

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO.369 OF 2006
WITH
NOTICE OF MOTION NO.1651 OF 2015
WITH
NOTICE OF MOTION NO.137 OF 2017
WITH
NOTICE OF MOTION NO.141 OF 2017
IN
ARBITRATION PETITION NO.369 OF 2006**

Nina Anil Shah,
aged 40 years, Occupation : Business,
the partner of M/s. Chitralkha Builders,
residing at 6-F, Dhan-Ratna, Bhardawadi,
Andheri (West), Mumbai – 400 058. Petitioner

Vs.

Kusum Bhaskarrao Gorule
@ Geetanjali Ganesh Sohani
having address at Flat No.4, 2nd Floor,
“Deepti”, Shraddhanand Road, Vile Parle
(East), Mumbai – 400 057. Respondent

**WITH
SUIT NO.3162 OF 2005
WITH
NOTICE OF MOTION NO.1556 OF 2014
WITH
CHAMBER SUMMONS NO.1383 OF 2016
WITH
NOTICE OF MOTION NO.1750 OF 2016
IN
SUIT NO.3162 OF 2005**

Nina Anil ShahPlaintiff

Vs.

M/s. Chitralkha Builders and 2 Ors.Defendants

Mr. Anil G. Shah, Constituted Attorney of petitioner present in person.
Mr. M.P. Rao, Senior Advocate a/w. Ms. Savita Ganoo i/b. Mr. Sanskar

Marathe for respondent.

Mr. Bhavin Manek holding for Mr. Shyam Mehta, Senior Advocate –
Amicus Curiae present.

CORAM : K.R.SHRIRAM, J.
RESERVED ON : 13th APRIL, 2017
PRONOUNCED ON : 5th JUNE, 2017

JUDGEMENT:

1 The Arbitration Petition impugns, under Section 34 of the Arbitration and Conciliation Act, 1996 (the Act), an Award dated 1st August, 2006. The Arbitral award reads as follows :-

“a) The firm M/s. Chitralkha Builders stands dissolved as on 15.7.1004.

b) The Suit Property viz. CTS No.727 at Sorojini Naidu Road, Mulund (W), Mumbai – 400 080 does not constitute the asset of the firm Chitralkha Builders.

c) The Claimant is ordered/directed to make payment to the respondents 50% of the expenses from the sum of Rs.62,18,324/-. The aforesaid amount has been arrived upon considering the expenses incurred by the firm till 15.7.2004 on which date the firm M/s. Chitralkha Builders was dissolved. The aforesaid amount will carry interest at the rate of 12% per annum from 8.4.1989 till payment. The aforesaid amount is directed to be paid on or before 1st November, 2006. In the event of default in payment on or before the aforesaid date the aforesaid amount will carry interest at the rate of 15% per annum from 1st November, 2006 till payment.

d) The Claimant will pay cost of the present Counter Claim to the respondent, which are quantified at Rs.50,000/-.”

By an order dated 3rd October 2006, Learned Single Judge (D.K. Deshmukh, J. as he then was) was pleased to dismiss the petition.

2 Against the said order dated 3rd October, 2006, the petitioner filed an Appeal No.813 of 2006. By an order dated 21st/22nd July, 2014 the Hon’ble Appeal Court set aside the order dated 3rd October, 2006 and

restored this Arbitration Petition to the file of the Learned Single Judge keeping open all contentions of the parties on the merits of the Arbitration Petition.

3 Against this order dated 21st/22nd July, 2014 of the Appeal Court, the respondent filed a Special Leave Petition No.31627 of 2014. The Hon'ble Supreme Court, by an order dated 6th October, 2016, dismissed the Special Leave Petition.

4 As the petitioner was not represented by an Advocate, but by her Constituted Attorney, who also happened to be her husband Mr. Anil Shah and he was not able to assist the court effectively, the court appointed Mr. Shyam Mehta, senior Advocate to be the Amicus Curiae. In fact the court had to time and again tell Mr. Shah to keep a check on his emotional outbursts and personal allegations and attacks on Mr. Rao, the counsel for respondent. I must also add that the written submissions running into 100 pages submitted, on behalf of the petitioner, by Mr. Shah, was also of no assistance.

5 During the course of the hearing of the present petition, the Hon'ble Court on a perusal of the Arbitration Petition and without much assistance from Mr. Shah, but due to assistance of Amicus stated an outline of the petitioner's grounds of challenge of the award. The Learned Amicus Curiae developed those points and submitted a list of 12 points for

consideration, three of which do not find mention in the petition. The Learned Amicus Curiae did mention that those three points for consideration, viz., Point No.9, Point No.11 and Point No. 12 did not find place in the Arbitration Petition. These three were included based on Mr. Shah's oral submissions. The 12 points for consideration are as under :

- (1) After the conveyance of the suit property on 26th July, 2005 the arbitration proceedings were frustrated and nothing survived in the arbitration proceedings and the same ought to have been terminated by the Hon'ble Arbitral Tribunal.*
- (2) The Hon'ble Arbitral Tribunal failed to pass any order on the preliminary statement dated 14th December, 2005 filed by the petitioner raising the issue of jurisdiction in the light of the disposal of the suit property.*
- (3) In the absence of a statement of claim being filed by the petitioner, no counter claim of the respondent could be entertained by the Hon'ble Arbitral Tribunal.*
- (4) The order dated 8th June, 2006 passed by the Hon'ble Arbitral Tribunal as received by the petitioner was in variance with the order dictated by the Hon'ble Arbitral Tribunal to both sides in the arbitration meeting. In this manner the Hon'ble Arbitral committed misconduct.*
- (5) One Mr. Prakash Naik, an agent of M/s. Oswal Enterprises was allowed to attend the proceedings by the Hon'ble Arbitral Tribunal despite strong objection from the petitioner. This again amounts to misconduct by the Arbitral Tribunal.*
- (6) The Hon'ble Arbitral Tribunal ought to have discontinued the proceedings in view of the refusal on the part of the petitioner to pay its charges and expenses by continuing with the proceedings, the Hon'ble Arbitral Tribunal was again guilty of misconduct.*
- (7) The Hon'ble Arbitral Tribunal wrongly passed an order of costs of rs. 25,000/- on the petitioner for allegedly failing to*

serve a copy of the arbitration petition no. 285 of 2006 on the respondent vide its order dated 14th July, 2006. This also amounted to misconduct on the part of the Arbitral Tribunal.

(8) The arbitral proceedings were conducted in a biased manner by the Hon'ble Arbitral Tribunal.

*(9) The original award was never served on the petitioner. A purported true copy thereof was served by the advocate of respondent on the petitioner's advocate under cover of his letter dated 4th August, 2006.**

(10) The impugned award contains contradictory findings in as much as on one hand the Hon'ble Arbitral Tribunal allowed a claim for Rs.62,18,324/- for maintenance of the partnership property whereas on the other hand the Hon'ble Arbitral Tribunal held that the suit property does not constitute partnership property.

*(11) While coming to the conclusion that the suit property does not belong to the partnership firm, the Hon'ble Arbitral Tribunal failed to consider the recitals in the Partnership Deed itself as well as the Development Agreement dated 20th April, 1980 between the Vaity's and the firm Chitrlekha Builders.**

*(12) There is no material whatsoever to justify the award of Rs.62,18,324/- against the petitioner.**

FACTS :

6 On 28th April, 1980 an Agreement for Sale was entered into between 52 members of one Vaity Family, the original owners of a huge piece of land, bearing Survey No.281, CTS No.727 of Village Mulund, situated at S.N. Road, Mulund (West), Mumbai – 400 080 admeasuring 4249.16 sq.mts. (the said property) and one M/s. Chitrlekha Builders, a partnership firm, which was then constituted by the respondent and one Shri Thukaram Baliram Nalawade in respect of the said property.

* Not in the petition

* Not in the petition

* Not in the petition

7 Shri Thukaram Nalawade retired from the partnership firm on 16th April, 1980 and the respondent herein continued as the sole proprietor of Chitralekha Builders. An Agreement dated 9th May, 1980 was entered into between Chitralekha Builders and GIC Employees Co-operative Housing Society Ltd. whereby Chitralekha Builders agreed to sell the constructed area after developing the said property to GIC Employees Co-operative Housing Society Ltd.

