

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION NO.734 OF 2010

Rajesh V.Choudhary)
of Mumbai inhabitant, having his address at)
D-3, nand Dham, 16-A, Bangur Nagar, Goregaon)
(West), Mumbai-400 090.)
presently residing at 51, Gaurav, Gulmohar Cross)
Road No.11, JVPD Scheme, Mumbai-400 049).. Petitioner

Vs.

1) Kshitij Rajiv Torka & Ors.)
2) Rajiv Rambhagat Torka)
Both adults, Indian inhabitant, having)
their address at 3rd floor, Highway Rose)
Building, Off Dixit Road, Vile Parle(East))
Mumbai-400 057.).. Respondents

Mr.Simil Purohit i/by Girish B.Kedia for the petitioner.
Mr.Sarosh Bharucha a/w Ms.Swapna Rachure for the respondents.

CORAM : K.R.SHRIRAM, J.

RESERVED ON : 28.7.2015.

PRONOUNCED ON : 15.9.2015.

JUDGMENT :-

1 An award dated 7.1.2010 passed by Mr.Justice S.M.Jhunhunwala
(retired) is sought to be set aside under Section 34 of the Arbitration &

Conciliation Act 1996 (the said Act). Though it is not stated specifically in the petition under which part of section 34 of the said Act the petitioner is praying for setting aside the award, the counsel for the petitioner, across the bar, submitted that the award has to be set aside under Sections 34(2) (a) (ii), 34(2) (a) (iii), 34 (2) (b) (i) and 34(2) (b) (ii) of the said Act.

2 As a prelude, it is necessary to mention that the petitioner had filed a Suit bearing No.1163 of 1999 against the respondents to this petition and one Dr.S.K.Poddar, in the Original Side of this Court. In the said suit the petitioner had prayed for the following reliefs :-

“(a) for a decree of specific performance of the agreement of sale entered into between the plaintiff and the 2nd Defendant as per Exhibit 'B' hereto by requiring the 2nd Defendant ;

(i) to execute a conveyance of the suit property as described in the schedule Exhibit 'A' hereto ;

(ii) to give vacant possession of the portion of the suit property in occupation of the 2nd Defendant, as shown shaded red and green in the plan Exhibit 'C' hereto and shown in red and green in the plan Exhibit 'D' hereto ;

(b) that pending the hearing and final disposal of the suit, the 2nd Defendant by himself or through his agents, servants or contractors, be restrained by temporary injunction from transferring or assigning or parting with the possession of any part of the suit property to any person other than the plaintiff ;

(c) for ad-interim relief in terms of prayer (b) above ;

(d) that pending the hearing and final disposal of the suit, Receiver, High Court, Mumbai be appointed Receiver of the suit property described in Exhibit 'A' hereto with all powers under Order 40 Rule 1 of the Code of Civil Procedure ;

(e) for ad-interim relief in terms of prayer (d) above ;

(f) for costs of this suit and

(g) for such further and other reliefs as the nature and the circumstances of the case admit.”

In the Schedule annexed to the Complaint filed in the said Suit as Exhibit 'A' thereto, the property in respect whereof the reliefs were claimed by the Claimant has been described as under :

DESCRIPTION OF THE SUIT PROPERTY

ALL that piece and parcel of land or ground admeasuring 453.1 square metres or thereabouts, lying, being and situate at 24, Tilak Mandir Road, Vile Parle (East), Mumbai 400 057 and bearing C.T.S.No.1287 of Greater Bombay in the Registration district and sub district of Bombay City suburban together with a building constructed in the year 1938 (approx) consisting of ground and one upper floor with ditched small ancillary structures used as W.O. Block and Watchman's cabin and other structures and erections standing thereon and bound as follows :-

WEST : By plot No.1285 known as Easwar Bhavan,

EAST : By main Tilak Mandir Road,

NORTH : By plot No.1288 known as Trimurti Building,

SOUTH : By plot No.1286 known as Heena Building.”

3 The first respondent at that time was a minor and was sued through his father and natural guardian-the 2nd respondent herein. Though no relief

against the said Dr. S.K.Poddar was claimed in the suit, according to the petitioner the said Dr. S.K.Poddar was made party defendant in the suit since in his capacity as one of the executor named in the Will of Smt. Dakhibai Mohanlal Saraf, the said Dr. S.K.Poddar was the first confirming party to the agreement for sale of the property as alleged by the petitioner and of which, decree for specific performance was sought by the petitioner herein.

4 The respondents herein, who were the defendant nos.1 & 2 to the Suit, took out a Notice of Motion under Section 8 of the said Act seeking reference of the disputes to arbitration. It was the respondents' case that the agreement relied upon by the petitioner in the Suit was a forged and fabricated document and that the petitioner and the 2nd respondent had executed an agreement dated 20.9.1995 which was for sale of 1/5th undivided share in the suit property. It was also the case of the respondents that the petitioner and the 2nd respondent retained one original each of the agreement, in 1996 the said agreement was revoked, cancelled and torn by the petitioner in the presence of the 2nd respondent and the reliance of the respondents on the said agreement was only to substantiate their case that the agreement which the petitioner was propounding, to be the agreement in the suit, was a forged and fabricated document. According to the

respondents, the alleged agreement for sale relied upon by the petitioner in the suit and of which the petitioner sought specific performance was never entered into by and between the petitioner and the respondents and that the petitioner was not entitled to maintain the suit. The 2nd respondent also contended that the subject matter of the suit in any event, was required to be referred to arbitration.

5 By an order dated 15.1.2004 a single Judge of this Court (D.K.Deshmukh,J as he then was), by consent of the parties, referred the disputes in the suit to Arbitration and appointed Justice S.M.Jhunjhunwala (retired) as the sole Arbitrator. The said order reads as under :-

“By consent of both the parties, the dispute in the suit is referred to Sole Arbitrator Justice S.M.Jhunjhunwala (Retired). The defendants shall be at liberty to submit before the Arbitrator any claims that they may desire to make against the plaintiffs in relation to the subject matter of dispute between the parties. Interim orders that are passed in this suit and presently operative, shall continue to operate during the pendency of the proceedings before the Arbitrator with liberty to the parties to apply for either modification or vacation of the interim orders or for any further interim orders. Parties undertake to inform the Arbitrator about this order by serving copy of this order on him.

Parties to act on the copy of this order duly authenticated by the Associate/Personal Secretary as true copy.

Certified copy expedited.”

6 The Notice of Motion No.1915 of 2001 taken out on behalf of the

respondents who were defendant nos.1 & 2 in the suit, was also disposed by the single Judge (D.K.Deshmukh,J, as he then was) by a separate order passed on the same day, i.e., 15.1.2004. The said order reads as under :-

“In view of the order passed in the suit today, this notice of motion does not survive for consideration. Hence disposed off.

Parties to act on the copy of this order duly authenticated by the Associate/Personal Secretary as true copy. Certified copy expedited.”

7 It is to be noted that the order appointing the Arbitrator was passed in the suit not in the Notice of Motion taken out by the respondents. It has been necessary to give this much background because the petitioner has also raised in one of the submissions that dispute was not arbitrable.

8 I have heard in depth both Shri Purohit for the petitioner and Mr.Bharucha for the respondents. I have considered their submissions, the award and the pleadings. Both the counsel have done extensive research and relied upon almost 30 precedents. In my view, the petitioner's challenge to the award, at the most, could be considered to be under clause b(ii) of sub-section 2 of Section 34. Let us deal with the other 3 provisions which the petitioner's counsel said, covers the petitioner's challenge to the award.

