

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

ARBITRATION PETITION NO.410 OF 2015

1. Mr.Gulmali Amrullah Babul)
an adult of Mumbai,Indian inhabitant)
resideing at Haji Esmail Gani Bldg.,)
Room No.92, 2nd Floor,)
Dr.Ambedkar Road, Byculla,)
Mumbai - 400 027.)

2. Smt.Siddiqua w/o Sunny A. Babul)
an adult of Mumbai,Indian inhabitant)
resideing at Mohamedi Bldg.,)
Room No.1 and 2, 2nd Floor,)
SVP Road, Dongri “Char Nal,”)
Mumbai - 400 009.)

3. Mrs.Effat Gulmali A.Babul)
an adult of Mumbai,Indian inhabitant)
resideing at Haji Esmail Gani Bldg.,)
Room No.92, 2nd Floor,)
Dr.Ambedkar Road, Byculla,)
Mumbai - 400 027.)

.. Petitioners
(Original Respondents)

Versus

Shabbir Salebhai Mahimwala)
an adult of Mumbai,Indian inhabitant)
resideing at Flat No.1, Bldg. No.6,)
Hawen Bldg., Byculla,)
Mumbai - 400 008.)

.. Respondent
(Original Claimant)

Mr.H. Toor a/w Mr. Nandu Pawar for the petitioners.
Mr.Ashish Kamat a/w Ms.Nidhi Singh a/w Ms.Aditi Maheshwari i/by
M/s.Vidhi Partners for the respondent.

ALONG WITH**ARBITRATION PETITION (L) NO.1435 OF 2015**

Shabbir Salebhai Mahimwala)
 an adult of Mumbai, Indian inhabitant)
 resideing at Flat No.1, Bldg. No.6,)
 Hawen Bldg., Byculla,)
 Mumbai - 400 008.) .. Petitioner
 (Original Claimant)

Versus

1. Mr.Gulmali Amrullah Babul)
 an adult of Mumbai, Indian inhabitant)
 resideing at Haji Esmail Gani Bldg.,)
 Room No.92, 2nd Floor,)
 Dr.Ambedkar Road, Byculla,)
 Mumbai - 400 027.)

2. Smt.Siddiqua w/o Sunny A. Babul)
 an adult of Mumbai, Indian inhabitant)
 resideing at Mohamedi Bldg.,)
 Room No.1 and 2, 2nd Floor,)
 SVP Road, Dongri "Char Nal,")
 Mumbai - 400 009.)

3. Mrs.Effat Gulmali A.Babul)
 an adult of Mumbai, Indian inhabitant)
 resideing at Haji Esmail Gani Bldg.,)
 Room No.92, 2nd Floor,)
 Dr.Ambedkar Road, Byculla,)
 Mumbai - 400 027.) .. Respondents
 (Original Respondents)

Mr.Ashish Kamat a/w Ms.Nidhi Singh a/w Ms.Aditi Maheshwari i/by
 M/s.Vidhi Partners for the petitioner.
 Mr.H. Toor a/w Mr. Nandu Pawar for the respondents.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 29th September 2015.
PRONOUNCED ON : 29th October 2015.

Judgment :-

. By Arbitration Petition No.410 of 2015 filed under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 (for short “the Arbitration Act”), the petitioners (original respondents) have impugned the order dated 11th October 2014 passed by the learned arbitrator under Section 17 of the Arbitration Act passed in favour of the respondent to the said arbitration petition. By Arbitration Petition (L) No.1435 of 2015 filed under Section 9 of the Arbitration Act, the petitioner/original claimant has prayed for an order and direction against the respondents to the said arbitration petition to forthwith hand over possession and management of the 'King of Iran Restaurant' as per and in implementation/compliance of the orders dated 10th March 2015 and 23rd March 2015 passed by the learned arbitrator under Section 17 of the Arbitration Act in favour of the petitioner to the said arbitration petition and for various other reliefs. By consent of the parties, both the arbitration petitions were heard together and are being disposed of by a common order.

2) The petitioners in Arbitration Petition No.410 of 2015 were the original respondents in the arbitral proceedings whereas the respondent to the said arbitration petition was the original claimant. For the sake of convenience, the parties are described in this order as they were described in the arbitral proceedings as “the claimant and the respondents,” as the case may be. Some of the relevant facts for the purpose of deciding these petitions are as under :

3) On 20th May 2001, a Partnership Deed was entered into between the respondents and one Sarguroh family in the name and style of M/s.King of Iran (for short “the firm”) which held and conducted the restaurant business in the premises namely Shop Nos. 9 to 14, Yusuf Chambers, Byculla (E), Mumbai (for short “the said suit premises”). It was, however, the case of the respondents that the said suit premises did not belong to the firm.

4) On 12th February 2002, the claimant and the respondents entered into a Memorandum of Understanding (MOU) under which the claimant agreed to be inducted as a partner in the said firm in lieu of the claimant getting finance to renovate the said suit premises which stood damaged in fire on 21st May 2001 and to restart the partnership business. It is the case of the claimant that the said MOU was wrongfully disputed by the respondents though the same was acted upon.

5) On 15th February 2002, a Deed of Retirement was executed between the respondents as continuing partners and the Sarguroh family as the exiting partners who held 35% share in the said firm. The respondent no.1 sought from the Sarguroh family release of their 35% share in the firm including the tenancy rights of the firm.

6) On 1st April 2002, the claimant and the respondents executed a Partnership Deed. Under the said Partnership Deed, the claimant had 30% share in the said partnership. Clause 22 of the Partnership Deed provides for an arbitration agreement. From the year 2006 onwards, the claimant had been intermittently outside the country

and the affairs of the firm were entrusted to the respondent no.1. It is the case of the claimant that from April 2002 to May 2013, the claimant had been paid approximately Rs.30,000/- per month towards his share in the firm which amounts were deposited in the accounts of the claimant by the respondents or his family members.

7) Vide their letters dated 11th March 2013, 23rd March 2013 and 9th April 2013, the claimant requested the respondents to give accounts of the suit firm for the period from April 2002 to March 2013. It is the case of the respondents that on 16th April 2013, the respondents furnished the accounts of the suit firm to the claimant along with income tax returns of the suit firm from 1st April 2002 to 31st March 2012.

8) It is the case of the claimant that the claimant sat in the hotel of the suit firm, M/s. King of Iran from April 2013 to 7th July 2013 and realized that the firm had a higher revenue than those disclosed in the accounts of the firm which were prepared and filed by the respondent no.1.

9) On 25th June 2013, the claimant through his advocate dissolved the said firm and invoked the agreement recorded in clause 22 of the Partnership Deed. In the said letter, the claimant alleged that accounts of the respondent no.1 were totally fabricated, manipulated and wholly inaccurate. The respondents vide their advocate's letter dated 26th July 2013 denied the said allegation made by the claimant in his advocate letter dated 25th June 2013.

10) The claimant also filed Arbitration Petition (L) No.1514 of 2013 under Section 11 of the Arbitration Act for appointment of an arbitrator. The claimant also filed Arbitration Petition (L) No.1370 of 2013 under Section 9 of the Arbitration Act for interim measures against the respondents.

11) By an order dated 13th December 2013, the designate of the Chief Justice appointed a Counsel practicing in this Court as a sole arbitrator in the said Arbitration Petition (L) No.1514 of 2013. On 7th January 2014, the claimant filed his statement of claim before the learned arbitrator. On 13th January 2014, the claimant filed an application under Section 17 of the Arbitration Act before the learned arbitrator inter alia praying for an order of allowing either of the parties to conduct the business of the dissolved firm by raising bids and for settling the terms and conditions for such bids for the said purposes. The claimant also sought an injunction restraining the respondents from running and/or conducting the business and operating and /or maintaining the bank accounts of the suit firm. On 14th April 2014, the claimant withdrew the Arbitration Petition (L) No.1370 of 2013 which was filed by the claimant under Section 9 of the Arbitration Act as undertaken before the learned arbitrator.

