AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Order reserved on: 3.8.2018

Order delivered on: 11.9.2018

Arbitration Appeal No.79 of 2017

Rajnish Agrawal, 49, S/o Late Sh. B.N. Agrawal (Deceased partner of M/s. Shree Enterprises), Agroha Marg, Korba, Chhattisgarh

----Appellant

Versus

M/s. Star Ferro Alloys Pvt. Ltd. Through Sh. Cyrus Rustom Patel, M.D., F-16, 1st Floor, Hauz Khas Enclave, New Delhi – 110 016

---- Respondent

For Petitioner : Mr.Manoj Paranjape, Advocate

For Respondent : Ms Kirti Mishra and Mr.Hari Agrawal, Advocates

---

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. Invoking appellate jurisdiction of this Court under Section 37 (1) (c) of the Arbitration and Conciliation Act, 1996 (hereinafter called as "AC Act"), the appellant herein has preferred this arbitration appeal calling in question legality, validity and correctness of the impugned order dated 28.9.2017 passed by the District Judge, Janjgir-Champa by which the appellant's application under Section 34 of the AC Act has been rejected.

2. M/s. Shree Enterprises was a partnership firm consisting of two partners namely Shri B.P.Poddar and Shri B.N. Agrawal. The respondent herein and M/s. Shree Enterprises entered into agreement on 11.4.2003 for mining and sale of dolomite. In the course of execution of said work, certain dispute arose between

the parties and accordingly, the respondent terminated the agreement on 7.3.2005 leading to appointment of Arbitral Tribunal to adjudicate the arbitral dispute arisen between the parties. The respondent herein has also filed counter-claim. During pendency of the arbitral proceedings, Shri B.N.Agrawal, one of the partners out of two partners died on 10.3.2008 and thereafter on behalf of M/s. Shree Enterprises, prayer was made for termination of arbitral proceedings. On 12.7.2008, the Arbitral Tribunal allowed M/s. Shree Enterprises to close arbitration proceedings and held that counter-claim would continue. During the course of that proceedings, legal representatives of Shri B.N.Agrawal were substituted in the said proceedings, but other partner of firm namely Shri B.P. Poddar was not brought on record. The respondent also stated that they do not wish to proceed against one of the legal representatives of Shri B.N. Agrawal namely Mamta Agrawal. Finally the Arbitral Tribunal by its award dated 14.5.2011 allowed the counter-claim filed by the respondent and held that M/s. Shree Enterprises is liable to make payment of ₹ 15,40,000/- along with 9% interest per annum from 17.11.2007 to the date of payment, but fastened the liability only on legal representatives of Shri B.N.Agrawal except Smt.Mamta Agrawal and other partner Shri B.P. Poddar to make payment of decretal amount.

3. Rajnish Agrawal, appellant herein, one of the legal representatives of deceased partner Shri B.N.Agrawal filed an

application under Section 34 (2) of the AC Act before learned District Judge for setting aside the award passed by the Arbitral Tribunal on various grounds including that the award passed by learned Arbitral Tribunal is contrary to the provisions contained in Section 13 (b) read with Section 42 (c) of the Indian Partnership Act, 1932 (hereinafter called as “the Act of 1932”).

4. By the impugned order, learned District Judge did not find favour with any of the grounds mentioned in the application under Section 34 (2) of the AC Act filed by the appellant herein and rejected the same leading to filing of the instant appeal under the aforesaid provisions questioning the order passed by learned District Judge rejecting his application.

5. Mr.Manoj Paranjape, learned counsel appearing for the appellant, would submit that the award passed by the Arbitral Tribunal granting counter-claim fastening sole liability on the appellant and other legal representatives excluding legal representative of Shri B.N. Agrawal namely Smt.Mamta Agrawal and other partner of partnership firm namely Shri B.P. Poddar runs contrary to the provisions contained in Section 13(b) read with Section 42(c) of the Act of 1932, therefore, the appellant has made out a ground for interference in the award, which was declined by learned District Judge, warranting interference by this Court in this appeal. Therefore, the impugned order as well as the award of learned Arbitral Tribunal granting counter-claim deserves to be set aside.

