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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Pronounced on: 31.05.2018

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O.M.P. (COMM) 382/2016

SURINDER KUMAR BERI & ANR.

..... Petitioners

Through Mr.Prag P.Tripathi, Sr.Advocate with
Ms.Priya Kumar, Mr.Adhish Srivastava and
Mr.Sujit Kr.Singh, Advs.

Versus

DEEPAK BERI & ANR.

..... Respondents

Through Mr.Sandeep Sethi, Sr. Advocate with
Mr.Akshey Makhija, Mr. Saurabh Seth,
Ms.Sumeera Seth, Ms.Seerat Deep Singh and Ms.
Kriti, Advs for R-1.

Mr.Dayan Krishnan, Sr. Advocate with
Mr.C.D.Mulherkar and Ms.Anushka, Advocates
for R-2.

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O.M.P. (COMM.) 396/2016

ATUL BERI

..... Petitioner

Through Mr.Dayan Krishnan, Sr. Advocate
with Mr.C.D.Mulherkar and Ms.Anushka,
Advocates.

versus

DEEPAK BERI & ANR.

..... Respondent

Through Mr.Sandeep Sethi, Sr. Advocate with
Mr.Akshey Makhija, Mr. Saurabh Seth,

Ms.Sumeera Seth, Ms.Seerat Deep Singh and Ms.
Kriti, Advs.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. These are two separate objections have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “Arbitration Act”) by the petitioners seeking to challenge the Award dated 02.08.2016 passed by the learned Arbitrator.
2. OMP (COMM) 382/2016 is filed by the father, namely, Sh. S.K. Beri. The facts of the said case are stated herein. Petitioner No. 1 who is 82 years old is said to be the founder of various business entities. Petitioner No.2 is the wife of petitioner No.1. The petitioners submit that they hold a large stake in the entities which are subject matter of the arbitration proceedings. It is stated by petitioner No. 1 that he has been involved in the business of manufacturing and trading of knives and other cutting tools since 1952. His two sons, namely, Sh. Deepak Beri, respondent No. 1 and Sh. Atul Beri, respondent No. 2 have also joined the petitioner in his business. Initially the business was managed through a partnership firm by the name S.K. Beri & Brothers (“SKB”). Currently, petitioner No. 1 has 50% share and the two sons are partners with 25% share each in the said firm. Thereafter, other entities have been created for the purpose of running the business including DB Engineering Pvt. Ltd., S.K.Beri & Brothers, Benaras Marbles & Granites Ltd., D.B.Engineering Company(partnership firm). Bulk of the business is being run through D.B.Engineering Pvt. Ltd.

3. As some disputes arose between the two sons, the sons entered into an arbitration agreement on 20.01.2016 whereby Sh.Manoj Nagrath was appointed as an Arbitrator to adjudicate the disputes between the two sons. The two sons thereafter entered into a Memorandum of Understanding on 17.02.2016. Separation of the companies, firms and properties as stated therein was agreed upon. The object was that the two brothers would separate their businesses amicably without affecting the running of the family business. It is further stated that two further documents were executed for smooth transaction of the steps proposed in the MOU. A document titled "Regarding Settlement between Deepak Beri and Atul Beri" dated 14.03.2016 was executed by petitioner No. 1 and Mr. Manoj Nagrath. A Deed of Arrangement dated 30.04.2016 was executed by petitioner No. 1 and his two sons.

4. Thereafter on 02.08.2016, the learned Arbitrator pronounced his Award. The learned Arbitrator in his Award noted that all the disputes have been settled in view of the agreements signed and there remains only implementation/execution of the settlement between the two parties. An Award was passed in terms of the MOU dated 17.02.2016 (Annexure A), the Settlement between Petitioner No.1 and Mr.Manoj Nagrath dated 14.03.2016 (Annexure B) and Deed of Arrangement dated 30.04.2016 (Annexure C). In addition, the learned Arbitrator gave various directions to the parties as stated therein. The petitioners have challenged the present Award in OMP (COMM) 382/2016. Mr. Atul Beri, respondent No. 2 has challenged the Award in OMP (COMM) 396/2016.

