IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION (L) NO. 20865 OF 2023

Jinam Arihant Realtors And Ors. ...Petitioners

Versus

Neha Yogesh Sachde ...Respondents

Mr. Atul G. Damle, *Senior Counsel, i/b Ashish J. Dubey, for the Petitioners.*

Mr. Shanay Shah, *a/w Kumar Kothari, i/b Vohuman Legal, for Respondent.*

CORAM : **SOMASEKHAR SUNDARESAN, J.**

PRONOUNCED ON : **FEBRUARY 3, 2026**

ORAL JUDGEMENT :

Context and Factual Background:

1. This is a Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 ("***the Act***") challenging an arbitral award dated April 29, 2023 ("***Impugned Award***") by which a Learned Arbitrator has allowed the claim of the Respondent, Neha Yogesh Sachde ("***Sachde***") against the Petitioners. Petitioner No. 1, Jinam Arihant Realtors

("***Jinam***"), is a partnership firm, of which Sachde owns a 15% partnership interest, while Petitioners No. 2 to 7 hold the remaining 85% partnership interest.

2. Reliefs sought by Sachde included a declaration that Jinam, constituted under the partnership deed dated December 12, 2011 ("***Partnership Deed***"), was valid and subsisting until it was dissolved with effect from September 27, 2019. Sachde also sought rendering of accounts since inception and until such dissolution or such further date, as the Learned Arbitral Tribunal may deem fit and proper. Various other attendant reliefs, including disclosures, were sought. The Petitioners also filed a counter claim but withdrew the same.

3. Jinam was to develop a building project pursuant to redevelopment of a certain land parcel situated in Goregaon. The *dramatis personae* in the matter are in fact Sachde's father Mr. Pankaj Somchand Shah ("***Pankaj***"), who is said to have been known to Petitioner no. 7, Rasiklal N. Mehta ("***Rasiklal***"), who along with Petitioner no. 2, Mr. Subhash V. Sheth (HUF) ("***Sheth***") and Petitioner no. 3, Mr. Navalkishore G. Sharma (HUF) ("***Sharma***") constituted Jinam to develop the property.

4. It is common ground that the development of the subject property did not take off – that was attributed to disputes over title to the property in question. However, the parties appear to have had dealings across projects, which will be alluded to later in this judgement. The arbitration agreement is contained in the Partnership Deed and governs disputes and differences under the Partnership Deed. In a bid to resolve disputes, a memorandum of understanding dated December 25, 2015 ("***MOU***") was executed between Sharma, Sheth and Sachde by which, it was determined that Sachde would retire from the firm for a payment to her in the sum of Rs. 1.17 crores, which was to be paid before March 31, 2016. If anything remained unpaid by this date, it would need to be paid before June 30, 2016 with 21% interest. To secure such payout, it was also agreed in the MOU that an equitable mortgage would be created over a certain flat identified in another property, for which, an allotment letter was also issued on the same day. It is upon payment of the contracted amount with or without interest as applicable, that such security interest would stand revoked.

5. It is Sachde's case that a sum of Rs. 46.50 lakhs had been received, and the balance amount is still pending. Eventually, on July 6, 2019, Sachde sought accounts and invoked arbitration. Another notice was issued on September 27, 2019, which also went unheeded. Eventually, a

Section 11 Application was filed to get an arbitral tribunal appointed, which was allowed by a Learned Single Judge of this Court on October 14, 2021. In the Section 11 proceedings, it was contended by Jinam and its other partners that the MOU overtook the Partnership Deed and that it was not open to Sachde to initiate disputes under the Partnership Deed, having agreed to leave the firm. Therefore, the MOU was relied upon to state that the Partnership Deed was of no validity upon execution of the MOU. The Learned Single Judge left this facet to be argued before the Learned Arbitral Tribunal, which indicates why an issue of whether the Partnership Deed was subsisting, came to be framed.

6. In the arbitral proceedings, the Petitioners contended that Sachde had invested only Rs. 12 lakhs (the books of accounts showed only two entries of Rs. 7 lakhs and Rs. 5 lakhs) and had also withdrawn Rs. 23 lakhs. Sachde's contention was that Rs. 1.17 crores were due under the MOU and the deadline to pay the balance had been missed. Therefore, the bargain of leaving Jinam was off the table, and her interest in Jinam subsisted, until, of course, when the firm dissolved on September 27, 2019. The Petitioners contended that Sachde had received far more than she invested and nothing more was owed to her. Sachde countered this by contending that her investment in Jinam was actually Rs. 60 lakhs, of which, Rs. 48 lakhs had been invested by her in Jinam in the form of cash.

