IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1298 OF 2026

M/s. Gagan Ace Developers and Anr. ... Petitioners
versus
M/s. Choice and Ors. … Respondents

Mr. G.S.Godbole, Sr. Advocate with Mr. Sitesh Sharma i/by Mr. Vijay Upadhyay, for Petitioners.
Mr. Sandesh Shukla with Dr. Milind Hartalkar i/by Mr. Tejas P. Hartalkar, for Respondent Nos.1 and 2.

CORAM: N.J.JAMADAR, J.

RESERVED ON : 4 MARCH 2026
PRONOUNCED ON : 18 MARCH 2026

JUDGMENT :

1. Rule. Rule made returnable forthwith, and, with the consent of the learned Counsel for the parties, heard finally.

2. By this Petition under Article 227 of the Constitution of India, the Petitioners take exception to an order dated 25 September 2025 passed by the learned District Judge, Pune, whereby the application for stay to the execution and operation of the award under Section 36 of the Arbitration and Conciliation Act, 1996 (the Act, 1996) came to be partly allowed, subject to the Petitioners – Applicants in the application under section 34 of the Act, 1996 depositing the entire award amount along with interest accrued thereon, till the date of the deposit.

3. The background facts necessary for the determination of this Petition,

can be summerized as under :

2.1 The Bombay Society of Franciscan Sister of Marry (R3) – a trust registered under the Maharashtra Public Trusts Act, 1950, was the original owner of the large parcel of land bearing final plot No.153, situated at Village Ghorpadi, within the limits of Pune Municipal Corporation. Respondent No.3 divided the larger land into 16 sub-plots. On 26 January 1980, Respondent No.3 entered into a development agreement with M/s. Choice (R1), a partnership firm, of which Atul Mahadeo Bhagat (R2) is a partner. Under the said Development Agreement, Respondent No.1 was to construct buildings on sub-plot Nos.13 to 15 and deliver the same to Respondent No.3 for its use and occupation, and, thereafter, develop and construct buildings on sub-plot Nos.1 to 8 and sell/transfer the same.

2.2 Eventually, sub-plot Nos.2 and 3 and 4 to 8 were permitted to be amalgamated. The Government of Maharashtra passed an order directing transfer of 30% of the constructed area - residual self-contained units, to the Government under the provisions of the Urban Lands (Ceiling and Regulation) Act, 1976.

2.3 Development commenced on amalgamated sub-plot Nos.4 to 8. However, the development could not be completed. Further Joint Venture Agreements and Development Agreements were entered into by Respondent No.1 with the third parties, who are impleaded as Respondent Nos.4 to 8.

Despite the involvement of Respondent Nos.4 to 8 at various stages, further development of sub-plot Nos.4 to 8 on a portion of land by consuming unutilized FSI of about 9150 sq.ft. and the available TDR could not be carried out. The Respondents, thus, decided to entrust the future development in respect of the said project to the purchaser/developer interested to undertake the same.

2.4 Thus, the Respondents agreed to sell/assign unutilized potential residual FSI of 9150 sq.ft. to be used on Plot No.5 together with entire present and future TDR benefits accruing and arising for the entire aggregate area of the sanctioned layout plot Nos.4 to 8 having total area 5876.4 sq. mtrs., other benefits and residual accruals available to the said plot Nos.4 to 8 to be used and utilized on the plot No.5 thereof, in favour of the Petitioners. Accordingly, agreements for sale cum transfer of rights to use TDR came to be executed between the Petitioners and the Respondents, on 17 November 2015. Under the terms of the said agreement, the Petitioners were to develop the subject property to the fullest extent permissible, including right to utilize TDR therein, in accordance with the DCR and agreed to pay aggregate consideration of Rs.15 Crores to the Respondent No.1 and Respondent Nos.4 to 8 apportionable as per their specific directions and requirements.