5. I have heard learned counsel for the parties.

6. Mr.Prag P. Tripathi, learned senior counsel appearing for the petitioners in OMP (COMM) 362/2016 submits as follows to challenge the award:-

(i) He submits that the petitioners are not a party to the arbitration proceedings or the Arbitration Agreement and yet directions have been passed against them which bind the petitioners. Reference is made to the directions in the Award whereby all the bank accounts of the family business are to be operated only by signatures of the three persons, namely, petitioner No.1 and his two sons. Earlier no such condition was in force. Hence, petitioner No.1 is now made dependant on his sons for the purpose of utilizing any money from the business he started and still owns.

(ii) Under Section 81 of the Arbitration Act the parties are forbidden from relying upon or introducing evidence in arbitral proceedings relating to the proceedings that have taken place in the course of conciliation. It is pleaded that the learned Arbitrator has taken into account material that was discussed in the course of conciliation proceedings.

(iii) It is further pleaded that the learned Arbitrator has wrongly and erroneously passed the award in terms of the MOU dated 17.02.2016, Settlement Deed dated 14.03.2016 and Deed of Arrangement dated 30.04.2016. It is urged that these documents do not dispose of the whole dispute between the parties.

(iv) It is further stated that petitioner No. 2 is not a signatory to any of the documents. However, the directions which have been passed by the learned Arbitrator affect the rights of petitioner No.2. Hence, the Award is entirely erroneous and is contrary to the public policy of India and is liable to be set aside.

7. Sh.Dayan Krishnan, learned senior advocate appearing for Mr.Atul Beri, who has also filed OMP (COMM) 396/2016 challenging the award, has argued as follows:-

(i) It has been submitted that the documents including MOU dated 17.02.2016 could not form part of the Award and hence, the learned Arbitrator has wrongly passed an Award based on the said document.

(ii) It is further pleaded that the mandate of the learned Arbitrator stood terminated the moment he participated in getting the lease deeds executed and also had correspondence with respondent No. 1 behind the back of respondent No. 2. It is stated that the associates of Sh.Manoj Nagrath assisted respondent No. 1 in creating clandestinely leases by which the properties belonging to the family concern, namely, D.B. Engineering Pvt. Ltd. and D.B. Engineering Company were leased out to D.B.Engineering Solutions LLP, a private firm of respondent No.1-Mr. Deepak Beri. These leases were said to have been executed without the consent of the parties or the entities who owned these properties.

(iii) It has further been pleaded that the learned Arbitrator could pass an award either in terms of the settlement under Section 30 of the Arbitration Act or after adjudication of the disputes. It is stated that in case, the Award was passed in terms of the settlement, then the learned Arbitrator had to record the settlement and pass an award. There can be no additions or modifications to the settlement recorded between the parties. It is stated that factually in the present case, the Award while referring to the settlement document extensively adds and modifies the same and also includes various directions. The Award also is not an outcome of any adjudication as it does not adjudicate any issues. It unilaterally adds directions to the settlement

agreed between the parties. Hence, it is urged that the Award is erroneous and is liable to be set aside.

(iv) It is also urged that the learned Arbitrator failed to follow the mandatory procedure as prescribed under Section 23 of the Act. Public policy requires that the parties state their case and defence so that the opposite party is aware of the same and the Arbitrator can thereafter adjudicate the dispute accordingly. The parties were never asked to file pleadings. An Award was simply passed.

(v) It is further urged that it was an essential pre-condition that the learned Arbitrator was to take the views of Sh. S.K.Beri, the father before making the Award. It is further urged that neither the Award nor does any document shows that any such consultation has taken place with Sh.S.K.Beri.

8. Mr.Sandeep Sethi, learned senior counsel appearing for respondent No.1-Mr.Deepak Beri opposing both the petitions has pleaded as follows:-

(i) It is pleaded that OMP (COMM) 382/2016 filed by Sh.S.K.Beri is not maintainable. It is urged that it is settled law that an award can only be challenged by a party to the arbitration agreement. It is stated that it is the own case of Sh.S.K. Beri that he or his wife is not a party to the Arbitration Agreement. Hence, the said persons cannot challenge the arbitration award under Section 34 of the Act.