As regards section 34 (2) (a) (ii) of the said Act, it should be noted, as

per the order dated 15.1.2004 of Mr. justice D.K.Deshmukh (retired) quoted above passed in the suit, the dispute in the suit was referred to the Sole Arbitrator by consent of both the parties. Therefore, the question of arbitration agreement not being valid does not and cannot arise.

As regards Section 34(2)(a)(iii), the counsel for the petitioner stated that he was not permitted by the Arbitrator to complete the cross-examination of the 2nd respondent as the Arbitrator wrongly curtailed his right which resulted in violation of principles of natural justice. In my view, this would not come under the category “..... or was otherwise unable to present his case”. Clause (iii) of sub-section 2(a) provides that an arbitral award may be set aside by the court only if the party making 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. Applying the principle of *Ejusdem Generis*, the portion “otherwise unable to present his case” would come into play only when the petitioner had no notice of any arbitration proceedings or even otherwise he was unable to present his case or participate in the arbitral proceedings. In this case the petitioner was the claimant. The petitioner's witnesses were examined and so also the respondents' witness. Therefore, section 34(2)(a) (iii) is not applicable. At the most the grievance of the petitioner of the Arbitrator curtailing the cross-examination may come under Section 34 (2) (b) (ii)-Public Policy. Whether

it requires to be entertained or not is dealt with later. But at the same time, it is not even the petitioner's case in the petition that he was not given proper notice of appointment of the Arbitrator or of the arbitral proceedings or that he was unable to otherwise present his case. In fact, the challenge to the award on this ground is not even pleaded and finds no mention anywhere in the petition and the entire argument with regard to the same was made across the bar at the time of hearing.

As regards section 34 (2) (b) (i), again the parties by consent referred the dispute in the suit to arbitration to sole Arbitrator Shri Justice S.M.Jhunjhunwala (retired). The counsel for the petitioner submitted that in view of the allegation of fraud made against petitioner, the dispute could not have been decided by the learned Arbitrator and ought to have been decided by a Civil court and that the Arbitrator went ahead with the matter despite being informed of the same. This is nothing but a bogey because in respondents' application under Section 8 of the Arbitration Act, in the affidavit and the rejoinder filed by the respondents, the allegation of forgery, fraud and fabrication has been made by the respondents and dealt with by the petitioner in his reply. Still the petitioner consented to refer to arbitration, the disputes in the suit thereby agreeing that the learned Arbitrator was competent and capable to attend to the reference. Therefore, section 34(2) (b) (i) is also not applicable.

9 What remains is the challenge under Section 34(2) (b) (ii) which provides that the arbitral award may be set aside by the Court only if the award is in conflict with the public policy in India. Let us consider whether the grievance raised by the petitioner as a challenge to the award will make the award to be in conflict with Public policy in India.

10 Section 34 read in conjunction with section 5 of the said Act makes it clear that an award can be set aside only on grounds mentioned under Section 34 (2) and (3) and not otherwise. It is important to note that the 1996 Act was enacted to replace the 1940 Arbitration Act in order to provide for an arbitral procedure which is fair, efficient and capable of meeting the needs of arbitration. The said Act also provides that the Tribunal gives reasons for its award. The said Act was also enacted to ensure that the arbitral Tribunal remains within the limits of jurisdiction and to minimize the supervisory roles of Courts in the arbitral process. Section 34 and section 5 of the said Act read as under :-

“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 making the application furnishes proof 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. —Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may 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 *Extent of judicial intervention* – *Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this part.”*

11 None of the grounds contained in section 34(2) (a) deal with the merits of the decision rendered by an arbitral award. Only when the challenge to the award is on the ground that the award is in conflict with the public policy in India, do we look into the merits of the award under certain circumstances. In the matter of ¹P.R.Shah Shares and Stock Brokers (P) Ltd. Vs. BHH Securities (P) Ltd., the Apex Court has held that the court does not sit in an appeal over the award of an arbitral Tribunal by re-assessing or re-appreciating the evidence. Following this judgment, the Apex Court in paragraph-33 of ²Associate Builders Vs. Delhi Development Authority has held as under :-

1 (2012) 1 SCC 594

2 (2015) 3 Supreme Court Cases 49

“It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.”

12 It is also settled law that interference with an award is permissible only when the findings of the Arbitrator are arbitrary, capricious or perverse or when conscience of court was shocked or when illegality is not trivial but goes to the root of the matter but not merely when another view is possible. It must also be kept in mind that the Arbitrator is the ultimate master of quantity and quality of evidence while drawing the arbitral award. In fact the Apex Court in *Associates Builders* (supra) has also held that even when the award is based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score, once it is found that the Arbitrators’ approach is neither arbitrary nor capricious.

Keeping this legal position in mind, let us deal with the allegations of the petitioner.

13 As mentioned above, dispute relates to the alleged agreement for sale of the suit property. One Smt. Dakhibai Mohanlal Saraf was the owner of the suit property. Upon the death of the said Smt. Dakhibai Mohanlal Saraf on or about 18.7.1993, pursuant to her last Will and Testament dated 15.8.1988 (the said Will), the suit property came to be bequeathed in favour of the 1st respondent, then a minor. The 2nd respondent who is the father of 1st respondent and one Dr.S.K.Podar were the executors under the said Will. The petitioner's case is that he had executed an agreement dated 20.9.1995 with the 2nd respondent who signed on behalf of the 1st respondent who was a minor and as executor of the said Will, for sale of the entire suit property for an amount of Rs.65,00,000/-. The 2nd respondent was to obtain the signature of said Dr. S.K.Podar as the first confirming party and executor of the said Will and hand over the original to the petitioner which was never done. A photo copy of the petitioner's agreement was given to the petitioner, photo copy whereof is being relied upon by the petitioner. The petitioner, inter alia, sought a declaration that the petitioner's agreement was valid, subsisting and binding and sought specific performance of the same. This agreement relied upon by the petitioner, let us refer to it as petitioner's agreement.

14 It was the respondents' case that the petitioner's agreement, of which the petitioner had sought specific performance, was not entered by and between the petitioner and the respondents and the petitioner's agreement was a forged and fabricated document. The stand of the respondents is that the petitioner and the respondents had executed an agreement dated 20.9.1995 for Rs.65,00,000/- which was for sale of 1/5th un-divided share in the suit property (the respondents' agreement), the said agreement was executed in duplicate on 2 stamp papers bearing nos.257 & 258, whereas the petitioner and the 2nd respondent retained one original each, in 1996 the respondents' agreement (both originals) was revoked, cancelled and torn by the petitioner in presence of the 2nd respondent.

15 Faced with this stand of the respondents, the petitioner altered his course in the rejoinder. In other words, the petitioner reshaped his case. In the rejoinder the petitioner admitted that the respondents' agreement had in fact been executed but after execution the petitioner no longer wanted mere 1/5th share in the suit property but wanted the entire property because of which the petitioner asked the 2nd respondent to make the necessary changes. The respondents' agreed for the changes and accordingly pages-1 & 12 of the respondents' agreement being the first and last pages were retained while pages-2 to 11 were removed and torn. A fresh print out of

pages 2 to 11 with the necessary changes were taken and the same were tagged between the original pages 1 & 12 and this is the agreement as mentioned earlier, the petitioner's agreement. According to the petitioner the 2nd respondent was to obtain the signature of said Dr. S.K. Poddar and hand over the original to the petitioner which was never done and as the petitioner only had a photo copy of the petitioner's agreement, he is relying on the photo copy.