12) On 10th May 2014, the application under Section 17 of the Arbitration Act filed by the claimant was heard by the learned arbitrator. On 15th March 2014, the respondents filed statement of defence and counter claim before the learned arbitrator. On 26th June 2014, the claimant filed an application for amendment of statement of claim to plead that the said shop premises were the properties of the suit firm.

Learned arbitrator passed an order on 11th October 2014 permitting both the parties to submit bids to the Commissioner Mr.Rajeev Bhatia and directed him to conduct the bidding process and to submit his report to the learned arbitrator.

13) On 20th November 2014, the respondents filed the Arbitration Petition No.410 of 2015 under Section 37 of the Arbitration Act and impugned the said order dated 11th October 2014. By an order dated 22nd November 2014, the learned arbitrator allowed the amendment application filed by the claimant and granted liberty to the respondents to file additional statement of defence.

14) By an order dated 10th March 2015, the learned arbitrator accepted the bid of claimant and directed the respondents to hand over management of the business of the dissolved firm to the claimant. The respondents did not attend the said meeting before the learned arbitrator. On 23rd March 2015, the learned arbitrator once again directed the respondents to hand over management of the business of the dissolved firm to the claimant.

15) It is the case of the claimant that the respondents have executed an impugned Partnership Deed on 11th March 2013 in the same name and style of M/s.King of Iran and have usurped the partnership business and assets pending the disposal of the arbitral disputes before the learned arbitrator. The claimant filed Arbitration Petition (L) No.1435 of 2015 on 15th July 2015 for various interim measures.

16) Mr.Toor learned counsel for the petitioner in Arbitration Petition No. 410 of 2015 and for the respondent in Arbitration Petition (Lodging) No.1435 of 2015 who are the original respondents in the arbitral proceedings submits as under :-

(i) The claimant has already quantified the loss against the respondent in the statement of claim at Rs.2,03,00,250/- with interest in prayer clause (c) of the statement of claim. In view of the money claim having been made by the claimant, no interim claim in the nature of the mandatory order and injunction and other reliefs as prayed by the claimant could be granted by the learned arbitrator. There was no irreparable loss or injury caused to the claimant which is pre-requisite or grant of interim mandatory order/injunction. In support of this submission, learned counsel placed reliance on judgment of Supreme Court in case of **Hindustan Petroleum Corporation Limited vs. Sriman Narayan (2002) 5 SCC 760** (paragraph 9 and 12) and the judgment of this Court in case of **Oil & Natural Gas Commission Limited vs. Jagson International Limited (2005) 3 R.A.J. 555 (Bombay)** (paragraph 21).

(ii) There was gross delay of seven years on the part of the claimant to apply for interim measures. In spite of seven years delay, the learned arbitrator has over looked the said crucial fact and has granted interim mandatory injunction in favour of the claimant. The statement of claim clearly discloses that the claimant was out of India prior to his departing in 2006 and again in 2008 and had requested the respondent no.1 to give the accounts of the suit firm. The claimant however, invoked arbitration agreement some time in the year 2013 and had purported to

dissolve the firm on 25th June, 2013. The application under section 17 of the Arbitration & Conciliation Act, 1996 came to be filed by the claimant on 13th January, 2014. Learned counsel placed reliance on the judgment of the Supreme Court in case of ***Mandali Ranganna vs. T. Ramchandra (2008) 11 SCC 1*** (paragraphs 21 and 22).

(iii) Though the respondents had denied in the statement of defence that the claimant had received a sum of Rs.30,000/- per month since April, 2002 till December, 2012 as his share of profit of the firm and had asserted that the claimant was paid his share of profit of the firm during the said period as agreed and as shown in the Income Tax Returns, the learned arbitrator in the impugned order has recorded *prima-facie* finding that the claimant was undisputedly paid a sum of Rs.30,000/- per month during the period between April, 2002 till December, 2012 as his share of profit of the firm. In support of this submission, learned counsel invited my attention to some of the income tax returns filed by the firm showing a very negligible amount of profit or loss during the said period.

(iv) Though shop nos.9 to 14 did not belong to the suit firm but had been devolved upon two of the respondents i.e. Gulamali A. Babul and Siddiqua Babul, the learned arbitrator has over looked the said fact and has permitted the claimant to act as the agent in respect of the business of the suit firm and to carry the same from from the suit premises which were not an asset of the suit firm. In none of the income tax returns or in the accounts of the suit firm, the said shops were reflected as an asset of the suit firm. Even if the suit firm had paid any rent in respect of the said shops at any point of time, that would not make

the said shops as an asset of the firm. There is a legal prohibition under section 26 of the Maharashtra Rent Control Act, 1999 from transferring the tenancy. The arbitral tribunal cannot interfere with the tenancy having limited powers and jurisdiction under section 17 of the Arbitration & Conciliation Act, 1996. Reliance is placed on the judgment of the Supreme Court in case of **Arjun Kanoji Tankar vs. Santaram Kanoji Tankar, 1969(3) SCC 555** (paragraphs 13 and 14) and also the judgment of the Delhi High Court in case of **Abdul Latif & Ors. vs. Mohammad Siddiq, 27 (1985) Delhi Law Times, 423** (paragraphs 11 to 13 and 27).

(v) The claimant had fabricated the Memorandum of Understanding (MOU) dated 12th February, 2002 and had approached the arbitral tribunal with uncleaned hands. The learned arbitrator over looked and permitted to consider this important fact while granting interim measures in favour of the claimant. It was the claimant's case in the statement of claim that he had advanced and contributed a sum of Rs.25.00 lacs to the firm for carrying out repairs and renovation to the property of the said firm as a basis to the Deed of Partnership dated 1st April, 2002.

(vi) Insofar as the maintainability of the arbitration petition filed by the claimant (Lodging No.1435 of 2015) is concerned, it is submitted that the impugned order dated 11th October, 2014 passed by the learned arbitrator cannot be enforced/implemented/executed in the petition filed by the claimant under section 9 of the Arbitration Act as the said petition is not maintainable. The arbitral tribunal has to decide the disputes submitted to arbitration including an application under section 17 of the

Arbitration Act in accordance with substantive law which includes Specific Relief Act, 1963 in view of section 28(1) (a) of the Arbitration Act. The learned arbitrator could not have granted any mandatory order and injunction, which is discretionary relief under section 39 read with section 2(10) of the Specific Relief Act, 1963 only to prevent the object of an application by compelling performance of certain acts which the Court is capable of enforcing. The arbitral tribunal is not a Court and does not decide the judicial duties or perform, judicial functions and does not have plenary and inherent power. The definition of the Court under section 3 of the Indian Evidence Act, 1872 is relied upon. Only the final arbitral award or an interim award is enforceable under the provisions of section 36 of the Arbitration Act in the same manner as if it were a decree of the Court. Any interim order or interim measure or protection made by the arbitral tribunal under section 17 is neither enforceable by the arbitral tribunal nor judicially enforceable through the Court. The following judgments are relied upon in support of the aforesaid submission :

- 1) ***Adhunik Steels Limited vs. Orissa Manganese & Minerals Pvt. Ltd.*** (2007) 7 SCC 125 (paragraph 17),
- 2) ***M.D. Army Welfare Housing Organisation vs. Sumangal Services (P) Ltd.*** (2004) 9 SCC 619 (paragraphs 57 and 58),
- 3) ***Sundaram Finance vs. NEPC India Limited*** (1999) 2 SCC 479 (paragraphs 9 and 11),
- 4) ***BPL Limited vs. Morgan Securities and Credits Pvt. Ltd.*** 2008(2) ***R.A.J. 660 (Delhi)*** (paragraphs 10, 11 and 12),
- 5) ***Nirma Limited vs. Lenties Energy (India) Pvt. Ltd.*** (paragraphs 9.2 and 13.3),
- 6) ***Maharashtra State Electricity Board vs. Dattar Switchgear***, 2003(2)

