment of arbitrator was served on 23.12.2010, followed by a petition for appointment of arbitrator, which was instituted in this court, only,

in March, 2011. It was submitted that both the notice as well as the petition filed under Section 11 were issued and instituted respectively beyond

the period of limitation.

(iii) The term in the agreement to sell dated 16.04.2007, which placed the obligation for conversion of the subject property from leasehold to

freehold on petitioner no. 1, was inserted in the background of the then policy prevailing in the DDA, whereby conversion could, if at all, take

place of the entire building and not on a piece-meal basis. With the change in policy, which allowed flats and spaces in a building to be converted

separately, the clause in issue had lost its significance. The said clause, accordingly, had to be read in consonance with the existing policy of the

DDA.

(iv) Having regard to the changed policy, the arbitrator failed to take into account the fact that the conversion of the subject property, from

leasehold to freehold, could not be achieved, on account of the breach committed by the respondent by failing to pay its proportionate share of

ground rent.

(v) The learned arbitrator committed an error of law by extending the principle pertaining to time not being the essence of the contract to the

provisions of the Limitation Act, in particular, Article 54. The law in this regard is well-settled that while time may not be of the essence of contract

qua issues pertaining to specific performance, vis-A -vis a sale transaction, the same would have no bearing whatsoever in matters pertaining to

ascertainment of limitation for filing a suit for enforcing a right. A party cannot contend that since time was not of the essence, and therefore, the

period fixed in the contract for performance was thus, liable to be extended, and thus, by logical corollary the limitation as provided for the said

purpose, would also get extended.

(vi) The learned arbitrator committed an error while interpreting Section 22 of the Limitation Act in holding that failure to get the subject property

converted resulted in a continuing injury, and thus, supplied a continuous cause of action to the respondent. It was contended that the breach was

completed in July, 2007, and therefore, the cause of action in favour of the respondent arose on that date, which was also the date on which

limitation for filing the action commenced in the matter. The learned arbitrator''s conclusion to the contrary constitutes an error in law.

(vii) The learned arbitrator''s observations to the effect that one had to look at the ""practical aspect of the matter"" as to whether the three month

provided in the agreement to sell dated 16.04.2007 for the purposed of conversion was a realistic time frame, resulted in the learned arbitrator

travelling beyond the terms of the contract. It is well settled that the arbitrator is a creature of the contract. The arbitrator is, therefore, bound by

the terms of the contract. The arbitrator could not have travelled beyond the terms of the contract.

(viii) The arbitrator committed an error in relying upon clause 30 and 28(b) of the agreement to sell, to hold that the time provided for conversion

was not fixed but was tentative and variable. Thus, the finding of the learned arbitrator that, time was not of the essence was erroneous in law and

fact.

(ix) No interest could have been awarded to the respondent, much less at the rate of 12% per annum, since the delay for conversion is not

attributable to petitioner no. 1, but to the respondent and other occupants. While, the respondent, failed to pay its proportionate share of ground

rent, other occupants failed to pay both, the ground rent and the proportionate share of conversion charges.

6.1. In support of his submissions, reliance was placed by Mr. Sapra on the following judgements: T.L. Muddukrishanan and another Vs. Smt.

Lalitha Ramchandra Rao, AIR 1997 SC 772 : (1997) 1 Crimes 160 : (1997) 1 JT 540 : (1997) 1 SCALE 321 : (1997) 2 SCC 611 : (1997) 1

SCR 11 : (1997) AIRSCW 593 : (1997) 1 Supreme 483 ; Babaji Charan Sahu and Others Vs. Rajendra Narayan Dash and Others, AIR 2004

Ori 160 : (2004) 98 CLT 526 : (2004) 2 OLR 134 ; K. Kallaiah Vs. Ningegowda, AIR 1982 Kar 93 : (1981) ILR (Kar) 819 : (1981) 2 KarLJ