(ii) Regarding the plea that Sh.S.K. Beri was not consulted, it is pointed out that Sh.S.K. Beri actively participated in the division process and the proceedings. He has signed some of the Agreements. He was fully involved in the process and cannot now claim that he was not consulted.

(iii) Regarding the plea of Mr.Atul Beri that certain lease deeds have been signed with the aid and assistance of the learned Arbitrator, it is pleaded that the leases were discussed with Sh.S.K. Beri and Sh.Atul Beri. The purpose of creating the lease was to enable Mr.Atul Beri to apply for licenses and permits under various laws so that he could commence work in the units coming to his share. The Award fully discloses this fact. Hence, there was no mala fide.

(iv) It is further stated that no rights of Sh.S.K. Beri, if any, get affected by the division.

(v) It is pleaded that the award is only in terms of the Settlement between the parties. The directions that have been passed are a consequence of and are contained in the agreements. In this context, it is pointed out that the directions to the parties to appoint a firm of chartered accountants to conduct a special audit for the examination of books of accounts including stocks and other records is to give compliance of Clause 19 of the MOU dated 17.02.2016. Similarly, it is pleaded that the direction, namely, that the parties shall operate the bank accounts or business jointly with Sh.S.K. Beri is only to protect the assets.

(vi) Reliance is also place on the judgments of the Supreme Court in the case of *Kale & Ors. vs. Deputy Director of Consolidating & Ors.*, AIR 1976 SC 807 and *Hari Shanker Singhania & Ors. vs. Gaur Hari Singhania & Ors*, 2006(88) DRJ 1 (SC) to plead that family settlements have to be encouraged by the court and that the present Award has been passed only in terms of the family settlement and this court should not scuttle the same merely because there might have been some irregularities committed by the learned Arbitrator.

OMP.(COMM.)396/2016

9. I will first deal with the above contentions of learned counsel for the petitioner Mr.Atul Beri in OMP (COMM.) 396/2016.

10. A perusal of the impugned Award dated 2.8.2016 would show that the learned Arbitrator has noted having held several long duration meetings with both the parties and Mr.S.K.Beri. He records about the Memorandum of Understanding dated 17.2.2016, the settlement deed dated 14.03.2016 and the Deed of Arrangement dated 30.04.2016. He states that he has heard the parties after 30.4.2016. Ultimately he fixed the date 16.7.2016 for hearing both the parties. On that date he states that Mr.Deepak Beri appeared and Mr.Atul Beri sought some time. He further states that he sent a final notice dated 21.7.2016 fixing the date of hearing as 25.7.2016 (changed to 26.7.2016). On that date namely, 26.7.2016 again Mr.Deepak Beri appeared and Mr.Atul Beri did not appear. He also notes that he considers that all the disputes have already been settled and there remains only the implementation/execution of the settlement already made by the parties. He also notes that the parties to the arbitration proceedings are brothers and the proceedings have been carried out as per the desire of the parties and hence no formal statement of claim or counter statement effecting the working of the group has been filed. However, he notes that parties have sent several emails which are known to each other. He hence seeks to pass an Award in terms of Annexure A, B and C i.e. the MOU dated 17.2.2016 and the two documents dated 14.3.2016 and 30.4.2016.

He further goes and gives directions for the purpose of carrying out the settlement agreed between the parties. Some of the salient directions given are as follows:-

- (i) The award notes that there are allegations of clandestine removal of stocks/under invoicing etc. and hence for the purpose of understanding the nature and substance of the allegations he appointed a team to examine the stock and other records, statutory or otherwise maintained for the purpose. As D.B.Engineering Private Limited and Sh.S.K.Beri and Brothers had not carried out physical stock taking during last many months so the books could not be verified/reconciled with the physical stock. As the parties did not agree to this exercise he directed both the parties to appoint a firm of Chartered Accountants and if this does not work out then the existing auditors of the company and the firm to be appointed to conduct a special audit for examination of books of account including the stock and other records to give a finding on each and every allegation as raised by the respective parties. He reiterates that this be done so that as per the terms of MOU dated 17.2.2016 all inventories/assets be transferred /retained after following the process of law in equal proportions in terms of the MOU.
- (ii) The award further directed that it is essential to have the audited financial statements for the financial year ending on 31.3.2016 which would contain figures of inventories and other assets. Directions were passed regarding the adjustments if necessary to give the correct figure of assets and liabilities in the financial statement for the year ended on 31.03.2016.
- (iii) He also directed that the parties shall operate the bank account of the business jointly with Mr.S.K.Beri i.e. three signatures on every payment being made.
- (iv) Directions were passed that the parties will ensure that the salary of the staff is given in time and all statutory liabilities like income tax, sales tax

