

**IN THE HIGH COURT OF MADHYA PRADESH : BENCH
INDORE**

**BEFORE HON'BLE SHRI JUSTICE VIVEK RUSIA
&**

HON'BLE SHRI JUSTICE ANIL VERMA

ARBITRATION APPEAL No. 33 of 2020

BETWEEN:-

**APOLLO REAL ESTATE LLP THR. SHASHIBHUSHAN PARTNER 451,
APOLLO TOWER, 2 MG ROAD, INDORE (M.P.) (MADHYA PRADESH)**

.....APPLICANT

**(SHRI RAMAKRISHNAN VIRARAGHAVAN, LEARNED SENIOR
ADVOCATE WITH SHRI NITIN PHADKE ADVOCATE FOR THE
PETITIONER.)**

AND

- 1. DR. ARUN WAGHMARE S/O LATE SHRI RAMCHANDRA
WAGHMARE 36, VASUDEV NAGAR INDORE (MADHYA PRADESH)
PRAKASH WAGHMARE S/O LATE SHRI RAMCHANDRA**
- 2. WAGHMARE B-504, PRIME AVENUE, SWAMI VIVEKANAND ROAD,
VILE PARLE, MUMBAI (MAHARASHTRA)**
- 3. VIJAY WAGHMARE S/O LATE SHRI RAMCHANDRA WAGHMARE
69, NARAYAN BAGH (MADHYA PRADESH)**
- 4. ARVIND PATANKAR 12/4, YUG PRABHAT HOUSING SOCIWETY,
SEETA DEVI TAPAL ROAD, MAHIM, MUMBAI (MAHARASHTRA)
RAJEEV S/O ARVIND PATANKAR 12/4, YUG PRABHAT HOUSING**
- 5. SOCIWETY, SEETA DEVI TAPAL ROAD, MAHIM, MUMBAI
(MAHARASHTRA)
SULAKSHANA VAIDHYA W/O AJIT VAIDHYA 12/4, YUG PRABHAT**
- 6. HOUSING SOCIWETY, SEETA DEVI TAPAL ROAD, MAHIM,
MUMBAI (MAHARASHTRA)
ANIRUDDHA S/O LATE SHRI RAVINDRA WAGHMARE 156, AB**
- 7. ROAD, NEAR PRESS COMPLEX, CHOTI KHAJRANI, INDORE
(MADHYA PRADESH)**
- 8. ADITI W/O PRATIK YADAV 156, AB ROAD, NEAR PRESS
COMPLEX, CHOTI KHAJRANI, INDORE (UAE)**
- 9. M/S SACHIN LEASING AND DEVELOPERS PVT. LTD. THROUGH
ITS DIRECTOR SACHIN SHARMA 63-64, VISHNUPURI MAIN**

COLONY, INDORE (MADHYA PRADESH)

.....RESPONDENTS

*(SHRI ANIKET ABHAY NAIK AND SHRI PRADYUMNA S. KIBE,
LEARNED COUNSEL FOR THE RESPONDENT NOS.1 TO 3)
(SHRI SHEKHAR BHARGAVA SENIOR ADVOCATE WITH SHRI, AMIT
SINGH, ADVOCATE FOR RESPONDENTS NO. 4 TO 6.)
(SHRI ROHINTON T.THANEVALA, LEARNED COUNSEL FOR THE
RESPONDENT NO.7.)*

ARBITRATION APPEAL No. 34 of 2020

BETWEEN:-

**APOLLO REAL ESTATE LLP THR. SHASHIBHUSHAN KHANDELWAL
PARTNER 451 APOLLO TOWER, 2 MG ROAD, INDORE (MADHYA
PRADESH)**

.....APPLICANT

*(SHRI RAMAKRISHNAN VIRARAGHAVAN, LEARNED SENIOR
ADVOCATE WITH SHRI NITIN PHADKE ADVOCATE FOR THE
PETITIONER.)*

AND

**ANIRUDDHA WAGHMARE S/O LATE SHRI RAVINDRA WAGHMARE
156, AB ROAD, NEAR PRESS COMPLEX, CHHOTI KHAJRANI
INDORE (MADHYA PRADESH)**

.....RESPONDENTS

*(SHRI ROHINTON T.THANEVALA, LEARNED COUNSEL FOR THE
RESPONDENT.)*

**Reserved on : 13.07.2023.
Pronounced on : 13.09.2023.**

*This arbitration appeal having been heard and reserved for
judgment, coming on for pronouncement this day, Hon'ble **SHRI
JUSTICE VIVEK RUSIA** pronounced the following :*

ORDER

As the controversy involved in both these Arbitration Appeals is
identical, therefore, same are being disposed of by this common order.

For the sake of convenience, facts narrated in A.A. No.33/2020 (Apollo Real Estate LLP V/s. Dr. Arun Kumar Waghmare & others) are being taken into consideration.

1- The appellant has filed this appeal u/s.37 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as “the Act of 1996” for short) read with Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 challenging the validity of the order dated 9.10.2020 passed by the Commercial Court-VIIIth Additional District Judge, Indore in MJC (AV) No.87/2018 whereby award dated 15.4.2018 and additional award dated 12.6.2018 passed by the sole Arbitrator (Hon'ble Justice N.K. Jain) have been set aside.

2- The facts which led to the filing of these appeals started after the date of passing of the judgment and decree dated 5.4.1982 in Civil Suit No.4-A/1982 [Vijay Waghmare Versus. Late Ramchandra Waghmare & others]. Late Ramchandra Waghmare was the owner of land bearing Survey Nos. 360, 382 and 382/437 situated at Village Khajrani, Indore. Late Ramchandra Waghmare and late Smt. Usha Waghmare had four sons and a daughter viz. (i) Dr. Arun Waghmare, (ii) Prakash Waghmare, (iii) Vijay Waghmare, (iv) Ravindra Waghmare and daughter (v) Sunita Patankar. Vijay Waghmare filed the suit for declaration and partition of the aforesaid suit land against his father, brothers and sister. Defendants Nos. 1 to 4 viz. Ramchandra Waghmare, Dr. Arun Waghmare, Prakash Waghmare and Sunita Patankar admitted the claim of the plaintiff. Defendant No.5 – Ravindra Waghmare objected to it by submitting that there was a family partition conducted by Shri B.S. Jagirdar and apart from the suit land, land bearing Survey Nos. 512 and 523 were also the self-

acquired property of Late Ramchandra Waghmare. Late on Ravindra Waghmare however, agreed to the declaration of 1/6th share of each party. Learned Addl. District Judge decided Issue No.1 by holding that the land bearing Survey Nos. 512 and 523 are the property of a Joint Hindu family. By deciding the Issue No.2, learned Addl. District Judge held that the plaintiff and defendants have 1/6th – 1/6th share in the suit land. In view of the aforesaid findings, vide Judgment & Decree dated 05/04/1982 was passed in the suit, the operative part is as under :

“9. In view of my findings on the above issues, the plaintiff's suit is decreed as follows:-

1) It is declared that between the plaintiff and defendants Khasra Plot No. 360, 382, 382/437 measuring 2.72 acres village Khajarani, Indore has been partitioned on 16.3.72 and the share allotted to the plaintiff is 16020 Sq.ft. Defendant No.1's share is 15487 Sq.ft., defdt. No.2's share is 14700 sq.ft., defendant 3's share is 14700 sq.ft., defdt. 4's share is 15174 sq.ft. and defdt. No.5's share is 14700 sq.ft. as has been shown in the Map which shall form part of the decree.

