

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS JURISDICTION UNDER THE COMMERCIAL COURTS ACT, 2016

COMMERCIAL ARBITRATION PETITION (L) NO. 746 OF 2019
WITH
NOTICE OF MOTION (L) NO.1727 OF 2019

1. Jabbar Gulam Rassol Jamal,)

2. Azizur Rehman Gulam Rasool,)
Both of Mumbai, Indian Inhabitants)
Residing at 317A, Lokhandwala Building)
1st Floor, 30, Bapty Road, Mumbai 400 003) Petitioners

VERSUS

1. M/s. Radio Restaurant,)
a Partnership firm, registered under)
the Indian Partnership Act, 1932,)
having its place of business at)
10, Musafirkhana Road,)
Off Carnac Road, Mumbai 400 001)

2. Saira Abdul Wahid Sheru,)
(Since deceased), through her legal heirs)
(Petitioner nos. 3 to 8))

3. Maaz Abdul Wahid Sheru,)

4. Huzefa Abdul Wahid Sheru,)

5. Mariyam Abdul Wahid Sheru,)

6. Romana Zahid Lal,)

7. Mariya Sadiq Sunesara,)

8. Maesra Abdul Wahid Sheru,)
Nos. 3 to 9 above all of Mumbai)
Indian Inhabitants, residing at)
802, Paramount Tower, Sahakar Road,)
Bandivli Village, Jogeshwari (West))

Mumbai 400 102.

)

..... Respondents

Mr.Rafique Dada, Senior Advocate, a/w. Mr.Satish Shah, Mr.P.K.Vyas for the Petitioners.

Mr.Pravin Samdhani, Senior Advocate, a/w. Mr.N.S.Patel, i/b. Mr.Anantkumar Asharam Jain for the Respondent no.1.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 7th AUGUST, 2019
PRONOUNCED ON : 30th AUGUST, 2019

JUDGMENT :

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996, the petitioners have impugned the arbitral award dated 7th January,2019 annexed at Exs.`A` and `J` to the arbitration petition (for short the Arbitration Act). By consent of the parties, the matter was heard finally at the admission stage. Some of the relevant facts for the purpose of deciding this arbitration petition are as under :-

2. The petitioners are the two of the heirs and legal representatives of one Mr.Gulam Rasool Jamal Sheru (hereinafter referred to as Sheru) who was one of the partner of the respondent no.1. The said Sheru died on 26th August, 2002. By a Deed of Partnership dated 7th November,1960, the said Mr.Sheru, Mr.Yusuf Miyaji and Mr.Gulam Rasool Suleman (hereinafter referred to as the said Miyaji and Suleman respectively) had agreed to run a business in partnership under the name and style of M/s.Radio Restaurant. The said premises from which the said business was being conducted is an asset of the respondent no.1 partnership firm.

3. It is the case of the petitioners that on 21st January, 1965, another Deed of Partnership was executed between the same partners. Under the said Deed of Partnership, the said Mr. Sheru was given 25% share in the partnership business. On 1st July, 1970, another similar Deed of Partnership was entered into between the same parties for conducting the same business.

4. It is the case of the petitioners that on 15th March, 1975, another Deed of Partnership was executed between the same partners wherein it was agreed by and between the parties that the net profits and losses of the business of the said firm were to be divided between the three partners, whereby the said Mr. Sheru was to receive 12% of the profit. It is the case of the petitioners that on 15th March, 1975 a Conducting Agreement was executed between the same partners whereby the said Mr. Sheru was appointed to conduct the said partnership business and was empowered to manage and look after the shares of the other partners in the said business. Under the said agreement, the said Mr. Sheru was to pay the other two partners a total of Rs.16,000/- per month as royalty, hire charges for management towards their share of business for a period of one year and also to pay all outgoings with respect to the said business.

5. It is the case of the petitioners that on 31st March, 1992, a Deed of Partnership was entered into between the said three partners in continuation of the previous agreement. It is the case of the petitioners that under the said Deed of Partnership, the effect of the said agreement dated 31st March, 1992 was to convert the earlier Conducting Agreement dated 15th March, 1975 into an agreement for payment of salary and in terms of the agreement of 1992, the said Mr. Sheru was to

receive Rs.30,000/- per annum, the said Mr.Miyaji was to receive Rs.12,000/- per annum and the said Mr.Suleman was to receive Rs.6,000/- per annum respectively. All these amounts were to be paid as salaries.

6. It is the case of the petitioners that the said Mr.Miyaji and Mr.Suleman were sleeping partners in the said firm and never used to attend or manage the affairs of the said partnership business. The business was conducted entirely by the said Mr.Sheru along with the petitioner nos. 1 and 2 and Mr.Abdul Wahid, since deceased the third son of the said Mr.Sheru.

7. On 26th August,2002, the said Mr.Sheru expired. It is the case of the petitioners that the petitioners along with their brother Mr.Abdul Wahid (since deceased) continued to run the hotel business in the same manner in their capacity as legal heirs of the said Mr.Sheru. It is the case of the petitioners that the petitioners and the said deceased brother were given oral assurances by the said Mr.Yusuf Miyaji and the said Mr.Suleman that the licence to conduct the said business was irrevocable and that they would be made partners in the said firm.