11 and K.S. Vidyanadam and Others Vs. Vairavan, AIR 1997 SC 1751 : (1997) 1 CTC 628 : (1997) 2 JT 375 : (1997) 1 SCALE 739 : (1997)

3 SCC 1 : (1997) AIRSCW 956 : (1997) 2 Supreme 597 .

7. On the other hand, Mr. Sengh, who appeared for the respondent made submissions which can be, broadly, paraphrased as follows:

(i) The respondent had called upon the petitioners to comply with the terms and conditions of the agreement to sell. A formal request in that behalf

was made vide legal notice dated 23.12.2010. The petitioners in their reply dated 11.01.2011, continued to take the position that it was ready and

willing to have the subject property converted to freehold. In the reply, the petitioner did not take the position that respondent''s claim was barred

by limitation, or that, it was required to pay proportionate share of ground rent. This position was taken only in the reply filed in this court qua the

petition filed under Section 11(6) of the Act by the respondent.

(ii) As a matter of fact, in the Section 11 proceedings, the petitioner had conveyed to the court that it had applied for conversion of the subject

property, albeit for the first time, on 08.12.2011.

(iii) A perusal of clause 30 of the agreement to sell would show that the limitation for execution of the lease deed has not even begun to run and,

therefore, the petitioners'' stand that the claim is barred by limitation, is clearly untenable.

(iv) The petitioners'' submission that the respondent is in breach of its obligations under the agreement to sell, as it has not paid the ground rent, is

unsustainable. A perusal of the terms and conditions of the agreement to sell and the perpetual lease deed dated 01.07.2004 would show that the

liability to pay the ground rent till such time a conveyance deed is executed, is that of petitioner no. 1. For this purpose, reliance was placed on

clause 16(g) of the agreement to sell. It was stated that up till 19.10.2010 the ground rent/ yearly rent payable was Rs. 5, and thereafter, it was

payable at the rate of 2.5% of the premium. No ground rent/ yearly rent is payable once the plot is converted into freehold. Petitioner no. 1 was

obliged to get the subject property converted into freehold prior to October, 2008. Having failed to do so, they could not foist the liability qua the

same on the respondent.

(v) Petitioner no. 1 failed to deposit the conversion charges paid by the respondent, and hence, was liable to pay interest as claimed by it.

REASONS

8. I have heard the learned counsels for the parties. The record shows that the agreement to sell contains two clauses, i.e., clause O(vi) and clause

CC(v). Both clauses, in effect, cast an obligation on petitioner no. 1 to get the subject property converted from leasehold to freehold. The only

obligation cast in this behalf on the respondent is that it should have paid its proportionate share of the conversion charges.

8.1. The argument advanced on behalf of the petitioners that clause O(vi) referred to the JPA, and, therefore, the reference to the same in the

statement of claim(s) filed by the respondent for enforcement of its rights, was erroneous, is in my view, a submission which in effect misses the

wood from the trees. In sum, the respondent seeks the execution of a conveyance deed in its favour in respect of the subject property. It cannot be

denied that the pre-requisite for occurrence of such an eventuality is the conversion of the subject property from leasehold to freehold.

8.2. The agreement to sell refers to both to clause O(vi) and CC(v). Clause O(vi) is referred in the first part of the agreement to sell, which sets

out, the background in which the agreement to sell qua the aforementioned four companies, i.e., Wales, Koshika, Pushp Vihar and Southlake,

came to be executed. The latter part of the agreement to sell refers to clause CC(v), which as indicated above, in substance, cast the very same

obligation on petitioner no. 1. This would be evident upon a bare perusal of the two clauses. The same are extracted hereinbelow for the sake of

convenience:

Clause O(vi)

.....(vi) As per the present guidelines of DDA, it is permissible to have leasehold rights in the said Commercial Plot converted into Freehold and

that there is no impediment or bar in this regard and the FRST PARTY shall have its leasehold rights in the said Commercial Plot converted into