2) It is further declared that the land left over for family charity and as shown in the annexed map is the joint family property of the plaintiff and defendant No. 1, 2, 4 and 5 and no one shall be entitled to transfer this portion of land.

3) It is further declared that as per the family partition the defendant . No.1 alone shall have the right to transfer the piece of land left for family charity.

4) It is further declared that as per the family partition neither of the party shall have the right to transfer his portion of land to any outsider except with the consent of the rest of the parties.

5) The plaintiff and defendants shall be entitled to get their names mutated in revenue records for their respective share.

6) In the circumstances of the case parties shall bear their own costs.”

3- As per the decree of the partition, the share in the land bearing Survey No. 367, 382 & 382/437 of the plaintiff and the defendants measured in square feet has been described in the map made part of the decree. A piece of land of the above survey numbers consisting of a Well, Temple and Garden was left in the centre for family charity as shown in the map which is non-transferable by anyone except Late Ramchandra Waghmare. The most controversial condition of the Judgment and decree is that **none of the party shall be entitled to transfer his portion of the property shall have the right to transfer his portion of land to any outsider except with the consent of the rest of the parties.** After the aforesaid partition, the names of the plaintiff and defendants were mutated in the revenue record. After the aforesaid decree, Ramchandra Waghmare expired on 01.04.1994 intestate and in his place name of his wife – Usha Waghmare was mutated in the revenue record.

4- Dr. Arun Waghmare, Prakash Waghmare, Vijay Waghmare, Smt. Usha Waghmare and Smt. Sunita Patankar (sellers/ first party) entered into an agreement to sell with the present appellant for the sale of their share in the suit land per the judgment and decree dated 5.4.1982 passed in Civil Suit No. 4-A/82. They agreed to sale the land by specifically leaving the share (14,700 Sq.ft.) of late Ravindra Waghmare out of a total 2.72 Acres as under :

“(1) यहकि, ग्राम-खजरानी, तहसील व जिला इन्दौर स्थित सर्वे क्रमांक 382/437 रकबा 0.20 एकड़, सर्वे क्रमांक 382, रकबा 2.46 एकड़ एवं सर्वे गगग0216मांक 367, रकबा 0.06 एकड़, इस प्रकार कुल 2.72 एकड़ भूमि, पूर्व में विक्रेतापक्ष क्रमांक 1 के पिता स्व. श्री रामचन्द्र गोविन्द वाघमारे, भूमि स्वामि स्वत्व एवं आधिपत्य की स्थित रही है। सदर भूमि उक्त स्व. श्री रामचन्द्र गोविन्द वाघमारे ने अपने जीवनकाल में रजिस्टर्ड विक्रय पत्र के द्वारा खरी की हुई थी तथा समस्त शासकीय रिकार्डों में उन्ही के नाम पर दर्ज थी। श्री रामचन्द्र वाघमारे ने अपने जीवनकाल में उक्त जमीन का बंटवारा कोर्ट द्वारा माननीय अष्टम अतिरिक्त न्यायाधीश श्री सी.एम. माथुर द्वारा दिये

गये आदेश द्वारा पारित किया होकर नं. 4-ए/82 का हिस्सा है। उक्त आदेश की कॉपी एवं नक्शे की प्रतिलिपि संलग्न है। 2.72 एकड़ जमीन में से रविन्द्र पिता रामचन्द्र वाघमारे का के बंटवारे का हिस्सा 14700 स्क्.फीट छोड़कर यह सौदा प्रथम पक्ष ने द्वितीय पक्ष के हित में लिख दिया है इसकी चतुःसीमा निम्नानुसार है।

पूर्व में : सीमेन्ट पोल फेक्ट्री
पश्चिम में : ए.बी. रोड़
उत्तर में : सीमेन्ट पोल फेक्ट्री
दक्षिण में : फ्री प्रेस हाऊस

(2) यह कि, उपरोक्त चरण क्रमांक (1) में वर्णित एवं चतुःसीमा के बीच की सम्पूर्ण भूमि, प्रथमपक्ष एवं सदर भूमि, प्रथम पक्ष एवं सदर भूमि के अन्य सह-स्वामी श्री रविन्द्र वाघमारे के संयुक्त स्वामित्व एवं आधिपत्य की सिति है तथा प्रथम पक्ष उपरोक्त भूमि को आप द्वितीय पक्ष को कुल कीमत रूपये 9,50,00,000/- (अक्षरी रूपये नौ करोड़ पचास लाख मात्र) में विक्रय करना अनुबंधित किया है। उपरोक्त राशि में श्री रविन्द्र वाघमारे का हिस्सा नहीं है। इस राशि का भुगतान द्वितीयपक्ष द्वारा आगे तय की गई समय सीमा अनुसार यथा समय को अलग-अलग चेकों के माध्यम से प्रथमपक्ष द्वारा निर्देशित अनुपात में भुगतान किया जावेगा। प्रथमपक्ष एवं द्वितीयपक्ष के मध्य उपरोक्त वर्णित भूमि का विक्रय व्यवहार तय करते समय जो शर्तें मौखिक रूप से तय हुई थी, उन्ही शर्तों के तहत सदर अनुबंध लेख दोनों के मध्य निष्पादित किया जा रहा है।

तय की हुई शर्तें निम्नानुसार है :

(1) यह कि, प्रथमपक्ष द्वारा सदर सम्पूर्ण भूमि द्वितीयपक्ष को विक्रय करना तय की गई है तथा विक्रय व्यवहार के सौदे पेटे प्रथमपक्ष ने द्वितीयपक्ष से निम्न राशियाँ प्राप्त की है:

रूपये 8,00,000/- (रूपये आठ लाख मात्र) की करर वैश्य बैंक लिमिटेड शाखा इन्दौर के चेक क्रमांक 331330, दिनांक 5/7/2004 के द्वारा प्रथमपक्ष के सदस्य क्रमांक 1 श्री अरुण वाघमारे ने द्वितीयपक्ष से प्राप्त किए हैं।

रूपये 8,00,000/- (रूपये आठ लाख मात्र) की करर वैश्य बैंक लिमिटेड शाखा इन्दौर के चेक क्रमांक 331331, दिनांक 5/7/2004 के द्वारा प्रथमपक्ष के सदस्य क्रमांक 2 श्री प्रकाश वाघमारे ने द्वितीयपक्ष से प्राप्त किए हैं।

रूपये 8,00,000/- (रूपये आठ लाख मात्र) की करर वैश्य बैंक लिमिटेड शाखा इन्दौर के चेक क्रमांक 331332, दिनांक 5/7/2004 के द्वारा प्रथमपक्ष के सदस्य क्रमांक 3 श्री विजय वाघमारे ने द्वितीयपक्ष से प्राप्त किए हैं।