- Bom.C.R. 81** (paragraph 51),
- 7) ***Union of India vs. Major S.P. Sharma & Ors. (2014) 6 SCC 351***
(paragraphs 82 to 86),
- 8) ***Commentary on Law of Arbitration and Conciliation by Justice R.S. Bachawat on Uncitral Report on adoption of Model Law,***
- 9) ***Bharat Aluminium Company vs. Kaisar Aluminium Technical Services INC. (2012) 9 SCC 552.***

(vii) Under section 5 of the Arbitration Act, a judicial authority including a Court exercising power under section 9 of the Arbitration Act is prohibited to intervene except where so provided in Part-I of Arbitration & Conciliation Act, 1996. The orders under section 9 are necessarily enforceable or executable by way of ordinary procedure of execution under the provisions of Code of Civil Procedure, 1908 i.e. under sections 36, 37 and 38 read with section 51 read with section 2(16) read with order XXI of the Code of Civil Procedure, 1908. Interim measures granted by the arbitral tribunal cannot be executed either by the arbitral tribunal itself or even by the Court under section 9 of the Arbitration Act. Interim order passed by the arbitral tribunal can only be of a preservative nature with a view to preserve situation preferring and keeping the suit property available to answer the final adjudication i.e. final arbitral award. The arbitral tribunal cannot pass any mandatory order / injunction section 17 of the Arbitration Act. Reliance is placed on the judgment of this court in case of ***Indo Pacific Software vs. Nagpur Improvement Trust (2011) 2 Arb.L.R. 354 (Bombay)*** (paragraphs 26 and 33).

17) Mr.Kamat, learned counsel appearing for the respondent in Arbitration Petition No.410 of 2015 and for the petitioner in Arbitration Petition (Lodging) No.1435 of 2015 (original claimant) submits as under :-

(i) There was a fire in the premises of the suit firm on 21st May, 2001 and the firm had no money. The parties had executed MOU on 12th February, 2002. The signature of the parties to the said MOU are not disputed. The claimant introduced large amount of capital and was inducted as a partner of the suit firm. On 15th February, 2002, a Retirement Deed was executed when Sarguroh family exited the suit firm. The said Sarguroh family surrendered and assigned the tenancy in respect of the said three shops in favour of the respondent no.1. The partners released the tenancy in favour of the suit firm. All through out the rent in respect of the said shops was paid by the suit firm. The claimant being one of the partner is also entitled to the tenancy of the suit firm. Reliance is placed on the profit and loss account of the suit firm for some of the financial years which were filed by the respondents to show that the rent in respect of the said three shops have been paid by the suit firm all through out. The rights in a commercial premises can be realised for final dissolution of the firm. Prohibition under Rent Act would not apply for realisation of tenanted property. Reliance is placed on the Full Bench judgment of this court in case of ***Tangerine Electronics Systems Pvt. Ltd. vs.Indian Chemicals & Ors. AIR 2004 Bom.198 (paragraphs 31 to 33)***

(ii) The claimant was staying abroad and in his absence the respondent no.1 was conducting the business of the suit firm. The

claimant was however paid ad-hoc amount lastly upto the year 2013. Some of these payments were also paid by cheques. The respondents had furnished the statement of account to the claimant. Since 2013, the claimant was asking for accounts. Only on 16th April, 2013, the respondents made available the statement of account to the claimant for the period from April, 2002 to March, 2012. The claimant thereafter called upon the respondents to give true and correct accounts and asked for various details. The claimant thereafter issued a notice for dissolution of the suit firm on 25th June, 2013. Even before dissolution of the suit firm, the respondents already started another partnership business in the name of the suit firm from the said shops which are asset of the suit firm.

(iii) The execution of the Partnership Deed is not disputed by the respondents even in the proceedings filed by the claimant under section 11 of the Arbitration & Conciliation Act, 1996. The respondents have falsely disputed the execution of the MOU dated 12th February, 2002 though the same was acted upon. After execution of the said MOU, Deed of Retirement dated 15th February, 2002 was executed between the respondents as continuing partners and Sarguroh family as exiting partners, who held 35% share in the firm. The respondent no.1 had sought from the Sarguroh family their 35% share in the firm, including the tenancy rights of the firm. The claimant was made a partner and was given 30% share in the partnership by executing a Partnership Deed on 1st April, 2002. Dispute arose between the parties in the year 2013 when the claimant realized that he was not being given true shares of the profits of the firm which led to the claimant addressing the letters dated 11th March, 2013, 23rd March, 2013 and 9th April, 2013, seeking accounts of

the firm. When the petitioner sat in the firm restaurant from April to 7th July, 2013, the claimant realized that the firm had higher income than it was disclosed in the account which were prepared and filed by the respondent no.1. The claimant accordingly had issued a notice for dissolution of the suit firm and asked for accounts.

(iv) The claimant was admittedly a partner having 30% shares in the suit firm. The partnership assets of the suit firm includes the shop premises. The business of the firm is substantially carried out in cash and the firm accounts prepared by the respondent no.1 did not reflect the true and accurate picture of the affairs of the firm. The respondent no.1 has executed a separate partnership deed and has hijacked the partnership assets with an intention to make unlawful gain and to frustrate the arbitral proceedings. This court has ample power under section 9 to grant interim measures of protection including the power to implement the order passed by the learned arbitrator at the instance of the party in whose favour such order is passed and not implemented by the other party. The claimant had made a prima facie case before the learned arbitrator and also in the present proceedings for grant of interim measures. Reliance is placed on the judgment of Division Bench of this court in case of ***Nimbus Communications Ltd. vs. Board of Control for Cricket in India 2012 (5) Bom.C.R.114(DB)***.

(v) The claimant had made a claim for dissolution of the partnership business and has pointed out various breaches on the part of the respondents in conducting the business of the partnership firm and in manipulation and not reflecting the true and accurate account and affairs

of the firm. The respondents have excluded the claimant from carrying on business of the partnership firm and has not paid the legitimate and due share of the claimant. The appointment of the Court Receiver in claim for dissolution is a matter of court. Reliance is placed on following judgments :-

1. ***Iqbalnath Premnath Anand vs. Rameshwarnath Premnath Anand*** – AIR 1976 Bom.405,
2. ***Minochar @ Minoo Aspandiyar Irani vs. Deenyar Sheriar Jehani & Ors.*** - 2014(6) Bom.C.R.540,
3. ***Qassim Mohd.Yousuf Aquil Bastaki vs. Smt.Sultana Abdul Ahad Narvel & Ors.*** 2003 (5) Bom.C.R.807.

(vi) The learned arbitrator by order dated 11th October, 2014 had given an option to both the parties to conduct the partnership business including the respondents. The respondents did not accept the said offer made by the learned arbitrator. The learned arbitrator therefore was justified in appointing a commissioner for conducting the bid between both the parties and to allow the highest bidder to run the said partnership business on payment of royalty. The learned arbitrator is empowered to pass such interim measures of protection since the same was arising out of and in relation of the dissolution of the partnership firm of M/s.King of Iran. The royalty offered by the claimant was much more than the profit and loss reflected in the accounts prepared by the respondent no.1 and the respondents also would be benefited of the higher income if the claimant was allowed to conduct the business on payment of royalty offered by the claimant before the learned arbitrator. No prejudice of any nature thus was caused to the respondents. Under section 17 of the

Arbitration Act, the arbitrator is not precluded from passing of a mandatory order and can pass such order if considered necessary in respect of the subject matter of the dispute. The learned arbitrator has commented upon the misconduct on the part of the respondents in orders dated 3rd November, 2014, 15th January, 2015, 10th March, 2015 and 23rd March, 2015.