16 When one compares the petitioner's agreement with the respondents' agreement, though the petitioner states that pages-1 & 2 of the respondents agreement was retained, the deletion of the words 1/5th undivided share from the title of the 1st page stand out as a contradiction. It also appears that though the subject matter changes from 1/5th undivided share in the suit property to the entire suit property, the price remains the same as Rs.65,00,000/-. The terms of payment contained in clause-3 are also changed in as much as clause 3(1) of the respondents' agreement requiring the payment of Rs.6,50,000/- as earnest money is deleted and replaced with the clause which provides that the respondents would utilize amount of Rs.40,00,000/- out of Rs.65,00,000/- towards payment to tenant/occupant of certain rooms in the suit property for alternate accommodation, in effect bringing down the price of the entire suit property to Rs.25,00,000/-

as against Rs.65,00,000/- for 1/5th shares in the suit property. On page-12 below signature of the parties in both the agreements, is a clause with regard to receipt of earnest money of Rs.6,50,000/-. It is to be noted that the requirement of earnest money was there only in the respondents' agreement and the petitioner's agreement contained no such requirement, yet this clause appears on page-20. All these discrepancies with other evidence led the Arbitrator to conclude that the petitioner's agreement was a fabricated and forged document.

17 The petitioner pitched his case on 5 limbs :-

- (a) the learned Arbitrator failed to decide the relevant January-2015 agreement ;
- (b) the petitioner was unable to present his case ;
- (c) Non-consideration of the petitioner's claim ;
- (d) The dispute is not arbitrable ;
- (e) The learned Arbitrator erroneously concluded that the respondents' agreement is the correct agreement and proceeded to hold the petitioner's agreement to be invalid.

18 It is also the case of the petitioner that the learned Arbitrator having awarded cost to the respondents also shows prejudice and bias of the learned

Arbitrator because in such proceedings and on facts of the case, such award of cost is unheard of. This point was not elaborated by the petitioner's counsel.

19 With regard to point (a) that the learned Arbitrator failed to decide the relevant agreement, it is the case of the petitioner that the petitioner having proceeded on the basis of the petitioner's agreement and the respondents having proceeded on the basis of the respondents' agreement, the Arbitrator should have framed issues and thereafter adjudicated thereupon to decide which of the agreement is valid. The counsel submitted that in arbitrations, normally the Tribunal is not bound to frame issues, but in this case the Tribunal not having framed any issue was a fatal fault on the part of the Arbitrator and had the Arbitrator framed issues as to which out of the two is the valid agreement, he could have granted reliefs accordingly. It was also submitted that the Arbitrator should have gone beyond the realm of "dispute in the suit" because the respondents while denying the petitioner's claim had propounded the respondents' agreement and therefore, the horizon of dispute widened and learned Arbitrator ought to have considered the entire dispute. According to Shri Purohit, counsel for the petitioner, the learned Arbitrator therefore has erred by proceeding to limit his adjudication to the reliefs sought in the plaint/statement of claim rather than adjudicating on the

entire dispute. Hence, the award is required to be set aside.

It was also submitted that the Arbitrator ought to have adjudicated upon the respondents' agreement having concluded that the petitioner's agreement was found to be forged and fabricated and having failed to arbitrate on the respondents' agreement, the award needs to be set aside.

20 First of all, I do not find this point being raised in the petition and it does appear that it has been raised for the first time across the bar when the matter was heard. Moreover, it was not the case of the petitioner in the plaint/statement of claim that there was a dispute regarding the respondents' agreement. The averment regarding respondents' agreement was made in the respondents' application under Section 8 of the said Act only by way of defence to the petitioner's case seeking specific performance of the petitioner's agreement and the same did not find place in the written statement filed by the respondents before the learned Arbitrator. Thus, the question of framing of issue with regard to the same or deciding the same did not arise. Therefore, this submission of the petitioner cannot be accepted.

21 As regards the 2nd part viz. the petitioner was unable to present his case, it is the petitioner's case that the award is vitiated and is liable to be

set aside as the petitioner was prevented from placing his evidence on record and thereby prevented from getting a fair opportunity to present his case. According to the petitioner, the petitioner being the claimant led evidence of 3 witnesses who were cross-examined by the Advocate for the respondents. Thereafter the respondents filed affidavit of evidence of their witness who was cross-examined by the Advocate for the petitioner from time to time and on 29.1.2009 the learned Arbitrator treated the cross-examination of the respondents' witness as closed and did not permit the petitioner's Advocate to further cross-examine the respondents' witness. According to the respondents this amounted to violation of the principles of natural justice and the Arbitrator cannot restrain the petitioner or fix a time frame with regard to cross-examination. The counsel submitted that the cross-examination of the witness depends on various factors including truthfulness of the answers given by the witness and also the straight forwardness of the witness in giving his answers and there cannot be a straight jacket formula as regards the cross-examination. It is also stated that the petitioner moved an application on 29.1.2009, the date on which the Arbitrator closed the petitioner's cross-examination of the respondents' witness, to allow continuation of cross-examination. The Arbitrator stated that the same would be dealt with in the award but has not been dealt with in the award and the Arbitrator has not rendered any reason or finding for

restraining the cross-examination of the respondents' witness. According to the counsel for the petitioner, this conduct of the Arbitrator should shock the conscience of the court and hence in conflict with the public policy of India. The petitioner's counsel also relied upon the judgment of the Hon'ble High Court of Kerala in the matter of ³Abdul Rashid Vs. State Bank of Travancore. Relying on the said judgment, the counsel submitted that no Tribunal or Court can take an attitude that the cross-examination of the witness shall be finished within a particular time limit and that the time that is required for cross-examination of the witness depends upon various factors. If the Tribunal insists that it will not record evidence of witness for more than a particular time limit, the parties will be put to irreparable injury and hardship. Therefore, the order of the learned Arbitrator is illegal and without jurisdiction and against the principles of natural justice.

22 It must be noted that this point also does not find place in the petition and has been raised for the first time across the bar when the matter was heard. Be that as it may, we can consider the same and deal with it.

23 It is true that cross-examination of a witness will depend on various factors and if a Tribunal unreasonably fetters a party from cross-examining

³ ILR 2003(2) Kerala 150

a witness or fixes an un-reasonable time limit, it would cause irreparable injury and hardship. It must be noted that in Abdul Rashid case (supra) the Tribunal had stopped the cross-examination of the witness on the ground that he was cross-examined for more than 1 & ½ hours on that date and the timing recorded by the Tribunal in the deposition-sheet showed that the witness was cross-examined only for 51 minutes and the witness was discharged. No permission was given to the petitioner to elicit the matter which he wanted to elicit from the witness during cross-examination and the Tribunal closed the evidence of the witness on the ground that his evidence was recorded for more than a particular time. It was therefore, in the facts and circumstances of that case, the Court concluded that the order passed by the Tribunal was illegal and against the principles of natural justice. The facts in the present case are different.

24 As mentioned earlier, it must be noted that the Arbitrator is the ultimate master of quantity and quality of evidence. In this case the cross-examination of the 2nd respondent was carried on for approximately 37 hearings, 2 hours each hearing, over a period of approximately 3.5 years. 1776 questions were asked and answered. Only 51 or odd questions were dis-allowed which shows that the learned Arbitrator gave the petitioner's counsel a free hand and complete opportunity to cross-examine. In the

minutes of the hearing held on 7.3.2008, after the answer to question 1037 was recorded, the Arbitrator has recorded that the cross-examination of the 2nd respondent had started on 9.8.2005 and more than thousand questions have been asked running into more than 200 pages and it is still not completed. In the minutes of the hearing held on 26.11.2008 it is recorded in paragraph-4 as under :-

“At the hearing held on 10th October, 2008, it was inquired from Mr.Bhatia his estimate as to time still required by him to complete the cross-examination of the 2nd Respondent. Mr.Bhatia had then informed that in the next two hearings, he would try to complete the same and requested for fixation of hearings at an interval of few days. Accordingly, the hearings were then fixed on 17th and 26th days of November, 2008. Since the cross-examination is still not complete, Mr.Bhatia is requested to inform about his estimate of further time required to complete the cross-examination. Mr.Bhatia has assured that he would make his best endeavour to complete the cross-examination in next two hearings and requested for fixation of such hearings at an interval of few days. Accordingly, the next hearings are fixed on 10th and 15th days of December, 2008 at 3.00 pm on each day at the same Venue.”