रूपये 8,00,000/- (रूपये आठ लाख मात्र) की करर वैश्य बैंक लिमिटेड शाखा इन्दौर के चेक क्रमांक 331333, दिनांक 5/7/2004 के द्वारा प्रथमपक्ष के सदस्य क्रमांक 4 श्रीमती सुनीता अरविन्द्र पाटनकर ने द्वितीयपक्ष से प्राप्त किए हैं।

रूपये 8,00,000/- (रूपये आठ लाख मात्र) की करर वैश्य बैंक लिमिटेड शाखा इन्दौर के चेक क्रमांक 331334, दिनांक 5/7/2004 के द्वारा प्रथमपक्ष के सदस्य क्रमांक 5 श्रीमती उषा पति स्व. श्री रामचन्द्र वाघमारे ने द्वितीयपक्ष से प्राप्त किए हैं।

रूपये 8,00,000/- (रूपये आठ लाख मात्र) की करर वैश्य बैंक लिमिटेड शाखा इन्दौर के चेक क्रमांक 331335, दिनांक 5/01/2005 के द्वारा प्रथमपक्ष के सदस्य क्रमांक 1 श्री अरूण वाघमारे ने द्वितीयपक्ष से प्राप्त किए हैं।

रूपये 8,00,000/- (रूपये आठ लाख मात्र) की करर वैश्य बैंक लिमिटेड शाखा इन्दौर के चेक क्रमांक 331336, दिनांक 5/01/2005 के द्वारा प्रथमपक्ष के सदस्य क्रमांक 2 श्री प्रकाश वाघमारे ने द्वितीयपक्ष से प्राप्त किए हैं।

रूपये 8,00,000/- (रूपये आठ लाख मात्र) की करर वैश्य बैंक लिमिटेड शाखा इन्दौर के चेक क्रमांक 331337, दिनांक 5/01/2005 के द्वारा प्रथमपक्ष के सदस्य क्रमांक 3 श्री विजय वाघमारे ने द्वितीयपक्ष से प्राप्त किए हैं।

रूपये 8,00,000/- (रूपये आठ लाख मात्र) की करर वैश्य बैंक लिमिटेड शाखा इन्दौर के चेक क्रमांक 331338, दिनांक 5/01/2005 के द्वारा प्रथमपक्ष के सदस्य क्रमांक 4 श्रीमती सुनीता अरविन्द पाटनकर ने द्वितीयपक्ष से प्राप्त किए हैं।

रूपये 8,00,000/- (रूपये आठ लाख मात्र) की करर वैश्य बैंक लिमिटेड शाखा इन्दौर के चेक क्रमांक 331339, दिनांक 5/01/2005 के द्वारा प्रथमपक्ष के सदस्य क्रमांक 5 श्रीमती उषा पति स्व. श्री रामचन्द्र वाघमारे ने द्वितीयपक्ष से प्राप्त किए हैं।

रूपये 80,00,000/- (अक्षरी रूपये अस्सी लाख मात्र कुल प्राप्त किये)

(2) यह कि, प्रथमपक्ष एवं द्वितीयपक्ष के मध्य यह तय हुआ है कि, जब भी प्रथमपक्ष, द्वितीयपक्ष के हित में सदर भूमि के विक्रय व्यवहार बाबद सहमति का अनुबंध लेख द्वितीयपक्ष के हित में निष्पादित करवा देवेंगे। तिपश्चात् उस दिनांक से द्वितीयपक्ष सदर विक्रय भूमि का विधिवत नक्षा, टाउन एण्ड कन्ट्री प्लानिंग विभाग, इन्दौर से स्वीकृत करवाने की कार्यवाही प्रारम्भ कर देवेंगे तथा द्वितीय पक्ष द्वारा उपरोक्त कार्यवाही को पूर्ण होने में छः माह का समय लगने की संभावना व्यक्त की गई है तथा टाउन एण्ड कन्ट्री प्लानिंग विभाग से नक्षा स्वीकृत करवाने में प्रथम पक्ष के जहां जहां भी हस्ताक्षर बयान तथा अन्य उपस्थितियों आवश्यक होगी वे समस्त कार्यवाहियों करने के लिये ततपर रहेंगे, जिस बात की स्वीकारोक्ति प्रथमपक्ष द्वारा प्रदान की गई है।

(3) यह कि, टाउन एण्ड कन्ट्री प्लानिंग विभाग से सदर वर्णित भूमि पर द्वितीयपक्ष की मंशानुसार तक्षा स्वीकृत हो जाते ही सदर अनुबंध लेख की समय सीमा प्रारम्भ हो जावेगी तथा नक्षा स्वीकृत हो जाने के पश्चात् प्रथमपक्ष, द्वितीयपक्ष को सदर भूमि का कार्य करने बाबत् अनुमति प्रदान करते हुए सदर भूमि का आधिपत्य द्वितीयपक्ष को सौंप देवेंगे तथा द्वितीयपक्ष, प्रथमपक्ष को तय की हुई विक्रय व्यवहार मूल्य पेटे रूपये 1,25,00,000/- (अक्षरी रूपये एक करोड़ पच्चीस लाख) का भुगतान करेंगे। इस भुगतान के उपरान्त प्रथमपक्ष उक्त भूमि द्वितीयपक्ष को रिक्त कर विधिवत निर्माण कार्य करने की अनुमति प्रदान कर देवेंगे।

(9) यह कि, उपर वर्णित सम्पत्ति को द्वितीयपक्ष के हक व हित में उपरोक्तानुसार शर्तों के अधीन अन्तरण आदि करने का पूर्ण तथा वैधानिक अधिकार प्राप्त है तथा इसमें प्रथमपक्ष के किसी भी वारिस, हकदार आदि को कोई तथा किसी भी प्रकार की आपत्ति, विवाद भी नहीं है, यदि भविष्य में

सदर सम्पत्ति के स्वामित्व बाबद किसी ने कोई आपतित विवाद उत्पन्न किया या इस अन्तरण करने संबंधित अधिकारों में किसी प्रकार की कोई त्रुटि, दोष आदि पाया गया तो उसके निराकरण की सारी जवाबदारी प्रथमपक्ष की होगी। आप द्वितीयपक्ष को किसी प्रकार की हानि या असुविधा प्रथमपक्ष नहीं होने देंगे।

(12) यह कि, प्रथमपक्ष एवं द्वितीयपक्ष के मध्य सदर अनुबंध लेख बाबद किसी भी प्रकार का कोई वाद-विवाद उत्पन्न होने की दशा में सदर वाद का निराकरण श्री रमेश शर्मा एवं ओमप्रकाश खण्डेलवाल दोनों के द्वारा किया जावेगा। जिनका निर्णय दोनों पक्षों को मान्य होगा।”

5- As per aforesaid conditions of the agreement to sale, the share of late Ravindra Waghmare was kept out from the sale. The appellant agreed to purchase the land for a total consideration of Rs.9,50,00,000/- in which Ravindra Waghmare was not given a share. They also agreed to sale the land of common use in which Ravindra Waghmare has an equal share and possession. It was also agreed between the parties that the first party i.e. the sellers shall obtain a consent agreement in favour of the second party i.e. the present appellant in respect of the sale transaction and thereafter the appellant would proceed to get an approved map from the Town & Country Department for which they would take probably 6 months' time. Admittedly, no such consent agreement was obtained by the first party i.e. the sellers. As per the aforesaid agreement to sale, Rs.16,00,000/- was paid to each of the sellers i.e. Dr. Arun Waghmare, Prakash Waghmare, Vijay Waghmare, Smt. Usha Waghmare and Smt. Sunita Patankar by way of cheques on different dates. Smt. Usha Waghmare w/o. Ramchandra Waghmare also expired on 31.12.2006 and her 1/6th share fell into the share of all 4 sons and a daughter.