Freehold on or before 31st day of October, 2004 or within 2 (two) months from the date of obtaining completion certificate of the said

Commercial Building (viz. "sOUTHERN PARK") provided that SOUTH LAKE bears the conversion charges on pro-rata basis in respect of the

said Property. The FIRST PARTY shall be responsible for ensuring that the conversion charges are paid on pro-rata basis by all the other buyers/

owners/ occupants of all the portions of the said Commercial Building (viz. "sOUTHERN PARK") other than the said Property and in case of

non-payment of pro-rata conversion charges by any of such other buyers/ owners/ occupants, the FIRST PARTY shall itself pay the same without

any delay and ensure that its leasehold rights in the said Commercial Plot are converted into Freehold on or before 31st day of October, 2005 or

within 2 (two) months from the date of obtaining completion certificate of the said Commercial Building (viz. "sOUTHERN PARK")....

Clause CC(v)

.....As per the present guidelines of the DDA, it is permissible to have leasehold rights in the said Commercial Plot converted into Freehold and

that there is no impediment or bar in this regard and the FIRST PARTY shall have its leasehold rights in the said Commercial Plot converted into

Freehold within 3 (three) months from the date of this agreement provided that the SECOND PARTY bears the conversion charges on pro- rata

basis in respect of the PREMISES. The FIRST PARTY shall be responsible for ensuring that the conversion charges are paid on pro-rata basis by

all the ther buyers/ owners/ occupants of all the portions of the said Commercial Building (viz. ''sOUTHERN PARK'') other than the PREMISES

and in case of non-payment of pro-rata conversion charges by any of such other buyers/ owners/ occupants, the FIRST PARTY shall itself pay

the same without any delay and ensure that its leasehold rights in the said Commercial Plot are converted into within 3 (three) months from the date

of this Agreement...

8.3. Therefore, the argument of Mr. Sapra that the statement of claims, instituted by the respondent, would lose their efficacy on account of

reference to clause O(vi), is untenable, if the pleadings filed before the arbitrator are read holistically. The learned arbitrator, in my view, has quite

correctly stated that this is a hyper-technical objection taken by the petitioners.

9. The other argument advanced on behalf of the petitioners that the claims are barred by limitation is, in my view, also untenable. This submission

is advanced based on the provisions of Article 54 of the Limitation Act. The said article is extracted hereinbelow:

9.1. A perusal of article 54 would show that the prescribed period of limitation for instituting an action is three years. The period of three years is

to commence either on the expiry of the date fixed for performance, or if no such date is fixed, when the plaintiff (in this case the respondent)

would have received a notice that performance is refused. It is the admitted case of parties before me that performance was never refused by the

petitioners.

9.2. As a matter of fact, in the reply dated 11.01.2011, the petitioners'' continued to hold that they were ready and willing to fulfil their part of

obligations. The petitioners'' conduct also demonstrated the same, in view of their stand, taken before the court, in Section 11 proceedings, on

08.12.2012, that they had applied for conversion of the subject property.

9.3. The question, therefore, is: Was the period of three months provided for conversion of the subject property from freehold to leasehold, to be

construed as the date fixed for ""'performance"" as contemplated under Article 54 of the Limitation Act. In my view, as correctly argued on behalf of

the respondent, the performance sought, was that, petitioner no. 1 should execute the ""sale deed"" in respect of the subject property in its favour, or

in favour of its nominees. The period of three months provided in clause CC (v) for conversion of the subject property from lease hold to freehold

was not the period for ""'performance"" as contemplated under Article 54 of the Limitation Act.

9.4. As a precursor to the performance, as envisaged in Article 54, petitioner no. 1 was required to obtain conversion of the said subject property.