etc. are made during the interim period till the date of implementation of the Award.

11. I may now deal with the contentions of the petitioner-Mr.Atul Beri. The learned Arbitrator was appointed on 20.1.2016. Reference may be had to the appointment of the Arbitrator vide communication dated 20.1.2016 by Mr.Deepak Beri and Mr.Atul Beri. The said letter reads as under:-

“20th January 2016

To,

Mr. Manoj Nagrath

Chartered Accountant

A-380 Defence Colony

New Delhi 110024

Subject: Appointment of Arbitrator

Dear Manoj Nagrath,

We the undersigned have entered into an agreement to refer all/ any disputes including but not limited to our business/business assets/company/joint property and family property to you to be decided as arbitrator. A copy of the agreement has also been enclosed for your reference.

We shall also request you that before proceeding with the arbitration you shall try and settle the matter as mediator, taking help and advice at all times from our father Mr.S.K.Beri.

We request you to accept the aforesaid appointment.

Thanking you

Sd/-

Deepak Beri

Sd/-

Atul Beri”

In terms of the above document the learned Arbitrator was requested that before proceeding with arbitration he should try and settle the matter through mediation taking the help and advice of the father Shri S.K.Beri.

12. I may see the statutory position regarding mediation/conciliation under sections 30, 73 and 74 of the Arbitration Act.

13. Section 30 of the Arbitration Act, 1996 reads as follows:-

“30. Settlement. –

(1) It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

(2) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(3) An arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.

(4) An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.”

14. Section 73 of the Arbitration Act, 1996 reads as follows:-

“73. Settlement agreements -

(1) When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the

observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement.

(3) When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively.

(4) The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.”

15. Section 74 of the Arbitration Act, 1996 reads as follows:-

“74. Status and effect of settlement agreement. -The settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30.”

16. It follows from the above that in case during arbitral proceedings if the parties settle the dispute the Arbitral Tribunal may terminate the proceedings and record the settlement in the form of an arbitral award on agreed terms. The said award shall have the same status as any other arbitral award on the substance of dispute. Section 73 and 74 of the Act, states the procedure where a Conciliator is appointed by the parties and a settlement of dispute is reached during the Conciliatory proceedings. A settlement agreement shall have the same effect as if it was an arbitral award on agreed terms.

17. Reference may be had to the judgment of the Supreme Court in ***Haresh Dayaram Thakur vs. State of Maharashtra and Others, (2000) 6 SCC 179***, where the court held as follows:

“ 19. From the statutory provisions noted above the position is manifest that a conciliator is a person who is to assist the parties to settle the disputes between them amicably. For this purpose the conciliator is vested with wide powers to decide the procedure to be followed by him untrammelled by the procedural laws like the Code of Civil Procedure or the Indian Evidence Act, 1872. When the parties are able to resolve the dispute between them by mutual agreement and it appears to the conciliator that there exists an element of settlement which may be acceptable to the parties he is to proceed in accordance with the procedure laid down in Section 73, formulate the terms of a settlement and make it over to the parties for their observations; and the ultimate step to be taken by a conciliator is to draw up a settlement in the light of the observations made by the parties to the terms formulated by him. The settlement takes shape only when the parties draw up the settlement agreement or request the conciliator to prepare the same and affix their signatures to it. Under Sub-section (3) of Section 73 the settlement agreement signed by the parties is final and binding on the parties and persons claiming under them. It follows therefore that a successful conciliation proceeding comes to an end only when the settlement agreement signed by the parties comes into existence. It is such an agreement which has the status and effect of legal sanctity of an arbitral award under Section 74.”