7. On June 7, 2022, Jinam and others filed an application consenting to a decree in terms of prayers (a), (b) and (c) in the Statement of Claim, which essentially meant that the Learned Arbitral Tribunal could declare that Partnership Deed was valid and subsisting; Jinam was dissolved on September 27, 2019; and that the partners of Jinam may be declared to be jointly and severally liable to render true, faithful and accurate accounts of Jinam from inception until dissolution or such further date as the Learned Arbitral Tribunal deemed fit.

8. A week later, on June 14, 2022, Sachde filed an application asking for recall of Pankaj as a witness to lead further evidence in connection with the cash investment of Rs. 48 lakhs. It is noteworthy that all actions by Sachde in the proceedings are through Pankaj as her constituted attorney. Pankaj's basis of seeking to lead further evidence to support the investment of Rs. 48 lakhs in cash was based on his contention that he had found some CDs (compact discs) in his cupboard, which had contained CCTV footage of 2011 that would prove Sachde's cash investment of Rs. 48 lakhs in Jinam. He would clarify later that he meant audio recordings and not CCTV footage; and also that the recordings related to the year 2016-17 and not 2011.

9. The Learned Arbitral Tribunal asked the Petitioners to confirm if it was submitting to an award in terms of the three prayers as indicated in its application, with a confirmation that Sachde had invested Rs. 60 lakhs in Jinam. Sachde indicated that there would be no objection if the Petitioners would also confirm that there is no quarrel left over Sachde's contentions. The Petitioners responded that the investment of Rs. 48 lakhs in cash was being categorically denied. The Learned Arbitral Tribunal was pleased to pass an order on July 22, 2022 allowing Sachde's request for leading further evidence on her investment in cash, and rejected the Petitioners' request for passing an award granting the three main prayers sought by Sachde on the ground that the Petitioners were seeking to escape trial of the core issues involved and leaving all disputes completely open.

10. The issues framed by the Learned Arbitral Tribunal essentially centred around the following:-

a. Whether Sachde was a 15% partner in Jinam;

b. Whether the Partnership Deed was valid and subsisting;

c. Whether Jinam stood dissolved with effect from September 27, 2019;

d. Whether Jinam and its other partners proved that Jinam's accounts had been settled and that Sachde had been paid far more than what had been invested;

e. Whether Jinam and its other partners were jointly and severally liable to render true, faithful and accurate accounts to Sachde from the date of incorporation until the date of dissolution.

11. Pankaj filed an additional affidavit dated August 26, 2022 seeking to bring on record telephonic recordings of certain conversations said to have been had with the Petitioners some time in 2016-17. It was his case that such recordings would indicate that there were cash transactions between the parties and would help prove the cash investment of Rs. 48 lakhs by Sachde into Jinam. The affidavit of Pankaj essentially sought to bring on record a pen drive containing three audio recordings of a length of 10 minutes 58 seconds; 12 minutes 17 seconds; and 27 minutes and 33 seconds respectively.

12. According to Pankaj, these recordings had originally been made on his Samsung phone. He claimed that in order to preserve these recordings, he had moved them from the mobile phone onto a CD. Some in 2016, he claimed, one Mr. Vipul Shah, his nephew helped him transfer the audio recordings from his mobile phone to his computer and thereafter from the

computer on to a CD, which was kept in his possession and he forgot about their existence, because of which he did not produce them with his original affidavit in evidence. However, when he took stock of developments in the arbitral proceedings with the denial of cash investment, he remembered the CDs and found them in his cupboard.

13. Pankaj purports to have visited the office of Mr. Vipul Shah again, and asked him to examine his computer to look for whether a back-up of the recordings were available. He says that he was successful in securing the recording from the computer backup of Mr. Vipul Shah and transferred the same to a pen drive.

14. The aforesaid affidavit enclosed an Electronic Document Certificate filed by an expert, which essentially indicated the activity as commencing from the movement of the recording from the CD to the computer and onwards to the pen drive. This document does not, in any manner purport to certify the original recording said to have been made on the Samsung phone.

15. The audio recordings and their transcripts are said to have been made at a meeting held in the office of Sharma with Rasiklal and Sharma. Because the meeting had been fixed after a lot of follow-up and effort on his part, he thought it fit to record it. Pankaj would admit that the

conversation does not specifically contain a crystallised and specific amount of Rs. 48 lakhs as having been invested by Sachde in Jinam, but it would indicate that the books of accounts of Jinam were not reliable since the Petitioners maintained three books of accounts and had never audited them for over three and half years. Pankaj would indicate that Sheth had a poor credit reputation and because of recent raids (not clear by which agency), the books held by him were not available, but for which he would have been able to indicate the precise amount invested in minutes.

