

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****ARBITRATION PETITION NO. 1005 OF 2009**

Borosil Glass Works Limited,
a company incorporated under the provisions
of Companies Act, 1956 and having its registered
office at Khanna Construction House, 44, Dr. R.G.
Thadani Marg, Worli, Mumai 400 018 ... Petitioner

Versus

Tata Motors Limited,
a company incorporated under Companies Act,
1913 and having its registered office at
Bombay House, 24, Homi Modi Street,
Fort, Mumbai 400 001
and inter alia an operating division known
as Motorfinance at DGP House, 4th Floor,
Old Prabhadevi Road, Mumbai 400 025 .. Respondent

Mr. Pratik Seksaria along with Mr. Chakrapani Mishra along with Ms.
Meghna Rajdhyaksha along with Mr. Sairam Subramaniam i/by M/s. Khaitan
& Co. for petitioners.

Mr. Simil Purohit along with Ms. Heta Shah i/by MDP & Partners for
respondent.

CORAM : R.D. DHANUKA,J.

RESERVED ON : DECEMBER 09, 2014

PRONOUNCED ON : JANUARY 20, 2015

ORAL JUDGMNET :

By this petition, filed under section 34 of the Arbitration and

Conciliation Act, 1996 (hereinafter referred to as the “Said Arbitration Act”), petitioner has impugned the arbitral award rendered by the arbitral tribunal on 18th June, 2009 directing the petitioner to indemnify the respondent by creation of a fund under the control of respondent and deposit the sum of Rs.26,30,662/- and Rs.58,170/- together with interest on the sum of Rs.26,30,662/- at the rate of 30% p.a., from 21st July, 2005 till 13th February, 2007 and further interest on the sum of Rs.26,30,662/-, at the rate of 10% from 14th February, 2007 till actual deposit.

2. The arbitral tribunal directed the petitioner to keep the said amount in a fixed deposit of a nationalized Bank of their choice within four weeks from the date of the said award. Petitioner was directed to deposit the said amount initially for the period of one year and was directed to keep the said fixed deposit renewed till such time as the appeals and further appeals which may be filed were finally disposed of. Some of the relevant facts for the purpose of deciding this petition are as under :

3. By letter dated 9th December, 1997, M/s. Tata Finance Limited sanctioned in favour of the petitioner lease of type I and type II equipments. On 19th December, 1997, parties executed lease agreement bearing No.LS-361/97-98. The said lease was for the period of five years. Separate supplementary lease schedules were also executed on 19th December, 1997 in respect of both type I and type II equipments. In respect of assets under type I, the respondent represented that they were entitled to claim 25% depreciation and in respect of type II equipments 100% depreciation.

4. Under clause 2.2 of the said agreement the respondent was entitled to recover service charges at the rate of 30% p.a., on the compounding basis with monthly rests from the due dates specified in supplementary lease schedules attached/to be attached till the actual date of payment. Under clause 2.4 of the said agreement, lessor was entitled to vary the lease rental charges at any time during the continuance of the said agreement in the event of certain eventualities set out therein. Clause 2.2 and 2.4 of the lease agreement are extracted as under :

“Clause 2.2 – Without affecting lessor's right the lessee's obligation to pay the lease rentals specified arrears of such lease rentals, such arrears of lease rentals shall carry service charges at the rate of 30% per annum on the compound basis with monthly rests from the due dates specified in Supplementary Lease Schedules attached/to be attached till date of actual payment.

Clause 2.4 : The Lessor shall be entitled to vary the lease rentals charges at any time during the continuance of this agreement in the event of a change occurring on the basis of which the lease rentals charged hereby are computed, namely, valuables relating to depreciation rate, permitted as per the Indian Income Tax regulations for the time being in force on declining balances or modifications in the cost of money to the Lessor. The Lessee irrevocably agrees and declares that the lease rentals charges shall be increased in correlation to increase in taxes whether sales tax or excise, and any other related or consequential charges that may be levied on or in connection with the Lease of the Equipment under this Agreement at any time hereafter or any increase in the price of the Equipment between the date of the order placed on the manufacturer/supplier thereof and the date of its delivery.”

5. Clause 14 of the lease agreement provided for indemnity on happening of certain eventualities set out therein. Clause 14 of the lease agreement is extracted as under :

“14. The Lessee shall indemnify and keep indemnified the Lessor, at all times against any loss or seizure of the Equipment under distress, executing or other legal process or destruction or damage to the Equipment by fire, accident or other cause, from any claim or demand arising out of the storage, installation, use or operation of the Equipment or any risk of liability for death or loss of limb of any person whether employee of the Lessee or of third party and hold the Lessor harmless, against all losses, damages, claims, penalties, expenses, suits or proceedings of whatsoever nature made, suffered or incurred consequent thereupon and for this purpose take out such workmen's compensation third party issuance cover as may be necessary, customary to the practice in the business carried on by the Lessor or as may be directed by the Lessor, in that behalf. “

6. On 27th November, 2000 M/s. Pravin Makhija and Associates, Chartered Engineers issued 3 certificates all dated 27th November, 2000 certifying that the Type II equipments qualified for 100% depreciation under the then Income Tax Rules and further, that the said Type II equipments have been installed and were in use by the petitioner.

7. For the Assessment year 2000-01 and 2001-02, the respondent in their income tax returns claimed 100% depreciation in respect of type II equipments.

8. By an order dated 28th March, 2003 the Deputy Commissioner of Income Tax, Range 8(3), disallowed the depreciation claimed by respondent on type II equipments mentioned in the supplementary lease schedule No. 361/1/1999-2000 and 361/03/1999-2000 respectively. The respondent preferred an appeal against the said assessment order before the Commissioner of Income Tax (Appeals).

9. The respondent vide their letter dated 18th September, 2003 informed the petitioner about the order dated 18th March, 2003 passed by the Deputy Commissioner of Income Tax and requested the petitioner to provide all the documents required by them for claiming depreciation before the Income Tax Authority. It is the case of the petitioner that the said letter dated 18th September, 2003 was received by the petitioner some time in the year 2005. The petitioner vide their letter dated 23rd November, 2005 provided all the documents required by the respondent for their claims before the Income Tax Authorities and also certified that the petitioner had not claimed any depreciation on the said equipments.

10. By letter dated 24th November, 2005, petitioner informed the respondent that lease rentals paid by the petitioner were allowed as deductible expenses under the income tax computation of the petitioner.

11. In so far as type II equipments mentioned in the supplementary lease schedule No. 361/05/99/2000 were concerned, the same were installed on 22nd May, 2000. The respondent claimed depreciation in respect of the said equipments in their income tax returns filed for the assessment year 2001-02. By an order dated 31st March, 2004, Deputy Commissioner, Income Tax Range 8(3), disallowed the depreciation claimed by the respondent on the type II equipments mentioned in supplementary lease schedule 361-05-1999-2000. The respondent has preferred appeal against the said order dated 31st March, 2004 before the Commissioner of Income Tax (Appeals).

12. On 21st July, 2005 respondent issued 3 debit notes of aggregate sum of

Rs.26,30,662/- being the amount disallowed by the Income Tax Department. By letter dated 22nd August, 2005 petitioner informed the respondent that the said debit notes were not acceptable and were not payable by the petitioner as per various lease agreements executed between the parties and requested the respondent to withdraw the said Debit notes. By letter dated 22nd September, 2005 petitioner informed the respondent that the issue of debit notes of overdue interest was already settled in the year 2002 and was evident from the petitioner's letter dated 14th November, 2000 and 30th November, 2000 respectively.

13. By letter dated 22nd August, 2006, respondent through their advocates demanded the sum of Rs.26,88,832/- along with interest at the rate of 30% p.a., thereon from the petitioner with effect from 17th August, 2006 till payment and/or realization. The petitioner vide their advocate's letter dated 11th September, 2006 to the respondent, responded to the notice dated 22nd August, 2006 and denied the claim of the respondent contending that the alleged demand was outside the purview and ambit of the agreement as the same was not provided for the reimbursement of disallowed depreciation and on other grounds.

14. Respondent through their advocates letter dated 22nd September, 2006, denied the contentions of the petitioner raised in their advocate's letter dated 11th September, 2006. Petitioner through their advocates letter dated 9th October, 2006 replied to the said letter dated 22nd September, 2006 and reiterated what was stated in the letter dated 11th September, 2006. On 13th February, 2007 the respondent filed statement of claim before the arbitral

tribunal inter alia praying for creation of funds for indemnity.

15. There was no money claim made in the statement of claim filed initially. On 8th March, 2007, petitioner filed reply and counter claim before the arbitral tribunal. On 19th June, 2007 the respondent applied for amendment of statement of claim so as to include money claim for the first time. On 31st August, 2007 the respondent was allowed to amend the statement of claim and to include money claim for the first time. Before the arbitral tribunal, both the parties led oral as well as documentary evidence.

16. On 18th June, 2009 the arbitral tribunal allowed the claim made by the respondent in so far as prayer for creation of fund with interest is concerned. Arbitral tribunal did not grant prayer for money decree on the ground that the appeals filed by the respondent were still pending. Petitioner was directed to pay cost of Rs. 5 lacs to the respondent. The counter claim filed by petitioner came to be rejected.

17. Mr. Seksaria, learned counsel for the petitioner invited my attention to the various provisions of the lease agreement, correspondence entered between the parties, some part of oral evidence led by the parties, impugned award rendered by the learned arbitrator and placed reliance on various judgments of the Supreme Court and this court in support of his submissions.

18. It is submitted by the learned counsel that since the appeals filed by the

respondent against the order passed by the Deputy Commissioner of Income Tax disallowing the depreciation were pending, the liability of the respondent therefore was not crystallized and thus the claim for indemnity could not have been invoked by the respondent in respect of those claims. It is submitted that in any event, under clause 14 of the lease agreement, claim for indemnity arising out of denial of depreciation by the tax authorities was not provided. It is submitted that the entire claim for indemnity and/or for creation of fund itself was not maintainable under clause 14 of the lease agreement or under any other provisions of the said agreement. In support of this submission, learned counsel placed reliance on paragraph 10 and 14 of the judgment of this court delivered on 16th July, 2013 in the case of **Gujarat Urja Vikas Nigam Ltd. Versus Tata Motors Ltd.** in Arbitration Petition No. 955 of 2001. It is submitted by the learned counsel that clause 14 of the lease agreement entered into between the parties in this case was identical to clause 14 of the lease agreement which has been interpreted by this court in the case of **Gujarat Urja Vikas Nigam Ltd. (supra)** and the said judgment of this court is binding on the parties and is squarely applicable to the facts of this case.

