

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

APPEAL NO. 727 OF 2004
IN
ARBITRATION PETITION NO. 333 OF 2002

Mohammedhussain Abdullabhai (since deceased
through his heirs and legal representatives)
Zulfikar Mohammedhusain Kagalwala and others. ... Appellants.

V/s.
Shabbirbhai Abdullabhai (since deceased)
Mrs.Raziabai Wd/o Shabbirbhai Abdullabhai
and others. ... Respondents.

WITH
APPEAL NO. 728 OF 2004
IN
ARBITRATION PETITION 354 OF 2002

Mohammedhussain Abdullabhai (since deceased
through his heirs and legal representatives)
Zulfikar Mohammedhusain Kagalwala and others. ... Appellants.

V/s.
Taherbhai Abdullabhai and others. ... Respondents.

WITH
APPEAL NO. 729 OF 2004
IN
ARBITRATION PETITION 332 OF 2002

Mohammedhussain Abdullabhai (since deceased
through his heirs and legal representatives)
Zulfikar Mohammedhusain Kagalwala and others. ... Appellants.

V/s.
Shabbirbhai Abdullabhai (since deceased
through his heirs and legal representatives)
Mrs.Raziabai Wd/o Shabbirbhai Abdullabhai
and others. ... Respondents.

WITH
APPEAL NO. 730 OF 2004
IN
ARBITRATION PETITION 353 OF 2002

Mohammedhussain Abdullabhai (since deceased
through his heirs and legal representatives)
Zulfikar Mohammedhusain Kagalwala and others. ... Appellants.
V/s.
Taherbhai Abdullabhai and others. ... Respondents.

WITH
APPEAL NO. 769 OF 2004
IN
ARBITRATION PETITION 332 OF 2002

Memuna Akhtarhussain Abdullabhai and others. ... Appellant.
V/s.
Shabbirbhai Abdullabhai (since deceased
through his heirs and legal representatives)
Mrs.Raziabai Wd/o Shabbirbhai Abdullabhai
and others. ... Respondents.

WITH
APPEAL NO. 788 OF 2004
IN
ARBITRATION PETITION 333 OF 2002

Memuna Akhtarhussain Abdullabhai and others. ... Appellants.
V/s.
Shabbirbhai Abdullabhai (since deceased
through his heirs and legal representatives)
Mrs.Raziabai Wd/o Shabbirbhai Abdullabhai
and others. ... Respondents.

WITH
APPEAL NO. 789 OF 2004
IN

ARBITRATION PETITION 353 OF 2002

Memuna Akhtarhussain Abdullabhai and others. ... Appellants.

V/s.

Taherbhai Abdullabhai and others. ... Respondents.

WITH

APPEAL NO. 790 OF 2004

IN

ARBITRATION PETITION 354 OF 2002

Memuna Akhtarhussain Abdullabhai and others. ... Appellants.

V/s.

Taherbhai Abdullabhai and others. ... Respondents.

WITH

APPEAL NO. 492 OF 2015

IN

ARBITRATION PETITION 333 OF 2002

Zulkarnain Mohammedhusain Kagalwala. ... Appellant.

V/s.

Shabbirbhai Abdullabhai (since deceased
through his heirs and legal representatives)
Mrs.Raziabai Wd/o Shabbirbhai Abdullabhai
and others.

... Respondents.

WITH

APPEAL NO. 493 OF 2015

IN

ARBITRATION PETITION 332 OF 2002

Zulkarnain Mohammedhusain Kagalwala. ... Appellant.

V/s.

Shabbirbhai Abdullabhai (since deceased
through his heirs and legal representatives)
Mrs.Raziabai Wd/o Shabbirbhai Abdullabhai
and others.

... Respondents.

WITH
APPEAL NO. 494 OF 2015
IN
ARBITRATION PETITION 353 OF 2002

Zulkarnain Mohammedhusain Kagalwala. ... Appellant.
V/s.
Taherbhai Abdullabhai and others. ... Respondents.

WITH
APPEAL NO. 495 OF 2015
IN
ARBITRATION PETITION 354 OF 2002

Zulkarnain Mohammedhusain Kagalwala. ... Appellant.
V/s.
Taherbhai Abdullabhai and others. ... Respondents.

Mr.Aditya Thakkar, Mr.Mubashir Syer & Mr.Murtaza Federal i/b. M/s.Federal & Rashmikant for the appellants in APP/727/04, APP/728/04, APP/729/04, APP/730/04, APP/492/15, APP/493/15, APP/493/15, APP/494/15 and APP/495/15 and for respondent No.2(d) in APP/769/04, APP/788/04, APP/789/04 APP/790/04.

Mr.Sean Wasoodew a/w Mr.Rupesh Mandhare i/b M.M.Vashi for appellant in APP/769/04, APP/788/04, APP/789/04 and APP/790/04.