16. The affidavit would further assert that Sharma had informed Rasiklal that for eight years, there has been no improvement in the status of the project. Pankaj would assert that since evidently, business was being done entirely by keeping accounts outside the official books, it was clear that Jinam's books were unreliable.

Impugned Award:

17. The Impugned Award holds emphatically in favour of Sachde. The Learned Arbitral Tribunal has held that Sachde has proved that a sum of Rs. 60 lakhs had been invested – Rs. 12 lakhs by cheque and Rs. 48 lakhs in cash. The Partnership Deed is held to be subsisting. Sachde's 15% stake is held to be alive. Sachde's claim of dissolution in September 2019

is allowed. The Petitioners have been directed to render accounts since inception. Not only is a direction given to render accounts and make payments, the Petitioners have also been directed that the sums owed to Sachde would be not less than Rs. 1.17 crores in terms of the MOU. A chartered accountant was asked to draw up accounts and ensure distribution to partners in proportion of their shares. Interest at 9% was declared as payable until Sachde is actually paid. Sachde was also awarded costs of Rs. ~12.29 lakhs.

Contentions of the Parties:

18. I have heard at length Mr. Atul Damle, Learned Senior Advocate on behalf of the Petitioners and Mr. Shanay Shah, Learned Advocate on behalf of Sachde, and with their assistance reviewed the material on record that was available to the Learned Arbitral Tribunal when adjudicating the matter.

19. Mr. Atul Damle would attack the Impugned Award on the ground that:

a. The Learned Arbitral Tribunal was foundationally flawed in allowing recall of a witness to fill up gaps found in the stance mid-course during the arbitral proceedings;

b. The MOU is held to be binding even when it was given up by Sachde;

c. The law on proof in the form of electronic evidence is entirely violated; and

d. When the Petitioners were willing to subject themselves to an award, the further conduct of proceedings conducted by the Learned Arbitral Tribunal was uncalled for and perverse.

20. Mr. Shanay Shah would submit that the Learned Arbitral Tribunal has returned its findings on the basis of the evidence before it, the quantity and quality of which was entirely for the Learned Arbitral Tribunal to determine. The Learned Arbitral Tribunal was entitled to allow additional evidence to arrive at the truth, he would contend. The expert certification of the voice recordings left it unshaken. No cross examination was conducted to dispel its veracity. Sharma had identified his own voice in the recordings although he would not identify the others, which enabled the Learned Arbitral Tribunal to return a plausible finding.

21. The MOU was binding on Jinam and its prime partners had agreed that it would bind Jinam, Mr. Shah would submit. The crystallised amount of Rs. 1.17 crores in the MOU could not be wished away. It was even acted upon to pay Rs. 46.50 lakhs. The Learned Arbitral Tribunal

was not wrong in making the sum set out in the MOU to be the minimum amount payable to Sachde.

Analysis and Findings:

22. This case presents a problematic conundrum. It is indeed a vital element of arbitration law that interference with arbitral awards should be constricted and in conformity with the law declared on how Section 34 of the Act must operate.

23. The Section 34 Court must refrain from being judgmental about the manner of judgment by the Learned Arbitral Tribunal and must simply look to whether the findings returned by the Learned Arbitral Tribunal are impossible or perverse findings. Even the earlier approach of discerning the absence of "judicial approach" is not to be resorted to lightly, unless of course, the arbitral award is based on no evidence at all or a completely perverse assessment of evidence, and that too with the perversity being of the order that cuts to the root of the matter.

24. On the other hand, this is a classic case where public policy considerations in assessing the Impugned Award have to be very carefully considered with the judgement creditor categorically bringing to bear the manner of conduct of business operations by all the parties concerned –

entirely in the parallel economy, off the books of accounts and balance sheet of the firm, with their conversations littered with handling of cash and role of politicians of nearly every prominent political party in Mumbai.

25. It is with this perspective in mind that when one looks at the transcript of the voice recordings introduced by Sachde, one cannot but help notice that it reveals nothing except that all the parties appear to be adept at and completely involved in cash transactions. It appears that the financial dealings on paper in running business of the partnership were a sham and completely unreliable. The parties merrily discussed various projects and various cash payments, and they were all in it together. I have been careful to examine the evidence and not weigh the evidence. A sheer examination, on the face of it, would show that the transcripts are incoherent and do nothing beyond indicating that the parties had the habit of engaging in cash dealings. At the very least, there is nothing to show that an investment of Rs. 48 lakh had been invested by Sachde or by Pankaj in cash even while it is obvious that three layers of books and diaries appears to have been maintained that would point to the real dealings, and those had been seized in a raid by some enforcement agency.