18. Similarly, this court in ***Morgan Securities & Credits Pvt. Ltd. vs. Morepen Laboratories Ltd. & Anr., 2006 (91) DRJ 618*** held as follows:-

“15. At this juncture, it would be relevant to note some provisions of the Arbitration and Conciliation Act, 1996. Section 5 of this Act limits the extent of judicial intervention

and provides that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I (Section 2 to Section 43), no judicial authority shall intervene except where so provided in Part I. Section 30 which falls within Part I of this Act provides for settlement. It reads as under:

30. Settlement. - (1) It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

(2) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(3) An arbitral award on agreed terms shall be made in accordance with Section 31 and shall state that it is an arbitral award.

(4) An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.

Reading Section 30 it is quite clear that the arbitrator is fully empowered to record a settlement where parties settle their disputes and the arbitrator is also empowered to terminate the proceedings upon recording such settlement in the form of an arbitral award on agreed terms. It is quite clear that the award on agreed terms is to be made in accordance with Section 31 and shall also state that it is an arbitral award. What is most important is that Sub-Section (4) of Section 30 provides that an arbitral award on agreed terms shall have the same status

and effect as any other arbitral award on the substance of the dispute. This clearly stipulates that whether it is an award on agreed terms or an award on the substance of a dispute the effect and status is the same. And, Therefore, in terms of Section 30(4) no distinction can be made between an award made on merits and an award made on agreed terms. This aspect of the matter would be relevant when the distinction that is sought to be brought about by Mr. Mehta between a consent decree and a decree on merits will be considered hereinbelow.”

19. I may note that the distinction between mediation and conciliation is minimal. The role of a conciliator has been defined under section 67 of the Arbitration Act. Section 67(4) of the Act states that a conciliator may at any stage of the proceedings make proposals for settlement of the disputes. The role of a mediator has not been defined in the Arbitration Act. However, a mediator acts as a facilitator. His role is to facilitate the parties to themselves to come up with suggestions and enter into a settlement. He does not make any proposal for settlement of the disputes. However, in the end the result is same, namely that the parties enter into a settlement. In both the proceedings, agreement is signed by consent of the parties. There is no adjudicatory process involved.

20. As per the arbitration agreement here dated 20.01.2016 the learned Arbitrator was to first try and settle the matter as a Mediator. The Award itself states that he has held several sittings with the parties, though no details of the sittings are stated in the Award. Pursuant to these sittings the parties have entered into a Memorandum of Understanding, Settlement and Deed of Arrangement dated 17.2.2016, 14.3.2016 and 30.4.2016 respectively. These agreements were signed with the consent of the parties

and were an outcome of the mediation proceedings held in terms of the Arbitration Agreement by the learned Arbitrator. It is also on record that Mr.S.K.Beri, the father participated in the proceedings, as stipulated in the Arbitration Agreement. The learned arbitrator also notes that the disputes stand settled and there remains only the implementation/execution of the settlement. Hence, in terms of section 30 of the Arbitration Act the learned Arbitrator was within his powers to record the settlement in the form of an arbitral award and terminate the proceedings. In my opinion, the Award to the extent it is in terms of the aforesaid agreements entered into by the parties is as per the procedure stated in the Arbitration Act and cannot be faulted with. The learned Arbitrator has rightly passed the Award in terms of the Settlement between the parties.

21. However, as noted above, after having passed the award in terms of the three documents i.e. the Agreements the learned Arbitrator has further given directions in the award which have been noted above. I would like to deal with the legality and validity of these directions now.

22. An attempt has been made by learned senior counsel appearing for Mr.Deepak Beri to argue that these directions have been passed in terms of the settlement between the parties. However, a perusal of the Award would show that these directions do not form a part of the settlement between the parties. These directions may be an attempt to implement and put into effect the terms and conditions of the settlement but certainly cannot said to be a part of the settlement agreement. Are the directions valid?

23. I may note Section 23 of the Arbitration Act which reads as follows:-

“23. Statement of claim and defence.—

(1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

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.....