8 The Vaity's, i.e., the original owners of the said property attempted to resile from the Agreement for Sale in favour of Chitralekha Builders. Therefore in 1988, GIC Employees Co-operative Housing Society Ltd. and the respondent herein as the sole proprietor of Chitralekha Builders, filed Suit No.1335 of 1988 against the Vaity's seeking specific performance of the Agreement dated 28th April, 1980. During the pendency of Suit No.1335 of 1988 a Deed of Partnership dated 8th April, 1989 was entered into between Kusum Bhaskarrao Gorule (respondent herein), Mrs. Nina Anil Shah (petitioner herein), one Mr. S. J. Pakhare and one Mr. S. N. Gadekar who carried on business in name of Chitralekha Builders. By an order dated 30th July, 1991 passed in said Suit No.1335 of 1988, the Court Receiver, High Court, Bombay, was appointed in respect of the said property.

9 In the year 1996, two of the partners, i.e., Mr. S.J. Pakhare and Mr. S.N. Gadekar retired from the partnership firm M/s. Chitralkha Builders. The petitioner and the respondent were the only remaining parties. Disputes arose between the petitioner and the respondent and the petitioner, by her letter dated 15th July, 2004, dissolved the partnership firm M/s. Chitralkha Builders. The petitioner filed a Chamber Summons No.1334 of 2004 wherein she sought herself to be impleaded as a co-plaintiff in Suit No.1335 of 1988. This Hon'ble Court by an order dated 26th October, 2004, rejected the Chamber Summons No.1334 of 2004 filed in Suit No.1335 of 1988 against which the petitioner filed an Appeal No.598 of 2005.

10 The petitioner filed an Arbitration Application No.62 of 2005 in this Hon'ble Court under Section 11 of the Arbitration & Conciliation Act, 1996 seeking appointment of a sole arbitrator with respect to disputes that arose under the Partnership Deed for forming the firm Chitralkha Builders, that was dissolved by the petitioner. Meanwhile, in Suit No.1335 of 1988 consent terms between the original owners of the suit property, i.e., the Vaity's and the respondent herein, were filed whereby, Vaity's, the original owners agreed to convey the suit property to the respondent/nominee of the respondent herein. By an order dated 22nd July, 2005 the Arbitration Petition No.62 of 2005 was allowed and

Hon'ble Mr. Justice A. C. Agarwal (Retired) was appointed as the sole arbitrator.

11 The owners of the suit property, i.e., the Vaity's executed a conveyance dated 26th July, 2005 in respect of the suit property in favour of one M/s. Oswal Enterprises (nominee of the respondent) and the respondent was the confirming party therein.

The petitioner filed in this court Suit No.3162 of 2005 against the respondent as well as M/s. Oswal Enterprises seeking, inter alia, setting aside of the conveyance dated 26th July, 2005.

12 By an order dated 19th August, 2005 the Appeal No.598 of 2005 filed by the petitioner challenging the order dated 26th October, 2004, as stated in paragraph 9 above, was allowed and the petitioner was directed to be added as party defendant in Suit No.1335 of 1988.

BEFORE THE LEARNED ARBITRATOR

13 The Ld. Arbitrator, upon his appointment, held the first meeting on 28th August, 2005, wherein he took on record a reply of the respondent to an application filed by the petitioner to adjourn the proceeding sine die until the disposal of Suit No.3162 of 2005 filed by the petitioner in this Hon'ble Court. As the petitioner was absent, the Arbitration proceedings were adjourned to 28th January, 2006.

14 The petitioner addressed a letter dated 28th September, 2005 to the Ld. Arbitrator stating that he had requested the Advocate for the respondent for a copy of the Deed of Conveyance dated 26th July, 2005 and on receipt of the same, the petitioner would file a reply. The petitioner, therefore, prayed that the Ld. Arbitrator adjourn the proceedings for a period of 8 weeks.

15 On 14th December, 2005, the petitioner filed a preliminary statement praying therein that the Arbitration Proceedings be adjourned sine die till the hearing and final disposal of Suit No.3162 of 2005. The petitioner contended that the arbitral proceedings had become infructuous in view of filing of Suit No.3162 of 2005. The petitioner pleaded that the controversy between the parties could not be resolved through the procedure of Arbitration and could only be resolved in Suit No.3162 of 2005. According to the petitioner, in view of the subsequent developments, the petitioner would not be filing statement of claim at that stage.

16 The petitioner, thereafter, addressed a letter dated 30th January, 2006 to the Ld. Arbitrator seeking an adjournment of the arbitration proceedings for a period of 5 years until the petitioner secures a true copy of the conveyance dated 26th July, 2005. The respondent's Advocate addressed a letter dated 8th February, 2006 to the petitioner

stating that the conveyance had nothing to do with the present arbitral proceedings and that the respondent would oppose any application for adjournment by the petitioner.

17 On 20th February, 2006, the petitioner addressed another letter to the Ld. Arbitrator praying that the arbitration proceedings be stayed and adjourned sine die until the hearing and final disposal of Suit No.3162 of 2005. The next date of hearing was fixed as 9th March, 2006 and the same was informed to the petitioner by letter dated 20th February, 2006 from the respondent.

18 On 1st March, 2006, the petitioner addressed a letter to the Advocate for the respondent as well as marked a copy to the Arbitrator refusing to deposit the fees of the Arbitrator and repeated that the arbitration proceedings have become infructuous and would have to be adjourned sine die until the hearing and final disposal of Suit No.3162 of 2005.

19 On 7th March, 2006, the petitioner addressed another letter to the Arbitrator again stating that the arbitral proceedings had become infructuous and that accordingly the same must be adjourned sine die till Suit No.3162 of 2005 was finally heard and disposed off. Petitioner further stated that due to the obsequial ceremonies of petitioner's maternal grandmother petitioner had difficulty in appearing before the Ld.

Arbitrator on 9th March, 2006.

20 On 9th March, 2006, the Arbitration meeting was held and the Ld. Arbitrator held that the petitioner could not unilaterally terminate the arbitration proceedings and that the proceedings would continue before the Ld. Arbitrator as per its own merits. As the petitioner had expressed difficulty to attend the Arbitration proceedings vide letter dated 7th March, 2006, the Arbitration proceedings were adjourned to 20th March, 2006.

21 The respondent's Advocate by a letter dated 10th March, 2006 addressed to the petitioner, enclosed a copy of the Minutes of the Arbitration meeting held on 9th March, 2006 and informed petitioner that the next meeting was fixed on 20th March, 2006. The petitioner by a letter dated 14th March, 2006 addressed to the Ld. Arbitrator stated that because petitioner was to leave for a pilgrimage, petitioner would not be able to attend the arbitration proceedings until 20th March, 2006. Petitioner refused to share the expenses of the Arbitration and prayed that the arbitration proceedings be adjourned until the final hearing and disposal of Suit No.3162 of 2005. The respondent's Advocate addressed a letter dated 17th March, 2006 stating therein that the Ld. Arbitrator would not conduct the arbitration proceedings in view of the fact that the petitioner was not available and asked petitioner to inform convenient dates to the

Ld. Arbitrator. The petitioner addressed a letter dated 22nd March, 2006 to the Ld. Arbitrator repeating the request that the proceedings be adjourned until the respondent revokes the conveyance and brings the property to status quo ante. Respondent's Advocate vide letter dated 24th March, 2006 informed the petitioner that the Ld. Arbitrator had fixed the next date of hearing as 28th March, 2006.

22 The reason why I have mentioned about the correspondence exchanged and minutes of meeting is only to show that the Ld. Arbitrator had given the petitioner numerous opportunities to appear and participate in the arbitration proceedings. It also shows that on one hand the petitioner refused to file statement of claim and urged that the arbitration proceedings had become infructuous and on the other hand kept seeking adjournments. This also shows the allegation of bias against the Ld. Arbitrator is baseless.