6- After almost laps of 2 years, the appellant served the notice dated 14.5.2007 calling upon Dr. Arun Waghmare, Prakash Waghmare, Vijay Waghmare, Ravindra Waghmare and Sunita

Patankar to execute the sale-deed and receive the balance sale consideration. Out of 5, only Ravindra Waghmare gave a reply dated 20.5.2007 strongly disputing the execution of the agreement to sale by his mother Late Usha Waghmare and stated that such an agreement is not binding on him. Vide notice dated 23.7.2007, the appellant served the copy of the agreement to sale to Ravindra Waghmare. Thereafter, legal notice dated 27.11.2007 was sent by an advocate on behalf of the appellant to all the 5 i.e. Arun Waghmare, Prakash Waghmare, Vijay Waghmare, Sunita Patankar and Ravindra Waghmare calling upon them to perform their part of the agreement individually being the legal representatives of late Usha Waghmare. Only Ravindra Waghmare gave the reply dated 5.12.2007 that he stands by on his reply dated 20.5.2007. According to Ravindra Waghmare, the agreement to sale is not binding on him as he never entered into such an agreement to sale with the appellant and he has no knowledge about the execution of the agreement to sale with his mother Usha Waghmare. Thereafter, in light of the arbitration clause, Shri Omprakash Khandelwal initiated the arbitration proceedings as another arbitrator viz. Ramesh Sharma had expired. All the respondents herein raised an objection about the maintainability of the arbitration proceedings vide letter dated 9.5.2008 addressed to Shri Omprakash Khandewal that on account of the death of Ramesh Sharma the arbitration clause has become void. Shri Omprakash Khandelwal proceeded with the arbitration proceedings and passed the order on 28.7.2008 to terminate the arbitration proceedings as the arbitration clause does not survive.

7- Thereafter the appellant approached the Civil Court by way of Civil Suit No. 34-A/2008 for a decree of specific performance and

perpetual injunction against all the sons and daughter of late Ramchandra Waghmare. In the said suit, the respondents/defendants raised an objection by way of an application under Order 7 Rule 11 of the C.P.C. that for want of an arbitration clause, the suit is not maintainable. Vide order dated 7.3.2011 learned 16th Additional District Judge dismissed the suit as not maintainable. Thereafter, the appellant served the notice dated 30.3.2011 to the respondents suggesting the names of 5 retired Supreme Court Judges for appointment as Arbitrator in place of Ramesh Sharma and sought consent from them, failing which, an application u/s. 11 of the Act of 1996 shall be filed before the High Court. Ravindra Waghmare gave a reply on 7.4.2011 and Vijay Waghmare on 15.4.2011 separately. Thereafter, the appellant approached the District & Sessions Judge by way of an application under section 9 of the Act of 1996 seeking a temporary injunction which came to be dismissed vide order dated 28.5.2011 . Thereafter Arbitration Appeal No.28/2011 was filed by the appellant which was also dismissed vide judgment dated 5.9.2012. Against the said order, Review Petition No.495/2012 was filed which was dismissed vide order dated 21.6.2013. Thereupon, the appellant filed an application u/s. 11 of the Act of 1996 (Arbitration Case No.23/2011) which came to be allowed vide order dated 17.1.2014 by appointing Hon'ble Shri N.K. Jain, retired Judge of this Court, as a sole Arbitrator.

8- The appellant submitted the statement of claim for a decree of specific performance and perpetual injunction before the learned Arbitrator. All the respondents filed their written statement to oppose the claim. The parties filed their affidavits in lieu of examination-in-chief. Learned Arbitrator framed 5 issues and 2 additional issues for

adjudication, which are as under :

“Issues -

1. (a) Whether the Agreement dated 05.07.2004 has been executed by Shri Nirmal Ramratan Agarwal on behalf of the Claimant Company or in his individual capacity and whether he had no authority to act on behalf of the Claimant Company?

(b) Whether the Respondents are stopped from raising this plea in the facts and circumstances of the case?

(c) Whether the said Agreement is ratified and adopted by the Claimant Company? Effect?

2. (a) Whether the consent of Respondent No.5 Shri Ravi Waghmare was not there for the transfer contemplated by Agreement dated 05.07.2004?

(b) Whether the absence of such consent renders the agreement inconclusive uncertain and unenforceable?

(c) Whether the respondents are stopped from taking this defence in the facts and circumstances of the case?

3. (a) Whether the claim made by the Claimant Company is within limitation prescribed by Article 54 of the Limitation Act, read with Section 21 and 43(2) of the Arbitration & Conciliation Act, 1996?

(b) Whether the period spent in civil suit from 31.07.2008 to 07.03.2011 deserves exclusion under section 14 of the Limitation Act?

4. Whether the Claimant Company have always been ready and are still willing to perform their part of the Agreement?

5. Relief & Costs.

Additional Issues -

1. Whether the Respondent No. 5 is bound by the agreement in question to the extent of his share in the disputed property inherited by him from his late mother Smt. Usha Waghmare?

2. Whether the agreement in question is inequitable disentitling the Claimant to the relief of specific performance?

9- During pendency of the arbitration proceedings, Smt. Sunita Patankar expired and her husband and two major sons were brought

on record as her legal heirs. Ravindra Waghmare also expired and his son and daughter were impleaded as respondents.

10- Learned Arbitrator passed the award dated 15.4.2018 in favor of the appellant that on claimant paying the balance sale consideration to the respondents No. 1 to 4 i.e. Dr. Arun Waghmare, Shri Prakash Waghmare, Shri Vijay Waghmare and L.Rs. of Smt. Suneeta Waghmare, thereafter they shall execute jointly or severally, the sale deed of the lands 382/5, 382/6, 382/7, and 382/3 put the appellant in possession. It is further directed that all four respondents and LR. of Ravindra Waghmare shall execute the sale deed of their 5/6 share in the land S.No. 382/1 situated at the same place. Learned Arbitrator also distributed the balance sale consideration of Rs.8.66 Crores as under :

(a) Respondents (1) Shri Arun Waghmare, (2) Shri Prakash Waghmare, (4) Smt. Suneeta Patankar (through her Lrs) each, 1.74 Crores, i.e. total Rs.5.22 Crores;

(b) Respondent No.3 Shri Vijay waghmare, Rs.1.70 Crores; and

(c) Rs.34,80,000/- each to respondents No.1 to 5 (heirs of respondent No. 3 and 5 are to be treated as one unit each) as heirs of Smt. Usha Waghmare.

