

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

ARBITRATION PETITION NO.810 OF 2011

Sahara Hospitality Limited	)	
Formerly known as Batra Hospitality	)	
Private Limited, a company duly	)	
Incorporated under the Companies Act,	)	
1956, and having its registered office at	)	
Hotel Sahara Star, Opposite Domestic	)	
Airport, Ville Parle (East),	)	
Mumbai – 400 099.	)	.. Petitioners

..Versus..

Hotel Corporation of India Limited,	)	
A public limited company duly	)	
incorporated and registered under the	)	
provisions of the Companies Act, 1956,	)	
having its registered office at Transport	)	
Annexe Building, Air India Complex,	)	
Old Airport, Santacruz (East),	)	
Mumbai – 400 059.	)	.. Respondents

—

Mr.G. R. Joshi, Senior Counsel with Ms.Neeta Jain, Mr.Satyen Vora and Mr.Sanmish Gala i/b M/s.Markand Gandhi & Co. for the Petitioners.
Mr.M.P.S. Rao, Senior Counsel with Mr.S.D. Shetty and Mr.Rakesh Singh i/b M.V. Kini & Co. for the Respondents.

--

CORAM : R.D. DHANUKA, J.
RESERVED ON : 26th APRIL, 2015
PRONOUNCED ON : 8th May, 2015.

JUDGMENT:-

. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996 (for short the said “Arbitration Act”) the petitioners have impugned the arbitral award dated 19th April, 2011, rendered by the arbitral tribunal thereby directing the petitioners herein to pay to the respondents the sum of Rs.1,88,48,920/- with interest at State Bank of India Prime Lending rate plus 2% with effect from 15th August, 2002 and has also awarded the arbitration costs in favour of the respondents in the Rs.40,00,000/-. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The petitioners herein were the original respondents, whereas the respondents herein were the original claimants in the arbitral proceedings. The petitioners had also filed a counter claim against the respondents. The respondent is fully owned subsidiary of Air India Limited, which is fully owned by the Government of India under the Minister of Civil Aviation. The petitioners have been doing the business of hospitality and travel industry and own several hotels including one in Mumbai and one in Delhi.

3. Some time in the month of December, 1997, its Disinvestment Commission recommended that the hotels owned by the respondents in Mumbai and Delhi be sold as separate units through a transparent and competent bidding process after getting a proper valuation done through a financial advisor. Air India accordingly constituted a sub-committee to oversee the process of sale of the units of the respondents. Air India appointed M/s.Jardine Fleming India Securities Ltd. as global advisors in

a board meeting held on 7th February, 2000. On 6th June, 2000, a formal agreement was entered into with M/s.Jardine Fleming India Securities Ltd. laying down the scope of work to be done by them.

4. The said global advisor suggested an option for sale of the Centaur Hotel Ltd., Mumbai Airport as a going unit. The advertisements were accordingly inserted in the newspapers seeking bids from interested parties. 37 parties submitted expression of interest to the said global advisors. 28 parties including A.L. Batra of Batra Group of Companies, who fulfilled the criteria laid down by the global advisors, were shortlisted. Only 13 parties including A.L. Batra expressed their interest in acquiring the hotels on “Slump Sale Basis”. A.L. Batra, *inter-alia* showed interest in acquiring the Centaur Hotel, Mumbai Airport and deposited the requisite amount of earnest money.

5. Detailed due diligence was carried out by 12 bidders along with finance and legal advisors. All these activities were closely monitored by the global advisors. Due diligence was completed by middle of April, 2001. On 5th November, 2001, the global advisors invited financial bids in respect of the Centaur Hotel, Mumbai Airport, Centaur Hotel, Centaur Hotel, Delhi and Indo Hokke Ltd. Only A.L. Batra of Batra Group of Companies submitted the financial bids in respect of the Centaur Hotel, Mumbai Airport. The said bid however, was not accepted by the Cabinet Committee on Disinvestment by its decision taken on 10th November, 2001 on the ground that it was much less than the reserved price.

6. On or about 1st January, 2002, a second round of bidding was

carried out for inviting bids from existing qualified parties in respect of the Centaur Hotel Mumbai airport, Centaur Hotel, Delhi and Chefair, Mumbai. Only A.L. Batra of Batra Group of Companies submitted the bid. On 4th February, 2002, the bid of A.L. Batra was finally accepted by Core Group of Secretaries for Disinvestment. The Ministry of Disinvestment by their letter dated 6th February, 2002 advised the Ministry of Civil Aviation about the decision of the Cabinet Committee of Disinvestment for acceptance of the bid submitted by A.L. Batra for Centaur Hotel, Mumbai Airport for the sum of Rs.83.00 crores on execution of the related transaction documents in consultation with global advisors.

7. By a letter dated 4th March, 2002, Air India Ltd. advised A.L. Batra of Batra Group of Companies that their bid of Rs.83.00 crores for Centaur Hotel, Mumbai had been accepted. The said A.L. Batra was directed to deposit the said amount of Rs.83.00 crores within a period of 30 days from the receipt of the said letter.

8. On 18th April, 2002, an agreement to sell Centaur Hotel Ltd., Mumbai Airport was signed between the respondents and the said A.L. Batra. On 22nd May, 2002, the Board of Directors of the respondents passed a modified resolution for entering into agreement to sell with Batra Hospitality Pvt. Ltd. Under the said agreement, the business of Centaur Hotel Ltd., Mumbai Airport was transferred with effect from 5th June, 2002 after fulfillment of the terms and conditions set out in the agreement to sell.

9. On 5th June, 2002, actual physical possession of the hotel business along with assets and liabilities of the respondents were handed over to the said purchaser. An inventory statement of all the assets and liabilities, including the furniture and fixtures were also furnished to the purchaser. On 5th June, 2002, the petitioners took over Centaur Hotel Ltd., Mumbai Airport as going unit along with all fixtures and fittings, employees, running business, records and documents.

10. M/s.KPMG, were appointed as auditors for verifying and inspecting the accounts, documents right from June, 2002 and were required to submit a Net Current Assets / liability statement within a period of 45 days from their appointment. Clause 3 of the said agreement provided that the accounts would be reconciled and the difference in the Net Current Assets of the Hotel as on the transfer date i.e. 5th June, 2002 and as on 31st March, 2002 would be worked out by the auditor selected by the respondent from the list annexed to the agreement whose decision shall be final and binding on the parties. It was further provided that if the Net Current Assets as on transferred date was greater than the 2001 Net Current Assets, the differential amount would be paid by the petitioners to the respondents Conversely if the 2001 Net Current Assets was greater than on the transfer date, the Net Current Assets, the differential amount would be paid by the respondents to the petitioners.

11. On 14th March, 2003, the said M/s.KPMG filed the report setting out a detailed reconciliation statement of the Net Current Assets on the transferred date showing that a sum of Rs.2,35,67,000/- was due and payable by the respondents to the petitioners herein as the reconciled Net

Current Assets on 5th June, 2002 were found lesser than those on 31st March, 2001.

12. On 26th March, 2003, 9th April, 2003, 23rd April, 2003 and 27th May, 2003, the petitioners demanded amounts due to them from the respondents as per the report of the said M/s.KPMG. The respondents vide their letter dated 1st July, 2003 however, alleged that the report of the said M/s.KPMG was not acceptable and was not final and binding on the respondents. Dispute arose between the parties and was referred to arbitration of the arbitral tribunal.

13. The respondents herein filed the statement of claim before the arbitral tribunal *inter-alia* making 11 claims against the petitioners in the total sum of Rs.5,08,03,041.25 ps. It was the case of the respondents that before the auditors were appointed by the parties, the difference in the Net Current Assets as on 5th June, 2002 and 31st March, 2001 was at Rs.2,58,50,000/- (i.e. Net Current Assets as on 31st March, 2001 was at negative Rs.3,76,64,000/- and the Net Current Assets on 5th June, 2002 was at negative Rs.1,18,14,000/-). The respondents also challenged the observations of the said auditors while dealing with the Net Current Assets and more particularly under three items i.e. (i) gratuity and leave encashment as per M/s.KPMG valuation of Rs.1,47,61,000/-, (ii) additional provision for the alleged outstanding liability on the false plea of additional renovation to hotel building (60 additional rooms) at Rs.53,32,000/- and (iii) towards erroneous and illegal demand of the petitioners for making further provisions on the alleged additional bad and doubtful debts Rs.20,30,000/-.

