IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

FAO No. 1260 of 2015(O&M)
Date of decision : September 24th , 2015

M/s Show Off.Brands Bargain and another
.... Appellants
Versus
M/s Jet Age Multimedia and another

.... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Gaurav Chopra, Advocate
for the appellants.

Mr. Kanwaljit Singh, Senior Advocate with
Mr. Sandeep Jain, Advocate
for the respondents.

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1. Whether reporters of local papers may be allowed to see the judgment ?
2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the digest?

Amit Rawal, J .

The present appeal has been filed against the impugned order dated 26.11.2014 whereby the objections filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter refered to as '1996 Act') for setting aside the award dated 27.8.2012 passed by the arbitrator has been dismissed. Before adverting to the submissions of the learned counsel for the parties to the *lis*, it would be apt to give preface of the matter.

The appellants entered into a Franhcise agreement dated 27.10.2008 through Gundeep Singh Chawla and Jugpreet Singh Chawla sons of Sh. M.P.S Chawla on certain terms and conditions. The conditions which are relevant for the adjudication of the present appeal reads thus:-

> " *Franchise Payment Terms and Tenure*
>
> *The second party assures the First party a Fixed Guaranteed commission of Rs. 1,00,000/- (one lacs) only per month during the operation of agreement as a return against the space with a 15% increase in Fixed Guaranteed Commission every 3 years.*
>
> *Fixed Guaranteed Commission Details are:*

Period	*Monthly fixed Guaranteed Commission*
From 01 Dec.2008 to 30 Nov.2011	*Rs.1,00,000/-(including service tax)*
From 01 Dec.2011 to 30 Nov.2014	*Rs. 1,15,000/- -(including service tax)*
From 01 Dec.2014 to 30 Nov.2017	*Rs.1,32,250/- -(including service tax)*

> *Fixed Guaranteed Commission will be paid in advance on 7th of every month by cheque by Second Party to the First Party.*
>
> ***Security Deposit***
>
> *The second party have deposited with the First Party an interest free refundable Security Deposit of Rs.3,00,000/- (three lacs) vide cheque No.75002 dated 20.10.08 drawn on HDFC Bank, Chandigarh which shall be returned by the First party to Second Party after making necessary adjustments towards outstanding payments of Second Party immediately."*

It is a matter of record that from the perusal of the aforementioned clauses it is evident that the agreement can be terminated at any time by the second party and the appellant by giving three months notice (after expiry of lock in period) to the first party and equally to other party without assigning any reason, can also terminate the same in the event when the second party-appellant fail to pay the fixed guaranteed commission for a period of three months by giving a further 15 days notice to the second party. It is a matter of record that in the year 2003 the respondent had taken on rent the half portion of ground floor of SCO No.6, Sector 10, Panchkula from respondent Sunil Kumar Sharma and others before entering into an Franchise agreement. A dispute between the parties to the lis arose on the premise that the appellant allegedly committed breach of the terms and conditions by not paying the commission, as agreed for a period of more than three months from July, 2010 and since the claim was disputed the matter was referred to arbitration, as agreement envisaged settlement of dispute by way of arbitration. The arbitrator was appointed by this Court vide order dated 13.10.2011. The claim of the respondent before the arbitrator was for recovery of ₹42,82,542.50/- due till November, 2011 on account arrears computed in terms of the agreement along with interest and also for awarding pendent lite interest on fixed guaranteed commission from the date of filing of the claim till the date of award or till handing over of the possession of the premises. In pursuance to the aforementioned claim, the appellant filed counter claim by seeking recovery of ₹107.5 lacs on account that the first party,/franchise, as per agreement had indemnified the second party from all the consequences, relating to mis representation or default in the tax obligation by first party and as well as any dispute which may arise with landlord of the premises and in such situation, the respondent would bear the legal cost in case of any dispute.

The claimant, based its claim on the ground that the appellant w.e.f. July, 2010, stopped paying the fixed guaranteed commission of one lac per month and the default continued for consecutive period of three months. Accordingly, vide legal registered notice dated 10.10.2010, the agreement, aforementioned, was terminated and the appellant was called upon to quit and deliver the possession. After expiry of 15 days of the issue of notice the aforementioned notice was followed by second notice dated 14.12.2010, as the appellant did not comply with the said demand owing to the default in the payment of Fixed Guaranteed Commission w.e.f. July, 2010. The appellants, before the arbitrator did not dispute the stage of payment of fixed guaranteed commission w.e.f. July 2010 but claimed their indemnity and raised all the possible/conceivable objections, that the respondent had not kept his promise by indemnifying them from the dispute, between the landlord and the claimant, eviction proceedings had been instituted against the claimant-respondent and since the agreement was for 9 (nine) years, therefore, the respondent failed to discharge the obligation and claimed the damages on account of loss incurred by them.