26. For the Learned Arbitral Tribunal to accept this as evidence of investment in cash and return findings to allow the claim as made, does not, to my mind, present a reasonable and plausible or even a possible view. It is impossible to connect the dots in any reasonable manner to solve the puzzle of what investment had been made by Sachde in Jinam and how they went about computing the returns.

27. Indeed, the MOU did record that Jinam and its partners would pay Sachde Rs. 1.17 crore. Payments to the tune of Rs. 46.50 lakhs had even been made under the MOU. Sachde called off the MOU seeking a share in Jinam instead, seeking accounts of the firm, even while evidently the very project for which it had been formed did not get off the ground. The Learned Arbitral Tribunal went a step ahead to hold that the accounts would need to be provided and regardless of the accounts and the pay-outs due to a 15% partner, at the least a return of Rs. 1.17 crores should be paid to Sachde. This is an outcome that is completely implausible and disconnected to the very claim made.

28. One could even understand a view that the MOU is an extension of the Partnership Deed since its subject matter is re-arranging of the relations between the partners. Indeed, Jinam claimed that the MOU terminated the Partnership Deed and with it, the arbitration agreement –

a contention that was rightly dismissed by the Learned Arbitral Tribunal. The Learned Arbitral Tribunal has returned a finding that the Partnership Deed was valid and subsisting and that the MOU did not bring it to an end. The Learned Arbitral Tribunal has also held that the partnership indeed was dissolved on September 27, 2019. The Learned Arbitral Tribunal held that Sachde had indeed invested Rs. 60 lakhs, of which Rs. 48 lakhs had been invested in cash. The Learned Arbitral Tribunal directed that accounts must be drawn up to ascertain the dues owed to Sachde. In the same breath, the Learned Arbitral Tribunal held that the amount contracted in the MOU would constitute the minimum payment due regardless of the financials of the partnership. The amalgam of these findings, and that too based mainly on incoherent voice recordings and their transcript, I am afraid, renders the Impugned Award irrational and arbitrary.

29. While the Section 34 Court must be slow to interfere with Arbitral Awards unless there is material infirmity that cuts to the root of the matter, indeed what one has on hand in these proceedings is an Arbitral Award that has expressed satisfaction based on a transcript of voice recordings that can be reasonably classified by gibberish, being treated as evidence of having contributed capital in the sum of Rs. 48 lakhs in cash taking the cheque contribution of Rs. 12 lakhs to a total of Rs. 60 lakhs.

Not only does the transcript not indicate the amount invested, but also the cross examination clearly records that Pankaj admitted that there was no specific reference in it to the amount invested. Therefore, the finding in this regard in the Impugned Award is truly inexplicable and irrational, which in my view, regrettably necessitates an intervention under Section 34 of the Act.

30. What is clear is that Jinam and the other partners have cynically attempted to submit themselves to an award in terms of the prayers sought, even while insisting that such submission to an award is not based on accepting the contention of Sachde having invested Rs. 48 lakhs in cash. No fault can be found with the Learned Arbitral Tribunal for rejecting such a self-serving proposition. Likewise, the arbitrator being the master of the evidence and the prime arbiter of the quality and quantity of evidence necessary to adjudicate, in my opinion, cannot be faulted for allowing introduction of further evidence by recalling Pankaj as a witness. However, after introduction of such purported evidence, which, even taken at face value, does nothing more than indicate how the parties were merrily engaged in cash dealings, the Learned Arbitral Tribunal concluded that a precise infusion of Rs. 48 lakhs in cash had been proved.

31. In my opinion, one has to be extremely careful not to re-appreciate the evidence when examining the approach of the Learned Arbitral Tribunal to the material before the arbitrator. At the same time, one would have to examine whether the material in question could at all have been interpreted by any reasonable person in the manner that the Learned Arbitral Tribunal did and examine whether the finding is an impossible view. If it is writ large on the face of the record that the findings rendered represent an impossible view, i.e. a view that no reasonable mind could justifiably take, it would then lead to the ground of perversity being attracted. It is with this delicate fine balance that I have examined the material on record, and not weighed or measured the evidence.

32. The additional affidavit of Pankaj seeking to bring on record the transcripts of three conversations is problematic on many accounts. First, evidently all parties have blatantly discussed having transactions not forming part of any books of accounts. Indeed, taking the evidence at face value, it appears that three sets of books of accounts had been maintained and each of these represented a parallel accounting of what was done by the parties. It is not even as if Pankaj was unaware of such a situation and was taken by surprise at the meeting at which he recorded the conversation surreptitiously. Pankaj himself claims to have invested such a large sum in cash. Indeed, he claims that the cash in hand by him has

been disclosed in his income tax returns. It is for him to demonstrate that to the income tax department, should such details be sought. However, whether the transcript of such recorded conversation even reasonably points to a plausible view that Sachde had invested Rs. 60 lakhs in Jinam (and not in multiple other projects – the transcript speaks of multiple projects) is something that the Learned Arbitral Tribunal does not even analyse.