14. The petitioners herein filed the written statement, resisting the claim made by the respondents and also filed counter claim *inter-alia* praying for various amounts under four counter claims.

15. The arbitral tribunal framed 8 issues. The petitioners led oral evidence of Ms.Ashu Sood, whereas the respondents examined two witnesses i.e. Mr.R.C. Agarwal and Mr.Sandeep Parikh, Chartered Accountant. All the three witnesses were cross-examined.

16. On 19th April, 2011, the arbitral tribunal made an award directing the petitioners to pay to the respondents a sum of Rs.1,88,48,920/- with interest at State Bank of India Prime Lending rate plus 2% p.a. from 15th August, 2002 and the arbitration costs of Rs.40,00,000/-. Mr.S. Krishna Moorthy, one of the arbitrator though concurred with the award rendered by the arbitral tribunal, made a dissenting note insofar as issue No.3 is concerned. The said arbitral award has been impugned by the petitioners in this petition under section 34 of the Arbitration Act. The respondents did not impugn any part of the arbitral award by filing a separate petition.

17. Mr.Joshi, learned senior counsel for the petitioner invited my attention to the pleadings, documents, some part of the oral evidence led by both the parties and also to the impugned award. He also invited my attention to the relevant clauses of the agreement entered into between the parties. Learned senior counsel also invited my attention to some of the relevant facts transpired before invitation of bid by the respondents. He submits that on 26th April, 2001, the respondents had placed letter of

intent on M/s.Raghubir Furniture for supply of loose furniture for 60 rooms to be completed in three months i.e. on or before 26th July, 2001. On 8th May, 2001, the respondents placed letter of intent on M/s.Gulraj Engineering Construction Co. for renovating the additional 60 rooms which were to be completed within five months i.e. 25th September, 2001. He submits that there was a delay on the part of the contractors in completing the said work under the said two letters of intent.

18. Learned senior counsel submits that in the meeting held on 2nd August, 2001 between the respondents and the global advisors, the respondents had mentioned that as per the draft agreement to sell, the difference in the Net Current Assets from the last date when the schedule had been prepared to the transfer date was to be prepared and the difference was to be adjusted in the purchase price. Similar adjustment was also proposed to be made for capital work. He submits that a conscious decision was internally taken by global advisors and the respondents not to seek any additional reimbursement in respect of the capital expenditure.

19. Learned senior counsel for the petitioner invited my attention to the record note of a meeting between the parties where various discussions in respect of the work awarded to the contractors was recorded. It is the case of the petitioner that the said record note was never forwarded to the petitioners.

20. On 22nd May, 2002, a meeting of the Board of Directors of the respondents came to be held. Learned senior counsel for the respondents

submits that in the said meeting of the Board of Directors of the respondents, the respondents deliberately sought to change their accounting policies. The Board of Directors decided that the respondents should book the amounts of payments made for those contracts under the head “Advances” and should ensure that the amounts so paid were reflected and accounted for in the “Net Settlement” with the buyer towards Net Current Assets adjustments for all transactions upto the transfer date. He submits that the respondents thus sought to convert an expenditure incurred by them into a current assets i.e. advance/loan given to the contractors. He submits that the respondents paid a sum of Rs.3,54,24,000/- to the contractors and further sum of Rs.97,31,000/- was payable to the contractors.

21. Learned senior counsel invited my attention to the minutes of the meeting held on 3rd August, 2002 between the representative of the parties, including the said auditors and global advisors wherein the disputes regarding accounting treatment to the expenditure incurred on renovation of addition 60 rooms was considered. In the said meeting, global advisors stated that they were made to believe that renovation of 60 rooms would be completed as per schedule given earlier to the contractors and it was fair that the respondents assume liabilities as per information disclosed in the transaction documents as on transfer date i.e. from 5th June, 2002 and the petitioners for unfinished work. In the said meeting, the Managing Director of the respondents admitted that he was not disputing the petitioners' contentions that with regard to accounting policy but claimed that the petitioners ought to assume the liability for unfinished capital work after the transfer date. The said auditors forwarded a copy of the draft report to the parties.

22. On 22nd October, 2002, the respondents in reply to the said draft report stated that they never disputed accounting treatment of capital advances in draft report as mentioned in meeting held on 3rd August, 2002. They however, claimed they relied upon clause 9.1.3 of the agreement.

23. Learned senior counsel invited my attention to a letter dated 31st January, 2003 addressed by the respondents to the auditors claiming that the advance paid upto 31st December, 2001 being the date of second round of bidding would be borne by the respondents and moneys paid thereafter by the respondents be reimbursed as capital commitment were to the knowledge of buyer. He submits that the respondents thereafter sought changes in the report from the said auditors.

24. Learned senior counsel invited my attention to a letter dated 12th March, 2003 from the said auditors to the parties recording that they did not propose to make change in the draft report and it had strictly analyzed the Net Current Assets as on 5th June, 2002 in accordance with accounting policy of the respondents as on 31st March, 2001. Learned senior counsel invited my attention to various paragraphs from the final report submitted by the said auditors on 14th March, 2003 in support of his submission.

25. Clauses 3.1 and 3.2 of the agreement are extracted as under:

“3.1 At the time after the date of this Agreement but not later than 10 Calendar days following the Transfer Date hereof, the Purchaser shall appoint an accounting firm from the list of accounting firms set out in Schedule 17 of this Agreement (the “Auditor”) to prepare and deliver to each of the Vendor and Purchaser, the Reconciliation Statement as described below. The Auditors shall prepare a statement showing in reasonable detail the computation of the Net Current Assets of the Business as of the Transfer Date, computed in a manner

consistent with the computation of the 2001 Net Current Assets Amount (the "Reconciliation Statement"). Provided that the computation of Net Current Asset would exclude any inventory which carries the Centaur logo or any other symbol of the Vendor which forms part of the Consumables and the Net Current Asset Amount and will further exclude any bad debts. The Net Current Assets of the Business as of the Transfer Date as reflected in the Reconciliation Statement is referred to in this agreement as the "Transfer Date Net Current Assets Amount."

3.2 The parties shall cause the Auditors to prepare the Reconciliation Statement in good faith. The Reconciliation Statement shall be delivered by the Auditors to each of the parties within 45 calendar days from the Transfer Date and except the errors that are apparent on the face of the records. To enable the Auditors to prepare the Reconciliation Statement. The vendor shall between the Agreement Date and the Transfer Date, and the Purchaser shall after the Transfer Date, permit the Auditors and the Auditor's authorised representatives and employees to review, during normal business hours, the books, records, interest management accounts and work papers of the Business. Without limiting the generality or effect of any other provision of this Agreement the Purchaser shall (i) provide the Auditors and their authorised representatives and employees access, during normal Business hours, to the facilities, personnel and accounting and other records of the Business necessary to permit the Auditors to prepare the Reconciliation Statement as provided in this Agreement (ii) co-operate with the Auditors and its authorised representatives and employees in the preparation of the Reconciliation Statement and (iii) take such action as may reasonably be requested by the Vendor to close or to assist the Vendor in closing, as of the close of business on the date hereof. The Books and accounting records of the Business."