24. Hence, the claimant is to file his statement of claim and respondent has to file his defence unless the parties have agreed otherwise. In *State of Goa vs. Praveen Enterprises, (2012) 12 SCC 581* the Supreme Court noted as follows:-

26. Section 23 of the Act makes it clear that when the arbitrator is appointed, the claimant is required to file the statement and the Respondent has to file his defence statement before the Arbitrator. The claimant is not bound to restrict his statement of claim to the claims already raised by him by notice, "unless the parties have otherwise agreed as to the required elements" of such claim statement. It is also made clear that "unless otherwise agreed by the parties" the claimant can also subsequently amend or supplement the claims in the claim statement. That is, unless the arbitration agreement requires the Arbitrator to decide only the specifically referred disputes, the claimant can while filing the statement of claim or thereafter, amend or add to the claims already made.

27. Similarly Section 23 read with Section 2(9) makes it clear that a Respondent is entitled to raise a counter claim "unless the parties have otherwise agreed" and also add to or amend the counter claim, "unless otherwise agreed". In short, unless the arbitration agreement requires the Arbitrator to decide only the specifically referred disputes, the Respondent can file counter claims and amend or add to the same, except where the arbitration agreement restricts the arbitration to only those disputes

which are specifically referred to arbitration, both the claimant and Respondent are entitled to make any claims or counter claims and further entitled to add to or amend such claims and counter claims provided they are arbitrable and within limitation.”

25. Reference may also be had to the judgment of Supreme Court in ***SREI Infrastructure Finance Limited vs. Tuff Drilling Private Limited, (2018) 11 SCC 470*** where the Court in paragraph 20 held as follows:-

“20. In the present case, proceedings were terminated vide order dated 12-12-2011 under Section 25(a). After termination of proceedings, application to recall the said order was filed by the claimant on 20-1-2012, which was rejected by the Arbitral Tribunal on the ground that it has no jurisdiction to recommence the arbitration proceedings. Section 25 contemplates a situation that when the claimant fails to communicate his statement of claim within the time as envisaged by Section 23, the Arbitral Tribunal has to terminate the proceedings. This section thus contemplates a situation where arbitration proceeding has not been started. The most important words contained in Section 25 are “where without showing sufficient cause—the claimant fails to communicate his statement of claim”. Under Section 23(1), the claimant is to state the facts supporting his claim within the period of time agreed upon by the parties or determined by the Arbitral Tribunal. The question of termination of proceedings thus arises only after the time agreed upon between the parties or determined by the Arbitral Tribunal comes to an end. When the time as contemplated under Section 23(1) expires and no sufficient cause is shown by the claimant the Arbitral Tribunal shall terminate the proceedings.....”

26. It would clearly follow from the above judgments of the Supreme Court and the provisions of section 23 of the Arbitration Act that filing of a

statement of claim and a statement of defence would normally be a mandatory procedure to be followed unless otherwise agreed upon by the parties. Such an interpretation would also be inconsonance with the principles of fair play and justice. The respondent who is defending his case is entitled to know the contentions of the petitioner. Such contentions when spelt out in the statement of claim would provide an opportunity to the respondent to put forth his defence. No such statement of claim/defence was sought for by the Ld. Arbitrator. The documents filed before the learned Arbitrator and the emails sent to him cannot be the basis for adjudication of the dispute between the parties and passing of directions, unless such a procedure is specifically agreed by the parties.

27. Reference may also be had to Section 18 of the Arbitration Act, which reads as follows:

“18. Equal treatment of parties.—The parties shall be treated with equality and each party shall be given a full opportunity to present his case.”

28. The Supreme Court in the case of *Associate Builders vs. DDA, AIR 2015 SC 620* held as follows:

“29. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

30. The Audi Alteram Partem principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act.....”

29. In relation to reasonable opportunity of being heard, in *Sohan Lal Gupta v. Asha Devi Gupta*(2003) 7 SCC 492, the Hon'ble Apex Court observed as under:—

23. For Constituting a reasonable opportunity, the following conditions are required to be observed:

1. Each party must have notice that the hearing is to take place.
2. Each party must have a reasonable opportunity to be present at the hearing, together with his advisers and witnesses.
3. Each party must have the opportunity to be present throughout the hearing.
4. Each party must have a reasonable opportunity to present evidence and argument in support of his own case.
5. Each party must have a reasonable opportunity to test his opponent's case by cross-examining his witnesses, presenting rebutting evidence and addressing oral argument.
6. The hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and argument.”