Mr.Sarosh Bharucha with Mrs.Vijayalaxmi Kulkarni and Ms.Hilla Boatwalla i/b M/s.Nanu Hormasjee & Co. for respondent No.2 in APP/493/15, APP/492/15, APP/729/04; for respondent No.1 in APP/495/15, APP/494/15, APP/730/04, APP/727/04, APP/728/04, APP/789/04. APP/790/04, APP/730/04; and for respondent No. 3 in APP/769/04, APP/788/04.

CORAM : A.S. OKA AND A. K. MENON, JJ.

RESERVED ON : 20th April 2017.

PRONOUNCED ON: 13th October 2017.

JUDGMENT : (Per A.S.Oka, J.)

1. These appeals can be conveniently disposed of by a common judgment and order. With a view to appreciate the submissions made across the bar, it will be necessary to make a brief reference to the facts of each case.

2. Appeal No.769/2004 takes an exception to the judgment and order dated 1st September 2004 passed by the learned single Judge in Arbitration Petition No.332/2002. By the said judgment and order dated 1st September 2004, the learned single Judge decided four Arbitration Petitions (Arbitration Petition Nos.353/2002; 332/2002; 354/2002; and 333/2002). The said Arbitration Petitions under Section 34 of the Arbitration and Conciliation Act,1996(for short “the Arbitration Act”) were filed for challenging the consent awards made by the learned Arbitrator.

3. In Appeal No.769/2004, the appellants are the legal representatives of late Akhtarbhai Abdullabhai. The said Akhtarbhai, the original the first, second and fifth respondents (Shabbirbhai,Mohammed Hussain and Ashfaqbhai), the third respondent (Taherbhai) the fourth

respondent(Moizbhai) and eighth and ninth respondents are brothers and sisters respectively. Their father was Abdullabhai. It appears that the dispute in respect of rights of the properties of deceased Abdullabhai were referred to the Sole Arbitrator. In the arbitration proceeding, the parties filed consent terms in respect of the reference relating to the properties of a firm M/s Abdullabhai Fiddali and Company. A consent award was made accordingly on 26th April 2001. The parties also arrived at a settlement of the two references relating to a firm Abdullabhai Fiddali and Sons on 5th April 2002. Consent awards were made and after filing of the consent terms and consent awards as aforesaid, two references in relation to the joint family properties and five rooms in Fiddali Building remained. There were negotiations between the parties as regards these disputes. It appears that the consent terms were drafted but some of the parties were not agreeable to sign the consent terms. Thereafter, the Arbitrator proceeded to decide the question whether there was a settlement reached between the parties and recorded a finding that in fact, there was a settlement between the parties and proceeded to pass an award in terms of settlement in respect of all remaining properties except five properties in respect which he passed a separate award on merits. The Award was made on 13th June 2017. We may also note here that an application was made by one of the parties (Akhtarbhai) for correcting the award in accordance with section 33 of the Arbitration Act and, accordingly, corrections were carried out. Appeal No.769/2004 arises out of Arbitration Petition No.332/2002 filed by Shabbirbhai wherein challenge was to the award dated 13th June 2002. By the impugned order dated 1st September 2004, the learned single Judge decided the said Arbitration

Petition No.332/2002 along with Arbitration Petition Nos.353/2002; 354/2002; and 333/2002. By the impugned judgment and order, the learned single Judge proceeded to set aside the consent awards. However, the awards made on merits were not disturbed.

4. Appeal No.769/2004 has been preferred by respondent Nos.5a to 5d in Arbitration Petition No.332/2002.

Appeal No.492/2015 is again directed against the same order of the learned single Judge dated 1st September 2004 in Arbitration Petition No.333/2002. The appellant in this appeal is not the party to the Arbitration Petition No.333/2002.

Appeal No.493/2005 is directed against the same order in Arbitration Petition No.332/2002. The appellant is not a party to the said arbitration petition.

Appeal No.494/2015 is preferred for challenging the same judgment and order dated 1st September 2004 in Arbitration Petition No.353/2002. Appeal No.495/2015 is preferred against the same order in Arbitration Petition No.332/2002. Appeal No.496/2015 is preferred by one Zulkarnain Kagalwala being aggrieved by the same judgment and order in so far as it relates to Arbitration Petition No.354/2002. Though this appellant is not a party to the Arbitration Petition, a Division Bench of this Court by order dated 6th August 2016 granted leave to him to prefer appeal. Appeal No.797/2004 has been preferred by the original first respondent in Arbitration Petition No.333/2002 for challenging the same judgment and order. Appeal No.727/2004 is preferred for challenging the order in Arbitration Petition No.333/2002. Appeal No.728/2004

challenges the order in Arbitration Petition No.354/2002. Appeal No.788/2004 has been preferred by the respondent Nos.5a to 5d in Arbitration Petition No.333/2002 against the same judgment and order passed. Appeal No.790/2004 has been preferred by the respondent Nos.5a to 5d in Arbitration Petition No.354/2002. Appeal No.729/2004 has been preferred by the first respondent in Arbitration Petition No.332/2002 for challenging the same order. Appeal No.730/2004 has been preferred by the first respondent in Arbitration Petition No.353/2002 for challenging the same judgment and order. Appeal No.789/2004 has been preferred by the respondent Nos.5a to 5d in Arbitration Petition No.353/2002.

