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Notations :

1.Options shown in green color and with ✔ icon are correct.

2.Options shown in red color and with ✖ icon are incorrect.

Paper ID	Paper Name
70186528	SCI Test Descriptive

Question Paper Name :	SCI Test Descriptive
Subject Name :	Law Clerk Part II Subjective Written Examination
Creation Date :	2025-03-07 13:02:03
Number of Questions :	3
Total Marks :	300
Display Marks:	Yes
Change Font Color :	No
Change Background Color :	No
Change Theme :	No
Help Button :	No
Show Reports :	No
Show Progress Bar :	No

Law Clerk

Group Number :	1
Group Id :	70186552
Group Maximum Duration :	0
Group Minimum Duration :	210
Show Attended Group? :	No
Edit Attended Group? :	No
Break time :	0
Group Marks :	300

Descriptive Exam

Section Id :	70186559
Section Number :	1
Section type :	Offline
Mandatory or Optional :	Mandatory
Number of Questions to be attempted :	3

Section Marks :	300
Maximum Instruction Time :	0
Sub-Section Number :	1
Sub-Section Id :	70186561
Question Shuffling Allowed :	No
Is Section Default? :	No

Question Number : 1 Question Id : 701865235 Question Type : SUBJECTIVE Consider As Subjective : Yes

Correct Marks : 150

QUESTION 1 - (150 marks)

Brief Preparation:

This question requires the candidate to prepare a brief synopsis or précis of a case file not longer than 750 words. Parameters for judging this question include:
(a) ability of the candidate to identify and marshal the relevant facts;
(b) identification of legal issues before the High Court/ Appellate Tribunal;
(c) comprehensive analysis of the issues as done by the High Court in the impugned decision;
(d) ratio of the impugned decision;
(e) relevant grounds before the Supreme Court;
(f) ability to condense information and structure the document logically; and
(g) brevity.

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
[UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA]

SPECIAL LEAVE PETITION (C) No. _____ of 2023
(Arising out of the final impugned judgment and order dated 07.08.2022 passed by the Hon'ble High Court of Judicature at Bombay in Commercial Appeal (L) No 924 of 2019)

WITH PRAYER FOR INTERIM RELIEF

IN THE MATTER OF:
James Peterson Mills Pvt. Ltd. ...Petitioner
VERSUS
Andrew Lex Logistics Pvt. Ltd. ...Respondent

WITH
I.A. No. _____ of 2022
(Application for condonation of delay in filing Special Leave Petition)
I.A. No. _____ of 2022
(Application for condonation of delay in re-filing Special Leave Petition)

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (C) NO. ____ OF 2022

IN THE MATTER OF:
James Peterson Mills Pvt. Ltd. ...Petitioner
VERSUS
Andrew Lex Logistics Pvt. Ltd. ...Respondent

OFFICE REPORT ON LIMITATION

1. The petition is within time.
2. The petition is barred by time, and there is a delay of **88 days** in filing the same against the order dated **08.07.2022**. A petition for condonation of **88 days'** delay has been filed.
3. There is a delay in refiling the petition, and a petition for condonation of ___ **days'** delay in refiling has been filed.

New Delhi
Dated: __.12.2022
BRANCH OFFICER

SYNOPSIS
This Special Leave Petition challenges a judgment of the High Court under Section 37 of the Arbitration and Conciliation Act, 1996, which confirmed the order of the Ld. Single Judge upholding an arbitral award. The dispute between parties arose out of land transactions, where the basic agreement was amended several times and where there was a novation of contract. The award is legally flawed as it is based on documents that were insufficiently stamped and liable to be impounded.

BRIEF FACTS
The Respondent ('ALPL') approached the Petitioner ('JPML') expressing its interest in acquiring land in Taluka Bhiwandi for the construction of a godown/warehouse for storage of agricultural produce. An email to this effect was sent to the Petitioner. Accordingly, the Respondent paid the Petitioner a sum of Rs. 20 lakhs as advance and both parties entered into an agreement for sale on 21.05.2007 for a total consideration of Rs. 17,62,25,000/- for 33.22 acres of land. In furtherance of the agreement, a further amount of Rs. 9.5 crores was made by the Respondent to the Petitioner.

- Several addendums were then entered into by the two. By way of the third addendum dated 10.01.2007, the agreement was re-written whereby the total acreage to be covered by the proposed sale was increased from 33.25 acres to 50 acres, and the consideration amount was also increased to Rs. 27.94 crores. The Respondent also entered into a mortgage transaction with the Petitioner by way of a memorandum of entry dated 18.07.2007 and 11.12.2007. It provided that the advance of Rs. 10,70,00,000/- paid under the agreements was to be treated as debt and that failure to convey on or before 30th November 2007 would call for a refund along with 15% interest. It was agreed that if the Petitioner failed to bring the agreements to their logical conclusions, ALPL would be entitled to a refund of the claim.
- The parties then agreed to register the land in two phases. The approved sale deed was stamped to the value of Rs. 57,20,490/- on 20.04.2009 in regard to the

Phase 1 properties. The Petitioner, on 23.04.2008, obtained non-agricultural permission. However, the Respondent maintained that the permission was inadequate and also did not take the initiative to register the said deeds as per Section 17(1-A) of the Indian Registration Act.

- Several disputes arose between the parties and the arbitration clause was invoked by the Respondent after a lapse of 3 years, and hence the same was barred by the law of limitation in pursuance of the Memorandum of Entry dated 11.12.2007. An application under Section 11 was filed by the Respondent, in which, vide order dated 15.06.2012 passed by the Ld. Single Judge, the agreements relied upon by the Respondent were impounded for want of sufficient stamp duty under the Maharashtra Stamp Act, 1958. The agreements were remitted to the Collector of Stamps, Thane, for adjudication and collection of requisite stamp duty, who passed an order on 23.01.2015 holding that sufficient stamp duty had been paid. This view was reversed on appeal by the I.G.R. Stamps on 04.01.2020. In the meantime, the High Court appointed a sole arbitrator on 26.06.2015.
- Before the Tribunal, the Respondent pleaded for specific performance of the contract of sale read with the addendums. According to the Respondent, the Petitioner had failed to make out a clear and marketable title of the lands sought to be purchased and also failed to obtain appropriate permissions for non-agricultural usage of the land, as was required under the agreement. The Tribunal passed an award on 09.12.2017 directing the Petitioner to return vacant possession of land admeasuring 33.26 acres to the Respondent and also refund a sum of Rs. 3,48,12,600/- along with 15% per annum from the date of the statement of claim, i.e., 06.08.2015, till payment and/or realization. The Petitioner's challenge to the award was dismissed by the Ld. Single Judge on 10.06.2019 and, in appeal, by the Division Bench on 08.07.2022.

Hence, this SLP.

BRIEF SUBMISSIONS

It is submitted that the view taken by the High Court upholding the validity cannot be sustained for the following reasons:

i. The agreement to sell dated 21 May 2007, which also contained the arbitration clause, and the eight addenda dated 1 June 2007, 26 June 2007, 10 July 2007, 4 December 2007, 29 March 2008, 31 March 2008, 30 May 2008, and 22 December 2008 were insufficiently stamped, as held by the order passed in appeal by the Inspector of General Registration and Stamps, Pune, on 04.01.2020. This would render the arbitration agreement as non-existent and not valid in law, as held by this Hon'ble Court in *Garware Wall Ropes vs. Coastal Marine Constructions and Engineering Limited* (2019) 9 SCC 209, as affirmed in *Vidya Drolia vs. Durga Trading Corp* (2021) 2 SCC 1. The same is a ground for the setting aside of the award as per Section 34(2)(ii) of the Arbitration and Conciliation Act, 1996.

ii. Although the correctness of the decision in *Vidya Drolia* has been doubted by another three-judge bench of this Hon'ble Court in *NN Global Mercantile Private Ltd vs. Indo Unique Flame Limited* (2021) 4 SCC 379 and a reference to a larger bench has been

made, which is currently pending, the decision in *NN Global*, which made the reference, also took the view that the adjudication of the rights and obligations under the work order or the substantive commercial contract would, however, not proceed before complying with the mandatory provisions of the Stamp Act. In this case, prior to the decision impugned being delivered, the IGR Stamps, Pune, had already passed an order highlighting the insufficiency of stamp duty paid by the Respondent on the documents. The High Court, while hearing the Petitioner's appeal, has not considered the same.

iii. The original contract dated 21.05.2007 was mutually substituted by a new contract by virtue of the execution of the mortgage deeds. The factum of the Respondent freely executing the mortgage deeds with new terms would sufficiently indicate that both parties were *consensus ad idem* on the original agreement being substituted by a new agreement. Therefore, novation as per Section 62 of the Indian Contract Act, 1872, took place.

iv. The Respondent had time and again raised doubts as to the Petitioner's title over the said property and the nature of the permissions granted in relation to the property not being appropriate. Even during negotiations, the Respondent claimed a refund and not specific performance. This would clearly indicate the Respondent's lack of readiness and willingness to perform the contract.

Hence, this SLP.

LIST OF DATES

Date	**Event Description**
14.03.2007	The Respondent approached the Petitioner expressing its interest in acquiring land in Taluka Bhiwandi for the construction of a godown/warehouse for storage of agricultural produce. An email to this effect was sent to the Petitioner. Accordingly, the Respondent paid the Petitioner a sum of Rs. 20 lakhs as advance.
21.05.2007	The parties entered into an agreement to sell which involved the following: I. Respondent to carry out title search within 3 days. II. Respondent to apply for NA and Register. III. If the Respondent fails to make out a marketable title, then Respondent to terminate the Agreement and demand refund along with interest. IV. Transaction to be completed in two months. V. Clause 6: Time Essence, transaction to be completed within 6 months. VI. Clause 9: Deadline to be mutually extended. If unable to convey, then Respondent shall terminate by 30 days' notice and reimburse @ 15% interest. VII. Clause 15: Arbitration clause.
01.06.2007	First Addendum to the agreement of sale for the payment of Rs. 1,00,00,000/-.
26.06.2007	Second Addendum to the agreement of sale for the payment of Rs. 1,50,00,000/-.
10.07.2007	Third Addendum to the agreement of sale: No payment made.

	• Property increased from 33.25 acres to 50 acres. • Consideration increased from Rs. 17,65,25,000/- to Rs. 27,94,00,000/-.
14.07.2007	Letter cum report dated 14th July 2007 by Trilegal to Respondent certifying their approval for title with regard to properties mentioned therein.
18.07.2007	Declaration with regard to the mortgage by Mr. Kaparia confirming the receipt of Rs. 7,00,00,000/- and also the mortgage by deposit of Title Deeds of 20 acres property.
18.07.2007	Memorandum of Entry: • Clause 2: Advance of Rs. 10,70,00,000/- under the Agreements to be treated as debt. Failure to convey on or before 30th November 2007 would call for refund along with 15% interest.
04.12.2007	Fourth Addendum to the agreement of sale for the payment of Rs. 2,00,00,000/-.
11.12.2007	Memorandum of Entry for Mortgage by Deposit of Title Deeds. • Clause 2: Rs. 3,00,00,000/- remitted. • Advance of Rs. 10,70,00,000/- under the agreements to be treated as debt. Failure to convey on or before 31st January 2008 would call for refund along with 15% interest. • Clause 4: Additional 10 acres.
17.03.2008 – 28.03.2008	Exchange of emails between Petitioner and Respondent.
29.03.2008	Sale Deed stamped with the value of Rs. 57,20,490/- in the name of Respondent.
31.03.2008	Sixth Addendum: Payment of Rs. 56,41,440/-.
23.04.2008	NA permission given by the Collector.
27.05.2008 – 28.05.2008	Exchange of emails between Petitioner and Respondent.
30.05.2008	Seventh Addendum: Payment of Rs. 1,00,000/-.
13.06.2008 – 24.09.2008	Exchange of emails between Petitioner and Respondent.
22.12.2008	Eighth Addendum (Demand on the ground of non-execution by Respondent): Payment of Rs. 25,00,000/-.
29.04.2009 – 19.08.2009	Exchange of emails between Petitioner and Respondent.
07.01.2010	Revised NA Order.
27.01.2010 – 15.06.2010	Exchange of emails between Petitioner and Respondent.
10.07.2010	Respondent Advocate's notice terminating the subject agreement and the addendums on the following grounds: • Subject agreement stands frustrated. • To pay compensation and costs incurred by the Petitioner on account of the Respondent's inability to perform their part on time. • To refund after deducting the cost and compensation. • To return the original title deeds.
18.08.2010	Email from the Petitioner to Respondent stating that the cheque for Rs. 25 lacs has been encashed by the Petitioner. Further, the

	Petitioner also enquired about a cheque for Rs. 60 lacs as the same had not been received by them till date.
03.09.2010	Petitioner's legal notice to the Respondent giving further 7 days' time.
15.10.2010	Notice sent by the advocate of the Petitioner to the Respondent.
08.12.2010 – 14.12.2010	Exchange of emails between Petitioner and Respondent.
15.12.2010	Petitioner advocate's notice to the Respondent calling upon the latter to comply with the earlier notice and assuring the Respondent that they would extend their full cooperation in removing the deadlock and refunding the money after deducting the costs, etc.
24.12.2010	A letter from Respondent Advocate to the Petitioner.
14.04.2011	Respondent's reply to the Petitioner's legal notice wherein all the allegations were denied, and the Petitioner was asked to fulfill their obligation within 8 weeks.
07.05.2011	Respondent's rejoinder to the aforesaid notice wherein all the stands taken by him in his earlier letter were reiterated and final 30 days were given to comply with its notice.
01.07.2011	Petitioner's letter invoking Arbitration clause.
14.10.2011	Respondent's letter invoking Arbitration clause.
14.10.2011	Respondent's letter nominating Arbitrators with arbitration proceedings commenced.
13.04.2012	A notice from the Respondent's advocate to the Petitioner.
15.06.2012	The Hon'ble High Court, after considering the Petitioner's objection, by an order dated 15.06.2012 passed in Arbitration Application No. 29 of 2012, impounded the aforementioned documents for adjudication of stamp duty by the concerned Collector of Stamps, Thane for adjudication and collection of required stamp duty and/or penalty.
03.09.2012	Notice sent by the Petitioner's advocate to the Respondent.
15.09.2012	Notice sent by the Petitioner's advocate to the Respondent.
23.01.2015	Ld. Collector of Stamps, Thane, vide its order dated 23.01.2015, held that no further stamp duty was required to be paid on the impounded documents.
09.11.2017	An Award was passed by the sole arbitrator directing the Petitioner to return vacant possession of land admeasuring 33.26 acres and also to pay a sum of Rs. 3,48,12,600/- along with 15% interest per annum.
28.02.2018	Petitioner filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996, challenging the award dated 09.11.2017 passed by the sole arbitrator.
10.06.2019	The Ld. Single Judge dismissed the petition under Section 34 of the Arbitration and Conciliation Act and reaffirmed the award dated 09.11.2017.
2019	The Petitioner, being aggrieved and dissatisfied by the order dated 10.06.2019, preferred an appeal under Section 37 of the Arbitration and Conciliation Act before the High Court of Judicature at Bombay.
04.01.2020	The Inspector of General Registration and Stamps, Pune, passed an order holding that the impounded agreements were insufficiently stamped.
08.07.2022	The impugned order was passed dismissing the appeal and

	reaffirming the order passed by the Ld. Single Judge.
24.12.2022	Hence, the present SLP.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL APPELLATE DIVISION
COMMERCIAL APPEAL (L) NO. 428 OF 2019
IN
COMM ARBITRATION PETITION NO. 538 OF 2018
WITH
INTERIM APPLICATION (L) NO. 16050 OF 2022
IN
COMMERCIAL APPEAL (L) NO. 428 OF 2019

JAMES PETERSON MILLS PRIVATE LTD. ...APPELLANT (ORIG. PETITIONER)
VS
ANDRE LEX PRIVATE LTD. ...RESPONDENT (ORIG. RESPONDENT)

Author: GS Patel
Bench: G.S. Patel, Madhav J. Jamdar

ORAL JUDGMENT (per GS Patel,J):

1. The Appeal is filed under Section 37 of the Arbitration and Conciliation Act 1996 ("the Arbitration Act"). It assails an order of 10th July 2019 of a learned Single Judge (RG Ketkar J) dismissing a petition filed by the Appellant, James Peterson Mills Private Ltd ("JPMPL") under Section 34 of the Arbitration Act. JPMPL assailed an Award dated 9th November 2017 of a learned sole Arbitrator. The claimant in Arbitration was the present Respondent, Andre Lex Private Ltd ("ALPL").
2. In June 2007, ALPL approached JPMPL saying that it was interested in acquiring land in Taluka Bhiwandi for construction of godowns, warehouses etc for agricultural produce. After a few initial meetings, ALPL paid a token advance of Rs. 20 lakhs. On 4th March 2007, ALPL wrote to JPMPL setting out its intention to acquire this land for a cold storage warehouse. On 21st May 2007 the parties entered into an Agreement for Sale. They agreed that JPMPL would convey land admeasuring 33.22 acres to ALPL for a total consideration of Rs.17,62,25,000/-. Whether the Agreement said so or not, these two numbers i.e. acreage and the consideration would necessarily yield an arithmetical result of the price per acre even under the original Agreement. Then ALPL paid a further consideration of Rs.1 crore as part consideration.
3. According to JPMPL, represented by Mr Damle before us, ALPL had certain obligations under this Agreement:
(a) within three days of payment, ALPL was to undertake a title search;
(b) upon being satisfied as to the marketability of title, it was to make a further payment of Rs.2.5 crores;
(c) on that payment JPMPL would register the properties in its name and apply for non-agricultural permissions;

(d) subject to these preliminary conditions, ALPL was to make a further payment of Rs. 5,11,25,000/-;
(e) ALPL was to execute and register a final Sale Deed within seven days of JPMPL obtaining the necessary non-agricultural permission.
4. ALPL seems to have obtained a title certificate from its solicitors approving the property to the extent of about 32 acres. Pursuant to this, and in consonance with the Agreement as set above, it paid an amount of Rs.9.5 crores in addition to the payments that it had already made. The aggregate payment thus came to Rs.10.70 crores.
5. There followed several Addenda recording further payments made by ALPL. We are told that there were eight such Addenda. The third Addendum was of 10th January 2007. By this, the total acreage to be covered by the proposed sale was, by consent, increased from 33.25 acres to 50 acres. Consequently, the consideration was also increased to Rs.27.94 crores.
6. There was also -- and this cannot be disputed because it is a part of the record -- a mortgage transaction with JPMPL as the mortgagor or borrower and ALPL as the mortgagee or lender. Two Memoranda of Entry dated 18th July 2007 and 11th December 2007 came to be executed. In arbitration and then before Ketkar J, JPMPL argued now that this mortgage transformed the Sale Deed into a simple mortgage transaction. It seems that JPMPL also executed declarations confirming the mortgages. Therefore, JPMPL argued, the consideration that ALPL paid to JPMPL was now converted into a debt repayable by JPMPL to ALPL. This was to be adjusted against a sale consideration if "the transaction was successful".
7. The mortgage carried interest at 15% per annum and the debt was payable, according to JPMPL, before 31st January 2008. We notice that JPMPL never made any attempt to repay any part of this so-called 'debt'. The mortgage covered property admeasuring about 30 acres. It was agreed that if JPMPL failed to bring the Agreements to their logical conclusions, ALPL was restricted to a refund of the claim.
8. JPMPL says that it proceeded to acquire properties and it did so admittedly to the extent of 32.06 acres by March 2008. There was an email of 17th March 2008 from JPMPL to ALPL saying that JPMPL would sell the properties at a stated rate of Rs.58.82 lakhs per acre. ALPL agreed to a revision of price to Rs.58.42 lakhs per acre. By another email of 24th March 2008, JPMPL sent on a draft Sale Deed for approval. On 28th March 2008, ALPL approved the draft. The parties agreed to register the lands in two phases. The approved Sale Deed was stamped to a value of Rs.57,20,490/- on 29th March 2009 in regard to the Phase-I properties.
9. There is some controversy about ALPL having lost the original Sale Deed. That need not detain us today. We were not addressed on this aspect of the matter at all.
10. JPMPL says that ALPL then inundated JPMPL with requisitions for the Phase-I lands and asked for various documents. JPMPL obtained non-agricultural permission around 23rd April 2008. This was subsequently revised. ALPL however, maintained that the permission obtained was inadequate because it stated that it was for 'industrial warehousing purposes' rather than the intended purpose, 'storage of agricultural produce and cold storage'. JPMPL claimed that ALPL was in breach of the contract and neither ready nor willing to perform its obligations. JPMPL contended that ALPL had abandoned the agreement. ALPL's representatives, in the course of this exchange, seem to have proposed a sale of the property and claimed a refund. Before us, Mr Damle argued that the claim for refund immediately means that ALPL could not have been held either by the Arbitrator or the learned Single Judge to have been ready and willing to perform its obligations under the contract.

11. By notices of 24th December 2010 and 13th April 2012, ALPL called on JPMPL to perform its obligations and in default threatened legal action. JPMPL replied and ultimately the matter went to Court for the appointment of an Arbitrator. On 26th June 2015, the Court appointed a Senior Advocate as the sole Arbitrator.
12. In its statement of claim, ALPL contended that it had agreed to purchase from JPMPL an aggregate of 50 acres in Bhiwandi Taluka. JPMPL was to obtain the necessary permissions. ALPL was to satisfy itself about the title being clear and marketable. ALPL said that it had already executed documents and advanced vast sums to JPMPL in furtherance of this contract. However, according to ALPL, JPMPL did not make out and could not make out a clear and marketable title. Specifically, although it was obliged to do so, it did not obtain appropriate non-agricultural permissions. JPMPL filed its reply. The pleadings completed, the Arbitral Tribunal framed points for determination. The matter proceeded to trial. Significantly, while ALPL led the evidence of three witnesses, JPMPL chose not to led any evidence at all. Then both parties were heard by the learned sole Arbitrator. They filed written submissions and additional written submissions.
13. During the course of the hearings, ALPL submitted that although it was entitled to specific performance, and was entitled an order of specific performance and that an order should be made saying that ALPL was entitled to specific performance, alternatively, if the Tribunal found that specific performance was not possible, then ALPL would be satisfied by restricting its claim to 32.06 acres.
14. The sole Arbitrator made his Award on 9th December 2017. He found that ALPL was entitled to specific performance. He accepted ALPL's restricted claim and directed JPMPL to convey to ALPL lands admeasuring 32.06 acres with vacant possession from 60 days of the date of the Award.
15. Various grounds were taken before the learned Single Judge for assailing the Award. There was an argument, for instance, that ALPL had suppressed documents. The learned Single Judge dealt with this in paragraph 13 of the impugned order. Frankly, we are unable to see how JPMPL could make this submission. It is not as if it was denied the opportunity to lead evidence or to put the necessary documents on record. This argument before the learned Single Judge was without substance and was rightly repelled.
16. Then JPMPL argued that there was a 'novation'. It founded this submission before the learned single Judge on Section 62 of the Contract Act. Reference was made to the Memorandum of Entry and declarations referred to earlier. The learned Single Judge rejected the submission, and, in our view quite correctly. He held inter alia that if there was to be a novation, material would be required to be produced on record to substantiate the assent of both sides to a novation, i.e. evidence to show that the parties intended to substitute the original contract by a new contract, or had agreed to rescind the earlier one. JPMPL led no such evidence whatsoever. It could hardly raise this point.
17. Then came the question of ALPL's readiness and willingness. In this context, given that its claim in arbitration was for specific performance, ALPL examined a witness who joined ALPL in 2010. JPMPL argued that this witness had no personal knowledge of the 2007 Agreement. Those who did know were not examined. The argument also was that ALPL's "questioning of JPMPL's title" demonstrated a lack of readiness and willingness. The learned Single Judge was asked to look at the questions and answers recorded by the learned sole Arbitrator in evidence.
18. In our view, this approach is wholly impermissible. Amended Section 34 of the

Arbitration and Conciliation Act reads thus:

34. Application for setting aside arbitral award.--

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub- section (3).