23 On 28th March, 2006, the Ld. Arbitrator held a meeting and directed the petitioner to file on or before 10th April, 2004 statement of claim with copy to the respondents. The respondent was further directed to file Written Statement and Counter Claim, if any, on or before 15th April, 2006. The proceedings were adjourned to 18th April, 2006.

24 On 18th April, 2006, the petitioner failed to remain present before the Ld. Arbitrator despite being informed. The Ld. Arbitrator

recorded that the petitioner failed to file her Statement of Claim despite directions in that regard. The Ld. Arbitrator granted time until 26th April, 2006 to the respondent to file her counter claim as also her Affidavit of Evidence. The next date was fixed on 2nd May, 2006.

25 On 29th April, 2006, the respondent filed her Counter Claim with the Ld. Arbitrator. The respondent prayed :

(a) it be declared that the said property does not constitute an asset of the firm M/s. Chitralkha Builders; and

(b) the petitioner be directed to make payment to the respondent of a sum of Rs.81,00,000/- (Rupees Eighty One Lakhs Only) together with interest thereon at the rate of 24% per annum from the date of dissolution of the firm, i.e., 14th July, 2004 till payment and/or realization.

26 The Ld. Arbitrator held a meeting on 2nd May, 2006. An Advocate appeared for the petitioner and sought an adjournment as the husband of the petitioner was required to go out of Mumbai to attend a matter in the Hon'ble Supreme Court and prayed that the proceedings be adjourned beyond summer vacation. The Ld. Arbitrator acceded to the request of the petitioner and adjourned the matter to 8th June, 2006.

27 On 8th June, 2006, the petitioner filed an application before the Ld. Arbitrator, in which the petitioner made reference to petitioner's preliminary statement dated 14th December, 2005 and all letters addressed by the petitioner to the Ld. Arbitrator and prayed that in view of the same, the Arbitration proceedings must be stayed until the hearing and final

disposal of Suit No.3162 of 2005. In the said Application dated 8th June, 2006, the petitioner reiterated the petitioner's contentions that in view of the conveyance the arbitral proceedings had become infructuous.

28 The Ld. Arbitrator in the minutes dated 8th June, 2006 dealt with the contentions urged by the petitioner that the arbitration proceedings ought to be adjourned until the hearing and final disposal of Suit No.3162 of 2005. The Ld. Arbitrator held that the arbitration proceedings were maintainable. The Ld. Arbitrator recorded that the Statement of Claim was not filed by the petitioner. The Ld. Arbitrator further recorded that the respondent had filed her Counter Claim. The Ld. Arbitrator gave the petitioner a last opportunity to file her statement of claim and adjourned the proceedings to 29th June, 2006.

29 The petitioner on 26th June, 2006 filed an Arbitration Petition No.285 of 2006 in this Court and sought quashing of the Arbitration Proceedings pending before the Ld. Arbitrator on the ground that the said property had been conveyed to Oswal Enterprises. The petitioner further sought a stay of the arbitration proceedings until the hearing and final disposal of Suit No.3162 of 2005.

In the meeting held on 29th June, 2006, the husband and Constituted Attorney of the petitioner, remained present. The Ld. Arbitrator was informed by the Parties that the minutes of the meeting

dated 8th June, 2006 was challenged by the petitioner in the said Petition. In view of the same the arbitration proceedings were adjourned to 14th July, 2006.

30 The Ld. Arbitrator held a meeting on 14th July, 2006. In the said meeting he recorded that no orders were secured by the petitioner in Arbitration Petition No.285 of 2006. In view of the fact that no claim was filed by the Claimant despite several opportunities having been given, the Ld. Arbitrator dismissed the claim of the petitioner for default or non prosecution under Section 23 read with Section 25(a) of the Act. The Ld. Arbitrator further ordered the petitioner to pay the respondents cost of Rs.25,000/- which was towards the dismissal of the claim and not for failing to serve a copy of the Arbitration Petition No.285 of 2006 as sought to be contended by the petitioner. Despite the refusal of the petitioner to file statement of claim, the Ld. Arbitrator gave the petitioner yet another opportunity to put petitioner's house in order and participate in the Arbitration proceedings.

31 The petitioner filed an Application dated 28th July, 2006 before the Ld. Arbitrator to recall the minutes dated 14th July, 2006 and further prayed that the Ld. Arbitrator withdraw himself from the matter. For the very first time, the petitioner alleged that the Ld. Arbitrator has lost its impartiality to dispense justice and that the petitioner had lost faith

in the Ld. Arbitrator.

32 The allegation of bias is based on the fact that the Ld. Arbitrator levied cost of Rs.25,000/- on the petitioner. The petitioner addressed a letter dated 14th July, 2006 on the premise that the Ld. Arbitrator refused to adjourn the proceedings sine die and proceeded with the hearing of the matter on 28th July, 2006 and recorded evidence led by the respondent in support of the Counter Claim filed by the respondent. The Ld. Arbitrator thereafter adjourned the matter after hearing arguments and made and declared his Award 1st August, 2006, which is impugned in this petition.

33 The Ld. Arbitrator passed the impugned award on 1st August, 2006. Arbitration Petition No.285 of 2006 was dismissed on 27th September 2006. The petitioner filed an Appeal challenging the order dated 27th September 2006 which was withdrawn by the petitioner on 29th January, 2007. Therefore, the order dated 27th September, 2006 dismissing the petition filed by the petitioner for quashing the arbitration proceedings and for stay of the arbitration proceedings attained finality.

POINTS OF LAW AND DISCUSSION ON GROUNDS OF CHALLENGE :

34 Section 34 of the Arbitration and Conciliation Act, 1996 reads as under :

34. Application for setting aside arbitral award. —

(1) Recourse to a Court against an arbitral award may be made only by an

application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

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

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

The petitioner is challenging the Award under Section 34 (2)

(b) (ii), i.e., the arbitral award is in conflict with the public policy of India.

35 Which are the heads of “Public Policy of India” has been very elaborately analysed by the Apex Court in *Associate Builders Vs. Delhi Development Authority*¹. While in this subject matter, the Apex Court in paragraph 33 of Associate Builders (Supra) has held as under :

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

36 We shall now deal with each of the 12 points for consideration, three of which are not raised in the petition, agreed upon by both parties and the Amicus as to be the only points for consideration in the present Petition. For convenience and brevity and as they overlap, certain points are clubbed and dealt with.

Point No.1 - After the conveyance of the suit property on 26th July, 2005 the arbitration proceedings were frustrated and nothing survived in the arbitration proceedings and the same ought to have been terminated by the Hon’ble Arbitral Tribunal and

Point No.3 - In the absence of a statement of claim being filed by the petitioner, no counter claim of the respondent could be entertained by the Hon’ble Arbitral Tribunal.

37 The main contention of the petitioner is that after the suit property was sold on 26th July, 2005, nothing survived in the arbitral proceedings and the same was liable to be terminated. This contention of

1. (2015) 3 Supreme Court Cases 49

the petitioner is not correct.

38 In Arbitration Application No.62 of 2005 filed by the petitioner in this Court seeking reference of the disputes and differences between the parties to arbitration and in particular para 17 thereof, the petitioner stated that the dispute between the parties was whether the respondent was entitled to dispose of the partnership property without the consent of the other partner. On this Application the disputes between the parties were referred to arbitration by this Court by its Order dated 22nd July, 2005.

39 Thereafter, on 26th July, 2005, the suit property was conveyed to Oswal Enterprises by the Vaity family, the owners thereof. The respondent was a confirming party in the conveyance. The petitioner thereupon filed Suit No.3162 of 2005 in this Court challenging the aforesaid conveyance. Apart from the respondent, Oswal Enterprises was also a Defendant in the suit.

40 Thereafter instead of filing a Statement of Claim before the Arbitral Tribunal, the petitioner filed a Preliminary Statement dated 14th December, 2005 requesting that the arbitral proceedings be adjourned sine die till the hearing and final disposal of the Suit No.3162 of 2005. According to the petitioner in view of the conveyance and the said suit, nothing survived in the arbitral proceedings and the same had

become infructuous.