33. The approach adopted appears to have been that once the transcript showed some evidence of any cash dealing among the parties, the Learned Arbitral Tribunal considered it plausible to conclude that Sachde had invested Rs. 48 lakhs in cash in Jinam. To my mind, this is where perversity strikes at the heart of the findings in the Impugned Award.

34. The voices attributed to the partners of Jinam and to Pankaj, would indicate that all parties were willing participants in a throbbing business activity that was entirely conducted off the books in the parallel economy. The very transcripts of the conversations sought to be brought on record names multiple politicians of multiple parties. This could be name-dropping to brag about influence wielded. It could even be true. However, how it indicates any reasonable basis to hold that the

investment of Rs. 60 lakhs stood proved, presents a gaping hole in the Impugned Award.

35. What is also clear is that all the parties have indulged in activity that is clearly underground and not above board. Even if one were to take a view that merely because the dealings were in cash, the dealings in real estate were not unenforceable contracts, what is apparent that the illegality is the contract sought to be enforced i.e. the Partnership Deed that is the agreement to constitute and run the affairs of Jinam. If the running of multiple partnership firms was in cash (the project run by Jinam did not take off) it begs the question as to whether the sheer illegality in running of Jinam as a partnership firm and maintenance of its books of accounts would raise public policy considerations when examining an arbitral award purporting to enforce such cash dealings.

36. It is in that light, that I am loathe to hold that the Impugned Award presents a plausible and reasonable interpretation of the material on record. To begin with, a bare reading of the record (as stated earlier, not from the perspective of appreciation and weighing of evidence, but from the perspective of examining whether any reasonable person would return a firm finding of the nature returned by the Learned Arbitral Tribunal), to my mind, betrays material that no reasonable person would conclude that

a cash investment of Rs. 48 lakhs was proved. On the contrary, it appears to me that the parties have essentially indulged in blatantly illegal actions in the running of the partnership firm, and enforcing such an illegal bargain is contrary to public policy.

37. If such transactions, that are blatantly contrary to the rule of law, were to be permitted to be enforced by the legal system, there would be no difference between enforcement of a valid and legal contract and enforcement of bargains that are evidently in direct conflict with law. In that context, in my view, the outcome does not withstand scrutiny from the standpoint of being consistent with most basic notions of justice and morality.

38. I have no doubt that the Learned Arbitral Tribunal was resolute in its view that justice was being done and has returned findings the Learned Arbitral Tribunal was convinced, presented a just outcome. However, enforcement of justice in blatantly illegal ecosystem of transactions, is not something that would pass muster on the touchstone of an arbitral outcome having to be in consonance with the most basic notions of justice and morality.

39. It also appears that the Petitioners had claimed that Rs. 23 lakhs had been taken out of the business by Pankaj on Sachde's behalf. To

dismiss this contention, the Learned Arbitral Tribunal holds that there was no material to demonstrate it. However, for the finding that Rs. 48 lakhs had been invested in Jinam, the Learned Arbitral Tribunal finds that the incoherent transcript that only shows rampant cash dealing was adequate to prove the investment. That discussions about other projects and cash flows relating to those projects were found in the transcript is also a pointer to the impossible reading of the transcript in the Impugned Award.

Public Policy and Fundamental Policy of Indian Law:

40. Guidance on how to deal with situations where parties to a contract are confederates to a fraud on the public, is available in a judgement rendered by the Supreme Court in the case of ***Narayanamma***[1], where the Court was dealing with confederates to a fraud, with one seeking enforcement against the other. Under the Karnataka Land Reforms Act, 1961, a grantee of land with a 15-year lock-in on the ownership of the land, purported to mortgage the land within seven years in favour of another person. Within a month of the mortgage, an agreement to sell was also executed, with the entire consideration being purported to have been received and the land was also transferred. Upon

[1] *Narayanamma & Anr. v. Govindappa & Ors.* – *(2019) 19 SCC 42.*

death of the transferor, the name of the transferee was routinely entered in the revenue records by a mutation entry. Whether such a transfer that was in conflict with the statutory prohibition on transfer could be specifically enforced, came up for consideration and the question eventually reached the Supreme Court.