2.5 A Deed of Confirmation came to be executed on 4 May 2017.

2.6 Disputes arose between the Respondent No.1 and the Petitioners over

the performance of the terms of the contract between the parties, especially in regard to the construction of Building B out of the sanctioned plan. Respondent Nos.1 and 2 – claimants, asserted that the Petitioners carried out construction over the lands beyond the rights granted to the Petitioners under the Agreement dated 17 November 2015. The Petitioners erected constructions over a portion of Plot No.6 in breach of the terms of the Agreement dated 17 November 2015. Secondly, the claimants asserted, Petitioners failed to comply with the conditions of the ULC order passed by the Government of Maharashtra, and, instead, obtained a waiver by payment of premium, and, thereby, enriched themselves at the cost of the claimants.

2.7 Eventually, arbitration was invoked by the claimants. A three-member Arbitral Tribunal came to be appointed. The Arbitral Tribunal, after appraisal of the evidence and material, gave a split award. Hon'ble Shri Justice S.R.Sathe (Retd.), the Presiding Arbitrator, gave a minority award, dismissing the claim of the claimants. Mr. R.R.Deshmukh and Mr. Anurag M. Jain, Co-Arbitrators, gave a majority award and allowed the claim of the claimants.

2.8 The Petitioners (Respondent Nos.1 to 3 before the Arbitral Tribunal), were directed to pay to the claimants an amount of Rs.7,81,18,000/- together with interest @ 18% p.a from the date of filing of the claim till the realization. The majority award proceeded on the premise that, by erecting constructions over some portion of sub-plot No.6, the Petitioners committed breach of the

terms of the Development Agreement dated 17 November 2015. Thus, the claimants were entitled for compensation. Placing reliance on the report of the Architect - Commissioner, the Arbitral Tribunal recorded a finding that the excess construction over sub-plot No.6 was to the extent of 1396.70 sq.mtrs., and, thus, applying the ready reckoner rate, 40% share of the claimants in the said construction was computed at Rs.2,92,35,724/-.

2.9 Secondly, the Arbitral Tribunal held, the Petitioners had no right under the Development Agreement or the Deed of Confirmation to obtain waiver of the conditions contemplated under the ULC order, and, thus, computed the net value of the flats, which became available to the Petitioners for sale in the open market, after deducting the amount of premium paid by the Petitioners to the Government. The Arbitral Tribunal assessed 40% share of the claimants therein at Rs.4,68,82,000/-.

2.10 In addition, under the terms of the Development Agreement, the claimants were entitled to a sum of Rs.20 Lakhs. Resultantly, the Arbitral Tribunal proceeded to pass the award, in the aggregate sum, as noted above.

2.11 The Petitioners preferred an application to set aside the award under Section 34 of the Act, 1996, before the District Court at Pune. In the said application, the Petitioners sought stay to the execution and operation of the award impugned therein, by filing an application (Exh.5) under Section 36 of the Act, 1996.

2.12 By the impugned order, the learned District Judge was persuaded to grant stay to the execution and operation of the award, subject to the deposit of the entire award amount along with interest accrued thereon.

2.13 Being aggrieved, the Petitioners have invoked the writ jurisdiction.

4. I have heard Mr. G.S.Godbole, learned Senior Advocate for the Petitioners, and Mr. Shukla, learned Counsel for Respondent Nos.1 and 2, at some length. With the assistance of the learned Counsel for the parties, I have perused the material on record, including the arbitral award and the impugned order.

5. Mr. Godbole, learned Senior Advocate for the Petitioners, submitted that the learned District Judge has imposed a condition of deposit of the entire award amount along with interest accrued thereon, in a rather mechanical manner. Glaring infirmities in the majority award were not all adverted to by the learned District Judge. Under no circumstances, the arbitral Tribunal could have passed the impugned award as the claim was in the nature of damages without proof of actual loss. The Arbitral Tribunal ventured into the exercise of hazardous guesswork to arrive at the compensation, to which the claimants were found entitled to. In such circumstances, the execution and operation of the impugned award deserves to be stayed unconditionally.