41 Although the petitioner did not file a Statement of Claim before the Arbitral Tribunal, the respondent filed a Counter Claim before the Arbitral Tribunal seeking the following final reliefs against the petitioner :

“(a) that it be declared by the Hon’ble Tribunal that the suit property i.e. Plot of land bearing CTS No.727 at Sarojini Naidu Road, Mulund West, Mumbai-400 080 does not constitute an asset of the firm of M/s. Chitralkha Builders;

(b) that the Claimant be ordered and directed to make payment to the respondent a sum of Rs.81,00,000.00 as per Particulars of Claim being Exhibit-“B” hereto alongwith interest on the principal sum of Rs.81,00,000.00 at the rate of 24% per annum from the date of dissolution of the firm i.e. 14.7.2004 till payment or realization;

(c) that this Hon’ble Tribunal be pleased to restrain the Claimant by an order and injunction from in any manner dealing with, disposing off, alienating, encumbering or creating any third party rights in respect of her property viz. 6-F, Dhan Ratna, Bhardawadi, Andheri (West), Mumbai – 400 058;

(d) for ad-interim reliefs in terms of prayer (c) above be granted;

(e) that the Claimant be directed to pay costs of this Application;

(f) for such further and other orders as this Hon’ble Tribunal may deem fit and proper.”

42 It is pertinent to note that after the Counter Claim was filed by the respondent, although the petitioner was appearing before the Arbitral Tribunal, the petitioner did not raise any issue of arbitrability in

respect of the claims made by the respondent in the Counter Claim. The only contention repeatedly raised by the petitioner was that the arbitral proceedings had become infructuous in view of the said conveyance and the said suit no.3162 of 2005 filed by the petitioner. On this basis the petitioner repeatedly made applications to the Arbitral Tribunal to adjourn the arbitral proceedings sine die till the disposal of the said suit.

43 Once the disputes between the parties are referred to arbitration, both sides are entitled to make claims and/or counter claims against each other. If one party decides not to seek reliefs, it does not mean that the arbitral proceedings come to an end and the other party is not entitled to seek any relief before the Arbitral Tribunal. This would be so even if the party at whose instance the disputes were referred to arbitration, eventually decides not to seek any relief before the Arbitral Tribunal. I find support in the decision of the Hon'ble Supreme Court in the case of *State of Goa V/s. Praveen Enterprises*²

44 Section 23(1) of the Act provides, as per direction of arbitral tribunal or as agreed, for filing of a statement of claim as also for respondent to file his/her reply/counter claim, if any. In the absence of the statement of claim not being filed or the respondent choosing not to file reply/counter claim, under Section 25(a) of the Act, the Tribunal is, when no sufficient cause is shown, mandated to dismiss the claim from

2. (2012) 12 SCC 581

being preferred if the default is of the petitioner and dismiss the right to file a reply/counter claim, if respondent is in default. The Arbitral Tribunal after giving several opportunities to the petitioner finally exercised the statutory right under Section 25(a) of the Act and dismissed the petitioner's claims. The petitioner has wrongly construed the provisions of the Act to the effect that the Ld. Arbitrator is required to terminate the entire proceedings for the petitioner's default of not filing a statement of claim.

45 A Single Judge of Delhi High Court, in the case of ***Indian Oil Corporation Ltd. vs. ATV Projects India Ltd. & Anr.***³ has held that the Arbitral Tribunal may terminate the arbitral proceedings in respect of the claim but continue the proceedings in respect of the counter claim and vice versa. The Hon'ble Court in paragraph 14 has held as follows:

"14. A reading of the said provision does make it clear that where the deposit in respect of a claim or counter claim is not made, the Arbitral Tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter claim, as the case may be. Therefore the act itself countenances a situation where for example, if no deposit as stipulated under Section 38 is made in respect of a claim, the Arbitral Tribunal may terminate arbitral proceedings in respect of the claim but may continue the arbitral proceedings in respect of the counter claim and vice versa. The Act itself therefore contemplates termination of part of the arbitral proceedings. Therefore, it would not be possible for me to agree with the contention of the learned counsel for the respondent No.1 (ATV) that a continuation of the arbitral proceedings in respect of the claim of the petitioner (IOCL) would ipso facto mean that the arbitral proceedings in respect of ATV's claim was also alive and continuing. It is permissible in law to terminate the proceedings in respect of one of the claimants or counter claimants and to continue proceedings in respect of the other or other claimants or counter-claimants, as the case may be."

(emphasis supplied)

3 . 2004(3) R.A.J. 6 (Del)

The judgment passed by the Ld. Single Judge in Indian Oil Corporation Ltd. (Supra), was challenged before the Division Bench. The Division Bench set aside the judgment of the single bench solely on the ground that a writ petition could not be filed against order passed by the Arbitrator and did not set the judgment aside on its merits. Paragraph 16 reads as under :

“16. Once it is held that the writ petition itself was not maintainable, the question of going into the merits of the order dated 02.06.2003 of the respondent no.2 Arbitrator does not arise. However for the sake of completeness, we may mention that the respondent no.2 Arbitrator having in the recall order dated 02.06.2003 recorded that he was satisfied with the reasons given by the appellant for being unable to file the Statement of Claim within the time granted by the respondent no.2 Arbitrator and having in the exercise of discretion vested in him recalled the order holding the right of the appellant to file the Statement of Claim having been lost, no case for interference with such decision arrived at by the by the Arbitrator or the discretion exercised by the Arbitrator especially in jurisdiction under Article 226 of the Constitution of India does not arise.”

46 The Hon’ble Supreme Court in the case of State of Goa Vs. Praveen Enterprises (Supra) held even if the Claimant fails to file her Statement of Claim, in order to avoid multiplicity of proceedings, a respondent need not resort to filing of a fresh application under Section 11 of Arbitration & Conciliation Act, 1996 to refer the same disputes or the respondent’s claims arising under the same agreement or under the same arbitration clause for fresh orders under Section 11 to appoint a tribunal but the same tribunal which is appointed for the adjudication of disputes can continue to adjudicate the counter claim filed by the respondent in reference.

47 In the present case the respondent had sought certain reliefs against the petitioner by filing a Counter Claim. It was not the case of the petitioner that these claims were not arbitrable. In fact as regards prayer (a) of the Counter Claim, even the petitioner had sought to refer the same dispute to the Arbitral Tribunal vide her Arbitration Application. This being the position, even though the petitioner did not seek any relief against the respondent, it was always open to the respondent to seek reliefs against the petitioner before the Arbitral Tribunal. The mere sale of the suit property and/or filing of the suit did not prevent the Arbitral Tribunal from deciding the claim of the respondent.

48 Moreover the petitioner had challenged the decision of the Arbitral Tribunal dated 8th June, 2006 whereby the Arbitral Tribunal rejected the request of the petitioner to adjourn the arbitral proceedings sine die till the disposal of the suit, in this Hon'ble Court by filing the Arbitration Petition No.285 of 2006. By an Order dated 27th September, 2006 this Hon'ble Court dismissed the aforesaid Arbitration Petition. The petitioner filed Appeal No.812 of 2006 against this order. However, the same was withdrawn by the petitioner on 29th January, 2007. Consequently this issue stands concluded and it is not permissible for the petitioner to re-agitate the same.

Point No.2 - The Hon'ble Arbitral Tribunal failed to pass any order on the preliminary statement dated 14th December, 2005 filed by the petitioner.

raising the issue of jurisdiction in the light of the disposal of the suit property.

49 According to the petitioner the Hon'ble Arbitral Tribunal failed to pass any order on the Application of the petitioner as contained in her Preliminary Statement dated 14th December, 2005.

50 As stated above the request made by the petitioner vide the Preliminary Statement was that the arbitral proceedings be adjourned sine die till the hearing and final disposal of Suit No.3162 of 2005 filed by the petitioner in this Hon'ble Court questioning the sale of the Suit Property. The primary reason for seeking this relief was that the Suit Property was conveyed to a third party, who was not a party to the arbitral proceedings, and that such conveyance was impugned in the aforesaid Suit. According to the petitioner, by reason of the sale of the Suit Property, the Arbitral Tribunal had no jurisdiction over the controversy between the parties, which now included a third party viz. M/s. Oswal Enterprises.