It is a matter of record that the tenant -respondent-claimant did not pay the rent to the landlord, which was fixed @ ₹30,000/- per month, however, the same was tendered, in pursuance to the assessment order which was accepted by the counsel for the landlord, accordingly, the eviction petition, claiming non-payment of arrears of rent was withdrawn. The landlord, after expiry of two years of filing of the first petition, as well as execution of Franchise agreement between the parties to the *lis,* filed another petition on the ground of sub letting which entailed into passing of the eviction order dated 19.5.2012. The said order was assailed by respondents, herein, by filing an appeal before the appellate authority, which was also dismissed vide judgment dated 7.2.2013 i.e. after the award.

Be that as it may, the fact remains that the arbitrator was confined, to adjudicate disputes between the parties in respect of interpretation of the Franchise agreement. The appellant raised the following objections regarding the maintainability of the claim before the Arbitrator:-

i) In view of provisions of Section 69(3) of the Indian Partnership Act, 1932 the claim petition was not maintainable.

ii) As per the provisions of section 74 of the Indian Contract Act,1872 owing to the breach of stipulation in the contract, the payment of ₹2,64,500/- as alleged i.e.fixed guaranteed commission cannot be treated as penalty as it could be at the best taken into consideration for assessing penalty on the actual loss and damage incurred which was germane to the controversy to be determined by the arbitrator that too, by leading direct and cogent evidence.

iii) Indemnification.

Iv) The counter claim of ₹40 lacs on account of respective claims, obligation to indemnify ₹25 lacs as compensation on account of mental harassment, ₹2.5 lacs as compensation on account of physical assault, 40 lacs for loss of business and re-location charges.

The arbitrator on the basis of the aforementioned evidence brought on record by the parties viz-a-viz respective claims, rejected the counter claim, but accepted the claim of recovery of ₹62,19,000/- and after deduction of sum of ₹3 lacs as security amount and ₹2 lacs paid by the appellant vide cheque dated 7.3.2011 determined/ recoverable amount to the tune of ₹57 lacs and directed the appellant to pay 6% interest on the said amount w.e.f. 1.9.2012 till the recovery thereof with a further direction to hand over the vacant possession of the business premises and to pay fixed guaranteed commission at the enhanced rate of ₹2,64,500/- per month w.e.f.1.9.2012. The relevant portion of the award reads thus:-

(i)	*Fixed Guaranteed Commission for the period July 2010 to October 2010 @ Rs. 1,00,000/- per month.*	*Rs. 4,00,000/-*
ii)	*Fixed guaranteed commission at the enhanced rate of Rs.2,64,500/- per month for 13 months for the period November 2010 till the filing of the claim pertition dated 25.11.2011.*	*Rs.34,38,500*
iii)	*Fixed guaranteed commission at the enhanced rate of Rs.2,64,500/- per month for 9 months for the period December 2011 to the date of this award i.e. August, 2012.*	*Rs.23,80,500/-*
	Total	*Rs. 62,19,000/-*

The aforesaid amount is reduced by Rs. 5,00,000/- on adjustment of the security amount of Rs.3,00,000/- with the claimant and Rs.2,00,000/- paid by respondents vide cheques dated 7.3.2011. The recoverable amount therefore comes to Rs.57,19,000/-.

The respondents will also pay interest @ 6% per annum on the said amount of Rs.62,19,000/- w.e.f. 1.9.2012 till recovery thereof.

The respondents are also liable to give vacant possession of the business premises to the claimant forthwitwh and to pay FGC at enhanced rate of Rs.2,64,500/- per month w.e.f. 1.9.2012 till the vacant possession of the premises in question being delivered to the claimant.

The respondents shall also pay Rs.50,000/- as costs for litigation."

The aforementioned award was objected to by filing objections, as noticed above and the same were dismissed.