19. Learned counsel in support of this submission invited my attention to paragraph 11 of the impugned award in which the arbitral tribunal has considered the averments made in the statement of claim as originally filed by the respondent stating that it was only on the disposal of the appeal that the issue would be finally determined and the liabilities of the petitioner herein to pay respondent herein be finally crystallized. It was averred by the respondent herein that they were entitled at this stage to have secured recovery of amounts from the respondent. It is submitted that thus the claim

allowed by the arbitral tribunal for creation of fund was patently illegal since the liability of the respondent had not been finally determined.

20. The next submission of the learned counsel for the petitioner is that the claim for creation of fund awarded by the arbitral tribunal is otherwise barred by law of limitation. It is submitted that the petitioner had raised the issue of limitation in the written statement filed by the petitioner. Petitioner had denied the averments of the respondent that the claim was not barred by law of limitation. Learned counsel invited my attention to paragraph 28 and 32 of the impugned award in support of the submission that the issue of limitation was not only pleaded in the written statement but was canvassed before the arbitral tribunal. The arbitral tribunal has considered the said submission on the issue of limitation in those two paragraphs of the impugned award.

21. It is submitted that in paragraph 3 of the impugned award, arbitral tribunal has erroneously held that the petitioner had not pleaded limitation even in the reply to the amended statement of claim. In Paragraph 32 of the impugned award, arbitral tribunal held that the issue of limitation is a mixed question of law and fact and if the petitioner would have raised that issue earlier, respondent could have led evidence and/or explained their case. Petitioner thus could not be permitted to raise that issue for the first time in the arguments. Arbitral tribunal however, held that there was no substance in the contentions raised by the petitioner on the issue of limitation. It is held that the period of limitation starts running from such time that the respondents refuse their liability to pay the increased rentals which was done for the first time by the petitioner by their letter dated 22nd August, 2005

whereas the arbitration was invoked on 22nd September, 2006. The Arbitral Tribunal rendered a finding that the claim made by the respondent herein was within time. It is held that even otherwise, petitioner themselves contend that the claim was premature and if the claim was premature, it cannot be time barred.

22. Learned counsel for the petitioner, submits that in view of section 3 of the Limitation Act, 1963, it is not required for a party to raise plea of limitation as defence. It is the duty of the arbitral tribunal to consider whether claims made by the claimant are within time or not. In support of this submission learned counsel placed reliance on the following judgments:

(1) *Kamlesh Babu and Ors. Vs. Lajpatrai Sharma 2008 (12) SCC*

577. Relevant paragraphs 4, 5, 7, 9, 10, 13 to 19, 21 and 23 read thus :

“4. While deciding issue No. 6. The Trial Court also held that the suit was barred under Article of the Limitation Act, 1963, because the plaintiff had failed to prove that the Will was not within the knowledge of the plaintiff within three years of the filing of the suit.

5. Aggrieved by the decision in the suit, the plaintiff-respondent No. 1 herein, preferred an appeal before the Civil Judge, Aligarh, which was allowed and the judgment of the Trial Court was reversed without deciding the question of limitation which had been decided against the plaintiff-respondent No. 1 and in favour of the defendants-appellants herein.

6. The defendants-appellants herein filed a second appeal before the Allahabad High Court on 3rd October, 1983, and the same was also dismissed on 6th February, 2006, affirming the judgment and order of the Appellate

Court.

7. In this appeal, the main point which was urged on behalf of the appellant is that although all the issues in the suit were decided against the plaintiff-respondent No. 1 by the Trial Court, in addition, the Trial Court had also held that the suit was barred by limitation. It was submitted that while reversing the judgment of the Trial Court, the First Appellate Court had neither gone into the question of limitation nor reversed the finding that the suit was barred by limitation under Article of the Limitation Act. While affirming the judgment of the First Appellate Court, even the High Court appears to have lost sight of the said finding.

8. Appearing in support of the appeal, Mr. S.B. Sanyal, learned senior advocate, submitted that both the First Appellate Court and the High Court erred in reversing the judgment of the Trial Court without deciding the question relating to limitation and that the judgment both of the High Court as well as of the First Appellate Court were liable to be set aside on such ground alone.

9. Appearing for the respondents, Ms. Rachana Srivastava, learned advocate, firstly submitted that the question now being raised on behalf of the appellants had not been raised on their behalf either before the First Appellate Court or before the High Court, which, therefore, had no opportunity to consider the same. Not having raised the said question before the First Appellate Court and the High Court, the appellants were not entitled to raise the same in this appeal.

10. Ms. Srivastava also submitted that even before the Trial Court no specific issue had been framed regarding limitation and the purported finding of the Trial Court in respect thereof was in the nature of an observation made in passing.

13. In support of her second submission, Ms. Srivastava relied upon a decision of this Court in *Balasaria Construction (P) Ltd. v. Hanuman Seva Trust and Ors.* 2006 (5) SCC 658 wherein it had been held that a suit

could not be dismissed under Order 7 Rule 11(d) of the Code of Civil Procedure in the absence of proper pleadings relating to limitation, particularly when the question of limitation is a mixed question of law and fact and on a mere reading of the plaint the suit could not be held to be barred by limitation.

14. A similar view was taken by this Court in *Narne Rama Murthy v. Ravula Somasundram and Ors.* 2005 (6) SCC 614 where also the question of limitation was an inextricably mixed question of law and fact and the bar of limitation could not be decided without considering the related facts giving rise to such question.

15. Ms. Srivastava urged that in this appeal, the situation was no different and the plea of limitation now sought to be taken, being a mixed question of law and fact, the same cannot be allowed to be raised in view of the aforesaid decisions of this Court.

16. Having considered the submissions made on behalf of the respective parties, the decisions cited by them and the relevant law on the subject, we are unable to accept Ms. Srivastava's submissions mainly on two counts. Firstly, the facts disclosed clearly indicate that neither the First Appellate Court nor the High Court took notice of Section [3\(1\)](#) of the Limitation Act, 1963, which reads as follows:

3. Bar of limitation. - (1) Subject to the provisions contained in Sections [4 to 24](#) (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period, shall be dismissed although limitation had not been set up as a defence.

Even in the decision of this Court in *Darashan Singh's case* (supra) the said provision does not appear to have been brought to the notice of the Hon'ble Judges who decided the matter.

17. It is well settled that Section [3\(1\)](#) of the Limitation Act casts a duty upon the court to dismiss a suit or an

appeal or an application, if made after the prescribed period, although, limitation is not set up as a defence.

18. In the instant case, such a defence has been set up in the written statement though no issue was framed in that regard. However, when the Trial Court had in terms of the mandate of Section [3\(1\)](#) come to a finding that the suit was barred by limitation, it was the duty of the First Appellate Court and also of the High Court to go into the said question and to decide the same before reversing the judgment of the Trial Court on the various issues framed in the suit. Even though the various issues were decided in favour of the plaintiff both by the First Appellate Court and the High Court, the same were of no avail since the suit continued to remain barred under Article of the Limitation Act, 1963,

19. Ms. Srivastava's submission that the plea of limitation not having been taken before the appellate forums, the same could not be taken before this Court in proceedings under Article [136](#) of the Constitution on the ground that the question of limitation was a mixed question of law and fact, stands nullified by the fact that the suit continued to remain barred by limitation after the decisions of the appellate Courts since such finding of the Trial Court had not been set aside either in the first appeal or by the High Court in second appeal.

21. It is no doubt true, as was pointed out by this Court in the case of Balasaria Construction (P) Ltd. (supra) and also in Narne Rama Murthy's case (supra), that if the plea of limitation is a mixed question of law and fact, the same cannot be raised at the appellate stage. We have no problem with the said proposition of law. What we are concerned with is whether the said proposition is applicable to the facts of this case. In this case the plea of limitation had been raised in the written statement and though no specific issue was framed in respect thereof, a decision was given thereupon by the learned Trial Court.

23. The reasoning behind the said proposition is that certain questions relating to the jurisdiction of a Court, including limitation, goes to the very root of the Court's jurisdiction to entertain and decide a matter, as otherwise, the decision rendered without jurisdiction will be a nullity. However, we are not required to elaborate on the said proposition, inasmuch as, in the instant case such a plea had been raised and decided by the Trial Court but was not reversed by the First Appellate Court or the High Court while reversing the decision of the Trial Court on the issues framed in the suit. We, therefore, have no hesitation in setting aside the judgment and decree of the High Court and to remand the suit to the First Appellate Court to decide the limited question as to whether the suit was barred by limitation as found by the Trial Court. Needless to say, if the suit is found to be so barred, the appeal is to be dismissed. If the suit is not found to be time-barred, the decision of the First Appellate Court on the other issues shall not be disturbed.”

(2) Judgment of this court in case of ***Sealand Shipping & Export Pvt. Ltd. Vs. Kinship Services India Pvt. Ltd. (2011) 5 BomCR***

572. Relevant paragraphs nos. 20 to 29 and 31 read thus :

“20. The Charter Party Agreement is dated 7 August 2001 between the parties. The vessel sunk on 1 October 2001. The arbitration clause was invoked by the Respondents by letter dated 7 October 2004. Between this period, the parties had exchanged various related correspondences. By letter dated 14 September 2004, the claimants also, in view of Clause 42 of the Charter Party Agreement, called upon the Respondents to pay ` 32,25,864/ in view of Charter Party Agreement and an outstanding dues at the foot of statement of account. The Respondents, in reply to the same, by letter dated 7 October 2004 while denying the liability raised counter claim as noted above. By this letter dated 14 September 2004 the claimants appointed even the Arbitrator. The Respondents resisted the same by

letter dated 7 October 2004 and suggested three names for the Arbitrator and ultimately the sole Arbitrator was appointed by consent of the parties and the arbitration proceedings commenced accordingly, based upon the Arbitration Act. Before the Arbitrator, no specific issue with regard to the limitation was raised by the parties. Therefore, in the present facts and circumstances, as the parties had business dealing since 1999 and they maintained regular accounts and as ultimately, based upon the agreement, the claimants invoked the arbitration clause and as the Respondents resisted the dispute and also raised counter claim and as claimants failed to lead any evidence and/or raise any objection with regard to the limitation, the point still remains is whether the Award so passed by the Arbitrator is within limitation or not.