51 From the record it also appears that although the Arbitral Tribunal did not decide the Application immediately, the Arbitral Tribunal eventually ruled on the petitioner's request to adjourn the arbitral proceedings sine die pending the final hearing of the said Suit vide its Order dated 8th June, 2006. After filing the Preliminary Statement the petitioner on several occasions addressed letters/applications to the Arbitral Tribunal reiterating the same request. The last such Application

was made by the petitioner on 8th June, 2006. Hence although the Arbitral Tribunal does not refer to the Preliminary Statement in its Order dated 8th June, 2006, the issues raised in the Preliminary Statement and the request made vide the Preliminary Statement was decided by the Arbitral Tribunal vide its Order dated 8th June, 2006.

52 This contention has been raised time and again by the petitioner right from preliminary statement dated 14th December, 2005, through all letters and application dated 8th June, 2006. The same was dealt by the Ld. Arbitrator in minutes dated 8th June, 2006. The Ld. Arbitrator in minutes dated 8th June, 2006 held therein that the contention is devoid of merit. The Ld. Arbitrator held that the issue before the Arbitrator was distinct and same relates to the dispute inter se between the partners and the monetary claim which may arise inter se between them. Admittedly the said order dated 8th June, 2006 was challenged in Arbitration Petition No.285 of 2006 filed by the petitioner. There is no valid explanation forthcoming from the petitioner as to why the petitioner did not file statement of claim after the petitioner's objection to the continuation of the Arbitration proceedings was rejected.

53 This Court by an order dated 27th September, 2006 was pleased to dismiss the Arbitration Petition No.285 of 2006 and held that the mere fact that the said property was conveyed does not render the

Arbitration proceedings infructuous. The petitioner challenged the order dated 27th September, 2006 by filing an Appeal No.812 of 2006. The petitioner, on 29th January, 2007, withdrew the said Appeal No.812 of 2006. On having withdrawn the said Appeal No.812 of 2006, the order dated 27th September, 2006 has attained finality and therefore this ground cannot be urged and considered in the present Petition. The petitioner cannot be now heard to urge that the Arbitrator ought to have recused himself or adjourned the proceedings sine die.

Point No.4 - The order dated 8th June, 2006 passed by the Hon'ble Arbitral Tribunal as received by the petitioner was in variance with the order dictated by the Hon'ble Arbitral Tribunal to both sides in the arbitration meeting. In this manner the Hon'ble Arbitral committed misconduct.

54 It was a case of the petitioner that when the Arbitrator dictated the Minutes on 8th June, 2016, the petitioner's representative Mr. Anil Shah wrote down the minutes alongwith the Stenographer. Mr. Anil Shah submitted that when the final minutes were received by him and when he compared it with his hand written notes, he found there were certain differences. Mr. Shah further submitted that the minutes were sent to him through the respondent's office and therefore, there was misconduct.

I find the submissions of Mr. Shah to be preposterous. It is Mr. Anil Shah's words against what is placed on record as the minutes of the meeting held on 8th June, 2016 by the petitioner and signed by the Ld.

Arbitrator. Even assuming, the Ld. Arbitrator has dictated and edited the minutes of the meeting later, there is nothing wrong with that and the Ld. Arbitrator was entitled to edit and firm up the minutes of the meeting. That would not amount to any bias or misconduct by the Ld. Arbitrator. The petitioner has placed on record the minutes of the meeting held on 8th June, 2006 which have been signed by the Arbitrator. Those minutes are final.

55 It must be noted that the Ld. Arbitrator infact showed lot of indulgence to the petitioner and time and again accommodated the petitioner to enable the petitioner to file statement of claim and participate in the Arbitration Proceedings. The Ld. Arbitrator, as noted above, was consistently, from 28th March, 2006, extending the time to enable to petitioner to file her statement of claim which the petitioner was persistently refusing to do so. The Ld. Arbitrator also adjourned the matter from 8th June, 2006 to 29th June, 2006 by giving one more opportunity to the petitioner to put her house in order and to proceed with the arbitration proceedings in accordance with law.

This ground also, therefore, is baseless.

Point No.5 - One Mr. Prakash Naik, an agent of M/s. Oswal Enterprises was allowed to attend the proceedings by the Hon'ble Arbitral Tribunal despite strong objection from the petitioner. This again amounts to misconduct by the Arbitral Tribunal.

56 Even assuming Mr. Prakash Naik was an agent of M/s. Oswal

Enterprises and he attended the hearings, in my view that cannot be termed misconduct by the Ld. Arbitrator. The petitioner is flinging all these ridiculous allegations perhaps hoping that atleast one may hit. In my view, this ground does not fall within the purview of Section 34 of the Arbitration & Conciliation Act, 1996. Mr. Rao submitted that reference to Mr. Prakash Naik as an agent of Oswal Enterprises is wholly misconceived. Mr. Rao explained that Mr. Prakash Naik is a representative of the respondent and was a personal friend of the husband of respondent and has since been assisting the respondent and that the allegations against Mr. Prakash Naik are all false and Mr. Prakash Naik remaining present in the arbitration proceedings on behalf of the respondent does not amount to any misconduct.

I accept the explanation given by Mr. Rao and the Ld. Arbitrator was within his rights to decide who could attend the hearing and who could not. Court's have no jurisdiction to go into these aspects under Section 34 of the Act. The Ld. Arbitrator is the best judge of the situation prevailing before him.

Point No.6 - The Hon'ble Arbitral Tribunal ought to have discontinued the proceedings in view of the refusal on the part of the petitioner to pay its charges and expenses by continuing with the proceedings, the Hon'ble Arbitral Tribunal was again guilty of misconduct.

57 Again this is no ground for setting aside an Award as per the provisions of Section 34 of the Act. The Act itself anticipates such a

situation in Section 38 wherein if one of the parties fails to deposit his share of the deposit, the other party is required to pay that share. Section 38 reads as under :

38. Deposits.—

(1) The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of section 31, which it expects will be incurred in respect of the claim submitted to it: Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter-claim.

(2) The deposit referred to in sub-section (1) shall be payable in equal shares by the parties: Provided that where one party fails to pay his share of the deposit, the other party may pay that share: Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.

(3) Upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the party or parties, as the case may be.

Therefore, the respondent paid the share of the petitioner.

Accepting the petitioner's share of fees cannot be misconduct.

58 Section 38(2) of the Arbitration & Conciliation Act and more particularly the proviso to Section 38(2) enables the Ld. Arbitrator to make claims for his fees and expenses from the other party if the first party refuses to make payment of the fees. Section 38 also prescribes other methods for the arbitrator to discontinue the proceedings if any one of the parties fails to pay the fees of the tribunal, like, in the case of the Claimant, the arbitrator could refuse to hear the Claimant's case and vice-

versa.

Point No.7 - The Hon'ble Arbitral Tribunal wrongly passed an order of costs of Rs. 25,000/- on the petitioner for allegedly failing to serve a copy of the arbitration petition no. 285 of 2006 on the respondent vide its order dated 14th July, 2006. This also amounted to misconduct on the part of the Arbitral Tribunal.

59 This again cannot be a ground for setting aside an Award under Section 34 of the Act. The contention that the Ld. Arbitrator imposed cost of Rs.25,000/- upon the petitioner for failure to serve a copy of the Arbitration Petition No.285 of 2005 is not correct. The petitioner has not understood the order imposing the cost. The cost of Rs.25,000/- was imposed upon the petitioner for failure to file statement of claim since 28th March, 2006 despite express directions to file the same. It is evident from the minutes of the meeting dated 14th July, 2006, that the Ld. Arbitrator on considering the fact that the petitioner failed to file statement of claim despite several opportunities being given passed its order dismissing the right of the petitioner to prefer any claim before the arbitral tribunal and accordingly imposed cost of Rs.25,000/-.

Point No.8 - The arbitral proceedings were conducted in a biased manner by the Hon'ble Arbitral Tribunal.

60 The petitioner has contended that the manner in which the arbitral proceedings were conducted shows that the Arbitral Tribunal was biased. This contention of the petitioner also is without any basis.