(vii) The claimant had applied for dissolution and winding up of the partnership firm of which the claimant had 30% share. The claimant had also applied for legitimate and due share upon dissolution of the suit firm in the profit and loss and also in the assets of the suit firm. The claim of the claimant was not simplicitor a money claim as canvassed by the respondents. In support of this submission, learned counsel invited my attention to the relevant paragraphs of the statement of claim showing cause of action which was for dissolution of the partnership firm. Learned counsel for the claimant distinguished various judgments relied upon by the respondents on the issue whether any injunctive reliefs can be granted by the learned arbitrator in money claim.

(viii) This court has ample power to grant interim measures under section 9 which powers are simultaneous and concurrent for successful conduct of the arbitral proceedings and to ensure that any arbitral award passed is not rendered infructuous. The claimant has not only applied for the same reliefs which were granted by the learned arbitrator but for additional reliefs. In any event this court can grant the same relief which were granted by the learned arbitrator based on the reliefs granted by the learned arbitrator or even otherwise. The respondents have not complied

with the order passed by the learned arbitrator. Prayers (b), (c) and (d) made in the arbitration petition filed by the claimant are independent and additional reliefs. Reliance is placed on the judgment of Supreme Court in case of ***Sundaram Finance vs. NEPC India Ltd. (1999) 2 SCC 479*** (paragraphs 9 and 11) and the judgment of this court in case of ***MSEB vs. Dattar Switchgear, 2003(2) Bom.C.R.81*** (paragraphs 49 to 51).

(ix) Learned counsel appearing for the claimant distinguished the judgment of Supreme Court in case of ***M.D., Army Welfare Housing Organisation (supra)*** on the ground that the said judgment was delivered under the provisions of the Arbitration Act, 1940 and in the said judgment it was not held by the Supreme Court that in exercise of powers under section 9 of the Arbitration Act, Court cannot pass the same order as that was passed by the arbitrator under section 17. Judgment in case of Delhi High Court in case of ***BPL Ltd. vs. Morgan Securities (supra)*** and judgment in case of ***Nirma Ltd. vs. Lentjes Energy (India) Pvt. Ltd.*** relied upon by the respondents are also distinguished by the learned counsel for the claimant on the same ground.

(x) Learned counsel for the claimant also distinguished the judgment of Supreme Court in case of ***Bharat Aluminium Co. vs. Kaiser Aluminium (supra)*** on the ground that the Supreme Court was dealing with the applicability of Part II of the Arbitration and Conciliation Act, 1996 in the said judgment and not the power of court under section 9.

(xi) Learned counsel for the claimant also placed reliance on the judgment of Andhra Pradesh High Court in case of ***SPA Agencies India***

Pvt. Ltd. vs. Harish Ratwani 2010 (2) Arb.L.R. 221(AP) (DB) and would submit that in the said judgment, after adverting to the judgment of Supreme Court in case of **Sundaram Finance and Firm Ashok Traders and Anr. vs. Gurumukh Das Saluja and others, (2004) 3 SCC 155**, it has been held that the court under section 9 has power to pass interim measures independently and de-hors the fact that there was an order under section 17 of the Act already passed by the arbitrator. The learned counsel distinguished the judgment in case of **Sri Krishan vs. Anand (supra)** relied upon by the respondents on the ground that the said judgment is contrary to the judgment of Supreme Court in case of **Sundaram Finance (supra)** and in case of **Firm Ashok Traders (supra)**. Reliance is also placed on the the judgment of this court in case of **Baker Hughes Singapore Pte. vs. Shiv Vani Oil, 2015(1) Bom.C.R.377** and it is submitted that the said judgment does not assist the respondents but assist the case of the claimant.

18) Mr. Toor, learned counsel for the respondents in rejoinder submits that the power of arbitral tribunal under section 17 of the Arbitration and Conciliation Act are very limited and cannot be equated with power and jurisdiction of the court under section 9. Insofar as tenancy in respect of three shops is concerned, it is submitted that the tenancy rights in respect thereof have been devolved upon Gulamali A. Babul and Siddiqua Babul in their individual or personal capacity from the deceased tenant much prior to the execution of the said partnership between the parties herein. The income tax returns never included the said shops as an asset of the firm. It is submitted that the petition filed by the claimant is for effective implementation and enforcement of the

impugned order dated 11th October, 2014 and consequential orders dated 10th March, 2015 and 23rd March, 2015 passed by the learned arbitrator. Learned counsel for the respondents made an attempt to distinguish the judgments relied upon by the learned counsel for the claimant and would submit that there was gross delay on the part of the claimant to seek interim measures. It is submitted that the claimant has not approached the arbitral tribunal with clean hands. The respondents had not expressed their desire to conduct the business of the firm as an agent as recorded by the learned arbitrator.

19) Learned counsel made an attempt to distinguish the judgment of this court in case of ***Baker Hughes Singapore Pte. (supra)*** on the ground that in the said matter, the party had agreed that the proceedings under section 9 would be converted into an application under section 17 and the same would be decided by the arbitrator on the basis that he would have jurisdiction to decide the said application under section 17 of the Arbitration and Conciliation Act, 1996. Reliance is placed on paragraphs 33, 34, 41, 42, 49 and 59 of the said judgment.

REASONS AND CONCLUSIONS

20) I have heard the rival submissions made by the learned counsel appearing for the parties at length and have given my anxious consideration to the submissions made by the learned counsel.

21) Learned counsel for the original respondents has submitted that there being the money claim simplicitor made by the claimant before

the learned arbitrator, no interim measures could be granted by the learned arbitrator under section 17 of the Arbitration and Conciliation Act, 1996. In support of this submission, learned counsel placed reliance on prayer clause (c) of the statement of claim. Learned counsel appearing for the claimant on the other hand invited my attention to the other prayers in the statement of claim filed before the learned arbitrator and would submit that the claim was not for money claim simplicitor but was for dissolution of the suit firm and for due share of the claimant upon such dissolution of the suit firm in the profit and loss and also in the asset of the suit firm.

22) The learned arbitrator has dealt with this issue in paragraph 11 of the order passed by the learned arbitrator and after considering prayer clauses (a) and (b) of the statement of claim, has rendered a prima facie finding that those prayers in the statement of claim were for an order and direction that the affairs and business of the partnership firm of M/s.King of Iran be wound up and was not a money claim as canvassed by the respondents. The said sum of Rs.2,03,00,250/- was the amount of loss that the claimant had alleged to have suffered. A perusal of the prayer in the statement of claim in toto makes it clear that the claim made by the claimant was not for any money claim but was for dissolution of the partnership firm for accounts and for share of the claimant in the profit and loss of the suit firm and the assets. Prayer (c) of the statement of claim in my view cannot be read in isolation.

23) In my view, the dissolution of the suit firm, finalization of the accounts and distribution of the assets of the suit firm was the subject

matter of the dispute in the arbitral proceedings. The claimant had already issued notice of the dissolution of the suit firm. The accounts of the suit firm will have to be drawn up. The assets and liability of the suit firm will have to be determined and thereafter will have to be distributed amongst the partners in their ratio of the profit and loss mentioned in the partnership deed. Till such exercise is completed by the learned arbitrator under section 48 of the Indian Partnership Act, 1932, the learned arbitrator has ample power under section 17 of the Arbitration and Conciliation Act, 1996 to pass an order of interim measures of protection in respect of such subject matter of dispute. In my view, there is thus no merit in the submission of the learned counsel appearing for the respondents that no order of interim measures could be granted by the learned arbitrator under section 17 of the Arbitration and Conciliation Act, 1996 in favour of the claimant.