21. The plea of limitation though not specifically pressed/framed, but can be raised for the first time in a Petition under Section [34](#) of the Arbitration Act. Section [3](#) of the Limitation Act, 1963 (for short, Limitation Act) provides as under:

3. Bar of Limitation. (1) Subject to the provisions contained in Sections [4 to 24](#) (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.

(2) For the purposes of this Act,

(a) A suit is instituted.

(i) in an ordinary case, when the plaint is presented to the proper officer;

(ii) in the case of a pauper, when his application for leave to sue as a pauper is made; and

(iii) in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator;

(b) any claim by way of a set off, or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted

(i) in the case of a set off, on the same date as the suit in which the set off is pleaded;

(ii) in the case of a counter claim, on the date on which the counter claim is made in Court;

(c) an application by notice of motion in a High Court is made when the application is presented to the proper officer of that Court.

22. Article 137 of the Limitation Act is reproduced as under:

Description of application

Period of limitation

Time from which period begins to run.

137. Any other application for which no period of limitation is provided elsewhere in this division.

23. Three years.

24. When the right to apply accrues.

Though the plea of limitation was raised, it appears that the same was not pressed before the learned Arbitrator. There was no issue of limitation framed and/or not insisted upon by the parties. In the Award, there is no reference of any kind made in this regard.

23. Section [4](#) of the Arbitration Act provides as under:

4. Waiver of right to object . A party who knows that

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-

compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

24. Section [5](#) of the Arbitration Act, unless provided under the Act, the Court's intervention in such arbitration proceeding is also discouraged. The point still remains, whether the parties can waive the issue of limitation before the Arbitrator, as it goes to the root of the matter. The Arbitrator, in view of settled law itself, is not empowered to award claim which is barred by law of limitation, specifically when there is no contra agreement to show that the parties are entitled to raise claim or counter claim inspite of such provisions.

25. The Apex Court, while dealing with Section [3](#) of the Limitation Act, in Kamlesh Babu and Ors. v. Lajpat Rai Sharma and Ors. [MANU/SC/2257/2008](#): (2008) 12 SCC 577 observed as under:

16. Having considered the submissions made on behalf of the respective parties, the decisions cited by them and the relevant law on the subject, we are unable to accept Ms Srivastava's submissions mainly on two counts. Firstly, the facts disclosed clearly indicate that neither the first appellate court nor the High Court took notice of Section [3\(1\)](#) of the Limitation Act, 1963, which reads as follows:

3. Bar of limitation. (1) subject to the provisions contained in Sections [4 to 24](#) (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence.

Even in the decision of this Court in Darshan Singh Case [MANU/SC/0843/2003](#): (2004) 1 SCC 328 the said provision does not appear to have been brought to the notice of the Hon'ble Judges who decided the matter.

17. It is well settled that Section [3\(1\)](#) of the Limitation Act casts a duty upon the court to dismiss a suit or an

appeal application, if made after the prescribed period, although, limitation is not set up a defence.

18. In the instant case, such a defence has been set up in the written statement though no issue was framed in that regard. However, when the trial court had in terms of the mandate of Section [3\(1\)](#) come to a finding that the suit was barred by limitation, it was the duty of the first appellate court and also of the High Court to go into the said question and to decide the same before reversing the judgment of the trial court on the various issues framed in the suit. Even though the various issues were decided in favour of the Plaintiff, both by the first appellate court and the High Court, the same were of no avail since the suit continued to remain barred under Article 59 of the Limitation Act, 1963.

26. Under Code of Civil Procedure (CPC) also in view of the provisions of Order 7, Rule 11(d), if evidence is not required and the plea of limitation is apparent, the Court can pass appropriate order. In a case where evidence is necessary at the final stage of the Suit along with other issues, the Court needs to consider the issue of limitation. Therefore, taking overall view of the matter, even the Arbitrator is bound to consider the aspect of limitation either at the initial stage if objection so raised and at least at the final stage of the arbitration proceedings based upon documents and material placed on record, whether plea was specifically pressed or not, to avoid further complication in the matter.

27. It is settled that the plea of limitation, prevent claiming the party from recovering the amount/claim though he has a right to claim the same. It debars the remedy and not the claim. Therefore, the Arbitrator under the Arbitration Act also bound to consider this aspect of limitation at least at the time of awarding the claim so raised by either of the parties, but within the limit of Limitation Act. In my view, there is no question of invoking doctrine of "waiver" and/or "no interference by the Court" as contemplated under Section [4](#) and/or [5](#) of

the Arbitration Act, specially at the time of awarding/granting/passing the final Award. The arbitration proceedings and the power of Arbitrator with this regard, are not exceptional to that. The Arbitrator is bound to pass award within the framework of substantive as well as procedural laws.

28. In view of above, the decision in Indian Oil Corporation Ltd. v. Kverner Construction India Ltd. [MANU/MH/0258/2000](#): 2000 (2) Bom. C.R. 871 renders no assistance in view of the facts and circumstances of the case itself and basically in view of the Supreme Court judgments as referred above with regard to the raising plea of limitation, though not pressed before the Arbitrator. Same is the position with regard to the decision in Union of India through Dy. Controller of Stores v. MAA Agency and Anr. [MANU/MH/0867/2002](#): 2003 (4) Bom. C.R. 234 . The facts and circumstances were different in this case also. This case also in my view so far as the arbitration issue is concerned is not in conformity with the view expressed by the Supreme Court (supra) with regard to the plea of limitation.

THE CONDUCT OF THE PARTIES BEFORE THE ARBITRATOR OF NOT PRESSING THE ISSUE, AT THE RELEVANT TIME, BUT AGITATE THE SAME IN THE COURT UNDER SECTION [34](#) OR ANY OTHER TIME.

29. Strikingly, in the present case, though plea was raised and as events reflect the claim as well as counter claim so raised was not considered from the point of view of limitation. Even the issue was not framed though plea was raised. The arbitration proceedings based upon the other issues on merit proceeded and the parties led evidence accordingly. The claimants, however in Section [34](#) Petition, has raised specific plea of limitation, based upon the events as well as the documents available on the record. Both the Counsel made their respective submissions; supporting as well as opposing the plea of limitation. Even the respective authorities were cited to support their claim/counter claim. As per the settled law,

if Court is under obligation, to consider the plea of limitation in view of Section [3](#) of the Act read with decisions of the Supreme Court as well as various other High Courts and as, if the limitation issue goes to the root of the claim/matter, there is no reason that the Court even in the Petition under Section [34](#), should not consider the same merely because the parties, for whatever may be the reason, had chosen not to press the point before the Arbitrator, but now agitating the issue in Section [34](#) Petition by raising specific ground to that effect. I am of the view that in view of the Supreme Court judgments, the Court is under obligation, to consider the plea of limitation so raised, though not pressed before the Arbitrator in a Petition under Section [34](#) and need to pass appropriate order accordingly in accordance with law.

31. This maxim cannot be read to mean that the parties can enter into any agreement which is contrary to law or illegal or against the public policy. Though in certain area like Arbitration, the parties agree to submit their differences to be settled by the Arbitrator or Mediator, subject to the agreed terms and conditions, they will be bound by such consent agreement.”

(3) Judgment of this court in case of ***Saraswat Coop. Bank Ltd. Vs. Jaynit Agencies 2012 (5) MhLJ 405***. Relevant paragraph no. 6 reads thus :

“6. The learned Arbitrator while deciding/rejecting the claim of the Petitioner nowhere dealt with the aspect of limitation. Though not raised, but as such claim in the present facts and circumstances, if are beyond the period of 3 years, the benefit if any, being the important provisions, need to be referred and decided by the Arbitrator, while granting and/or rejecting the claim. Whether it is within limitation, is a crucial factor to adjudicate the monetary claim in any of the proceedings. I have in Sealand Shipping & Export Pvt.Ltd. vs. Kinship Services (India) Pvt. Ltd.2, observed as under :

“25 The Apex Court, while dealing with

section 3 of the Limitation Act, in (Kamlesh Babu and ors. Vs. Lajpat Rai Sharma and ors. 2008 DGLS (soft)

498: (2008) 12 S.C.C. 577 observed as under: 17. It is well settled that section 3(1) of the Limitation Act casts a duty upon the Court to dismiss a suit or an appeal application, if made after the prescribed period, although, limitation is not set up as a defence.

27. It is settled that the plea of limitation, prevent claiming the party from recovering the amount/claim though he has a right to claim the same. It debars the remedy and not the claim. Therefore, the Arbitrator under the Arbitration Act also bound to consider this aspect of limitation at least at the time of awarding the claim so raised by either of the parties, but within the limit of Limitation Act. In my view, there is no question of invoking doctrine of “waiver” and/or “no interference by the Court” as contemplated under sections 4 and/or 5 of the Arbitration Act, specially at the time of awarding/granting/passing the final Award. The arbitration proceedings and the power of Arbitrator with this regard, are not exceptional to that. The Arbitrator is bound to pass award within the frame work of substantive as well as procedural laws.”

(4) Judgment of this court in case of ***Asian Electronics Vs. Tata Motors*** in Arbitration Petition No. 254 of 2006 delivered on 28th November, 2006.

(5) Judgment of this court in case of ***Aditya Birla Chemicals (India) Ltd. Vs. Tata Motors Ltd.*** In Arbitration Petition No. 1027 of 2011 delivered on 9th October, 2012.

(6) Order of Division Bench of this court in case of ***Asian***

Electronics Ltd. Vs. Tata Motors Ltd. in Appeal No. 384 of 2007.

(7) Judgment of Supreme Court in case of ***State of Goa Vs. Praveen Enterprises*** (2012) 12 SC 581.