Mr. Gaurav Chopra, learned counsel appearing on behalf of the appellant in support of his grounds of appeal raised the following submissions by referring to the provisions of Section 74 of the Indian Contract Act, 1872 deals with measures of damages in case of two classes of the case.

i) Whether the contract prescribes a sum to be paid in case of breach?

ii) Whether the contract contains any other stipulation by way of penalty?

In support of his contentions he has relied upon paragraph 8,9,11 of the judgment of Hon'ble the Supreme Court in **Fateh Chand Vs. Balkishan Dass 1963 AIR (SC)1405** to contend that the award of the arbitrator is vitiated in law as the claimant did not lead any evidence with regard to the actual damage and loss suffered but erroneously awarded a stipulated amount of Fixed Guaranteed Commission, for, the aforementioned amount was the maximum and the onus to prove was on claimant as to whether he was entitled to the maximum or some other amount, but in the absence of any evidence, the arbitrator could not have granted the maximum amount. For the sake of brevity the aforementioned paragraphs of **Fateh Chand's case (supra)** are reproduced hereinbelow:-

"8. The claim made by the plaintiff to forfeit the amount of Rs. 24,000/- may be adjudged in the light of s. 74 of the Indian Contract Act, which in its material part

provides:-

"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case maybe, the penalty stipulated for."

The section is clearly an attempt to eliminate the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.

9. The second clause of the contract provides that if for any reason the vender fails to get the sale-deed registered by the date stipulated, the amount of Rs. 25,000/- (Rs. 1,000/- paid as earnest money and Rs. 24,000/- paid out of the price on delivery of possession) shall stand forfeited and the agreement shall be deemed cancelled. The covenant for forfeiture of Rs. 24,000/- is manifestly a stipulation by way of penalty.

10. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and 'ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of tile case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated, but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according, to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damages" it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach."

The respondent-partnership is an unregistered partnership deed and therefore in view of sub section 3 of Section 69 of the Indian Partnership Act, 1932, the claim was not maintainable. In order to lend support to his contention he has relied upon the following case law; i) **Jagdish Chandra Gupta Vs. Kajaria Traders (India) Ltd. 1964 AIR (SC) 1882, Delhi Development Authority Vs. Kochhar Construction Work and another 1998 (8) SC 559, U.P.State Sugar Corporation Ltd. Vs. Jain Construction Co.and another 2004(4) RCR (Civil) 248, Himachal Pradesh Cooperative Group Housing Society Vs. M/s Umesh Goel and another 2007(4) ArbLR 353, Ram Nandan Prasad Sinha Vs. K. M. Consultants 2002 AIR(Bombay) 90 and Firm Ashok Traders and another Vs. Gurumukh Das Saluja and others etc. 2004 (1) RCR (Civil) 725** to contend that both the courts have committed illegality and perversity. He further submitted the fact that the award of the arbitrator was not in consonance with the provisions of Section 24, 28 or 31 (3) of the 1996 Act and in support of the aforementioned contentions he has relied upon the judgment of the Hon'ble Supreme Court in **Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd. 2003 AIR (SC) 2629.**

On the other hand, Mr. Kanwaljit Singh, learned Senior counsel, assisted by Mr. Sandeep Jain, Advocate appearing on behalf of the respondents-claimants submits that after passing of the eviction order against the respondent, the appellant has entered into a fresh tenancy with the landlord and he is carrying on the business, aforementioned.

He further submits that the appellant did not lead evidence in support of the counter claim, neither they had put in appearance, but only their father Mr. M.P.S Chawla appeared, with whom there was no privity of contract.

He further submits that the objection with regard to the registration of the partnership deed is not maintainable, for the reason that when the order dated 13.10.2011 appointing the arbitrator had been passed, no such objection had been taken. In essence, the appellant is estopped from raising the objections, much less acquiessed to the adjudication of dispute by an independent arbitrator. He has drawn attention of the Court to the order dated 13.10.2011. The same reads thus:-

> "*The petitioner has sought appointment of a sole arbitrator to adjudicate the dispute between the parties by invoking jurisdiction under Section 11 of the Arbitration & Conciliation Act, 1996 (for short the Act).*
>
> *As per the petitioner, the parties entered into an agreement on 27.10.2008 wherein the petitioner was granted franchise rights in respect of the products of the respondent. The agreement Annexure P-1 has following as the arbitration clause:-*
>
> *"Any dispute between the parties to this agreement matter shall be referred to an arbitrator whose name shall be agreed upon between the parties mutually, in case parties fail to appoint arbitrator mutually within one month from the notice by either side to the other side to appoint arbitrator then, either side can approach the court to appoint the arbitrator and decision of arbitrator so appointed shall be final and binding upon both the parties. All disputes will be settled at Chandigarh courts*

only."