24) Insofar as judgment of Supreme Court in case of ***Hindustan Petroleum Corp. Ltd. (supra)*** is concerned, Supreme Court has dealt with the issue that while passing an order granting relief by way of interlocutory injunction under Order 39 Rule 1, court is not required to deal with the matter as if deciding the suit finally. The court has to consider that the plaintiff has a strong case for trial and to prevent irreparable and serious injury which normally could not be compensated in terms of money and if the balance of convenience is in favour of the party seeking such relief, court can grant injunction. In this case, the respondents have been dealing with the assets of the suit firm exclusively and has not been even paying the legitimate shares of the claimant. The respondents have also executed a partnership deed for carrying on the

same business from the shops which are claimed to be the partnership assets by the claimant even before dissolution of the suit firm by the claimant. The shops which are prima facie assets of the suit firm and the business of the partnership is required to be protected. The learned arbitrator has thus ample power to pass such interim measures under section 17. The judgment of Supreme Court in case of ***Hindustan Petroleum Corp. Ltd. (supra)*** thus does not assist the case of the respondents.

25) Insofar as judgment of this court in case of ***Oil & Natural Gas Commission Ltd. vs. M/sJagson International Ltd. (supra)*** is concerned, this court was considering a situation where the injunction in respect of bank guarantee was prayed by the party who had furnished a bank guarantee. This court held that the invocation of the bank guarantee cannot be interfered with by the court, unless there is an established fraud or irreparable injustice involved in the case. It is held that loss of money never causes any irreparable injury. It is held that an interim order of injunction can be made only when the court or the tribunal finds that apart from the fact that the applicant making out a strong prima facie case and showing that the balance of convenience is in favour of grant of the temporary injunction, the applicant would suffer an irreparable injury if the temporary injunction is not granted to him. The court has to render a prima facie finding that in case injunction is not granted, the applicant would suffer irreparable injury. There is no dispute about the proposition laid down by the court in the said judgment.

26) In my view, the said judgment does not assist the case of the respondents but assist the case of the claimant. The respondents have

completely excluded the claimant from carrying on business and from recovering his share in the profit and loss and also assets of the suit firm. The learned arbitrator has enquired from the learned advocate representing the respondents as to whether the respondents would pay the amount that were being paid by the respondents to the claimant towards his share of profit. The respondents however did not agree to pay even the same amount which was paid for last several years. The respondents through their learned counsel had made a statement before the learned arbitrator that the lot of cash amounts were received in the said restaurant business by the suit firm.

27) The next submission of the learned counsel for the respondents was that there was gross delay in filing an application under section 17 of the Arbitration and Conciliation Act by the claimant. It was submitted that though the claimant had alleged non payment of the alleged dues from the year 2006 onwards, the respondents had invoked section 9 only in the year 2013 and section 17 only on 13th January, 2014. A perusal of the record prima facie indicates that from 2006 onwards for quite sometime the claimant was out of India. During that period it was the case of the claimant that he was paid a sum of Rs.30,000/- per month sometimes by cash or by cheques which was deposited in the accounts of the claimant or in the account of his relatives.

28) The claimant had set in the suit restaurant for sometime in the year 2013 and discovered that the suit firm was recovering lot of amounts in cash and was generating profit much more than what was paid to the claimant. The claimant thereafter asked for the copies of the

account and other accounts related details. It is the case of the claimant that when such documents were furnished by the respondents to the claimant, the claimant realized that the respondent nos. 1 and 2 had fabricated and manipulated the accounts of the suit firm and the claimant was not paid the legitimate share of the suit firm. The claimant thereafter issued a notice of dissolution on 25th June, 2013 and filed a petition under section 9 of the Arbitration and Conciliation Act, 1996 in this court immediately.

29) During the pendency of the proceedings under section 9, the claimant filed an application under section 17 before the learned arbitrator. In view of the claimant having filed such application under section 17 before the learned arbitrator, the applicant withdrew petition under section 9 and pursued the said application before the learned arbitrator. There was thus no delay on the part of the claimant in making an application for interim measures. I am inclined to accept this submission made by the learned counsel for the claimant. In my view even if there was any delay on the part of the claimant as canvassed by the respondents, a perusal of the record indicates that there was no prejudice caused to the respondents. On the contrary the respondents were benefited by carrying on the business of the suit firm exclusively and generating profit from such business and not paying the legitimate dues of the claimant. The learned arbitrator has rightly considered all these issues in paragraphs 7 and 12 of the impugned award and in my view has rightly rejected the issue of alleged delay canvassed by the respondents.

30) Insofar as judgment of Supreme Court in case of ***Mandali Ranganna and others (supra)*** relied upon by the learned counsel for the respondents is concerned, it is held by the Supreme Court that a person who had kept quiet for a long time and allowed another to deal with the properties exclusively, ordinarily would not be entitled to an order of injunction. It is held that the court shall however be oblivious of the fact that grant or refusal of injunction has serious consequence depending upon the nature thereof. The Courts while dealing with such matters must make all endeavors to protect the interest of the parties. In my view since the claimant was prima facie paid certain amounts by the respondents from time to time and had refused to pay any amount since 2013, the learned arbitrator was justified in giving an opportunity to both the parties to participate in the bid and permit one of them who would be highest bidder to conduct such business on payment of royalty. Till such time, the accounts were drawn up under section 48 of the Indian Partnership Act, running business of the partnership firm was required to be conducted by the partners who would offer highest amount of royalty for the benefit of all partners. The said judgment of Supreme Court would not assist the case of the respondents but would assist the case of the claimant.

31) Insofar as submission of the learned counsel for the respondents that the Memorandum of Understanding dated 12th February, 2002 was alleged to have been fabricated by the claimant is concerned, a perusal of the record prima facie indicates that after execution of the said MOU, the parties have entered into a partnership deed and have acted upon the said MOU dated 12th February, 2002 as well as partnership deed.

In my view there is thus no substance of any nature whatsoever in the submission of the respondents that the said MOU dated 12th February, 2002 was fabricated by the claimant. Be that as it may, after execution of the partnership deed between the parties subsequently which is not in dispute, the execution of the MOU dated 12th February, 2002 is not of much significance.

32) Insofar as submission of the learned counsel for the respondents that the tenancy in respect of Shop nos. 9 to 14 devolved in Mr.Gulamali A.Babul and Mrs.Siddiqua A. Babul and was not an asset of the suit firm and thus no interim measures in respect of such property could be granted by the learned arbitrator in favour of the claimant is concerned, a perusal of the profit and loss and balance-sheet of the suit firm which were produced by the respondents themselves before the learned arbitrator and forming part of the record in the present proceedings prima facie indicates that the rent in respect of the said shop premises had been paid all throughout by the suit firm. The suit firm had been carrying on restaurant business in the said premises for last several years. The claimant has also applied for a declaration that the said shops were the assets of the suit firm before the learned arbitrator. In my view the learned arbitrator has not granted any interim measures of a nature which would be in violation of the section 26 of the Maharashtra Rent Control Act. There is no transfer of tenancy in favour of the claimant who was admittedly a partner merely because the claimant is allowed to conduct the business of the partnership firm as an agent during the pendency of the arbitral proceedings. The learned arbitrator will ultimately decide whether the said tenancy in respect of the shop nos. 9 to

14 were forming part of the assets of the suit firm or not. It is not in dispute that the suit firm was carrying on business in the said premises since inception.

33) Insofar as submission of the learned counsel for the respondents that such tenancy rights were not shown as an assets in the balance-sheet is concerned, in my view, the tenancy rights are never reflected as a fixed or current assets in the balance sheet. Be that as it may, the said issue will have to be decided by the learned arbitrator. Insofar as judgment of Supreme Court in case of **Arjun Kanoji Tankar (supra)** relied upon by the learned counsel for the respondents on the issue that the respondent nos. 1 and 2 had not surrendered their individual interest in the said tenancy in favour of the suit firm and thus the same would not form part of the partnership asset is concerned, the learned arbitrator has not decided the issue of tenancy in the said order passed under section 17 of the Arbitration and Conciliation Act, 1996. Whatever observations are made by the learned arbitrator in the said order, it has been clarified in the said order itself that the same are prima facie. The said judgment of Supreme Court in case of **Arjun Kanoji Tankar (supra)** thus would be of no assistance to the respondents.