23. Per contra Mr. Purohit learned counsel for the respondent submits that since petitioner did not raise any issue of limitation in the written statement, or under section 16 of the said Arbitration Act which issue touches the jurisdiction of the learned arbitral Tribunal, it would amount to waiver under section 4 of the said Arbitration Act. Since the petitioner did not raise any such issue, the arbitral tribunal rightly did not frame issue of limitation. It is submitted that the petitioner has not raised any ground in the petition that though plea of limitation was raised the arbitral tribunal did not frame any issue of limitation. The respondent (original claimant) was not put to notice.

24. Without prejudice to the aforesaid submissions, it is submitted by the learned counsel that the plea of limitation has to be made in detail and can't be a vague plea. Simplicitor denial of the averment made by the claimant that the claim was within time and not barred by law of limitation, can not amount to a plea of limitation on the part of the petitioner (original respondent). In support of this submission, learned counsel placed reliance on the judgment of this court in case of ***State of Maharashtra Vs. Ashoka Buildcon Limited*** delivered on 1st April, 2013 in Arbitration Appeal No. 3 of 2009 and in particular paragraph 13, 14 and 15 which read thus :

“13. It is not in dispute that there was no plea of limitation raised in the written statement or in the application filed

under section 34 of the Arbitration and Conciliation Act, 1996 by the appellants. In my view, the plea of limitation being a mixed question of fact and law has to be raised with details in the pleadings before the arbitral tribunal so as to give an opportunity to the other side to meet with such plea. If such plea of limitation would have been raised by the appellants before the arbitral tribunal, the respondents could have even led oral evidence to prove that the claims were within time and were not barred by law of limitation.

14. In my view, plea of limitation touches the issue of jurisdiction of the arbitral tribunal and being a mixed question of facts and law has to be raised by the parties before the arbitral tribunal itself and cannot be allowed to be raised for the first time in this appeal under Section 37 of the Arbitration and Conciliation Act, 1996.

15. Though the plea of limitation is raised by the appellants in the present proceedings, in my view since the said plea was not raised by the appellants in the application filed under section 34 of the Arbitration and Conciliation Act, 1996, as well as before the arbitral tribunal, the said plea cannot be allowed to be raised in the proceedings filed under section 37 of the Arbitration and Conciliation Act, 1996 for the first time. In my view, the judgment of this court relied upon by the learned senior counsel by which it was held that even at the second appeal stage plea of limitation can be raised is of no assistance to the appellants.”

25. Learned counsel also placed reliance on the judgment of Division Bench of this court in case of **Vimal Jain Vs. Vertex Financial Services Pvt. Ltd. And anr. 2007 (5) BomCR 478** and in particular paragraphs 4, 5, 8 and 9. It is submitted that plea of limitation is plea of jurisdiction and if not raised it would amount to waiver under section 4 of the said Arbitration Act. No such

plea thus can be raised for the first time in the proceedings filed under section 34 of the Arbitration Act. Relevant paragraphs read thus :

“4. Perusal of the impugned order apparently discloses that the point regarding bar of limitation was not raised before the learned arbitrator and, therefore, the same being a mixed question of law and fact, the learned single Judge has rejected the petition under Section [34](#) of the Arbitration and Conciliation Act, 1996, hereinafter called as "the said Act", which was to be filed on the said ground of bar of limitation. Secondly, the contention about the payment of Rs. 5,00,000/-to the respondents has been rejected as the records, based on which the award was passed, evidently disclosed that the sum of Rs. 5,00,000/-was paid prior to the formation of the company to the two persons, who thereafter became the Directors of the said company and not to the respondent-company inspite of the admitted fact that the appellant was liable to pay the amount to the respondent-company.

5. As regards the first ground of challenge, placing reliance in the decisions in the matters of Management of the State Bank of Hyderabad v. [Vasudev Anant Bhide and Ors. reported in MANU/SC/0326/1969](#): (1969)IILLJ713SC and Ramesh B. Desai and Ors. v. [Bipin Vadilal Mehta and Ors. reported in MANU/SC/2996/2006](#): AIR2006SC3672 , as also Bye-law 252 of the Bye-laws applicable to the parties, the learned Advocate appearing for the appellant submitted that in terms of Clause (2) of Bye-law 252, an arbitration proceedings ought to have been initiated within six months from the date of cause of action and the same having not been so initiated, the arbitrator had no jurisdiction to entertain the proceedings and the learned single Judge failed to take into consideration this aspect of the matter. It was also sought to be contended that the Apex Court has clearly held that plea of limitation can be raised, even for the first time, at the appellate stage. The learned Advocate appearing for the respondents, on the other hand, drawing attention to Clause (2) of Bye-law 252 of the said Bye-laws, and more particularly to the third proviso thereto, submitted that the amended Bye-laws came into force from

4-6-2003 and the proceedings were initiated in September, 2003. Hence, they were within the period of limitation.

8. The Section [4](#) of the said Act provides that:

4. Waiver of right to object: A party who knows that

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

Further, the Section [16\(2\)](#) of the said Act clearly provides that a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because he has appointed, or participated in the appointment of, an arbitrator. Conjoint reading of the above provisions of law would disclose that a party to the arbitration proceedings seeking to raise the point of bar of limitation for initiating the arbitration proceedings should raise the issue at the earliest opportunity and in any case not later than the submission of the statement of defence, otherwise it would be deemed to have been waived. The law in that regard is well-settled by the decision of the Apex Court in *Narayan Prasad Lohia v. Nikunj Kumar Lohia and Ors.* [reported in MANU/SC/0114/2002](#): [2002]1SCR1136 wherein it has been clearly held that unless the objection in terms of Section [16\(2\)](#) is raised within the time prescribed under the said Section, it would be deemed to have been waived in terms of Section [4](#) of the said Act. In the case in hand, undisputedly, the point regarding the bar of limitation was never raised before the learned arbitrator. Being so, it should be deemed to have been waived.

9. Even otherwise, the point of limitation is a mixed

question of law and fact. In fact, the law in this regard also is well-settled and the same was reiterated by the Apex Court in the decision sought to be relied upon on behalf of the appellant himself. In Ramesh Desai's case (supra), it was clearly observed by the Apex Court that "A plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained which is entirely a question of fact. A plea of limitation is a mixed question of law and fact.". Once it is clear that the point of limitation was not raised before the learned Arbitrator, apart from the fact that it is deemed to have been waived, the question of entertaining such point in proceedings under Section [34](#) of the said Act or in an appeal arising from the order passed therein, cannot arise. Hence no fault can be found with the impugned order in that regard."

26. It is submitted by the learned counsel that even if the arbitral tribunal has dealt with the issue of limitation in the impugned award, no reliance on such observation of the learned arbitral tribunal on the issue of limitation can be placed since the said plea was waived by the petitioner not having raised the same in the written statement.

27. Without prejudice to the submissions made aforesaid on the plea of limitation and waiver, it is submitted by the learned counsel that cause of action for indemnification arises when the party is damnified. In support of this submission the learned counsel placed reliance on the judgment of this court in case of **Abdul Hussein Shaikh Gulamali Jambawala Vs. M/s. Bombay Metal Syndicate AIR 1972 BOM 252** and in particular paragraphs, 3, 4, 5, 7 and 8 which read thus :

“3. Between October 11, 1957 and January 3, 1958, the plaintiff had sold and delivered to the defendants certain

different goods and had also recovered the price thereof. In the letter dated October 11, 1957, the defendants stated : "In respect of the transactions under your invoice x x x x x dated 25th September 1957 we do hereby indemnify you against any amount of sales tax that may be levied by the authorities with or without any guarantee thereof, as the case may be, as and when charged". Similar letter of indemnity was executed by the defendants on January 3, 1958. There is no dispute between the parties that in respect of the goods sold and delivered by the plaintiff to the defendants during the above period a contract of indemnity in the terms contained in the above letters existed.

4. In connection with the sales tax relating to the goods sold by the plaintiff to the defendants as mentioned above, the sales tax authorities issued an order dated February 28, 1963, calling upon the defendants (plaintiff ?) to pay Rs. 3,101.25 by way of sales tax and Rs. 378/- as penalty. The plaintiff called upon the defendants to deposit the amount of tax and penalty, but the defendants failed to do so. An appeal filed by the plaintiff was dismissed on November 12, 1963. The revisional application filed by the plaintiff was dismissed in July 1963. Prior to the institution of the above appeal, between April 27, and July 1, 1963, the plaintiff deposited the aggregate sum of Rs. 3,479.25 with the sales tax authorities. To recover that amount the plaintiff filed the present suit on April 13, 1966. The parties were agreed before the learned Judge below that the claim in suit was governed by the provisions in Article 113 in the Schedule to the Limitation Act of 1963 which runs as follows :-

"113. Any suit for which no period of limitation three years. When the right to sue accrues is provided elsewhere in this Schedule."

Relying upon certain observations of Chagla J. (as he then was) in the case of Gajanan Moreshwar v. [Moreshwar Madan MANU/MH/0039/1942](#): AIR1942Bom302 , the learned Judge below held that in the present case the right to sue that in the present case the right to sue had accrued in favour of the plaintiff when the order dated February 28, 1963, demanding

and / or levying sales tax and penalty was issued. As three years' period had expired from that date prior to the date of the institution of the suit, he held that the suit was barred and dismissed the same.

5.Mr. Malkani for the plaintiff has submitted that the above finding of the learned Judge is contrary to the decision of the Supreme Court in the case of Shanti Swarup v. [Munshi Singh, MANU/SC/0275/1967](#) : [1967]2SCR312 . The effect of the observations of the Supreme Court in this case, according to Mr. Malkani, was such that in the present case the right to sue on the contracts of indemnity between the parties should be held to have accrued to the plaintiff only upon the plaintiff being damnified and suffering loss of the sum of Rs. 3,479.25 by deposit and payment thereof between April 27 and July 1, 1963. He, therefore, submitted that the suit that was filed before expiry of three years from April 27, 1963, was within the prescribed period of three years and was not barred by the Law of Limitation.