11- After passing the aforesaid award, the claimant filed an application u/s. 33(4) of the Act of 1996 for passing an additional award for the sale of land bearing Survey Nos. 382/437/1 as a whole and 29/36 share in the lands bearing Survey Nos. 382/4, 367 and 382/437/2. Despite objections raised by the respondents, the learned Arbitrator passed the additional award dated 12.6.2018 favour of the claimant/appellant.

12- Being aggrieved by the aforesaid award, Dr. Arun Waghmare,

Prakash Waghmare, Vijay Waghmare, and the legal heirs of Sunita Patankar filed Arbitration Case MJC No.87/2018. Aniruddh Waghmares/o late Ravindra Waghmare also filed an application u/s. 34 of the Act of 1996 which was registered as Arbitration Case MJC No.292-A/2019.

13- Vide **order dated 9.10.2020**, learned Commercial Court (District Judge Level), Indore has set aside the **Award dated 15.4.2018** and additional award dated 12.6.2018. Hence, the appellant has filed A.A. No.33/2020. Vide order dated 9.10.2020, the application filed by Aniruddh Waghmare has also been allowed by setting aside the award and the additional award, against which, A.A. No.34/2020 has been filed before this Court.

14- At the very outset learned counsel for the parties fairly stated that the controversy between the parties is confined with respect of the findings recorded by the learned Arbitrator on Issue No.2 (a), (b) & (c), as under :

“2. (a) Whether the consent of Respondent No.5 Shri Ravi Waghmare was not there for the transfer contemplated by Agreement dated 05.07.2004?

(b) Whether the absence of such consent renders the agreement inconclusive uncertain and unenforceable?

(c) Whether the respondents are stopped from taking this defence in the facts and circumstances of the case?”

15- The learned Arbitrator held that admittedly, the consent of Ravindra Waghmare could not be obtained, and in order to outcome this major hurdle in the execution of the sale deed, learned Arbitrator has considered it by framing an additional issue, whether prospective vendors or legal heirs can be allowed to refuse specific performance of the said contract on the ground of defect or deficiency in their

authority to sale the property occasioned on account of absence of consent of late Ravindra Waghmare? According to the learned Arbitrator, Dr. Arun Waghmare, Prakash Waghmare, Vijay Waghmare, and Late Smt. Sunita Patankar (through legal heirs) are estopped from pleading their inability to perform their part of the agreement more so when the claimant/purchaser is willing to perform its part. Learned Arbitrator has held that the agreement was not a contingent contract. So far as the consent of late Ravindra Waghmare is concerned, the learned Arbitrator has held that his position is not different from other respondents as he (and now his heirs) stepped into the shoes of Late Smt. Usha Waghmare. They cannot set up any defence which was not available to that lady. Relying on the judgment of this Court in the case of *Kamalnarayan Ramsaranlal V/s. Ram Kishorilal* reported in *AIR 1958 MP 246*, the learned Arbitrator has held that the right to withhold consent was available to Shri Ravindra Waghmare during his lifetime only and the same is now no longer available to his heirs after his death. However, the said judgment has been reversed by the apex Court in the case of *Ram Kishorilal Versus Kamalnarayan* reported in *AIR 1963 SC 890*. Therefore, the withholding of consent by the late Ravindra Waghmare was required during his lifetime only and it will not continue even after his death. Learned Arbitrator has further held that even if late Ravindra Waghmare or his legal heirs had any right pre-emption, the same cannot be enforced in the present proceedings. Even while holding that the consent of Ravindra Waghmare was not there, the agreement is enforceable against the respondents who cannot avoid its performance for want of consent of the late Ravindra Waghmare or his heirs. Learned Arbitrator accordingly passed the award and the additional award in favour of the appellant.

16- Learned Commercial Court vide **impugned order dated 9.10.2020** has set aside the award and the additional award observing that the right which had been declared in the decree dated 5.4.1982 still holds good and is binding on the parties to the decree, therefore, no sale could be affected without the consent of late Ravindra Waghmare and hence, agreement dated 5.4.2004 is not enforceable in absence all the parties and accordingly found patent illegality in the award and the additional award. Hence, the present appeals before this Court.

Submission of learned senior counsel appearing for the appellant

17- Shri Ramakrishnan Viraraghavan, learned senior counsel appearing for the appellant, argued that before the learned Arbitrator, four issues were under consideration, firstly, whether the parties in the partition suit means only the parties to the suit or should include their legal heirs for all time to come?; secondly, what would be the position of Ravi Waghmare's consent after the death of his mother late Usha Waghmare?; thirdly, what would be the position after the death of the late Ravindra Waghmare?; and lastly, does sub para 2 of the decree prevents transfer of the land jointly held land after Ramchandra Waghmare's death? After considering the entire facts and circumstances of the case, the learned Arbitrator has rightly held that the parties to the agreement to sale are not bound by the consent of late Ravindra Waghmare especially after his death. Clause 4 of the partition decree is confined to the parties to the suit, otherwise, it would be impossible for the generations to come to sale the property. It has further been held that so far share after the death of mother Smt. Usha Waghmare inherited by late Ravindra Waghmare, his consent was not required and for the land fell into his share, the appellant

never intended to take the said land. Therefore, the other parties to the decree have rightly been directed to execute the sale-deed in favour of the appellant.

18- It is further submitted by learned senior counsel that the scope for interference with the award under section 34 of the Act of 1996 is very limited. Firstly, the respondents were required to show an error in the award; secondly, it should be a patent error; thirdly, the Arbitrator has committed patent illegality in passing the award. In support of his contention, learned senior counsel placed reliance on the judgment of the apex Court in the case of *Delhi Airport Metro Express Pvt. Ltd. V/s. Delhi Metro Rail Corpn. Ltd. : (2022) 1 SCC 131*; *Ssangyong Engg. & Construction Co. Ltd. V/s. National Highways Authority of India : (2019) 15 SCC 131*; and *Associate Builders V/s. DD : (2015) 3 SCC 49*. In the recent case of Delhi Airport Metro Express (supra) the apex Court has held that the judicial interference with the arbitral award is strictly limited to the grounds u/s. 34 of the Act of 1996. Patent illegality is when the Arbitrator takes a view which is even not possible or interprets a clause in the contract in such a manner which no fair and reasonable-minded person would or if the Arbitrator commits an error of jurisdiction by wondering outside the contract and dealing with the matter not allotted to him. The second ground u/s. 34(2)(b) the court can set aside the award if the dispute which is not capable of settlement by arbitration is the subject matter of the award or the award is in conflict with the policy of India. Therefore, the learned Commercial Court has committed an error of law while interfering with the well-reasoned award beyond the purview of Section 34.