26. Learned senior counsel also invited my attention to the various balance sheets and annual reports of the respondents and in particular for the year 2000-2001 and submits that the item "capital work in progress" had been shown under the Fixed Assets which would show that the capital work in progress was in part of Fixed Assets and not Current Assets. Under the heading "Fixed Assets" in Schedule-J, capital work in progress was shown. The respondents had capitalized expenditure incurred for carpets as major renovation as Fixed Assets. My attention is also invited to paragraph 6 of Schedule - B. He submits that according to

the said schedule, as on 31st March, 2001, Net Current Assets was shown at Rs.3,76,64,000/-.

27. He submits that as per the respondents, there was negative figure of Rs.1,18,14,000/-. According to the calculation drawn by the said auditors, as on 5th June, 2002, there was a negative figure of Rs.6,12,31,000/-. The negative figure had thus been increased from Rs.3,76,64,000/- to Rs.6,12,31,000/-. The liability was thus increased by Rs.2,35,00,000/-. He submits that if the report of the said auditors was accepted, the respondents were liable to pay to the petitioners a sum of Rs.2,35,00,000/- However, according to the respondents, the Net Current Assets was Rs.3,76,64,000/- and thus the petitioners were liable to pay to the respondents a sum of Rs.2,58,00,000/-.

28. Learned senior counsel invited my attention to the part of the said report of the auditors in which it was proposed by the auditors to exclude the payments made to the two contractors. It was the view of the said auditors that the amounts shown under the heads "loan and advance" should be treated as capital work in progress. He submits that the arbitral tribunal should have referred the matter back to the said auditors, if according to the arbitral tribunal there was any error apparent on the face of record in the said report submitted by M/s.KPMG. Though the arbitral tribunal considered the other part of the report as authentic and correct, the arbitral tribunal discarded the said report in respect of renovation of 60 rooms and for purchase of carpet. He submits that under the provisions of the said agreement, the report of the said auditors was final and binding since there was no error apparent on the face of record.

29. It is submitted by learned senior counsel for the petitioners that except two claims i.e. claim no.1 and claim no.3 (partly) made by the respondents, the arbitral tribunal had rejected all other claims of the respondents by accepting the correctness of the said report submitted by M/s.KPMG. He submits that in the said M/s.KPMG's report, the auditors had considered prevalent past accounting practice adopted by the respondents. He submits that it was within exclusive domain and jurisdiction of the auditors to determine as to what was the past accounting practice being followed by the respondents for the purpose of reconciliation of the accounts.

30. Learned senior counsel submits that the opinion thus made by the said auditors was not open to challenge unless there was any error apparent on the face of record. He submits that the arbitral tribunal has not rendered any finding that there was any error apparent on the fact of record. He submits that the issue of changes effected in the method of accounting followed by the respondents had been already decided by the said auditors and could not be reviewed and/or re-opened by the arbitral tribunal. In support of the submission as to what would be an error apparent on the face of record, he placed reliance on the judgment of the Supreme Court in the case of **Parsion Devi & Ors. vs. Sumitri Devi & Ors.** reported in **(1997) 8 SCC 715** and in particular paragraphs 7 to 10 thereof.

31. Learned senior counsel for the petitioner also placed reliance on the judgment of the Supreme Court in the case of **Meera Bhanja vs. Nirmala Kumari Choudhary**, reported in **(1995) 1 SCC 170** and in

particular paragraph 15 thereof, the judgment of the Supreme Court in the case of ***Mumbai Metropolitan Region Development Authority vs. Unity Infraproject Ltd.*** reported in ***2008 (5) Bom.C.R. 196*** and in particular paragraph 36, the judgment of the Supreme Court in the case of ***Deva Metal Powder (P) Ltd V/s. Commissioner, Trade Tax, Uttar Pradesh***, reported in ***(2008) 2 SCC 439***, and in particular paragraphs 8, 10, 11 to 15 thereof and would submit that the arbitral tribunal had no jurisdiction to review the report submitted by the said auditors since there was no error on the face of record.

32. Learned senior counsel invited my attention to the findings rendered by the arbitral tribunal in respect of the two claims. The arbitral tribunal did not follow the said report only on the ground that the view of the said auditors was not final and conclusive on the ground that the auditors had made observations that those issues could be discussed by the parties themselves and could be sorted out. He submits that even in respect of those two issues, the auditors had already made their view clear which was in favour of the petitioners. He submits that the findings rendered by the arbitral tribunal thus on this issue are perverse and this Court thus has ample power to set aside such perverse findings of fact.

33. Learned senior counsel for the petitioners then submits that though the respondents had admitted before the arbitral tribunal that a sum of Rs.1,72,00,000/- would be borne by the respondents, the arbitral tribunal omitted such crucial admission on the part of the respondents in the impugned award and did not consider the same at all. The award thus shows patent illegality on the face of award.

34. Learned senior counsel submits that there was no change in the assets of the respondents company which were transferred to the petitioners by virtue of those 60 rooms since the same were already the assets of the respondents on the cut of date. He submits that the arbitral tribunal has re-written the contract, which is not permissible in law. He submits that the petitioners were not liable to reimburse the respondents for payments made to the contractors before the transfer date. The respondents had made payment to three contractors in the sum of Rs.3,46,00,000/- before 31st May, 2002. They were net outstanding liabilities as the same were already paid. There was no provision of reimbursement of any amount by the petitioners to the respondents under the said agreement. The arbitral tribunal has considered the part of the claim of the respondents based on the equity. The respondents had already awarded contracts to three contractors much before inviting tenders for sale of the hotel.

35. Learned senior counsel submits that the respondents had treated the amounts paid to the contractors for the work done as expenditure and not as “loans and advances”. Same accounting principles ought to have been thus followed and the said payment made to the contractors ought to have been shown as expenditure and not as “loans and advances”. The respondents had not given any loan to those contractors.

36. Learned senior counsel invited my attention to the oral evidence of the Chartered Accountant examined by the respondents. The witness admitted that the method of accounting was changed by the respondents. He submits that the respondents were liable to maintain the earlier

accounting method. The said M/s.KPMG had accordingly followed the previous accounting principles in their report and thus there was no error of any nature whatsoever in the said report. He submits that the finding rendered by the arbitral tribunal is contrary to the evidence led by the parties. The payment made to the contractors could have been shown as expenditure and not as an advance.

37. Learned senior counsel invited my attention to the finding rendered by the arbitral tribunal that the payments made to the contractors were shown as current liability, whereas in the balance sheet, the respondents had shown the same as current assets and not current liabilities. He submits that the finding of the arbitral tribunal is perverse and contrary to the admissions made by the respondents and contrary to the case of the respondents also.

38. Learned senior counsel invited my attention to the impugned award insofar as claim no.7 made by the respondents is concerned and would submit that while rejecting the said claim by the arbitral tribunal, the arbitral tribunal has held that the change of accounting method could not be allowed, whereas the arbitral tribunal has completely over looked the change of accounting principles made by the respondents in respondent of two claims. He submits that the award shows inconsistency and patent illegality on the face of award. He submits that claim No.7 was also under caption of “amounts not agreed to by the parties”. Though the arbitral tribunal rejected the said claim which also objected by the petitioners on the identical ground, the arbitral tribunal rejected claim No.7 but allowed claim Nos.1 and 2. The award shows non-application of mind on the part of the arbitral tribunal.

39. Learned senior counsel for the petitioner submits that the arbitral tribunal has not considered several issues raised by the petitioners in the written statement as well as in the written submissions. The petitioners had recorded their oral arguments advanced across the bar in the written submissions. The impugned award has been delivered after more than two years of the closure of hearing. He submits that the delay in pronouncing the award after such gross delay itself would be a ground for setting aside the impugned award. In support of this submission, learned senior counsel placed reliance on the judgment of the Supreme Court in the case of **Anil Rai vs. State of Bihar**, reported in **(2001) 7 SCC 318** and more particularly paragraph 10.

40. Learned senior counsel submits that the arbitral tribunal has not given any cogent reasons for discarding the auditors' report in respect of two claims. The award is thus in violation of the principles of natural justice. Learned senior counsel placed reliance on the definition of “capital assets” from the Blacks Law Dictionary and would submit that the finding rendered by the arbitral tribunal that there was no change in the accounting policy is contrary to record and also contrary to the definition of capital assets. Learned senior counsel also relied upon the definition of “advance” and also of “Net Current Assets”.