7.Now, in connection, with the phrase "right to sue accrues" that appears in the third column of Art. 113, one may refer to the contents of Sections [22](#) and [23](#) of the Act which relate to continuing breaches and torts and suits for compensation for acts not actionable without special damage. Without quoting the contents of these sections it is sufficient to state that the Law of Limitation has recognized that liabilities for payments of damages and / or compensation may continue to accrue from day to day newly in respect of continuing breaches of contracts and torts. One illustration of a cause of action which may continue to come into existence under a contract from time to time and day to day will be a negative covenant agreed to between purchasers and sellers in deeds of conveyances and between lessors and lessees in the deeds of leases. But this is not the subject in which it is necessary to indulge too deep. It is sufficient to state that a contract of indemnity may be such as may give rise to two and different sorts of claims which may be enforceable in a Court of law. The ordinary common law cause of action on a contract of indemnity did not arise at any date prior to damnification and / or loss that the plaintiff suffered. In other words the cause of action arose only if and

when the plaintiff was damnified and suffered losses. Now, it is true that this view of the nature of contracts of indemnity was by the Chancery and / or Equity Courts considered very harsh and not sufficient to carry out the entire and true purpose of such contracts. The common law was by rulings of Chancery and Equity Courts amended and it was held that the promisee in a contract of indemnity was entitled to additional and extra cause of action vesting him with a right to call upon the promisor to carry out his obligations by payments to the creditors and third parties and / or by deposits made in Court in anticipation of the actions and proceedings which such creditors and third parties may take against the promisee in the indemnity contract. The effect of the findings made by the learned Judge below is that the above additional relief which is afforded to a promisee in an indemnity contract by Law established under rulings of the Chancery and Equity Courts was sufficient to make a finding that a cause of action which would have accrued to such promisee only upon being damnified and suffering loss as originally at common law was not a separate cause of action. It appears to me that in spite of the discussion contained in the case of [MANU/MH/0039/1942](#): AIR1942Bom302 there is no justification in holding against the plaintiff-indemnified promisee that a fresh cause of action does not accrue to him under the same contract of indemnity when he is in fact damnified and / or suffers loss. It is true that by the law of indemnity as amended by the rulings of the Chancery and Equity Courts, promisee in an indemnity contract would have a cause of action to claim relief of directions that the promisor do make payment to the third party creditor so that in fact the promisor (promisee ?) is never damnified. It is true that in this very connection the promisee may claim relief of deposit of the relevant amount in a Court of law so that the promisee can have the deposited money in hand for payment to the third party creditor. This is a new cause of action created by the rulings of the Chancery Courts. This has not wiped off the common law cause of action vested in a promisee under an indemnity contract for enforcement of obligation on the indemnity contract itself by seeking a direct decree against the promisee (promisor?). To such decree he was entitled at

common law only upon damnification and sufferance of loss. This cause of action arises only upon damnification and sufferance of loss. The observations made above are in consonance with the observations of the Supreme Court in the case of [MANU/SC/0275/1967](#): [1967]2SCR312 where in paragraph 5, Their Lordships observed:-

"The vendees, in the present case, covenanted to the vendors not only to purchase the property mentioned in the sale deed but also to relieve the vendors from the liability of the mortgages, and in that sense there was an implied contract to indemnify the vendors. The cause of action in such a case arises when the plaintiff-vendors are actually damnified. The mere fact that a mortgage decree has been obtained against the plaintiff is not sufficient to put the statute in motion. In other words, the statute runs not when the event happens which caused the loss but on the actual damnification".

8. In view of the above observations of the Supreme Court, I do not deem it necessary to discuss the observations of Chagla, J., in the case of [MANU/MH/0039/1942](#): AIR1942Bom302 mentioned above as also the contrary statements of law contained in the judgment of Lokur, J. in the case of Shankar Nimbaji v. [Laxman Supdu](#) [MANU/MH/0127/1939](#): AIR1940Bom161, which both cases are referred to in the judgment of the learned Judge. In my view, on a true construction of the contracts of indemnity admitted between the parties, it was permissible for the plaintiff to call upon the defendants to pay the amounts claimed in the order dated February 28, 1963, directly to the sales tax authorities. That was because of the additional cause of action afforded by rulings of Courts of Equity. It was, however, permissible for the plaintiff to wait and institute the present suit on the basis of the original cause of action arising at common law upon damnification and sufferance of loss. The plaintiff was for the first time damnified and suffered losses for which he was entitled to be indemnified when he made payments between April 27 and July 1, 1963. The plaintiff's suit was within three years from the date of the

above period and accordingly within the time prescribed by Article 113.”

It is submitted that this judgment of the Bombay High Court was not noticed by this court in the judgment in case of **Gujarat Urja Vikas Nigam Limited** in Arbitration Petition No.955 of 2011. The judgment of this court in **Gujarat Urja Vikas Nigam Ltd.(supra)** thus would not be binding on the respondent.

28. It is submitted by the learned counsel that though there were separate lease summary schedules for the purpose of payment of lease rental all the said lease summary schedules were forming part of the same agreement dated 19th December, 1997. For the year 1999-2000 the respondent had claimed depreciation on 1st July, 1999. For the year 1999-2000 and 2000-01 the respondent had claimed depreciation at the rate of 50% for both those years on 10th February 1999. For the year 2000-01 the respondent claimed 100% depreciation on 2nd May, 2000. The Deputy Commissioner of Income Tax disallowed depreciation firstly on 20th March, 2003 and thereafter by another order passed on 31st March, 2004 for another year. It is submitted that since all the equipments given on lease to the petitioner were under one agreement, there was one cause of action in respect of all the equipments and thus the order dated 31st March 2004 passed by the Dy. Commissioner of Income Tax shall be considered for the purpose of commencement of limitation and the arbitration notice issued on 22nd August, 2006 was thus well within time.

29. Learned counsel distinguished the judgment of this court in case of

Aditya Birla Chemicals (Supra) on the ground that this court had considered the plea of limitation in case of claim for specific performance which is not the case in this matter. It is submitted that judgment of this court in case of ***Abdul Hussein Shaikh Gulamali Jambhawala (supra)*** was not noticed by this court in the said Judgment delivered in case of ***Aditya Birla Chemicals (supra)***.

30. Learned counsel distinguished the judgment of this court in case of ***Gujarat Urja Vikas Nigam Limited (supra)*** on the ground that the lease summary schedules of the lease agreement in this case were different. It is submitted that in this case the cause of action can at the most considered to be commenced on 31st March, 2004 when the last order was passed by the Dy. Commissioner of Income Tax.

31. It is submitted that since the view taken by the arbitral tribunal on the plea of limitation is a plausible view, this court under section 34 of the said Arbitration Act, can not interfere with such plausible view of the arbitral tribunal.

32. In so far as issue of indemnity is concerned, it is submitted by the learned counsel that the petitioner did not raise any issue before the arbitral tribunal that clause 14 would not apply to claim for creation of fund. No ground is raised in the arbitration petition that the interpretation of the learned arbitrator is not a possible interpretation or that the claim allowed is contrary to the terms of the contract. In support of this plea the learned counsel invited my attention to the averments made in the statement of claim by the

respondent herein and in the written statement filed by the petitioner herein. It is submitted that in ground(s) the petitioner has not raised any such specific ground about interpretation of clause 14.

33. It is submitted that the arbitral tribunal has interpreted clause 14 and has held that the said clause was wide and would include claim for creation of fund made by the respondent herein. This court cannot interfere with the possible interpretation of the arbitral tribunal. It is submitted by the learned counsel that even otherwise since under clause 2.4 of the lease agreement, the petitioner had agreed to pay revised lease rental, petitioner had hereby agreed to indemnify the respondent for any claim arising out of disallowance of the depreciation by the income tax department. This court cannot interfere with the findings of fact recorded by the arbitral tribunal on this issue in paragraph 21, 35, 36 and 48 of the impugned award. In support of the submission that even promise to pay will include indemnity, learned counsel placed reliance on the judgment of Supreme Court in case of ***Lala Shantiswaroop Vs. M.C. Singh and Ors*** AIR 1966 SC 1315 Paragraph 4 and 5 of the said judgment read thus :

“4. On behalf of the appellant Mr. B. C. Misra put forward the argument that a provision in a conveyance whereby the purchaser agrees to pay off an encumbrancer does not give rise to any contract of indemnity and that the appropriate article of Limitation Act was Article and not Article and time began to run from the date from which the covenant to pay off the encumbrancer is broken. We are unable to accept this argument as correct. If a conveyance contains a covenant by a purchaser to pay off an encumbrance on the property sold the failure of the purchaser to do so may give rise to two different causes of action. In the first place, the failure of the purchaser to discharge the encumbrance within such time as is provided expressly or by implication entitles the vendor

to bring an action to have himself put in a position to meet the liability which the purchaser has failed to discharge. In such a case, limitation will run under Article of the Limitation Act (or under Article if the sale deed is unregistered) from the date on which the purchaser ought to have paid off the mortgage. In the second place, it is also open to the vendor to bring a suit on the contract of indemnity if as a result of the failure of the purchaser to discharge the encumbrance the vendor incurs a loss. It was contended on behalf of the appellant that there was no express contract of indemnity in the sale deed executed on February 9, 1920 in favour of the appellant. But the contract of indemnity is implicit in this case because of the covenant on the part of the purchaser to pay off the previous encumbrance on the property sold. Under section [124](#) of the Indian Contract Act "a contract of indemnity" is a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person. Under Article of the Limitation Act a suit based upon the contract of indemnity is required to be brought within three years from the time when the plaintiff was actually damaged. In the present case there is no express contract of indemnity. But, in our opinion, the provisions of Article are also applicable to a case where the contract of indemnity is implied and not express. It was observed by the Judicial Committee in *Musammat Izzal-un-Nissa Begum v. Kunwar Pertab Singh* that a contract of indemnity may be express or implied and if the purchaser covenants with the vendor to pay the encumbrances, there is nothing more than a contract of indemnity. At page 208 of the Report of Judicial Committee clearly expressed the proposition as follows :

"It seems to depend on a very simple rule. On the sale of property subject to incumbrances the vendor gets the price of his interest, whatever it may be, whether the price be settled by private bargain or determined by public competition, together with an indemnity against the

incumbrances affecting the land. The contract of indemnity may be express or implied. If the purchaser covenants with the vendor to pay the incumbrances, it is still nothing more than a contract of indemnity. The purchaser takes the property subject to the burthen attached to it. If the incumbrances turn out to be invalid, the vendor has nothing to complain of. He has got what he bargained for. His indemnity is complete. He cannot pick up the burthen of which the land is relieved and seize it as his own property. The nation that after the completion of the purchase the purchaser is in some way a trustee for the vendor of the amount by which the existence, or supposed existence, of incumbrances has led to a diminution of the price, and liable, therefore, to account to the vendor for anything that remains of that amount after the incumbrances are satisfied or disposed of, is without foundation. After the purchase is completed, the vendor has no claim to participate in any benefit which the purchaser may derive from his purchase. It would be pedantry to refer at length to authorities. But their Lordships, under the circumstances, may perhaps be excused for mentioning *Tweddel v. Tweddel* , *Butler v. Butler* , and *Waring v. Ward* ."