19- Learned senior counsel for the appellant further submitted that

the learned Commercial Court has interfered with the award and denied the decree of specific performance solely on the ground that there was no consent of late Ravindra Waghmare or the remaining parties to an agreement failed to submit the consent deed in favour of the appellant. It is submitted that the respondents including late Ravindra Waghmare did not plead pre-emption which is evident from the reply filed by the respondents and Ravindra Waghmare. Even the partition decree did not give any right of pre-emption, hence Section 22 of the Succession Act does not apply. Even if it is accepted that late Ravindra Waghmare made an offer to purchase the land of the respondents, but same was never accepted by them and such an offer cannot be treated as an offer under the right of pre-emption. The consent of late Ravindra Waghmare was necessary during the life time of Ramchandra Waghmare, but after the death of Smt. Usha Waghmare, Ravindra Waghmare got 1/6th share in land and for which no consent was required. Therefore, the decree of specific performance has rightly been granted in respect of the entire land excluding the individual land of late Ravindra Waghmare. Late Ravindra Waghmare stepped into the shoes of Usha Waghmare hence he was bound to perform the agreement u/s. 42 of the Contract Act. So far as the contention of Ravindra Waghmare before the learned Arbitrator as well as Commercial Court that the arbitration agreement does not bind him because he was not a party to the agreement is concerned, after the death of Usha Waghmare when he accepted 1/6th share, then he became a party to the agreement in view of Section 40 of the Act of 1996 read with Section 42 of the Contract Act and Section 19-B of the Specific Relief Act.

20- Learned senior counsel for the appellant submitted that although

the learned Arbitrator placed reliance on an overruled judgment i.e. Kamalnarayan Ramsaranlal (supra) can be said to be an error, it is not a patent illegality. Even if this judgment is removed from the relevant paragraph of the award, even then the appellant had a good case for getting a decree of specific performance as the learned Arbitrator has rightly interpreted Clause 4 of the partition decree.

21- Learned Senior counsel further submitted that the conduct of the respondent is liable to be considered as being a signatory to the agreement they did not make any effort to obtain the consent of late Ravindra Waghmare. Therefore, the appellant was forced to issue legal notice after waiting for sufficient time. The respondents accepted the huge amount of Rs.80.00 Lakhs out of the total sale-consideration and did not make any effort to obtain the consent of late Ravindra Waghmare. Therefore, the learned Commercial Court has committed a jurisdictional error while setting aside the well-reasoned award in a limited scope of Section 34 of the Act of 1996, hence the appeal be allowed and the impugned judgment be set aside.

Submissions of respondents No. 1 to 3

22- Shri Aniket Naik, learned counsel appearing for respondents No.1 to 3, with the consent of other counsel appearing for the other respondents, argued to support the impugned judgment. Learned counsel contended that para 9(4) of the partition decree specifically restricts all the parties to transfer his portion of the land to an outsider except with the consent of the rest of the parties. Admittedly, the consent of late Ravindra Waghmare was not obtained either before the execution of the agreement to sale or thereafter. Shri Naik submitted that as per para 9(2), the land leftover for family charity as shown in the map declared as a joint family property of the plaintiff and

defendants and no one shall be entitled to transfer his portion of the land. Even by way of the agreement, this patch of land was agreed to sale and which has not been considered by the learned Arbitrator. Learned counsel referred to Para 1 and 2 of the sale-agreement, according to which, the respondents agreed to sale the land area 2.72 Acres except 14,700 Sq.ft. of Ravindra Waghmare. Therefore, the common land which was kept for the use of all had also been agreed to sale which was not salable even by way of consent or by way of joint consent. According to Mr. Naik Para 2 of an agreement to sale entire sale-consideration was taken by the respondents in which nothing was given to late Ravindra Waghmare. Hence, Ravindra Waghmare was specifically excluded from the entire sale transaction whereas as per the partition decree, his consent was necessary. It is further submitted that Ravindra Waghmare had four shares i.e. (1) his own share; (2) a share in father's land; (3) a share in mother's land; and (4) share in the joint family property i.e. the common land.

23- It is submitted that it was a consent decree which could be modified by way of consent or by a Court which passed it. The interference by the Arbitrator with the decree amounts to modification of the decree which is not permissible in law , hence the learned Commercial Court has not committed any error while interfering with the award both appeal be dismissed.

24- Shri Naik learned counsel submitted that the learned Arbitrator while relying on the judgment in the case of Kamal Narayan (supra) which had been overruled by the apex Court in the case of Ramkishorilal (supra), it is a patent illegality which warranted interference by the Commercial Court u/s. 34 of the Act of 1996. Learned counsel further submitted that even on merit the appellant is

not entitled to a decree of specific performance as the appellant was never ready and willing to get the sale deed executed by paying the entire sale consideration. The agreement to sale was executed on 5.7.2004 and the first notice ((Exhibit-C/9) was send on 14.5.2007. For almost more than two years the appellant remained silent and did not take any steps to show readiness and willingness.

25- From day one the appellant was aware that there was a consent decree of partition between the Waghmares' brothers and sister and their consent would be necessary befor execution of the sale-deed. Therefore, by way of Clause 2 it was agreed between the first party and second party that the first party shall submit the consent-deed for the execution of the sale-deed in favour of the appellant and thereafter the appellant would proceed further to get the approval of the map from Town & Country Planning Department. Therefore, the moment the consent-deed was not submitted, the agreement to sale came to an end and was not liable to be executed. It is further submitted by the learned counsel that admittedly, no such consent deed was obtained by the respondents. It is further submitted that the learned Arbitrator has wrongly held that the decree was confined to the parties to the decree. From the nature of the decree intention of parties was clear that all the brothers and sister would live together, therefore, the common land was left for their common use and all were restricted from selling their lands. The map is the part of the decree and the land was equally divided between the parties for their joint habitation. Therefore, from day one, it was the intention of late Ramchndra Waghmare that the family property would remain intact between Wagmare brothers and sister and their generations to come. It has not been specifically mentioned in the decree that this will be binding only on the parties to

the suit and not to their successors as held by the apex Court in the case of Ramkishorilal (supra).

26- To support his contention, Shri Aniket Naik learned counsel has placed reliance on the judgment of the apex Court in the case of *Manish Mohan Sharma V/s. Ram Bahadur : (2006) 4 SCC 416* in which it is held that family settlements are governed by a special equity and are to be enforced if honestly made. This would be so “even if the terms may have been agreed to on the basis of an error of the parties or originate in a mistake or ignorance of the fact as to what the rights of the parties actually are, or of the points on which their rights actually depend”. This is because the object of an arrangement is to protect the family from long drawn out litigation, and to bring about harmony and goodwill in the family. The consent decree/compromise decree is doubly reinforced when it is a consent decree amounting to a family agreement because no appeal is maintainable against such a consent decree, no independent suit can be filed and it operates as an estoppel and is valid and binding unless set aside or modified as held by the apex Court in the case of *Triloknath Singh V/s. Annirudh Singh : AIR 2020 SC 2111*. Therefore, the learned Arbitrator has wrongly interfered with the consent decree and held that the consent of Ravindra Waghmare is not necessary for other parties to sale the land. The learned Arbitrator has wrongly held that this restriction is not hit by Section 10 of the Transfer of Property Act.