30. In the present case it is clear that the directions which are passed by the learned Arbitrator are not contained in the agreement between the parties. No doubt these directions can be said to be an attempt by the learned Arbitrator to try and execute/implement the terms and conditions agreed upon by the parties. However, such directions could be passed only by the process of adjudication after having concluded the mediation proceedings. It appears that the learned arbitrator has mixed up the mediation process and

the adjudicatory process based on the hearings which have been conducted and the exchange of emails by the parties. He has recorded a settlement, passed an award based on the settlement and has also passed further directions which could only have been passed pursuant to adjudication.

31. It is clear that the directions in the award have been passed contrary to the principles of natural justice without affording any reasonable opportunity to the petitioner to file his defence and make his submissions on the merit of the case. Acting with undue haste, the learned arbitrator has chosen to add additional directions to the parties which are not part of the Settlement Agreement.

32. Directions that have been passed are clearly illegal and contrary to the mandatory and statutory procedure. The learned Arbitrator cannot suo motu on his own *de hors* the procedure prescribed under the Arbitration Act pass such directions. Hence, the award to the extent that it gives directions *de hors* the agreement between the parties, namely, Annexure A, B and C to the Award are illegal and being severable, is set aside. Such directions are contrary to the fundamental policy of Indian Law.

33. I may deal with two other contentions raised by the learned counsel for the petitioner. One plea was that the learned Arbitrator had assisted and participated in getting the lease deeds executed behind the back of the petitioner. As an Award in terms of Annexure A, B and C has been passed based on the voluntary agreements between the parties, this plea about the learned Arbitrator being disqualified has no basis. The alleged act done by the learned Arbitrator cannot and does not vitiate the agreements entered into by the parties.

Another plea raised by the learned counsel for the petitioner was that Sh. S.K.Beri's view had not been taken in terms of the arbitration agreement. The records show that Sh. S.K.Beri is a signatory to two of the three agreements executed between the parties, namely, Annexure B dated 14.03.2016 and Annexure C dated 30.04.2016. This plea is also misplaced.

34. The award to the extent it is passed based on Annexure A, B and C is upheld.

35. OMP(COMM) 396/2016 is accordingly disposed of. All the pending applications, if any, also stands disposed of.

OMP(COMM) 382/2016

36. This petition has been filed by the father Mr. S.K.Beri impugning the concerned award. As noted above, the plea of the petitioner herein is that he was not a party to the arbitration agreement yet directions have been passed by the learned Arbitrator which affect him. It has been pleaded that petitioner No.1 and petitioner No.2 have large stakes/shares in the companies and interest in the partnership firms. Yet, contrary to the earlier agreed procedure an embargo has been placed upon petitioner No.1 signing the cheques which he used to do in the past. Direction has been passed that the cheques would be signed by all the three parties. The banks in response to this award have on their own stopped honouring the cheques signed by the petitioner.

37. Learned senior counsel appearing for the respondent had strongly objected to this petition pointing out that as the petitioner is not a party he cannot file these objections. He has relied upon judgment of this court in *M/s.Tara Logitech Private Limited vs. M/s.Religare Finvest Limited and Anr., 2014 SCC Online Del 7528* to contend that a non party to an

arbitration proceedings cannot file a petition under section 34 of the Arbitration Act.

38. I need not go into the said controversy, namely, as to whether the petitioner could have filed a Petition under section 34 of the Act. The petitioner was basically aggrieved by the directions passed by the learned Arbitrator over and above the Award in terms of Annexure A, B and C. I have already set aside those directions. Nothing further survives in the petition. This petition is also disposed of on the above terms. All the pending applications, if any, also stands disposed of.

MAY 31, 2018/n

JAYANT NATH, J.