This decision was followed by the Full Bench of the Allahabad High Court in *Tilak Ram v. Surat Singh* . In our opinion, the principle applies to the present case and we accordingly hold that the covenant undertaken by the predecessor-in-interest of the appellant was not only one to purchase the vendor's property but also one to relieve the vendor from the liability of the mortgage, and in that sense there was an implied contract of indemnity in favour of the vendor. It follows therefore that Article of the Limitation Act applies to this case and as the sale deed is a registered document the plaintiff has six years for

bringing the suit from the time when he is damnified or actually suffers loss. The view that we have expressed is borne out by a long catena of authorities - Kumar Nath Bhattacharjee v. Nobo Kumar Bhattacharjee , Ratan Bai v. Ghasiram Gangabisan Wani Harakchand Tarachand v. Sumatilal Chunilal Gulabrao Vithoba v. [Shamrao Jagoba, MANU/NA/0065/1947](#) Naima Khatun v. Sardar Basant Singh, Ram Barai Singh v. Sheodeni Singh and Venkatanarayaniah v. Subramania Iyer. .

5. It was then contended by Mr. B. C. Misra that even if there was a contract of indemnity the cause of action for the plaintiff arose on February 4, 1937, when the final mortgage decree was passed and not on February 25, 1943 when the plaintiff was dispossessed. It was argued that the suit must be held to be brought beyond the period of limitation and the plaintiff was not entitled to succeed. It is not possible for us to accept this argument as correct. The vendees, in the present case, covenanted to the vendors not only to purchase the property mentioned in the sale deed but also to relieve the vendors from the liability of the mortgages and in that sense there was an implied contract to indemnify the vendors. The cause of action in such a case arises when the plaintiff-vendors are actually damnified. The mere fact that a mortgage decree has been obtained against the plaintiff is not sufficient to put the statute in motion. In other words, the statute runs not when the event happens which caused the loss but on the actual damnification. "Where the covenant is to indemnify or save harmless, no action can be brought till some loss has arisen; so it is also where the covenant is to acquit from damage by reason of a bond or some particular thing; and in either case the proper plea is non damnificatus." - . In Collinge v. Heywood the plaintiff at the request of the defendant prosecuted an action, on receiving an undertaking to indemnify him from the said distress, actions, costs, damages, and expenses, which are now, or may be hereafter, commenced or otherwise incurred by reason of the claim of the distraining party. The plaintiff incurred costs of the suit and his own attorney thereafter delivered him a bill on account of

them. But it was held by the King's Bench that he was not damnified till he had paid the bill. In the present case, the damage occurred to the plaintiffs not on February 4, 1937 when the final mortgage decree was passed in favour of the mortgagees but on February 25, 1943 when the Collector directed the execution by the plaintiffs of a self-liquidating mortgage of three-fourths of the half share of the property of which they were the owners. We are therefore of the opinion that, in the present case, time runs under Article of the Limitation Act from February 25, 1943 when the plaintiffs were compelled to execute the self-liquidating mortgage for the purpose of satisfying the claim of the mortgagees.”

34. Lastly it is submitted by the learned counsel that in so far as award of interest by the arbitral tribunal is concerned, the respondent has no objection if this court considers reasonable rate of interest on the principal amount though contract provided for compound interest at the rate of 30% p.a.

35. Learned counsel placed reliance on the judgment of Supreme Court in the case of **Ittyavira Mathai Vs. Varkey Varkey and another, AIR 1964 Supreme Court 907** (paragraph 9) in support of the plea that if there is no clear plea of limitation by stating relevant facts and by making appropriate averments, the arbitral tribunal was not required to render any finding thereon. Even if any finding is rendered, this court cannot go into such finding which is rendered though there was no pleadings on the issue of limitation.

36. Mr. Seksaria learned counsel for the petitioner in rejoinder, submits that provisions of Code of Civil procedure are not applicable to the arbitration proceedings. Even if the provisions of the Code of Civil Procedure were to be strictly applied to the arbitration proceedings, under Order VI rule 4,

particulars are required to be stated in the pleadings only in case of misrepresentation, fraud, breach of trust etc and not in case of limitation. It is submitted that in any event, in the written statement the petitioner was only required to contend a concise statement of the defence of the petitioner which statement was sufficiently made by the petitioner and thus the arbitral tribunal was bound to frame an issue on limitation in view of the proviso to Section 3 of Limitation Act, 1963.

37. It is submitted that in any event since the arbitral tribunal has rendered a finding, on the issue of limitation, after dealing with the submissions advanced by both the parties on the plea of limitation, petitioner is entitled to urge the plea of limitation in this petition filed under section 34 and to demonstrate that the finding of the arbitral tribunal on the issue of limitation discloses an error apparent on the fact of the award and is illegal.

38. It is submitted by the learned counsel that the cause of action did not accrue on the petitioner refusing to pay pursuant to the demand made by the respondent vide their debit notes or by correspondence but had commenced when the claim for depreciation was rejected by the Deputy Commissioner of Income Tax. The finding of the arbitral tribunal on the issue of limitation is contrary to the law laid down by the Supreme Court and by this court in catena of decisions relied upon by the petitioner. The onus was on the respondent herein to prove that the claims made by the respondent were within time. He submitted that since the petitioner had raised the issue of limitation, section 4 of the said Arbitration Act did not apply.

39. On the issue raised by the respondent whether section 4 would be attracted to the plea of limitation or not, it is submitted by the learned counsel that the plea of limitation could not be waived and is not derogative under section 4 of the said Arbitration Act. The learned counsel placed reliance on various judgments of the Supreme court and this court already referred to aforesaid.

40. Learned counsel distinguished the judgment of this court in case of ***Abdul Hussein Shaikh Gulamali Jambawala*** and submits that the said judgment would not assist the respondent but would assist the petitioner. Even if the argument of the respondent is accepted that cause of action would arise on damnification, since it was the case of the respondent themselves that the Deputy Commissioner of Income Tax had appropriated the amount of refund due to the respondent by adjusting the demand raised while disallowing the claim for depreciation thereby the respondent already having made payment of income tax, even claim for creation of fund would have arisen on the date of passing the assessment order by the Deputy Commissioner of Income Tax for the first time.

41. It is submitted that there was no money claim in the original statement of claim and the said claim was added subsequently by way of amendment. It is submitted that in any event since the arbitral tribunal has rendered a finding that the money claim could not be allowed since liability of the respondent was not ascertained, no award for creation of fund could be passed by the arbitral tribunal. It is submitted that even in the amended statement of claim, there was no prayer for indemnity. My attention is invited

to various paragraphs of the statement of claim in support of this submission and in particular paragraph 21, 24, 26, 31 and 31A to 31C. In paragraph 32A of the statement of claim it was averred by the respondent that the income tax department had already adjusted the refund amount against the tax liability. Learned counsel distinguished the judgment of this court in case of ***Abdul Husssein Shaikh (supra)*** on the ground that there were two causes of action considered by this court in the said judgment.

42. It is submitted that on the issue of limitation as well as indemnity judgment of this court in case of ***Gujarat Urja Vikas (supra)*** would squarely apply to the facts of this case. It is submitted that under no provision of lease agreement, the respondent could make such claim for indemnity. There was no foundation led for claim of indemnity. Learned counsel distinguished the other judgments relied upon by the learned counsel for the respondent on the ground that the facts before the court in those judgments were different. Reliance is also placed on section 43 of the Arbitration Act in support of the submission that the provisions of Limitation Act, 1963 since are made applicable to arbitral proceedings, section 3 also applies to arbitration proceedings and the same can not be derogative.

REASONS AND CONCLUSIONS

Whether any part of the claims made by the respondent are barred by law of limitation ?

43. It is not in dispute that the petitioner and the respondent had entered into an agreement of lease bearing No. LS-361/97-98 alongwith summary schedule appended thereto on 19th December, 1997. On 28th March, 2003 the

Deputy Commissioner of Income Tax passed an order disallowing the depreciation claimed by the respondent on Type II equipment in supplementary lease schedules i.e. 361/1/1999-2000 and 361/03/1999-2000. By a letter dated 18th September, 2003 the respondent has allegedly informed the petitioner about the said order passed by the Deputy Commissioner of Income Tax dated 28th March, 2003 and requested the petitioner to provide all the documents required by them for claiming the depreciation before the IT Authority. It is not in dispute that on 31st March, 2004 the Deputy Commissioner of Income Tax passed another order disallowing the depreciation claimed by the respondent on Type II equipment described in supplementary lease schedules 361/05/1999-2000. Appeal filed by the respondent against both these orders are stated to be pending. On 21st July, 2005, the respondent issued three debit notes for an aggregate sum of Rs.26,30,662/- being the amounts disallowed by the Deputy Commissioner of Income Tax. The petitioner vide letter dated 23rd August, 2005 informed the respondent that the said debt note was not acceptable to the petitioner. On 22nd August, 2006 the respondent issued a demand notice demanding a sum of Rs.26,88,832/- with interest and invoked arbitration under clause 20.9 of the said lease agreement.

44. Question therefore arise for consideration of this court is :-

1. Whether the petitioner had raised plea of limitation in the written statement filed by the petitioner before the arbitral tribunal ?
2. If such plea is not raised by the petitioner in the written statement, whether such plea could be urged before the learned arbitrator across the bar ?