(2) An Arbitral award may be set aside by the Court only if--

(a) the party marking the application establishes on the basis of the record of the arbitral tribunal that

--

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that--

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1.-- For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,--

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.-- For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrators, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award;

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

(3) An application for setting aside my not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient

cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.
(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award. (5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement. (6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon other party."
(Emphasis added)
19. As the Section itself shows, the scope for challenge is exceedingly narrow. An erroneous application of law is not a ground to set aside an award. Re-appreciation of evidence by a Section 34 Court is impermissible. The amended provision has been authoritatively appreciated by the Supreme Court in **Sangyong Engineering & Construction Co Ltd v National Highways Authority of India[1]**. The previous law including **Associate Builders v Delhi Development Authority[2], ONGC Ltd v Western Geco International Ltd[3], Renusagar Power Co Ltd v General Electric Co[4]** and other decisions were analysed, as was the effect of the statutory amendments. Sangyong Engineering effectively says:
(a) "Public policy of India", whether in Section 34 or Section 48 means the 'fundamental policy of Indian law' as explained in paragraphs 18 and 27 of Associate Builders. This is a return to the Renusagar position: violation of (i) the fundamental policy of Indian law; (ii) the interest of India; and (iii) justice or morality.
(b) The *Western Geco* expansion, i.e. the requirements of a judicial approach (as interpreted in Western Geco) and placing 'unreasonableness' in the 'public policy' head, is now a thing of the past. To do so would be to enter impermissibly into a merit-based review of an arbitral award.
(c) Violations of principles of natural justice continue to be a ground for interference.7
(d) "The interest of India" does not survive as a ground for challenge.8
(e) The 'justice or morality' standard is now to be viewed as a test of whether the award violates 'the most basic notions of morality or justice', in accord with paragraphs 36 to 39 of Associate Builders -- the award must shock the judicial conscience to admit of interference on this ground.
(f) Domestic awards must now survive an additional test: that set out in Section 34(2A), the 'patent illegality' standard. This must be a facially patent illegality. It cannot be an erroneous application of the law. A backdoor entry is not permitted: a ground not within 'the fundamental policy of Indian law' -- the contravention of a statute unlinked to public policy or public interest -- cannot slither in under the ground of 'patent illegality'.
(g) There is distinction between 'an erroneous application of the law' and an 'incorrect invocation of the law'. For instance, ignoring a binding decision of a superior court is not an erroneous application of the law. It is a ground of patent illegality, because it does not state the law correctly. But an award that correctly states the law is not vulnerable because its application of that correctly stated law to the contractual dispute is said (or even shown) to be erroneous.

(h) Patent illegality does not extend to a re-appreciation of evidence. Only an appellate court can do that. A Section 34 court cannot. It is not an appellate court.
(i) A mere contravention of substantive Indian law is no longer a ground to set aside an arbitral award.
(j) But an award with no reasons is a violation of Section 31(3) of the Arbitration Act and constitutes a patent illegality. Paragraph 42.2 of *Associate Builders stands.*
(k) The interpretation and construction of a contract is primarily for the arbitrator to decide. If the tribunal does so in a way no fair-minded or reasonable person would -- that is, the arbitrator's view is not even minimally a possible one -- or if he wanders outside the contract and deals with mattes not assigned to him (for instance, in a dispute about a leave and license agreement considering whether a particular communication is defamatory and awarding damages or an injunction), then the award is vulnerable as a jurisdictional error within Section 34(2A).
(l) 'Perversity', as understood in paragraphs 31 and 32 of *Associate Builders*, is no longer under the 'public policy of India' head. Yet it continues to exist. It is now re- positioned to fall under the 'patent illegality appearing on the face of the award' head. This would include: a finding based on no evidence at all; an award which ignores vital evidence in arriving at its decision; or, say, a finding based on documents taken behind the back of the parties.
(m) The patent illegality standard is unavailable for international commercial arbitrations.
(n) Section 34(2)(a) does not permit a challenge to an arbitral award on merits.
20. In *Union of India v Recon***[5]**, the decision of the Supreme Court in **Sangyong Engineering** has been further analysed to cull out the emergent principles. Paragraph 17.4 reads thus.
17.4 This yields the following result:
(i) A lack of a 'judicial approach', being the Western Geco expansion, is not available per se as a ground of challenge.
(ii) A violation of the principles of natural justice is a ground for challenge as one under Section 18 read with Section 34(2)(a)(iii) -- that is to say, not under the 'fundamental policy' head nor the 'patent illegality' head, but distinctly under this sub-section.19
(iii) A lack of reasons is a patent illegality under Section 34(2-A)[6].
(iv) In interpreting the contract, the arbitral view must be fair-minded and reasonable. If the view is one that is not even possible, or if the arbitrator wanders beyond the contract, that would amount to a 'patent illegality'.
(v) 'Perversity' as understood in *Associate Builders*, is now dishoused from 'fundamental policy' (where *Western Geco* put it), and now has a home under 'patent illegality'. This includes:
(A) a finding based on no evidence at all;
(B) an award that ignores vital evidence;
(C) a finding based on documents taken behind the back of the parties.
Combining (iv) and (v) above, therefore, while the explicit recognition or adoption of the Wednesbury unreasonableness standard (introduced in Western Geco) is probably done away with, there is even yet a requirement of reasonableness and plausibility in matters of contractual interpretation. If the interpretation of the contract is utterly unreasonable and totally implausible -- the view taken is not even possible -- a challenge lies. Therefore: an award that was impossible either in its making (by ignoring vital evidence, or being based on no evidence, etc) or in its result (returning a

finding that is not even possible), then a challenge on the ground of 'perversity' lies under Section 34(2-A) as a dimension of 'patent illegality'.

21. Paragraph 29 of the Supreme Court decision in **Delhi Airport Metro Express Pvt Ltd v Delhi Metro Rail Corporation Ltd[7]** says:

29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-
A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality".

(Emphasis added)

22. There is no possibility at all in Arbitration law as it stands of a Section 34 Court or Section 37 Appeal Court, re-appreciating the evidence actually led before the Arbitrator. The Arbitrator is the master of the evidence. It is another matter if relevant evidence is entirely ignored or irrelevant evidence is taken into account. But that is not JPMPL's case in this regard at all. The emails in question were in fact before the learned sole Arbitrator and were considered. What the learned Single Judge was being asked to do was to re- appreciate the evidence as if he was hearing a regular civil first appeal. On this the law is firmly settled and quite emphatically that a Section 34 Petition is not in the nature of the first appeal.

23. The other argument raised before the learned Single Judge and again before us is that both the award and the impugned order do not properly apply Section 12 of the Specific Relief Act 1963. Now it is clear that the Section 12 argument was taken in Arbitration and before the learned Single Judge. Again, on this, as Sangyong Engineering tells us, an incorrect appreciation of law is not a contravention with the fundamental policy of Indian law.

24. This has been appreciated by the Supreme Court in **Vijay Karia v Prysmian Cavi E Sistemi SRL**,[8] as also by this Court in **Banyan Tree Growth Capital LLC v Axiom Cordages Limited[9]**. Something more than contravention of law is required to attract the bar of public policy under the Act.

25. Before the learned Single Judge, Mr Jain on behalf of ALPL pointed out that there was a certain trajectory to how the agreement in question evolved. It did not begin with 50 acres. It began with 33.25 acres. Then, through addenda, the land to be acquired and transferred was increased to 50 acres. The consideration too correspondingly increased. ALPL had already paid Rs. 22,21,07,120/- between January 2007 and 12th April 2012. This was, he submitted then, as he does now, and in our view

completely correctly, dislodges any case of a lack of readiness and willingness. In fact, between 31st March 2008 and 12th April 2010, ALPL paid about Rs.10 crores to JPMPL.
26. This aspect the learned Sole Arbitrator considered in paragraph 25 of the impugned Award. He found as a matter of fact on an appreciation of evidence before him that this progression of acreage and consideration from the original 33.25 acres to 50 acres and then being brought back down in Arbitration to 32.06 acre was completely justified. The evidence clearly showed that JPMPL had only acquired some sort of rights to 32.06 acres and no more.
27. The argument before us is that the learned sole Arbitrator travelled beyond the remit of the contract by "fixing" a rate per acre. The submission only needs to be stated to be rejected. There is not only material to indicate the price of Rs. 58.42 lakhs per acre, but as we noted, the price per acre is the inevitable result of a simple arithmetical calculation. ALPL's offer to restrict to its claim to 32.06 acres was made before the learned sole Arbitrator and accepted. Indeed, the Arbitrator found although ALPL was entitled to specific performance of the entirety of the contract, i.e. for 50 acres, but since ALPL had with restricted its claim -- and which it was perfectly entitled to do -- the order of specific performance could properly be restricted to that acreage. Therefore, there would have to be a refund of the additional consideration that had by then been paid.
28. Before us today there is an additional ground, viz., that the Agreement (with or without its addenda) is insufficiently stamped. We note Mr Jain's statement on instructions that the entire amount of stamp duty as assessed will be paid, whether under an amnesty scheme or otherwise. This is enough for that aspect of the matter.
29. As to the scope of Section 37 Appeal, we may profitably refer to the decision of a three-judge Bench of the Supreme Court **in UHL Power Company Limited v State of Himachal Pradesh.[10]** In paragraphs 16 and 17, the Supreme Court said:
16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the 23. Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. ... ...
(Emphasis added)
30. Having regard to the restricted scope for interference, we do not believe that the learned Single Judge was even slightly in error in dismissing the Petition. There was no ground for interference with the Award, and the learned Single Judge rightly held so.
31. The Appeal is without merit. It is dismissed.
32. The Interim Application does not survive and is disposed of accordingly.
33. No costs.

(Madhav J. Jamdar, J) **(G. S. Patel, J)**

8th July 2022

IN THE SUPREME COURT OF INDIA
(UNDER ORDER XXI RULE 3(1)(a) .
(CIVIL APPELLATE JURISDICTION)
UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA
SPECIAL LEAVE PETITION (C) No.___ of 2022

(Arising out of the impugned final Judgment and order dated 08.07.2022 passed by the Hon'ble High Court of Judicature at Bombay in Commercial Appeal (L) No. 428 of 2019)

WITH PRAYER FOR INTERIM RELIEF

IN THE MATTER OF:

James Peterson Mills Pvt. Ltd. ..... Appellant

v.

Andrew Lex Pvt. Ltd .....Respondent

To,
THE HON'BLE CHIEF JUSTICE OF INDIA, AND HIS COMPANION JUSTICES OF THE SUPREME COURT OF INDIA, NEW DELHI.

The Special Leave Petition of the petitioner named above.

MOST RESPECTFULLY SHOWETH:

1. That the petitioner above named, respectfully submits that this petition seeking Special Leave to Appeal is against the impugned final Judgment and order dated 08.07.2022 passed by the Hon'ble High Court of Judicature at Bombay in Commercial Appeal (L) No. 428 of 2019 whereby the Hon'ble High Court of Judicature at Bombay dismissed the appeal being Commercial Appeal (L) No. 428 of 2019 and reaffirmed the decision passed by the Ld. Single Judge at Bombay.
2. It is stated that previously, the Petitioner's Company was a private limited company and subsequently the company was converted into a limited liability company on 07.02.2008. Therefore, the authorization consists of a stamp marked as Ltd Company and not Pvt. Limited.

QUESTIONS OF LAW:

The following questions of law arise for the consideration by this Hon'ble Court:

3. Whether the Hon'ble High Court at Bombay was correct in dismissing the appeal on the ground that the said Hon'ble Court has limited scope for interference?
4. Whether the Hon'ble High Court at Bombay was correct in not appreciating that the award passed by the Ld. Sole Arbitrator was totally unsustainable in law, patently illegal, and opposed to public policy?
5. Whether the Hon'ble High Court at Bombay was correct in not appreciating that the award passed by the Ld. Sole Arbitrator was totally unsustainable in law, as the same was barred by the law of limitation in pursuance of Memorandum of Entry dated 11.12.2007?
6. **DECLARATION IN TERMS OF RULE 3 (2):** That the petitioners state that no other petition seeking leave to appeal has been filed by them against the impugned final order.
7. **DECLARATION IN TERMS OF RULE 5:** The Annexures- P/1 to P/22 produced along with the S.L.P. are true copies of the pleadings/documents which formed part of the records of the case in the Court below against whose order the leave to appeal is sought for in this petition.

GROUNDS:

8. Leave to appeal is sought for on the following grounds amongst others, which are taken without prejudice to one another:-
    A. Because the Petition under Section 11 was based on an Agreement to Sell dated 21.05.2007 and 8 Addenda dated 01.06.2007, 26.06.2007, 10.07.2007, 04.12.2007, 29.03.2008, 31.03.2008, 30.05.2008, and 22.12.2008. It is submitted that the aforesaid documents upon which the alleged cause of action was based were not duly and sufficiently stamped as per law and registered and thus, are not enforceable in law. This would render the arbitration agreement as non-existent and not valid in law as held by this Hon'ble Court in Garware Wall Ropes vs. Coastal Marine Constructions and Engineering Limited (2019) 9 SCC 209 as affirmed in Vidya Drolia vs. Durga Trading Corp (2021) 2 SCC. The same is a ground for the setting aside of the award as per Section 34(2)(ii) of the Arbitration and Conciliation Act, 1996.
    B. Because the specific performance of an insufficiently stamped agreement cannot be granted. Furthermore, even the arbitration clause incorporated in the Agreement to Sell dated 21.05.2007 cannot be said to have come into existence when the agreement itself is invalid and non-existent. Any award based on such a non-existent and invalid arbitration clause itself is unenforceable, illegal, void, and bad in law.
    C. Because the Ld. Collector of Stamps, Thane vide its order dated 23.01.2015, held that no further stamp duty was required to be paid on the impounded documents. However, in appeal, on 04.01.2020, the Inspector of General Registration and Stamps, Pune, passed an order holding that the impounded Agreements were insufficiently stamped.
    D. Because the order dated 4th January, 2020 of the . Ld. I.G.R. Pune was passed only after the captioned Commercial Appeal was filed by the Petitioner, and the same, being utmost necessary, essential and germane to the adjudication of the present dispute, ought to have been considered by the Hon'ble High Court while deciding the Commercial Appeal. The effect of non stamping and non registration of the· principal documents in the present dispute between the· Petitioner and Respondent was not considered by the Ld. Arbitrator, nor by the Ld. Single Judge in Commercial Arbitration Petition No. 538 of 2018.
    E. Because, the Agreement to Sell dated 21.05.2007, is now declared to be insufficiently stamped vide the order dated 04.01.2020 passed by the Ld. I.G.R., Pune and the same has not been challenged by the respondents. Therefore, it has attained finality and thus, cannot be relied upon, and specific performance of the same cannot be granted.
    F. Because the High Court grossly erred in not appreciating the material documents produced which substantiate the ground of novation under section 62 of the Indian Contract Act whereby the original contract dated 21.05.2007 was mutually substituted by a new contract by virtue of the execution of the mortgage deeds which converted the consideration paid into a debt, which in turn amounts to substitution and/or rescinding the original contract.
    G. Because the award dated 09.11.2017 suffers from the want of an

Arbitration Agreement in view of the novation which automatically came into existence on the very day the mortgage deeds were executed by and between the petitioner and the respondent.

H. Because the High Court erred in not considering the fundamental principles laid down in section 18 of the Specific Relief Act and ought to have held in view of the prevailing facts and provisions of law that the award dated 09.11.2017 dehors the legal position and is vitiated by patent illegality and hence is against the public policy of India.

A. Because the Hon'ble High Court at Bombay erred in not holding that the Ld. Single Judge in his order dated 10.06.2019 used excess jurisdiction by holding that the respondent is entitled to part performance of the contract and upholding the order of refund of Rs. 3,48,12,600/- along with interest at 15% per annum for want of jurisdiction as the order of refund of Rs. 3,48,12,600/- also includes the cost for developing land which was not a part of the Arbitration Agreement.

J. Because the Hon'ble High Court at Bombay erred in not considering that the award was made contrary to the provisions of the Specific Relief Act as once the Respondent, instead of asking for specific performance, which the respondent has voluntarily abandoned/waived and demanded a refund of money, was left with no other scope but ought to have quashed/set aside the award.

K. Because the Hon'ble High Court at Bombay erred in not appreciating the fact that the agreement for sale of land for consideration requires registration under the Indian Registration Act and the provision of Section 17(1-A) and thus the Arbitration clause contained in the main agreement was not enforceable for want of payment of stamp duty as well as registration.

AX. Because the Arbitral Tribunal did not have jurisdiction to decide the dispute on the basis of an agreement which stood substituted by another one which did not contain an arbitration clause.

ALL. For that the Hon'ble High Court at Bombay erred in not appreciating that the order dated 10.06.2019 was passed without giving effect to the notices sent by the petitioner being dated 10.07.2010, 15.10.2010, 03.09.2012, and 15.09.2012; on the contrary, heavily relying upon the notice issued by the respondent being dated 24.12.2010 and 13.04.2012 thereby making it fundamentally erroneous and against the principle of natural justice.

N. Because it is well settled that the arbitrator cannot create new rights and/or re-write the contract between the parties since the arbitral tribunal is a creation of the law of contracts which cannot travel outside the contract.

O. Because the High Court failed to consider that both the Ld. Single Judge and the sole arbitrator exceeded their respective jurisdictions in granting relief to the respondent and thereby traveled beyond the contract.

P. Because the High Court did not appreciate the fact that the agreement for sale of land for consideration requires payment of stamp duty under the Maharashtra Stamp Act, 1958, and thus the Arbitration clause contained in the main agreement was not enforceable for want of payment of stamp duty.

Q. Because the High Court grossly erred in not considering that the respondent was never ready and willing to perform its part of the contract and that they abandoned the agreement and requested the petitioner to sell the property and claimed a refund of the amount paid instead.

R. Because the High Court erred in not considering that it was beyond the jurisdiction of the Sole Arbitrator to award a refund of the amount, not paid as purchase price but as consideration under the main contract for 32.06 parcels of land and ought to have rejected the Award granting the refund of amount with interest, which was in fact paid for extra works not forming part and/or outside the scope of the main contract. Thus, the Judgment/order on the face of it is erroneous and needs to be quashed.

S. Because the High Court ought to have considered that the only remedy left and/or available for the Respondent was to enforce the mortgage debt and not for specific performance of the main contract.

GROUNDS FOR INTERIM RELIEF:-

9. For that the Hon'ble High Court at Bombay grossly erred in not appreciating the material documents produced substantiating the ground of novation under section 62 of the Indian Contract Act whereby the original contract dated 21.05.2007 was mutually substituted by a new contract i.e. the execution of mortgage deeds and thereby converting the consideration paid into a debt, which in turn amounts to substitution and/or rescinding the original contract.
10. For that the Hon'ble High Court at Bombay grossly erred in not appreciating that the award dated 09.11.2017 passed by the Ld. Sole Arbitrator and re-affirmed by the Ld. Single Judge suffers from patent illegality in view of section 62 of the Indian Contract Act.
11. For that the Hon'ble High Court at Bombay grossly erred in not appreciating the fact that the award dated 09.11.2017 suffers from want of an Arbitration Agreement in view of the novation which automatically came into existence on the very day the mortgage deeds were executed by and between the petitioner and the respondent.
12. For that the Hon'ble High Court at Bombay erred in not considering the fundamental principles laid down in section 18 of the Specific Relief Act and ought to have held in view of the prevailing facts and provisions of law that the award dated 09.11.2017 dehors the legal position and is vitiated by patent illegality and hence, being against the public policy of India, should be quashed/set aside.

MAIN PRAYER

13. It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to:
    A. GRANT Special Leave to Appeal against the impugned final Judgment and order dated 08.07.2022 passed by the Hon'ble High Court of Judicature at Bombay in Commercial Appeal (L) No. 428 of 2019; and
    B. PASS any other or further order(s) which may be deemed to be just, fit, and proper in the facts and circumstances of the case.

PRAYER FOR INTERIM RELIEF:

14. It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to:

    A. grant ad-interim ex-parte stay of the execution proceeding being Execution Petition No. 2261 of 2019 pending before the Court of District Judge at Thane,
    B. stay the operation of the award dated 09.11.2017; and
    C. PASS any other or further order(s) which may be deemed to be just, fit, and proper in the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNESS THE HUMBLE PETITIONER BEING DUTY BOUND SHALL EVER PRAY.

Drawn on: 03.10.2022 Filed on: 24.12.2022
DAYA SENGUPTA

AGREEMENT TO SELL

This Agreement to Sell ("Agreement") is made at Mumbai on this 21st May, 2007 **BY** and BETWEEN
M/s. JAMES PETERSON MILLS PVT. LTD., a company incorporated under the Companies Act, 1956, having its office at 1st Floor, Mumbai-400002, through its **Director** hereinafter referred to as the "Vendor" (which expression **shall** unless repugnant to the context or meaning hereof be deemed to mean and include **its** legal heirs, executors, and Assigns) of the FIRST PART.
AND
ANDREW LEX PVT. LTD., a company incorporated under the Companies Act, 1956, having its office at Gaman Center, Mak Road, 3rd Floor, Andheri Kurla Road, Andheri East, Mumbai-59, through its authorized signatory Mr. Shoabh Sheikh hereinafter referred to as **"Purchaser"** (which expression shall unless repugnant to the context or meaning hereof be deemed to mean and include **its** successors in title, assigns, and nominees) of the SECOND PART.
WHEREAS
A. The Vendor represents that (1) Balu Shiva Mathe (2) Popular Enterprises Limited (3) Narayan Baburao Shinde (4) Shirish Gangaram Shinde (5) Ketan Gangaram Shinde (6) Shweta Gangaram Shinde (7) Nayana Gangaram Shinde (8) Ramchandra Kanu Thange (9) **Dilip** Anant Mathe (10) Suresh Anant Mathe (11) Ramchandra Kanu Thange (12) Shriganglukha Mathe (13) Changuna Bai Lukha Mathe (14) Rukshana Wasim Nachan (15) Laxman Kanu Thange (16) Vilas Baburao Shinde (17) Shivram Baburao Shinde (18) Gangaram Baburao Shinde (19) Suresh Baburao Shinde (20) Shantaram Baburao Shinde (21) Vithabai Ragunath (22) Baburao Shinde (23) Sunanda Rajaram Bhoir (24)

Santosh Rajaram Bhoir (25) Kailash Rajaram Bhoir (26) Nana Dharma Bhoir (27) Devki Vithal Patil (28) Anubai Laxman Patil (29) Sudhabai Vithal Patil (30) Kana Dharma Patil (31) Balaram Banga Patil (32) Vimal Chandrakant Phulore (33) Kamal Bhaskar Patil (34) Sunita Shivaji Thakre (hereinafter referred to as the **"Owner"**) are the absolute owners by title and interest of the immovable properties bearing numbers 61, 62, 63, 67, 68, 70 situated at Village Bahuli, Taluka Bhiwandi, Dist: Thane (MS), and bearing numbers 64, 65, 66 situated at Village Kurund, Taluka Bhiwandi, Dist: Thane (MS), total admeasuring about 33.25 acres, hereinafter referred to as **"Schedule Property".**

B. The Vendor represents that he is currently in the process of acquiring all rights, title, and **interest** in the Schedule Property from the Owner, and has already paid the Owner a sum **of Rs.1,27,75,000/-** as advance against consideration for the purchase of the Schedule Property.

C. The Vendor has approached the Purchaser and has agreed to acquire all right, title, and interest of the Owner in the Schedule Property fully and absolutely and to further convey the same to the Purchaser by way of an absolute deed of sale ("Deed of Sale"). Thus, the Vendor, on becoming the absolute owner of the Schedule Property, has agreed to sell the absolute right, title, and interest in the Schedule Property to the Purchaser.

D. In pursuance of the same, the Vendor and the Purchaser are hereby executing this Agreement under the terms and conditions set out hereinafter.