6. Mr.Hari Agrawal, learned counsel for the respondent, would submit that actual issue before this Court is sustainability of the award and not executability of the award. He would further submit that by virtue of the provisions contained in Order 30 Rule 4 of the Code of Civil Procedure (hereinafter called as "CPC") question of substituting legal representatives of deceased partner does not arise and death of Shri B.N.Agrawal had no impact on the arbitral proceedings. Relying upon the judgment of the Supreme Court in the matter of **Anokhe Lal v. Radhamohan Bansal & others**[1], he would further submit that by virtue of the provisions contained in Order 30 Rule 4 of the CPC it is not mandatory to join the legal representatives of a deceased partner as party in the arbitration proceedings. He would also submit that legal representatives of deceased partner Shri B.N.Agrawal had been brought on record though strictly, it was not required and Shri B.P. Poddar, partner (alive) was also served with a notice, but Shri B.P.Poddar and Smt. Mamta Agrawal, other legal representative of Shri B.N.Agrawal, did not participate in the arbitration proceedings even after service of notice, therefore, they were proceeded ex-parte and the award passed against M/s. Shree Enterprises is valid and strictly in accordance with law even though Shri B.N.Agrawal, one of the partners of partnership firm had died during pendency of arbitration proceedings and entire amount awarded by the Arbitral Tribunal can be recovered from appellant-Rajnish Agrawal by virtue of the provisions contained

[1] (1996) 6 SCC 730

in Sections 42 to 45 of the Indian Contract Act, 1872 (hereinafter called as "the Act of 1872").

7. I have heard learned counsel appearing for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumspection.

8. As noticed hereinabove, M/s. Shree Enterprises was a partnership firm consisting of two partners namely Shri B.P.Poddar and Shri B.N.Agrawal. In arbitral proceedings commenced at the instance of M/s. Shree Enterprises, a partnership firm, before the Arbitral Tribunal, the respondent company had also submitted counter-claim. Unfortunately, Shri B.N.Agrawal, one of the partners, died on 10.3.2008.

9. At this stage, it would be appropriate to notice Section 42 (c) of the Act of 1932 which reads as under:-

> "**42. Dissolution on the happening of certain contingencies**.-Subject to contract between the partners a firm is dissolved,-
> (a) xxx xxx xxx
> (b) xxx xxx xxx
> (c) by the death of a partner; and
> (d) xxx xxx xxx"

10. In the matter of **Mohammad Laiquiddin and another v. Kamala Devi Misra (Dead) by Lrs. and others**[2] the Supreme Court has held that where there are only two partners constituting partnership firm, on death of one of them, the firm is deemed to be dissolved despite the existence of a clause which says otherwise.

11. Similar is the proposition of law laid down by the Supreme Court in the matter of **Commr. Of Income-Tax, Madhya**

[2] (2010) 2 SCC 407

<u>Pradesh, Nagpur and Bhandara, Nagpur v. Seth Govindram Sugar Mills</u>[3], in which it has been held that if one of the partners dies, the firm is dissolved; but if there is a contract to the contrary, the surviving partners will continue the firm. It was observed as under:-

> "7.....Section 42(c) of the Partnership Act can appropriately be applied to a partnership where there are more than two partners. If one of them dies, the firm is dissolved; but if there is a contract to the contrary, the surviving partners will continue the firm. On the other hand, if one of the two partners of a firm dies, the firm automatically comes to an end and, thereafter there is no partnership for a third party to be introduced therein and, therefore, there is no scope for applying cl. (c) of S. 42 to such a situation........ "

12. In the instant case, there were only two partners constituting the partnership firm namely M/s. Shree Enterprises and therefore, by virtue of the provisions contained in Section 42 (c) of the Act of 1932, M/s. Shree Enterprises is deemed to have been dissolved by operation of law.

13. At this stage, Order 30 Rule 4 of the CPC may be noticed herein gainfully and profitably which provides for right of suit on death of partner as under:-

> "4. **Right of suit on death of partner**.-(1) Notwithstanding anything contained in Section 45 of the Indian Contract Act, 1872 (9 of 1872), where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

[3] AIR 1966 SC 24

> (2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have-
>
> (a) to apply to be made a party to the suit, or
>
> (b) to enforce any claim against the survivor or survivors."