5. Before we advert to the submissions made by the parties, we may refer to the findings recoded by the learned single Judge. The submission made before the learned single Judge by the petitioners in Arbitration Petition was that the learned Arbitrator has no jurisdiction to decide an issue whether a settlement is arrived between the parties or not. A submission was made that unless all the parties request the learned Arbitrator to make a consent award, he has no jurisdiction to make a consent award. The learned single Judge held that on conjoint reading of sections 30 and 32 of the Arbitration and Conciliation Act, 1996 (for short "Arbitration Act"), if the parties to the arbitration state before the Arbitrator that they have settled the dispute, the Arbitrator has no option but to terminate the proceeding unless a request is made by the parties for making an award in terms of the agreed settlement. The learned single Judge held that unless such request is made by all the

parties to pass a consent award in terms of the settlement, the Arbitrator is powerless to pass a consent award. The learned single Judge held that admittedly such a request was not made by all the parties to the awards and, therefore, the consent awards made by the Arbitrator were liable to be set aside. The learned single Judge held that the Arbitrator had no jurisdiction to decide whether the parties have arrived at settlement.

6. Detailed submissions have been made by the learned counsel appearing for the parties. Written submissions have been filed by the appellants in some of the appeals. It will be necessary to mention in brief the rival submissions made across the bar.

7. The learned counsel appearing for the appellants in Appeal Nos.769/2004 and 789/2004 pointed out that two separate awards were made by the learned Arbitrator on the basis of the settlement. Those two separate awards are in respect of (a) joint family properties and (b) five rooms in Fiddali Building. He pointed out that in the meeting held on 7th September 2001, all the parties through their learned counsel had agreed that the consent terms would be drawn in terms of the settlement in respect joint family properties which was initially in the form of a chart. He pointed out that the consent terms were initially drawn up by the advocate of Taherbhai group and circulated to all other advocates and to the learned Arbitrator on 9th January 2002. It is pointed out that the Arbitrator proceeded to pass an award in terms of the consent terms. He made a distinction between the provisions of Rule 3 of Order XXIII of the Code of Civil Procedure, 1908 (for short “the said Code”) and section 30

of the Arbitration Act. The submission is that Rule 3 of Order XXIII of the said Code specifically requires that the lawful agreement or compromise must be in writing and signed by the parties. But, section 30 of the Arbitration Act talks only about the settlement of disputes. It was submitted that though the ground that the settlement is not signed by all the parties is raised in the petitions, this ground is advisedly given up by the petitioners in Arbitration Petition Nos.332/2002 and 353/2002. His submission is that the statement of all the parties through their learned counsel in the meeting dated 7th September 2001 is that the consent terms would be drawn and filed is an implied request to record the settlement made by all the parties. The observation in the Judgment that “admittedly” all the parties did not request that a settlement should be recorded must be construed to mean that there was no explicit request in writing by all the parties to pass an award in terms of the settlement. In the alternative, it was submitted that the appellants be permitted to resile from the said concession recorded in the fifth line of page 286 of Appeal No.769/2004. Assuming that it is a concession by the advocate for the appellants, it was made on a wrong appreciation of law and has led to gross injustice. It is urged that in view of express language of section 30 of the Arbitration Act, the express consent of all the parties is not necessary for passing a consent award.

8. The learned counsel appearing for the appellants submitted that the record of the case before the learned Arbitrator would show that the parties filed pleadings on the question whether settlement was arrived or not and the question was determined by the learned Arbitrator without

any demur by any party. In any event, after participating in the proceedings, the parties shall be deemed to have waived their right to object to the act of the learned Arbitrator of going into the question whether there was any settlement. He submitted that after participating in the decision making process on the said issue, now it is not open for the concerned respondents to raise the issue by filing Arbitration Petitions under section 34 of the said Act. He submitted that the contention that there must be agreed terms and even though there are agreed terms, the learned Arbitrator can make a consent award provided there is a request by all the parties to record the settlement, is not raised in the petition filed under section 34 of the said Act. There is a vague contention that the award is not in terms of section 30 of the Arbitration Act. He submitted that the view taken by the learned single Judge that upon settlement between the parties, the arbitral proceedings are mandatorily terminated is not correct. Our attention is invited to clauses (a) and (b) of sub-section (2) of section 32 of the said Act. He submitted that the ground that the learned Arbitrator had no jurisdiction to decide the question whether there was a settlement arrived at was not at all raised. He urged that merely because rule 3 of the order XXIII of the said Code is not incorporated in the said Act, it cannot be said that the Arbitrator does not possess the said power. Reliance is placed by the learned counsel appearing for the appellants on the decisions of the Apex Court in the cases of *Narayan Prasad Lohia v. Nikunj Kumar Lohia and others*¹; *Hari Shankar Singhania v. Gaur Hari Singhania and others*². Reliance is placed on the decisions of this Court in the cases of *Union of*