41. Noting the contents of another Supreme Court judgement in ***Kedar Nath Motani***[2] and in ***Immani Appa Rao***[3] the Supreme Court, in ***Narayanamma***, held that the application of two maxims *ex turpi causa non oritur actio* (right of action cannot arise out of transgression of law) and *in pari delicto potior est conditio possidentis* (where each party is involved in fraud the law favours him who is actually in possession) and a third principle namely, *nemo allegans suam turpitudinum audiendum est* (that party that has to first plead fraud in which he participated, must fail). The Court found that where the contestants in a dispute have equally engaged in fraudulent activity, enforcing the bargain at the behest of one of the parties would lead to active assistance of the Court in recognising and enforcing fraud while refusing to grant assistance of the Court may passively assist another party to the fraud but it merely let the facts lie as they are without any active assistance, which course is less injurious to public interest.

[2] *Kedar Nath Motani & Ors. v. Prahlad Rai & Ors.* – 1959 SCC OnLine SC 16
[3] *Immani Appa Rao & Ors. v. Gollapalli Ramalingamurthi & Ors.* – (1962) 3 SCR 739

42. Summarising ***Kedar Nath Motani***, the Court said:

> *16. It could thus be seen, that* ***this Court has held that the correct position of law is that, what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered****. This Court further held, that* ***if the illegality is trivial or venial and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position****. It has further been held, that a strict view must be taken of the plaintiff's conduct and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by misstating the facts. However,* ***if the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose is achieved, then, unless it be of such a gross nature as to outrage the conscience of the Court, the plea of the defendant should not prevail.***

43. Summarising ***Immani Appa Rao***, the Court said:

> *18. This Court held that, which principle is to be applied in the facts of the case would depend upon the question, as to which principle is more consistent with public interest. The Court finds that,* ***when both the parties before the Court are confederates in the fraud, the Court will have to find out which approach would be less injurious to public interest. The Court observed that, whichever approach is adopted, one party would succeed and the other would fail and, therefore, it is necessary to enquire as to which party's success would be less injurious to public interest****. The Court in the facts of the said case finds that* ***if the decree was to be passed in favour of Respondent 1 (who was the***

plaintiff), it would be actively assisting Respondent 1 to give effect to the fraud to which he was a party and it has been held that in that sense the Court would be allowed to be used as an instrument of fraud and that is clearly and patently inconsistent with public interest.

19. It has further been held, that ***if both the parties are equally guilty and the fraud intended by them had been carried out, the position would be that, the party raising the defence is not asking the Court's assistance in any active manner****. It has been held, that* ***all the defence suggested is that a confederate in fraud shall not be permitted to obtain a decree from the Court because the documents of title, on which the claim is based really conveys no title at all****. In the facts of the said case, it was held, that* ***though the result thereof would be assisting the defence therein to retain their possession, for such an assistance would be purely of passive character and all that the Court would do in effect is that on the facts proved, it proposes to allow possession to rest where it lies****. It has been held that, latter course appears to be less injurious to public interest than the former one.* ***This Court in the said judgment has digested the English law on the issue in the following paragraphs, which read thus****: (Immani Appa Rao case [Immani Appa Rao v. Gollapalli Ramalingamurthi, (1962) 3 SCR 739 : AIR 1962 SC 370] , AIR pp. 377-78, paras 19-21)*

> *"19. In support of the contrary view reliance is usually placed on an early English decision in Doe d. Roberts v. Roberts [Doe d. Roberts v. Roberts, (1819) 2 B & Ald 367 : 106 ER 401] . In that case it was held that: (ER p. 401)*
>
> > *'****no man can be allowed to allege his own fraud to avoid his own deed; and, therefore, where a deed of conveyance of an estate from one brother to another was executed, to give the latter a colourable qualification to kill game. The***

***document was as against the parties to it valid and so sufficient to support an ejectment for the premises**'.*

In dealing with the question raised Bayley, J. observed: (ER p. 401)

*'**By the production of the deed, the plaintiff established a prima facie title; and we cannot allow the defendant to be heard in a court of justice to say that his own deed is to be avoided by his own fraud**;'*

and Holroyd, J. added that: (ER pp. 401-02)

*'**A deed may be avoided on the ground of fraud, but then the objection must come from a person neither party nor privy to it, for no man can allege his own fraud in order to invalidate his own deed**.'*

20. This decision has, however, been commented on by Taylor in his Law of Evidence. According to Taylor

*'it seems now clearly settled that **a party is not estopped by his deed from avoiding it by proving that it was executed for a fraudulent, illegal or immoral purpose** [Taylor's "Law of Evidence", Vol. I, 11th Edn., p. 97, para 93]. The learned author then refers to the case of Roberts [Doe d. Roberts v. Roberts, (1819) 2 B & Ald 367 : 106 ER 401] and adds "**in the subsequent case of Prole v. Wiggins [Prole v. Wiggins, (1837) 3 Bing NC 230 : 6 LJCP 2 : 43 RR 621 : 132 ER 398] , Sir Nicholas Tindal observed that this decision rested on the fact that the defence set up was inconsistent with the deed**" '.*

Taylor then adds that

'the case, however, can scarcely be supported by this circumstance, for in an action of ejectment by the grantee of an annuity to recover premises on which it was secured, the grantor was allowed to show that the premises were of less value than the annuity, and consequently, that the deed required enrolment, although he had expressly covenanted in the deed that the premises were of greater value….'