27- Shri Naik learned counsel further submitted that admittedly, late Ravindra Waghmare was not a party to the agreement to sale, therefore, the inclusion of his legal heirs for executing the sale-deed in favour of the appellant is a patent error apparent on the face of the

record committed by the learned Arbitrator. The learned Arbitrator has travelled beyond the terms of reference of arbitration. He has placed reliance on the judgment of the apex Court in the case of ***Premmada Prabhakar V/s. Youngmen's Vysya Assn.*** : (2015) 5 SCC 355 in which it is held that the provisions of Section 17 of the Specific Relief Act in categorical terms expressly state that a contract to sale or let any immovable property cannot be specifically enforced in favour of a vendor or lessor who does not have an absolute title and right upon the property. Therefore, the other parties to the decree without the consent of Ravindra Waghmare were not entitled to execute the agreement to sale. A similar view has been by the apex Court in the case of ***Shanmughasundaram & others V/s. Diravia Nadar (Dead) by LRs.*** : (2005) 10 SCC 728 that in the absence of sisters being party to the agreement, the vendee can at best obtain the undivided interest of two brothers in the property. It is further submitted by the learned counsel that Section 12 of the Specific Relief Act cannot be invoked by the vendee to obtain sale of an undivided share of the two brothers with a right to force partition on the sisters who were not parties to the agreement of sale. Therefore, in similar facts and circumstances, Ravindra Waghmare or his legal heirs who were not parties to the agreement to sale, are now being forced to enter into the agreement to sale their land against their consent. Hence, no interference with the impugned judgment is called for and the appeals are liable to be dismissed.

28- At last Shri Naik learned counsel submitted that the learned Arbitrator had committed an error by passing an additional award which amounts to modification of the original award and same is impermissible as held by the apex Court in the case of ***Project***

Director, National Highways No. 45 E and 220, National Highways Authority V/s. M. Hakeem : (2021) 9 SCC 1.

Submissions of respondents No. 4 to 6

29- Shri Shekhar Bhargava, learned senior counsel appearing on behalf of respondents No. 4, 5 and 6, legal heirs of Smt. Sunita Patankar, adopted the arguments advanced by Shri Aniket A. Naik learned counsel but added that the agreement to sale was not enforceable without the consent of all the parties. The decree creates a new agreement and still the property is treated as a joint as well as separate property in order to maintain unity between the brothers and sister. Para 2 of the decree specifically says that it is a joint family property. Learned senior counsel further submitted that in view of the judgment reported in ***(2022) 10 SCC : Raman (Dead) by LRs. V/s. R. Natarajan*** (Para 15 to 20) both appeals are liable to be dismissed.

Submissions of Respondent No. 7&8

30- Shri R.T. Thanewala, learned counsel appearing for respondent –legal heirs of late Ravindra Waghmare, submitted that Order 23 (3) (a) of the C.P.C. bars the suit to set aside a compromise decree. The interference by the Arbitrator with the consent decree was not permissible. The appellant from day one was aware that without the consent of late Ravindra Waghmare, the other owners /respondents could not have sale the inch of the land , therefore, a specific condition was inserted in the agreement to sale. The appellant vide notice dated 14.5.2007 requested all the respondents to submit a consent-deed in favour of the appellant so that it may start further proceedings as per Para 2 of the agreement. Vide reply dated 20.5.2007, Ravindra Waghmare specifically denied his consent and even disowned the signature of Usha Waghmare as she never indulged

in any business transaction, therefore, that was the end of the matter. No arbitration proceedings could have been initiated as the agreement to sale came to an end. The remaining respondents failed to submit the consent-deed as Ravindra Waghmare denied the consent. Hence, the appeals have no merit and are liable to be dismissed.

Appreciations & Conclusion

31- The entire controversy between the parties is confined to the findings recorded by the learned Arbitrator on Issues No. 2(a), (b) & (c). While answering issue No. 2(a), the learned Arbitrator has held that the consent of Ravindra Waghmare was not there for transfer contemplated by the agreement dated 5.7.2004. While answering issue No.2(b), the learned Arbitrator has held that in the absence of such a consent, it does not render the agreement inconclusive, uncertain and unenforceable. It has also been held in favour of the appellant while answering the additional issue that respondent No.5 is bound by the agreement in question to the extent of his share in the disputed property inherited by him in the share left by his mother Usha Waghmare. The contention of Shri Ramakrishnan Viraraghavan, learned senior counsel for the appellant, is that once Ravindra Waghmare got, a 1/6th share after the death of Smt. Usha Waghmare, his consent became immaterial as he is bound by the consent of his mother Usha Waghmare. Therefore, for sale of the land which came into the share of other respondents except for Ravindra Waghmare, separate consent of Ravindra Waghmare is not required. Even after the death of Usha Waghmare, Ravindra Waghmare became a party to the arbitration agreement. This Court while deciding A.C. No.23/2011 has rejected his objection and he was made a party in the arbitration proceedings. Therefore, now Ravindra Waghmare and his legal heirs

are estopped from raising such objections. It is further argued that the consent of Ravindra Waghmare was necessary during his life time and after his death, no consent was required from his legal heirs as they were not party to the decree. Even if the consent of Ravindra Waghmare was not there during his life time, now there is no impediment for others to execute the sale-deed in favour of the appellant. We are unable to accept such contentions.

32- The issue is, whether the agreement to sale survived when the respondents or vendees failed to give consent-deed for the execution of the sale-deed in favour of the appellant as per Para 2 of the agreement to the sale? As per Para 8 of the judgment and decree, the learned Arbitrator held that it is proved that Plot Nos. 512 and 523 situated in Village Khajrana is a joint Hindu family property of the plaintiff and defendants and each one of them has a 1/6th share. It was only a declaratory decree declaring 1/6th share of each party in the joint Hindu family property, especially in Plot Nos. 512 and 523. They have been allotted their respective shares as shown in the map (Exh. P/2). The land from 'X' to 'X' i.e. temple, Well and garden left for family charity and all the parties have been given 1/6th share in the said portion of the land. As per Para 9.2, none of the plaintiff and defendants held entitled to transfer this portion of the land to the outsider without the consent of others, but the agreement to sale this part of the land has also been agreed to sale to the appellant which is absolutely contrary to the dictum of decree. Learned Arbitrator did not consider this aspect of the decree and agreement to sale.

33- So far as Para 9.4 of Judgment & Decree is concerned, it says that as per family partition, neither of the party shall have a right to transfer his portion of land to any outsider except with the consent of

rest of the parties. Therefore, there is a specific restriction for each party to the suit to transfer the land without the consent of rest of the parties. Keeping in view this restriction, para 2 was inserted in the agreement to sale that the respondents – Dr. Arun Waghmare, Vijay Waghmare, Prakash Waghmare, Ravindra Waghmare and Sunita Patankar shall obtain consent-deed in favour of the appellant and thereafter appellant would proceed further and after sanction of the map from Town & Country Planning Department, the limitation of an agreement to sale shall start. Thereafter, the sellers shall handover the possession to the appellant with permission for construction. In Para 9 of the agreement, it has been made clear that only the legal heirs of Dr. Arun Waghmare, Vijay Waghmare, Prakash Waghmare, Sunita Waghmare and Usha Waghmare shall have no objection or right to create any dispute. Therefore, the legal heirs of Ravindra Waghmare cannot be said to be included in this agreement.