6. Taking the Court through the recitals in the Development Agreement dated 17 November 2015 and the pleadings before the Arbitral Tribunal, Mr.

Godbole made a strenuous effort to demonstrate that the parties fully understood that the development of building B in accordance with the sanctioned building plan was not possible on Plot No.5 only. The parties were fully cognizant of the fact that a portion of Plot No.6 was required to be utilized to exploit the full developmental potential of Plot No.4 to 8 collectively.

7. It was further submitted that, under the Development Agreement, the claimants were not entitled to claim any share in regard to the saleable portion which would become available for the Petitioners. As the Petitioners had got waiver of condition to surrender units, upon payment of premium to the State Government, and the claimants were completely divested of any interest in the development potential of the subject property, the claimants were not entitled to claim any share in the flats which became available to the Petitioners, upon payment of premium to the Government.

8. In opposition to this, Mr. Shukla, learned Counsel for Respondent Nos.1 and 2 submitted that the impugned order passed by the learned District Judge does not suffer from such legal infirmity or perversity as would warrant interference in exercise of the supervisory jurisdiction under Article 227 of the Constitution. The learned District Judge has dealt with the contentions raised on behalf of the Petitioners, rather elaborately, and has recorded a justifiable finding. Thus, the Petition does not deserve to be entertained against an interim order which grants stay to the award subject to the condition of deposit

of the award amount.

9. Mr. Shukla submitted that, it is fairly well settled that, where the award is in monetary terms, if the stay is granted to the execution and operation of the award under Section 36 of the Act, 1996, the award-debtor shall be required to deposit 100% of the award amount. In the case at hand, Mr. Shukla would urge, the Petitioners have failed to make out any 'exceptional case' for extending the benefit of unconditional stay to the execution and operation of the award. Neither the award passed by the Arbitral Tribunal can be said to be perverse, nor riddled with patent illegalities, nor ex-facie untenable. On the contrary, Mr. Shukla would urge, all the contentions which were sought to be urged before this court, were canvassed before the Arbitral Tribunal and have been repelled by the Arbitral Tribunal by ascribing sustainable reasons. To buttress these submissions, Mr. Shukla placed reliance on an order passed by the Supreme Court in the case of **Popular Caterers V/s. Ameet Mehta and Ors.**[1].

10. At the outset, it is necessary to note that, from a bare perusal of the material on record and the award passed by the Arbitral Tribunal, there does not seem much controversy over the fact that the Petitioners have carried out construction over a portion of Plot No.6. The arbitral tribunal has in terms recorded that the Petitioners did concede that they had carried out

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construction over a portion of plot No.6.

11. Mr. Godbole, learned Senior Advocate for the Petitioners, submitted that, even if the court were to proceed on the premise that the Petitioners have carried out construction over a portion of Plot No.6, yet, that, by itself, would not sustain the impugned award. A valiant attempt was made by Mr. Godbole to drive home the point that the construction over a portion of Plot No.6 was squarely in the contemplation of the parties.

12. It would be contextually relevant to note that, an endeavour was made before the arbitral tribunal to show that the Development Agreement dated 17 November 2015 and the Deed of Confirmation dated 4 May 2017 did not reflect the real intent of the parties. It was also sought to be contended that there was an inadvertence error in recording the terms of the contract in the said instruments.

13. It is well recognized that the intent of the parties to a commercial contract is required to be ascertained from the words employed by the parties in the agreement and the express terms thereof. It is impermissible for the Courts to construe or make a new contract for the parties. Therefore, the submission that the terms of the bargain between the parties as incorporated in the Development Agreement dated 17 November 2015 and the Deed of Confirmation dated 4 May 2017, did not reflect the real intent of the parties, cannot be readily acceded to.