1 2002 (3) SCC 572

2 2006 (4) SCC 658

***India v. Maa Agency and another*³; *O.N.G.C. v. Comex Services SA*⁴; *Union of India v. Ghanekar Builders & Chemicals Pvt.Ltd.*⁵; and *Pushpa P. Mulchandani v. Admiral R. Tahilani (Retd.)* and others⁶.**

9. In support of Appeal No.494/2004, the learned counsel appearing for the appellants submitted that power under section 30 of the Arbitration Act would include the power to enquire whether the settlement has been concluded or not. Another submission was that consent to arbitrate would include consent to record settlement and for recording compromise, a separate consent was not required. He urged that word “all” is not at all found in section 30 and the same has been erroneously read into section 30 by the learned single Judge. The learned counsel appearing for the appellants in Appeal No.494/2004 relied upon the following decisions:

Ramjas Marwari and others v. Baruni Mahton and others*⁷; *Sukhdeo Missir and others v. Kamleshwari Prasad Singh*⁸; *Mst.Kalpa v. Sita Ram and another*⁹; *Misrilal Jalanchand and another v. Sobhachand Jalanchand and others*¹⁰; *K.Chandrahasa Shetty v. Jayaram Sasani*¹¹; *Shobha Ram v. Inamul Haq.*¹²; *Bhaja Govinda Maikap and another v. Janaki Dei and others*¹³; *Bharat Alluminium Company v.

3 2003 (2) Mh.L.J. 643

4 2003 (5) Bom.C.R. 146

5 2007 (2) Bom.C.R. 30

6 2001 (1) Bom.C.R. 592

7 AIR 1929 Patna 102

8 AIR 1937 Patna 39

9 AIR 1955 All 187

10 AIR 1956 Bom 569

11 AIR 1970 Mysore 209

12 AIR 1974 All 253

13 AIR 1980 Orissa 108

***Kaiser Aluminium Technical Services Inc.*¹⁴; *Doshion Ltd.* v. *Sembawang Engineers and Constructors Pvt.Ltd.*¹⁵**

10. The learned counsel appearing for the appellants in Appeal Nos.788/2004 and 790/2004 pointed out that the settlement in respect of Fiddali Building is signed by seven out of eight parties. He pointed out that though the respondent Nos.6 and 7 in Arbitration Petition No.333/2002 may not have signed separately, the second respondent thereto has signed the same who has been consistently signing on their behalf as their constituted attorney. The learned counsel appearing for the appellants also raised a contention that the learned single Judge has gone into the contentions which were not at all raised specifically in the memorandum of petitions filed under section 34 of the Arbitration Act.

11. The learned counsel appearing for the respondents supported the impugned judgment and order. The learned counsel appearing for some of the respondents relied upon the relevant portion of the Report on the United Nations Commission on International Trade Law on the work of its eighteenth session and in particular article 30 thereof. The learned counsel appearing for the respondents relied upon certain passages in the commentaries on the Arbitration Act by Dr.P.C.Markanda as well as by Justice Saraf and Justice Jhunjhunwalla. Their contention is that sub-section (2) of section 30 of the Arbitration Act refers to settlement by the parties and a request made by the parties to record settlement in the form of an arbitral award on agreed terms. It was pointed out that before the

¹⁴ (2012) 9 SCC 552

¹⁵ (2011) 3 Singapore Law Reports 118

United Nations Commission on International Law, a proposal was submitted that a request to record settlement as an award needed to be made only by one of the parties. The Commission, after deliberation, agreed that there must be the dual will of the two parties that the settlement may be recorded as an award. Their submission is that as a rule, settlement of the disputes in arbitral reference results into termination of the proceedings and only an exception to the said rule is that the settlement in the form of an award on agreed terms can be made in accordance with section 31 of the Arbitration Act. Therefore, the contention of the contesting respondents is that no interference is warranted with the impugned Judgment and order.