41. Learned senior counsel submits that the respondents could not have changed the accounting principles or even accounting method, which was admitted by the respondents in their pleadings before the arbitral tribunal. No part of the contract could have been amended otherwise than in writing. The arbitral tribunal has over looked this issue raised by the petitioners in the impugned award and has rendered a perverse finding.

42. Learned senior counsel submits that in the impugned award, the arbitral tribunal has not considered the admissions of global advisors which was an agency appointed by the respondents which were very crucial and thus the arbitral tribunal have committed patent illegality on the face of award.

43. Insofar as the rate of interest awarded by the arbitral tribunal is concerned, learned senior counsel for the petitioners submits that that the arbitral tribunal has directed the payment of interest at State Bank of India Prime Lending rate plus 2%. He submits that the award insofar as interest is concerned, is vague and indefinite as the prime lending rate of State Bank of India is not decided by the arbitral tribunal. The arbitral tribunal has considered the period for the purpose of interest i.e. 15th August, 2002, which is even prior to the date of invocation of arbitration by the respondents.

44. Learned senior counsel for the petitioners submits that the arbitral tribunal could not have awarded arbitration costs against the petitioners and in favour of the respondents and that also in the sum of Rs.40,00,000/- since the claims made by the respondents were frivolous and untenable.

45. Mr.Joshi, learned senior counsel for the petitioners also invited my attention to the cross-examination of Mr.R.C.Agarwal, one of the witnesses examined by the respondents. He submits that in the cross-examination, the said witness admitted that the accounts were to be finalised as per standard accounting practices where happening of the

event also needs to be taken into consideration. The witness also admitted that prior to the resolution passed by the respondents, it was the practice and method of the respondents to book all the amounts paid to the contractors for renovation of rooms under the heading “Capital Work In Progress”, at the year end.

46. The witness also admitted that the same was in accordance with the standard accounting practices adopted by the respondents. It is admitted that for the year ended March 2001, the respondents had renovated various rooms and those amounts were shown as “Capital Work In Progress.” He also admitted that with regard to year 2000-01, such amounts were always posted by the respondents under the heading “Capital Work In Progress.” However, for the earlier years, he had to check the records. The witness admitted that number of entries had been reversed as were being observed by the management and the auditors keeping in view the standard accounting practice. Last of such entry was reversed on 9th October 2002. The witness also admitted that “Capital Work In Progress” was incomplete capital expenditure. When witness was asked whether such expenditure would form part of fixed assets, the witness admitted that the respondents herein were following the accounting practice as laid down by the Institute of Chartered Accountants of India. When the witness was asked whether as per clause 3.1 of the agreement dated 18th April 2002, Computation of the Net Current Assets Amount would be as per the computation of 2001 Net Current Assets amount, the witness answered in affirmative.

47. Learned senior counsel also invited my attention to the relevant part of the evidence of Mr. Sandeep Parikh, Chartered

Accountant who was examined by the respondents as one of the witnesses. The said witness also admitted in the evidence that the expenditure incurred before and after the date of invitation of bids were not comparable and governed by different accounting principles. The said witness in the cross-examination deposed that the accounting standards laid down by the Institute of Chartered Accountants of India must be followed and did not agree to the suggestion of the petitioners' counsel that the parties were free to agree to any method of accounting irrespective of the accounting standards laid down by the Institute of Chartered Accountants of India. The witness admitted that if the accounts were not to be audited, then the parties were free to prepare accounts in whatever manner they agree. The witness also admitted that the management could decide what method of accounting was to be followed. There could be change in the method even from year to year.

48. Mr. Rao, learned senior counsel for the respondents, on the other hand, submits that the arbitral tribunal has rendered findings of facts after considering the pleadings, documents and the oral evidence led by both the parties which findings are not perverse and thus this Court cannot interfere with such findings of facts under Section 34 of the Arbitration Act. He submits that the report submitted by the auditors was incomplete. The respondents have not changed their accounting policy. The respondents had examined the various witnesses including the Chartered Accountants to prove that there was no change in the accounting principles by the respondents after execution of the agreement with the petitioners. He submits that the petitioners ought to have examined the auditors on the issue whether the report was conclusive or not which the petitioners failed.

49. He submits that the petitioners did not raise any issue of jurisdiction before the arbitral tribunal that the report of M/s.KPMG was final and binding and could not be challenged in the arbitral proceedings. He submits that in any event, the said M/s.KPMG was appointed for submitting a report which was for internal use only. In the said report, M/s.KPMG separately carved out the category of the dispute on which the said auditors had not submitted their views and had advised that those matters shall be agreed by and between the parties. He submits that since the report of M/s.KPMG was not concluded and was incomplete, the arbitral tribunal was empowered to decide those unconcluded issues in the report of the said M/s.KPMG. He submits that the arbitral tribunal has interpreted the terms of the contract which interpretation is a possible interpretation and thus, the same cannot be substituted by another interpretation by this Court.

50. Learned senior counsel submits that the respondents had not changed the accounting principles as canvassed by the petitioners but followed the accounting standards prescribed by the Institute of Chartered Accountants of India. Reliance is placed on clause 6 of the Auditors' report in respect of the balance sheet for the year ended with 31st March 2001 and it is submitted that such expenditure in the on going contracts could have been capitalised only when those 60 rooms were put to use. He submits that in the Meeting held by the Board of Directors, various resolutions were passed for the purpose of deciding the accounting principles. He submits that the petitioners never made any allegations in the said meeting that the respondents were changing the accounting principles. Learned senior counsel invited my attention to

some of the portions of the oral evidence led by Mr.R.C. Agarwal, the witness examined by the respondents.

51. He submits that the respondents being Government Undertaking, the accounts of the respondents are also to be compulsorily audited by Statutory Auditors and Comptroller and Auditor General of India. The petitioners did not prove what did they consider in their bid i.e. whether the expenditure on the said 60 rooms were treated as current assets, fixed assets or something else. He submits that there was no prohibition under the agreement entered into between the parties that the standard accounting practice prescribed by the Institute of Chartered Accountants could not have been followed by the respondents while finalising their accounts. He submits that the deposition of the witnesses examined by the respondents that there was no change in the accounting principles was not shaken in the cross-examination.

52. He submits that the respondents had rightly taken a stand that the expenditure on capital assets was to be treated as “loans and advances” since the said 60 rooms were incomplete and were not put to use. He submitted that the witnesses examined by the respondents were not confronted with any other accounting principles by the petitioners. He submits that no sooner the rooms were put to use, the expenditure incurred on renovation of those rooms were shown as capital assets.

53. Learned senior counsel submits that if there was any change of substantial event after preparation of balance sheet, there could be change in the treatment of particular entries. The witness examined by the respondents had proved that it was always policy of the

respondents to capitalise the fixed assets only after the assets were put to use and the respondents were able to generate income out of the renovation of such assets when put to use. The petitioners, however, did not produce any evidence to prove that such expenditure could not be shown as 'loans and advances'.

54. Learned senior counsel invited my attention to various parts of the impugned award and would submit that the arbitral tribunal has rightly interpreted the various clauses of the agreement entered into between the parties and has come to the conclusion that there was no change in accounting principles by the respondents and that the report submitted by M/s. KPMG was incomplete and not a concluded report on settled issues. He submits that the arbitral tribunal has rightly rendered finding that ultimately the benefit of the said 60 rooms would go to the petitioners and not to the respondents when those 60 rooms would be put to use.

55. Learned senior counsel submits that the Chartered Accountants examined by the respondents were disinterested witnesses who had deposed and proved the practice required to be followed as per accounting standards issued by the Institute of Chartered Accountants of India. He submits that the reports made by the Global Agency were totally irrelevant and thus the arbitral tribunal rightly did not consider the same in the impugned award.