14. Schedule II to the Development Agreement dated 17 November 2015 makes it abundantly clear that the said agreement was in respect of unutilized potential residual FSI of 9150 sq.ft. usable on plot No.5 together with TDR benefits accuring upon the sanctioned layout plot Nos.4 to 8 having total area as per Property Card admeasuring 5876.4 sq. mtrs.

15. The following recitals in the Development Agreement also deserve to be noted :

> "AND WHEREAS pursuant to mutual negotiations, the owners, erstwhile Developers / Stakeholder and the Consenting Party have now agreed to sell / assign the unutilized potential residual FSI of 9150 sq. ft. to be used on Plot No.5 together with entire present and future TDR benefits accruing and arising for the entire aggregate area of the sanctioned layout plot Nos.4 to 8 having total area 5876.4 sq. mtrs. Other benefits and residual accruals available to the said plot Nos.4 to 8 to be used and utilized on the plot No.5 thereof and more particularly described in Schedule II hereunder and hereinafter referred to as the "said Property.
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> ……..
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> AND WHEREAS, the Purchaser / developer further represented that if shall comply with the orders of the ULC and shall allot and grant the balance unallotted flats as per list above remained to be allotted under

the said ULC order."

16. The intent of the parties, as is evincible from the description of the property in Schedule II and the aforesaid recitals, prima facie, appears to be that, the Development Agreement was confined to Plot No.5, though TDR benefits accruing upon the sanctioned layout Plot Nos.4 to 8 were also to be utilized on the said Plot No.5. The Deed of Confirmation dated 4 May 2017, in a sense, seals the issue. The relevant covenant in the said Deed of Confirmation reads as under :

> "It is made absolutely clear that this Deed does not confer upon the Purchasers / Developers any right to make any construction of any nature whatsoever on any plot other than Plot No.5 on which, however, the Owners / Developers can exploit and use the entire residual potential & TDR of Plot Nos.4 to 8 in terms of the Agreement dated 17 November 2015."

17. Keeping in view the aforesaid contractual stipulations and rather incontrovertible position that the Petitioners have erected construction over a portion of Plot No.6, the justifiability of the impugned order granting stay to the execution and operation of the award of the Arbitral Tribunal, deserves to be decided. The provisions contained in Section 36 of the Act, 1996, on the touchstone of which the legality and correctness of the impugned order deserve to be evaluated, read as under :

> "36. **Enforcement –** (1)……..
>
> (2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.
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> (3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing :
>
> Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions of grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908.
>
> Provided further that where the Court is satisfied that a prima facie case is made out that, -
>
> (a) the arbitration agreement or contract which is the basis of the award; or
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> (b) the making of the award,
>
> was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award."

18. A plain reading of the aforesaid provisions would indicate that the filing of an application under section 34 of the Act, 1996 shall not, by itself, operate

as a stay to the enforcement of the arbitral award. In the event, an application for stay to the award is filed, in such an application under Section 34 of the Act, 1996 the Court has discretion to grant stay, which may be subject to such conditions as it may deem fit. However, while granting stay to the arbitral award, the Court shall have "due regard to the provisions of the Code of Civil Procedure, 1908" for grant of stay of money decree. If a case falls within the ambit of the second proviso to sub-section (3) of Section 36, it is mandatory for the court to say the award unconditionally. For that, the Court has to record a prima facie satisfaction that, either arbitral agreement or contract which is the basis of the award, or the making of the award was induced or effected by fraud or corruption. If that is not the ground of challenge to the arbitral award, the case would fall within the ambit of the first proviso and then the Court is expected to have due regard to the provisions of the Code, for grant of stay of money decree.