12. We have considered the submissions. We have carefully perused the decisions and other material relied upon by the parties. The relevant provisions for our consideration are sections 30, 31 and 32 of the Arbitration Act. Before we analyze the sections, it will be necessary to sum up the findings recorded by the learned single Judge. He has held as under:-

(i) If the parties settle the dispute before the Arbitrator, he has to terminate the proceedings;

(ii) In such a case, if a request is made by all the parties to the arbitral proceedings and if such request is not objected to by the arbitral Tribunal, the settlement can be recorded by the arbitral Tribunal in the form of an arbitral award on the agreed terms;

(iii) Unless there is a request made by all the parties to the arbitral

proceedings to make an award on the agreed terms, the consequence of the settlement between the parties is that the arbitral proceedings are terminated and the mandate of the Arbitrator comes to an end;

(iv) Because of initial consent given by the parties, the Arbitrator gets jurisdiction to make an award on the basis of the adjudication and, therefore, to enable the Arbitrator to make an award based on something other than adjudication, there has to be a fresh consent given by all the parties;

(v) Rule 3 of order XXIII of the said Code specifically confers a power on a Court to record a finding on the issue of existence or otherwise of the settlement in case the settlement is disputed a party or some of the parties to the suit. There is no such specific power conferred on the Arbitrator by the Arbitration Act;

13. There was an argument made before the learned Single Judge that the grounds for setting aside the arbitral awards urged before him were not pleaded in the petitions under section 34 of the Arbitration Act. In paragraph-8 of the impugned judgment, the learned single Judge observed that there was a specific ground taken that the consent award made by the learned Arbitrator is not in accordance with section 30 of the Arbitration Act and, if one goes through the entire petitions, it is clear that the challenge which was argued before him is raised in the petition.

14. Firstly, we have to consider the question whether the contentions which were raised before the learned single Judge were agitated in the Arbitration Petitions. Therefore, we are referring to the

averments made in each petitions. Firstly, we make a reference to Arbitration Petition No.332/2002 filed by Shabbirbhai which is subject matter of Appeal No.769/2004. In paragraph-8 of the said petition, a specific contention was raised that the parties to the proceedings have not given their consent to the terms in Annexure-3 of the impugned award in terms of which the impugned award is passed. In ground-B of challenge, a specific contention has been raised that the petitioner has not given any consent either oral or in writing in terms of Annexure-3. Ground-F is taken to the effect that after prolonged negotiations, a final settlement was not arrived at and in any case, the said petitioner or his advocate has not signed the same. In ground-H, it is contended that there was no signed document on record indicating settlement and, therefore, the impugned award is against the public policy in India and not in accordance with the Arbitration Act.

15. It will be necessary now to advert to the findings recorded by the learned Arbitrator. In paragraph-2, the basic facts are set out. It is pointed out that Abdullabhai was a well established businessman who had acquired several properties in Mumbai and other States. There were partnership firms constituted by him. It is pointed out that said Abdullabhai had eight sons and three daughters. The claimant (Mohammed) before the learned Arbitrator was one of the sons of Abdullabhai. Taherbhai, Moizbhai, Ashfaqbhai Akhtarbhai and Shabbirbhai (the respondent Nos.1 to 5 before the learned Arbitrator) were the sons of Abdullabhai. The respondent Nos.6 and 7 before the learned Arbitrator (Hussenabai and Shamimabai) are the daughters of

Abdullabhai. Two sons i.e. Fida Hussain and Abbasbhai died in the years 1977 and 1989 respectively. The daughter Khatijabai predeceased Abdullabhai. Abdullabhai died on 5th December 1967. After his death, the dispute was referred to the arbitration of Mukasir Mukasur E-Dawal Salabhai Saheb Saidufdin. The learned Arbitrator declared five different awards which were challenged before the learned single Judge. By setting aside the said awards, a reference was made to the learned Arbitrator.

16. In paragraph-3 of the award, the learned Arbitrator has observed that initially Taherbhai was supported by his two brothers Moizbhai and Ashfaqbhai and two sisters Hussenabhai and Shaminabai. The claimant before the Arbitrator (Mohammed), Akhtarbhai and Shabbirbhai were together. Later on Shabbirbhai decided to support the group led by Taherbhai. After recording of some evidence, the parties started negotiations for settlement in cases of disputes in respect of three firms (a) Fidaali Abdul Rasul Atterwala Company; (b) Abdullbhai Fiddali and Company; and (c) Abdullabhai Fidaali and Sons. Consent terms were filed and consent awards were made. Thereafter two references relating to (i) joint family properties and (ii) five rooms in Fiddali Building remained pending. In the reference pertaining to the joint family properties, the parties to the arbitration filed a chart duly signed by them as well as their advocates which is annexed as Annexure-1 to the award of the learned Arbitrator. The said chart sets out the shares of the parties to the arbitral proceeding. Even in respect of five rooms in the Fiddali Building, the parties commenced negotiations for settlement. In

paragraph-5, the learned Arbitrator has noted as to how the settlements were arrived in respect of specific properties mentioned therein. The minutes recorded by the Arbitrator on 6th September 2001 record that “Agreement reached. Taken on record.” The agreement was in respect of five rooms in Fiddali Building. On 7th September 2001, in the minutes it was recorded that the parties are not able to reach an amicable settlement in respect of the joint family properties as there was a serious dispute whether five properties were belonging to the family or not. Accordingly, points for determination were framed to enable the parties to lead evidence. In the minutes, it was further recorded by the learned Arbitrator “Further, the Counsel stated after taking instructions from the respective clients that in view of the negotiated settlement there was no other dispute in respect of any of the properties involved in the reference which is required to be adjudicated.” In the minutes, it is recorded that the learned counsel stated that the consent terms in respect of properties, save and except five properties for which points for determination were framed, will be filed. It appears from the minutes dated 11th September 2001 that the dispute was further narrowed down as some of the parties gave up their claims in respect of the properties mentioned in the minutes. It is further recorded that the parties desired to lead evidence in respect of shares of Standard Oil and Paint Company and Laxmi Mill Estate. In the minutes of the meeting held on 30th October 2001, the following things were recorded:

- “2. Proceedings adjourned to November 1, 2001 at 3.00 pm. On that day the Parties to lead evidence, if they so desire, in respect of the following items:
 - (i) Standard Paint Company's shares.

- (ii) Godown at Andheri.
- (iii) Unit Trust Certificates which are encashed.

In case evidence is not led, the finding will be recorded on all the three points after hearing Counsels.

3. Mr.Ghanekar assures that Consent Terms will be drafted and signed within one week from today.
4. After determination of the three disputed items mentioned herein above the remaining item would be taken up for adjudication.”

The minutes dated 21st December 2001 record that the parties were discussing settlement in respect of Khamgaon property. On 5th April 2002, evidence was recorded.

17. We may note here that various affidavits were filed before the learned Arbitrator on the issue of settlement. Mr.Ghanekar appearing for the Taherbhai group forwarded a draft of the settlement on 9th January 2002 to the counsel representing other sharers. The said draft of consent terms is Annexure-3 to the award of the Arbitrator. As noted earlier, in the minutes of the meeting held on 6th September 2001 it is recorded that the consent terms will be drafted and signed within one week from the said date. It is stated that on 30th March 2001 it was informed to the Arbitrator that Taherbhai group is not willing to sign the settlement in respect of division of joint family properties. Even Shabbirbhai started claiming that there was no settlement in respect of the joint family properties. In the affidavit filed by Akhtarbhai (respondent No.4 before the learned Arbitrator) on 1st April 2002, a request was made to declare

the award in accordance with the settlement and that no one should be allowed to resile from the settlement. It was claimed that not only the disputes in respect of joint family properties except five properties were settled but also the disputes as regards five rooms in Fiddali Building were settled. The claimant- Mohammed also filed his affidavit supporting the stand taken by Akhtarbai. On 17th April 2002, the learned counsel appearing for Akhtarbai pleaded that an award may be passed in terms of the settlement to which Advocate Ghanekar representing Taherbhai group informed that the issue as to whether the parties have settled the dispute should be first determined. The parties were informed that they are at liberty to file affidavits on the issue of settlement. On 19th April 2002, the parties were heard on the issue of settlement. In paragraph-10 of the award, the learned Arbitrator recorded that the question which is required to be determined is whether final and concluded settlement between the parties in respect of joint family properties and five rooms in Fiddali Building was arrived at. Thereafter, there is a discussion about the term of settlement in Annexure-3 and affidavits filed on record. The learned Arbitrator referred to the contentions raised by Shri Ghanekar appearing for Taherbhai group that the said group never signed the consent terms and, therefore, in view of Rule 3 of Order XXIII of the said Code, as there was no signed compromise, the issue need not be considered. The Arbitrator has observed that the advocate who was earlier appearing for Shabbirbai was all along supporting the settlement and opposing Taherbhai group. The said advocate was discharged by Shabbirbai on 30th March 2002 and, ultimately, on 19th April 2002 Shabbirbai filed an affidavit claiming that the settlement was not

reached. Thereafter, there are findings recorded on five points for determination. The operative part of the award dated 13th June 2002 reads thus:

“(A) Award as per Consent Terms attached and marked Annexure '3'.

(B) Respondent No.3 Ashfaqbhai is directed to pay to the Claimants and each of the Respondents their share in the proceeds of the Units of Unit Trust of India, that is Rs.4,82,511.50 along with interest at the rate of 13% per annum from December 1, 1989 till realization. The Claimant and Respondents No.1 to 5 each have 1/7th share while respondent Nos.6 and 7 each have 1/14th share.

(C) The Counterclaim filed by Taherbhai Group stands dismissed in its entirety.

(D) The Parties to bear their respective costs.”

18. The consent terms at Annexure-3 record settlement in respect of nine properties which are stated to be the joint family properties and five rooms in Fiddali Building. The consent terms were signed by the claimant, the second, third, fourth and fifth respondents in the proceedings before the learned Arbitrator. The issue regarding shares in the proceeds of units of Unit Trust of India is not covered by the settlement.

19. At this stage, without going to the question as to whether all the contentions which are raised before the learned learned single Judge,

were raised in the Arbitration Petitions, it will be necessary to advert to the powers of the Arbitrator. Section 19 of the Arbitration Act reads thus:

“19. Determination of rules of procedure.- (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.”