The petitioner served a notice on 14th October, 2010 as also notice dated 14th December, 2010 but, the respondent has not consented to an arbitrator, therefore, the petitioner has invoked the jurisdiction of this Court for appointment of an arbitrator.

Shri Ashish Chopra, learned counsel for the respondents, states that there exists disputes, and that such disputes are required to be decided by an arbitrator.

Consequently, Shri M.S. Lobana, resident of House No.78, Sector 27-A, Chandigarh, a retired District Judge, is appointed as an Arbitrator. He shall be entitled to fee as per the Punjab & Haryana High Court (Arbitrators' Panel & Fees) Rules, 2011, to be shared initially equally by the parties.

The petition stands disposed of. "

The provisions of Section 74 of the Indian Contract Act, 1872 would not apply, in as much as, that the ratio decidendi culled out by the Hon'ble Supreme Court in **Fateh Chand's case (supra)** supports the case of the claimant on the premise, that provisions ibid, does not debar the parties to the agreement to claim fixed amount of Franchise (fixed guaranteed commission) in case of breach of contract as the conditions fixed was/is not unreasonable, for, the parties to the agreement quantified the total amount of fixed guaranteed commission and thus the arbitrator could not exceed from the amount specified in the contract and rightly so, the arbitrator has awarded the amount as stipulated in the agreement.

He further submits that the award does not suffer from any illegality and perversity, much less it is a detailed one and cogent reasons have been assigned in awarding the claim and declining the counter claim.

I have heard learned counsel for the parties and appraised the paper book as well as case law cited by the counsel for the parties.

It would be apt to refer to the provisions of Section 74 of the Indian Contract Act, 1872 which reads thus:-

> "***74 Compensation for breach of contract where penalty stipulated for:**- When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.*
>
> *Explanation.— A stipulation for increased interest from the date of default may be a stipulation by way of penalty.*
>
> *(Exception) — When any person enters into any bail-bond, recognizance or other instrument of the same nature or, under the provisions of any law, or under the orders of the [35] [Central Government] or of any [36] [State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.*
>
> *Explanation.— A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested."*

On peusal of the ratio decidendi culled out by the Hon'ble Supreme Court in **<u>Fateh Chand's case (supra)</u>** it is irresistably concluded that the amount of penalty stipulated in the agreement should not exceed to what has been stipulated. The arbitrator, in my view, has awarded the amount as already determined and stipulated in the agreement. Inasmuch as, that the jurisdiction of the arbitrator is to award compensation in case of breach of contract but where amount is not quantified, claimant was/is required to lead direct and cogent evidence to claim a particular amount. The language of Section 74 of the Indian Contract Act, 1872 leaves no manner of doubt that the aggrieved party is entitled to receive compensation from the party, where actual damage or loss is proved to have been caused, thereby, dispenses with the proof of "actual damage or loss". Here the parties to the *lis* have stipulated the penalty of ₹2,64,500/-, therefore in view of the ratio decidendi culled out in the aforementioned case, the fixed guaranteed commission cannot be said to be unreasonable as it has not exceeded the amount specified in the contract, thus, the contention raised by Mr. Gaurav Chopra that the awarding of fixed guaranteed commission is unreasonable, much less fallcious is hereby rejected.

Now coming to the next point as to whether the claim, on behalf of the respondents being an un-registered partnership firm in view of the provisions of Section 69(3) of the Indian Partnership Act, 1932 was maintainable or not. It would be apt to refer to the ratio decidendi culled out by the Hon'ble Supreme Court in **Jagdish Chander Gupta's case (supra).** Paragraphs 6,7 and 9.