25 Even at the end of the evidence recorded on 26.11.2008 it is noted as under :-

“Adjourned to 10.12.2008 and 15.12.2008 at 3.00 P.M. on each day at the same venue.
Mr.Bhatia assures that on these days, he would make his best efforts to complete the cross-examination of the witness.”

26 On 15.12.2008 the learned Arbitrator once again recorded that the petitioner would make his best endeavour to complete cross-examination in the next 2 hearings. The next 2 hearings were accordingly fixed on 8.1.2009 and 15.1.2009. It was further directed that if the cross-examination was not complete by 15.1.2009, the cross-examination would stand completed on that date. The same is recorded as under :-

“At the hearing held on 26.11.2008, Mr.Bhatia, Learned Advocate for the Claimant, had assured, as recorded in the Minutes of the said meeting, that he would make his best endeavour to complete the cross-examination of this witness in next two hearings, i.e., at the hearings held on 10.12.2008 and today. Earlier also Mr.Bhatia, Learned Advocate for the Claimant had stated that he would try to complete the cross-examination of this witness at the hearings held on 17.11.2008 and 26.11.2008. Mr.Bhatia, Learned Advocate for the Claimant, however states that he has not completed the cross-examination of the witness and that he would need two more hearings to complete the cross-examination of this witness. Accordingly, the next hearings are fixed on 08.01.2009 at 03.00 P.M. and on 15.01.2009 also at 03.00 P.M. The gap between these two dates is given in view of the request made by Mr.Bhatia, Learned Advocate for the Claimant. It is, however, directed that if the cross-examination of this witness is still not completed on 15.01.2009, the cross-examination of this witness will stand as completed on that day.”

27 As 8.1.2009, was declared a holiday to make up for 8.1.2009 on 15.1.2009 the next hearing was fixed on 22.1.2009. As per the original direction, the cross-examination should have concluded on 22.1.2009. On 22.1.2009 the Arbitrator fixed another hearing on 29.1.2009. On 29.1.2009

the learned Arbitrator recorded that in view of his earlier direction regarding conclusion of cross-examination and since the cross-examination has still not been completed, the same was treated as closed. The learned Arbitrator also recorded that the petitioner's counsel has handed over an application dated 29.1.2009 (for re-calling the order, closing cross-examination) which was taken on record and will be dealt with in the award. The noting of the Arbitrator reads as under :-

“[Per Arbitrator : Mr.Bhatia, Learned Advocate for the Claimant states that he has still not completed the cross-examination of the witness. In view of my earlier direction as regards completion of the cross-examination and since Mr.Bhatia has not yet completed the cross-examination at the close of today's meeting, the cross-examination of the witness is treated as closed. The meeting started at 03.30 P.M. and has ended at 05.30 P.M.]

Mrs.Malvankar states that the Respondents have no further witness to be cross-examined and as such recording of evidence on behalf of the Respondents is closed.

At this stage Mr.Bhatia, Learned Advocate for the Claimant hands over an application dated 29.01.2009. The Application is taken on record and it shall be dealt with in the Award.

Adjourned for arguments.

Mr.Bhatia is directed to commence the arguments on behalf of the Claimant first.

Adjourned to 25.03.2009 at 11.30 A.M. at the same venue.”

28 As regards the submission of the counsel for the petitioner that the Arbitrator has not dealt with this application dated 29.1.2009, it is not

correct at all. In the award, I find in paragraph-34 of the impugned award that the Arbitrator has dealt with the same.

29 This Court in the matter of ⁴Yashpal Jashhai Parikh Vs. Rasiklal Umedchand Parikh, 318, has held that a Court always has the discretion as to how far the cross-examination will go or how long it may continue.

Paragraphs-3 & 7 read as under :-

“3 However that may be, the principle is, I think, indisputable that the Court has, and should have, a discretion in controlling the cross-examination, and while the Court will allow reasonable latitude to an advocate or counsel to cross-examine a party or a witness, it should always be remembered that the Court has an undoubted control and 3 discretion in the matter of controlling the cross-examination of a party by counsel of the opposite party.

7 In the present case the record shows that the opponent has been cross-examined so far for a period of 13 hours and that the applicant has been given a further period of four or five hours within which to complete the cross-examination of the opponent. If the grievance is that the applicant has not been given a proper opportunity, I must - say that that grievance is entirely unfounded. If it is suggested that not even the fringe of the case has so far been touched, it would not be unfair to say that the right of the cross-examination has not been properly exercised and in this particular case I am satisfied that the learned Magistrate, who is a Magistrate of experience, has, looking to the record of the case, justifiably asked counsel for the applicant to complete the cross-examination, by 5 p.m. on 30-11-1954.

4 1955 AIR (Bom) 318

While, therefore, I quite agree that the Court should not as a rule impose a particular time limit as regards the cross-examination of a party or a witness, I am unable to assent to the proposition that the Court has no discretion or control in such a matter. Obviously, the Court must have such power. Otherwise, the work of the Court would be impossible. On the whole, therefore, I am satisfied that the order made by the learned Magistrate is not open to any exception and that there is no ground to interfere with that order.

30 In the matter of ⁵Makhan Lal Bangal Vs. Manas Bhunia & Ors., the

Apex court in paragraph-26 has stated as under :-

“An election petition is not a dispute between the petitioner and respondent merely; the fate of the constituency is on trial. A Judge presiding over the trial of an election petition, and any trial for the matter of that, needs to effectively control examination, cross- examination and re-examination of the witnesses so as to exclude such questions being put to the witnesses as the law does not permit and to relieve the witnesses from the need of answering such questions which they are not bound to answer. Power to disallow questions should be effectively exercised by reference to [Sections 146, 148, 150, 151](#) and [152](#) of the Evidence Act by excluding improper and impermissible questions. The examination of the witnesses should not be protracted and the witness should not feel harassed. The cross- examiner must not be allowed to bully or take unfair advantage of the witness. Though the trials in India are adversarial, the power vesting in the court to ask any question to a witness at any time in the interest of justice gives the trial a little touch of its being inquisitorial. Witnesses attend the court to discharge the sacred duty of rendering aid to justice. They are entitled to be treated with respect and it is the judge who has to see that they feel confident in the court. In Ram Chander Vs. State of Haryana AIR 1981 SC 1036 this Court observed,

⁵ (2001) 2 Supreme Court Cases 652

“ to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest. . . .”

An alert judge actively participating in court proceedings with a firm grip on oars enables the trial smoothly negotiating on shorter routes avoiding prolixity and expeditiously attaining the destination of just decision. The interest of the counsel for the parties in conducting the trial in such a way as to gain success for their respective clients is understandable but the obligation of the presiding judge to hold the proceedings so as to achieve the dual objective — search for truth and delivering justice expeditiously — cannot be subdued. Howsoever sensitive the subject matter of trial may be; the court room is no place of play for passions, emotions and surcharged enthusiasm.”