34) Insofar as judgment of Delhi High Court in case of **Abdul Latif & Ors. (supra)** relied upon by the learned counsel appearing for the respondents on the similar issue is concerned, in my view, the said judgment also would be of no assistance to the respondents at this stage.

35) Insofar as submission of the learned counsel for the respondents that his clients having been carried out business of the

partnership firm for last several years without any interruption of the claimant and thus the learned arbitrator could not have passed any such mandatory order under section 17 of the Arbitration and Conciliation Act in favour of the claimant allowing the claimant to carry on such business is concerned, a perusal of the record prima facie indicates that the respondents had admitted before the learned arbitrator that there was lot of cash receipts by the suit firm while conducting the restaurant business. The learned arbitrator was of the prima facie view that the accounts produced by the respondents were manipulated and did not reflect the true and proper income of the suit firm. The respondents had refused to pay even a sum of Rs.30,000/- per month to the claimant from the year 2013. Before the learned arbitrator, both the parties showed their willingness to act as an agent for the purpose of conducting the business of the suit firm during the pendency of the arbitral proceedings and had expressed that the highest bidder can be permitted to carry on such business.

36) The learned arbitrator thus in my view was justified in giving an opportunity to both the parties to participate in that bid and in appointing commissioner for conducting such bid. Though the learned arbitrator rendered sufficient opportunities to the respondents also to participate in the bid as agreed, the respondents deliberately remained absent before the commissioner appointed by the learned arbitrator and did not participate in the bid. The matter was adjourned on various occasions to give such opportunity to the respondents. The respondents took adjournment on one or the other ground and filed this appeal under section 37. The respondents did not apply for early hearing of the

arbitration petition and deliberately remained absent before the commissioner. The claimant submitted his bid in the sum of Rs.90,000/- per month which was excluding all the expenses required to run the business. The learned arbitrator thus accepted the said bid submitted by the claimant before the commissioner.

37) Insofar as the submission of the learned counsel for the respondents that the claimant was not paid profit at the rate of Rs.30,000/- per month but was paid only the amount what was reflected in the books of account and in the income tax returns is concerned, a perusal of the record *prima-facie* indicates that the claimant had produced relevant proof in support of his submission that he had been paid the said amount of Rs.30,000/- per month either paid by cheque or in cash, which was deposited either in the account of the claimant or his relatives by the suit firm. The respondents themselves admitted before the learned arbitrator that there was cash receipts by the suit firm and the business of the restaurant being run by the respondents was on the case basis. Be that as it may, whether the actual amount of profit is reflected or not in the books of account in the suit firm can be conclusively decided by the learned arbitrator. In my view, there is no infirmity in the *prima-facie* observation made by the learned arbitrator that the claimant had been paid a sum of Rs.30,000/- per month since April, 2002 till December, 2012.

38) I will now deal with the arguments of both the parties whether the reliefs as prayed in the arbitration petition filed by the claimants (petitioner in Arbitration Petition (Lodging) No.1435 of 2015)

can be granted by this Court as prayed and as to whether the claimant has made out a case for grant of such reliefs.

39) Insofar as the submission of learned counsel for the respondents that in view of section 5 of the Arbitration & Conciliation Act, 1996, this Court cannot grant any reliefs so as to enforce the order passed by the learned arbitrator under section 17 of the Arbitration & Conciliation Act, 1996 on the ground that the Court cannot intervene in any proceedings other than what is provided under the Arbitration & Conciliation Act, 1996 is concerned, in my view there is no merit in this submission of the learned counsel for the respondents. The claimant has prayed for various reliefs in the petition filed by the claimant, including prayer for an order and direction against the respondents to forthwith hand over possession and management of King of Iran Restaurant to the claimant as per orders dated 10th March, 2015 and 23rd March, 2015 passed by the learned arbitrator. The claimant has also prayed for various other interim measures in prayers (b) to (d) of the said arbitration petition which were not prayed before the learned arbitrator. It is not the case of the respondents that this Court has no power to grant interim measures under section 9 of the Arbitration & Conciliation Act, 1996. Reliance placed on section 5 of the Arbitration & Conciliation Act, 1996 by the respondents in my view is totally misplaced.

40) Next question that arises for consideration of this Court is whether this Court can pass any order under section 9 of the Arbitration & Conciliation Act, 1996 which would be in the nature of an enforcement and/or execution of the orders passed by the learned arbitrator under

section 17 of the Arbitration & Conciliation Act, 1996. It is also one of the submission made by the respondents vehemently is that in view of section 39 read with section 2(10) of the Specific Relief Act, 1963, the learned arbitrator could not have passed any mandatory order while exercising power under section 17 of the Arbitration & Conciliation Act, 1996.

41) It is not in dispute that though the said orders dated 10th march, 2015 and 23rd March, 2015 were passed by the learned arbitrator under section 17 of the Arbitration & Conciliation Act, 1996 thereby permitting both the parties to participate in the bid before the Commissioner and to permit the highest bidder to act as an agent have not been stayed by this Court till date, the respondents have not complied with the said order.

42) I shall first deal with the issue whether the learned arbitrator could pass any mandatory order while exercising powers under section 17 or in fact whether any such mandatory order is passed. There is no dispute that the partnership firm has been dissolved. It was the case of the claimant that the respondents were not paying the legitimate share of the claimant in the partnership business and has manipulated the accounts of the suit firm. The claimant had accordingly applied for an order to permit the claimant to conduct the business of the said firm as an agent on such terms as the learned arbitrator deem fit. The learned arbitrator has recorded the statement of both the parties that they were ready and willing to participate in such bid for the purpose of participate agency before the commissioner appointed by the learned arbitrator.

43) In view of the statement made by the parties, the learned arbitrator appointed the commissioner for the purpose of carrying out the bid amongst the partners and to appoint the highest bidder as an agent for the purpose of conducting partnership business. The respondents did not participate in the said process before the learned commissioner. The learned arbitrator therefore accepted the bid of the claimant and passed an order appointing him as an agent for the purpose of carrying on partnership business. In my view, the learned arbitrator has thus not passed any mandatory order as canvassed by the learned counsel for the respondents. Be that as it may, the learned arbitrator in my view in appropriate case for the purpose of protecting the subject matter of the dispute before the learned arbitrator has ample power to pass a mandatory order.

44) Insofar as judgment of Supreme Court in case of ***MD., Army Welfare Housing Organisation (supra)*** relied upon by the respondents is concerned, it is held by the Supreme Court that the arbitrator cannot issue any direction which would go beyond the reference or the arbitration agreement. It is held that under section 17 of the Arbitration and Conciliation Act, 1996 no power is conferred upon the arbitral tribunal to enforce its order nor does it provide for judicial enforcement thereof. In this case, the learned arbitrator has not issued any direction to enforce its own orders passed under section 17 of the Arbitration and Conciliation Act, 1996. The said judgment of the Supreme Court in case of ***MD., Army Welfare Housing Organisation (supra)*** thus does not assist the case of the respondents.

45) The question that arises for consideration of this court is whether court can pass the same order what was passed by the learned arbitrator by exercising power under section 9 or can pass a similar order on the basis of the order passed by the learned arbitrator which is not complied with though neither set aside nor stayed and if any such order is passed, whether it would amount to enforcement of the order passed by the learned arbitrator.

46) In case of ***Sundaram Finance (supra)***, it is held by the Supreme Court that though under section 9, arbitral tribunal has power to pass the orders, the same cannot be enforced as order of the court and it is for that reason that section 9 admittedly gives powers to the court to pass interim order during the arbitration proceedings. In my view, merely because the arbitral tribunal has no power to enforce its own orders passed under section 17 as order of the court in view of the learned arbitrator not having machinery to enforce such orders, that would not prevent a court while exercising power under section 9 to pass a similar order that was passed by the learned arbitrator or on the same basis as that of the order passed by the learned arbitrator under section 17. No party in that event will comply with the order passed by the learned arbitrator. It may be true that the proceedings under section 9 may not be the proceedings in execution of the order passed by the learned arbitrator, that however would not mean that the order passed by the arbitral tribunal under section 17 cannot be enforced in any manner whatsoever even if the court while passing the order under section 9 takes the same view.