NOW THIS AGREEMENT WITNESSETH as follows:

1. In consideration of the Vendor agreeing to convey to the Purchaser the absolute right, title, and interest in the Schedule Property free of all encumbrances and impediments, the Purchaser hereby agrees to pay to the Vendor a total consideration of **Rs.17,62,25,000/-** (Rupees Seventeen Crore sixty-two lakh twenty-five thousand only) as follows:

a) The Purchaser has paid on the 2nd day of January 2007 a token advance of **Rs.20,00,000/-** (Rupees Twenty Lakhs only) vide cheque number **013571** dated 2nd January 2007, drawn on Citibank NA, Mumbai, which the Vendor hereby acknowledges. Further, the Purchaser has on this 21st day of May, 2007, paid the Vendor a token advance of **Rs.1,00,00,000/-** (Rupees One Crore only) vide cheque number **000001** dated 21st May 2007, drawn on Citibank NA Mumbai, which the Vendor hereby acknowledges.

b) Within three days of paying the Token Advance, the Purchaser will carry **out** a title search to establish whether the Schedule Property that is being acquired by the Vendor has a clear marketable title and is free of all encumbrances and impediments. In the event the Purchaser is satisfied as to the title and marketability, it shall within three days of getting **the** legal clearance report on **the** marketable property, pay an amount of **Rs.2,50,00,000/-** (Rupees Two Crores Fifty Lakhs only) vide demand draft/cheque, to the Vendor towards part consideration for the purchase of the Schedule Property, which the Vendor hereby acknowledges. After this payment, the Vendor will register all the land in his name and will apply for **Non-Agricultural** land process.

At this stage and after complying with the above process of completion of the documents by the Vendor (registering the schedule property in the name of the Vendor etc.), the Purchaser will release **Rs.5,11,25,000/-** (Rupees Five Crore Eleven Lakhs Twenty-Five Thousand only), to the Vendor towards part consideration for the purchase of the scheduled property.

The advance sum paid by the Purchaser to the Vendor shall be apportioned/adjusted against the total consideration payable by the Purchaser **to** the Vendor. It is hereby specifically agreed by the Vendor that in the unlikely event that it is found by the Purchaser during the title search period indicated above, that the Schedule Property being acquired by the Vendor does not have a clear marketable title, the Purchaser will, at its sole **discretion,** have the right to terminate this Agreement, and the Vendor will be required to repay the entire advance (paid till **date** as per the above-mentioned schedule of payments) to the Purchaser immediately, failing which the same will be repaid by the Vendor **to the** Purchaser along with interest at the rate of 15% per annum. It is hereby clarified that in the event the Agreement is terminated under this clause, there will be no requirement for the Purchaser to make any further payment to the Vendor for any reason whatsoever.

It is hereby agreed by the Vendor that the entire process as mentioned above—getting the clear title report by the Purchaser, getting the Schedule Property registered in favour of the Vendor from the 'Owners,' and getting the land converted for non-agriculture usage for warehousing purposes—will be completed within 2 months from the date of this **Agreement.** Failing which, the Purchaser will have the sole right to terminate this **Agreement,** and the Vendor will be required to repay the entire **advance** (paid till date as per the above-mentioned schedule of payments) to the Purchaser immediately, failing which the same will be repaid by the Vendor to the Purchaser along with interest at the rate of 15% per annum. It is hereby clarified that in the event the Agreement is terminated under this clause, there will be no requirement for the Purchaser to make any further payment to the Vendor for any reason whatsoever.

c) The Purchaser agrees and undertakes to pay the balance consideration of **Rs. 8,81,00,000 (Rupees Eight Crore Eighty-One Lac only)** simultaneous with the execution and registration of the Deed of Sale in respect of the Schedule Property in favour **of** the Purchaser along with **the** conversion of **land** to non-agriculture use. At this stage, the Vendor should have the Schedule Property duly registered in his name, and the conversion of land for non-agriculture use for warehousing **purposes** should be complete in all aspects.

2. The Purchaser shall bear all costs and expenses, i.e., stamp duty and registration charges, relating to this Agreement and the Deed of Sale. The Vendor shall sign and present before the Office of the Sub-Registrar all necessary forms, affidavits, and documents as may be necessary for the purposes of registration of the Deed of Sale in favour of the Purchaser and conveying a perfect title to the Purchaser.

3. Right to Assign

The Vendor agrees that the Purchaser shall be entitled to purchase the Schedule Property and have the sale deeds registered either in his own name, or the Purchaser shall have the right to assign his rights and interests under this Agreement in favour of any third party and have the sale deed with respect to the Schedule Property registered in the names of **such** third party nominated by him. The Vendor shall not have any objection to the same.

4. The Vendor shall, at the request of the Purchaser, assist the Purchaser in conducting a survey of the Schedule Property so as to ascertain the exact physical dimensions of the Schedule Property. In the event the **dimensions** or measurements of the Schedule Property are found to be less than the area mentioned in the schedule, the Purchaser shall be entitled to make a proportionate reduction in the sale consideration payable for the purchase of the same.

5. Further, The Vendor hereby warrants, represents, covenants with, and assures the Purchaser after he **acquires** the Scheduled Property from the Owner that:
i. The Vendor is the sole and absolute owner of the Schedule Property and has the absolute and unencumbered power and authority to sell, convey, and transfer the same to the Purchaser.
ii. The Schedule Property is not subject to any mortgage, charge, lien, attachment, claim, or other encumbrances or impediments whatsoever, and the sale of the same to the Purchaser pursuant hereto will be free from any encumbrances or impediments.

iii. the Vendor has not assigned or agreed to assign his rights under the Agreement or otherwise in respect of the Schedule Property, to any other person or party other than the Purchaser or has not at any time done or knowingly suffered or been a party to any act, deed or thing whereby he can be prevented from transferring absolutely the right title and interest in the Schedule Purchaser and putting the Purchaser in possession thereof.
iv. The Vendor shall not negotiate with any third party to lease, assign, sell, convey, or encumber in any manner the Schedule Property or any part thereof during the subsistence of this Agreement.
v. The Vendor shall permit the authorized representatives of the Purchaser to enter upon the Schedule Property for any inspection or survey that the Purchaser may want to conduct.
vi. The Vendor has not committed any act, deed, or thing, or omitted to do any act, deed, or thing **whereby** the Vendor's right, title, or interest in the Schedule Property or any part thereof could be forfeited, extinguished, or rendered void or the Vendor's right to sell or convey the same to the Purchaser is not affected or prejudiced in any manner and the Schedule Property has not been the subject matter of any litigation or has not been subjected to attachment in the execution of any decree.
vii. Upon the sale and purchase of the Schedule Property and upon payment of the **entire** sale consideration, the Purchaser will have the absolute and unrestricted right, title, and interest over the Schedule Property and the Purchaser shall have the sole and exclusive right, title, and interest to use, occupy, enjoy, and own the Schedule Property without any hindrance from **either** the Vendor or any person claiming through, under, or in trust for the Vendor.
viii. No other party has any legal or beneficial right, claim, interest, or demand whatsoever to or in respect of the Schedule Property or any part thereof.
ix. The Vendor has not received any notice for acquisition or requisition of the Schedule Property or any part thereof.
x. The Vendor **doth** hereby covenant that it will always keep the Purchaser indemnified from or against all actions, suits, and proceedings, claims, demands, fines, penalties, prosecutions, costs, charges, expenses, damages, and/or other liabilities of whatsoever nature made or suffered or incurred by or caused to be imposed or levied on the Purchaser by reason or virtue of any non-performance or non-observance of any of the terms, conditions, agreements, covenants, and provisions **stated** herein.

6. Time shall be the essence of this Agreement. The Vendor and Purchaser shall seek to complete the execution and registration of the Deed of Sale in respect of the Schedule Property within 7 (seven) days of getting the NA permission from appropriate

authorities.
7. Until completion of the sale by execution and registration of the Deed of Sale in favour of the Purchaser, the Vendor and thereafter the Purchaser shall be entitled to all the benefits from the Schedule Property and be liable for all taxes, levies, cess, duties, and outgoings in respect thereof.
8. The sale shall be completed in the following manner:
a) On the balance sale consideration detailed in clause 1(c) hereof being paid by the Purchaser to the Vendor.
b) On the Vendor putting the Purchaser into possession of the Schedule Property.
c) On the Vendor handing over the original documents of title pertaining to the Schedule Property to the Purchaser and on the Vendor executing the Deed of Sale in favour of the Purchaser, which shall be within a period referred to in Clause 6.
d) On the Vendor producing an up-to-date Encumbrance Certificate declaring that the Schedule Property has not been encumbered during the pendency of this Agreement.
e) On the Vendor signing the necessary forms to permit the khata of the Schedule Property to be transferred to the name of the Purchaser.

9. In the event the Vendor is unable to convey, within the time stipulated above, the Schedule Property to the Purchaser for any reason whatsoever, the Purchaser may agree upon a mutually extended date to complete the sale and purchase of the Schedule Property. In the event the Purchaser does not desire to extend the date for completing the execution and registration of the Deed of Sale or the Vendor is unable to convey the Schedule Property to the Purchaser within the mutually extended time, the Purchaser may terminate this Agreement with a notice of 30 days, and the Vendor shall reimburse any amount received from the Purchaser vide this Agreement within 30 days of notice from the Purchaser to terminate this Agreement, failing which the same will be repaid along with interest at the rate of 15% per annum. Notwithstanding the above, the Purchaser shall be at liberty to require the Vendor to specifically perform the Vendor's obligations as provided in this Agreement by institution of legal proceedings.
10. The Vendor shall have no right of termination under this Agreement and shall be compelled to fully and satisfactorily discharge all his obligations under this Agreement, in default of which, the Purchaser shall have the right to claim damages and seek specific performance, injunctive relief, and any other remedies available under law.
11. Without prejudice to any other rights that the Parties may have, in the event of a breach of the terms of this Agreement by any party, the non-defaulting party will be entitled to approach the arbitrator/s in terms of clause 14 to enforce specific performance of the obligations of the defaulting party.
12. Any delay or indulgence by any party in enforcing the terms and conditions of this Agreement or any forbearance shown in any manner shall not be construed as a waiver on the part of that party of any of his/their rights under this Agreement.
13. This Agreement embodies the entire understanding between the Vendor and the Purchaser regarding the subject matter hereof and supersedes all prior negotiations, agreements, and understandings between the Purchaser and the Vendor. This Agreement may be varied or amended only in writing and under the signature of the Vendor and the Purchaser.
14. Both the Vendor and the Purchaser have agreed that in case of dispute between them, the same shall be resolved solely by way of arbitration in terms of the Arbitration and Conciliation Act, 1996. This Agreement of Sale shall be specifically enforceable by

both parties.
15. Subject to the arbitration clause, the parties agree that the courts at Mumbai shall have exclusive jurisdiction in respect of all matters arising out of this Agreement.
IN WITNESS WHEREOF the Parties have set their hands and signed this Deed on the day, month, and year first mentioned above in the presence of witnesses.

For JAMES PETERSON MILLS PVT. LTD.
Sd/-
For ANDREW LEX PVT. LTD.
Sd/-

BEFORE THE SOLE ARBITRATOR
SHRI NITIN THAKKER, SENIOR ADVOCATE
ARBITRATION REFERENCE No. 3 of 2015

Andre Lex Private Limited
Versus
James Peterson Mills Private Limited
AWARD

1. By an Order dated 26th June 2015, the Hon'ble High Court, Bombay, appointed me as the Sole Arbitrator. As per the directions given, the parties have filed their respective pleadings. The parties have disclosed documents. The Claimant led oral evidence of three witnesses. The Respondent has chosen not to lead any oral evidence. Both parties have made oral submissions as well as filed written submissions. The parties have also filed additional written submissions. Having considered the pleadings, oral and documentary evidence relied upon by both parties, and their oral and written submissions, including additional written submissions, I am proceeding to make the following Award.

FACTS
Claimant's Case:
2.1 The Claimant and the Respondent are companies incorporated under the Companies Act, 1956. The Claimant is in the business of logistics and warehousing. The Respondent has acted as an aggregator of lands for onward sale to the Claimant.
2.2 According to the Claimant, it was on the lookout for a property to construct and run an industrial warehouse sometime in November-December 2006. The Respondent approached the Claimant with a proposal to provide a suitable property, expressing its willingness and ability to sell to the Claimant land bearing:

- Survey Nos. 61, 62, 63, 67, 68, and 70 at *Village Vahuli, Bhiwandi, Dist: Thane*
- Survey Nos. 64, 65, and 66 at *Village Kurund, Taluka Bhiwandi, Dist: Thane*

The total land area was approximately 33.25 acres. The Claimant pleads that several meetings were held between the representatives of both parties, and the Claimant found the property ideally suitable for its purpose.
In respect of the said property, the Claimant handed over a cheque dated 2nd January 2007 for Rs. 20,00,000/- as a token advance for the original property. The Respondent accepted and encashed the cheque. Subsequently, by an Agreement to Sell dated 21st May 2007, the Respondent agreed to sell, and the Claimant agreed to purchase the said property for an aggregate consideration of Rs. 17,62,25,000/-, on the terms and conditions set out therein.
According to the Claimant, under the Agreement, the Respondent was obliged to:

1. Make out a clear marketable title, free of all encumbrances and impediments in respect of the Original Property.
2. Purchase all pieces and parcels of land constituting the Original Property from its owners.
3. Get the Original Property registered in its own name.
4. Get the Original Property converted for non-agricultural use for warehousing purposes.
5. Execute a Sale Deed whereby the Original Property would stand sold and conveyed by the Respondent to the Claimant.

2.3 On or before the execution of the said Agreement, the Claimant paid the Respondent a further sum of Rs. 1 Crore via cheque dated 21st May 2007. The same was accepted and encashed by the Respondent. Further consideration was due and payable by the Claimant only upon the Respondent first making out a clear marketable title, free of all encumbrances and impediments, in respect of the said property. After execution of the Agreement, the Respondent started requesting the Claimant to advance further sums of money to enable the Respondent to purchase the property mentioned above. After repeated requests from the Respondent, the Claimant agreed to advance monies to the Respondent. However, as per the Claimant, both parties agreed that all monies paid would be treated as an advance, to be adjusted towards consideration at the time of execution of the Sale Deed. The Claimant further stated that the Claimant and the Respondent executed the following Addenda to the Agreement:

Addenda to the Agreement

Sr. No.	Date	Nature of Document	Further Sum of Money Advanced by the Claimant (Rs.)
(i)	01.06.2007	1st Addendum	1,00,00,000/-
(ii)	26.06.2007	2nd Addendum	1,50,00,000/-
(iii)	04.12.2007	4th Addendum	2,00,00,000/-
(iv)	29.03.2008	5th Addendum	6,58,560/-
(v)	31.03.2008	6th Addendum	53,41,440/-
(vi)	30.05.2008	7th Addendum	1,00,00,000/-
(vii)	22.12.2008	8th Addendum	25,00,000/-
Total	-	-	6,35,00,000/-

2.4 Each Addendum explicitly states that it forms part and parcel of the Agreement, as

well as any preceding Addendum, if any. Each Addendum is subject to its own terms, in addition to all other rights and obligations of the parties under the Agreement. Each Addendum is signed by the Respondent alone. There is no dispute that the amounts mentioned in the Addenda were received by the Respondent.

2.5 By a Third Addendum dated 10th January 2007, the Agreement dated 21st May 2007 was modified to the following extent:
(i) The Claimant agreed to purchase and acquire from the Respondent, and the Respondent agreed to sell and convey to the Claimant the Original Property as also the additional land bearing Survey Nos. 66/4, 65/5, 66/1, 66/2, 66/5, 66/10, 66/11, 66/12, 65/15 of Kurundh Village and 61/7, 61/4, 66/1, 69 of Village Vahuli, Taluka Bhiwandi, District Thane, in aggregate admeasuring about 50 acres and more particularly described in the Schedule annexed thereto.
(ii) The Respondent agreed to get proper permission from the Gram Panchayat or any other such department for constructing warehouses for industrial usage by the Claimant on the subject property.
(iii) The total consideration payable by the Claimant to the Respondent against the purchase of the subject property was increased from Rs. 17,62,25,000/- to Rs. 27,94,00,000/-.
2.6 The 1st to 8th Addenda are hereinafter collectively referred to as "the Addenda", and the Agreement and the Addenda are hereinafter collectively referred to as "the subject Agreement".
2.7 The Claimant has further claimed that as the Respondent requested for further monies, the Respondent agreed to mortgage about 27 acres, which was purchased by the Respondent from various owners, and documents of mortgage and declaration were also executed. The documents of Memorandum of Entry of Deposit of Title Deeds are also referred to.
2.8 The Claimant claims in paragraph 17 of the Statement of Claim that it was the obligation of the Respondent to make out clear and marketable title, free from encumbrances. The Claimant also claims that the documents referred to in the Claim Statement were executed and monies were being advanced as due diligence of the subject property was in progress. It is claimed by the Claimant that the Respondent was unable to make out a marketable title.
2.9 In paragraph 17 of the Statement of Claim, it is claimed that another obligation to be performed by the Respondent under the subject Agreement was to obtain conversion of the land to non-agricultural use for the purpose of building/constructing an Industrial Warehouse on the subject property. The Claimant forwarded a draft of Sale Deed to the Respondent with the understanding that the Respondent would complete all its obligations as set out in the Agreement before execution and registration of Conveyance.
2.10 In paragraph 19 of the Statement of Claim, the Claimant claims that the Respondent had, in or about May 2008, informed the Claimant that the original stamped unexecuted Sale Deed had been lost by the Respondent. The Respondent had only purchased 32.06 acres out of the subject property. The due diligence in respect of the title of the subject property was not yet complete. The Respondent did not furnish necessary documents of title of the subject property proving change of user, reflecting that the subject property could be used for constructing a warehouse.
Accordingly, it is claimed that the Respondent committed breaches of the Agreement, and the Claimant is seeking specific performance of the said Agreement read with the

Addenda.

3. The Defence:

3.1 The Respondent has specifically denied the allegations made by the Claimant in the Claim Statement. The Respondent has pointed out in paragraph 21 that even before proceeding to get Conveyance executed from the Owner, the title clearance report from M/s Trilegal, Advocates of the Claimant was obtained, and only after the Claimant was satisfied about the title of the said property admeasuring 33.22 acres, the Respondent proceeded to take conveyance.

The Respondent has denied that they have not made out a clear and marketable title. The Respondent has written several letters answering the requisition and also furnished documents. The Respondent also got the Conveyance duly stamped worth Rs. 37,00,000/- (Rupees Thirty-Seven Lakhs only).

In spite of giving duly stamped documents to the Claimant, the Claimant did not come forward to execute the same, and in fact, in April 2010, one of the Officers of the Claimant expressed shortage of funds and the Claimant's inability to release money for completing the said project. He also desired to sell the property and asked Mr. Taparia for such transfer. The said facts were recorded in the letter dated 2nd April 2010 and also subsequent correspondence.

3.2 The Respondent has denied that they were required to obtain conversion of land for non-agricultural use for the purpose of building an Industrial Warehouse as claimed by the Claimant.

The N.A. order for the purpose of storing food products was required to be obtained, which has been duly obtained by the Respondent on 23rd April 2008, and in spite of the said order, the Claimant failed to complete the transaction.

3.3 It is also specifically denied by the Respondent that they informed the Claimant that the original stamped unexecuted Sale Deed had been lost by them.

In fact, under a letter dated 18th March 2010, the Claimant had informed the Respondent that the original stamp document is not traceable in their office and that the Respondent should take suitable steps for obtaining a refund of the stamp duty as per law.

3.4 The Respondent has also contended that the Claimant has suppressed material documents from this Hon'ble Court.

The material documents suppressed by them are:

- Email dated 17th March 2008, whereby the price was revised to Rs. 58.42 lakhs per acre.
- Moreover, the Claimant had, by their letter dated 14th April 2011, called upon the Respondent to return the money paid under the Agreement dated 21st May 2007.

Thus, the Claimant clearly intended to cancel and abandon the contract while demanding the money in the said letter. Therefore, the Claimant is not entitled to specific performance of the Agreement.

3.5 Further, the respondent has pointed out that the claimant has acted in variance of the Agreement as the Agreement was only for obtaining N.A. permission for warehousing and not for industrial warehousing as claimed. In the circumstances, the respondent has contested the claim of the claimant.

Clause 1(a) and 1(b) of the said Agreement are reproduced hereunder:

"1. In consideration of the Vendor agreeing to convey to the Purchaser the absolute

right, title, and interest in the Schedule Property free of all encumbrances and impediments, the Purchaser hereby agrees to pay to the Vendor a total consideration of Rs.17,62,25,000/- (Rupees Seventeen Crore Sixty-Two Lakhs Twenty-Five Thousand only) as follows:

(a) The Purchaser has paid on the 2nd day of January 2007 a token advance of Rs.20,00,000/- (Rupees Twenty Lakhs only) vide cheque number 013571 dated 2nd January 2007, drawn on Citibank NA, Mumbai, which the Vendor hereby acknowledges. Further, the Purchaser has on this 21st day of May 2007 paid the Vendor a token advance of Rs.1,00,00,000/- (Rupees One Crore only) vide cheque number 000001 dated 21st May 2007, drawn on Citibank NA Mumbai, which the Vendor hereby acknowledges.

(b) Within three days of paying the Token Advance, the Purchaser will carry out a title search to establish whether the Schedule Property that is being acquired by the Vendor has a clear marketable title and is free of all encumbrances and impediments. In the event the Purchaser is satisfied as to the title and marketability of the Scheduled Property, it shall within three days of getting the legal clearance report on marketable property pay an amount of Rs.2,50,00,000/- (Rupees Two Crores Fifty Lakhs only) vide demand draft/cheque to the Vendor towards part consideration for the purchase of the Schedule Property, which the Vendor hereby acknowledges.

After this payment, the Vendor will register all the land in his name and will apply for the non-agriculture land process. At this stage and after complying with the above process of completion of the documents by the Vendor (registering the Schedule Property in the name of the Vendor etc.), the Purchaser shall release Rs.5,11,25,000/- (Rupees Five Crore Eleven Lakhs Twenty-Five Thousand only) to the Vendor towards part consideration for the purchase of the Schedule Property.

The advance sum paid by the Purchaser to the Vendor shall be apportioned/adjusted against the total consideration payable by the Purchaser to the Vendor. It is hereby specifically agreed by the Vendor that in the unlikely event that it is found by the Purchaser during the title search period indicated above, that the Schedule Property being acquired by the Vendor does not have a clear marketable title, the Purchaser will at its sole discretion have the right to terminate this Agreement and the Vendor will be required to repay the entire Advance (paid till date as per the above-mentioned schedule of payments) to the Purchaser immediately, failing which the same will be repaid by the Vendor to the Purchaser along with interest at the rate of 15% per annum.

It is hereby clarified that in the event the Agreement is terminated under this clause, there will be no requirement for the Purchaser to make any further payment to the Vendor for any reason whatsoever.

3.6 The Respondent, relying upon Clauses 1(a) & 1(b) of the Agreement, contended that the said clauses make it clear that it was the obligation of the Claimant to carry out a title search in respect of properties, which were to be acquired by the Respondent, to establish that they have a clear marketable title and are free of all encumbrances and impediments. Only upon the Claimant being satisfied as to the title and marketability of the Schedule Property, the Claimant was required to acquire, within 3 days of getting the legal clearance report on marketable property, an amount of Rs.2,50,00,000/- (Rupees Two Crores Fifty Lakhs only) vide Demand Draft to the Respondent for the purchase of the Schedule Property.