In view of sub-section (1) of section 19, the arbitral Tribunal is not bound by the said Code.

20. At this stage, it will be necessary to make reference to Rule 3 of Order XXIII of the said Code, which reads thus:

“3. Compromise of suit

Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the

subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit:

Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.

*Explanation.--*An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.”

Rule 3 of Order XXIII requires a lawful agreement or compromise in writing and signed by the parties. Apart from the fact that Rule 3 of Order XXIII will not apply to the arbitral proceedings in view of section 19(1) of the Arbitration Act, in section 30 there is no such requirement of a settlement being in writing and signed by the parties. Sub-section (1) of section 30 shows that the arbitral Tribunal is required to encourage settlement of disputes and the arbitral Tribunal can follow the procedures (Mediation, Conciliation or other proceedings) at any time during the proceedings to encourage settlement. Preamble of the Arbitration Act itself relies upon adoption of UNCITRAL Model Law on international commercial arbitration by the United Nations Commission on International Trade Law. It refers to the recommendations of General Assembly of the United Nations that all the countries should give due

consideration to the said Model Law in view of the desirability of uniformity of law of arbitration. Article 30 of the Model Law dealing with settlement contains two clauses. Clause (1) thereof is incorporated in the form of sub-section (2) of section 30. Clause (2) of Article 30 has been bifurcated into sub-sections (3) and (4) of section 30. In the report of the United Nations Commission in clause 250, it is noted that a proposal was moved that a request to record settlement as an award needed to be made only by one of the parties. Paragraph-250 dealing with the said suggestion reads thus:

“250. Another proposal was that the request to record the settlement as an award needed to be made by only one of the parties. **The Commission, after deliberation, was agreed that there must be the dual will of the two parties that the settlement be recorded as an award, but that the formal request needed to be made by only one of them.**”

(emphasis added)

21. Sub-section (2) of section 30 provides that if during arbitral proceedings, the parties settle the dispute, it is mandatory for the arbitral Tribunal to terminate the proceedings. If requested by the parties and not objected to by the arbitral Tribunal, it is open for the arbitral Tribunal to record the settlement in the form of an arbitral award. Sub-section (2) of section 32 mandates that in case of three contingencies specified in clauses (a), (b) and (c), it is mandatory for the arbitral Tribunal to order for termination of the arbitration proceedings. Thus, during the arbitral proceedings, if the parties settle the dispute, the arbitral Tribunal has no

choice but to terminate the proceedings provided there is no request made to record settlement in the form of an arbitral award. As sub-section (1) of section 30 does not require settlement to be in writing or signed by the parties, if a contention is raised before the learned Arbitrator that there is a settlement of disputes between the parties, for the purpose of sub-section (2) of section 30, the arbitral Tribunal will have to decide whether there is such a settlement. The reason being that if there is a settlement, the mandate of sub-section (2) of section 30 must be followed of terminating proceedings as the Arbitrator has no jurisdiction to continue the arbitral proceedings after the settlement of the disputes subject matter of the reference . Therefore, it is not possible to endorse the view taken by the learned single Judge that the Arbitrator has no jurisdiction to decide the question whether the dispute referred to him is settled by the parties. If such interpretation is not accepted, first part of sub-section (2) of section 30 will become redundant. If such interpretation is not accepted, in a given case, though the parties have settled the dispute, if one of the parties raises a dispute for namesake or a frivolous dispute about the fact of settlement, the Arbitrator will have to proceed with the arbitral proceedings without terminating the same which will be contrary to the mandate of sub-section (2) of section 30. In view of the mandate incorporated in the first part of sub-section (2) of section 30, the power of the Arbitrator to decide whether there is a settlement of the disputes is implicit. This is so especially when the settlement of the dispute before the Arbitrator need not be in writing signed by the parties to the proceedings. Therefore, in the case in hands, the learned Arbitrator was well within his powers to decide the issue whether there was a settlement of dispute.

22. In a given case, if the Arbitrator comes to a conclusion that there was a settlement of dispute, the other question which arises is whether it is necessary for all the parties to the arbitral proceedings to make a request to the arbitral Tribunal to record the settlement in the form of an arbitral award. In a given case, assuming that all the parties to the arbitral proceedings make such a request to record settlement as contemplated by sub-section (2) of section 30, the arbitral Tribunal can always object to such request and refuse to record such settlement. In such a case, the arbitral Tribunal will have to terminate the proceedings.