The period of three months, which was fixed both in clause O(vi) and CC(v) was for conversion and not for execution of the sale deed. The

limitation of three months for execution of the sale deed would commence only after petitioner no. 1 had obtained conversion of the subject

property. This is clear on a bare perusal of the expression which provides for unconditional commitment by petitioner no. 1 that it would execute

and register the sale deed within three months of the agreement to sell ""and after"" its conversion. As is undisputed, conversion of the subject

property had to precede execution of sale deed. Therefore, period for ""'performance"" which was execution of sale deed, could commence only

thereafter. Quite obviously, the respondent expected expedition, and therefore, the provision of three months in both clause CC(v) and 30 of the

agreement to sell. The intent being that immediately on conversion, the sale deed would be executed. Having said so, the obligation of conversion

cast on petitioner no. 1 under clause CC(v) was not the ""'performance"" as envisaged under Article 54 though, it was a step-in aid of the said

performance. A careful perusal of clause 30 of the agreement to sell makes this aspect quite clear. The emphasis in this behalf is on the words ""and

after"" in the underlined portion of clause 30. For the sake of convenience the said clause is extracted below:

....30. The parties to this Agreement understand that this is an agreement for the purchase of constructed floor space i.e., the PREMISES and that

the FIRST PARTY hereby makes the unconditional commitment in all events to execute and register the sale deed in respect of the PREMISES as

provided for hereinabove in favour of the SECOND PARTY or its nominee(s) within 3 (Three) months from the date of this Agreement and after

getting the leasehold rights in respect of the said Commercial Plot converted into freehold and also on payment of conversion charges by the

SECOND PARTY on pro-rata basis in respect of the PREMISES....

(emphasis is mine)

10. Therefore, as correctly argued on behalf of the respondent, time for performance, under Article 54 of the Limitation Act, would start running

only after petitioner no. 1 had obtained conversion of the subject property into freehold. The word ""performance"" in Article 54 has to be read and

understood keeping the provisions obtaining in the agreement to sell in mind. An action for specific performance seeks, via the intervention of the

court, fulfilment of obligations entered into between the parties. In an agreement to sell, there would be several intermittent obligations which would

lead up to a fundamental obligation, which, in this case, is the execution of a ""sale deed"". The intention being to seek, conferment of legal title to the

immovable property. Looked at from this angle, time for the purpose of limitation would commence under Article 54 only after conversion is

obtained by petitioner no. 1.

11. It is in this sense, that the learned arbitrator has stated that time was not of the essence. In other words, that the time fixed for conversion had

attached to it several variables, including the delay which could occur at the end of DDA, even if the petitioners had taken all relevant steps within

the period of three months provided for in clause CC(v) of the agreement to sell.

12. The other submission of Mr. Sapra, that the respondent was in breach of its obligation under the agreement to sell, and therefore, no specific

performance could have been accorded by the arbitrator, in view of its failure to pay the ground rent, is in my opinion, also unsustainable. The

learned arbitrator has, in my view, correctly interpreted the provisions of clause 13, 16(g) and CC(v) of the agreement to sell and the provisions of

the perpetual lease deed 1.07.2004 (and also taken into account, conduct of the parties), to come to the conclusion that the obligation to pay the

ground rent was that of petitioner no. 1 and not that of the respondent. The observations of the learned arbitrator are contained in internal pages 19

to 28 of the award. The sum and substance of the arbitrator''s findings in this behalf is as follows:

(i) Clause 16(g) of the agreement to sell provides that the liability to pay ""yearly"" rent in terms of the perpetual lease deed dated 01.07.2004, till its

conversion to freehold, was that of petitioner no. 1.

(ii) The expression ""yearly rent"", has the same meaning as ""ground rent"". Counsel for the petitioners, as noted by the learned arbitrator, was not

able to demonstrate any distinction between the two expressions.

(iii) The conduct of the petitioners, as demonstrated by the reply dated 11.01.2011, would show that while they professed that they were ready

and willing to get the subject property converted from leasehold to freehold, the only impediment was, the non-payment of proportionate

conversion charges by other owners/ occupants.