61 The petitioner's contention of bias rests on the fact that she did not contribute towards the fees of the Ld. Arbitrator and because the Ld. Arbitrator was proceeding with the arbitration without receiving fees and expenses from the petitioner, there was a needle of suspicion towards the Ld. Arbitrator. The petitioner, in the Application dated 28th July, 2006, for the very first time raised the ground that the petitioner had lost faith in the Ld. Arbitrator and that the Ld. Arbitrator has lost his impartiality. It is pertinent to note that in petitioner's various correspondence and applications prior thereto, the petitioner never raised the allegation of bias. The petitioner states that it was improper for the tribunal to conduct arbitration proceedings in view of the fact that the petitioner had refused to pay the charges of the Arbitrator and the same amounts to bias.

62 With a view to demonstrate how the arbitral proceedings were conducted the Amicus Curiae tendered a list of dates and events during the course of the hearing. This list of dates and events have also been noted earlier and these establish that the Ld. Arbitrator was very accommodating and showed ample latitude while dealing with the petitioner and petitioner's letters and applications. The Ld. Arbitrator repeatedly adjourned the proceedings at the request of the petitioner. The Ld. Arbitrator gave ample opportunities to the petitioner to secure orders in petitioner's favour from this Court.

63 In the circumstances, no case of bias is made out against the Ld. Arbitrator.

Point No.9 - The original award was never served on the petitioner. A purported true copy thereof was served by the advocate of respondent on the petitioner's advocate under cover of his letter dated 4th August, 2006.

64 This is one of the grounds which has not been raised in the petition as stated earlier. This ground is without any merit. This ground could have been raised by a party when he/she seeks to file a Petition under Section 34 of the Arbitration & Conciliation Act, 1996 and the same is held to be time barred. In the present case the petitioner has accepted the letter of the Advocate for the respondent serving a copy of the Award on the petitioner and has also filed this petition accordingly.

Point No.10 - The impugned award contains contradictory findings in as much as on one hand the Hon'ble Arbitral Tribunal allowed a claim for Rs.62,18,324/- for maintenance of the partnership property whereas on the other hand the Hon'ble Arbitral Tribunal held that the suit property does not constitute partnership property ;

Point No.11 - While coming to the conclusion that the suit property does not belong to the partnership firm, the Hon'ble Arbitral Tribunal failed to consider the recitals in the Partnership Deed itself as well as the Development Agreement dated 20th April, 1980 between the Vaity's and the firm Chitralekha Builders and

Point No.12 - There is no material whatsoever to justify the award of Rs.62,18,324/- against the petitioner.

65 The petitioner urged that the impugned award is contradictory, as, on the one hand the arbitral tribunal allowed the claim of Rs.62,18,324/- for the maintenance of the partnership property

whereas on the other hand the tribunal has held that the suit property does not constitute an asset of the partnership firm M/s. Chitralekha Builders. Mr. Rao submitted that this submission of petitioner is erroneous as the Tribunal has granted expenses to the extent of Rs.62,18,324/- which were incurred by the respondent as a partner of M/s. Chitralekha Builders during the subsistence of the partnership, i.e., from 8th April, 1989 to 15th July, 2004. Each partner is liable to contribute towards expenses and accordingly the Tribunal has awarded the said claim by way of counter claim.

66 The respondent submitted as under :

(a) That the petitioner deliberately did not participate in the arbitration proceedings despite being given several opportunities to file statement of claim and participate in the arbitration proceedings. The respondent filed Counter Claim on 29th April, 2006. The respondent further filed witness's Affidavit in lieu of Examination in Chief on the same day 29th April, 2006. The Ld. Arbitrator in the impugned Award at paragraph 8 records that the counsel for the respondent has examined his witness and tendered documents in support of the proof of claim made by the respondent. The Ld. Arbitrator refers to documents marked as Exhibit R-16 Collectively which substantiates that the documents were marked and they have been considered by the Ld. Arbitrator. Further the Ld.

Arbitrator records at paragraph 9 of the impugned Award that the Affidavit of Shri. Kumar Sohani the witness of the respondent has already been filed and that Mr. Anil Shah has declined to cross examine him. The petitioner was given an opportunity to cross examine the witness of the respondent but he failed to do so and therefore today ought not to be heard on the merits of the Counter Claim.

(b) As held in the judgment in the case of *Indian Institute of Technology, Mumbai vs. Creative Construction*⁴ the petitioner cannot be allowed to raise a point for the first time in the Petition as that would give no opportunity to the respondent to defend its case.

“7.... It was sought to be raised for the first time before the Learned Single Judge in the Arbitration Petition. Once it is evident from the records that the ground on which the Award was sought to be modified or challenged was not raised before the Arbitrator and that it is related to the disputed questions of facts or mixed questions of fact and law and consequently there was no opportunity for the respondents to meet the ground in that regards before the Learned Arbitrator; before whom the evidence was required to be produced by the parties in support of their rival contentions, the Appellants cannot be allowed to raise such point for the first time in the Arbitration Petition. By allowing the Appellants to raise such a point for the first time in the petition, it would result in the respondents being left with no opportunity to defend the case. It is not the case of the Appellants, that the Appellants were not able to raise such point before the Arbitrator for any sufficient reason or ground.”

(c) As held in the judgment of the Hon’ble Supreme Court in the case of Associate Builders (Supra) when a Court is applying the “public policy” test to an Arbitration Award, it does not act as a Court of Appeal and consequently errors of fact cannot be corrected. A possible

4. 2007 (5) MhL.J. 323

view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers the Arbitral Award. The Court while considering challenge to the Arbitral Award does not sit in appeal over the findings and decision of the Arbitrator. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the Agreement. If he does so, the decision of the umpire has to be accepted as final and binding. In Associate Builders (Supra) paragraph 22 reads as under :

“22... As has been held above, the expression “justice” when it comes to setting aside an award under the public policy ground can only mean that an award shocks the conscience of the Court. It cannot possibly include what the Court thinks is unjust on the facts of a case for which it then seeks to substitute its view for the Arbitrator’s view and does what it considers to be justice. The Division Bench has lost sight of the fact that it is not a first Appellate Court and cannot interfere with errors of fact.

(d) The Ld. Arbitrator in paragraph no.12 whilst dealing with the issue as regards the making up of the Accounts of the firm has permitted expenses to be shared by the Claimant/petitioner and the respondent to the extent of Rs.62,18,324/- (Rupees Sixty Two Lakhs Eighteen Thousand Three Hundred and Twenty Four Only). The Arbitrator having held that the firm stood dissolved by the petitioner on 15th July, 2004 held that the accounts ought to have been accounted in respect of the expenses that the firm M/s. Chitralekha Builders incurred until

15th July, 2004. In all 16 heads of expenses were urged for consideration of the Ld. Arbitrator. The respondent put forth the evidence of her son and constituted attorney alongwith evidence to prove the said expenses.

(e) It was submitted by Mr. Rao that since the expenses were incurred over a long period of time only a few documents were available to substantiate the case of the respondent and all of them have been produced. The respondent submitted that towards her claim for Miscellaneous expenses she had produced numerous vouchers for over a period of time which have all been placed on the record of the Ld. Arbitrator and which was not challenged by the petitioner despite having been given an opportunity to do so. In case of other expenses such as Survey charges, compound wall, site office, professional charges, zone change charges, right of way, Architect/consultant fees, Municipal Corporation Expenses, Plinth Supplier/Construction Work, Repairs of boundary wall, security charges as per the demand of the Court Receiver, the respondent submitted the respondent had produced the necessary evidence and proved respondent's case and the petitioner did not challenge the amounts despite being aware of the claim and in the light of the documents produced by the respondent, respondent is entitled to cause the petitioner to share the expenses.

(f) Ground 11 has not been raised in the petition and therefore ought not to entertained. Mr. Rao relied upon Indian Institute of

Technology, Mumbai vs. Creative Construction (Supra) wherein it was held that the petitioner cannot be allowed to raise a point for the first time in the Petition as that would give no opportunity to the respondent to defend its case.