14. In the matter of **Upper India Cable Co. & Ors. v. Bal Kishan**[4] the Supreme Court has clearly held that question of substituting legal representatives of the deceased partner is not required and death has no impact on the proceeding and observed as under:-

> "8. Now the question is where the suit is instituted against the firm and partners are impleaded as proper parties, in the event of death of a partner so sued, would the suit or appeal, as the case may be, abate if heirs and legal representatives of the deceased partner are not substituted within the prescribed period of limitation. There is a two fold answer to this question. Order XXX, Rule 4 provides that notwithstanding anything contained in Section 45 of the Indian Contract Act 1872 where two or more persons are sued in the name of the firm under the enabling provisions of Order XXX, and any such person dies whether before the institution of the suit or during the pendency of any suit, it shall not be necessary to join the legal representatives of the deceased as a party to the suit. Secondly death of a proper party would have no impact on the suit more so where on death of a partner the partnership may stand dissolved or heirs do not desire to join the firm. Both these aspects were overlooked by the High Court.
>
> 11. The position boils down to this that two of the partners who were appellants alongwith the firm in the second appeal before the High Court died pending the appeal. It is no body's case that the heirs and legal representatives of the deceased partners joined the firm or they were entitled to be taken in as partners in place of the deceased partners as partners in the firm. Therefore, the question to be answered is whether on the death of two of the proper or formal parties impleaded in their capacity as partners by the plaintiff along with the firm, in absence of substitution of heirs

[4] 1984 (3) SCC 462

> and legal representatives the appeal abates? The answer is in the negative. Therefore, the question of substituting heirs and legal representatives of the two proper formal parties does not arise and the death has no impact on the proceeding. The appeal cannot abate. Therefore, the High Court was in error in disposing of the appeal as having abated."

15. Likewise, in the matter of **Anokhe Lal** (supra) the Supreme Court has clearly held that by virtue of Order 30 Rule 4(1) of the CPC, it is not mandatory to join the legal representatives of a deceased partner as party in the suit. Para 7 and 8 of the report states as under:-

> "7. The aforesaid Rule 4(1) is clearly an exception to Section 45 of the Contract Act. The principle made out in Section 45 applies to a situation where one person has made a promise to two or more persons Jointly. The right to claim performance of the contract arising out of such a promise would then rest with those promisees together during their joint lives and after the death of any of them, such right would devolve on the representative of the deceased promisee jointly with the surviving promisees. Thus if the joint promisees were partners of a firm this provision obliges the legal representative of a deceased partner to join the rest in enforcement of the right to have performance of the contract. This is the nub of Section 45 of the Contract Act. But a conflict of opinions arose between different High Courts regarding interpretation of the rule involved in the said Section. High Courts of Madras, Bombay and Allahabad took the view that in a suit for enforcement of the said right by a firm legal representatives of a deceased partner need not be impleaded, whereas the Calcutta High Court took the contrary view that in such a case legal representatives were necessary parties. In fact sub-rule (1) of Rule 4 of Order 30 has been prescribed to resolve the said conflict by diluting the rigour contained in the rule embodied in Section 45 of the Contract Act in relation to a suit involving a partnership firm.
>
> 8. What sub-rule (1) of Rule 4 in Order 30 of the Code provides is that ii is not mandatory to join the legal representative of a deceased partner as

> a party in the said suit. What sub-rule (2) says, in other words, is that sub- rule (1) is not a hindrance to any 1egal representative of a deceased partner to get himself impleaded if he has otherwise any right to do so. It is therefore, clear that sub-rule (2) does not create any right as such for a legal representative to get impleaded in a suit, but it only operates as an exception to sub-rule (1). At any rate, Rule 4(2) of Order 30 cannot come into operation in a situation where Order 1 Rule 10 of the Code cannot be invoked.”

16. In the instant case, undisputedly, the Arbitral Tribunal allowed the respondent company to bring legal representatives of Shri B.N.Agrawal to be brought on record though strictly that was not required and upon substitution it was represented by Rajnish Agrawal, appellant herein.

17. In the matter of **Her Highness Maharani Mandalsa Devi and others v. M. Ramnarain Private Ltd. and others**[5], the Supreme Court has held that a suit by or in the name of a firm is really a suit by or in the name of all its partners. The firm's name is used for a convenient method of denoting those persons who compose the firm and the suit in truth is actually against the individuals. The decree passed though in form against the firm is in effect a decree against all the partners. A suit may be filed and a decree may be obtained against a firm and such decree may be executed against the properties of the partnership firm and against all the partners by following the procedure under Order XXI, Rule 50 CPC.