47) Insofar as judgment of Delhi High Court in case of ***BPL Ltd. vs. Morgan Securities (supra)*** relied upon by the respondents is

concerned, Delhi High Court took a view that the order passed by the learned arbitrator was beyond the subject matter of agreement and was without giving any opportunity to contest the interim protection sought by the parties to another party and the said order was without jurisdiction. Delhi High Court has held that the arbitral tribunal cannot be considered as a court of law and its order cannot be treated as judicial order though award passed by the arbitrator is enforced in law. The said judgment of Delhi High Court in my view is clearly distinguishable in the facts of this case and does not assist the respondents.

48) Insofar as judgment of Gujarat High Court in case of ***Nirma Ltd.(supra)*** is concerned, the issue was whether arbitral tribunal has power to issue any interim orders which can bind third parties over whom it has no consensual jurisdiction. It is not in dispute that under section 9 of the Arbitration and Conciliation Act, 1996, the court has power to grant interim measures before during or after conclusion of the arbitral proceedings till the said award is executed. In this case the claimant had already filed a petition under section 9 for interim measures before this court and the said petition was pending in this court. The claimant thereafter filed an application under section 17 before the learned arbitrator for interim measures. In view of the claimant having filed the said application under section 17 before the learned arbitrator during the pendency of the petition filed under section 9, the claimant withdrew the said petition under section 9. The judgment of Gujarat High Court in case of ***Nirma Ltd. (supra)*** thus does not apply to the facts of this case at all.

49) Insofar as judgment of this court in case of ***M.S.E.B. vs. Datar Switchgear Ltd. (supra)*** is concerned, this court has dealt with the

residuary power of court under section 9(ii) (e) of the Arbitration and Conciliation Act, 1996 to order such other interim measure of protection as may appear to the court to be just and convenient. It is held that the court in an appropriate case, does have the jurisdiction statutorily conferred to grant such interim measures of protection as may appear to it to be just and convenient. It is held that in wide canvass, various eventualities may arise which may require the court to ensure, in an appropriate case, that the process of arbitration is not abused. It is held that the conferment of a residual jurisdiction upon the court under section 9(ii)(e) has to be matched by a consciousness on the part of the court, while exercising the jurisdiction that this power is to be utilized for effectuating the object for which the power has been conferred. It is held that the prayer for relief under section 9(ii)(e) is not a substitute for enforcing the order of the arbitral tribunal. A willful disregard of the order of the tribunal must be shown to exist, bordering on contumacious behaviour.

50) This court in the said judgment of ***M.S.E.B. vs. Datar Switchgear Ltd. (supra)*** has also held that in an appropriate case where the circumstances warrant the passing of an order as stringent as a stay of the arbitral proceedings, the Court in the exercise of its power under section 9 of the Arbitration and Conciliation Act, 1996 can impose such sanctions to secure due compliance with an order of the Arbitral Tribunal. However this power must be wielded with extreme caution and circumspection. It is held that there has to be an element of bad faith, or of contumacious conduct. This court has referred to an illustration that there may be for instance where despite being possessed of means, a

party refuses to comply with an order to furnish security. It is held that the court under section 9 of the Act does have power in an exceptional case to impose sanctions against a recalcitrant party, such as by the grant of a stay of the arbitration proceedings to secure compliance with an interim order for the furnishing of security, however that power has to be exercised with caution and circumspection.

51) A perusal of the record indicates that the respondents have not participated in the bid before the commissioner though had agreed to participate in the bid for the purpose of agency and went on applying for adjournments on one or the other grounds. Though there was no stay granted by this court of the order passed by the learned arbitrator under section 17, the respondents to the arbitral proceedings did not comply with the said order and are in breach thereof.

52) Section 9 provides that the court shall have the same power for making an orders as it has for the purpose of and in relation to any proceedings before it. This court in case of ***Magic Properties Private Limited vs. Raj Pipla Co-operative Housing Society Limited*** in a judgment delivered on 1st October, 2015 in Arbitration Petition No.983 of 2014 with connected matter after adverting to the judgment of Division Bench of this court dated 19th August, 2014 in Appeal (L) No.480 of 2014 in case of ***Raj Pipla Co-operative Housing Society Limited vs. Magic Properties Private Limited*** has held that since the respondents therein had not complied with the order passed by the learned arbitrator under section 17 of the Arbitration Act, the petitioner was entitled to file the proceedings under section 9 of the Arbitration Act for the similar reliefs

which were granted by the learned arbitrator and not having been complied with by the respondents. Similar arguments which are advanced in this case have been dealt with by this court in the said judgment. It is held that the court can pass interim measures under section 9 of the Arbitration Act on the basis of the order passed by the arbitral tribunal under section 17 of the Arbitration Act which are not complied with or not set aside or stayed.

53) The Division Bench of this court in the said judgment in case of ***Raj Pipla Co-operative Housing Society Limited vs. Magic Properties Private Limited*** has dealt with the judgment of Supreme Court in case of ***MD. Army Welfare Housing Organisation vs. Sumangal Services (P) Ltd. (supra)*** and has held that the Supreme Court in case of ***MD. Army Welfare Housing Organisation (supra)*** was neither called upon nor it decided the issue of interim order passed under section 17 of the Arbitration Act. The Division Bench also held that in that case, the respondent had invoked the provisions of section 9 of the Arbitration Act to seek interim measures consistent with those contained in the order made by the learned arbitrator under section 17 of the Arbitration Act which clearly indicates that the petitioner therein was entitled to do so in the wake of refusal on the part of the society to comply with or ad-hoc measures as directed by the learned arbitrator in its interim order. I am respectfully bound by the judgment of Division Bench in case of ***Raj Pipla Co-operative Housing Society Limited vs. Magic Properties Private Limited (supra)*** and judgment of learned Single Judge in case of ***Magic Properties Private Limited vs. Raj Pipla Co-operative Housing Society Limited (supra)*** delivered on 1st October, 2015.

54) In my view this court has ample power to pass interim measures under section 9 of the Arbitration Act on the basis of the order passed by the arbitral tribunal under section 17 of the Arbitration Act which are not complied and not set aside or stayed by the appeal court. A party cannot be without a remedy. In my view, the approach of the respondents in not complying with the order passed by the learned arbitrator under Section 17 of the Arbitration and Conciliation Act and disregarding the said order shows their contumacious behaviour.

55) Insofar as judgment of Supreme Court in case of ***Bharat Aluminium Company and Ors. vs. Kaiser Aluminium Technical Service Inc. and Ors. (2012) 9 SCC 552*** is concerned, the Supreme Court in the said judgment has dealt with the issue whether Part I or Part II of the Arbitration and Conciliation Act would apply to a foreign seated arbitration or not. The reliance placed by the learned counsel for the respondents on the said judgment is totally misplaced.

56) Andhra Pradesh High Court in case of ***SPA Agencies India Pvt. Ltd. vs. Harish Ratwani (supra)*** has held that in a given case, the remedy provided under section 9 is not barred even if the party moving a petition thereunder has already obtained the relief partly or wholly from the arbitrator and in such an event, the petition for an interim order would be independent and different from the interim order already obtained under Section 17 of the Arbitration and Conciliation Act. The said judgment of Andhra Pradesh High Court also supports the case of the claimant.

57) I shall now decide the issue whether the claimant has made out a case for grant of similar order passed by the learned arbitrator in addition to the other reliefs prayed by the claimant in Arbitration Petition (L) No.1435 of 2015.