Upon receipt of the said amount of Rs.2,50,00,000/- (Rupees Two Crores Fifty Lakhs Only), the Respondent was required to register the land in their name and apply for

N.A. Permission. The Claimant was required to release Rs.5,11,25,000/- (Rupees Five Crores Eleven Lakhs Twenty-Five Thousand only) to the Respondent in part consideration. In the event of the title not being cleared, the Respondent was required to repay the entire amount. The Respondent, who is an aggregator of land, made it clear that they would acquire the subject land only after the title clearance is given.
In fact, the title clearance report was given by M/s. Trilegal after proper investigation of title on 14th July 2007 (Exhibit-R3). The Claimant made payment of Rs.2,50,00,000/- (Rupees Two Crores Fifty Lakhs only), which was utilized by the Respondent for obtaining the registration of land in their name. By and under letter dated 14th March 2007 (Ex. R-1), the Claimant had requested the Respondent to obtain N.A. permission for the Warehouse, which was proposed to be used for storing fresh food and vegetables, etc.
Even Clause No. 1(b) of the Agreement contemplates that the Respondent is to obtain non-agricultural usage for warehouse purposes, which was to be read with the said letter. The Respondent has obtained the said permission.
3.7 Thus, the Respondent submitted that the entire case of the Claimant with regard to the breaches committed by the Respondent is false, baseless, and contrary to the Agreement.
On the basis of the pleadings, the following issues were framed.

4. **ISSUES:**
   The following issues are framed:

ISSUE NO.1:
Whether the Claimant is entitled to specific performance of the Agreement dated 21st May 2007 and addenda dated 1st June 2007, 26th June 2007, 29th March 2008, 31st March 2008, 30th May 2008, and 22nd December 2008 in full or in part to the extent of purchased property?
ISSUE NO.2:
If the answer to Issue No.1 is in favour of the Claimant, to the extent of granting specific performance in part, then whether the Claimant is entitled to excess amount, and if so, to what extent and with or without interest, and if so, at what rate?
ISSUE NO.3:
If it is found that the specific performance of the Agreement dated 21st May 2007 and addenda ought not to be granted, but there is a breach of contract by the Respondents, then whether the Claimant is, in addition thereto, entitled to damages in terms of particulars of claim at Exhibit "E" and/or Exhibit "F" and/or Exhibit "G"? If yes, then with or without interest, and if so, at what rate of interest?
ISSUE NO.4:
Whether the Claimant is entitled, in the alternative, for damages for breach of contract in terms of particulars of claim at Exhibit "H" or part thereof and refund of the amount of Rs.22,21,07,120/- or part thereof paid by the Claimant to the Respondent? If yes, at what rate of interest?
ISSUE NO.5:
Does the Respondent prove that the Claimant is not entitled to specific performance of the Agreement to Sell dated 21st May 2007 along with addenda?
ISSUE NO.6:
Does the Respondent prove that in view of the Memorandum of Entry dated 11th December 2007, the entire amount paid by the Claimant to the Respondent under the original Agreement dated 21st May 2007 was treated as Debt, and whether the

Agreement dated 21st May 2007 was rescinded as alleged in paragraph 1(vii) of the statement of defense?
ISSUE NO.7:
Does the Respondent prove that the Claimant has abandoned the transaction, as alleged in paragraph 1(viii) of the statement of defense?
ISSUE NO.8:
Does the Respondent prove that the subject agreement stood frustrated on account of the Claimant's demand for getting revised N.A. permission as alleged in paragraph 1(ix) of the statement of defense?
ISSUE NO.9:
Whether the Claimant proves that it was ready and willing to perform its part of obligation under the Agreement dated 21st May 2007 and the addenda?
The Claimant has examined three witnesses. Mr. Kalyan Borade was C.W.1, Mr. Satish Balaji Pawar was C.W.2, and Mr. Rajaraman Gopalkrishnan was C.W.3. While discussing the various issues, the necessary evidence will be referred. The Statement of Claim seeks the following reliefs:

RELIEFS:
(a) (i) that this Arbitral Tribunal be pleased to order and direct the Respondent to specifically perform the subject Agreement being the Agreement dated 21st May, 2007 and Addenda dated 01st June, 2007, 26th June 2007, 10th July, 2007, 04th December, 2007, 29th March, 2008, 31st March, 2008, 30th May, 2008 and 22nd December, 2008, execute the sale deed and hand over to the Claimant quiet, vacant and peaceful possession of the subject property described in Exhibit "C" to the Statement of Claim within such time and on such terms and conditions as this Arbitral Tribunal may deem fit and proper;
(a)(ii) that this Arbitral Tribunal be pleased to order and direct the Respondent to execute all such documents and do all such acts, deeds, matters, and things as may be found necessary and required to specifically perform the subject Agreement being the Agreement dated 21st May, 2007 and Addenda dated 01st June 2007, 26th June 2007, 10th July 2007, 04th December 2007, 29th March 2008, 31st March 2008, 30th May, 2008 and 22nd December, 2008 in favour of the Claimant as directed by this Arbitral Tribunal;
(a)(iii) that this Arbitral Tribunal be pleased to order and direct the Respondent to pay to the Claimant an amount of Rs.15,30,10,000/- as per particulars of claim annexed at Exhibit "E" to the Statement of Claim along with interest @ 18% per annum from the date hereof till payment and/or realization;
(a)(iv) that this Arbitral Tribunal be pleased to order and direct the Respondent to pay to the Claimant an amount of Rs.33,00,000/- per month from the date hereof till such time as the Claimant is placed in quiet, vacant, and peaceful possession of the subject property along with interest thereon @ 18% per annum from the date of accrual of each monthly compensation till payment and/or realization thereof;
(b) In the alternative to prayer clause (a) above, this Arbitral Tribunal be pleased to:
(i) Order and direct the Respondent to specifically perform the subject Agreement being Agreement dated 21st May 2007 and Addenda dated 1st June, 2007, 26th June, 2007, 10th July 2007, 04th December, 2007, 29th March 2008, 31st March 2008, 30th May 2008 and 22nd December, 2008 to the extent of the Purchased Property described in Exhibit "D" to the Statement of Claim or such part thereof as may be directed by this Arbitral Tribunal within such time and on such terms and conditions including as to the

price and consideration thereof as this Arbitral Tribunal deems fit and proper;
(ii) Order and direct the Respondent to execute all such documents and do all such acts, deeds, matters, and things as may be necessary and required to specifically perform the subject agreement being Agreement dated 21st May 2007 and Addenda dated 1st June, 2007, 26th June, 2007, 10th July 2007, 04th December 2007, 29th March, 2008, 31st March 2008, 30th May, 2008 and 22nd December, 2008 to the extent directed as per the preceding prayer in favour of the Claimant;
(iii) Order and direct the Respondent to pay to the Claimant a sum of Rs.17,50,00,000/- as per particulars of claim annexed as Exhibit "F" to the Statement of Claim along with interest thereon @ 18% per annum from the date hereof till payment and/or realization;
(iii)(a) Order and direct the Respondent to pay to the Claimant as and by refund the excess amount paid by the Claimant to the Respondent along with interest thereon @ 18% per annum from the date of commencement of arbitration till payment and/or realization;
(iv) Order and direct the Respondent to pay to the Claimant a sum of Rs.15,30,10,000/- as per particulars of claim annexed at Exhibit "E" to the Statement of Claim along with interest thereon @ 18% per annum from the date hereof till payment and/or realization;
(v) Order and direct the Respondent to pay to the Claimant a sum of Rs.33,00,000/- per month from the date hereof till such time as the Claimant is placed in quiet, vacant, and peaceful possession of the purchased property described in Exhibit 'D' to the Statement of Claim along with interest thereon @ 18% per annum from the date of accrual of each monthly compensation till payment and/or realization;
(c) In the alternative to prayer clause (a) and (b) above, this Arbitral Tribunal be pleased to:
(i) Order and direct the Respondent to specifically perform the subject Agreement being Agreement dated 21st May 2007 and Addenda dated 1st June 2007, 26th June 2007, 10th July, 2007, 04th December 2007, 29th March, 2008, 31st March, 2008, 30th May, 2008 and 22nd December, 2008 to the extent of the Purchased Property described in Exhibit "D" to the Statement of Claim or such part thereof as may be directed by this Arbitral Tribunal and execute Sale Deed and hand over to the Claimant quiet, vacant, and peaceful possession of the purchased property described in Exhibit "D" to the Statement of Claim or such part thereof as may be directed by this Arbitral Tribunal within such time and on such terms and conditions including as to the price and consideration thereof as this Arbitral Tribunal deems fit and proper;
(ii) Order and direct the Respondent to execute all such documents and do all such acts, deeds, matters, and things as may be found necessary and required to specifically perform the subject Agreement being Agreement dated 21st May 2007 and Addenda dated 1st June 2007, 26th June 2007, 10th July 2007, 04th December 2007, 29th March 2008, 31st March 2008, 30th May 2008 and 22nd December 2008 to the extent directed as per the preceding prayer in favour of the Claimant;
(iii) Order and direct the Respondent to pay to the Claimant as and by refund the excess amount paid by the Claimant to the Respondent along with interest thereon @ 18% per annum from the date of commencement of arbitration till payment and/or realization;
(iv) This Arbitral Tribunal be pleased to order and direct the Respondent to pay to the Claimant a sum of Rs.10,04,61,000/- as per particulars of claim annexed at Exhibit "G" to the Statement of Claim along with interest thereon @ 18% per annum from the date

hereof till payment and/or realization;
(v) This Arbitral Tribunal be pleased to order and direct the Respondent to pay to the Claimant a sum of Rs.21,66,667/- per month from the date hereof till such time as the Claimant is placed in quiet, vacant, and peaceful possession of the purchased property described in Exhibit "D" to the Statement of Claim along with interest thereon @ 18% per annum from the date of accrual of each monthly compensation till payment and/or realization;
(d) In the alternative to prayer clause (a) to (c) above, this Arbitral Tribunal be pleased to:
(i) Order and direct the Respondent to pay to the Claimant a sum of Rs.50,00,00,000/- as and by way of damages for breach of the subject Agreement by the Respondent along with interest thereon @ 18% per annum from the date hereof till payment and/or realization as per the particulars of claim annexed at Exhibit "H" to the Statement of Claim;
(e) for costs;
(f) for such further and other reliefs as the nature and circumstances of the case require.

ISSUE NO.1:
Whether the Claimant is entitled to specific performance of the agreement dated 21st May 2007 and addenda dated 1st June 2007, 26th June 2007, 10th July 2007, 4th December 2007, 29th March 2008, 31st March 2008, 30th May 2008 and 22nd December 2008 in full or in part to the extent of purchased property?
Answer: In view of the discussion above, I would hold that the Claimant is entitled to specific performance of the agreement in full, but in view of the Respondent having acquired only 32.06 acres of land, it is not possible to grant specific performance of the subject contract. In view of the Claimant having relinquished their claim for specific performance with regard to the balance portion of the contract and the Claimant having relinquished their claim for compensation and damages for the unperformed part of the contract in accordance with Section 19(1)(a) of the Specific Relief Act, 1963, I hold that the Claimant is entitled to part performance of the contract to the extent of purchased property, which is described in the schedule appended to the Award. However, the Claimant shall be liable to pay the price for the said land at the rate of Rs. 58.42 Lakhs per acre. The total amount payable by the Claimant to the Respondent would be Rs. 18,72,94,520/-.

ISSUE NO.2:

If the answer to Issue No.1 is in favour of the Claimant, to the extent of granting specific performance in part, then whether the Claimant is entitled to excess amount, and if so, to what extent and with or without interest, and if so, at what rate?
Answer: The Claimant has paid to the Respondent an aggregate amount of Rs. 22,21,07,120/-. After adjusting therefrom the sum of Rs. 18,72,94,520/- being the consideration for the land for which specific performance is granted, the balance amount would be Rs. 3,48,12,600/-. The Respondent shall be liable to refund to the Claimant a sum of Rs. 3,48,12,600/-.
Insofar as the interest is concerned, the Claimant has submitted that the agreement provides that if the contract is terminated, the Respondent would be liable to return

the advances received to the Claimant with interest at 15% p.a. No contrary submission is advanced. As 15% p.a. is an agreed rate, in my opinion, the Claimant would be entitled to receive the said sum @ 15% p.a. I order the return of the aforesaid amount at the rate of 15% per annum from the date of Statement of Claim i.e. 06.08.2015 till payment and/or realization. I have granted payment of interest from the date of Statement of Claim only and not for the prior period because the Claimant has exercised the option of obtaining lesser relief while filing the Statement of Claim.

ISSUE NO.3:
It is found that the specific performance of the agreement dated 21st May 2007 and addenda ought not to be granted, but there is a breach of contract by Respondents, then whether the Claimant is, in addition thereto, entitled to damages in terms of particulars of claim at Exhibit "E" and/or Exhibit "F" and/or Exhibit "G"? If yes, then with or without interest, and if so, at what rate of interest?

ISSUE NO.4:
Whether the Claimant is entitled, in the alternative, for damages for breach of contract in terms of particulars of claim at Exhibit "H" or part thereof, and refund of the amount of Rs. 22,21,07,120/- or part thereof paid by the Claimant to the Respondent? If yes, at what rate of interest?
Answer: It does not arise in view of the relinquishment of the claim for damages and/or compensation as the Claimant elected to get the lesser relief.

ISSUE NO.5:
Does the Respondent prove that the Claimant is not entitled to specific performance of the Agreement to Sell dated 21st May 2007 along with addenda?
Answer: The Respondent has failed to prove that the Claimant is not entitled to specific performance of the Agreement to Sell dated 21st May 2007 along with addenda and, in any event, the Respondent has failed to prove that the Claimant is not entitled to specific performance of the agreement to the extent of the land acquired by the Respondents as discussed above.

ISSUE NO.6
Does the Respondent prove that in view of the Memorandum of Entry dated 11th December 2007, the entire amount paid by the Claimant to the Respondent under the original Agreement dated 21st May 2007 was treated as debt and whether the Agreement dated 21st May 2007 was rescinded as alleged in paragraph 1(vii) of the Statement of Defence?
Answer:
a) It is the Respondent's case that by virtue of the aforesaid Mortgage Agreement, the subject agreements stood substituted by the said Memorandums of Entry. The Respondent has relied upon Section 62 of the Indian Contract Act that if a new contract substitutes the previous one, or rescinds or alters it, then the earlier contract need not be performed. Both the parties agreed to the substitution of the subject agreement, along with all Addendums by the Mortgage Agreements, and therefore the subject agreement and the Addendums stood altered or rescinded and the same need not be performed.
b) The Respondent submits that by virtue of the Memorandum of Entry dated 11th July

2007, it was agreed between the parties that the amount which was paid by the Claimant to the Respondent till that date shall be treated as a debt, in furtherance to which several title deeds pertaining to approximately 20 acres of land acquired by the Respondents were mortgaged with the Claimant. These title deeds till date continue to remain in the custody of the Claimant. Similarly, vide Memorandum of Entry dated 11th December 2007, executed by the Respondent, the aforesaid agreement was reiterated, wherein title deeds of an additional 10 acres of land acquired by the Respondent were mortgaged to the Claimant. The said Mortgage Agreements dated 11th July 2007 and 11th December 2007 are referred to and relied upon by the Claimant in paragraph Nos. 15 and 16 of the Statement of Claim and also paragraph Nos. 7 and 8 of the Affidavit in Chief of CW-1 marked as E-12 and C-14, respectively.

c) The Respondent submits that by virtue of the said Mortgage Agreements, the subject agreements stood substituted. Relying upon Section 62 of the Indian Contract Act, 1872, the Respondent submits that if a new contract substitutes the previous one, or rescinds or alters it, then the earlier contract need not be performed.

d) The Respondent submits that both the parties agreed to the substitution of the subject agreements by the Mortgage Agreements, and thus these subject agreements stood altered and/or rescinded and need not be performed. Under Section 62 of the Indian Contract Act, 1872, the subject agreements stood novated, thereby disentitling the Claimant from seeking specific performance of the same.

e) The Respondent further submitted that in the Mortgage Agreements referred to above, it is specifically agreed by the Claimant that if the Respondent failed to accomplish the obligations under the subject agreement, the Respondent shall have to repay the mortgage amount to the Claimant along with 15% interest per annum. Relying on the Memorandum of Entry, the Respondent submits that the parties have consciously agreed that if the Respondent fails to discharge its obligation under the subject agreement, the remedy available for the Claimant would be the refund of monies and not specific performance.

f) The Respondent, in paragraph No.1(viii) of the Statement of Defence, submits that by virtue of the Memorandum of Entry dated 11th July 2007 and 11th December 2007, it was agreed between the parties that the amount which was paid by the Claimant to the Respondent till date shall be treated as a debt. In furtherance of the same, several title deeds of approximately 30 acres of land acquired by the Respondent were mortgaged to the Claimant. The Title Deeds of this 30 acres of land till date remain in the custody of the Claimant. The said Mortgage Agreements are also referred to in the subject agreement. Addenda 4 to 7 make a reference to the documents of mortgage executed by the Respondent in favour of the Claimant.

The Respondent has relied upon the decision of the Apex Court in the case of *Kalianna Gounder v. Polani Gounder & Anr.*, where in paragraph No.14 of the said Judgment, the following paragraph from Halsbury's Laws of England is quoted:

"A material alteration is one which varies the rights, liabilities, or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such void, or may otherwise prejudice the party bound by the deed as originally executed."

g) The Respondent has relied upon the judgment of the Apex Court in *Lata Construction & Ors. v. Dr. Rameshchandra Ramniklal Shah*, which holds that one of the essential requirements of novation (as contemplated by Section 62) is that there should be a complete substitution of a new contract in place of the old. It is in that situation that

the original contract need not be performed.
h) The Respondent has also relied upon the decision of the Apex Court in *H.B. Basavaraj (Dead) by LRs. & Another v. Canara Bank and Another*, which holds that alteration or variation in the terms of a contract under Section 62 of the Contract Act implies that both parties have voluntarily agreed to change the terms of the agreement.
i) The Respondent has also relied upon the decision of the Delhi High Court in *Nalini Singh Associates v. Prime Time IP Media Services Ltd.*, which holds that Section 62 is based upon the principle that a contract is the outcome of mutual agreement and it is equally open to the parties to mutually agree to bring the said contract to an end, to enter into a new contract, or to modify the earlier contract.
j) The Respondent has also relied upon the decision of the Delhi High Court in *Rates Commercial Enterprises Ltd. v. Vasu Tech Ltd. & Ors.*, which reiterates that the question of the intention of the parties when they enter into the 2nd Contract is relevant for the purpose. However, whether there is novation or not would depend upon the merits of each case.
k) The Respondent relied upon the judgment of the Hon'ble Supreme Court of India in *Narbada Devi Gupta v. Birendra Kumar Jaiswal & Anr.*, which holds that the mere production and marking of a document as an Exhibit by the Court cannot be held to be proof of its content. Its execution has to be proved by admissible evidence, i.e., by the evidence of those persons who can vouch for the truth and facts of the same.
l) The question, therefore, to be considered is whether the Memorandum of Entry is in substitution of or in place of Ex C-1. If not, the contention of the Respondent will fail. Reading all the documents, it is clear that the Memorandum of Entry was not in substitution. The parties have consciously entered into the arrangement of mortgage in the event of the failure on the part of the Respondent to procure the land and convey the same to the Claimant. The conduct of the parties clearly reveals that the agreement dated 21st May 2007 was never rescinded, and there is no convincing evidence produced by the Respondents to prove otherwise.
The Respondent would not have applied for NA permission after 11th December 2007 if the Agreement dated 21st May 2007 was rescinded as alleged by the Respondent. I answer this issue against the Respondent.

ISSUE NO.7:
Does the Respondent prove that the Claimant abandoned the transaction, as alleged in paragraph 1(viii) of the Statement of Defence?
Answer: For the reasons mentioned above, I answer this issue against the Respondent. The Respondent has failed to prove this issue.
ISSUE NO.8:
Does the Respondent prove that the subject agreement stood frustrated on account of the Claimant's demand for getting revised N.A. permission as alleged in paragraph 1(ix) of this Statement of Defence?
Answer: The Respondent has contended that the Agreement stood frustrated on account of the Claimant's demand for getting revised NA permission.
First of all, I fail to see how the plea of frustration can be applied in the present fact situation. The NA permission has not been refused. The Claimant is willing to take the land with the NA permission as obtained by the Respondent, and the Claimant has stated that the rules have changed and they have no objection to taking the lands with the permissions which are obtained. Thus, the agreement cannot be said to have been frustrated.

In any event, the Respondent has not led any evidence to prove that the Agreement stood frustrated. Therefore, I answer this issue against the Respondent.

ISSUE NO.9:

Whether the Claimant proves that it was ready and willing to perform its part of obligation under the Agreement dated 21st May 2007 and the Addenda?

Answer: As discussed above, I hold that the Claimant has proved that the Claimant was and is ready and willing to perform its part of obligation under the Agreement dated 21st May 2007 and the Addenda.

As held above, the Claimant has paid the amount in excess in respect of the lands available. I answer the issue in favour of the Claimant.

ISSUE NO.10:

Whether the Claimant proves that the Respondent failed to make out a marketable title and furnish necessary documents and answer requisitions?

Answer: There are several emails and letters exchanged between the parties on the question of marketability and requisition to the title of the lands acquired by the Respondent. The said correspondence revealed that in respect of certain lands, there were claims made and suits filed against the Respondent, which, according to the Respondent, were false and were in the nature of blackmailing action.

The said suits have been dismissed. Therefore, it cannot be said that the Claimant was delaying or whiling away the time by administering requisitions to title. Since the Claimant is ready and willing to take the 32.06 acres of land described in the schedule to the Award, it is not necessary to give any specific finding on this issue. One thing is certain, Ex R-3 is not a certificate of title.

ISSUE NO.11:

What order and reliefs?

I therefore award that:

a) The Respondent does convey to the Claimant the lands admeasuring 32.06 acres described in the schedule annexed hereto and hand over to the Claimant quiet, vacant, and peaceful possession of the property described in the Schedule to the Award within 60 days from the date of the Award on the following conditions:

i) The Claimant has given up demand for performance for the balance of the properties;

ii) The Rate per Acre would be Rs. 58.42 Lakhs;

iii) The Claimant has relinquished the claim for compensation and damages against the Respondent;

iv) The Claimant shall pay the stamp duty, registration charges, and taxes, if any, payable in respect thereof.

b) The Respondent does execute all such documents and do all such acts, deeds, matters, and things as may be required to comply with the Award in terms herein.

c) In addition to the above, the Respondent does pay to the Claimant a sum of Rs. 3,48,12,600/- with interest @ 15% per annum from the date of the Statement of Claim in August 2015 till payment and/or realization.

d) No order as to costs.

Date: This 9th day of November 2017

Sd/-

NITIN G. THAKKER

(Sole Arbitrator)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY ORDINARY ORIGINAL CIVIL JURISDICTION COMMERCIAL ARBITRATION PETITION NO.538 OF 2018

James Peterson Mills Private Limited...Petitioner

Vs.

Andrew Lex Private Limited ...Respondent

ORDER

Heard Mr. Narula, learned Counsel for the petitioner and Mr. Jain, learned Counsel for the respondent at length.