18. In the case in hand, impleadment of legal representatives of the deceased partner Shri B.N. Agrawal was not legally

[5] AIR 1965 SC 1718

necessary by virtue of the provisions contained in Order 30 Rule 4 of the CPC, but anyhow legal representatives of Shri B.N. Agrawal except Smt. Mamta Agrawal were brought on record leaving other partner of firm Shri B.P. Poddar away from record, but thereafter the Arbitral Tribunal passed the following award against M/s. Shree Enterprises excluding legal representative of Shri B.N. Agrawal namely Mamta Agrawal and other partner of partnership firm Shri B.P. Poddar as under:-

> "42) Issue No.4. Reliefs and costs."
>
> From the foregoing discussion and after due consideration of all materials filed by both the parties including statement of counter claimant Shri Cyrus R. Patel, and after due consideration of all documents filed by both the parties and arguments raised by the counter claimant, counter claim of the counter claimant is partly allowed and following award is passed.
>
> (i) It is declared against opposite party (except legal heir Mamta Agrawal and partner Shri B.P. Poddar) that a sum of Rs.15,40,000/- (Rupees fifteen lakh forty thousand) along with interest @ 9% per annum from 17-11-2007 to the date of payment to the counter claimant is the debts and liability of the firm M/s. Shree Enterprises, Korba (CG) being claims to be paid by the firm M/s. Shri Enterprises, Korba to M/s. Star Ferro Alloys Ltd.
>
> (ii) Opposite party subject to extent of their liability (individually as well as jointly) in accordance with provisions of Indian partnership Act and provisions contained in

other laws applicable to the legal heirs (except legal heir Mamta Agrawal and alive partner Shri B.P. Poddar) shall pay to the counter claimant as below;

(iii) Rs.15,40,000/- (Rupees fifteen lakh and forty thousand) along with interest @ 9% per annum from 17-11-2007 to the date of payment.

(iv) Rest of the counter claim stands rejected."

19. A careful reading of the aforesaid award would show that the Arbitral Tribunal has found that ₹ 15,40,000/- along with interest @ 9% per annum from 17.11.2007 to the date of payment to the counter claimant is the debts and liability of the partnership firm M/s. Shree Enterprises, Korba (CG), but the Arbitral Tribunal exonerated Smt. Mamta Agrawal, one of the legal representatives of Shri B.N. Agrawal and further exonerated other partner Shri B.P.Poddar from their liability. Not only this, while directing to recover the aforesaid amount, the Arbitral Tribunal again exonerated aforesaid two persons i.e. Smt. Mamta Agrawal and Shri B.P.Poddar from any liability towards decretal amount.

20. Section 13 of the Act of 1932 provides for mutual rights and liabilities which reads as under:-

> "13. **Mutual rights and liabilities**.-Subject to contract between the partners,-
> (a) xxx xxx xxx
> (b) the partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm;
> (c) xxx xxx xxx

(d)	xxx	xxx	xxx
(e)	xxx	xxx	xxx
(f)	xxx	xxx	xxx”

21. The Supreme Court in the matter of **Mandyala Govindu & Co. v. The Commissioner of Income Tax, Andhra Pradesh, Hyderabad**[6] held as under:

> “7.....Section 13(b), it seems plain to us, makes the partners liable to contribute equally to the losses only when they are entitled to share equality in the profits. In this case the shares of the partners are not equal. In the absence of any indication to the contrary, where the partners have agreed to share the profits in certain proportions, the presumption is that losses are also to be shared in the same proportion. So where the partners have unequal shares in the profits, there can be no presumption that the losses are to be equally shared between them.”

22. Reverting to the facts of the present case after noticing statutory provisions contained in Section 13(b) of the Act of 1932, it is clear that in M/s. Shree Enterprises, a partnership firm, had two partners namely Shri B.P.Poddar and Shri B.N.Agrawal and they had agreed to share loss and profit as under:-

> “5. That the profit and loss of this partnership business shall be divided between both the partners to this deed in the following proportions:-
>
> Sri B.P. Poddar 50%
>
> Sri B.N. Agrawal 50%”

23. At this stage, it would be appropriate to notice Section 25 of the Act of 1932 which states about liability of a partner for acts of the firm as under:-

[6] (1976) 1 SCC 248

> "**25. Liability of a partner for acts of the firm**.- Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner."

24. In the matter of **Sahu Rajeshwar Nath v. Income Tax Officer, C-Ward, Meerut and another**[7] it has been held by the Supreme Court that since the liability of partners is joint and several, it is open to a creditor of firm to recover the debt from any or more of the partners. It is a decree against the partnership firm, each partner is personally liable except the minor whose liability is limited to his assets in the partnership.