23. In a case where there is a settlement in writing and signed by all the parties which is not disputed or where on adjudication, the Arbitrator finds that there is a settlement, the question which arises is when only some of the parties expressly request the Arbitrator to record settlement in the form of an arbitral award, whether the arbitral Tribunal is powerless to record the settlement in the form of an award. If the settlement which is admitted or proved itself provides that there should be an award in terms of settlement, no separate request is required to be made to record the settlement in the form of an award. It is well settled that in the same section, the same words used can have different meanings. In first part of sub-section (2) of section 30, the word “parties” means all the parties to the arbitral proceedings as settlement has to be between all the parties. In the second part of sub-section (2), the word “parties” has been used which has to be interpreted to mean any of the

parties. When there is a settlement, the request to record settlement is implicit unless the settlement provides that the proceedings be terminated in view of the settlement without passing an award. Therefore, if it is established that there is a settlement of dispute, unless the settlement provides that the proceedings be terminated in view of the settlement without passing an award, on a formal request made by some of the parties, the settlement can be recorded in the form of an award. The reason is that dual will of the parties is reflected from the settlement itself. In the case of *Bhatia International v. Bulk Trading S.A. and another*¹⁶ in paragraph-15, the Apex Court held thus:

“15. It is thus necessary to see whether the language of the said Act is so plain and unambiguous as to admit of only the interpretation suggested by Mr. Sen. It must be borne in mind that the very object of the Arbitration and Conciliation Act of 1996, was to establish a uniform legal framework for the fair and efficient settlement of disputes arising in international commercial arbitration. **The conventional way of interpreting a statute is to seek the intention of its makers. If a statutory provision is open to more than one interpretation then the Court has to choose that interpretation which represents the true intention of the legislature.** This task often is not an easy one and several difficulties arise on account of variety of reasons, but at the same, it must be borne in mind that it is impossible even for the most imaginative legislature to forestall exhaustively situations and circumstances that may emerge after enacting a statute where its application may be called for. It is in such a situation the Courts' duty to expound arises with a caution that the Court should not try to legislate. While examining a particular provision of a statute to find out whether the

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jurisdiction of a Court is ousted or not, the principle of universal application is that ordinarily the jurisdiction may not be ousted unless the very statutory provision explicitly indicates or even by inferential conclusion the Court arrives at the same when such a conclusion is the only conclusion. Notwithstanding the conventional principle that the duty of judges is to expound and not to legislate. The Courts have taken the view that the judicial art of interpretation and appraisal is imbued with creativity and realism and since interpretation always implied a degree of discretion and choice, the Court would adopt particularly in areas such as, constitutional adjudication dealing with social and defuse rights. Courts are therefore, held as "finishers, refiners, and polishers of legislatures which gives them in a state requiring varying degrees of further processing". (see *Corrocraft Ltd. vs. Pan American Airways* , . If a language used is capable of bearing more than one construction, in selecting the true meaning, regard must be had to the consequences, resulting from adopting the alternative constructions. A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results. (see *Johnson vs. Moreton and Stock vs. Frank Jones (Tipton) Ltd.* . **In selecting out of different interpretations the Court will adopt that which is just reasonable and sensible rather than that which is none of those things, as it may be presumed that the legislature should have used the word in that interpretation which least offends our sense of justice.** In *Shanon Realites Ltd. vs. Sant Michael* at page 192-193 Lord Shaw stated, "where words of a statute are clear, they must, of course, be followed, but in their Lordships opinion where alternative constructions are equally

open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system." This principle was accepted by Subba Rao, J. while construing Section of the Sea Customs Act and in coming to the conclusion that the Chief of Customs Authority was not an officer of custom, 1983 ECR 2163 D (SC)."

(emphasis added)

24. With the greatest respect to the learned single Judge, if the view taken by the learned single Judge is accepted as correct, it will result in hardship, serious inconvenience and absurdity. It will completely defeat the very object of sub-section (1) of section 30 of the Arbitration Act which requires the arbitral Tribunal to encourage settlements. In our considered opinion, the view which we have taken above is just and reasonable which is consistent with the smooth and effective working of the provisions of the Arbitration Act.

25. By the impugned judgment and order, the learned single Judge has set aside the impugned award only on the ground that the arbitral Tribunal had no jurisdiction to decide the dispute whether there was a settlement of the claim and that even if there was a settlement, request for passing the award in writing has to be made by all the parties to the arbitral proceedings. This view is erroneous. The learned single Judge has not disturbed the awards made on adjudication by the learned Arbitrator.

26. Therefore, in our considered view, the impugned judgment and order cannot be sustained and will have to be set aside. Accordingly, the appeals must succeed and we pass the following order:

O R D E R

- (i) The impugned judgment and order dated 1st September 2004 is hereby set aside;
- (ii) Arbitration Petition Nos.353/2002; 332/2002; 354/2002; and 333/2002 stand dismissed;
- (iii) The appeals are allowed on the above terms;
- (iv) There shall be no order as to costs.
- (v) At this stage, the learned counsel appearing for the contesting respondents pray for stay of execution of the impugned awards (except the awards made on merits). Considering the facts and circumstances of the case, we direct that the execution of the awards shall remain stayed for a period of eight weeks from today.

(A. K. MENON, J.)

(A.S. OKA, J.)