According to the learned author

'the better opinion seems to be that where both parties to an indenture either know, or have the means of knowing, that it was executed for an immoral purpose, or in contravention of a statute, or of public policy, neither of them will be estopped from proving those facts which render the instrument void ab initio; for although a party will thus in certain cases be enabled to take advantage of his own wrong, yet this evil is of a trifling nature in comparison with the flagrant evasion of the law that would result from the adoption of an opposite rule' (p. 98).

Indeed, according to Taylor,

'although illegality is not pleaded by the defendant nor sought to be relied upon by him by way of defence, yet the court itself, upon the illegality appearing upon the evidence, will take notice of it, and will dismiss the action ex turpi causa non oritur actio. No polluted hand shall touch the pure fountain of Justice' (p. 93).

21. To the same effect is the opinion of Story [Story's Equity Jurisprudence, Vol. I, Section 421; English edition by Randall, 1920, Section 298.]:

> *'In general, **where parties are concerned in illegal agreements or other transactions, whether they are mala prohibita or mala in se, courts of equity following the rule of law as to participators in a common crime will not interpose to grant any relief, acting upon the known maxim in pari delicto potior est conditio defendentis et possidentis.** The old cases often gave relief, both at law and in equity, where the party would otherwise derive an advantage from his inequity. **But the modern doctrine has adopted a more severely just and probably politic and moral rule, which is, to leave the parties where it finds them giving no relief and no countenance to claims of this sort**."*

*20. **It could thus be seen that, although illegality is not pleaded by the defendant nor is relied upon by him by way of defence, yet the court itself, upon the illegality appearing upon the evidence, will take notice of it, and will dismiss the action ex turpi causa non oritur actio**. It has been held, that **no polluted hand shall touch the pure fountain of justice**. It has further been held, that where parties are concerned in illegal agreements or other transactions, courts of equity following the rule of law as to participators in common crime will not interpose to grant any relief, acting upon the maxim in pari delicto potior est conditio defendetis et possidentis.*

44. Applying ***Kedar Nath Motani*** and ***Immani Appa Rao***, the Supreme Court ruled as follows:

> *24. ……Under Section 61 of the Reforms Act, there is a complete prohibition on such mortgage or transfer for a period of 15 years from the date of grant. Sub-section (1) of Section 61 of the Reforms Act begins with a non-obstante clause. It is thus clear that, the unambiguous legislative intent is that no such mortgage, transfer, sale, etc. would be permitted for a period of 15 years from the date of grant. Undisputedly, even according to the plaintiff, the grant is of the year 1983, as such, the transfer in question in the year 1990 is beyond any doubt within the prohibited period of 15 years. Sub-section (3) of Section 61 of the Reforms Act makes the legislative intent very clear. It provides, that any transfer in violation of sub-section (1) shall be invalid and it also provides for the consequence for such invalid transaction.*
>
> *25. Undisputedly, both, the predecessor-in-title of the defendant(s) as well as the plaintiff, are confederates in this illegality. Both, the plaintiff and the predecessor-in-title of the defendant(s) can be said to be equally responsible for violation of law.*
>
> *26. However, the ticklish question that arises in such a situation is:"the decision of this Court would weigh in side of which party"? As held by Hidayatullah, J. in Kedar Nath Motani, the question that would arise for consideration is as to whether the plaintiff can rest his claim without relying upon the illegal transaction or as to whether the plaintiff can rest his claim on something else without relying on the illegal transaction. Undisputedly, in the present case, the claim of the plaintiff is entirely based upon the agreement to sell dated 15-5-1990, which is*

clearly hit by Section 61 of the Reforms Act. There is no other foundation for the claim of the plaintiff except the one based on the agreement to sell, which is hit by Section 61 of the Act. In such a case, as observed by Taylor, in his "Law of Evidence" which has been approved by Gajendragadkar, J. in Immani Appa Rao, although illegality is not pleaded by the defendant nor sought to be relied upon him by way of defence, yet the Court itself, upon the illegality appearing upon the evidence, will take notice of it, and will dismiss the action ex turpi causa non oritur actio i.e. no polluted hand shall touch the pure fountain of justice. Equally, as observed in Story's Equity Jurisprudence, which again is approved in Immani Appa Rao, where the parties are concerned with illegal agreements or other transactions, courts of equity following the rule of law as to participators in a common crime will not interpose to grant any relief, acting upon the maxim in pari delicto potior est conditio defendentis et possidentis.