(iv) Any other interpretation would render clause 16(g) otiose.

12.1. It is in this background, the learned arbitrator concluded as follows, vis-A -vis the issue as to who was to pay the ground rent:

..... Taking into consideration over all facts and circumstances it is apparent that Clause CC(v) read with sub- clause (g) of Clause 16 reproduced

hereinabove shall govern the obligations of the parties, in regard, to payment of ground rents. Accordingly, the fact that the occupiers/ owners had

not paid conversion charges is immaterial, in view of unequivocal undertaking given by the Respondent....

13. Before I conclude I may only refer to the judgments cited by Mr. Sapra. In T.L. Muddukrishana''s case, the dicta laid down by the Supreme

Court is no different from what has been discussed by me, hereinabove. The court came to the conclusion that the limitation under Article 54

would commence from the date fixed for performance or if no such date is fixed, from the date, the person instituting the action has notice of

refusal. In that particular case, the court returned a finding of fact that the date for performance for executing the sale deed was fixed. This is clear

on reading the following observations :-

..The requirement of Article 54 is not that the actual day should necessarily be ascertained upon the face of the deed, but that the basis of the

calculation which was to make it certain should be found therein. We accordingly hold that under the agreement the date for the defendant to

execute the sale deed was fixed, although not by mention a certain date but by a reference to the happening of a certain event, namely, the

redemption of the mortgage; and, immediately after the redemption by the plaintiff, the defendant became liable to execute the sale deed which the

plaintiff was entitled to enforce..

13.1. It is in this context that the court dismissed the appeal which arose out of an order passed under Order VI Rule 17 of the Code of Civil

Procedure, 1908 (in short CPC) whereby, a suit for mandatory injunction was sought to be amended to one, seeking specific performance of the

contract.

13.2. The judgments of the Orissa High Court and Karnataka High Court in the case of Babaji Charan Sahu and K. Kalllaiah laid down no

different proposition.

13.3. The fourth judgement, which is once again a judgment of the Supreme Court passed in the case of K.S. Vidyanadam, brings out the facet

that, in a contract relating to an immovable property though, time may not be of the essence ordinarily, the time limits stipulated in the contract for

doing one thing or the other need to be given some meaning. These observations were made in the context of the provisions under the Specific

Relief Act, 1963 (see Section 10 and 20), which confer discretion on the court to refuse specific performance. In other words, the court felt that

even where in a suit for specific performance of an agreement, which does not provide specifically that time is of the essence of the contract, the

courts should not proceed to decree the suit straightaway. Delay and latches on the part of the plaintiff in approaching the court would be a factor

which the court would examine when, exercising its discretion.

13.4. The last case cited by Mr. Sapra was the judgment in the case of Rajasthan State Mines and Minerals Ltd. In this case, the appeal arose out

of an order passed by a single Judge of the High Court of Rajasthan, confirming the District Judge''s order in a petition filed under Section 30 and

33 of the Arbitration Act, 1940. The High Court had sustained the decree passed in terms of the award. The Supreme Court accepted the

contention of the appellant before it, that the, arbitrator had travelled outside the terms contained in the contract which in no uncertain terms

provided for, firm and fixed rates, irrespective of variation in the cost of works covered under the contract. This case was cited by Mr. Sapra to

emphasise his submission that the arbitrator had travelled beyond the terms of the contract. In my view, on the contrary, the learned arbitrator in

the instant case has remained well within the bounds of the agreement.

14. Having regard to the above, in my view, the learned arbitrator has, also, correctly found that the petitioners are responsible for the delay in

obtaining conversion of the subject property from leasehold to freehold. Therefore, quite correctly, the learned arbitrator has granted interest to the

respondent, on amounts paid towards conversion charges, which have been utilized by the petitioners, without getting the subject property

converted.

15. Accordingly, the reliefs granted in the award, in my opinion, do not require any interference.

16. Resultantly, the petitions being without merit, are dismissed.