67 In respect of the heads of expenses, i.e., legal expenses, scrutiny and Registration charges for the Power of Attorney, Advocate's fees and interest on loan taken by the firm M/s. Chitralkha Builders until 15th July, 2004 it has been urged by the Amicus Curiae that there did not exist sufficient evidence to substantiate the case of the respondent.

68 The petitioner also submitted that the Arbitral Tribunal wrongly concluded that the suit property was not an asset of the firm Chitralkha Builders. According to the petitioner, the Arbitral Tribunal failed to consider relevant material like the Partnership Deed and the Development Agreement dated 20th April 1980 while deciding this issue.

69 The Amicus Curiae submitted that :

- (a) there was substance in the contention of the petitioner.
- (b) it is the undisputed position that there was a Development Agreement dated 28th April, 1980 between the owners of the suit property and the respondent in respect of the suit property. It is also the undisputed position that when the Partnership Deed dated 8th April, 1989 was entered into, inter alia, between the petitioner and the respondent, the respondent brought her rights in respect of the suit property into the firm. In fact the Partnership Deed itself recites this fact. The Partnership Deed further provides that the place of business of the firm shall be on the suit property. Under the Deed the petitioner was required to

infuse capital to develop the suit property. Hence there is no doubt at all that the partnership firm Chitralekha Builders acquired rights in respect of the suit property.

(c) From the impugned Award it is clear that the Arbitral Tribunal did not consider this aspect at all and completely ignored the recitals and admissions contained in the Partnership Deed. In para 11(ix) of the impugned Award, the Arbitral Tribunal, inter alia, came to the conclusion that Chitralekha Builders never became the owner of the suit property because there was no conveyance or any right or title in favour of Chitralekha Builders in the suit property. This finding is totally contrary to the admitted facts referred to above including the recitals in the Partnership Deed.

(d) No doubt that the firm was never the owner of the suit property. However, it cannot be said that the firm had no right or interest or title in respect of the suit property. Accordingly if the declaration made by the Arbitral Tribunal in para 14(b) of the Award is taken to mean that the firm Chitralekha Builders had no right, title or interest in the suit property, the same is clearly and ex facie erroneous and contrary to the admitted facts and terms of the Partnership Deed itself.

(e) It is well settled that the Wednesbury Test is applicable to Arbitral Awards. This test, inter alia, requires that all relevant material is required to be considered by the Arbitral Tribunal while making its Award. In the instant case the Arbitral Tribunal totally ignored the Development Agreement dated 28th April, 1980 as well as the terms of the Partnership Deed while coming to the conclusion that the firm did not have any right or title in the suit property and that the same was not an asset of the firm.

(f) In the circumstances this part of the Award of the Arbitral Tribunal is ex facie illegal and contrary to law.

70 I must note with appreciation that the assistance of the Amicus Curiae has been immense. Mr. Mehta did a very commendable job.

 I would, however, not agree with the submissions of the Amicus Curiae that this part of the award is bad because the Arbitral

Tribunal failed to consider the relevant material, to wit, the Partnership Deed and the Development Agreement, etc., while deciding the issue.

71 The prayer in the counter claim was to declare that the suit property does not constitute an asset of the firm Chitrlekha Builders and the Ld. Arbitrator has only confirmed that. Infact it is also stand of the petitioner that the property never belonged to the firm. If the petitioner had any objection, petitioner should have appeared before the Ld. Arbitrator, filed statement of defence to the Counter Claim and contested the matter. Instead of contesting the matter, petitioner chose not to appear or file any reply to the counter claim. How much can the Arbitral Tribunal do? The petitioner never appeared and pointed out the various clauses of the Partnership Deed and the Development Agreement and make submissions. It is too much of a burden on the Arbitral Tribunal to go through the entire records and argue the matter on behalf of the petitioner, who never appeared or filed reply to Counter Claim. To expect the Arbitral Tribunal to have considered all these agreements on its own and then decide the matter in favour of the petitioner is not correct. Moreover, if the petitioner has not raised any of those points before the Ld. Arbitrator, the petitioner cannot, for the first time, raise those points in its petition filed under Section 34 of the Act. This court under Section 34 is not sitting as a court of appeal. It is settled law that courts would

interfere only when findings of the Arbitrator are arbitrary, capricious and perverse. What has not been raised before the Ld. Arbitrator cannot be permitted to be raised for the first time in Section 34 application.

The decision could be stated suffered from perversity, following a patent error on a fundamental principle of law or disregard to relevant materials or cognizance of irrelevant or non-germane determinants. A decision, however, on the issues raised, is a sine qua non for a question of law or ground of challenge under Section 34 to exist. If the petitioner has not even filed a defence or written statement to the counter claim, the question of raising that issue also did not arise.

Moreover, the prayer sought in the counter claim was that it be declared by the Hon'ble Tribunal that the suit property does not constitute the asset of the firm – M/s. Chitralkha Builders. Even if one considers the Partnership Deed or Development Agreement, they do not mention anywhere that the suit property was an asset of the firm. Infact this is also confirmed by the fact that the respondent had filed suit no.1335 of 1988 for specific performance against Vaity family, in which the petitioner was joined on petitioner's application as defendant. The suit no.3162 of 2005 filed by the petitioner itself is on the basis that the suit property has been sold to M/s. Oswal Enterprises by the Vaity brothers and for cancellation of the sale and conveyance. The suit property was never an asset of the firm or owned by the firm and this was the correct position

as neither side was disputing this fact.

72 Therefore, the Ld. Arbitrator was not in error in his conclusion that the said property did not constitute an asset of the firm Chitralkha Builders. So far as the amount of Rs.62,18,324/- against the petitioner is concerned, in my view, the award is severable.

73 According to the petitioner and Amicus Curiae there is no material whatsoever to justify the Award of Rs.62,18,324/- against the petitioner. Further while making this Award the Arbitral Tribunal has not given any reasons. Hence the Award is illegal and liable to be set aside.

74 In my view, there is substance in the contentions of the petitioner and Amicus Curiae. It is well settled that an Award of the Arbitral Tribunal must be based on evidence. Further an Award must be reasoned, unless parties agree to the contrary. In the present case, as stated below, neither is the Award of Rs.62,18,324/- based on any evidence nor has the Arbitral Tribunal given any reasons in support thereof. The impugned Award to this extent deserves to be set aside. These aspects are elaborated below.

75 The Arbitral Tribunal has dealt with the issue of expenses in para 12 of the impugned Award. A perusal of para 12 shows that while holding that the expenses have been proved by M/s. Chitralkha Builders, the Arbitral Tribunal has not provided any reason in support thereof. The

Arbitral Tribunal has not considered whether there was sufficient material or evidence on record to prove the expenses. There are no reasons whatsoever in support of the finding that the expenses have been proved. To this extent the impugned Award is clearly without reasons and therefore contrary to law.

76 As a matter of fact also there is no material or evidence on record to prove the expenses. To prove her claim the respondent led the evidence of her son vide an Affidavit in Evidence dated 29th April, 2006. In support of claim for expenses, no material was produced by respondent along with this Affidavit. However, further Examination-in-Chief was conducted of the witness by the respondent's Advocate before the Arbitral Tribunal whereby evidence was sought to be given in support of the claim for expenses. However, as stated above, the said evidence does not prove the expenses.

77 Before we proceed further, we must keep in mind, the firm Chitralekha Builders came into existence by a Partnership Deed dated 8th April, 1989 between petitioner, respondent, one Pakhare and Gadekar. Pakhare and Gadekar resigned in 1996. Prior to 8th April, 1989, after Thukaram Nalawade retired on 16th April, 1980, Chitralekha Builders was a sole Proprietor concern of respondent. Therefore, when we state below "it was before the petitioner joined as a partner" it means the firm itself

was not in existence.

(i) Rs.3,03,000/- was claimed towards legal expenses. From para 1 of the further Examination-in-Chief it is clear that these alleged expenses relate to the period prior to 1989, i.e., when the petitioner became a partner in the firm. Secondly there is receipt for only Rs.3000/- issued by Advocates Thakurdas & Madgaonkar and there is no receipt to prove the payment of the balance Rs.3,00,000/-.