2. By this Petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'Act'), the petitioner – James Peterson Mills Private Limited, hereinafter referred to as 'JPMPL' has challenged the award dated 09.11.2017 made by the learned sole arbitrator Mr. Nitin G. Thakker (Senior Advocate) as also by way of interim relief, has prayed for stay of the said award. The facts and circumstances giving rise to filing of the present Petition, briefly stated, are as follows:

3. The petitioner, JPMPL is a Private Limited Company incorporated under the provisions of the Indian Companies Act, 1956 and carries on business as an aggregator of lands. The respondent Andrew Lex Private Limited, hereinafter referred to as 'ALPL' is also a private limited company involved in the business of logistics and warehousing. It is the case of the JPMPL that around January 2007, ALPL made representations to the JPMPL showing interest in acquiring certain lands in Bhiwandi Taluka for construction of godowns, warehouse, etc. After negotiations in few meetings, ALPL paid a token amount of Rs.20,00,000/- (Rupees Twenty Lakhs only) vide cheque No.013571 dated 02.01.2007. ALPL also addressed a letter dated 04.03.2007 to JPMPL recording its Letter of Intent with regard to the construction of warehouse along with a cold storage to be used for storing fresh fruits, fast moving consumer goods (FMCG) and other general merchandise. On 21.05.2007, the parties executed an agreement of sale where it was agreed that JPMPL shall convey a land admeasuring

33.22 acres to ALPL for a total consideration of Rs.17,62,25,000/- (Rupees Seventeen Crores Sixty Two Lakhs Twenty Five Thousand only). A further amount of Rs.1,00,00,000/- (Rupees One Crore only) was paid as and by way of part consideration. It is the case of the JPMPL that ALPL were under the following obligations:

I. Within three days of payment, ALPL was to carry out a title search to establish if the concerned properties have a clear and marketable title and are free from all encumbrances.
II. After satisfying itself about the marketability and title of the property, ALPL was to make a further payment of Rs.2,50,00,000/- (Rupees Two Crores and Fifty Lakhs only) pursuant to which JPMPL was to register all the properties in its name and apply for Non-Agricultural process.
III. Subject to above, ALPL was to make a further payment of Rs.5,11,25,000/- (Rupees Five Crores Eleven Lakhs Twenty Five Thousand only).
IV. ALPL was to execute and register the final sale deed within seven days from JPMPL obtaining the Non-Agriculture permission.

4. It is the case of JPMPL that ALPL obtained a Title Clearance cum Investigation Report dated 14.07.2007 of M/s. Trilegal approving property to the extent of about 32 Acres. ALPL, being satisfied with the title, released an amount of Rs.9,50,00,000/- (Rupees Nine Crores Fifty Lakhs only) in addition to the earlier payment. ALPL thus made aggregate payment of Rs.10,70,00,000/- (Rupees Ten Crores Seventy Lakhs only). In furtherance of the agreement to sell dated 21.05.2007, the parties executed several addenda thereby recording further payments made by ALPL. By the third addendum dated 10.01.2007 to the agreement dated 21.05.2007, the area of total properties was increased from 33.22 acres to 50 acres along with a consequent increment in consideration from Rs.17,62,25,000/- (Rupees Seventeen Crores Sixty Lakhs and Twenty Five Thousand only) to Rs.27,94,00,000/- (Rupees Twenty Seven Crores Ninety Four Lakhs only).

5. In addition to the addenda executed by the parties, the parties (JPMPL as mortgagor and ALPL as mortgagee) also executed two instruments in the nature of Memoranda of Entry dated 18.07.2007 and 11.12.2007. It is the case of JPMPL that by virtue of this Memoranda of Entry, the entire transaction was converted into a Deed of Mortgage resulting into depositing of original Title Deeds by JPMPL with ALPL. Simultaneously, JPMPL also executed Unilateral Declarations dated 18.07.2007 and 11.12.2007 confirming that the said instruments are of mortgage. It is the case of JPMPL that the effect of the mortgage deeds was that the consideration paid by ALPL for purchasing the land was converted into a debt owed by JPMPL (mortgagor) in favour of ALPL (mortgagee). The said consideration was to be adjusted against the sale consideration in case the transaction is successful and in the event of failure to fulfill the agreements, the said debt was to be repaid to the mortgagee along with interest @ 15% p.a. on or before 31.01.2008.

Under the Memoranda of Mortgage, property admeasuring 30 acres was mortgaged by JPMPL in favour of ALPL. It was categorically agreed that in the event JPMPL fails to bring the said agreements to its logical end, the remedy available to ALPL was restricted to claim refund by enforcing the mortgage deeds.

6. It is the case of JPMPL that after receipt of consideration of Rs.10,17,00,000/- (Rupees Ten Crores Seventeen Lakhs only), it proceeded to acquire properties and successfully acquired the properties to the extent of 32.06 acres in March, 2008. In the email dated 17.03.2008 sent by JPMPL to ALPL, it was stated that JPMPL will sell the properties @ Rs.58.82 Lakhs per acre. In response, ALPL vide its email dated 27.03.2008 agreed to revise the price to Rs.58.42 lakhs per acre. By email dated 24.03.2008, JPMPL forwarded a draft sale deed for approval of ALPL. By email dated 28.03.2008, respondent approved the draft sale deed. Under the sale deed, it was contemplated that the parties shall register properties in two phases. The sale deed was then stamped by ALPL with the value of Rs.57,20,490/- (Rupees Fifty Seven Lakhs Twenty Thousand Four Hundred Ninety only) on 29.03.2008 with regard to Phase I properties. It is the case of JPMPL that ALPL lost the stamped sale deed in May 2008. Instead of taking steps to rectify their default, ALPL started burdening JPMPL with series of

requisitions in respect of Phase I as well as other properties. ALPL went on calling upon JPMPL to arrange documents in relation to the survey numbers as also title documents. JPMPL has made reference to series of correspondence exchanged between the parties.

7. JPMPL obtained Non-Agriculture permission with regard to the purchased properties on 23.04.2008. The Non-Agriculture permission was obtained keeping in mind that the proposed warehouse would be used for the purpose of storing fresh fruits, vegetables, dry fruits, food grains, FMCG products and other general merchandise. The Non- Agriculture permission was revised vide order dated 05.03.2008 read with order dated 07.01.2010. ALPL, however, was not satisfied with Non-Agricultural order and maintained that the desired permission was for usage of industrial warehousing purpose and not for storing agricultural produce and cold storage. Thus, ALPL failed to complete the obligation. Thus, ALPL committed breach of the contract.
8. It is the case of JPMPL that ALPL was not ready and willing to perform its part of the contract and in fact, had abandoned the Agreement. The representative of ALPL gave a proposal to JPMPL for selling of the properties purchased by JPMPL and claimed refund of the amount.
9. Despite this position, by notice dated 24.12.2010 read with 13.04.2012, ALPL called upon JPMPL to perform their part of the agreement within 8 weeks from receipt of the notice, failing which they were to initiate legal action. JPMPL addressed its notice dated 07.05.2011 wherein after giving a final 30 days period, JPMPL intimated ALPL its intention to invoke arbitration through this Court.
10. Eventually, by order dated 26.06.2015, this Court appointed Shri Nitin Thakkar, Senior Advocate as a Sole Arbitrator. ALPL filed its Statement of Claim. ALPL contended that it agreed to purchase and acquire from JPMPL, land in aggregate admeasuring 50 acres in Bhiwandi Taluka, District Thane. JPMPL agreed to obtain permission from Grampanchayat or any other department for building / constructing warehouse/s for industrial usage on the property so purchased. ALPL was to make out a clear and marketable title free from encumbrances.

ALPL contended that the documents referred to in the Statement of Claim were executed and moneys were advanced. JPMPL was unable to make out a marketable title. JPMPL was under obligation to obtain conversion of land to non-agricultural use for the purpose of building / constructing the industrial warehouse on the properties so purchased. ALPL forwarded a draft of sale deed to JPMPL with understanding that JPMPL will complete all its obligations as set out in the agreement before execution and registration of conveyance. In May, 2008, JPMPL informed ALPL that the original stamped sale deed has been lost by it. It is the case of ALPL that JPMPL committed breach of the agreement and it is seeking specific performance of the agreement read with addenda.

11. On the basis of pleadings of the parties, the Arbitral Tribunal framed the necessary issues. ALPL led oral evidence of 3 witnesses. JPMPL chose not to lead any oral evidence. Both the parties made oral submissions as well as filed

written submissions; additional written submissions before the Arbitral Tribunal. During the course of arbitration, ALPL submitted that though they are entitled to performance of contract, in the alternative, submitted that in the event of Tribunal holding that contracts cannot be performed, it relinquished all its claim to the performance of the subject agreement qua the balance property as also all rights to compensation either for the deficiency or for the loss or damage sustained by it on account of the default of JPMPL qua the balance property. ALPL restricted its claim for part performance in respect of lands purchased by JPMPL to the extent of 32.06 acres.

12. After considering the material on record, by award dated 09.12.2017, the Arbitral Tribunal directed JPMPL to convey to ALPL the lands admeasuring 32.06 acres described in the Schedule annexed thereto and handover quiet, vacant and peaceful possession of the

property set out in the Schedule within 60 days from the date of the award subject to certain conditions. It is against this award, JPMPL has instituted the present Petition under Section 34 of the Act.

13. In support of this Petition, Mr. Narula strenuously contended that ALPL has suppressed various documents and they did not produce the documents before the Arbitral Tribunal. No explanation is given by ALPL for not producing the documents. For example, ALPL did not produce the report of Trilegal. It was produced by JPMPL before the Arbitral Tribunal. He submitted that parties entered into agreement on 21.05.2007. In that agreement, ALPL agreed to purchase land admeasuring 33.22 acres for a total consideration of Rs.17,62,25,000/- (Rupees Seventeen Crores Sixty Two Lakhs Twenty Five Thousand only). By third addendum dated 10.01.2007 to the agreement dated 21.05.2007, the area of the total properties was increased from 33.22 acres to 50 acres. The total consideration was also increased from Rs.17,62,25,000/- (Rupees Seventeen Crores Sixty Two Lakhs Twenty Five Thousand only) to Rs.27,94,00,000/- (Rupees Twenty Seven Crores Ninety Four Lakhs only). That apart, even the rates were revised to Rs.58.42 lakhs per acre. This amounts to novation.

14. Mr. Narula submitted that even otherwise, there is novation of contract. In support of this, he invited my attention to Memorandum of Entry dated 11.12.2007, exhibit C-13 as also Declaration dated 11.12.2007, exhibit C-14. The parties agreed that the consideration paid by ALPL shall be treated as debt and the same shall be recovered by enforcing the mortgage deeds. Thus, the earlier Agreement dated 21.05.2007 was novated by consent of the parties. The Arbitral Tribunal was, therefore, not justified in making the impugned award.

15. Mr. Narula further submitted that at any rate, ALPL was never

ready and willing and is not ready and willing to perform its part of contract. In support of their claim, ALPL examined Kalyan Borade. From his evidence, it is clear that he joined ALPL sometime in 2010 and was not in the picture in the year 2007 when the negotiations between the parties were held and the Agreement was executed on 21.05.2007. The persons of ALPL, who were in the picture, did not step into the witness

box. This is also one of the facets that substantiates the case of JPMPL is that ALPL is not ready and willing to perform its part of contract. He further submitted that ALPL started disputing the title of the lands purchased by JPMPL. They could not have disputed the title after making the payment. He invited my attention to questions No.27, 58, 59, 60, 64 and answers given by C.W.1. He submitted that by email dated 24.09.2008, ALPL wanted to abandon the agreement. ALPL was running into losses. Representative of ALPL, therefore, asked JPMPL to sell the property as the project became unviable. This also reflects on the readiness and willingness on their part. In support of this submission, he relied upon the decision in **Balraj Taneja Vs. Sunil Madan**, **(1999) 8 SCC 396**.

16. Mr. Narula submitted that the sale deed was stamped by ALPL with the value of Rs.57,20,490/- (Rupees Fifty Seven Lakhs Twenty Thousand Four Hundred Ninety only) on 29.03.2008 with regard to Phase I properties. ALPL lost the stamped sale deed in May 2008. He has invited my attention to questions No.36 and 37 and the answers given by witness - Kalyan Borade (C.W.1), which is to the following effect:

"Q.36) Is it correct that the draft Deed of Sale was duly stamped by the Respondent and handed over to the Claimant?
Ans) I am not aware.

Q.37) Can you explain why inspite of draft Deed of Sale being handed over, the same was not executed by the

Claimant?
Ans) It was not executed on legal advice."

17. Mr. Narula has invited my attention to findings recorded by the Arbitral Tribunal in paragraph 7.4 and paragraph 11.2. He submitted that in paragraph 19 of Statement of Claim, ALPL admitted that the original stamped sale deed was lost by them. For all these reasons, he submitted that Petition requires consideration and the impugned award made by the Arbitral Tribunal deserves to be stayed.

18. On the other hand, Mr. Jain supported the impugned award. He submitted that it is not in dispute that the parties executed Agreement of Sale on 21.05.2007. JPMPL agreed to convey land admeasuring 33.22 acres to ALPL for a total consideration of Rs.17,62,25,000/- (Rupees Seventeen Crores Sixty Two Lakhs Twenty Five Thousand only). By Addendum dated 10.01.2007, the area was increased from 33.25 acres to

50 acres. The consideration was also increased to Rs.27,94,00,000/- (Rupees Twenty Crores Ninety Four Lakhs only). He submitted that though it is the case of JPMPL that from 2008, ALPL started disputing the title of the lands acquired by JPMPL, ALPL had paid Rs.22,21,07,120/- (Rupees Twenty Two Crores Twenty One Lakhs Seven Thousand One Twenty only) from January, 2007 to 12.04.2012, this clearly falsifies the contention of JPMPL that,

I. ALPL was disputing the title of the lands acquired by JPMPL;

II. ALPL was running into losses, and therefore, decided to abandon the project;
III. Representative of ALPL asked JPMPL to sell the properties acquired.

19. He submitted that in fact, between 31.03.2008 and 12.04.2010, ALPL paid approximately Rs.10,00,00,000/- (Rupees Ten Crores only)

to JPMPL. He further submitted that the contention of JPMPL that ALPL lost duly stamped draft sale deed dated 29.03.2008 is patently false. He invited my attention to email dated 24.03.2008 sent on behalf of JPMPL to ALPL enclosing therewith the draft sale deed. The endorsement dated 20.03.2010 made by Vishal A. Bhanushali, Advocate of JPMPL on the draft sale deed is to the following effect:
"I have received original document for further legal procedure."

Thus, the original stamped draft sale deed was with JPMPL.

20. He invited my attention to the notice dated 10.07.2010 (C-15) addressed by s.K. Jain & Associates, Advocates of JPMPL to ALPL, and in particular paragraph 12 thereof. In this notice, the case made out by JPMPL is that the main contract and memoranda stood frustrated. In other words, it is not the case of termination of contract but the case of frustration of contract.

21. Finally, Mr. Jain submitted that arbitral award can be set aside if it is contrary to - (a) the fundamental policy of Indian law; (b) the interest of India, (c) justice or morality. He submitted that this Court cannot sit in appeal over the award of the Arbitral Tribunal by reassessing or re- appreciating the evidence. An award can be challenged only under the grounds under Section 34(2) of the Act. In the present case, the Arbitral Tribunal has examined the facts, appreciated the evidence on record and interpreted the contract between the parties. Merely because on the basis of material on record another view is possible, this cannot be a ground for setting aside the award. In support of his submissions, Mr. Jain relied upon the following decisions:

    a. **Associate Builders Vs. D.D.A.**, **(2015) 3 SCC 449**, and in particular, paragraphs 15, 17, 19, 28, 32 and 33; and

    b. **H. R. D. Corporation Vs. GAIL (India) Limited**, **(2018) 12 SCC 471**, and in particular paragraphs 18 and 19.

22. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. In so far as the contention of Mr. Narula that there is a novation of contract between the parties on account of - (a) revision of rates and

(b) execution of the mortgage deeds converting consideration paid by ALPL to JPMPL into debt is concerned, I do not find any merit in this submission. Section 62 of the Indian Contract Act, 1872 (for short 'Contract Act') reads thus,
"**62. Effect of novation, rescission, and alteration of contract.-** If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

23. A perusal of the above provision shows that if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. In the present case, JPMPL did not examine any witness. No material is produced on record to substantiate that the parties agreed to substitute the original contract by new contract or agreed to rescind or alter it.

24. Mr. Narula relied upon Section 63, which deals with the "promisee may dispense with or remit performance of promise". Section 63 lays down that every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit. I fail to appreciate how Section 63 can be applied to the fact situation obtaining in the present case.

25. In so far as the contention that ALPL was not ready and willing to perform its part of contract is concerned, equally, the said contention is without any substance. A perusal of the schedule of payment made by ALPL to JPMPL shows that right from 2007 onwards till 12.04.2010, ALPL had paid Rs.22,21,07,120/- (Rupees Twenty Two Crores Twenty One Lakhs Seven Thousand and One Twenty only). Instead of acquiring 50 acres, JPMPL acquired 32.06 acres. It was agreed between the parties that 58.42 lakhs per acre are required to be paid. Thus, as against Rs.18,00,00,000/- (Rupees Eighteen Crores only) being the cost of 32.06 acres, ALPL had paid Rs.22,00,00,000/- (Rupees Twenty Two Crores only). The Arbitral Tribunal has considered the fact that ALPL had restricted its claim in respect of 32.06 acres land. The Arbitral Tribunal also considered Section 12 of the Specific Relief Act, 1963 and held that though ALPL is entitled to performance of entire contract, in view of their giving up the claim, ALPL is entitled to part performance of contract to the extent of the purchased property, which is described in the schedule appended to the award. The Arbitral Tribunal accordingly ordered refund of the amount of Rs.3,48,12,600/- (Rupees Three Crores Forty Eight Lakhs Twelve Thousand and Six Hundred only) along with interest @ 15% p.a.

26. In so far as the contention of Mr. Narula that ALPL had lost the draft sale deed duly stamped is concerned, I do not find any merit in this submission. As noted earlier, Vishal A. Bhanushali, Advocate of JPMPL had made endorsement acknowledging receipt of the original document for further legal procedure. JPMPL has not produced any evidence on record to show that after 20.03.2010, original document in the custody of Advocate Bhanushali was handed over to ALPL. It has, therefore, to be concluded that the original stamped sale deed was with JPMPL.

27. In the case of **Associate Builders** (*supra*), the Apex Court referred to Section 5 of the Act as also decisions in -

i. *Renusagar Power Co. Ltd. Vs. General Electronic Company*, **1994 Supp (1) SCC 644**;
ii. *ONGC Ltd. v. Western Geco International Ltd.*, **2014 (9) SCC 263**;
iii. *P. R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.*,

(2012) 1 SCC 594, and extracted paragraph 21 where it is held that a Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act.

28. In the case of **H.R.D. Corporation** (*supra*), the Apex Court referred to these decisions in paragraph 18 where it is held that the construction of the terms of contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one.

29. Applying the tests laid down by the Apex Court in the aforesaid decisions, I do not find that JPMPL has made out any ground under Section 34(2) of the Act for setting aside the award. Hence, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

Minal Parab

CHIEF CONTROLLING REVENUE AUTHORITY,
STATE OF MAHARASHTRA

James Peterson Mills Pvt. Ltd.
versus

1. **Collector of Stamps, Thane Rural, Thane**
2. **Andrew Lex Pvt. Ltd. Appellant Respondents**

Appeal under Section 53(1A) of Maharashtra Stamp Act. On behalf of Appellant - Advocate Sachin
On behalf of Respondent No.2 Advocate Shri Satyajit

JUDGMENT (Delivered on Today on 4th January, 2020)

Being aggrieved by the Order dated 23/01/2015 passed by District Controller of Stamps, Thane Rural, Thane, in the matter, the Appellant has filed an Appeal under Section 53 (1A) of the Maharashtra Stamp Act (hereinafter referred to as the said Act).

I. Brief facts of the case-

1.1 Andrew Lex Pvt. Ltd., the Purchaser, and James Peterson Mills Pvt. Ltd. (Appellant) herein, the Seller, on 21/05/2007, the Original Owner Balu Shiva Mathe and 33 others owned agricultural land bearing No.61, 62, 63, 67, 68 and 70, Mouje Bahuli, Taluka Bhiwandi, District Thane, and also Nos. 64, 65 and 66 of Mouje Kund, Taluka Bhiwandi, District Thane, total area 33.25 acres, executed Agreement for sale for consideration of Rs.53,00,000/- per acre aggregating to Rs.17,62,25,000/-. For the said documents,

Andrew Pvt. Ltd. purchased Rs.100/- non-judicial stamp paper on 08.05.2007.
1.2 Regarding consideration amount paid from time to time, between both the Parties on 01.06.2007 "Addendum To Agreement to Sale," on 26.06.2007, on 10.07.2007, on 04.12.2007, on 29.03.2008, on 31.03.2008, on 30.05.2008 and on 12.12.2008, First Addendum To Agreement to Sale to Eighth Addendum To Agreement to Sale respectively were executed.
1.3 In all the Agreements, as the Appellants have violated the terms and conditions, Andrew Lex Pvt. Ltd. (Respondent No.2), for specific performance of the agreement as mentioned in it, filed Arbitration Application No.29 of 2012. Hon'ble High Court passed an Order dated 15.06.2012, bringing to notice that on the Agreement dated 21.05.2007, proper stamp duty is not paid. Hence, the Hon'ble Prothonotary & Senior Master, High Court directed that a certified copy of the Agreement be sent to the Office of the Collector of Stamps, Thane Rural, Thane. Accordingly, for the first time, on 21.05.2007, a certified copy of the Agreement was sent to the Office of the Collector of Stamps, Thane Rural, Thane (hereinafter referred to as "Lower Authority"). The same was received on 19.07.2014.
1.4. Concluding that as the Lower Authority did not have possession of the property, as per all the relevant agreements, an Order was passed on 23.01.2015 stating that Rs.100/- is payable as per paragraph 5(h)(b) of Appendix A of the said Act and the stamp duty paid is reasonable.
1.5 Being aggrieved by the said Order, the Appellant (Original Owner) under section 53 (1A) of the said Act filed an Appeal on 11.05.2015. Hence, the said Appeal in the matter.

2. Issues of Hearing and Argument-

In the matter, Appellant and Respondent No.2 on 10.05.2016, 23.08.2016, 28.06.2016, 12.07.2016, 04.10.2016, 25.10.2016, 26.07.2016, 29.11.2016, 24.01.2017, 31.01.2017, 05.02.2019, 26.03.2019, 18.06.2019, hearings were held.
On behalf of Appellant, Advocate Sachin Vaishampayan was present for the hearing. The points of arguments presented by him are as follows:-
A. As per condition No.5(iii) on Page No.4 of the Agreement, it was agreed to give possession of the property in future. Therefore, on all the agreements as per Paragraph 25, stamp duty is payable.
B. As the Purchaser has to pay the stamp duty, registration fee, etc., all expenses, therefore, firstly the stamp duty was not deposited to the government.
C. As stamp duty is not paid to the Government, as per section 39, penalty is liable. Therefore, the Appellant requests to allow the Appeal.
On behalf of Respondent No.2, Advocate S.R. Kakad was present for the hearing. The points of arguments presented by him are as under:-
A. As it was decided to give possession of the property after measurement of the agricultural land, the possession has not been obtained as per the subject matter of the agreement.
B. When by any agreement the possession of the property is not given, stamp duty of Rs.100/- is payable on the said agreement.
C. This is confirmed by Balwantgiri Giri Vs. Mansi Constructions Judgment and requested that the Order dated 23.01.2015 of the Collector of Stamps, Thane Rural, Thane is proper and hence to be considered as final.

3. Issues to be considered:-

3.1 Collector of Stamps, Thane Rural, Thane, in C.M.S Matter: No.586/15, whether agreement for sale dated 21.05.2007 is included as per paragraph -25 of Appendix 1 or how?
3.2 Whether Agreement for sale dated 21.05.2007 and First Addendum to Eight Addendum eligible for stamp duty?

4. Findings –

4.1 In the matter C.M.S No.586/15, Collector of Stamps, Thane Rural, Thane, Agreement for sale dated 21.05.2007 is included in paragraph 25 of Appendix 1 of Maharashtra Stamp Act as Agreement for sale.
4.2 The said Agreement for sale dated 21.05.2007 and First Addendum to Eight Addendum documents are eligible for payment of stamp duty.