> *"6. It remains, however, to consider whether by reason of the fact that the words "other proceeding"stand opposed to the words "a claim of set-off'any limitation in their meaning was contemplated. It is on this aspect of the case that the learned Judges have seriously differed. When in a statute particular classes are mentioned by name and then are followed by general words, the general words are sometimes construed ejusdem generis, i.e., limited to the same category or genus comprehended by the particular words. But it is not necessary that this rule must always apply. The nature of the special words and the general words must be considered before the rule is applied. In* ***Allen v. Emerson, (1944) 1 KB 362.*** *Asquith, J., gave interesting examples of particular words followed by general words where the principle of ejusdem generis might or might not apply. We think that the following illustration will clear any difficulty. In the expression "books, pamphlets, newspapers and other documents"private letters may not be held included if other documents'be interpreted ejusdem generis with what goes before. But in a provision which reads "newspapers or other document likely to convey secrets of the enemy", the words 'other document'would include document of any kind and would not take their colour from 'news papers'. It follows, therefore, that interpretation ejusdem generis or noscitur a sociis need not always be made when words showing*

particular classes are followed by general words. Before the general words can be so interpreted there must be a genus constituted or a category disclosed with reference to which the general words can and are intended to be restricted. Here the expression "claim of set-off"does not disclose a category or a genus. Set-offs are of two kinds - legal and equitable - and both are already comprehended and it is difficult to think of any right "arising from a contract"which is of the same nature as a claim of set-off and can be raised by a defendant in a suit. Mr. B. C. Misra, whom we invited to give us examples, admitted frankly that it was impossible for him to think of any proceeding of the nature of a claim of set-off other than a claim of set-off which could be raised in a suit such as it described in the second sub-section. In respect of the first sub-section he could give only two examples. They are (i) a claim by a pledge of goods with an unregistered firm whose goods are attached and who lias to make an objection under Order 21, Rule 58 of the Civil Procedure Code and (ii) proving a debt before a liquidator. The latter is not raised as a defence and cannot belong to the same genus as a "claim of set off". The former can be made to fit but by a stretch of some considerable imagination. It is difficult for us to accept that the Legislature was thinking of such far- fetched things when it spoke of "other proceeding"ejusdem generis with a claim of set-off.

7. Mr. Justice Naik asked the question that if all proceedings were to be excluded why was it not considered sufficient to speak of proceeding along *with suits in sub-sections (1) and (2) instead of framing a separate sub-section about proceedings and coupling other proceeding with 'a claim of set-off? The question is a proper one to ask but the search for the answer in the scheme of the section itself gives the clue. The section thinks in terms of (a) suits and (b) claims of set-off which are in a sense of the nature of suits and (c) of other proceedings. The section first provides for exclusion of suits in sub-sections (1) and (2). Then it says that the same ban applies to a claim of set-off and other proceeding to enforce a right arising from a contract. Next it excludes the ban in respect of the right to sue (a) for the dissolution of a firm, (b) for accounts of a dissolved firm and (c) for the realisation of the property of a dissolved firm. The emphasis in each case is on dissolution of the firm. Then follows a general exclusion of the section. The fourth sub-section says that the section as a whole, is not to apply to firms or to partners'and firms which have no place of business in the territories of India or whose places of business are situated in the territories of India but in areas to which Chapter VII is not to apply and to suits or claims of set off not exceeding Rs. 100/- in value. Here there is no insistence on the dissolution of the firm. It is significant that in the latter part of clause (b) of that section the words are "or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim"and this clearly shows that the word "proceeding"is not limited to a proceeding in the nature of a suit or a claim of set-off. Sub-section (4) combines suits and a claim of set-off and then speaks of "any proceeding in* *execution"and "other proceeding incidental to or arising from any such suit or claim"as being outside the ban of the main section. It would hardly have been necessary to be so explicit if the words 'other proceeding'in the main section had a meaning as restricted as is suggested by the respondent. It is possible that the draftsman wishing to make exceptions of different kinds in respect of suits, claims of set-off and other proceedings grouped suits in sub-sections (1) and (2), set-off and other proceeding in sub-section (3) made some special exceptions in respect of them in sub-section (3) in respect of dissolved firms and then viewed them all together in sub-section (4) providing for a complete exclusion of the section in respect of suits of particular classes. For convenience of drafting this scheme was probably followed and nothing can be spelled out from the manner in which the section is sub-divided.*

Xx xx xx

9. In our judgment, the words 'other proceeding'in sub-section (3) must receive their full meaning untrammelled by the words 'a claim of set-off'. The latter words neither intend nor can be construed to cut down the generality of the words 'other proceeding'. The sub-section provides for the application of the provisions of sub-sections (1) and (2) to claims of setoff and also to other proceedings of any kind which can properly be said to be for enforcement of any right arising from contract except those expressly mentioned as exceptions in sub-section (3) and sub-section (4).”