56. On the issue of jurisdiction of the arbitral tribunal raised by the petitioners, the learned senior counsel for the respondents submits

that even if the respondents did not plead any error apparent on the face of the record, the respondents could always show such error from the report of the said M/s.KPMG itself in the arbitral proceedings. He submits that the prima facie view emerges from the report of the said M/s.KPMG is that the amount spent by the respondents under the heading of “Capital Work In Progress” was absurd and contrary to the accounting standards required to be followed as per the norms of the Institute of Chartered Accountants of India. There was thus error apparent on the face of the record and thus the arbitral tribunal was right in rendering such finding of fact.

57. Learned senior counsel submits that the said M/s.KPMG did not deal with the policy of the respondents that unless the assets were put to use and income was generated, it could not be considered as fixed assets. The said issue would go to the root of the matter and thus the arbitral tribunal has rightly considered the issues by exercising their jurisdiction. He submits that in the written submissions filed by the respondents before the arbitral tribunal, the respondents had raised such issues. In so far as the report submitted by M/s.KPMG in respect of the carpet is concerned, the learned senior counsel did not press this issue seriously.

58. Mr.Joshi, learned senior counsel, in the rejoinder, submits that the arbitral tribunal has not considered various submissions made by the petitioners in the impugned award. The arbitral tribunal has rendered the impugned award after more than two years of closure of the proceedings for pronouncing the award. The arbitral tribunal did not

consider the admission of the respondents on various issues. Since the arbitral tribunal has not considered the crucial and important piece of evidence, the findings rendered by the arbitral tribunal are perverse. In support of this submission, learned senior counsel placed reliance on the judgment of the Supreme Court in the case of Associate Builders Vs. Delhi Development Authority reported in (2015) 3 Supreme Court Cases 49. It is submitted by the learned senior counsel for the petitioners that the arbitral tribunal also did not consider the admission of the Global Advisors who were agents of the respondents in the impugned award. My attention is invited to the Minutes of Meeting of the said Global Advisors.

59. Learned senior counsel for the petitioners submits that to ascertain whether there was any error apparent on the face of the documents, the arbitral tribunal could not go into the lengthy evidence but ought to have found out such error apparent on the face of the documents itself which alleged error was not found by the arbitral tribunal. He submits that the principles of Order XLVII Rule 1 of the Code of Civil Procedure, 1908 would apply to the facts of this case. In support of this submission, learned senior counsel placed reliance on various judgments.

60. Learned senior counsel for the petitioners then submits that even on those two issues which according to the arbitral tribunal were not concluded and were left incomplete by the said M/s.KPMG, the M/s.KPMG had expressed their clear views and decisions which were final and binding. He submits that the finding of the arbitral tribunal that the said report was incomplete is perverse. The arbitral tribunal has not

rendered any finding that there was any error apparent on the face of the documents in the said report. Learned senior counsel placed reliance on the judgment of the Supreme Court in the case of ***Deva Metal Powders Pvt. Ltd. Vs. Commissioner, Trade Tax, U.P.***, reported in ***2008 (2) SCC 439*** and in particular paragraph 10 thereof.

61. It is submitted by the learned senior counsel that the method and accounting principles followed prior to the date of agreement was required to be followed consistently after execution of the agreement with the petitioners. Since there was sale and purchase of on going business, any change in method or accounting principles for recording any entries subsequently by the respondents was not binding on the petitioners. He submits that the respondents wanted to sell the hotel. Reliance is placed on clauses 2.6.4 and 3.1 of the agreement in support of the aforesaid submission. He submits that even if the respondents had effected any changes in the accounting treatment under the guise of the policy issued by the Institute of Chartered Accountants of India, the same were irrelevant and was not binding in so far as the agreement entered into between the parties is concerned.

62. He submits that the parties were bound by the terms of the agreement entered into for the purpose of valuation and not with the alleged policy of the Institute of Chartered Accountants of India for the purpose of following a particular accounting method. He submits that Mr.R.C. Agarwal who was examined as witness by the respondents did not dispute that there was a change in accounting principles by the respondents.

63. It is submitted by the learned senior counsel for the petitioners that since the respondents had admitted about the admissions of M/s.Global Advisors on the accounting principles, the petitioners were not required to lead any separate evidence to prove the accounting principles. There was no *iota* of evidence led by the respondents to show that as per the accounting principles, the respondents could treat any expenditure on renovation as 'loans or advances'. Learned senior counsel submits that part of the impugned award shows patent illegality on the face of the award and thus this Court has ample power to interfere with such patently illegal award under Section 34 of the Arbitration Act.

REASONS AND CONCLUSIONS :

64. Before the arbitral tribunal, the petitioners and the respondents had made their respective claims. The arbitral tribunal raised eight points for determination. The respondents examined two witnesses viz. Mr.R.C.Agarwal and Mr. Sandeep Parikh whereas the respondents examined Ms.Ashu Sood. In the impugned award, the arbitral tribunal held that the claims of the respondents herein was maintainable to the extent M/s.KPMG had not given their final decision on several disputed items. It is held by the arbitral tribunal that M/s.KPMG report would be final and binding to the extent it has decided any matter and not left for the parties to discuss or to sort out amongst themselves. It is also held that the report of the said M/s.KPMG was a condition precedent to any claim being made by the parties one against other only to the extent that if that was an event which had occurred prior to M/s.KPMG submitted their report, it could have been urged before M/s.KPMG . It is held that to some extent the condition precedent had not been performed.

65. The arbitral tribunal held that the Net Current Assets as on the transfer date was required to be rectified. Insofar as claim no.1 is concerned, it is held by the arbitral tribunal that the amount of Rs.3,67,42,000/- towards work done by the Gulraj, a sum of Rs.39,41,000/- being the amount of certified work done by Raghbir, a sum of Rs.3,68,000/- towards the work done by Nishu Enterprises had all been treated as capital expenditure as on 5th June, 2002 by M/s.KPMG totalling to Rs.4,10,51,000/-. The arbitral tribunal accepted the contention of the respondents herein that though the items would to be shown under the head of the “loan and advances” and thus the increase of loans and advances on the transfer date i.e. 5th June, 2002 would increase to Rs.4,10,51,000/-.

66. Insofar as claim no.3(b) is concerned, the arbitral tribunal accepted the contention of the respondents herein that the value of the unlaidd stocks of carpets to the extent of Rs.8,05,000/- should be added to the current assets as on the transfer date and accordingly the inventory item would go up correspondingly by Rs.8,05,000/-. In respect of claim no.6, on the basis of the statements made by both sides, the arbitral tribunal found that a sum of Rs.9,56,000/- should be reduced from the net current assets as on 31st March, 2001 and the net current assets should be accordingly reduced by the said sum. It is held that after making those adjustments in the net current assets as on 31st March, 2001 the figure of net current asset as on 31st March, 2001 comes to Rs.3,94,02,000/-. It is held by the arbitral tribunal that the figure of net current asset as on 5th June, 2002 arrived by M/s.KPMG would have to be reduced by a figure of Rs.4,83,28,000/-. The arbitral tribunal directed that a sum of

Rs.1,88,48,920/- was awarded to the respondents herein. The arbitral tribunal directed the payment of interest at State Bank of India Prime Lending rate plus 2% per annum from 15th August, 2002 and also directed payment of Rs.40,00,000/- as cost of the arbitration in favour of the respondents herein.

67. Under the said agreement to sale dated 18th April, 2002, the 'net current assets' has been defined which would be aggregate of the current assets, loans and advances of the business, including total inventories, sundry debtors, loans and advances, but excluding cash and bank balances and current accounts with scheduled banks under the accounting principals used to prepare the current assets loans and advances as mentioned in Schedule 4.