5. Conclusion –

5.1 Agreement for sale dated 21.05.2007 and eight documents namely First Addendum to Eight Addendum, executed from time to time, i.e. 01.06.2007, 26.06.2007, 30.07.2007, 04.12.2007, 29.03.2008, 31.03.2008, 30.05.2008 and 22.12.2008, Order of Collector of Stamps, Points of arguments presented by the Appellant and Respondent No.2 respectively, were considered.
5.2 Andrew Lex Pvt. Ltd. (Respondent No.2) has not executed the Agreement for sale dated 21.05.2007 and other Eight Supplemental Agreements for transfer of ownership of the property, therefore for appointment of an Arbitrator, an Arbitration Application No.29/2012 was filed before the Hon'ble High Court. The Hon'ble High Court on 15.06.2012 considered that the documents included in the proceedings are not properly hence sent them to the office of Collector of Stamps, Thane City, Thane for adjudication. The Lower Authority concluded as the possession of the subject property in all the agreements is not given hence as per paragraph 5(h)(b) of Appendix 1 of the said Act, passed an Order dated 23.01.2015 that proper stamp duty of Rs.100/- is paid. Against the said Order, the Appellant has filed the said appeal.
5.3 Appellant's submission that by the said agreement consideration and other terms and conditions were fixed. Respondent No.2 has paid consideration amount to the Appellant from time to time. Each Addendum is filed as an evidence. As the possession of the property has been agreed to be given through these documents, the Lower Authority has not levied stamp duty on the said Agreement for sale. Therefore, under section 30 of the said Act, it is the responsibility of the Respondent No.2 to pay the stamp duty and the penalty thereon.
5.4 Respondent No.2 has not obtained possession of the property as per the subject matter of the Agreement, at that time on the said agreement Rs.100/- stamp duty is payable, arguing that the Order dated 23.01.2015 of the Collector of Stamps, Thane Rural, Thane is proper, hence request to fix the Order of the Lower Authority.
5.5 On scrutiny of the documents in the matter in question, it is necessary to consider the contents in the following paragraph in the document.
“(d) On the Vendor producing and up to the date Encumbrance Certificate declaring that the Schedule Property has not been encumbered during the pendency of this Agreement. e) On the Vendor signing the necessary forms to permit the khata of the Schedule Property to be transferred to the name of the Purchaser."
In accordance with the above procedure, on payment of balance consideration amount by the Purchaser to the Original Owner, the Original Owner will give possession of the

property to the Purchaser. The Original Owner has given purchaser document to the Purchaser and as mentioned in paragraph 6 of the agreement within the stipulated period shall execute Sale Deed. During the period of the agreement, regarding non-lien after giving that date's certificate and after recording the names of the purchasers in the Government documentary records, by the Original Owner, the sale would be deemed to be completed, is agreed. From this it is clear that, before completion of the sale transaction, it is necessary to give possession of the property, in the said matter, possession of the property was to be given on execution of the agreement, is seen.
5.6 In this respect, the following explanation in paragraph 25 of Appendix I of Maharashtra Stamp Act- "Explanation 1- For the purpose of this article, where in the_ case of Agreement to Sell and immovable property *the* possession of any immovable property is transferred (or agreed to be transferred) to the purchaser before the execution or at the time of execution, or after the execution of, such agreement then such agreement to sell shall be deemed to be a conveyance and stamp duty there on shall be leviable accordingly."
5.7 The role of the Government in this regard is that, before making provision for agreement for sale, nominal stamp duty is payable as per Article 5(h) of Appendix 1 of the Maharashtra Stamp Act to the document of sale agreement and the document is being executed by levying stamp duty accordingly. However, the Government has noticed that the possession of the property is given by this agreement, but as per the agreement, there is no further agreement for sale and the rights acquired under the sale agreement are transferred to a third party. But the Agreement for sale is not executed. Therefore, after realising that the stamp duty on agreement for sale is not being received by the Government in time, the Government has amended the above provision by amending the following explanation in Article 25 of Appendix I of the Maharashtra Stamp Act. It is important to consider the role of the Government.
5.7 In response to the arguments made by the Respondent No.2 that the stamp duty is not payable as the possession of the property has not been obtained through the document under consideration, has relied on the judgments of the Hon'ble High Court:-
a. Balwantgiri Giri V/s Mansi Constructions 2007 (1) BOM CR212
b. Sheshrao Kale V/s Damodar Pandhare 2004 (6) BOM CR 354
c. Jugalkishore Arora V/s Sunil Kokje 2006 (6) ALL MR 576
d. Narendra Pathak V/s Collector of Stamps, Thane W.P. No.13821/2016.
In this respect, Hon'ble Supreme Court's Civil Appeal No. 1655/1996 Veena Hasmukh Jain V/s Maharashtra Government, Judgment was relied upon.

The principal question advanced before us, as was done before the High Court, is whether the document in question, that is, an agreement to sell, is a document conveying right, title, and interest of the flat in favour of the appellants. Section 4 of the MOF Act requires an agreement to be drawn in respect of sale with each of the persons who have taken a flat or flats on an ownership basis before accepting any money as advance or deposit, and such advance payment of money or deposit cannot exceed 20% of the sale price under the agreement. Section 4(1A) provides that the agreement should be in the prescribed form and contain several matters mentioned therein. The terms and conditions of the agreement recited that the purchaser agreed to purchase and acquire from the builders a flat admeasuring about 473 sq. ft. carpet area for the price of Rs.1,75,000, which had been paid in the manner set out therein. If there is default in the matter of payment of any of the instalments, the amount paid by

the purchasers to the builders under the agreement would stand forfeited. However, an option was also reserved by the builders to regularize on payment of interest at 24% on such defaulted amounts. It was also agreed that if the agreement is terminated, the purchasers cease to have any right, claim, or demand in respect of the premises agreed to be purchased by him, nor shall the purchaser be entitled to claim specific performance of this agreement and/or compensation or damages.
In paragraph 7 of the agreement, it was stated that subject to the purchaser making full payment of all amounts due and payable by him under the agreement and subject to force majeure, possession of the said premises is expected to be delivered by the builders to the purchaser on or before the 30th November 1987. The agreement was dated 8th October 1987, and the possession was to be handed over by 30th November 1987. Paragraph 13 provided that in the event of any amount by way of premium, development tax, betterment charges, or any other tax or payment of a similar nature or security deposit for a water connection, which was payable to the State Government or Municipal Corporation, would be paid by the purchasers in proportion to the area the purchasers have agreed to purchase. Paragraphs 14 and 15 of the agreement read as follows:
"14. Nothing contained in these presents is intended to be, nor shall it be deemed to be, a grant, demise, conveyance, assignment, or transfer in law of the said property premises or the building thereon, or any part thereof to the purchaser by the builders.
“15. The Purchaser shall not let, sub-let, sell, transfer, assign, or otherwise deal with or dispose of the said premises or his interest or benefit under this agreement till all the dues payable by him to the builders under this agreement have been fully paid up and until previous consent in writing of the Builders in that behalf is obtained by him."
The Hon'ble High Court, Mumbai, in the Original Writ Petition also examined the scope of the explanation of Article 25. The judgment of the Hon'ble Supreme Court is as under:
"The High Court also examined the scope of Explanation I to Article 25 of Schedule I of the Bombay Stamp Act and held that the same was attracted to the case. Under the agreement, there is an obligation to hand over possession even before execution of a conveyance, and therefore, it was a 'conveyance' for the purpose of duty payable under the Bombay Stamp Act, and there was no obligation in the agreement to enter into a conveyance at a later stage, and clearly, it was a case which attracted said Explanation. Handing over of the possession on the very date of execution was not relevant for determining the nature of the document. On that basis, the High Court upheld the stand taken by the State in the matter of the levy of duty. Other questions raised in the Writ Petition are not the subject matter of these appeals, and therefore, we do not advert to those questions. On the conclusion reached by the High Court, the Writ Petition stood dismissed."
The duty in respect of an agreement covered by the Explanation is liable as if it is a conveyance. The conditions to be fulfilled are: if there is an agreement to sell immovable property and possession of such property is transferred to the purchaser before the execution or at the time of execution or subsequently without executing any conveyance in respect thereof, such an agreement to sell is deemed to be a "conveyance." In the event a conveyance is executed in pursuance of such agreement subsequently, the stamp duty already paid and recovered on the agreement of sale, which is deemed to be a conveyance, shall be adjusted towards the total duty leviable on the conveyance. Now, in the present case, the agreement entered into clearly provides for the sale of an immovable property, and there is also a specific time within

which possession has to be delivered. Therefore, the document in question clearly falls within the scope of Explanation I. It is open to the Legislature to levy duty on different kinds of agreements at different rates. If the Legislature thought that it would be appropriate to collect duty at the stage of agreement itself if it fulfills certain conditions instead of postponing the collection of such duty till the completion of the transaction by execution of a conveyance deed, inasmuch as all substantial conditions of a conveyance have already been fulfilled, such as by passing of consideration and delivery of possession of the property, and what remained to be done is a mere formality of execution of a sale deed, it would be necessary to collect duty at a later stage itself. Though right, title, and interest may not have passed as such, still, by reason of the fact that under the terms of the agreement, there is an intention of sale and possession of the property has also been delivered, it is certainly open to the State to charge such instruments at a particular rate which is akin to a conveyance, and that is exactly what has been done in the present case. Therefore, it cannot be said that the levy of duty is not upon the instrument but on the transaction. Therefore, we reject the contention raised on behalf of the appellants in that regard.
The judgments relied upon by Respondent No.2 will not be applicable in this case as it is agreed to take possession of the property through the subject matter document.
5.8 In the said matter, the said agreement and from time to time executed, First Addendum to Eighth Addendum dated 01.06.2007, 26.06.2007, 10.07.2007, 04.12.2007, 29.03.2008, 31.03.2008, 30.05.2008, and 22.12.2008, respectively, and on perusal of the Award dated 09.11.2017 passed by the Hon. Sole Arbitrator, the original agreement and its supplementary agreement are eligible to pay stamp duty. On deposit of stamp duty and penalty on the original agreement, on the First Addendum to Agreement to Sale to the Eighth Addendum to Agreement to Sale, as per section 4, each Rs.100/- stamp duty is to be paid, and all the documents have to be certified. And accordingly, the Lower Authority has to keep follow-up in that respect, and after receipt of the final agreement, on the Award documents as per rule, separate appropriate action has to be taken.
Considering the facts and circumstances of the case, the documents and its supplementary documents, the arguments, the role of the Government in relation to the Sale Agreement, the judgments filed in the matter, in the said matter, it is agreed to give possession of the property by agreement for sale document. Hence, as per Article 25 of the Maharashtra Stamp Act, it is classified as a Sale Agreement and accordingly is eligible to pay stamp duty, is of the conclusion.
Hence, the valuation of the property is as under:
a) Appellant (Owner) has agreed to execute an Agreement to Sell in favour of Respondent No.2 for a total of 30 acres of the property. For this, Respondent No.2 has agreed to pay a consideration amount at the rate of Rs.53 lakhs per acre.
53 lakhs × 33.25 acres = Rs.17,82,12,500/-
b) Total area = 33.25 acres = 13300 sq. mtrs.
ASR - 2007 as per guidelines per sq. mtr. at the rate of Rs.200/- comes to 13300 × 200 = 26,26,000/-.
As per said Act, as per section 2(na) point (a) and (b), whichever is more shall be declared as market rate, and stamp duty is payable.

Hence, on Agreement dated 21.05.2007, the following stamp duty is payable.
a) Market Rate per acre Rs. 53,00,000/- = Rs. 17,62,25,000/-
(33.25 acres)

b) Stamp Duty payable @ 4% = Rs. 70,49,000/-

c) Stamp Duty paid = Rs. 100/-
d) Deficit Stamp Duty = Rs. 70,48,900/-
And the said agreement was executed on 21.05.2007; hence, penalty levied is as under:

a) Deficit Stamp Duty = Rs. 70,48,900/-
b) Penalty period from 08.05.2007 to 08.10.2019, total 12 years 5 months (149 months)

c) Penalty amount @ 2% = Rs. 2,10,05,722/-
Hence, the Order is passed as under:

ORDER

a. Appeal is allowed.
b. In matter C.M.S No. 58~/15 before the Collector of Stamps, Thane Rural, Thane, on the Agreement dated 21.05.2007 Rs. 70,48,900/- (Rupees Seventy lakhs forty-eight thousand and nine hundred only) stamp duty and Rs. 2,10,05,722/- (Rupees two crores ten lakhs five thousand seven hundred and twenty-two only) penalty is levied.

c. After deposit of the above-mentioned by Andrew Lex Pvt. Ltd.
Respondent No.2) with the Government, the Collector of Stamps has to certify the Agreements dated 01.06.2007, 26.06.2007, 19.01.2008, 04.12.2007, 29.03.2008, 31.03.2008, 30.05.2008, and 22.12.2008, the First Addendum to Agreement to Sale to the Eighth Addendum to Agreement to Sale, after levying stamp duty of Rs. 100/- on each document as per Section 4.
d. After receipt of the final amount, the Collector of Stamps, Thane Rural, Thane, has to take separate action on the Award as per rules.
Sd/-
Date: 04/01/2020
Chief Controlling Revenue Officer,
State of Maharashtra, Pune

Question Number : 2 Question Id : 701865236 Question Type : SUBJECTIVE Consider As Subjective : Yes

Correct Marks : 75

QUESTION 2 - (75 marks)

Preparation of a draft research memo: In this question, the candidate is required to formulate a draft reasoned memo not longer than 500-750 words on the issue in question. Parameters for judging this question include:
(a) ability to use relevant legal sources;
(b) use of legal language;
(c) exposition of the law;
(d) analysis of the facts and applicability of the law to the facts; and

(e) structure of the opinion.

Mr. Pawan Kumar and Mr. Nayan Bansal were business partners. They founded a partnership in 2006 dealing with supplying marble tiles to contractors engaged in the construction business. Things went well with their business till about 2010. Thereafter, problems began to arise due to issues with the supply chain of the business. Pawan and Nayan began to have serious differences about the direction in which their business was to go, and Pawan suggested certain compromises in quality and business practices that Nayan did not agree with. On 2nd of February 2012 at 2 pm -after a long and bitter phone-call between the partners earlier that morning- Pawan tracked Nayan down in front of his housing society where a cultural program was going on. Pawan insisted that Nayan have a conversation with him immediately, whereas Nayan refused. This led to some more bitter words. As Pawan was being escorted out by the security of Nayan's housing colony, he pulled out a revolver and aimed it at Nayan, shooting thrice. All the bullets missed Nayan, but one of the bullets hit Mr. Asmit Gogia squarely in the chest. Asmit Gogia was a stranger to Nayan and Pawan and was only on the spot to perform in the cultural program that was happening in Nayan's housing colony. As a result of the bullet wound, Asmit Gogia died on the spot. He was rushed to the nearest hospital but was declared dead on arrival. It came to light that the revolver that Pawan used to shoot was purchased by him from the black market. Thereafter an FIR was lodged against Pawan under Section 302 of the Indian Penal Code and Section 25 of the Arms Act. An investigation led to the filing of a charge-sheet. Once the case was committed to the Sessions Court, charges were framed under Section 302 of IPC along with Section 25 of the Arms Act. The Ld. Trial Court convicted Pawan who then preferred an appeal before the Hon'ble High Court.

You are a legal researcher working for a Hon'ble Judge of the High Court. You have been asked by the Hon'ble Judge to prepare a research note on the 'Doctrine of Transfer of Malice or Transmigration of Motive', and how it applies to the facts of the present case.
Please use the resources provided below to prepare this research brief.

RELEVANT LEGAL PROVISIONS
CHAPTER XVI
OF OFFENCES AFFECTING THE HUMAN BODY
Of offences affecting life
299. Culpable homicide.—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.
Illustrations
(a) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z, believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.
(b) A knows Z to be behind a bush. B does not know it. A, intending to cause, or knowing it to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of

culpable homicide.
(c) A, by shooting at a fowl with intent to kill and steal it, kills B, who is behind a bush; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or to cause death by doing an act that he knew was likely to cause death.
Explanation 1.—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.
Explanation 2.—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.
Explanation 3.—The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

300. Murder.—Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—
2ndly.—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—
3rdly.—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—
4thly.—If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.
Illustrations
(a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.
(b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.
(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.
(d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.
Exception 1.—When culpable homicide is not murder.—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and

sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident. The above exception is subject to the following provisos:—

First.—That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.—That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Illustrations

(a) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(e) A attempts to pull Z's nose. Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z. This is murder, inasmuch as the provocation was giving by a thing done in the exercise of the right of private defence.

(f) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

Exception 2.—Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Illustration

Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

Exception 3.—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his

duty as such public servant and without ill-will towards the person whose death is caused.
Exception 4.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.
Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.
Exception 5.—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.
Illustration
A, by instigation, voluntarily causes Z, a person under eighteen years of age to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder.

301. Culpable homicide by causing death of person other than person whose death was intended.—If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause.

302. Punishment for murder.—Whoever commits murder shall be punished with death, or 1[imprisonment for life], and shall also be liable to fine.

303. Punishment for murder by life-convict.—Whoever, being under sentence of 1[imprisonment for life], commits murder shall be punished with death.

304. Punishment for culpable homicide not amounting to murder.—Whoever commits culpable homicide not amounting to murder shall be punished with 1[imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death. 1[304A. Causing death by negligence.—Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.]

SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
GYANENDRA KUMAR VS THE STATE OF U.P. ON 25 NOVEMBER, 1971
JUDGMENT

1. In this appeal by special leave the appellant Gyanendra Kumar who is about 22 years old has been convicted by the Civil and Sessions Judge Etah for offences

under Sections 302, 307, 224 IPC and Section 25 of the Indian Arms Act. On conviction he has been sentenced to imprisonment for life and to several other terms of imprisonment. All the sentences are made to run concurrently In appeal, the High Court at Allahabad confirmed the conviction and sentence and hence this appeal by special leave.

2. The person who lost his life was one Munshi Lal, the maternal uncle of the appellant. The incident took place in Ganjdunwara town on August 30, 1984. There is a School in that town known as the Hindi Muria School, which was run by the Dharmada Committee of the local grain-merchants. The appellant's father Raja Ram and Uncle Mehtab Rai are influential grain merchants of the town and were members of the Dharmada Committee. The deceased Munshi Lal was a teacher in that School. The President of the Dharmada Committee received a letter in which it was suggested that the School may either be closed or the salaries of the teachers be reduced. Hence a meeting of the Dharmada Committee was called on August 29, 1964. The meeting, however, was adjourned to 2. 30 P.M. on August 30, 1964. A large number of people attended the meeting of the Dharmada Committee. There were members of the Committee and also non-members. The appellant, a non-member, was also present at the meeting.

3. As soon as the meeting commenced one Bankey Lal Kabra P.W. 9 pressed for the consideration of the letter which suggested that the School be either closed or the salaries of the teachers be reduced. The appellant's father Raja Ram and uncle Mehtab Rai took exception to Bankey Lal Kabra taking part in the proceedings on the ground that he had ceased to be a grain merchant and was not entitled to address the meeting as a member. This annoyed Bankey Lal Kabra who made some derogatory remarks against Raja Ram and Mehtab Rai. The appellant got very much excited on hearing what was said against his father and uncle and said that Binkey Lal Kabra was creating trouble and it was necessary to look to him. So he left the meeting, went to his house which was about a furlong away and returned with a loaded double barrelled gun. By that time the meeting had ended in disorder and the people were dispersing on the road in front of the house where the meeting was taking place. Banekcy Lal Kabra accompanied by some-others was moving away from the place when the appellant came with the gun and addressing those who were accompanying Bankey Lal Kabra said "Move away. I shall shoot this Sala Kabra with my gun." Saying this, he fired one shot in the direction of Bankey Lal Kabra. He missed his aim. Bankey Lal Kabra then started running to save himself towards the house of one Laxrai Narain. In the meantime the deceased Munshi Lal rushed towards his nephew, the appellant, in order prevent him from using the gun. The appellant, however, pushed him back and fired at Bankey Lal Kabra, Unfortunately Munshi Lal came between the gun and Bankey Lal Kabra and was shot in the back. Munshi Lal fell down.

4. The gun was a breach loader. The appellant attempted to reload the gun after the two spent cartridges were thrown out by the rejector and fell on the ground. As he put his hand in his pant pocket to take out fresh cartridges, the appellant was overpowered by the friends and associates of Bankey Lal Kabra namely Sita Ram. P.W. 1, Chandra Shekhar, P.W. 6 and others. Binkey lal Kabra also joined them they caught the appellant and were marching him to the Police Station when Mehtab Rai, Raja Ram and six of their associates came and rescued him from his captOrs. In the melee, Bankey Lal held the appellant fast by his shirt and a piece of shirt came in his hand as the appellant freed himself by force The appellant with his gun was

taken away by his relations. It was past 3.00 P.M. by now. The captors picked up the two empty cartridges which had fallen on the ground and then wrote a complaint. With this complaint they proceeded to the Police Station and at 3.30 P.M. lodged the complaint. The two empty cartridges and the piece of shirt were handed over to the Officer in charge. A search was taken of the house for the shirt of the appellant and the same, Ext. 21, was attached under a Seizure Memo. On Comparison, the piece was found to be a part of the shirt attached.

5. In the evening the Superintendent of Police arrived in town and he called for the gun. The gun was produced by Mehtab Rai. On examination of the gun it was found that it had been freshly greased and the barrels had been cleaned. The gun and the two empty cartridges were sent to the Scientific Section of the U.P. Government where Inspector Rameshwar Prasad Rastogi, P.W. 3 found, after firing two live cartridges from the gun that the two empty cartridges which had been sent to him must have been fired from this gun. Munshi Lal died of the gun shot wound and on a post-mortem examination of his body it was found that he had a gun shot injury which was chest cavity deep with margins blackened A charge sheet was filed against the appellant and his rescuers. The learned Sessions Judge acquitted the rescuers but convicted the appellant as aforesaid,

6. The defence of the appellant was one of alibi. He said that he had gone away to Bareilly on the evening of August 29. 1964 and that he was not present all at at the time of the occurrence. He further stated that he had been falsely involved because his father and uncle were influential men and the prosecution witnesses were jealous of them.

7. Both the courts held that the prosecution case had been substantially proved. The eye-witnesses of the occurrence were Bankey Lal, P.W. 9, Sita Ram, P.W.I, Chandra Shekhar, P.W. 6 and Krishna Gopal P.W 7. Besides, there was the evidence of the two empty cartridges, which, in the opinion of the Expert Inspector Rastogi had been fired from the gun recovered from Mahtab Rai. There was also the piece of the shirt of the appellant. Objection was taken to the evidence of the eye witnesses on the ground that they were associates of each other and partial witnesses. After due consideration of this objection, both courts held that the appellant had fired two shots from the gun at Bankey Lal. The first missed its aim and the second hit the unfortunate Munshi Lal when it was really intended for Bankey Lal. These are findings of fact and this Court would not normally interfere with the High Court's findings of fact. We may say at once that no good grounds are made before us for reviewing the findings.

8. Mr. Kohli appearing for the appellant, however, submitted that on the basis of some of the findings of the High Court and the admitted circumstances of the case it was very probable that the deceased Munshi Lal might have been hit by a shot discharged accidentally in a scuffle. Admittedly Munshi Lal had rushed to the appellant to prevent him from firing the second shot. It is also in evidence that the appellant pushed Munshi Lal aside. It is submitted that at this stage there might have been a scuffle between the two and in the scuffle the gun was accidentally discharged and Menshi Lal fell to the shot. In this connection Mr. Kohli particularly invited our attention to the following observations of the High Court: It is not very clear how Munshi Lal came in between the barrel of the gun and Bankey Lal. In our opinion, there is no substance in this submission. The observations of the High Court must be read in their context. The High Court does not say that there was any scuffle, between Munshi Lal and the appellant. There is no evidence to show that

Munshi Lal was trying to catch hold of the gun. The evidence, on the ether hand, was that Munshi Lal was pushed aside, and, according to the High Court, it was quite likely that when he was pushed aside, he steadied himself and assumed a standing position just when the appellant fired a second time at Banney Lal. The fact is that Munshi Lal received the wound in the chest, though from a very short range, which only goes to show that the appellant was firing at chest height. Moreover, there is absolutely no basis made in the evidence to show that there was a scuffle. The case of the appellant was that he was not present at the time of the occurrence. No suggestion also about the alleged scuffle or the gun accidentally discharging itself was made when the eye witnesses were cross-examined The point was not even raised before the learned Sessions Judge. A feeble attempt, however, seems to have been made before the High Court, but the submission was rejected by the High Court, and in our opinion, rightly.