31 The Delhi High Court in the matter of ⁶R.K.Chandolia Vs. CBI & Ors. (un-reported) has in paragraph nos.15 to 20 stated as under :-

“15 [Section 137](#) gives a statutory right to the adverse party to cross- examine a witness. [Section 138](#) only lays down the three processes of examination to which a witness may be subjected. It does not deal with the admissibility of the evidence. It also provides that the examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified in his examination-in-chief. Under this Section, the cross-examination can go beyond the facts narrated in examination-in- chief, but all such questions must relate to relevant facts. It is not that under the right of cross examination, the party will have the right to ask reckless, irrelevant, random and fishing questions to oppress the witness. The "relevant facts" in cross examination of course have a wider meaning than the term when applied to examination-in-chief. For instance, facts though otherwise irrelevant may involve questions affecting the credit of a witness, and such questions are permissible in the cross

6 HIGH COURT OF DELHI AT NEW DELHI W.P. (CRL.) 225 OF 2012 decided on 11.4.2012.

examination as per [Section 146](#) and [153](#) but, questions manifestly irrelevant or not intended to contradict or qualify the W.P.(Crl.) 225/2012 Page 8 of 16 statements in examination-in-chief, or, which do not impeach the credit of a witness, cannot be allowed in cross examination. It is well-established rule of evidence that a party should put to each of a witness so much of a case as concerns that particular witness.

16. It is experienced that sometimes, cross examination goes rambling way and assumes unnecessary length and is directed to harass, humiliate or oppress the witnesses. It is also experienced that the Courts often either due to timidity or the desire not to become unpopular or at times, not knowing its responsibilities and powers, allow the reckless, scandalous and irrelevant cross examinations of witnesses. In fact, in such situations, the court has the power to control the cross examination. The court has a duty to ensure that the cross examination is not made a means of harassment or causing humiliation to the witness. While allowing latitude in the cross examination, court has to see that the questions are directed towards the facts which are deposed in chief, the credibility of the witness, and the facts to which the witness was not to depose, but, to which the cross examiner thinks, is able to depose. It is also well-established that a witness cannot be contradicted on matters not relevant to the issue. He cannot be interrogated in the irrelevant matters merely for the purpose of contradicting him by other evidence. If it appears to the Judge that the question is vexatious and not relevant to any matter, he must disallow such a question. Even for the purpose of impeaching his credit by contradicting him, the witness cannot be put to an irrelevant question in the cross examination. However, if the question is relevant to the issue, the witness is bound to answer the same and cannot take an W.P.(Crl.) 225/2012 Page 9 of 16 excuse of such a question to be criminating. That being so, it can be said that a witness is always not compellable to answer all the questions in cross examination. The court has ample power to disallow such questions, which are not relevant to the issue or the witness had no opportunity to know and on which, he is not competent to speak. This is in consonance

with the well-established norm that a witness must be put that much of a case as concerns that particular witness.

17. A protracted and irrelevant cross examination not only adds to the litigation, but wastes public time and creates disrespect of public in the system. The court is not to act a silent spectator when evidence is being recorded. Rather, it has the full power to prevent continuing irrelevancies and repetitions in cross examination and to prevent any abuse of the right of cross examination in any manner, appropriate to the circumstances of the case. The court could have such a power to control the cross examination apart from the [Evidence Act](#) as also [the Code](#) of Criminal Procedure. [Section 146](#) though relaxes the ambit of cross examination and permits the putting of questions relating to the trustworthiness of the witness, but such questions also must be relevant for the purpose of impeaching the credit, though not to the issue. Under the garb of shaking credit, irrelevant or vexatious questions cannot be allowed, if they do not really impeach the credit of witness or do not challenge the evidence given in examination-in-chief relating the matter under enquiry. It is established proposition of law that if the question is directly relevant i.e. if it relates to the matters, which are points in issue, the witness is not protected to answer even it amounts W.P.(Crl.) 225/2012 Page 10 of 16 to criminating him but, if it is relevant only tending to impeach the witness's credit, the discretion lies with the Judge to decide whether witness shall be compelled to answer it or not. Generally, he will not be allowed to be contradicted except in the cases under [Section 153](#). In fact, [Section 132](#), [146](#), [147](#) and [148](#) embrace whole range of questions, which can properly be addressed to witness and these should be read together.

18. Thus, it can be said that the relevancy of evidence is of a two- fold character; it may be directly relevant in the bearing on, elucidating, or disproving, the very merits of the points in issue. Secondly, it can be relevant in so far as it affects the credit of a witness. As regard the relevancy relating to a credit of a witness, the court has to decide the same under [Section 148](#) whether the witness is to be compelled to answer or not or to be warned that he is not obliged to answer. The

Judge has the option in such a case either to compel or excuse. The provisions of [Section 148-153](#) are restricted to questions relating to facts which are relevant only in so far as they affect the credit of the witness by injuring his character; whereas some of the additional questions enumerated in [Section 146](#) do not necessarily suggest any imputation on the witness's character. When we talk of the relevancy of the questions relating to character, unnecessarily provocative or merely harassing questions will not be entertained in this class of questions.

19. As per [Section 151](#) and [152](#), the questions which are apparently indecent or scandalous or which appear to be intended to insult or W.P.(Crl.) 225/2012 Page 11 of 16 annoy or are offensive in form, are forbidden. Such questions may be put either to shake the credit of witness or as relating to the facts in issue. If they are put merely to shake the credit of the witness, the court has complete dominion over them and to forbid them even though they may have some bearing on the questions before the court. But, if they relate to the facts in issue or are necessary to determine the facts in issue existed, the court has no jurisdiction to forbid them. The court cannot forbid indecent or scandalous questions, if they relate to the facts in issue. It is because what is relevant cannot be scandalous.

20. Having seen that though the ambit of cross examination of a witness goes beyond his examination-in-chief, but there has to be relevancy of the questions as regard to the facts or to the creditworthiness of a witness. The counsels must exercise their right of cross examination in a reasonable manner. They have their obligations no less than their privileges. They have no right of unlimited arguments or examination of witnesses, but only so much as would be relevant and reasonably necessary in the particular matter. When a Judge exercises his discretion and disallows a question being irrelevant on any count, the cross examiner should accept the court's rulings without any demur or display of temper. The court is entitled to expect such like acceptance of a ruling on the part of the counsel.

32 Though the Evidence Act is not applicable to Arbitration under the said Act, certainly the principles therein can be applied by the Arbitrator while hearing a matter. Therefore, the learned Arbitrator undoubtedly had the power to control and had discretion in the matter of controlling the cross-examination of the party by counsel of the opposite party. In the present case, the learned Arbitrator has not terminated the cross-examination abruptly but permitted the Advocate for the petitioner to cross-examine the 2nd respondent who was the witness for the respondents for 37 hearings across 3 & ½ years. On 7.3.2008 the learned Arbitrator had made a note that the petitioner's counsel had cross-examined the respondents' witness from 9.8.2005 and more than 1000 questions running into 200 pages had been recorded. On 26.11.2008 the counsel for the petitioner was asked how long he will take and he said he will make his endeavour to finish in the next 2 hearings. In the next hearings again the counsel for the petitioner was asked, and he said he will take 2 more hearings. It is recorded in the Minutes, "Mr.Bhatia..... that he would need two more hearings to complete the cross-examination of the witness." On the next hearing on 15.1.2008 though as recorded earlier the counsel was to finish in one more hearing, he was given 2 more hearings and then only the Arbitrator closed the cross-examination. In my view, therefore, the Arbitrator correctly

exercised the powers in the facts of the present case. The order made by the learned Arbitrator is not open to any exception and there is no ground to interfere on that basis with the award.

33 As regards the 3rd part of the petitioner's grievance, non consideration of the petitioner's claim, the counsel for the petitioner submitted that though initially the petitioner sought specific performance of the petitioner's agreement, the petitioner has also made an alternate claim for refund and in the alternative, compensation. As regards compensation- the counsel submitted that they are not pressing for it and they are pressing their claim only for refund.