3. Whether there was any waiver on the part of the petitioner in so far as issue of limitation is concerned ?
4. What is the effect of the arbitral tribunal rendering a finding on the plea of limitation even if it is held that no such plea was raised and/or properly raised in the written statement ?

45. A perusal of the record indicates that it was averred by the respondent in the statement of claim that the claims were within time and not barred by law of limitation. In the written statement filed by the petitioner, the said statement of the respondent in the statement of claim was denied by the petitioner. The arbitral tribunal did not frame any issue/point for determination on limitation. A perusal of the award and more particularly paragraphs 31 and 32 indicates that both the parties through their learned counsel had made submissions on the issue of limitation before the arbitral tribunal. Though the arbitral tribunal has observed that in the written statement as well as in the reply to the amended claim the petitioner herein had not pleaded limitation and no issue had been placed on this point, there was no substance in the said contention raised by the learned counsel for the petitioner.

46. It is held by the arbitral tribunal that the period of limitation starts running from such time that the respondent to the arbitral proceedings refuse their liability to pay their increased rentals. The respondent to the proceedings for the first time by their letter dated 22nd August, 2005 refused their liabilities to pay the increased rentals to the arbitration having been

invoked on 26th September, 2006, the claim was in time. The arbitral tribunal also held that even otherwise the respondent therein themselves contended that the claim was prematured and thus if the claim was prematured, it could not be time barred. Relying on this discussion and the findings rendered by the arbitral tribunal in the impugned award, it is strenuously argued by the learned counsel for the petitioner that not only the petitioner had raised a plea of limitation in the arbitral proceedings though no such plea was required to be raised in view of section 3 of the Limitation Act, 1963 and the same having been urged before the arbitral tribunal and once the arbitral tribunal having considered such plea on merits, there was no question of any waiver under section 4 of the Arbitration and Conciliation Act, 1996. It is also one of the submission advanced by the learned counsel for the petitioner that there could be no waiver of plea of limitation under section 4 of the said Arbitration Act since it was duty of the learned arbitrator to decide the plea of limitation whether the same was raised or not in the written statement.

47. Mr.Seksaria, learned counsel appearing for the petitioner does not dispute that in so far as claim for revised rental raising out of dis-allowance and depreciation by the order dated 31st March, 2004 in respect of supplementary lease schedules 361/05/1999-2000 is not barred by law of limitation in view of the respondent having invoked arbitration agreement by letter dated 22nd August, 2006 i.e. within three years from the date of the said order dated 31st March, 2004.

48. In my view, since the petitioner herein had in their written statement denied the statement made by the respondent that the claims made by the

respondent herein were within time and not barred by law of limitation, the initial onus thus was on the original claimant (respondent herein) to prove that the claims were within time and not barred by law of limitation. The arbitral tribunal however did not frame any such issue during the course of the arbitral proceedings and before commencement of the oral evidence. A perusal of the record indicates that both the parties had made submission on the issue of limitation before the arbitral tribunal. Though the arbitral tribunal has observed that no such plea was raised by the petitioner in the written statement or in the additional written statement and the plea of limitation being a mixed question of facts and law, it could not have been urged across the bar has rendered a finding on the submissions made on the issue of limitation by both the parties.

49. In my view though the arbitral tribunal did not frame any issue for plea of limitation, the arbitral tribunal appears to have allowed both parties to make submission on the issue of limitation and have rejected the submission made by the petitioner on the issue of limitation on merits. In my view once the arbitral tribunal having rendered a finding on the issue of limitation on merits, this court is entitled to look into such finding to ascertain whether the arbitral tribunal has allowed any time barred claim and has acted illegally and thus such award is in conflict with public policy. In my view, the question of waiver in the facts and circumstances of this case thus would not arise.

50. This court in case of *Asian Electronics Vs. Tata Motors* decided on 28th November, 2006 in Arbitration Petition No. 254 of 2006 has held that the cause of action had arisen when the Income Tax Officer disallowed the

depreciation and respondent would be entitled to claim the lease rental appeal arising out of the said order passed by the Senior Judge of this Court in Case of ***Asian Electronics vs. Tata Motors*** is dismissed by the Division Bench of this court in Appeal No.384 of 2007 dated 10th July, 2007. This court in case of ***Gujarat Urja Vikas Nigam Limited vs. Tata Motors Ltd.*** have interpreted identical clause which permits the lessor to vary lease rental charges in Arbitration Petition No.955 of 2011 and in its judgment dated 16th July, 2013 after referring to various other judgments of this court has held that the right to sue arise when the claim for depreciation is disallowed by the income tax authority for the first time and not when the demand notice was subsequently issued by the lessor and/or denied and/or when such demand was disputed by the lessee. Paragraph 10 of the said judgment in case of ***Asian Electronics (supra)*** reads thus :-

10. The seventh ground on which the award is challenged is that the claim made by the Respondent was barred by the law of limitation. According to the learned Counsel reference was made after the income-tax officer made the order on 31st March, 2000 and the amount of lease rental due from 27th September 1996 onwards were claimed. I find that the learned arbitrator has correctly held that the cause of action arose when the Income-tax Officer disallowed the depreciation and the Respondent would be entitled to claim lease rental from the year 1996. Admittedly, no interest has been claimed on that amount. I, therefore, do not find any infirmity in the finding recorded by the learned arbitrator on this count.

51. This court in case of ***Aditya Birla Chemicals (India) Ltd. vs. Tata Motors Ltd.*** decided on 9th October, 2012 in Arbitration Petition No.1027 of 2011 has considered the identical provisions and has held that the right to sue accrued when the claim for depreciation made by the lessor was rejected by

the income tax authority. In the said judgment it is also held that raising of issue of debit note by the respondent and refusal to pay by the petitioner subsequently would not extend the period of limitation. Paragraph 20 of the said judgment of this court read thus :-

20. In my view right to sue accrued when claim for depreciation made by Respondent was rejected on 31st March, 2004 and raising of demand by the Respondent by issuing debit note on 19th June, 2006 and refusal to pay the said demand by the Petitioner on 17th August, 2006 would not commence fresh period of limitation, which had already commenced on 31st March, 2004. In view of Section 9 of the Limitation Act, 1963, once time is begun to run, no subsequent disability or inability to institute a suit or make an application stops it. Once time starts running, it does not stop. Limitation is not extended unless there is an acknowledgment of liability or part payment. It is not the case of the Respondent that the Petitioner acknowledged its alleged liability or there was any part payment made by the Petitioner after 31st March, 2004. In my view, correspondences does not extend the period of limitation.

52. In so far as judgment relied upon by Mr.Seksaria, learned counsel appearing for the petitioner and Mr.Purohit, learned counsel for the respondent on the issue whether there would amount to waiver under section 4 of the Arbitration Act in view of the petitioner not having raised any specific plea of limitation with details is concerned, since this court has taken a view that the arbitral tribunal having permitted both the parties to urge submission on limitation and having taken a view that the learned arbitrator ought to have framed an issue of limitation and/or point for determination on the issue of limitation and the arbitral tribunal having permitted both the parties to advance their submissions and ultimately having adjudicated upon

such submissions and rendering findings on limitation, I do not propose to deal with those judgments relied upon by both sides on the issue of waiver.

53. In my view, the judgment of this court referred to aforesaid on interpretation on the identical clause in the agreement entered into between the respondent and other lessees squarely applies to the facts of this case. I am respectfully bound by those judgments. In my view since the Deputy Commissioner of Income Tax had disallowed the claim for depreciation made by the respondent in respect of Type II equipments in supplementary leasee schedules i.e. 361/1/1999-2000 and 361/03/1999-2000 by order dated 28th March, 2003 and the notice of arbitration having been issued on 22nd August, 2006 and having been received by the petitioner beyond the period of three years from the date of order passed by the Deputy Commissioner of Income-tax claim arising out of such equipment is ex-facie barred by law of limitation. In my view once the cause of action had already commenced when the income tax authority disallowed the claim of depreciation on 28th March, 2003 subsequent notice of demand raised by the respondent and/or issuance of debit notes by the respondent, refusal on the part of the petitioner to pay in response to such notes of demand and debit notes would not amount to fresh cause of action.

54. I will now consider the submissions advanced by both the parties on the issue of creation of fund in the impugned award. It is not in dispute that when the respondent-original claimant initially filed a statement of claim before the arbitral tribunal, there was no money claim made by the respondent during the pendency of the arbitration petition. The respondent

had applied for amendment of the claim. The amendment was allowed by the learned arbitral tribunal on 21st August 2007. A perusal of the award indicates that the arbitral tribunal did not allow the money claim of the respondent on the ground that the appeals filed by the respondent were pending. The claim for creation of fund awarded by the arbitral tribunal has been impugned on various grounds by the petitioner including maintainability of the claim itself under Clause 14 or under any other provision of the Lease Agreement and also on the ground of limitation. The submission of the learned counsel for the respondent in so far as this claim is concerned is that the cause of action for damnification arises only when the party is damnified. In support of this submission, the learned counsel for the respondent placed reliance on the judgment of this Court in the case of ***Abdul Hussein Shaikh Gulamali Jambawalla Vs. M/s. Bombay Metal Syndicate (supra)*** and it is submitted that the said judgment of this Court has not been noticed by this Court while deciding the Arbitration Petition No.955 of 2011 filed by ***M/s.Gujarat Urja Vikas Nigam Ltd. (supra)***.

55. A perusal of the records clearly indicates that there was no money claim made by the respondent initially when the statement of claim was filed. A perusal of the order passed by the Deputy Commissioner of Income Tax clearly indicates that the income tax department has already recovered the tax liabilities from the respondent arising out of disallowance of claim of depreciation when the assessment order came to be passed from the excess amount of tax made by the respondent, in support of which the respondent had made a claim for refund. Mr.Purohit, learned counsel for the respondent cannot dispute this position that the amount was already recovered by the Income Tax Department from the amount of the respondent

lying with the department. In my view, even if the submission of Mr. Purohit, learned counsel for the respondent is accepted, the cause of action had arisen on the date of indemnification i.e. when the respondent had actually made payment to the Income Tax Department. The fact remains that the said amount which was demanded from the petitioner had been already recovered while passing the assessment order which was admittedly prior to the date of three years of the respondent invoking the arbitration agreement. In my view, the cause of action had arisen out of a claim for creation of fund when the assessment order came to be passed by the learned arbitral tribunal on 18th March 2003. The said claim for creation of fund, therefore, would ex facie bar by limitation.