9. It was next contended that the offence, if any, was one under Section 304, Part-I and not under Section 302 r/w Section 301-IPC. It was argued that the appellant was of an irritable temperament and that he must have Bred the shots under grave and sudden provocation. The learned Sessions Judge has rejected this contention. It may be the, the appellant had an irritable temper but there was no question of any grave provocation much less a sudden provocation. After all, during the course, of the meeting, all that Bankey Lal had said was that Mehtab Rai and Raja Ram were monoplising all seats of authority and they were dishonest. The appellant being a near relation may certainly resent such derogatory words addressed to his father and uncle. But they can hardly be said to be grave provocation having regard to the station in life. Mehtab Rai and Raja Ram occupied, on the one hand, and Binkey Lal, on the other. It is true that what is grave provocation in one set of society may not be grave provocation in another. But the words uttered by Bankey Lal to the effect that they were dishonest cannot be regarded as grave provocation under the circumstances. In any case the provocation was far from being sudden. The appellant goes to his house which is about a furlong away and latches the gun. There was sufficient time for him to cool down. His action was deliber. ate. He asked these who were near Bankey Lal to move away because he wanted to shoot Bankey Lal. One shot missed its aim, Munshi Lal came up to prevent him from filing another shot. The appellant pushed him and then fired the second shot. All this cannot be attributed to any grave and sudden provocation. The offence, therefore, it is on under Section 304, Part-I. In the remit the appeal fails and is dismissed.

IN SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NOS. 1704-1705 OF 2015

ASHOK SAXENA **APPELLANT(S)**

VERSUS

THE STATE OF UTTARAKHAND **RESPONDENT(S)**

O R D E R

1. These appeals arise from the judgment and order passed by the High Court of Uttarakhand at Nainital dated 20-01-2015 by which the appeal filed by the State of Uttar Pradesh came to be allowed and thereby the judgment and Order of acquittal passed by the Trial Court in Sessions Case No. 204 of 1994 came to be set aside.

2. Since, we intend to dispose of this appeal on a short ground we need not reproduce the facts or rather the case of the prosecution in details. We borrow the facts as stated by the High Court in its impugned judgment and order. We quote

the relevant part of the High Court's judgment:-
"Present Govt. Appeal has been filed by the State being aggrieved against the judgment and order dated 06.11.1996 passed by learned 2nd Addl. Sessions Judge, Nainital, whereby the respondents were acquitted of the charge(s) levelled against them. Respondent Ashok Saxena was exonerated of the charge levelled against him under Section 302 IPC and the respondent no. 2 Yashpal Singh was exonerated of the charge levelled against him under Section 302 read with Section 34 IPC, giving them benefit of doubt. Respondent Yashpal Singh died during the pendency of the Govt. Appeal, on 24.01.2007, which fact is admitted to both the sides and therefore, this Court proceeds to discuss the appeal only against respondent no. 1 Ashok Saxena filed by the State.
2. Earlier, on a Govt. Appeal, being Govt. Appeal No. 82 of 2001 and Criminal Revision, being Criminal Revision No. 359 of 2001 filed by the revisionist, Division Bench of this Court held Ashok Saxena guilty of the offence punishable under Section 302 IPC and also held Yashpal Singh guilty of the offence punishable under Section 302 read with Section 34 IPC. They were accordingly convicted and sentenced to undergo imprisonment for life, as also to pay fine of Rs. 5,000/- each, vide order dated 14.07.2010.
3. Present respondent i.e. Ashok Saxena filed Criminal Appeal Nos. 963 -964 of 2011 before the Hon'ble Supreme Court of India and the Hon'ble Apex Court, among other things, was pleased to direct as under:
"In the above view of the matter, we are satisfied that the judgment/order dated 14.07.2010 rendered by the High Court in Government Appeal No. 82 of 2001 and Criminal Revision No. 359 of 2001, as against the appellant herein deserve to be set aside. The same are accordingly set aside and the matter is remanded back and restored on the file of the High Court. The High Court of Uttarakhand shall re-adjudicate the Government Appeal no. 82 of 2001 and Criminal Revision No. 359 of 2001 in accordance with law. The appellant shall enter appearance through counsel before the High Court of Uttarakhand on 19.11.2014. In case the appellant remains unrepresented, it will be open to the High Court to appoint an amicus curiae to assist it on behalf of the appellant".
4. Thereafter, in the light of the directions of Hon'ble the Apex Court dated 15.10.2014, this Court proceeded to hear the Govt. Appeal as well as Criminal Revision afresh.
5. Whereas the State was represented by Mr. A.S. Gill, Deputy Advocate General with Mr. Milind Raj, Brief Holder for the State, the respondent Ashok Saxena by Mr. Lok Pal Singh, Advocate.
6. PW-1 Het Ram wrote a complaint (Ext. Ka-1) to SHO police station Kichha, District Nainital on 25.06.1992 enumerating the facts contained therein that the complainant is residing in Hydel Colony Kichcha; his son Joginder Singh used to go for learning typing and Surendra Singh S/o Yashpal Singh was also learning typing there. There was an altercation between Joginder Singh and Surender Singh at the typing centre; Joginder Singh narrated the incident of altercations at his home and his nephew-Man Singh made complaint to the father of Surender Singh. Thereafter, Surender Singh did marpeet with Joginder Singh and the complainant made complaint to his superior officers in this regard. On the day of incident, when nephew of complainant, accompanied with Joginder, had gone to typing centre, in the way, accused Ashok Saxena and Yashpal Singh met them and they threatened them with dire consequences. The son and nephew of the complainant reached

home and narrated the entire story to the deceased. Accused persons Ashok Saxena and Yashpal also reached there and started hurling abuses at them. When the complainant came back from his duty, the entire story was narrated to him. On this, the complainant came outside his house and asked the accused persons not to hurl abusive languages, to which both the accused got annoyed. At that time, Ashok Saxena was having knife in his hand and Yashpal Singh was armed with hockey stick and they chased the complainant and entered into his house. In the meantime, when wife of the complainant came to his rescue, Ashok Saxena gave a knife blow in the stomach of his wife and Yashpal Singh caught hold of the hands of the victim. There was candlelight in the house. The incident took place at about 7:45 p.m. The complainant tried to catch hold of the accused persons, but they fled away. On receiving knife blow, wife of complainant fell down on the floor and she was taken to hospital in a rickshaw, where doctors declared her 'brought dead'."

3. Thus, it appears from the above that the nephew of the first informant along with Joginder were learning typewriting & for that they used to attend a typing institute.

4. While both were on their way to the typing centre, the appellant herein namely Ashok Saxena and the co-accused Yashpal Singh (since deceased) met them and threatened them with dire consequences. The two boys reached home and narrated the entire episode first before the deceased and then upon arrival of Hetram in the evening, the same was conveyed to him also.

5. The aforesaid was the starting point of all the trouble for both the families.

6. It appears that the appellant herein with a knife in his hand and Yashpal Singh (since deceased) with a hockey stick in his hand trespassed into the house of the first informant with the intention to lay an assault on him. The deceased i.e. the wife of Hetram, sensing trouble tried to intervene and in the process the appellant herein is alleged to have inflicted a knife blow in the abdomen of the deceased. Of-course there are allegations that at the relevant point of time the co-accused(deceased) had caught hold of the hands of the deceased.

7. The aforesaid incident took place at about 7.45 p.m. Hetram tried to catch hold of the accused persons but they managed to make good their escape.

8. The deceased having suffered a stab serious injury in her abdomen was put in a rikshaw for being taken to the hospital. However, she was declared dead on being brought to the hospital.

9. The First Information Report (FIR) was lodged by Hetram at the Kichan Police Station, Nainital on 25.6.1992, which reads thus:-

"To SHO Police Station Kichan, Nainital Sir, It is submitted that I am living with my family in the Hydril Colony, Kichan. My son Joginder Singh goes to learn typing in Kichan since last 4-5 days and at the same shop, Yashpal Singh's son Surinder Singh also learns typing. Day before yesterday, my son Joginder had a heated arguments with Yashpal's son Surinder at the typing shop. When my son came home and told about this, my nephew Man Singh went and lodged complaint about this to Surinder's father at his house. On this, Surinder beat my son Joginder in the evening in the colony. I complained about this to my officers. Earlier also, I have made several similar complaints to my officers. To avoid a quarrel, in the evening my nephew went to pick up Joginder from the typing shop. On the way, they meet Ashok Saxena and Yashpal Singh both on the scooter and said that you keep complaining for no reason at all and today we shall see you. At that time, my nephew and son escaped and came home and told everything to his mother and following them Yashpal also came to his house and sat at his door and started

abusing when electricity went off. I finished my duty and came home and with me, my acquaintance Chandra Shekhar Mohalla Kishanpur had also come. Then I was told the whole thing. I went out and stopped Yashpal and Ashok Saxena from abusing then both peoples stood up in anger and Ashok Saxena with a knife in his hand and Yashpal Singh with a hockey in hand ran after me. I ran inside my house. As soon as both these persons entered my house, my wife came forward to save me. Ashok Saxena stabbed my wife with a knife from the front and Yashpal, while abusing held both hands of my wife. Candles were lighted in the house. This incident took place at about quarter to 7.45 pm. I immediately tried to catch them both but could not get hold of them and they ran off. After being stabbed with knife my wife fell down on the floor. I immediately put her in a rickshaw and took her to the hospital where the doctors declared my wife as dead. Dead body of my wife is kept in the Kichan Hospital. Please oblige me by writing my report and taking necessary action."

10. On the FIR being registered the investigation started. The inquest Panchnama of the dead body of the deceased was drawn in the presence of two independent Panch witnesses. The body of the deceased was sent to the hospital for post mortem.

11. The post mortem revealed the following two injuries:-

"1. Cut wound 3cm x Yi cm deep till the cavity on the stomach towards the left 10 cm above the mid claride line and diagonal. On opening the wound muscles of stom- ach, walls, fragments, and left lobe of the liver was found to be cut.

2. On internal examination right portion of the heart was full of blood and left was empty. Around 1 1/2 liters blood was present in the stomach cavity. Some undigested food was present in the intestine."

12. The clothes and other articles of the deceased as well those of the accused persons were collected and sent to the Forensic Science Laboratory for chemical analysis. Statements of various witnesses were recorded by the police under Section 161 of the Criminal Procedure Code, 1973 (for short the "Cr.P.C.")

13. Upon completion of the investigation chargesheet was filed for the offence of murder.

14. The case came to be committed to the Court of Sessions under the provisions of Section 209 of the Cr.P.C. Upon committal, the case came to be registered in the Court of Additional Sessions Judge II, Nainital as Sessions Case No. 204 of 1994.

15. The Trial Court framed charge to which both the accused persons pleaded not guilty and claimed to be tried.

16. The prosecution examined the following witnesses:-

"PW 1 Hetram (Informant) PW 2 Joginder Singh (Son of deceased) PW 3 Surinder Singh (S.I. & I.O.) PW 4 Dr. Anil Kumar Tiwari (conducted post mortem)"

17. The prosecution also led few pieces of documentary evidence.

18. Upon closure of the recording of the oral evidence the further statements of the appellant herein and the co-accused were recorded under Section 313 of the Cr.P.C., to which both claimed to be innocent and said that they were falsely implicated.

19. The Trial Court upon appreciation of the oral as well as documentary evidence on record came to the conclusion that the prosecution had failed to establish its case beyond reasonable doubt and accordingly acquitted both the accused.

20. The State went in appeal before the High Court. The High Court allowed the appeal. Against the order passed by the High Court allowing the appeal filed by the

State and holding the appellant herein guilty of the alleged offence, the appellant came before this Court by filing Criminal Appeal Nos. 963-964 of 2011 respectively. This Court vide an order dated 15.10.2014 disposed of both the appeals in the following terms:-

"Heard learned counsel for the parties. It is not a matter of dispute that the appellant herein was prosecuted in furtherance of FIR S.T.No.204 of 1994 dated 25.06.1992 lodged at police station Kichan, Nainital. The Trial Court, namely, the Additional Sessions Judge-II, Nainital while proceeding against the appellant in Sessions Case No.204 of 1994 acquitted the appellant, as also, his co-accused Yashpal Singh vide judgment/order dated 06.11.1996. Dissatisfied with the order of acquittal dated 06.11.1996, the State of Uttarakhand preferred Government Appeal No.82 of 2001 (Old number Government Appeal No.1198 of 1997). The complainant also preferred Criminal Revision No.359 of 2001 (Old number Criminal Revision No.139 of 1997). The High Court of Uttarakhand vide its impugned judgment dated 14.07.2010 reversed the finding of the Trial Court, and ordered the conviction of the appellant, and his co-accused Yashpal Singh. The solitary contention raised by the learned counsel for the appellant before this Court was, that even though the appellant was served in Criminal Revision No.359 of 2001, he did not enter appearance before the High Court of Uttarakhand through counsel. His further contention was, that he was not served in the Government Appeal No.82 of 2001. It was pointed out, that his co- accused Yashpal Singh was served in Government Appeal No.82 of 2001, and that, he entered appearance before the High Court of Uttarakhand through Mr.Rakesh Thapliyal, Advocate. A xerox copy of the power of attorney executed by the aforesaid Yashpal Singh in favour of his counsel Mr.Rakesh Thapliyal is available on the record of this case (at page No.150 of the appeal paperbook). It was submitted, that the aforesaid Yashpal Singh died during the pendency of the proceedings before the High Court of Uttarakhand on 24.01.2007. The Death Certificate of the aforesaid Yashpal Singh is also available on the record of this case (at page No.90 of the appeal paperbook). The contention of the learned counsel for the appellant was, that Mr.Rajesh Sharma, Advocate, holding the brief of Mr.Rakesh Thapliyal, Advocate, had appeared before the High Court whereupon the impugned judgment/order dated 14.07.2010 was passed. It is submitted that neither Mr.Rajesh Sharma, Advocate nor Mr.Rakesh Thapliyal, Advocate, had the right to represent the appellant herein (Ashok Saxena) before the High Court of Uttarakhand. When confronted with the aforesaid factual position, learned counsel appearing on behalf of the State of Uttarakhand acknowledges, that there was no representation on behalf of the appellant herein when Government Appeal No.82 of 2001 and Criminal Revision No.359 of 2001 were disposed of by the High Court.

It is, therefore, apparent that the High Court proceeded against the appellant, even though he was not represented. In the above view of the matter, we are satisfied that the judgment/order dated 14.07.2010 rendered by the High Court in Government Appeal No.82 of 2001 and Criminal Revision No.359 of 2001, as against the appellant herein deserve to be set aside. The same are accordingly set aside and the matter is remanded back and restored on the file of the High Court. The High Court of Uttarakhand shall re-adjudicate the Government Appeal No.82 of 2001 and Criminal Revision No.359 of 2001 in accordance with law. The appellant shall enter appearance through counsel before the High Court of Uttarakhand on 19.11.2014. In case the appellant remains unrepresented, it will be open to the High

Court to appoint an amicus curiae to assist it on behalf of the appellant. Since the order of the High Court is set aside, no order is required on the application for bail. The appeals stand disposed of accordingly."

21. The High Court upon considering the appeals afresh once again reiterated that the Trial Court had committed an error in acquitting the accused persons and accordingly held both the accused persons guilty.

22. At this stage, it is relevant to note that one of the co- accused Yashpal passed away while the appeal was pending before the High Court. It is only the appellant who ultimately stood convicted for the offence of murder.

23. In such circumstances, referred to above, the appellant- convict is here before this Court with the present appeals.

24. Mr. Hooda, the learned senior counsel appearing for the appellant submitted that the High Court committed a gross error in disturbing a very well-reasoned judgement of acquittal passed by the Trial Court. He would submit that once the Trial Court upon appreciation of the oral as well as documentary evidence acquits the accused of the offence like murder, then unless the High Court finds such judgement to be absolutely perverse or contrary to the evidence on record the same should not be disturbed by the appellate court even if a different view is possible.

25. The second contention before us is that the case is one of culpable homicide & not one of murder. In other words, according to him, even if the entire case of the prosecution is believed or accepted to be true the only offence that could be said to have been committed is Section 304 of the IPC.

26. His third argument in the aforesaid context is that the appellant herein had no intention to cause any harm to the deceased. The appellant had nothing to do with the deceased. Even according to the case of the prosecution, the appellant had some grudge towards Hetram and the intention was to cause harm to Hethram, but unfortunately the deceased all of a sudden came in between and got severely injured who later succumbed. Therefore, his argument is that the case on hand is not even one of culpable homicide not amounting to murder but only knowledge could be attributed.

27. In the last the learned counsel submitted that the incident is of the year 1992. Almost 33 years have passed by. The appellant as on date is 74 years of age. He has undergone about more than five years of sentence (a little under 6 years of sentence).

28. He submitted that having regard to the oral evidence on record and the peculiar facts and circumstances, the conviction at best could be under Section 304, Part-I giving benefit of exception 4 of Section 300 of the IPC.

29. On the other hand, Mr. Sudarshan Singh Rawat, the learned counsel appearing for the State vehemently submitted that no error not to speak of any error of law could be said to have been committed by the High Court in holding the appellant herein guilty of the offence.

30. He would submit that there are two eye-witnesses to the incident PW-1 Hetram and PW-2 Joginder Singh.

31. The oral version of both these two-eye witnesses has been correctly looked into & accepted by the High Court in holding the appellant guilty of the alleged offence.

32. He would submit that there is no good reason to disbelieve the two eye-witnesses referred to above.

33. In the last he submitted that the case on hand is one of murder and no benefit

of any of the exceptions to Section 300 is available to the appellant herein.
ANALYSIS
34. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the High Court committed any error in holding the appellant herein guilty of the offence of murder.
35. We have no difficulty in answering the first submission of Mr. Hooda that the offence is not one of murder or even culpable homicide not amounting to murder as the appellant herein had no intention worth the name to cause any harm to the deceased.
36. Section 301 of the IPC is the answer to the contention of Mr. Hooda. Section 301 of the IPC, reads thus:-
"301. Culpable homicide by causing death of person other than person whose death was intended.— If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause."
37. From the perusal of the provision of Section 301 of the IPC, it becomes manifest that Section 301 embodies what the English authors describe as the doctrine of transfer of malice or the transmigration of motive. Under the Section, if A intends to kill B, but kills C whose death he neither intends nor knows himself to be likely to cause, the intention to kill C is by law attributed to him. If A aims his shot at B, but it misses B either because B moves out of the range of the shot or because the shot misses the mark and hits some other person C, whether within sight or out of sight, under Section 301, A is deemed to have hit C with the intention to kill him. What is to be noticed is that to invoke Section 301 of the IPC, A shall not have any intention to cause the death or the knowledge that he is likely to cause the death of C. This Section lays down that culpable homicide may be committed by causing death of a person whom the offender neither intended nor knew himself to be likely to kill. If the killing takes place in the course of doing an act which a person intends or knows to be likely to cause death, it must be treated as if the real intention of the killer had been actually carried out.
38. Having noticed salutary principles on which Section 301 of the IPC is based, it would be instructive to refer to law on the point as laid down by this Court. In Gyanendra Kumar v. State of U.P., reported in AIR 1972 SC 502 the accused was deliberately trying to shoot at a fleeing man who had criticized his father in a School Committee Meeting, but unfortunately, his own maternal uncle came in between him and the intended victim and thus got killed. This Court has held that the act of the accused was nothing but murder under Section 302 read with Section 301 of the IPC.
39. In Hari Shankar Sharma v. State of Mysore reported in 1979 UJ 659 (SC), the intention of the accused was to kill prosecution witness No. 15 by firing a shot at him, but the accused shot the fire and killed the deceased. A plea was raised before this Court that the appellant would be guilty of offence under Section 304-A or 307 of the IPC. While negativing the said plea, this Court has held as under:
"This appeal under the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act is directed against the judgment of the Mysore High Court

convicting the appellant under Section 302 and sentencing him to imprisonment for life. Detailed facts of the case have been narrated in the judgment of the High Court and it is not necessary for us to reproduce the same here. The main allegation against the appellant was that he had shot the deceased Nazirunnissa and Killadher. So far as the facts are concerned both the Sessions Judge and the High Court have concurrently found that the case was fully proved. The Sessions Judge was of the opinion that the first appellant wanted to kill PW. 15, but as PW. 15 was not available at that time, Nazirunnissa come in between and she was shot, therefore the appellant could be guilty of an offence under Section 304(A) or under Section 307 IPC. This view of the learned Sessions Judge was legally erroneous as rightly pointed out by the High Court. Section 301 furnishes a complete answer to the view taken by the Sessions Judge. It is obvious that the appellant has the intention to kill PW.15 and if with this intention, he kills somebody also, he is undoubtedly guilty of committing murder. There is evidence of PWs. 13, 14 and 15 to show that A.1 fired that shot and killed the deceased. There is no escape from conclusion that the appellant committed an offence under Section 302 of the IPC. In these circumstances, the High Court was right in correcting the error of law committed by the Learned Sessions Mr. Udayarathnam, tried to bring the case of the appellant within the ambit of Section 304(a) or Section 307 but on the fact found it is not possible for us to accede to her contention. For the reasons given above, there is no merit in the appeal, which is accordingly, dismissed."

40. In Jagpal Singh v. State of Punjab reported in AIR 1991 SC 982:

1991 CrLJ 597, appellant Jagpal had shot at Surjit Kaur even though he aimed at only Kapur Singh. After applying doctrine of transfer of malice as contemplated under Section 301 of the IPC, this Court has held that Jagpal had made himself punishable under Section 302 of the IPC.

41. In Abdul Ise Suleman v. State of Gujarat reported in 1995 CrLJ 464, it was the case of the prosecution that the accused had fired freely towards the fleeing complainant party and the first shot had injured one person whereas second shot had resulted into death of ten year old son of the complainant. It was noticed that firing was resorted to in a commercial locality. The Sessions Court had acquitted the accused, but acquittal appeal was allowed by the High Court and the appellant was convicted under Section 302 read with Section 301 and other provisions of the IPC. It was submitted before this Court that the facts and circumstances of the case and evidence led by the prosecution did not establish that the appellant had any intention to commit murder of an innocent boy aged ten years with whom there was no question of having any enmity or any occasion to take a revenge. According to the learned Counsel of the appellant, even from the evidence, it was possible to hold that such death of the boy was absolutely unintentional and at best it could be held that such firing was a rash and negligent action on the part of the appellant. It was argued by the learned Counsel of the appellant that act committed by the appellant was not murder under Section 302 read with Section 301 of the IPC as held by the High Court, but was an offence under Section 304A of the IPC. Negativing the said contention, this Court has held that gun was not fired in the air just to frighten the complainant and his companions, but the gun was fired by the appellant towards fleeing person even when by the first shot one of such person was injured. According to this Court, such firing was resorted to in a locality where there were number of shops and provision of Section 301 of the IPC was clearly attracted in the facts and circumstances of the case. Ultimately, the conviction of

the appellant under Section 302 read with Section 301 of the IPC was upheld by this Court.
42. In view of the principles laid down by this Court in above quoted decisions, it is evident that even if it is held for the sake of argument that the appellant had no intention to cause death of the deceased, it will have to be held that doctrine of transfer of malice, as contemplated under Section 301, is applicable to the facts of the present case and that the appellant would be guilty under Section 302 of the IPC.
43. We do not propose to look into the matter any further, more particularly, the evidence of the two eye-witnesses. In other words, whether the oral testimonies of the two eye-witnesses PW1 and PW4 respectively inspire any confidence.
44. We are of the view that having regard to the genesis of the occurrence, the case falls within Exception 4 to Section 300 of the IPC.
45. In the result, the appeals are partly allowed. The impugned judgement and order of the High Court is modified to the extent that the appellant stands convicted for the offence punishable under Section 304 Part-I of the IPC.
46. Having altered the conviction from Section 302 to section 304 Part-I, we reduce the sentence to the period already undergone keeping two things in mind the year of the incident i.e. 1992 and the age of the appellant as on date, 74 years.
47. With the aforesaid these appeals stand disposed of.

SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
STATE OF MAHARASHTRA VS KASHIRAO & ORS ON 27 AUGUST, 2003
J U D G M E N T

1. On 27.12.1987 Subhash Warankar (hereinafter referred to as the 'deceased') lost his life and Pundlik (PW-1) was seriously injured. Allegedly, the respondents were the assailants. The Additional Sessions Judge, Amravati found them guilty of offences punishable under Sections 302, 307, 147, 148, 452 read with Section 149 of the Indian Penal Code, 1860 (in short the 'IPC'). Each was sentenced to undergo imprisonment for life and three years for the offences relatable with Section 302 read with Section 149 and Section 307 read with Section 149 IPC respectively. One person, namely, Mohan was tried along with the respondents. Since he died during the pendency of the trial the matter was abated so far as he is concerned.
2. Factual scenario according to the prosecution is as follows:

Relationship between Pundlik (PW-1) and respondent-accused No.1 Kashirao was strained since a long time. Originally, Pundlik (PW-1) used to stay in a village Dhamori but he shifted his residence to another village along with family members about one year before the date of incident. On the date of incident when Gangadhar (PW-2), Jayawant (PW-5) and Charandas (PW-6) and the deceased were going to village Dhamori in an auto-rickshaw, PW-1 was standing and he enquired from them as to where they were going and when he learnt that they were going to Dhamori he also accompanied them and all of them reached there at about 5.00 p.m. They went to the house of father-in-law of Gangadhar (PW-2) who was the Sarpanch of the village. They rested there for some time. Thereafter, PW-1 went to the weekly market along with Jayawant (PW-5), Charandas (PW-6) and the deceased. Father of PW-1 met him at the market and PW-1 told his father to purchase mutton

so that he could entertain his friends at night. Thereafter, he along with his friends returned to his house. PW-1 told his mother to prepare meat for his friends and asked PWs 5 and 6 to go to the house of Raghunath (PW-3) and invite Gangadhar (PW-2) for the feast. House of accused-respondent no.1 is at a short distance from the house of PW-1. All the accused persons came together and assembled near the house of PW-1 and they were all armed with deadly weapons. They proceeded towards the house of PW-1 with the common object of killing PW-1 and his friends. At about 6.30 p.m. accused Kashirao along with other accused persons and the deceased accused formed an unlawful assembly to cause death of PW-1 and his friends. Accused No.1-Kashirao was armed with sword, Mohan was armed with an axe and other accused persons were armed with lathis. All the accused persons hurled stones at the house of Pundlik (PW-1) and threatened to kill him and his friends. When the deceased tried to escape from the rear door being afraid of assaults, the accused persons chased him and assaulted him with deadly weapons and committed his murder. Thereafter, they came back to the house of PW-1, pelted stones and when he ran away to save his life, the accused persons chased him and gave blows. As a result of the assaults given, left arm of PW-1 was severed and injuries were caused on his right arm. Another friend of PW-1 Jayawant (PW-5) was also chased, but he successfully managed to escape by getting into a State transport bus. On coming back to the house of PW-1, they shouted that they had killed one person from Amravati, others had run away and now they would kill PW-1. PW-1 tried to save himself by throwing tiles from the roof but he did not succeed and therefore, tried to run away from the house by jumping out from the roof. However, accused chased him and he was assaulted. Assuming him to be dead, they returned to the village. They also carried the severed arm and showed it to his mother and ran away. Mother of PW-1 went to the place where PW-1 was lying, gave him water and took him to Kolhapur Bus stand and then to Kolhapur police station. He was later on taken to the hospital. His statement was recorded and the FIR was registered. The weapons and blood stained swords were collected. The accused persons were arrested and the charge sheet was placed. Mohan is the son of accused No.1 Kashirao, Mahadeo (A-4) and Sahadeo (A-5) are real brothers and Ganesh (A-7) is the son of Ajab (A-6). All are residents of village Dhamori.

3. The prosecution sought to prove the assaults on the deceased and PW-1 with the testimonies of PWs 1, 2, 5, 6 and 7. PWs 1, 5 and 7 were stated to be eye-witnesses. Placing reliance on their version, the conviction was made and sentence was awarded as aforesaid. The respondents preferred an appeal before the High Court questioning legality of the judgment passed by the trial Court. By the impugned judgment, the High Court held that only respondent No.1 Kashirao was guilty of offence punishable under Section 326 IPC in respect of the assault on deceased and other respondents were not guilty. The High Court came to the conclusion that the elements of Section 149 were not established. For the assaults on PW-1, it was held that the case was not covered by Section 307 IPC as held by the trial Court but by Section 326 IPC. All the respondents were held guilty of offence punishable under Section 326 IPC read with Section 147 IPC. Sentence of 3 years RI and fine imposed were maintained, though conviction was altered from Section 307 read with Section 149 IPC. It was also stipulated that sentences in respect of

accused Kashirao were to run consecutively and not concurrently.

4. Coming to the accusations under Section 302 IPC, the High Court was of the view that the deceased was not the intended victim, and only the assault on his leg by accused-respondent No.1 Kashirao was established and nothing else. That being not a very vital part the case was not covered under Section 302 IPC and only Section 326 IPC was applicable.
5. In support of the appeal, learned counsel for the State submitted that the High Court's judgment cannot stand scrutiny because practically no reason has been given to discard the prosecution evidence, more particularly, the evidence of eye-witnesses 1, 5 and 7 who have described in detail the roles played by each of the accused respondents. Further, the High Court has not even indicated any reason to show how Section 149 IPC was not applicable. After having accepted the fact that blows were given by a deadly weapon by accused-respondent No.1 Kashirao, there was no reason to hold him guilty of offence punishable under Section 326 IPC and not Section 302 IPC. The fact that the accused persons were armed with deadly weapons, chased the deceased and assaulted him and came back to assault PW-1 has been established by clear, cogent and credible evidence. There is no scope for entertaining any doubt about the applicability of Section 149 IPC. Additionally, merely because PW-1 was the victim intended, does not take away the effect of the common object to do an illegal act. Mere fact that instead of the original intended victim, somebody else was also assaulted and killed does not take away the rigour of Section 149 IPC. Looked at from any angle, judgment of the High Court is unsustainable.
6. Per contra, learned counsel for the accused-respondents submitted that prosecution version being that PW-1 was the intended victim, Section 149 cannot be applied. Even if it is accepted for the sake of arguments that the deceased was chased and assaulted, the assailant alone can be convicted and others cannot be roped in by application of Section 149 IPC. Evidence of so-called eye-witnesses lacks acceptability and credibility. It does not establish what role, if any, played by the accused persons. None of them could have seen the various assaults allegedly made. It is also submitted that view taken by the High Court is a plausible one and considering the limited scope of interference in an appeal against acquittal there should not be any interference.
7. Rival contentions need to be carefully weighed.
8. Evidence of PWs 1, 5 and 7 is cogent and credible. Merely because there was some animosity between PW-1 and accused persons as claimed by the prosecution, that cannot be a ground to discard his evidence even if it is credible and cogent.
9. Additionally, the evidence of PWs. 5 and 7 more than strengthen the evidence of PW-1. They have graphically described the scenario as to how the accused persons were armed with weapons, pelted stones, chased the deceased, assaulted him, came back and assaulted PW-1. That being the position, the prosecution version has been amply established. The important question is as to applicability of Section 149 IPC to the facts of the case.
10. A plea which was emphasized by the respondents relates to the question

whether Section 149, IPC has any application for fastening the constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly.

11. 'Common object' is different from a 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. For determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, are some of the relevant considerations. What the common object of

the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot co instanti. Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down under the circumstances from which the common object can be called out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of incident. The word 'knew' used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known'. Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within first offences committed in

prosecution of the common object would be generally, if not always, with the second, namely, offences which the parties knew to be likely committed in the prosecution of the common object. (See Chikkarange Gowda and others v. State of Mysore : AIR 1956 SC 731.) In State of U.P. v. Dan Singh and Ors. (1997 (3) SCC 747) it was observed that it is not necessary for the prosecution to prove which of the members of the unlawful assembly did which or what act. Reference was made to Lalji v. State of U.P. (1989 (1) SCC 437) where it was observed that:

"while overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149".

12. This position has been elaborately stated by this Court in Gangadhar Behera and Ors. v. State of Orissa (2002 (8) SCC 381). Above being the position in law, when the facts are applied it becomes clear that all the accused person are liable in terms of Section 149 IPC. Looking at the nature of the injuries, weapons used and the manner of assaults, there was no reason to apply Section 326 IPC in case of accused-respondent No.1 alone. The trial Court had rightly convicted the accused persons under Section 302 IPC. The gruesome nature of the attack is amply demonstrated by the injuries noticed on the body of the deceased. One other aspect which was emphasized was that when prosecution version accepted PW-1 to be intended victim, Section 149 IPC cannot be invoked for deceased's murder. This plea has no legal foundation, when logic of Section 301 IPC is applied. Same reads as follows:

"Section 301- Culpable homicide by causing death of person other than person whose death was intended- If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends or knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause."

13. The provision is founded on a doctrine called by Hale and Foster, a transfer of malice. Others describe it as a transmigration of motive. Coke calls it coupling the event with the intention and the end with the cause. If the killing takes place in the course of doing an act which a person intends or knows to be likely to cause death, it ought to be treated as if the real intention of the killer had been actually carried out.
14. Though Section 149 IPC may not in a given case apply to a case covered by Section 301, it would depend upon the factual background involved. No hard and fast rule of universal application can be invoked. In the facts of present case, as adumbrated supra, the essential ingredients of Section 149 have been amply established. Though initially the malice was focused on PW-1, the fact that all the accused chased and assaulted the deceased is a case of transfer of malice. The same was again pursued by coming back and attacking PW-1. So far as the assaults on PW-1 is concerned, the nature of the assaults and the injuries found clearly bring in application of Section 307 IPC.

The trial Court was therefore justified in convicting accused- respondent No.1 under Section 307 IPC. The essential ingredients required to be proved in the case of an offence under Section 307 are:-

i. That the death of a human being was attempted;
ii. That such death was attempted to be caused by, or in consequence of the act of the accused;
iii. That such act was done with the intention of causing death; or that it was done with the intention of causing such bodily injury as; (a) the accused knew to be likely to cause death; or (b) was sufficient in the ordinary course of nature to cause death, or that the accused attempted to cause death by doing an act known to him to be so imminently dangerous that it must in all probability cause (a) death, or (b)such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury.

15. In offence under Section 307 all the ingredients of offence of murder are present except the death of the victim. For the application of Section 307 it is not necessary that the injury capable of causing death should have been actually inflicted. The injuries sustained, the manner of assaults and the weapons used clearly make out a case of Section 307 IPC. But since sentence and fine have been maintained alteration of conviction notwithstanding no modification of sentence need be made. It is true that when two views are possible and if one view has been adopted by the Court to either acquit the accused or to apply a different provision of law, interference should not be made but when the judgment suffers from legal infirmities and application of legal position to the factual scenario is unsustainable, interference is not only necessary but also highly desirable. The appeal deserves to be allowed. In the ultimate, the judgment of the High Court is set aside and that of the trial Court is restored. The respondents shall surrender to custody and serve out the balance sentence.

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 2791 OF 2023

NANHE ...APPELLANT

VERSUS

STATE OF U.P. ...RESPONDENT

J U D G M E N T

1. Heard learned counsel appearing for the parties.
2. In an incident which took place on 30.05.2007 at about 3:30 p.m. in the market area, one Mahendra was injured and one Saddam Hussain, son of the informant, Mohd. Ali was killed. Two cases, one crime No.169/2007 under Section 304 and 308 IPC and another case crime No.170/2007 under Section 25 of Arms Act, 1959 were registered against the accused Nanhe.
3. Both the cases were clubbed and were tried as Sessions Trial Nos. 1097 of 2007 and 1212 of 2007 by Special Judge, S.C./S.T.(P.A.) Act,1989. The trial court vide judgment and order dated 14.05.2010 held the accused Nanhe to be guilty of an offence under Section 302 IPC and sentenced him to life imprisonment with fine of

Rs.5000/- and in the event of default in payment of fine to undergo additional one year of imprisonment. The trial court also held the accused to be guilty for an offence under Section 25 of the Arms Act and imposed punishment of two years of rigorous imprisonment with fine of Rs.1000/-.

4. The judgment and order of conviction and sentencing the accused was affirmed by the High Court vide its judgment and order dated 31.01.2019 passed in criminal appeal No.4474 of 2010. It may be worth noting that a single appeal was filed by the accused against his conviction in both the cases.

5. The aforesaid judgment and order of the High Court has been assailed by the accused/convict by means of the present appeal.

6. The submission of learned counsel for the appellant is that there was no intention of the appellant to kill the deceased. His death was accidental. His intention could have been only to kill Mahendra and not the deceased Saddam Hussain. The appellant at the relevant time was heavily intoxicated and as such was not in a position to even know what he was doing. The case would therefore, fall under Part II of Section 304 IPC and not under Section 302 IPC.

7. The informant, Mohd. Ali lodged a written FIR at police station Moosajhag, district- Badaun on 30.05.2007 stating that on the said date at about 3:30 p.m. he was going from home to the shop of Sant Ram for purchasing some domestic items along with his son, Saddam Hussain (deceased). When he reached the shop, he saw Mahendra and Nanhe (appellant) quarrelling with each other. Sant Ram, who is none other than the brother of Mahendra intervened and asked Nanhe (appellant) to leave the place. On this, Nanhe (appellant) left but after walking 15 to 20 steps from there, he turned around and with his country made pistol fired a shot which piercing the neck of the deceased hit the head of Mahendra. Nanhe (appellant) was caught on the spot. Saddam was taken to the district hospital where he died.

8. There is no dispute to the fact that Saddam Hussain died of a fire arm shot received in his neck and that the same was fired from the country made pistol possessed by the appellant Nanhe. The weapon of offence and the cartridges were recovered from him. It is also an admitted position as established from the evidence on record that the single shot fired from the said country made pistol after hitting and piercing the deceased in his neck had finally hit Mahendra in his head with whom he was having an altercation a few minutes earlier.

9. On the basis of the evidence of the eye witnesses though one of them had turned hostile, the trial court as well as the High Court came to a definite conclusion that the appellant is guilty of an offence under Section 302 IPC.

10. The only aspect which requires consideration by us is whether the said offence is liable to be reduced to culpable homicide not amounting to murder falling under second part of Section 304 IPC in view of the fact that the appellant had no intention to kill the deceased as he had fired with the intention to settle his score with Mahendra with whom he had entered into a harsh argument. The other aspect which needs consideration is as to what would be the impact of the intoxication of the appellant at the time of the incident.

11. In context with the argument that the appellant had no intention to kill the deceased and that he was accidently killed though in fact he had fired the shot upon Mahendra with whom he had a quarrel/altercation a little earlier, it is relevant to refer to Section 301 of IPC which reads as under: -

“**301.Culpable homicide by causing death of person other than person whose death was intended**. -If a person, by doing anything which he intends or knows to

be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender of the person whose death he intended or knew himself to be likely to cause."

12. The aforesaid provision is based up on the 'Doctrine of Transfer of Malice or Transmigration of Motive' which provides that where there is 'mens rea' of committing an offence, it can be transferred to another. To illustrate the said doctrine, an example could be given of a person who had intention to kill a person but by mistake kills another person, then he would still be held guilty of committing murder even in the absence of intention to kill that particular person. In simpler words, if a person has an intention to commit an offence or cause a death of any person but kills one whose death he never intended to cause, he would still be guilty of causing death.

13. In **Shankarlal Kacharabhai & Ors vs. The State of Gujarat** [AIR 1965 SC 1260], this court while discussing the scope of Section 301 IPC held as under:

"It embodies what the English authors describe as the doctrine of transfer of malice or the transmigration of motive. Under the section if A intends to kill B, but kills C whose death he neither intends nor knows himself to be likely to cause, the intention to kill C is by law attributed to him. If A aims his shot at B, but it misses B either because B moves out of the range of the shot or because the shot misses the mark and hits some other person C, whether within sight or out of sight, under S.301, A is deemed to have hit C with the intention to kill him. What is to be noticed is that to invoke S.301 of the Indian Penal Code A shall not have any intention to cause the death or the knowledge that he is likely to cause the death of C."

14. In a similar case where also, the victim was accidently shot though the firing was intended to cause injuries to some other person, this Court in **Rajbir Singh vs. State of U.P. and Anr.** [(2006) 4 SCC 51] held that the approach of the High Court in setting aside the order passed by the Special Judge solely on the ground that the firing was not aimed at the victim and that he was accidently injured is completely in ignorance of the provision of Section 301 IPC. The Supreme Court observed as under: -

"We have heard learned counsel for the appellant (complainant), learned counsel for Akhilesh Chauhan (respondent no.2) and have perused records. The only reason given by the High Court for setting aside the order passed by the learned Special Judge framing charges against respondent no.2 is that the firing was not aimed at Pooja Balmiki but she accidently received the injuries as she was passing through that way and was hit. The High Court completely ignored the provisions of Section 301 IPC."

The aforesaid provision clearly shows that if the killing took place in the course of doing an act which a person intends or knows to be likely to cause death, it ought to be treated as if the real intention of the killer had been actually carried out. The fact that there was no intention to cause injury to Pooja Balmiki and she was accidently hit can make no difference as according to the version of the prosecution, the accused intended to cause injuries by firearm to Hoti Lal and in attempting to carry out the same, also caused injuries to her. The reasons given by the High Court for quashing the charges are, therefore, wholly erroneous in law and cannot be sustained."

15. In another case of similar nature i.e. **Jagpal Singh vs. State of Punjab** [AIR 1991 SC 982], this Court held that under the 'Doctrine of Transfer of Malice or

Transmigration of Motive' as per Section 301 IPC, the accused has made himself punishable under Section 302 IPC (simplicitor) as he accidently shot a particular person, though, in fact he might have intended to kill another person and may have aimed the shot at that another person only.

16. A composite reading and understanding of the aforesaid provision of Section 301 IPC, "Doctrine of Transfer of Malice or Transmigration of Motive' and above cases on the subject, it is quite implicit that the appellant herein is guilty of committing an offence of culpable homicide amounting to murder punishable under section 302 IPC and that the intention to kill some other person is not material in as much as he had the intention of committing the aforesaid offence though accidently he might have killed another person.

17. In so far as the impact of intoxication and causing death while in the state of intoxication is concerned, a reference to Section 86 of IPC is relevant which provides for the offence caused by a person under intoxication and incapable of understanding the nature of his act. The said provision absolves the accused of committing an offence by reason of intoxication and incapability of knowing the nature of his act.

However, for applying the said provision, it has to be noticed that such intoxication has to be administered to him against his will or without his knowledge which means that it should not be a voluntary intoxication.

18. The aforesaid provision for the sake of convenience is reproduced herein below: -

"86. Offence requiring a particular intent or knowledge committed by one who is intoxicated.—In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will."

19. In applying the above provision, the following twin conditions have to be satisfied. The first that the accused was administered a thing which intoxicated him without his knowledge or against his will. Secondly, the intoxication has to be of the level which incapacitated him of knowing the nature of the act committed or likely to be committed by him.

20. The above provision of Section 86 IPC had come up for consideration before this Court in the case of **Basdev vs. State of Pepsu** [AIR 1956 SC 488] and it was held that where no evidence was led to show that the accused was incapacitated to form requisite intention due to the influence of the drink, the killing of a person would be an offence of murder. In short, the ratio is that not only the accused be intoxicated but also the level of his intoxication be such as to render him incapable of knowing and understanding what he is doing or likely to do. Therefore, evidence to prove his incapacity to understand the nature of his action is mandatory to reduce the criminality of the accused.

21. In a celebrated case **The King vs. Meade** [(1909) 1 K.B. 895] it was opined that a person charged with a crime of violence may show or rebut the presumption that he intended the natural consequences of his acts, that he was drunk and that he was incapable of knowing what he was doing was dangerous. The law was thus summed up as under:

(i) The insanity, whether due to drunkenness or otherwise is a defence in a crime;

(ii) The evidence of drunkenness which renders the accused incapable of forming

any opinion or intention ought to be considered with the surrounding facts and circumstances so as to come to the conclusion whether or not he had intention to do the said act; and
(iii) The drunkenness of the accused must be sufficient to render him incapacitated to form any intention to commit the crime.
22. In the case at hand, though the informant, Mohd. Ali, PW1 in his deposition/cross-examination has accepted that at the time of the incident, the appellant, Nanhe was drunk and was in a state of intoxication, and even the SI, PW6 was of the opinion that the accused was heavily intoxicated and he was unable to speak but the fact remains that in even in such a situation he was able to walk properly and had gone 15 to 20 steps away from the place of quarrel after it was settled to return and fire. This sufficiently proves that he was mentally alert and was not incapacitated from knowing what he is doing and what would be its consequences. Once the killing was complete, the public had thrashed and beaten him mercilessly and, therefore, when the SI PW6 examined him, he could not speak. The inability to speak in such a situation would not be sufficient indication that the level of intoxication was so high that he was unable to understand and take a conscious decision.
23. In view of the above statements of the witnesses, it stands duly established that the appellant had fired the shot in the state of intoxication which resulted in the killing of Saddam Hussain but there is no evidence to prove that on account of the intoxication, he was incapacitated to know and understand his actions.
24. The facts as narrated above would clearly reflect that the incident had taken place on account of a quarrel between the appellant and Mahendra with which the deceased Saddam Hussain had no connection. In the firing which probably took place as a result of the above quarrel, the target was Mahendra, but unfortunately, Saddam was killed. The aforesaid killing of the Saddam was apparently not intentional and was rather by way of an accident.
25. It may be true that the deceased may have been killed accidently by the appellant in the state of intoxication but there is no iota of evidence to establish that due to intoxication he was incapable of knowing the nature of his act or that the act which he was doing or likely to do was so dangerous so as to cause death of any person. Thus, in the absence of such evidence, coupled with the fact that it is not the case of the appellant that he was administered intoxication without his knowledge or against his will, the provision of Section 86 IPC would not be applicable and he would not be entitled to reduction of sentence from 302 IPC to one falling under Part-II of Section 304 IPC.
26. In view of the aforesaid facts and circumstances, we find no illegality in the impugned judgment and order of the High Court Criminal Appeal No.2791 of 2023 in confirming the conviction and punishing the appellant under Section 302 IPC.
27. The appeal is devoid of merit and is accordingly dismissed with no order as to cost. However, the appellant is at liberty to apply for remission in accordance with remission policy of the State in vogue and in the event such power is invoked, the State is expected to consider it on its own merit most expeditiously.

Question Number : 3 Question Id : 701865237 Question Type : SUBJECTIVE Consider As Subjective : Yes

Correct Marks : 75

QUESTION 3 - (75 marks)

Answer **any one** of the following questions (in 350-500 words):

1. Caste remains conspicuously absent from mainstream discussions about Indian prisons. Write a brief note on the judgment in “Sukanya Shantha vs Union of India and Ors.” (2024), which struck down provisions in various State prison manuals that legitimised caste-based discrimination in prisons.
2. Analyse the implications of the “Supriyo v. Union of India” judgment (2023) on the right to marry for queer couples in India. Discuss how this judgment advances or hinders the cause of marriage equality for LGBTQ+ individuals in India, and what further legal reforms are necessary to ensure full recognition and protection of their rights.
3. The principle of reasonable accommodation acknowledges that if disability as a social construct is to be remedied, conditions must be affirmatively created for facilitating the development of the disabled. Discuss this in light of the judgments of the Supreme Court of India on disability rights.
4. Discuss the status of women’s representation in the armed forces, the challenges they face, and the arguments for and against reservations. Also, analyse the impact of the Supreme Court's judgment in the case of “Secretary, Ministry of Defence v. Babita Puniya” (2020) on the issue of permanent commission and command positions for women in the armed forces.