34 It is the case of the petitioner that the Arbitrator in paragraph nos.10 & 11 of the award records his submission with respect to the claim of the petitioner for refund but in paragraph-27 merely records the respondents' contention that the amount of Rs.31.75 lacs (they were admitted receipt of at least Rs.31.75 lacs) stand forfeited without in any manner rendering any finding in respect thereof. It is the case of the petitioner that in paragraph-27, as observed, the Arbitrator has recorded that the respondents' admit having received Rs.31.75 lacs but still the Arbitrator has not directed refund of the amount when he has come to a conclusion that the petitioner's

agreement was not valid and further has erroneously recorded that the petitioner has not proved that the petitioner has made any payment to the 1st respondent or the respondents and hence not entitled to any relief even alternative relief to the relief of specific performance as prayed for or otherwise. For refund, the counsel also relied on section 65 and section 70 of the Contract Act 1872. The counsel submitted that their claim for refund has been rejected without any reason and in any event wrongfully rejected.

35 In my view, the learned Arbitrator has not made any error in as much as the petitioner's entire claim was based on the petitioner's agreement under which the petitioner claimed to have made payment. The petitioner's case was not based on the respondents' agreement. When the Arbitrator has come to a conclusion that the petitioner's agreement based on which the petitioner claimed to have made payment of which he was seeking refund itself does not exist and such an agreement was never entered into, the question of refund under the petitioner's agreement did not arise. Nothing stopped the petitioner from being truthful and raise the claim on the basis of the respondents' agreement. In my view, the Arbitrator was correct in coming to a conclusion that the plaintiff was not entitled to any refund.

36 As regards sections 65 & 70 of the Contract Act, again the basis of

the petitioner's claim being under the petitioner's agreement, the Arbitrator was justified in rejecting petitioner's claim. The Arbitrator having considered the evidence has given his reasons in paragraph-33 of the award which reads as under :-

“The evidence on record establish that the said alleged Agreement for Sale of the said property in its entirety relied upon by the Claimant, a Xerox copy of the alleged photocopy thereof is annexed as Annexure `B' to the Statement of Claim filed, is neither genuine nor valid, but is a false and fabricated document. Since the Claimant has not established or proved existence of a valid, legal, subsisting, binding and/or enforceable at law Agreement for Sale of the said property in its entirety as alleged by the Claimant, the question of the Claimant being entitled to the specific performance of such alleged agreement or any relief thereunder does not arise. The Claimant has not proved that the Claimant made any payments to the 1st Respondent or the Respondents pursuant to the alleged Agreement for Sale of the said property in its entirety and as such, the Claimant is not entitled to any relief even alternative to the relief of specific performance as prayed for or otherwise.”

37 The counsel for the petitioner relied upon the judgment in the matter of ⁷Satgur Prasad Vs. Har Narain Das, to submit that section 65 of the Indian Contract Act, 1872 will apply to a contract held to be void. There is no dispute with this proposition because section 65 reads as under :-

“65. Obligation of person who has received advantage under void agreement, or contract that becomes void – When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to

⁷ AIR 1932 Privy Council 89

restore it, or to make compensation for it, to the person from whom he received it.”

The relevant words in section 65 are “when an agreement is discovered to be void, or when a contract becomes void”. Therefore, for restoring the advantage a party received or to make compensation for it to the person from whom he received it, there has to be first an agreement or a contract which is discovered to be void or that becomes void. In the present case the conclusion arrived at by the Arbitrator is that the petitioner's agreement was non-est and fabricated which means there was no such agreement or contract ever entered into between the parties in the first place. Therefore, certainly section 65 will not apply and the Arbitrator was correct in arriving at that conclusion.

38 The Privy Council in ⁸Mohori Bibee & Anr. Vs. Dhurmodas Ghose has held that section 65 of the Contract Act starts from the basis of there being an agreement or contract between competent parties and has no application of the case in which there never was and never could have been any contract. This decision has been followed by a Division Bench of this Court in ⁹Motilal Mansukhram Vs. Maneklal Dayabhai. Therefore, the

⁸ (1902-03) 30 Indian Appeals 114

⁹ AIR 1921 Bom 147 (1)

petitioner's agreement having been held to be a fabricated and got up document, the same never existed and section 65 would thus not apply.

39 The counsel for the petitioner also relied upon the ¹⁰State of West Bengal Vs. M/s.B.K.Mondal and ¹¹Ram Pratap Kamalia Mills Vs. State of Bihar, to submit that under Section 70 of the Contract Act 1872, where a person lawfully does anything for another person or delivers anything to him not intending to do so gratuitously and such other person enjoys the benefits thereof, the later is bound to make compensation to the former, in respect of or to restore the thing so done or delivered. Again there is no dispute on this preposition.

40 First of all section 70 is a provision under which a claim for compensation may be made. In the present case, the petitioner as recorded in paragraph-11 of the award that “.....claimant has not pressed his claim for damages as prayed in”cannot now seek to re-open the same on the basis of section 70. Even in this court, Shri Purohit stated that petitioner is not pressing any claim for compensation. In my view, the learned Arbitrator has rightly held that Section 70 has no application to the facts of the present case. The claim under Section 70 was not even pleaded but still

10 AIR 1962 Supreme Court 779

11 AIR 1963 PATNA 153

the learned Arbitrator considered the oral submissions and rejected the claim. In ¹²M/s. Hansraj Gupta & Co. Vs. Union of India, the Apex Court has held that the conditions for the applicability of this section must at least be set out in the pleadings and proved. Section 70 of the Contract Act enables the person who supplied goods or rendered some services not intending to do so gratuitously to claim compensation from the person who enjoys of the benefits of the supply made or services rendered. It is a liability which arises on equitable ground even though express agreement or contract may not be proved. Paragraph-12 of the said judgment in Hansraj Gupta (supra) reads as under :-

“12. We may now turn to the plaintiff's claim to the benefit of Section 70 of the Contract Act put forward in this Court for the first time. It was urged, on the strength of Piloo Dhunjishaw Sidhwa v. Municipal Corporation of the City of Poona , that, so long as the claim is there, this Court is not precluded from applying Section 70 of the Contract Act for the first time even on appeal by special leave. We, however, think that the conditions for the applicability of the Section must at least be set out in the pleadings and proved. As already noticed above the plaintiff has not said anywhere in the plaint that any supplies were made by the plaintiff to the Army authorities. On the other hand, the assertion is that the supplies were made by the contractor (defendant No. 2). Section 70 of the Contract Act enables the person who actually supplies goods or renders some services, not intending to do so gratuitously, to claim compensation from the person who enjoys the benefit of the supply made or services rendered. It is a liability which arises on equitable grounds even though express agreement or a contract may not be proved.

¹² (1973) 2 Supreme Court Cases 637

41 In this case there is no such pleadings let alone the same being proved. The Apex court in ¹³Devi Sahai Palliwal Vs. Union of India & Anr. has held that when there is no allegation in the plaint to support any pleading under section 70 of the Indian Contract Act, the claim should not be entertained.