19. In the case of **Pam Developments Pvt. Ltd. V/s. State of West Bengal**[2], the Supreme Court has clarified that the phrase 'have due regard to the provisions for grant of stay to the money decree' under the provisions of the Code, 1908, does not imply that the court is enjoined to determine an application for stay of an arbitral award for payment of money 'in accordance with the provisions of the Code'. The said expression, therefore, does not

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partake the character of a legislative edict, but operates as a guiding principle. The observations of the Supreme Court in paragraph No.20 are instructive, and, hence, extracted below :

> "20. In our view, in the present context, the phrase used is 'having regard to' the provisions of CPC and not 'in accordance with" the provisions of CPC. In the latter case, it would have been mandatory, but in the form as mentioned in Rule 36(3) of the Arbitration Act, it would only be directory or as a guiding factor. Mere reference to CPC in the said Section 36 cannot be construed in such a manner that it takes away the power conferred in the main statute (i.e. Arbitration Act) itself. It is to be taken as a general guideline, which will not make the main provision of the Arbitration Act inapplicable. The provisions of CPC are to be followed as a guidance, whereas the provisions of the Arbitration Act are essentially to be first applied. Since, the Arbitration Act is a self-contained Act, the provisions of the CPC will apply only insofar as the same are not inconsistent with the spirit and provisions of the Arbitration Act." (emphasis supplied)

20. If the Courts under Section 34 of the Act, 1996 were to have due regard to the provisions of the Code in regard to the grant of stay of a money decree, the three-pod requirements under the provisions of Order XVI Rule 5(3) need to be kept in view, namely, (i) whether the applicant would suffer substantial loss, if stay is declined; (ii) whether the application suffers from unreasonable delay; (iii) whether security has been furnished by the applicant

to satisfy the decree.

21. A profitable reference in this context can be made to a judgment of the Supreme Court in the case of **Lifestyle Equities C.V. and Anr. V/s. Amazon Technologies Inc.**[3], wherein after an elaborate analysis of the provisions and the precedents, including the implication of the provisions contained in Section 36 of the Act, 1996, though the said case did not arise out of an arbitral award, the Supreme Court culled out the principles in paragraph No.134. The relevant propositions read as under :

> "134…..
>
> (VIII) For the grant of benefit of an unconditional stay of execution of a decree, an exceptional case has to be made out before the appellate court. This discretion of the appellate court to grant an unconditional stay of execution of decree must not be exercised arbitrarily. It must be exercised sparingly and only if an exceptional case is made out for such stay in view of the peculiar facts and attending circumstances of the case before it.
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> (IX) A lodestar for bringing a case within the purview of "exceptional case" for the purpose of granting benefit of unconditional stay of the execution of money decree by the appellate court would be, if the money decree in question: -
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> (i) is egregiously perverse;
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> (ii) is riddled with patent illegalities;
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> (iii) is facially untenable; and/or
>
> (iv) such other exceptional causes similar in nature.
>
> (X) For the purpose of the grant or refusal of stay of

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> execution of the decree under Rule 5 of Order XLI, it is immaterial whether the decree is a money decree or any other decree. The language couched in the said provision is very clear. Order XLI, Rule 5 of the makes no distinction between a money decree and other decrees, and the said provision applies with full rigour in both instances. Yet as a rule of prudence and established practice evolved over a period of time, no stay of execution of a money decree should be granted, except on the condition that the decretal amount be deposited in the court. However, such condition for deposit cannot be said to be mandatory and non-prescription thereof does not operate as a bar to staying the execution of a money decree." (emphasis supplied)

22. In the case of **Popular Caterers (supra)**, on which reliance was placed by Mr. Shukla, the Supreme Court has again emphasised that, while granting unconditional stay to the execution of the arbitral award, the High Court should have posed unto itself a question, whether the award-debtors could be said to have made out an exceptional case, for the purpose of granting benefit of unconditional stay of the execution of the award, which is in the form of a money-decree. A reference was made to the propositions enunciated in **Lifestyle Equities (supra).**

23. Whether the Petitioners have succeeded in making out an exceptional case of the nature, illustratively expounded in the case of **Lifestyle Equities (supra)**, is the moot question ? As noted above, there is not much

controversy over the first component of the claim, namely, the erection of construction over the portion of Plot No.6. On the second component of the claim premised on the availability of the flats, which were to be surrendered to the Government by the Petitioners, upon obtaining a waiver of the said condition, the facts that such waiver has been obtained, albeit upon payment of premium, and, those flats became available for free sale, are also not much in contest.