25. In the matter of **Addanki Narayanappa and another v. Bhakara Krishnappa (dead) and thereafter his heirs and others**[8] and **M/s. Malabar Fisheries Co., Calicut v. Commissioner of Income Tax, Kerala**[9] the Supreme Court considered the nature and charterstics of partnership and held as under:-

> "Partnership firm under the Indian Partnership Act, 1932, is not a distinct legal entity apart from partners constituting it and equally in law. The firm as such has no separate rights of its own in the partnership assets and when one talk's of firm's property or firm's assets all that is meant is property or assets in which all partners have a joint or common interest."

26. The principle of law laid down in the matter of **Sahu Rajeshwar Nath** (supra) has been followed in the matter of **Ashutosh v. State of Rajasthan and others**[10] and it has been held as under:-

> "13. Under Section 25, the liability of the partners is joint and several. It is open to a creditor of the firm to

[7] AIR 1969 SC 667
[8] AIR 1966 SC 1300
[9] (1979) 4 SCC 766
[10] (2005) 7 SCC 308

> recover the debt from any one or more of the partners. Each partner shall be liable as if the debt of the firm has been incurred on his personal liability.”

27. In **Ashutosh** (supra) the Supreme Court while considering provisions contained in Order 21 Rule 49 CPC has held that no execution will lie against partnership property except on a decree issued against the firm or against the partners in the firm. Similarly it has also been held that by virtue of provisions contained in Order 21 Rule 50 CPC, execution can only be granted under that Rule, where a decree has been passed against a firm. A decree against the firm must perforce be in the firm's name. Under this Rule, execution may be granted against the partnership property. It may also be granted against the partners, in which case the decree-holder may proceed against the separate property of the partners.

28. Before proceeding further, it would be appropriate to consider the scope of interference under Section 34 of AC Act.

29. The Supreme Court in the matter of **Associate Builders v. Delhi Development Authority**[11] has held that merits of the arbitral award is assailable under Section 34 of the AC Act only when award is in conflict with public policy of India and further indicated the heads of the public policy of India, though the award would be set aside if it is contrary to (i) fundamental policy of Indian Law, (ii) Interest of India, (iii) Justice or Morality or (iv) if it is patent illegality and while defining the patent illegality it has been held that a contravention of the substantive law of India would result in the death knell of an

[11] (2015) 3 SCC 49

arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature.

30. In the matter of **Nirmalabai Narayan Datar and others v. Girijabai Gangadhar Gadre and others**[12] the Supreme Court has held as under:-

> "2. The award passed by the Arbitrator suffers from an error which is apparent on the fact of award. That error has to be corrected.
>
> 3. Section 37 of the Partnership Act, 1932 provides, insofar as relevant, that where any member of a firm has died and the surviving partners carry on the business of the firm with the property of the firm without any final settlement of accounts, then, in the absence of a contract to the contrary, the estate of the deceased partner is entitled at its option to a share in the profits made by the partnership which is attributable to the use of the share of the deceased partner in the property of the firm or to interest at the rate of six per cent per annum on the account of his share in the property of the firm. The error committed by the Arbitrator is that he awarded interest at 9 per cent instead of 6 per cent."

31. Likewise, in the matter of **Anand Umashankar Gupta and Ors. v. Jayant Maniklal Lunawat**[13] the Bombay High Court has interfered with the award finding the award in contrary to Section 48 of the Partnership Act and held as under:-

> "15. It is not in dispute that the respondent had made counter claim before the learned arbitrator seeking dissolution of the firm and for settlement of the account. On the perusal of the award, it is clear that the counter claim made by the arbitrator. Though the learned arbitrator was bound to decide the issue of dissolution of the firm and to settle the accounts between the parties in the modes and manner prescribed under Section 48, admittedly no such exercise

[12] 1984 (Supp) SCC 590
[13] 2013 (1) MhLJ 65

has been done by the learned arbitrator in the impugned award. The learned arbitrator granted relief of retirement of a partner and not dissolution. In my view, the learned arbitrator was bound to follow the mandatory procedure under Section 48 while dissolving the firm and to settle the account of the firm in the manner setout therein. In my view, the award made by the learned arbitrator was not in compliance of mandatory procedure prescribed under Section 48 of the Partnership Act and was thus in conflict with public policy. In my view the learned District Judge was right in setting aside the said perverse and illegal award and thus the said order passed by the learned District Judge cannot be faulted with."