42 In ¹⁴C.I.Abraham Vs. K.A.Chериан a Division Bench of the Kerala High Court held that section 70 of the Contract Act has 3 ingredients and all 3 have to be pleaded and proved. Otherwise, claim under Section 70 cannot be entertained. The Kerala High Court held that even if a valid contract may not be existing, section 70 of the Contract Act may still be applied but there must be evidence and circumstances to hold that a lawful relationship existed between the two parties and one of the parties rendered services to the opposite party not intending to do so gratuitously and that action of the opposite party has been benefited. But at the same time what is required is each of the 3 ingredients has to be specifically pleaded and proved and in this case it is not so. Paragraph-8 of CI Abraham (supra) reads as under :-

“8. The learned counsel for the appellant next contended that the appellant (defendant) who rendered service to the plaintiff

¹³ (1976) 4 Supreme Court Cases 763

¹⁴ AIR 1986 Ker 60

and thereby benefiting him is at any rate entitled to compensation as provided under [Section 70](#) of the Contract Act. [Section 70](#) of the Contract Act provides that where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. Learned counsel for the appellant contended that terms of [Section 70](#) are wide enough and the court can apply the same with discretion in appropriate cases and so far as this case is concerned the court should interfere to do substantial justice between the parties. Learned counsel for the plaintiff argued that so long as there is no evidence to show that defendant rendered service to the plaintiff not intending to do gratuitously, [Section 70](#) cannot have any application. Evidence in the case would show that plaintiff who was in Ethiopia, was helped by his relative the deceased in the purchase of the property and later in the collection of rent. But, there is hardly any evidence to show, that at any time defendant informed the plaintiff that he has been rendering the service not intending to do so gratuitously. [Section 70](#) of the Contract Act applies to cases irrespective of any contract or agreement where a person lawfully does for another person or delivers anything which was never meant to be gratuitous and the other person has enjoyed the advantage. The three essential conditions for invoking [Section 70](#) are :

- (1) The goods are to be delivered lawfully or something has to be done for another person lawfully;
- (2) The thing done or the goods delivered must be done or delivered not intending to do so gratuitously; and (3) the person to whom the goods are delivered enjoys the benefit thereof.

It is needless to say when all the above three ingredients are pleaded and established in a case, [Section 70](#) of the Contract Act can be invoked. So far as the case in hand is concerned, the second condition has not been established by the appellant. There is not a single document or other evidence to show that plaintiff was made aware by the defendant that he was rendering service not intending to do so gratuitously”.

43 The Apex court in the matter of ¹⁵Union of India Vs. Sita Ram has held in paragraph-6 as under :-

6. The three ingredients to support the cause of action under [section 70](#) of the Indian Contract Act are: First, the goods are to be delivered lawfully or anything has to be done for another person lawfully. Second, the thing done or the goods delivered is so, done or delivered "not intending to do so gratuitously". Third, the person to whom the goods are delivered "enjoys the benefit thereof". It is only when the three ingredients are pleaded in the plaint that a cause of action is constituted under [section 70](#) of the India Contract Act. If any plaintiff pleads three ingredients and proves the three features the defendant is then bound to make compensation in respect of or to restore the things so done or delivered.

44 In ¹⁶Amar Chand Butail Vs. Union of India, it is held that indirect benefit is not enough for a claim under Section 70. Paragraph nos. 27 & 29 of the said Judgment read as under :-

“27 In order to attract the aforesaid section three conditions must be satisfied by the person seeking relief, (i) He must have lawfully done something for another or delivered something to him. (ii) He must not have intended to do so gratuitously, (iii) That other person must have enjoyed the benefit. The section will not apply if any of the aforesaid three conditions is not satisfied. Thus where a person merely derives a benefit without the person seeking compensation having done anything for him or having delivered anything to him, the section will not come into play. In the instant case

¹⁵ (1976) 4 Supreme Court Cases 505

¹⁶ AIR 1962 HP 43

respondent No. 1 did not deliver stocks of foodgrains or any money to the appellants in connection with the disputed transactions. The sums of money paid by R. B. Jodha Mull cannot be said to have been paid on behalf or for the use of respondent No. 1.

29 I, therefore, hold that the appellants were indirectly benefited to the extent of Rs. 24,198/8/3 and Rs. 37,669/3/6 but that by itself is not sufficient to clothe respondent No. 1 with the right to recover back the aforesaid sums of money from the appellants.”

45 In fact the Andhra Pradesh High Court in Nuli Kanaka Rao Vs. T. Sriranga Venkata Ramalinga Reddy,¹⁷ has held that if something is done for doers benefit and incidently the other persons benefit, the doer cannot claim for compensation under section 70. Para-12 reads as under :-

“12. It must also in this connection be remembered that the act done must have resulted in the enjoyment of its benefits of other persons sought to be held liable. If the act is done for the doer's benefit or the person sought to be held liable does not derive any benefit, or that the benefit is both to the person who does the act and incidentally it also benefits some other person, it is obvious that no liability can be fastened under Section 70 of the Act.”

46 In this case I do not even find any pleading that monies were paid by the petitioner to anybody for and on behalf of the respondents and that the respondents have benefited and hence entitled to compensation under section 70. In ¹⁸Avudayappa Pillai Vs. T.S.Thillai Thandavaraya Pillai, it

¹⁷ AIR 1966 AP 297

¹⁸ The Law Weekly, 1928 Vol-XXVII pg-406

is held that if something is done for the benefit of another which the other person was not bound or required to do so then claim under Section 70 against the other person does not lie. In other words a thing is said to be done for some one if that person is bound to do himself. If he was not so bound and enjoyed the benefit, section 70 would not apply.

47 The counsel for the respondents also relied on some other judgments on this point to submit that section 70 is not applicable and those judgments are ¹⁹Ganapathi Bhatta & Anr. Vs. Sanna Sedu Beari ; ²⁰Tangya Fala Vs. Trimbak Daga and Anr.; ²¹M.K.Radhakrishnan Iyer & Anr. Vs. The Secretary of State for India and ²²State of Rajasthan Vs. H.V.Hotels (P) Ltd.

48 In view of the above, as there has been no pleadings and no contract or agreement, the judgments relied upon by the petitioner's counsel in the matter of ²³Village Panchayat of Jangarddigudem Vs. Kommireddy Narasayya ; ²⁴Majesty Krishnaya Vs. Ukala Uppayya and ²⁵Modi Vanaspati Manufacturing Company & Anr. Vs. Katihar Jute Mills (Private) Limited, though lays down the correct principle on facts again will not be applicable

19 AIR 1930 Mad. 644

20 AIR 1916 Bom. 302

21 44 L.W. 518

22 (2007) 2 Supreme Court Cases 468

23 AIR 1965 Andhra Pradesh 191

24 AIR 1928 Madras 476(1)

25 AIR 1969 CALCUTTA 496

to this matter.

49 The counsel for the petitioner also relied upon sections 21, 22 & 33 of the Specific Relief Act 1963 to raise his claim for refund. Section 21 relates to plaintiffs' claim for compensation and not to refund and hence will not be applicable to the present facts of the case because the petitioner has given up his claim for compensation. Even section 22 will not be applicable because it provides that any person suing for the specific performance of the contract for the transfer of immovable property may, in an appropriate case ask for- any other relief to which he may be entitled including the refund of any earnest money or deposit paid or made by him in case his claim for specific performance is refused. First of all the plaintiff is not asking for refund of any earnest money or deposit paid or made by him. In any event, section 22 pre-supposes the existence of a contract. In this case the Arbitrator after considering evidence has come to a conclusion that the petitioner's agreement on which the petitioner was relying upon was a forged and fabricated document and that there was no contract at all in existence as claimed by the petitioner. Therefore, section 22 is also not applicable.

50 As regards section 33 of the Specific Relief Act, again it provides for

benefit to be restored or compensation to be made when instrument is cancelled or is successfully resisted as being void or voidable. The present proceedings are filed by the petitioner for specific performance of the petitioner's agreement and not for cancellation of the same. Secondly, the Arbitrator has arrived at a finding after considering the pleadings and evidence, by giving reason, that the petitioner's agreement is fabricated and forged and there was no contract/agreement in existence as claimed by the petitioner as opposed to being void or voidable. In the circumstances, even section 33 will also not apply.