24. In the Development Agreement (extracted above), the Petitioners had specifically represented that the Petitioners shall comply with the orders of ULC and shall allot and grant the balance unallotted flats under the said ULC order. Recitals in the development agreement further record that the Petitioners had a right to sell – transfer the units to be developed on the subject properties (excluding the units allocable under the order of exemption under ULC). In this backdrop, the Arbitral Tribunal has recorded a finding that, neither under the Development Agreement nor under the Deed of Confirmation, the Petitioners were given a right and option to obtain a waiver of the condition under ULC order and, thus, the said action of the Petitioners was beyond the scope of the Development Agreement.

25. Prima facie, the aforesaid finding is borne out by the contractual instruments between the parties. The legality and validity of the award based on the aforesaid findings would be examined by the District Court on the well

recognized parameters for setting aside the arbitral award. However, it cannot be said that the arbitral award is egregiously perverse on the said count.

26. The thrust of the submission of Mr. Godbole was that the arbitral award suffers from the patent illegality as it awards a claim for damages without actual proof of loss. Reliance was placed on an order of this Court in the case of **Alkem Laboratories Ltd. V/s. Issar Pharmaceuticals Pvt. Ltd.**[4], wherein a prima facie view was recorded that the arbitral award in the said case suffered from perversity as well as patent illegalities as the learned Arbitrator therein had ignored the settled law that in regard to the claim for damages actual loss was required to be proved.

27. I have perused the arbitral award to ascertain, albeit prima facie, whether the arbitral award suffers from patent illegality and perversity which stares in the face. The fulcrum of the Petitioners' contention is that the compensation was awarded by the Arbitral Tribunal sans evidence of actual loss. Primarily, two pieces of material were considered by the arbitral tribunal. First, the report of Architect – Commissioner indicating the area of excess construction and, second, the value of the construction as per the ready reckoner rate. First is rather an objective fact. The second is in public domain.

28. At this stage, while the challenge to the arbitral award awaits

4 IA 377 of 2024 in Comm. Arb. Petition No.389 of 2023 dt. 5 Feb. 2024

determination by the District court, this Court does not consider it appropriate to delve more on this aspect of the matter. Suffice to note that the consideration of the aforesaid material, prima facie, does not appear to be an exercise riddled with patent illegality or perversity.

29. The conspectus of aforesaid consideration is that the Petitioners cannot be said to have succeeded in making out an exceptional case. Nor could it be demonstrated that the Petitioners would suffer a substantial loss if the execution of the award is not stayed. The fact that the Petitioners have suffered an arbitral award, which directs payment, by itself, cannot be construed as a substantial loss. Nor there is material to show that the Petitioners have given adequate security for the due performance of the arbitral award. Thus, viewed from any perspective, no case for grant of unconditional stay was made out. Resultantly, the learned District Judge cannot be said to have committed any error in the exercise of discretion in granting stay to the execution of the award upon deposit of the award amount. The Writ Petition, therefore, deserves to be dismissed.

30. Hence, the following order :

ORDER

(i) The Writ Petition stands dismissed.

(ii) Rule discharged.

(iii) By way of abundant caution, it is clarified that the consideration is

confined to test the legality, propriety and correctness of the impugned order and this court may not be understood to have expressed any opinion on the merits of the application under Section 34 of the Arbitration Act, 1996 and the District Court shall decide the same on its own merits and in accordance with law, without being influenced by any of the aforesaid observations.

(iv) No costs.

(N.J.JAMADAR, J.)