32. Likewise, the Delhi High Court in the matter of **Pradeep Arora and others v. Samantah Kochhar**[14] has held thus:-

> "The learned Arbitrator referred to an email dated 22nd December, 2010 and has interpreted it as promise made by the Petitioner to the Respondent to refund the capital brought in by her. As rightly pointed out by learned counsel for the Petitioner, apart from the fact that the said email cannot constitute a binding contract to refund the capital contribution without setting off losses or third party debts, the said contract would be hit by Sections 46 and 48 of the PA and would never have been enforceable in law.
> (25) In that view of the matter, the Court is satisfied that there is an error apparent on the face of the Award which is contrary to the scheme of the PA and is also contrary to the fundamental policy of the Indian law."

33. Finally, reverting to the facts of the instant case, it is quite vivid that upon the death of one partner Shri B.N. Agrawal, by virtue of the provisions contained in Section 42(c) of the Act of 1932, partnership firm namely M/s. Shree Enterprises stood dissolved and the legal representative of Shri Agrawal, deceased partner was not legally required to be brought on record as provided in Order 30 Rule 4 of the CPC and principle of law laid down by the

[14] 2016 SCC Online Del 6268

Supreme Court in **Upper India Cable Co. & Ors.** (supra) and **Anokhe Lal** (supra). Learned Arbitral Tribunal permitted the legal representatives of deceased partner except Smt. Mamta Agrawal it was not legally necessary to be brought on record. Thereafter, the Tribunal passed an award of ₹15,40,000/- fastening liability on M/s. Shree Enterprises (erstwhile partnership firm), but exonerated Smt.Mamta Agrawal and other partner Shri B.P. Poddar from the liability after declaring that the amount due is liability of M/s. Shree Enterprises and further held that their liability is confined to the extent of their liability in accordance with the Act of 1932.

34. In my considered opinion, learned Tribunal ought to have passed an award against the firm (M/s. Shree Enterprises) without exonerating Smt. Mamta Agrawal and other partner of firm Shri B.P. Poddar in view of the provisions contained in Section 13(b) read with Section 25 of the Act of 1932 as the liability of partners of firm is joint and several as held by the Supreme Court in the matter of **Sahu Rajeshwar Nath** (supra), particularly in view of Clause 5 of partnership deed providing for loss and profit of business was agreed to be divided equally between both the partners and could not have exonerated Smt. Mamta Agrawal and Shri B.P. Poddar, other partner from its liability as the award against the liability of partnership must against all the partners. However, the decree-holder may recover the award amount from any of the partners as if the liability of firm has been incurred is his personal

liability. Thus, the impugned award limiting the liability of partnership firm to legal representatives of one partner except one is allowed to stand, it will be in teeth of the provisions contained in Section 13(b) and 25 of the Act of 1932 and legally unenforceable in law apart from this, as such, the award passed by learned Arbitral Tribunal is not in consonance with Section 13(b) and 25 of the Act of 1932 and it would fall within the meaning of illegality as held by Their Lordships of the Supreme Court in the matter of **Associate Builders** (supra) and would be a ground to set aside the award under Section 34 (2) (b) (ii) of the Act of 1996 and provisions contained in Section 42 to 45 of the Contract Act would not be applicable.

35. Faced with this situation, Mr.Hari Agrawal, learned counsel for the respondent, would submit that doctrine of severability can be applied to the award. If some part of award is unsustainable and where other part of award is found to be good and enforceable in law under Section 34 of the Act and he would rely upon the decision of Full Bench of Bombay High Court in the matter of **R.S. Jiwani (M/s) Mumbai v. IRC International Ltd Mumbai**[15].

36. As held hereinabove that the impugned award in contrary to Section 13(b) and 25 of the Act of 1932 as one of partner has been completely exonerated from the liability to pay the award amount, as such, the said doctrine would not be applicable herein to the facts of the present case.

---

[15] (2010) IMH LJ 547

37. As a fallout and consequence of the above-stated discussion, the impugned order passed by learned District Judge rejecting the application under Section 34(2) of the AC Act is set aside. Consequently, this appeal is allowed and the arbitral award is set aside. No cost(s).

Sd/-

(Sanjay K.Agrawal)
Judge

B/-