51 The petitioner relied on a judgment of this court in the matter of ²⁶M/s. Heavy Light Industrial Corporation Vs. The State of Maharashtra. The ratio of the said judgment is that a claim for damages in a suit for specific performance arises from the same cause of action and that an amendment of the plaint to include such a claim must therefore, be allowed but the petitioner having given up its alternative claim for compensation, the said judgment does not apply to the present case.

52 To conclude, the petitioner's agreement is held to be non-est, forged and fabricated document. Therefore, payment if any, made by the

²⁶ 2000 (2) Bom. CR 121

petitioner would be only under the respondents' agreement and that was not the case of the petitioner before this Court when they filed the suit and when they filed the statement of claim before the Arbitrator. The petitioner's claim for refund is not under the respondents' agreement. In fact the plaintiffs' case was pages-2 to 11 of the respondents' agreement were torn and destroyed. Therefore, the Arbitrator was justified in coming to a conclusion that the petitioner was not entitled to any refund.

53 As regards the fourth ground that the disputes are not arbitrable, the counsel for the petitioner submitted that in light of the contentions raised by the respondents, the respondents having raised a contention that the petitioner's agreement was invalid, though the petitioner does not claim to be so, the disputes are not arbitrable. According to the counsel for the petitioner if the respondents contended that the agreement was invalid or void, the same involved in its entirety and the arbitration clause perishes with the same. Thus the dispute could never been arbitrated upon. The counsel also relied upon the judgment of the Division Bench of this court in the matter of ²⁷Mulheim Pipecoatings GmbH Vs. Welspun Fintrade Limited & Anr. to submit that the arbitration clause was not separable and therefore has to fall with the agreement. The counsel stated that when it is the case of

²⁷ 2014(3) ALL MR 838

the respondents that the petitioner's agreement did not exist at all, there cannot be an arbitration agreement as against the situation where the petitioner's agreement is considered to be void in which case the arbitration agreement does not ipso facto or necessarily come to an end.

54 In this case the Arbitrator was appointed by the court as could be seen from its order dated 15.1.2004 quoted earlier, by consent of both the parties. The order reads “ By consent of both the parties.....” The parties have consented that the dispute in the suit be referred to arbitration. Therefore, this submission of the petitioner also cannot be accepted.

55 The counsel for the petitioner also submitted that in view of the allegation of fraud made against the petitioner, the dispute could not have been decided by the learned Arbitrator and ought to have been decided by a civil Court and the learned Arbitrator went ahead with the matter despite being informed of the same. In fact the petitioner has filed Notice of Motion No.481 of 2013 seeking that the present dispute be relegated to the civil Court in Suit No.1163 of 1999 and that the award be stayed pending the hearing and final disposal of the said Notice of Motion. The said Notice of Motion is pending. The counsel for the petitioner relied on 2 judgments in

support of the above contentions viz. judgment of the Apex court in ²⁸N.Radhakrishnan Vs. Maestro Engineers & Ors. and the judgment of this court in the matter of ²⁹India Assurance Co.Ltd. V/s. Nusli Neville Wadia. On this point also, I am not in agreement with the counsel for the petitioner in as much as the dispute was referred to arbitration by a consent order dated 15.1.2004. The petitioner participated in the arbitration proceedings and thereafter filed the present petition to challenge the award. This was despite the fact that serious allegation of fraud has been levelled by both the parties against each other in the application taken out by the respondents under section 8 of the said Act and in the pleadings before the learned Arbitrator. In fact, the petitioner has not taken this stand even in the petition challenging the award. The Notice of Motion has been filed 3 years after filing of the petition and 9 years after the reference to arbitration. Therefore, it is quite obvious that this Notice of Motion has been taken out only as an after-thought and to harass the respondents. Moreover, such a Notice of Motion is not maintainable because the effect of an order in favour of the petitioner in the Notice of Motion would mean setting aside the award. An award can be set aside only under section 34 of the said Act and the petitioner having filed this petition, cannot file a Notice of Motion seeking the same relief.

28 2010 (1) SCC 72

29 2011 (2) Bom. C.R. 559

56 Moreover, the 2 judgments viz. N.Radhakrishnan (supra) and Ivory properties (supra) are not applicable because both those judgments are passed prior to reference to arbitration and not after the award. Reading those judgments, it is clear that there is no bar to refer dispute to arbitration where there are allegations of fraud but at the same time, it will be within the discretion of the court in an application under section 8 or section 11 of the said Act whether the matter be referred to arbitration or not. But in this case, the Arbitrator was appointed by consent of the parties and the petitioner has participated in the arbitration proceedings. Therefore, this submission of the petitioner cannot be accepted.

57 In any event, the Apex court in the matter of ³⁰Swiss Timings Limited Vs. Commonwealth Games 2010 Organising Committee has held that the judgment in the matter of Radhakrishnan (supra) was per in-curium and did not lay down the correct law and further held that the arbitral Tribunal will have jurisdiction to examine the plea of fraud raised by the party. The said judgment in fact holds that “As a pure question of law, I am unable to accept the very broad proposition that whenever a contract is said to be void ab-initio, the courts exercising jurisdiction under Section 8 and

30 (2014) 6 Supreme Court Cases 677

Section 11 of the Arbitration Act, 1996 are rendered powerless to refer the disputes to arbitration.” The Hon'ble Supreme Court further holds that “However, it would not be possible to shut out arbitration even in cases where the defence taken is that the contract is voidable.

58 The Apex court in the matter of ³¹National Insurance Company Limited Vs Boghara Polyfab Private Limited has held that the arbitrator has jurisdiction to entertain and deal with the issues involving fraud.

59 As regards the judgment of the division bench of this Court in the matter of Mulheim Pipecoatings GmbH Vs. Welspun Fintrade Limited & Another (supra) on which reliance was placed by Shri Purohit to canvas the doctrine of separability in respect of a contract and the arbitration agreement contained therein, it is necessary to note that in the facts of that case, the seed of the matter was a petition under section 45 of the Arbitration Act. It was also an issue before the Hon'ble Court prior to the reference to arbitration and not after the passing of the award as in the present case. The said judgment would thus not apply to the facts of the present case.

31 (2009) 1 Supreme Court Cases 267

60 The fifth point of the petitioner was that the Arbitrator erred in concluding that the respondents' agreement is the correct agreement.

The counsel for the petitioner submitted that the learned Arbitrator erroneously proceeded on the premise that the respondents' agreement is the correct agreement between the parties and comparing the same, proceeded to hold that the petitioner's agreement is conversely invalid. According to the counsel the entire approach of the Learned Arbitrator was erroneous and contrary to law and even on this ground, the impugned award deserves to be quashed and/or set aside.

61 As stated earlier, this court has very limited scope under section 34. This court is not sitting as an appellate court. The Arbitrator is a sole judge of quantity and quality of evidence and even if the award is passed on little evidence, it cannot be held to be invalid. The Arbitrator has considered the evidence before him and the pleadings and has come to the conclusion that the petitioner's agreement was invalid and non-est. The Arbitrator has also given his reasons. So this case of the petitioner also requires to be rejected.

62 To conclude, I do not find the action of the Arbitrator to be capricious or arbitrary or perverse. I do not find any illegality in the award. The Arbitrator has heard both the parties, considered the pleadings and has come to the conclusion based on the evidence and correctly so.

63 In the circumstances, petition requires to be dismissed with costs. The petitioner is directed to pay a sum of Rs.1,00,000/- as costs of this petition.

64 In view of the above, the Notice of Motion No.481 of 2013 does not survive and is disposed.

(K.R. SHRIRAM, J.)

CERTIFICATE

Certified to be true and correct copy of the original signed
Judgment/Order.

(K.G.Jahagirdar)
Private Secretary to His
Lordship Justice K.R.SHRIRAM