58) A perusal of the record clearly indicates that the respondents have not paid any amount admittedly to the claimant since 2013. The respondents had been exclusively carrying on business for last several years and was paying certain amounts to the claimant. A perusal of the computation of income and trading and profit and loss account of the suit firm for the year ended on 31st March, 2012 which was prepared by the respondents would show that according to the respondents, net profit of the suit firm for the said financial year 2011-2012 was only Rs.5,831/-. According to the respondents, the 30% share of the claimant in the said financial year was only Rs.1,749/- for the entire year whereas the share of the respondent no.1 was Rs.1,895/-. Similarly in the financial year 2012-2013, the computation of income of the suit firm produced by the respondents shows net income of Rs.5,352/- for the entire year. The net profit alleged to have been received by the petitioner was Rs.1605.60 and by the respondent no.1 was Rs.1739.40. A perusal of the record further indicates that according to the respondents, the net profit earned by the claimant for the period 2005-2006 till 2012-2013 was at Rs.870, Rs.663/-, Rs.930/-, Rs.1,204/-, Rs.1268.40, Rs.2229.30, Rs.1,749/- and Rs.1,605.60 respectively in each of the year. The accounts produced by the respondents are seriously disputed by the claimant. There is no dispute that in the said restaurant business, the firm is receiving cash. In my prima facie view, the accounts which are admittedly prepared by the

respondents are grossly manipulated by the respondents so as to reduce the profit of the suit firm substantially and to deprive the claimant of his legitimate share in the profit of the partnership firm.

59) The court can take a judicial notice that in any street of Mumbai, a hawker selling even vadapav must be earning much more than the profit of about Rs.5000/- to Rs.6000/- per year reflected by the respondents in the accounts of the suit firm carrying on restaurant business from five shops.

60) The learned arbitrator in my view rightly took a cognizance of the position of the accounts produced by the respondents and thought it proper to give an opportunity to both the parties to participate in the bid and to permit the highest bidder to act as an agent for the purpose of conducting the business till the matter is finally decided. The respondents did not make any application before the learned arbitrator alleging that no such statement was made by the respondents before the learned arbitrator.

61) Be that as it may, since the respondents deliberately did not participate in the said bid process and the claimant only having participated and had offered royalty amount of Rs.90,000/- per month excluding all expenses, in my view the learned arbitrator was right in accepting the said bid of the claimant. It is thus clear beyond reasonable doubt that as against the profit of about Rs.1,750/- shown in the account of the claimant by the respondents for last two years and even the lesser amount earlier, if the bid of the claimant for payment of Rs.90,000/- per month excluding all expenses is accepted, not only the claimant would be

benefited but the respondents would also be substantially benefited. If the accounts of the respondents are proper and correct according to the respondents, in my view by accepting the bid of the claimant on payment of royalty of Rs.90,000/- per month excluding all expenses rights would be for the benefit of the respondents and would not prejudice their rights.

62) The conduct of the respondents in somehow violating the order passed by the learned arbitrator itself would indicate that the income earned by the respondents from running the restaurant in the name of the suit firm would be much more than the amount reflected in the books of account.

63) A perusal of the record also indicates that the respondents had already executed another partnership deed in the name of the suit firm for carrying on the same business from the said premises even before dissolution of the suit firm by the claimant which is prejudicial to the interest of the claimant.

64) This court in case of ***Baker Hughes Singapore Pte. vs. Shiv Vani Oil (supra)*** has held that the provisions under sections 9 and 17 of the Arbitration and Conciliation Act are meant for the purpose of protecting the subject matter of the dispute till the arbitration proceedings, culminate into an award. The Division Bench of this court in case of ***Nimbus Communications Ltd. (supra)*** has held that the power under section 9 (ii) (b) is wide and has to be guided by the paramount consideration that the party having a claim adjudicated in its favour ultimately by the arbitrator is in a position to get the fruits of such

adjudication and in executing the Award. The court has also to consider whether denial of such order would result in grave injustice to the party seeking a protective order. The obstructive conduct of the party against whom such a direction is sought is regarded as being a material consideration.

65) This court in case of ***Mr.(Sic)Qassim Mohd. Yousuf Aquil Bastaki vs. Smt.Sultana Abdul Ahad Narvel & Ors., 2003(5) Bom.C.R.807*** has held that in the normal course of the dissolution of the partnership, the consequences are that Receiver is to be appointed as a matter of course. It is held that once the partnership is dissolved, the assets will have to be realized for the purpose of distribution amongst the partners. This court also held that the fact that some of the parties residing abroad is immaterial. This court appointed the court receiver and directed the court receiver to appoint the highest bidder as an agent of the court receiver on usual terms. In my view, the said judgment would apply to the facts of this case. Since the learned arbitrator has given an opportunity to both the parties to participate in the bid and to appoint the highest bidder as an agent, in my view there was no miscarriage of justice. The business of the suit firm, which is a running business can be continued by the highest bidder till the firm is finally dissolved by the learned arbitrator and the accounts are drawn up.

66) Insofar as the other prayers claimed by the claimant in the Arbitration Petition (L) No.1435 of 2015 are concerned, in my view the claimant has made out a case for injunction restraining the respondents from dealing with, alienating, transferring, licensing and/or creating third

party rights and/or interest in the premises from where the business of the partnership was being carried out and also for injunction from carrying on business of the suit firm and/or any other business either individually or severally from any other premises in the name of King of Iran till the firm is finally dissolved and the accounts are drawn up.

67) Since this court has upheld the order passed by the learned arbitrator allowing the claimant to act as an agent for conducting the business on payment of royalty, the respondents are restrained from inter-meddling, interfering and/or in any manner obstructing the claimant from carrying on business of the restaurant King of Iran at the premises described at Ex.Q. The claimant has made out a case for appointment of the claimant as an agent on payment of Rs.90,000/- per month excluding expenses for the purpose of conducting the business in the name of King of Iran restaurant till the arbitral proceedings are finally disposed of by the learned arbitrator on the same terms and conditions as are directed by the learned arbitrator. In my view, the claimant has made out a case for appointment of the claimant as an agent for the purpose of conducting the business in the name of King of Iran independently.

68) I, therefore, pass the following order :-

- (a) Arbitration petition No.410 of 2015 filed by the original respondents is dismissed;
- (b) Impugned orders dated 11th October 2014, 10th March 2015 and 23rd March 2015 passed by the learned arbitrator are upheld;
- (c) The claimant is permitted to act as an agent for the purpose of conducting the business in the name of King of Iran restaurant on

payment of royalty of Rs.90,000/- per month excluding all expenses which shall be deposited by the claimant in this court with the Prothonotary and Senior Master on or before 10th day of each month. Upon deposit of the said amount by the claimant, Prothonotary and Senior Master shall invest the said amount in a fixed deposit of a nationalized bank initially for a period of one year and for like period till the arbitration proceedings are disposed of;

- (d) Claimant is also restrained from creating any third party rights and/or interest in the said shops premises during the pendency of the arbitral proceedings;
- (e) In Arbitration Petition (L) No.1435 of 2015, respondent nos. 1 to 3 are directed to handover possession and management of King of Iran restaurant to the original claimant alongwith all the licenses and permits which are in the name of the suit firm within two weeks from today;
- (f) Arbitration Petition (L) No.1435 of 2015 is made absolute in terms of prayer clauses (b), (c) and (d);
- (g) Claimant (petitioner in Arbitration Petition (L) No.1435 of 2015) shall maintain a regular and proper accounts and shall furnish a copy of such accounts to the respondents every month on or before 10th of each month;
- (h) Petitioners in Arbitration Petition No.410 of 2015 are directed to pay cost of Rs.50,000/- to the original claimant within two weeks from today;
- (i) No order to costs in Arbitration Petition (L) No.1435 of 2015.

R.D. DHANUKA, J.

. Learned counsel appearing for the petitioner in Arbitration Petition No.410 of 2015 seeks stay of the operation of this order. It is not in dispute that there was no stay of the order passed by the learned arbitrator till date, though the said order was passed by the learned arbitrator as far back as on 11th October 2014. Application for stay of the operation of this order is accordingly rejected.

R.D. DHANUKA, J.