68. Under clause 2.1 of the said agreement, the petitioners had agreed to purchase and the respondents had agreed to sell, assign, transfer and convey to the petitioners, the business as a going concern and on as is where is basis, at and for an agreed consideration mentioned therein. Under clause 2.4 of the said agreement, it was provided that it was the intention of the parties that the sale of business to the purchaser shall take effect on the transfer date and shall be treated as having been made with effect from the transfer date.

69. Under clause 2.6 of the said agreement records an undertaking of the respondents herein that from the date of the said agreement till the transfer date, the respondents shall not do any of the activities mentioned therein and during that period the respondents shall

require the prior written permission of the petitioners. Clause 2.6.3 of the said agreement clearly provided that the respondents shall not make any change in the method of accounting or accounting practice or policy of the business except where such change is required under applicable law.

70. Clause 2.6.4 also prohibited the respondents from making any new capital expenditure or commitment for any capital expenditure except as disclosed in the Disclosed Information, of an amount exceeding Rs.2,00,000/- provided that if the cumulative amount of such new capital expenditure incurred was more than Rs.20,00,000/- except as disclosed in the Disclosed Information, the respondents shall require the prior written permission of the petitioners for every subsequent capital expenditure made by it between the date of the said agreement and the transfer date.

71. Clause 2.6.8 provided that the respondents shall not make any material changes in the customary methods of operation of the business including without limitation, practices and policies relating to purchasing, marketing, selling and pricing subject to without prior written permission of the petitioners.

72. Under clause 3.1 of the said agreement, it was provided that the petitioners shall appoint an accounting firm (auditors) to prepare a reconciliation statement showing in reasonable detail the computation of the net current assets of the business as of the transfer date, computed in a manner consistent with the computation of the 2001 net current assets provided that the computation of Net current assets would exclude any inventory which carries the Centaur logo or any other symbol of the

vendor which forms part of the consumables and the net current asset amount and will further exclude any bad debts. Under clause 3.2, the auditors were under an obligation to deliver a reconciliation statement to each of the parties within 45 calendar days from the transfer date which was to be final and binding on the parties to the agreement subject to the exception that there was no error apparent on the face of the records. Clause 3.3 of the agreement provides for giving effect to the said reconciliation statement.

73. Under clause 7.1.11 of the said agreement, the respondents had declared that except as disclosed in the Disclosed Information or otherwise provided for in or pursuant to the said agreement, since the date of the last audited financial statements of the business contained in the last audited financial statement of the respondents for the year ended on 31st March, 2000, there had not been any material change in the accounting policy of the business.

74. The said M/s.KPMG submitted a report on 14th March, 2003. The respondents made their claims based on the said report submitted by M/s.KPMG and placed reliance on the said report in respect of most of their claims. However, the respondents disputed the said report insofar as claim no.1 and part of claim no.3 is concerned on the ground that the said report was not complete in respect of those two claims and thus the arbitral tribunal could have decided those two claims also. It is not in dispute that the arbitral tribunal has rejected most of the claims made by the respondents accepting the validity, authenticity and accuracy of the said report except few items in respect of which the

arbitral tribunal came to the conclusion that the said report of the M/s.KPMG had not given any final decision. Based on this conclusion, the arbitral tribunal allowed claim no.1 of the respondents and held that the figures of loan and advances on the transfer Rs.4,10,51,000/- and added a sum of Rs.8,05,000/- to the current assets insofar as the value of unlaidd stocks of carpets was concerned. It is not in dispute that the respondents have not impugned any part of the arbitral award by filing a separate petition though some of the claims made by the respondents came to be rejected by the arbitral tribunal.

75. A perusal of the record indicates that prior to the date of invitation to bid issued by the respondents, the respondents had already placed the letter of intent on M/s.Raghubir Furniture for supply of loose furniture for 60 rooms and issued letter of intent on M/s.Gulraj Engineering Construction Co. for renovating the additional 60 rooms on 8th May, 2011. There was a delay on the part of the contractor in completing the said work under two letters of intent.

76. A perusal of the record indicates that there is no dispute that in the meeting held on 2nd August, 2001, between the respondents and the global advisors, the respondents had mentioned that as per the draft agreement to sell, the difference in the Net Current Assets from the last date when the schedules had been prepared to the transfer date, would be prepared and the difference was to be adjusted in the purchase price. Similar adjustment was also proposed to be made for capital work in progress. The respondents had decided not to seek any additional reimbursement in respect of the capital expenditure.

77. A perusal of the resolution in the meeting of board of directors held on 22nd May, 2002, indicates that in the said meeting, the respondents sought to change their accounting policies and decided that the respondents should book the amounts of payments made for those contracts under the head “Advances” and should ensure that the amounts so paid were reflected and accounted for in the “Net Settlement” with the buyer towards Net Current Assets adjustments for all transactions upto the transfer date. The respondents already paid a sum of Rs.3,54,24,000/- to those contractors and further sum of Rs.97,31,000/- was payable to the contractors.

78. I have perused the minutes of the meeting held on 3rd August, 2002 held between the representative of the parties, including the said auditors and global advisors in which meeting the disputes regarding accounting treatment to the expenditure incurred on renovation of addition 60 rooms were considered. Global advisors in the said meeting stated that they were made to believe that renovation of 60 rooms would be completed as per schedule given earlier to the contractors and it was fair that the respondents assume liabilities as per information disclosed in the transaction documents as on transfer date i.e. from 5th June, 2002 and the petitioners for unfinished work.

79. A perusal of the said minutes indicates that the Managing Director of the respondents had admitted that he was not disputing the contention of the petitioners that with regard to accounting policy but claimed that the petitioners ought to assume the liability for unfinished capital work after the transfer date. The said auditors forwarded a copy of

the draft report to the parties. A perusal of the reply dated 22nd October, 2002 of the respondents, it is clear that it was their own statement that they had never disputed the accounting treatment of capital advances in the draft report as mentioned in meeting held on 3rd August, 2002, however, they relied upon clause 9.1.3 of the agreement.

80. Mr.Joshi, learned senior counsel rightly placed reliance on the letter dated 31st January, 2003 which was addressed by the respondents to the auditors claiming that the advance paid upto 31st December, 2001 being the date of second round of bidding would be borne by the respondents and moneys paid thereafter by the respondents be reimbursed as capital commitment were to the knowledge of buyer. A perusal of the award clearly indicates that though the respondents had agreed to bear the expenditure incurred upto 31st December, 2001, arbitral tribunal did not consider the said admission on the part of the respondents in the impugned award. The arbitral tribunal also did not consider the statement made by the respondents in the meeting held on 3rd August, 2002 which was also attended by the said auditors and global advisors. In my view, both these documents were very crucial and material for the purpose of deciding the issues have been totally overlooked by the arbitral tribunal and shows patent illegality in the impugned award.

81. A perusal of the financial documents forming part of the record clearly indicates that in various balance sheets and annual reports of the respondents and in particular in the year 2000- 2001 admittedly the item capital work in progress had been shown under the fixed assets and was part of the fixed assets and not the current assets. The respondents

had capitalized the expenditure incurred on carpet major renovation as fixed assets.

82. A perusal of the report of the said M/s.KPMG clearly indicates that it was proposed by the auditors that the payments made to two contractors and shown under the heads 'loans and advances' should be treated as capital work in progress. A perusal of the said report clearly indicates that the said M/s.KPMG had given various reasons as to how the said auditor had arrived at net current assets. The said M/s.KPMG had also arrived at the figures of the net current assets after the proposed adjustment showed therein including under the head 'loans and advances'. It was made clear in the said report that net current assets statement should be read in conjunction with the notes appended thereto which would explain certain transactions which had been accounted for in a manner which was not acceptable to the respondents herein which needs to be mutually discussed and agreed between the parties. It was further stated that the said M/s.KPMG had relied upon the representations from the petitioners or for the respondents for several matters and as a result thereof had concluded the said report.