(ii) Rs.5000/- claimed towards purported survey charges. In para 2 of the further Examination-in-Chief a receipt issued by G.N. Sohani is relied upon. Once again this pertains to a period before the petitioner became a partner of the firm. Moreover, it is a receipt issued by the respondent's husband which raises doubts about its authenticity.

(iii) An amount of Rs.1,29,275/- is claimed as expenses towards construction of a compound wall. Once again, from para 3 of the further Examination-in-Chief, it is seen that the wall was purportedly constructed in the year 1980 which was before the petitioner became a partner of the firm. Moreover there is no proof of payment of this bill or of the construction of the wall.

(iv) Rs.40,500/- is claimed towards construction of a site office. To justify this claim in para 4 of the further Examination-in-Chief a bill dated 18th September, 1980 is relied upon. Once again the alleged expenses towards the construction of the site office relate to the period

prior to the petitioner becoming a partner of the firm. Further, no receipt is produced showing that this amount is actually paid.

(v) The next claim is for the alleged professional charges of Rs.1,00,000/-. From para 5 of the further Examination-in-Chief, it is again seen that this alleged payment pertains to bills dated 19th July, 1986 and 15th February, 1987 which are prior to the petitioner becoming a partner of the firm. Moreover there are no receipts acknowledging payment of these amounts.

(vi) An amount of Rs.9000/- is claimed towards zone change fees. In para 6 of the further Examination-in-Chief the witness has relied upon a bill dated 25th June, 1983 raised by M/s. G.N. Sohani Associates. Once again this expense pertains to the period prior to the petitioner becoming a partner in the firm. Moreover, the bill is raised by the respondent's husband which again raises a doubt about its genuineness. There is also no proof of payment of this amount.

(vii) A sum of Rs.40,000/- is claimed towards a right of way. From para 7 of the further Examination-in-Chief it appears that this alleged payment was made under an Agreement dated 24th October, 1983, which was before the petitioner became a partner in the firm. Further the Agreement produced is not the original and not even a photocopy of the original. It appears to be a typed copy. The respondent is not a party to this Agreement. The Agreement has not even been proved as required by

law.

(viii) An amount of Rs.19000/- is claimed towards Architect's/Consultant's fees. From para 8 of the further Examination-in-Chief it is evident that even this purported expense pertained to the period prior to the petitioner becoming a partner of the firm. Further there is no proof of payment of these bills by the firm.

(ix) A sum of Rs.1,82,580/- is claimed towards Municipal Corporation expenses. From para 9 of the further Examination-in-Chief it is clear that these bills pertain to the period from 1984 to 1988, before the petitioner became a partner. A perusal of the bills show that they are all in the name of G.H. Vaity. There is no proof of these bills having been paid by the firm.

(x) An amount of Rs.2,50,524/- is claimed towards Plinth Supplier and Construction Work. Again from para 10 of the further Examination-in-Chief it is apparent that these alleged expenses pertain to the period prior to the petitioner becoming a partner in the firm. Further there is no proof of payment of these amounts.

(xi) Rs.1,25,000/- is claimed towards repairs to the boundary wall. In para 11 of the further Examination-in-Chief the witness has produced a bill dated 13th March, 2004. There is no proof of payment of this bill by the firm.

(xii) An amount of Rs.7,28,000/- is claimed towards scrutiny

and registration for Power of Attorney. Although in para 13 of the further Examination-in-Chief there is a reference to a purported receipt issued by the Sub Registrar of Assurances dated 2nd June, 2005, admittedly no such receipt was tendered nor is any such receipt available on record. Moreover this appears to be an expense pertaining to the period after the dissolution of the firm on 15th July, 2004. In para 12 of the impugned Award the Arbitral Tribunal has observed that expenses for the period post 15th July, 2004 have been disallowed. By awarding this claim the Arbitral Tribunal has contradicted itself.

(xiii) A sum of Rs.11,45,000/- is claimed towards security charges paid as per the Court Receiver. Para 12 of the further Examination-in-Chief pertains to this claim. An examination of the receipts, inter alia, show that, except for the first receipt, they do not mention the period to which they relate. Further, the amounts in the receipts also vary drastically. There is no evidence as to what was the amount payable per month for the security service. No letter from the Court Receiver has been produced directing payment of any amounts for the security service.

(xiv) An amount of Rs.2,00,000/- is claimed towards Advocate's fees. There is no evidence in respect of this alleged expense either in the Affidavit of Evidence or in the further Examination-in-Chief.

(xv) An amount of Rs.8,41,145/- is claimed towards

miscellaneous expenses. In para 14 of the further Examination-in-Chief the witness has referred to alleged vouchers in support of this claim. The witness has not deposed that he is familiar with the signatures on the vouchers or that he prepared the vouchers. The vouchers have therefore not been proved as required by law. The witness also does not say that the amounts mentioned therein were paid. Further, all the vouchers appear to have been signed by just 2 or 3 persons although they are issued in different names. The handwriting on the vouchers also appears to be of only 2 or 3 persons. The vouchers are clearly of doubtful veracity.

(xvi) An amount of Rs.21,00,000/- is claimed as interest on loans. This claim is sought to be proved by the deposition in para 15 of the further Examination-in-Chief. Although the witness has deposed that he is producing vouchers proving payment of interest, what is actually produced is just typed statement purporting to show payment of interest. No details have been provided. No proof of payment is produced.

78 The above facts and analysis of the material produced by the respondent to prove her claim for expenses establish beyond doubt that there is no material or evidence at all to prove the expenses. The material produced does not constitute evidence. This is therefore not a case of erroneous appreciation of evidence but a case where there is no evidence to support the claims. The Arbitral Tribunal totally overlooked this aspect

and, in fact, did not even consider the same.

CONCLUSIONS :

79 The judicial discretion vested in the Court in terms of the provisions of Section 34 of the Act takes within its ambit power to set aside an Award partly. A Full bench of this Court in the case of **R.S. Jiwani vs. Ircon International Ltd.**⁵ answered two question that were put up for its consideration (i) Whether doctrine of severability can be applied to an Award while dealing with a Petition under Section 34 of the Act? and (2) What is the scope of the proviso to Section 34 (2)(iv) and whether its application is restricted to clause (iv) alone or it applies to the whole of Section 34 (2) of the Act? The Full bench answered the reference as follows.

"38. Thus we proceed to record our answers to the question framed as follows: 1. The judicial discretion vested in the Court in terms of the provisions of Section 34 of the Arbitration & Conciliation Act, 1996 takes within its ambit power to set aside an Award partly or wholly depending on the facts and circumstances of the given case. In our view, the provisions of Section 34 read as a whole and in particular Section 34(2) do not admit of interpretation which will divest the Court of competent jurisdiction to apply the principle of severability to the award of the Arbitral Tribunal, legality of which is questioned before the Court. The Legislature has vested wide discretion in the Court to set aside an Award wholly or partly, of course within the strict limitations stated in the said provisions. The scheme of the Act, the language of the provision and the legislative intent does not support the view that judicial discretion of the Court is intended to be whittled down by these provisions. 2. The proviso to Section 34 (2)(a)(iv) has to be read ejusdem generis to the main section, as in cases falling in that category, there would be an absolute duty on the Court to invoke the principle of severability where the matter submitted to arbitration can clearly be separated from the matters not referred to arbitration and decision thereupon by the Arbitral Tribunal.

5. 2010(1) Mh.L.J. 547

80 Accordingly the Award of 50% of the claim for Rs.62,18,324/- by the Arbitral Tribunal in favour of the respondent against the petitioner is legally perverse and is hereby set aside.

81 Therefore, the petition is partly allowed, i.e., prayer clause - (c) of the Award ordering/directing the petitioner to pay 50% of the sum of Rs.62,18,324/- is set aside.

82 In the facts and circumstances of the case, no order as to costs. The court must, once again note the immense help received from the Amicus Curiae Mr. Mehta whose efforts made the task easy.

83 In view of the above, all interim applications in the arbitration petition stand disposed.

84 The suit and all interim applications in the suit be listed for directions on 23rd June, 2017.

(K.R. SHRIRAM, J.)