34- As stated above, the appellant was aware of the judgment and decree passed in Civil Suit No. 4-A/1982 and the map both were made part of the agreement to sale. In Para 2, it is mentioned that the property mentioned in Para 1 and the boundaries, the property of the joint owner, late Ravindra Waghmare is also included for which the second party i.e. the appellant agreed to purchase Rs.9.50 Crores. In the said amount, there was no share of the late Ravindra Waghmare, therefore, the land of Ravindra Waghmare has been put to sale without giving him any sale-consideration. The first party to the agreement had no right to sale the common land in which Ravindra Waghmare had a joint share. Despite knowing the fact that without the consent of Ravindra Waghmare the other co-owners cannot sale the land, the appellant entered into an agreement to sale and agreed to proceed

further only after execution of the consent deed.

35- The agreement to sale was executed on 5.7.2004. Thereafter the parties to the agreement to sale never took any step to obtain consent of late Ravindra Waghmare. No notice, no document, no pleading to show that any efforts were made to get the consent of Ravindra Waghmare. After an expiry of almost two years, the appellant served the legal notice dated 14.5.2007 to Dr. Arun Waghmare, Vijay Waghmare, Prakash Waghmare, Ravindra Waghmare and Sunita Patankar to give consent so that the appellant may proceed further for other formalities as agreed in Para 2 of the agreement. Only late Ravindra Waghmare replied to the aforesaid notice disowning the agreement. He was provided with a copy of the agreement by the appellant vide letter dated 23.7.2007. Thereafter, a legal notice was sent to all the respondents by the office of Shri A.K. Sethi, Senior Advocate on behalf of the appellant calling upon them to perform their individual part of the agreement being legal heirs of Usha Waghmare and all are required to perform their part within 15 days. Even this notice was replied to only by the late Ravindra Waghmare. Thereafter, Shri Omprakash Khandelwal, the only surviving Arbitrator initiated the arbitration proceedings, in which, Ravindra Waghmare submitted an objection and he accordingly closed the proceedings. Thereafter, a civil suit was filed which was dismissed for want of an arbitration clause and thereafter his Court appointed the Arbitrator.

36- In Para 8 of the award, the learned Arbitrator has held that it was the responsibility of the respondents/vendors to obtain the requisite consent of Ravindra Waghmare in terms of the decree (Exh. C/4). Admittedly, there was an absolute bar in the compromise decree that the property is not salable to the outsider of Waghmare family

without the consent of others, therefore, condition No.2 was inserted in the agreement and the vendors undertook the liability to obtain the consent of Ravindra Waghmare. On the basis of that consent, the appellant claimant agreed to purchase the land in question and paid a substantial amount of Rs. 80.00 Lakhs. The Arbitrator has held that admittedly the consent of Ravindra Waghmare could not be obtained and now the issue is, whether that ends the matter or still the appellant still has a right to seek a decree of specific performance. As per Clause 12 of the agreement, in case of dispute between the first party and the second party of any type same shall be decided by two Arbitrators viz. Ramesh Sharma and Omprakash Khandelwal.

37- Admittedly the first party/vendors agreed to sale were required to hand over the consent deed and they failed to get consent from late Ravindra Waghmare rather they did not make any effort. It is not the case of the appellant, that no consent deed was required, therefore it was not issue or dispute between them . As per the arbitration clause in the agreement to sale the dispute between the first and second party are liable to be adjudicated by two named arbitrators, since on the issue of consent deed there was no dispute therefore, it is beyond the arbitration. The learned Arbitrator was not required to adjudicate on the issue of consent of late Ravindra Waghmare. If consent deed was not there, there cannot be any dispute between prospective vendors and purchasers i.e. appellant. This dispute was not liable to be referred to the Arbitrator as the issue of whether the consent of Ravindra Waghmare was necessary or not has been a dispute between the parties to the agreement as also held by the learned Arbitrator. Therefore, the learned Arbitrator has wrongly proceeded further by framing an issue of whether these prospective vendors or their heirs

can be allowed to refuse the specific performance of the contract on the ground of defect or deficiency in their authority to sale the property.

38- The issue also was never referred as to whether after the death of Usha Waghmare or Ravindra Waghmare consent would not be required from their legal heirs and even no issue was framed by the learned Arbitrator, whether the consent of legal heirs of late Ravindra Waghmare, is necessary or not. Therefore, the learned Arbitrator has wrongly recorded the finding on Issue No.2(b) that in the absence of such consent given by Ravindra Waghmare, the agreement has not become inconclusive, uncertain or unenforceable.

39- The learned Arbitrator has held that the deficiency of giving consent on the part of the prospective vendors and for which the purchaser cannot be made to suffer as he was always ready and willing to perform their part of the agreement. As held above, the appellant was always ready and willing to go further into the agreement subject to the consent deed given to him. But when no consent-deed was given, further readiness and willingness are immaterial. The learned Arbitrator has wrongly held that it was not a contingent contract, as it always depended on the consent of late Ravindra Waghmare. Chapter III of the Contract Act, 1872 deals with contingent contracts. The contingent contract has been defined in Section 31 and the method of enforcement is stated in Section 32 which reads as under:

“31. *‘Contingent contract’ defined.*—A ‘contingent contract’ is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

32. *Enforcement of contracts contingent on an event happening.*—Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void. In this case after the death of Ravindra Waghmare now it is impossible to get his consent hence there is impossibility which renders the contract void or unenforceable. It is clear that if the condition prescribed or even described in the contract is impossible, undoubtedly, such contracts become void and not enforceable in terms of Section 32.

40- The learned Arbitrator has committed an error in passing the award by taking support of the judgment in the case of Kamal Narayan (supra) which has admittedly been overruled/reversed by the apex Court in the case of Ramkishorilal (supra). Therefore, the findings that the right to withhold the consent was available to Ravindra Waghmare during his life time has wrongly been held by relying on the case of Kamal Narayan (supra). In view of the judgment of the apex Court, this right of withholding will pass on to the legal heirs of the deceased party. Therefore, in the absence of any consent of Ravindra Waghmare, the agreement to sale in question became unenforceable.

41- Only Arvind Patankar and Sulakshana Vaidhya have filed cross objection/appeal in the Arbitration Appeal No. 33/2020 challenging the order/award dated 9.10.2020 whereby Apollo Real Estate LLP has been held entitled to the refund of entire money of Rs.84,00,000/- advanced at the time of execution of the agreement to sale. Vide order dated 5.1.2021, the same was taken on record. At the time of final hearing, no one addressed on the issue of cross-objection/appeal. Hence, the same is liable to be dismissed.

42- In view of the foregoing discussion, we do not find any ground to interfere with the impugned order dated 9.10.2020 passed by the learned Commercial Court. Accordingly, both these appeals and the

cross-appeal are dismissed. However, there shall be no order as to costs. Let a photocopy of this order be kept in connected AA No. 34/2020.

**[VIVEK RUSIA]
JUDGE.**

**[ANIL VERMA]
JUDGE.**

Alok/-