83. On page 9 of the said report, M/s.KPMG proposed an adjustment for advances paid to the contractors M/s.Gulraj Rs.33,488 thousand, M/s.Raghubir Rs.3,343 thousand and M/s.Nishu Enterprises Rs.300 thousand as capital work in progress. Insofar as item of 'carpets' is concerned, the said M/s.KPMG proposed an adjustment to exclude from inventory the value of unlaidd carpets procured for the renovation of rooms at Rs.805 thousand on the ground that the accounting policy of the

respondents stated that carpets purchased for major renovations were to be capitalized.

84. On page 17 of the said report, the said M/s.KPMG observed that in the past the respondents had accounted for advances to those contractors under the 'capital work in progress'. It is observed that the said M/s.KPMG were informed that advances paid in 2000-01 for the renovation of certain rooms at the Juhu property, even though not completed at year end, were classified as 'capital work in progress'. The capital advance paid for the renovation of the health club and coffee shop at Centaur Hotel was similarly classified as at 31st March, 2001. In the said report, M/s.KPMG expressed their views that the appropriate accounting treatment would appear to be as follows :-

- (a) The extent to which work completed had been certified should be classified as capital work in progress.
- (b) Advances paid should be adjusted accordingly,
- (c) Additional liability should be created to the extent that the value of work certified exceeds advance.
- (d) In case of M/s.Gulraj, the amount certified by the architect Rs.36,742 thousand should be treated as capital work in progress which includes the advances already paid (Rs.31,500 thousand) and a provisions should be created for the difference between work certified and advances already paid. Accordingly a residual liability for Rs.4572 thousand (net of advance of Rs.31500 thousand and amounts recoverable from the contractor Rs.670 thousand) is proposed to be created.

85. Similarly based on an interim bill for work completed by M/s.Raghbir before the transfer date and certified by the architect, an amount of Rs.3941 thousand should be treated as capital work in progress and a residual liability of Rs.760 thousand (net of advance of Rs.3,132 thousand and amount recoverable from the contractor Rs.49 thousand) is proposed to be created for M/s.Raghbir. The respondents however did not agree with the said accounting treatment. A perusal of the said portion of the report clearly indicates that the said auditors had already proposed to make various adjustment having found change in the accounting principals made by the respondents after entering into agreement with the petitioners.

86. Based on such opinion, in the said M/s.KPMG report, the auditors had already arrived at the figures of net current assets statement. In my view, the findings of the arbitral tribunal that the said report was not complete in respect of few items on the ground that the said auditors had advised that on those items, the parties need to agree is contrary to the said report submitted by M/s.KPMG. Though in the said report, the said M/s.KPMG had felt it more convenient and advised that on those two issues, the parties shall discuss, M/s.KPMG had already given their final opinion on all the issues including the said two issues which were in favour of the petitioners. The findings of the arbitral tribunal in my view is perverse and contrary to the said report.

87. Under clause 3.2 of the said agreement, the said reconciliation statement prepared by the said auditors was final and binding on the parties to the said agreement except for the error that was

apparent on the face of the record. A perusal of the award clearly indicates that no findings has been rendered by the arbitral tribunal that there was any error apparent on the face of the record of the said report submitted by the said M/s.KPMG. It was also not the case pleaded by the respondents that for those two claims, there was any error apparent on the face of the record of the said report. In my view on the plain reading of clause 3.2 of the said agreement, it is clear that the said report was final and binding on both parties only subject to an exception that there was no error on the face of the record. The arbitral tribunal has substantially accepted the said report and substantial part of the claims of the respondents have been rejected by the arbitral tribunal accepting the correctness and authenticity of the said report. In my view the said report was final and binding on both the parties and the arbitral tribunal therefore did not have jurisdiction to re-open any part of the said report.

88. In my view the respondent not having raised the plea for reopening any portion of the said report by the arbitral tribunal, the respondents cannot be permitted to urge such issue across the bar at the time of argument before the arbitral tribunal or in the present proceedings. In my view Mr.Joshi, learned senior counsel for the petitioners is right in his submissions that the principles of Order 47 Rule 1 of Code of Civil Procedure, 1908 would apply to this situation. I am not inclined to accept the submission of Mr.Rao, learned senior counsel for the respondents that such issue though not raised in the pleadings by the respondents could have been raised even at the stage of arguments or any any stage of the matter.

89. In case of ***Meera Bhanja (supra)***, it is held by the Supreme Court that the review bench had re-appreciated the entire evidence, sat almost as court of appeal and has reversed the findings reached by the earlier division bench. The said exercise is not permitted under order 47 Rule 1 of the Code of Civil Procedure.

90. Supreme Court in case of ***Parsion Devi and others (supra)*** has held that under Order 47 Rule 1 of Code of Civil Procedure, a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 of Code of Civil Procedure.

91. Supreme Court in case of ***Deva Metal Powders Pvt. Ltd. (supra)*** has held that where an error is far from self-evident, it ceases to be an apparent error. It is held that a decision on a debatable point of law or a disputed question of fact is not a mistake apparent from the record. The plain meaning of the word "apparent" is that it must be something which appears to be so ex facie and it is incapable of argument or debate. A perusal of the award indicates that the arbitral tribunal has though not come to any conclusion that there was any error apparent on the face of the record of the said report submitted by the auditors has taken the task upon themselves to review the said report by looking into the evidence which in my view is not permissible in law. Even if according to the arbitral tribunal any portion of the said report was showing any error apparent on the face of the record, the arbitral tribunal could not have

corrected such error and ought to have referred that issue to the said auditors. In my view principles laid down by the Supreme Court in the aforesaid judgments would be applicable to the issue involved in this matter.

92. A perusal of the award indicates that on one hand, the arbitral tribunal held that the said auditors had not given their final decision on claim no.1 and part claim no.3 and the said report was incomplete and on the other hand it is held by the arbitral tribunal that the said auditors in the said report had treated the amount of Rs.4,10,51,000/- as capital expenditure as on 5th June, 2002 which according to the arbitral tribunal was required to be shown under the heads of 'loans and advances' and accordingly directed the addition of the said amount to the said heads of 'loan and advances'. In my view the award shows patent illegality and apparent contradiction in the impugned award. If according to the arbitral tribunal the auditors had treated the said amount as capital expenditure in the said report, the said report was thus final and binding on parties and on that ground itself, the arbitral tribunal could not have reopened the said report. In my view there is patent error committed by the arbitral tribunal in the impugned award, and thus that portion of the award deserves to be set aside.

93. A perusal of the record indicates that though the respondents had admitted before the arbitral tribunal that a sum of Rs.1,72,00,000/- would be borne by the respondents, the arbitral tribunal over looked such crucial admission on the part of the respondents and committed patent illegality on the face of award and thus that portion of the said award deserves to be set aside.

94. A perusal of the record indicates that there was no change in the assets of the respondents company which were transferred to the petitioners under the said agreement by virtue of those 60 rooms since the same were already the assets of the respondents on the cut of date. The arbitral tribunal in my view has re-written the contract, which is not permissible in law. There is no provision of reimbursement of any amount by the petitioners to the respondents under the said agreement. In my view the arbitral tribunal has decided contrary to the terms of the agreement and has virtually directed the petitioners to reimburse the respondents for the expenditure incurred by the respondents by treating the same as loan and advances and by adding the said amount to the amount of the net current assets. No loans were given by the respondents to the contractor and thus even on that ground such amounts which were incurred as expenditure could not have been shown under the heads 'loans and advances'. The award shows patent illegality on the face of the award.

95. A perusal of the oral evidence of the Chartered Accountant examined by the respondents clearly indicates that he had admitted that the method of accounting was changed by the respondents. Mr.R.C.Agarwal was the managing director of the respondents and was examined as a witness. In his cross examination he admitted that at the time of entering into the contract with the contractor, no advances were made by the respondents. When the witness was shown clause 2.6.3 of the agreement and was asked whether the respondents were prohibited from the change method practice or policy, the said witness deposed that there was no prohibition. He deposed that the accounts were to be

finalized as per standard accounting practice where happening of the event were also required to be taken into consideration. The witness admitted that prior to the board resolution passed by the respondents, it was the practice and method of the respondents to book all the amounts paid to the contractors for renovation of rooms under the heading 'capital work in progress' at the year end.