Mr. Gaurav Chopra, learned counsel for the appellants submitted that the expression or phrase “other proceedings” as envisaged in sub Section 3 of the Act would envisage “arbitration proceedings”. In essence, suit on behalf of the un-registered firm is not maintainable against the third party. Similar anology would apply to the arbitration proceedings.

In U.P.State Sugar Corporation’s case(supra) the Hon’ble Supreme Court considered the question as to whether the arbitral proceedings at the instance of the unregistered firm would be maintainable or not and it has been held that the arbitral proceedings would not be maintainable at the instance of an unregistered firm having regard to the provisions of section 69 of the Indian Partnership Act, 1932, which finding was based as per facts and circumstances of the case, but on going through the ratio decidendi culled out in **Jagdish Chandra Gupta’s case (supra)** and **Ashok Traders and another’s case(supra)** and it has been held that Section 69 of the Indian Partnership Act, 1932 would have no bearing on the right of a party in respect of an arbitration proceedings initiated under Section 9 of the 1996 Act.

Similarly, in **Ram Nandan Prasad Sinha’s case (supra)** a Division Bench of Bombay High Court held that sub section 3 of Section 69 of the Parntership Act, 1932 does not prohibit reference to the arbitration, in essence, reference to the arbitration without intervention of the Court is not prohibited by the provisions. In the instant case, as it would be evident, from the order dated 13.10.2011 came to be passed in proceedings initiated under section 11 (6) of 1996 Act whereas the parties were relegated for adjudication of dispute by appointment of an arbitrator and the question that firm was not registered had not been raised, thus, in my view, appellant is estopped to raise such an objection, much less acquiesced therefore, in my view, the said objection cannot be permitted to be raised in appeal or before arbitrator at a subsequent stage.

In the judgment in firm **Ashok Traders and another's case (supra)** the dispute was between the partners. Even in J**agdish Chandra Gupta's case (supra)** in the penultimate paragraph of the judgment while referring to the word"other proceedings" in sub section 3 of Section 69 of Indian Partnership Act, 1932 the Hon'ble Supreme Court held that the said expression would be in respect of claim or set off for enforcement of right arisen from the contract except those expressly mentioned in sub section 3 or sub section 4.

In view of the fact that once the appellant has not taken a specific objection at the time of reference of the dispute to the arbitrator, it cannot be raised before the arbitrator, much less in the present appeal. Therefore, the award as well as finding rendered by the objecting court does not suffer from any illegality, much less perversity.

The award on the face of it, cannot be said to be unreasonable as detail reasons have been assigned for awarding the amount of compensation while interpreting the terms and conditions stipulated in the Franchise agreement. Even otherwise, the partners of the appellant firm have not stepped into the witness box to belie the stand of the claimants and in support of the stand/claim in the counter claim.

It is now a settled law that as to under what circumstances the award has to be interfered with. The question which has now been raised in the aforementioned appeal has already been answered by the Hon'ble Supreme Court in catena of judgments wherein it has been laid down that until and unless the award suffers from illegality as statutorily prescribed under Section 31 (3) of the Act, the same cannot be interfered with. In this context I intend to refer the judgments of Hon'ble Supreme Court in **Associate Builders Vs. Delhi Development Authority (2015) 3 SCC 49 and Navodaya Mass Entertainment Ltd. Vs. J. M. Combines (2015) 5 SCC 698.** In the aforementioned judgment the Hon'ble Supreme Court had culled out the ratio decidendi by holding that until and unless there is error apparent on the face of record or the arbitrator has not followed statutory legal position, it is only in these circumstances it would be justified interfering with the award. The High Court should not act as a Court of appeal and reappraise the material/evidence and embarked on a path by substitution in its own view. It is not the case of the appellant that the award is against the public policy or has violated the principles of judicial approach, much less against the statute and other provisions of Section 34 of the Act. The Arbitrator has dealt with the dispute which was contemplated and was within the scope of it.

The award read as a whole is just, fair and reasonable. It is now a settled law that the Arbitrator is the sole judge of quality and quantity of the evidence before him and decide on the basis of the available evidence.

Keeping in view what has been observed above, the award cannot be said to have been suffering from want of reasons or vitiated in law/fallacious or capricious.

Accordingly the appeal is dismissed.

(AMIT RAWAL)
JUDGE

September 24th , 2015
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