56. In my view, since the said amount was already recovered by the Income Tax Department from the respondent while disallowing the claim for depreciation, the claim for creation of fund which was made by way of indemnity even otherwise could not have been awarded by the arbitral tribunal. Mr. Purohit, learned counsel for the respondent could not point out any provision in the Lease Deed other than Clause 14 of the Lease Deed under which, the respondent had made such claim for creation of fund.

57. Mr. Seksaria, learned counsel for the petitioner placed reliance on the judgment of this Court in the case of ***M/s.Gujarat Urja Vikas Nigam Ltd. Vs. Tata Motors Ltd. (supra)***. This Court has considered the earlier judgment in the case of ***Gajanan Parelkar Vs. Moreshwar***, reported in ***AIR 1942 Bombay 302*** relied upon by Mr. Purohit and has also considered Clause 14 of the Lease Agreement which is identical to the Clause 14 in this case. After considering the judgment of this Court in the case of *Gajanan*

Parelkar Vs. Moreshwar and after interpreting the Clause 14 of the Lease Deed, this Court has held that the application of Clause 14 of the Lease Deed by the learned arbitral tribunal for allowing the creation of fund demonstrated patent illegality on the face of the award. This Court held that no such claim for creation of fund would fall under Clause 14 of the Lease Deed. Paragraph 8 of the judgment in the case of ***M/s.Gujarat Urja Vikas Nigam Ltd. Vs. Tata Motors Ltd. (supra)*** reads thus :-

“8. On perusal of the statement of claim made by the respondents, it is clear that the respondents had initially prayed for creation of fund in view of the pendency of appeal before the Income Tax Appellate Tribunal filed by the respondents. It is the case of the respondents that under clause-14 of the Lease Agreement, respondents were entitled to seek creation of fund. It is not in dispute that respondents did not invoke any other provision of the lease agreement in support of their claim for creation of fund except clause-14. Learned arbitrator has on interpretation of Clause-14 held that such clause was wide and covered all events wherein all losses, damages, claims, penalties, expenses, suits or proceedings of whatsoever have been made, suffered or incurred consequent thereto and this would even apply in respect of the suit equipment. On plain reading of Clause-14 in my view, it is clear that the petitioners had agreed to keep the respondents indemnified against any loss or seizure of the equipment under distress, execution or other legal process or destruction or damage to the equipment by fire, accident or other cause. It also refers to the risk for liability for death or loss of limb of any person whether employee of the Lessee or of third party arising out of such seizure, destruction, damage, storage, use or operation of equipments. In my view, the expression ‘all losses, damages, claims, penalties, expenses, suits or proceedings’ would apply only to the situation where there was any damage to the equipment by fire, accident, any risk or liability arisen due to death or loss of limb of any person whether employee of the Lessee or any third party. The first part of Clause-14 also will have to be understood considering the obligation imposed on lessee to take out workmen's compensation third party insurance

cover. It is not the case of the respondents that there was any loss or seizure of equipment or there was any fire or accident or other cause which resulted in risk of liability or death or loss of any limb of any person whether employee of the Lessee or of third party. In my view, on plain reading of the entire Clause-14, it is clear that the same would not apply for creation of fund arising out of a dis-allowance of claim for depreciation made by the Assessing Officer. In my view, such indemnity could have been invoked only in respect of distress, execution or other legal process or destruction or damage to the equipment by fire, accident or other such cause. In my view, interpretation of the learned arbitrator that the word "whatsoever" has to be given wide interpretation and the words 'consequent thereto' is clarificatory in nature and thus would also include the claim arising out of dis-allowance of depreciation is neither a possible view nor a plausible view. Clause 14 has to be interpreted as a whole to ascertain the intent of parties and not few words in isolation as read by the learned arbitrator. In my view, petitioners are right in their submission that learned arbitrator has misapplied Clause-14 to the claim of the respondents for creation of fund arising out of disallowance of claim of depreciation by the assessing Officer. Applying Clause-14 to such claims made by the respondents in my view demonstrates patent illegality on the face of the award."

58. In my view, the judgment of this Court in the case of ***M/s.Gujarat Urja Vikas Nigam Ltd. Vs. Tata Motors Ltd. (supra)*** would squarely apply to the facts of this case. The said judgment is binding on this Court. I do not propose to take any different view in the matter. In my view, since the claim for creation of fund itself was not maintainable under Clause 14 or any other provision of the Lease Deed, the entire award allowing such claim in favour of the respondent is contrary to the terms of the contract and is in conflict with the public policy. The impugned award is also contrary to the law laid down in the case of ***M/s.Gujarat Urja Vikas Nigam Ltd. Vs. Tata Motors Ltd. (supra)*** and thus deserves to be set aside.

59. In so far as the submission of Mr. Purohit, learned counsel for the respondent that the contract being a composite contract containing several Lease Summary Schedules, the respondent was under no obligation to make a claim when the Deputy Commissioner disallowed the claim for depreciation for the first time on 20th March 2003 but could have claimed any time subsequently when another such order would have been passed disallowing the depreciation is concerned, in my view, there is no substance in the submission of the learned counsel for the petitioner. In my view, the cause of action in support of the equipments which were covered by the assessment order dated 20th March 2003 had arisen when the said order was passed by the Deputy Commissioner disallowing the depreciation. The cause of action had already been commenced on 20th March 2003. In my view, there could be no fresh cause of action in respect of claim arising out of the said order dated 20th March 2003 when the Deputy Commissioner of Income Tax passed a fresh order in respect of the another assessment year in respect of other summary schedule on 30th March 2004.

60. In so far as the submission of the learned counsel for the respondent that the view taken by the arbitral tribunal on the plea of limitation is plausible view and no interference under Section 34 of the said Arbitration and Conciliation Act is warranted is concerned, in my view, the view of the arbitral tribunal on the plea of limitation is not a plausible view and is contrary to the law laid down by this Court and the Supreme Court and thus interference with such impossible view under Section 34 of the Arbitration and Conciliation Act, 1996 is not barred but is necessitated.

61. In so far as the submission of the learned counsel for the respondent

that in ground (S) of the petition, the petitioner has not raised any specific ground about interpretation of Clause 14 of the Lease Deed and thus the petitioner cannot be allowed to urge such ground is concerned, a perusal of ground (S) indicates that the petitioner has impugned the said award on the ground that the law of indemnity did not arise and the principle is wrongly applied. The said ground raised by the petitioner has to be read along with other grounds urged by the petitioner for challenging the legality and validity of the entire claim. In my view, there is no substance in the submission of the learned counsel for the respondent.

62. In so far as the submission of the learned counsel for the respondent that the learned arbitral tribunal has interpreted the Clause 14 and has held that the said clause was wide and would include claim for creation of fund made by the respondent and thus this Court cannot interfere with the possible interpretation of the arbitral tribunal is concerned, this Court has already taken a view in the case of ***M/s.Gujarat Urja Vikas Nigam Ltd. Vs. Tata Motors Ltd. (supra)*** that no claim for creation of fund is maintainable under Clause 14 of the Lease Deed. The said judgment is binding on this Court. The impugned award is contrary to the law laid down by this Court in the said judgment which applies to the facts of this case.

63. In so far as the submission of the learned counsel for the respondent that since under Clause 2.4 of the Lease Agreement, the petitioner had agreed to pay revised lease rental, petitioner had hereby agreed to indemnify the respondent for any claim arising out of dis-allowance of the depreciation by the Income Tax Department is concerned, I am not inclined to accept this submission of the learned counsel for the reason that the said clause did not

provide any obligation on the part of the petitioner to indemnify the claim for creation of fund made by the respondent. Reliance placed on the judgment of the Supreme Court in the case of ***Lala Shantiswaroop Vs. M.C. Singh and Ors. (supra)*** by the respondent is misplaced. The said judgment is of no assistance to the respondent.

64. In so far as the claim for interest is concerned, Mr. Purohit, learned counsel for the respondent fairly left the claim for interest awarded by the learned arbitral tribunal to the discretion of this Court. At the first instance, since the principal claim itself is illegally awarded by the arbitral tribunal, question of awarding payment of any interest thereon did not arise.

65. Be that as it may, a perusal of the award indicates that the arbitral tribunal has awarded interest @30% p.a. on the amount of Rs.26,30,662/- from 21st July 2005 till 13th February 2007 i.e. from the date of debit notes having been sent by the respondent to the petitioner. On one hand, the arbitral tribunal has held that the money claim could not be awarded in favour of the respondent since the appeals filed by the respondent were pending and on the other hand, the arbitral tribunal has considered the said amount of Rs.26,30,662/- to be due on 21st July 2005 when the debit notes were sent by the respondent to the petitioner and on such amount, the arbitral tribunal has awarded interest @30% p.a. The said amount of Rs.26,30,662/- is already inclusive of interest. In my view, even otherwise, the arbitral tribunal could not have awarded interest on interest but could have awarded interest only on the principal amount from the date of cause of action till payment. However, while granting interest from 21st July 2005 till 13 February 2007, the arbitral tribunal has awarded interest on interest. That

part of the award is also illegal and contrary to the law and deserves to be set aside.

66. In so far as the claim for arbitration cost in the sum of Rs.5,00,000/- awarded by the arbitral tribunal in favour of the respondent is concerned, in my view, since the petitioner was dragged to arbitration by filing such untenable claim, the arbitral tribunal could not have awarded the said claim. The arbitral tribunal ought to have dismissed the claim of the respondent with arbitration cost in favour of the petitioner and would not to have awarded any such cost in favour of the respondent. Even that part of the arbitration award is accordingly set aside.

67. In my view, the entire award is patently illegal and is in conflict with the public policy and deserves to be set aside under Section 34 of the Arbitration and Conciliation Act, 1996.

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

- a) Arbitration Petition is made absolute in terms of prayer clause (a).
- b) There shall be no order as to costs.

(R.D. DHANUKA,J.)