96. The said witness also admitted that the same was in accordance with the standard accounting practices adopted by the respondents. The said witness admitted that in the year March 2001, the respondents renovated various rooms and the said amounts were shown as capital work in progress. He further deposed that at that time the fact with regard to exact date of divestment and transfer of the property was not known and as per the standard accounting practices, the same had been dealt with. The witness also confirmed with regard to 2000-2001, that such amounts were always posted by the respondents under the heading 'capital work in progress'. For the earlier years, the witness deposed that he shall have to check the records. The said witness admitted that the entries had been reversed in the books of accounts after 31st March, 2002. He deposed that the entires were reversed as observed by the management and the auditors keeping in view the standard accounting practice. Last of such entry was reversed on 9th October, 2002.

97. Insofar as evidence of Mr.Sandeep Parikh, Chartered Accountant examined by the respondents is concerned, in his examination in chief he deposed that the expenditure incurred before and

after the date of invitation of bids were not comparable and they were governed by different accounting principles. The said witness when asked as to which accounting standard provides that the terms of the agreement between the parties could be overridden, he deposed that he was not aware of such accounting standard at present. When the witness was shown the accounting standards alleged to have been laid down by the Institute of Chartered Accountants of India and was asked to point out which accounting standards prevents a party from preparing accounts in terms of the agreement, after going through those accounting standards laid down by the Institute of Chartered Accountants of India, the witness explained that he was not aware of the existence of any such accounting standards. The said witness admitted that if the accounts were not to be audited, then the parties were free to prepare accounts in whatever manner they agree.

98. The said chartered accountant was asked whether the parties could change method of accounting or accounting practice, he deposed that the management could decide what methods of accounting should be followed and they could change the method from year to year. The witness agreed that as per clause 2.6.3, the parties had agreed not to make any change in the method of account or accounting practice, unless a law required such change.

99. A perusal of the oral evidence laid down by the respondents clearly indicates that the witness examined by the respondents categorically admitted that there was change in method of accounting and accounting principles. The said auditors in their report also noticed this

changes. The work allotted to the contractor for renovation was admittedly not completed when the agreement was entered into between the parties and not even on the cut off date. The respondents had shown the said amount paid to such contractor under the heads 'capital work in progress' under the fixed assets. In my view since there was a clear bar under clause 2.6.3 read with 2.6.8 of the said agreement, without prior permission to the petitioners, the respondents could not have made change in the method of accounting or accounting practice or policy of the business except where such change was required under the applicable law. The respondents could not establish before the arbitral tribunal that there was any change in the applicable law between the period when the agreement was entered into with the petitioners and the cut off date.

100. The arbitral tribunal in my view has completely overlooked the crucial and material evidence produced by the respondents themselves in which they had admitted that there was change in method and also in accounting principles. The guidelines issued by the Institute of Chartered Accountants of India was not changed during the period between the date of the agreement and the cut off date. It is obvious that the said decision taken by the board of directors of the respondents after entering into the agreement with the petitioners was contrary to the said agreement and was obviously with a view to increase the amount of the net current assets. In my view by changing the accounting method and accounting principles by the respondents after execution of the agreement, the respondents had changed the quantum of the net current assets against the petitioners and in favour of the respondents. The said auditor has thus rightly proposed to make such adjustment and to show

such amount by the respondents to such contractor under the heads 'work in capital in progress'. In my view, the arbitral tribunal has committed patent error by ignoring the final and binding report of M/s.KPMG and taking a different view in the matter insofar as disputed portion of claim of respondents allowed by the arbitral tribunal is concerned.

101. A perusal of the record indicates that the arbitral tribunal has proceeded on the premise that the payment made to the contractor was shown as current liability though in the balance-sheet, the respondents had shown the said payment as current assets. There is gross error apparent on the face of the record. The award shows patent illegality and non-application of the mind on the part of the arbitral tribunal. A perusal of the award indicates that though the arbitral tribunal rejected the claim no.7 made by the respondents on the ground that a change of accounting methods could not be allowed, the arbitral tribunal applied different yardstick and took contrary and inconsistent view while allowing other two claims made by the respondents. The award thus shows contradiction, inconsistency and patent illegality on the face of the award.

102. A perusal of the record indicates that the arbitral tribunal has pronounced the award after more than two years of the closure of the proceedings and has not dealt with several issues raised by the petitioners which were placed on record by way of written submissions which was summary of the oral arguments claimed to have been advanced by the petitioners. In the impugned award, the arbitral tribunal has also not considered the admission of the global advisors which was an agency appointed by the respondents themselves. The award thus shows patent illegality.

103. I am not inclined to accept the submission of Mr.Rao, learned senior counsel for the respondents that there was no change in the accounting policy. The said submission is contrary to the oral evidence laid by the respondents themselves. Even the change in method of accounting was not permissible under clause 2.6.3 of the agreement read with clause 2.6.8. The accounting standard prescribed by the Institute of Chartered Accountants of India were neither proved by the respondents nor such accounting standards prescribed by the Institute of Chartered Accountants of India would come into the category of change of law.

104. Insofar as submission of Mr.Rao that the respondents being a government undertaking and thus the accounts of the respondents were audited compulsorily twice and no infirmity was found by the auditors is concerned, even if the accounts of the respondents by change of method were audited twice, since there was a change in method of accounting and accounting policy and even if have been approved by the auditors, it would not be binding on the petitioners. The parties would be still governed by the agreement entered into between them and not on the basis of the advise received by the respondents from their auditors which may be contrary to the provisions of the agreement.

105. In my view, there is no substance in the submission of the learned senior counsel for the respondents that interpretation of the clause of the agreement by the arbitral tribunal is a possible interpretation and cannot be substituted by this court by another interpretation. In my view interpretation of the clause of the agreement is ex-facie contrary to the plain reading of such clause. It is not a case of simplicitor interpretation

of the terms of the contract but the award shows patent illegality and amount awarded is *de-hors* the provisions of the agreement.

106. I am not inclined to accept the submission of the learned senior counsel for the respondents that the Chartered Accountant examined by the respondents were dis-interested witnesses. In my view even the said witness could not prove the case of the respondents and could not even establish the accounting standards issued by the Institute of Chartered Accountants of India. Even the said witness admitted that there was change in method adopted by the respondents after execution of the agreement on the parties.

107. Insofar as claim in respect of the carpet allowed by the arbitral tribunal is concerned, learned counsel for the respondents fairly did not press this issue seriously.

108. Supreme Court in case of ***Associate Builders vs. Delhi Development Authority*** has laid down the principles of law as to when the arbitral award can be set aside under section 34 of the Arbitration and Conciliation Act, 1996. In my view the principles laid down by the Supreme Court in the said judgment squarely applies to the facts of this case insofar as some of the claims allowed in favour of the respondents are concerned.

109. Insofar as interest awarded by the arbitral tribunal is concerned, that portion of the award awarding interest at State Bank of India Prime Lending rate plus 2% per annum which in my view is vague

and is incapable of execution. The arbitral tribunal has not decided about the prevailing rate of interest of State Bank of India from 15th August, 2002.

110. In my view since the arbitral tribunal has rejected the substantial claims made by the respondents and claims which are awarded in favour of the respondents are patently illegal, the arbitral tribunal could not awarded cost of Rs.40,00,000/- against the petitioners.

111. I, therefore, pass the following order :-

- (a) Arbitral award in respect of claim no.1, claim no.3 (b) and directions in operative part of the award in paragraphs (a) and (b) directing the petitioners to pay a sum of Rs.1,88,48,920/- with interest and cost is set aside.
- (b) Arbitration petition is disposed of in the aforesaid terms.
- (c) There shall be no order as to costs.

R.D. DHANUKA, J.