28. Now, let us apply the other test laid down in Immani Appa Rao. At the cost of repetition, both the parties are common participator in the illegality. In such a situation, the balance of justice would tilt in whose favour is the question. As held in Immani Appa Rao, if the decree is granted in favour of the plaintiff on the basis of an illegal agreement which is hit by a statute, it will be rendering an active assistance of the court in enforcing an agreement which is contrary to law. As against this, if the balance is tilted towards the defendants, no doubt that they would stand benefited even in spite of their predecessor-in-title committing an illegality. However, what the court would be doing is only rendering an assistance which is purely of a passive character. As held by Gajendragadkar, J. in Immani Appa Rao , the first course would be

> ***clearly and patently inconsistent with the public interest whereas, the latter course is lesser injurious to public interest than the former***.
>
> ***[Emphasis Supplied]***

45. The above extracts are indicative of the conflict between the Impugned Award and public policy of India, as indeed, the fundamental policy of Indian law as declared by the Supreme Court. The Supreme Court has declared that when both parties are involved in fraud, the principle that is less injurious to public interest should be applied. While one party may benefit from the refusal to grant relief, the justice delivery system would not be actively lending its *imprimatur* to enforcement of a claim based on actions that are admittedly illegal. This is the approach that is least injurious to public interest and ought to have guided the Learned Arbitral Tribunal in its approach once the evidence led by Pankaj revealed that the parties had actively engaged in massive cash dealings. Arguably, right when Pankaj, as the constituted attorney of Sachde, indicated that he had invested Rs. 48 lakhs in cash, the prospect of the entire partnership between the parties being off the books and illegal was raised. The mere fact of investment in cash may be inadequate to conclude illegality but nothing was left to imagination after the voice recordings and their transcript was brought on record by Pankaj.

46. As stated above, I have found that there was nothing wrong in the Learned Arbitral Tribunal admitting further evidence from Pankaj since that fell within a reasonable exercise of discretion by the master of the evidence. There is another line of submissions by Jinam's advocates to impugn the evidentiary integrity of the voice recordings and that the certification of the recordings do not lead up to the original source of the recording on Pankaj's mobile phone and only relate to the records available on the CDs transferred to a computer, from which it was transferred to the pen drive. In deference to the Learned Arbitral Tribunal in its assessment of the quality of evidence, and my opinion on what such evidence has meant for the basic bargain between the parties that has been enforced, I find that it is not necessary to pronounce upon the validity of the electronic evidence and parameters that need to be met for such evidence to be compliant.

47. In my opinion, enforcing a bargain rooted in such patent illegality of dealings between the parties renders the Impugned Award to be contrary to public policy within the parameters of Section 34 of the Act. While the Learned Arbitral Tribunal may have been moved by the notion of justice being done to the party wronged in the Learned Arbitral Tribunal's perception, the outcome is one that shocks my conscience – an outright enforcement of the Partnership Deed that evidences a

partnership with no real books of accounts, with Pankaj and Sachde having been actively aware of being documented in parallel books, with a minimum return as contracted in the MOU. Moreover, the decision that Sachde had invested Rs. 48 lakhs in cash is *ex facie* based on no evidence at all (the voice recording transcripts do not at all lead an inference other than showing that there were rampant cash dealings among the parties), rendering the Impugned Award perverse and thereby patently illegal.

48. I am conscious of the scope of jurisdiction under Section 34 of the Act – it is well covered in multiple judgements of the Supreme Court. To avoid prolixity I quote from only ***Dyna Technologies***[4], where the Supreme Court held thus:

> ***24.*** *There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts.* ***We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award****. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction.* ***The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.***

[4] *Dyna Technologies Private Limited v. Crompton Greaves Ltd – (2019) 20 SCC 1*

> *25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists.* ***The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act****.*
>
> ***[Emphasis Supplied]***

49. It is with this standard in mind that I have come to the conclusion that the enforcement of transacting the conduct of the business of Jinam, the partnership firm, in cash outside the books of accounts and entirely in the parallel cash economy in black money, is unpardonable perversity under Section 34 of the Act.

50. In these circumstances, in my opinion, the Impugned Award deserves to be ***set aside*** and the Petition is ***allowed***. In the circumstances, taking into account the conduct of both parties, no case is made out for award of costs.

51. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]