8. It is the case of the petitioners that at about 11.00 p.m. on 2nd May, 2003, about 50 or 60 persons forcibly entered the suit premises armed with swords, hockey sticks and pistols and looted and destroyed the premises of the restaurant. Those persons broke open a lock in which Rs.4,00,000/- to Rs.5,00,000/- were kept and took away the said amount and also the original documents relating to the hotel business viz. the hotel licence, sales tax and income tax files, wealth tax files, professional tax files and other files relating to the business of the

restaurant. The petitioners accordingly lodged an FIR dated 3rd May, 2003 regarding alleged incident with the local police station. It is the case of the petitioners that pursuant to the filing of the said FIR by the petitioners, the police enquired into the matter and put the petitioners and their deceased brother Mr.Abdul Wahid back in possession of the said premises. On 14th June, 2003, the petitioners addressed a letter to the Commissioner of Police requesting for police protection as they feared further violence from the said Mr.Miyaji and the said Mr.Suleman and/or hirelings of these persons.

9. Sometime in the year 2003, the said Mr.Miyaji and Mr.Suleman filed a suit being Suit No.1557 of 2003 against the petitioners alleging that the petitioners and their deceased brother were trespassers on the suit property and praying for injunction restraining them from entering upon the suit premises. The said Mr.Miyaji and Mr.Suleman filed a notice of motion being no.1634 of 2003 in the said suit praying for interim relief and injunction restraining the petitioners and their deceased brother from entering the suit property and dealing with the suit property in any manner whatsoever.

10. On 10th June, 2003, this court appointed a court commissioner to visit the premises and to prepare and submit a report as regard to whether the business was a running business and to find out who was running the business and since when. The court commissioner appointed by this court visited the suit premises on 19th June, 2003 after intimation to all the parties and conducted the inspection. On 3rd July, 2003, the court commissioner submitted a report. It is the case of the petitioners that in the said report dated 3rd July, 2003, the learned court commissioner stated that the business of the respondent no.1 firm

was being run by the petitioners herein with their deceased father Mr.Sheru since 1960.

11. On 5th August, 2005, this court dismissed the Notice of Motion No.1634 of 2003 filed by the respondent no.1 holding that the said Mr.Yusuf Miyaji and the said Mr.Suleman had failed to show any independent evidence as to prove their actual possession or that they were carrying on the business of the partnership firm.

12. The respondent no.1 filed an appeal against the said order dated 5th August,2005. The appeal filed by the respondent no.1 is admitted by the Division Bench of this court. Notice of motion filed by the respondent no.1 in the said appeal came to be dismissed by the Division Bench. On 18th March,2006, the brother of the petitioners Mr.Abdul Wahid expired. On 26th November, 2018 the wife of the said Mr.Abdul Wahid who was the original respondent no.2 in the arbitral proceedings expired. The respondent nos. 3 to 8 are the surviving heirs and legal representatives of the said Mr.Abdul Wahid and the original respondent no.2.

13. On 16th September, 2005, the said Mr.Miyaji expired. Mr.Abdul Samad Agloria and Mr.Abdul Hamid being the legal heirs of Mr.Miyaji, were taken as partners in the respondent no.1 firm. Sometime in the year 2006, the partners of the respondent no.1 filed another suit being Suit No.1668 of 2006 against the petitioners and the others *inter alia* praying that the petitioners herein and the other heirs of the said Mr.Sheru be ordered and directed to handover the said premises of the partnership business, on the payment of compensation in the sum of Rs.54,10,000/- and mesne profits as per the statement of

claim with interest and further compensation until possession was handed over to the respondent no.1 by the petitioners and the others.

14. On 12th September, 2006, this court passed an order in Suit No.1668 of 2006 with Notice of Motion No.1909 of 2006 filed by the respondent no.1 and others. The parties to the suit agreed that all disputes and differences between the parties be referred to the sole arbitration of Mr.R.A.Kapadia, senior advocate of this court. By the said order, this court appointed the Court Receiver, High Court, Bombay in respect of the suit business with a direction to the Court Receiver to appoint the petitioners as the agents of the Court Receiver on payment of royalty but without security. This court directed the Court Receiver to fix the royalty within a period of eight weeks from the date of the said order. The parties were allowed to make any further application for *ad-interim* reliefs under section 17 of the Arbitration and Conciliation Act, 1996 before the learned arbitrator. This court disposed of both the suits in terms of the said order.

15. By an order dated 22nd September, 2006, this court passed an order thereby speaking to the minutes of the order dated 12th September, 2006 and substituted the word “decided” with the word “agreed”. This court added the words “the disputes and differences are accordingly referred to arbitration, as aforesaid” at the end of paragraph (1) of the said order dated 12th September, 2006. In the first and second line of the paragraph (3) of the said order dated 12th September, 2006, this court added the following words before the word “business” “property and”.

16. Pursuant to the liberty granted by the learned arbitrator, the

petitioners filed a statement of claim before the learned arbitrator. The pleadings filed by the parties in Suit No.1668 of 2006 were treated as pleadings in the arbitration. Each party was given opportunity to file additional pleadings if necessary. The respondent no.1 became claimant in the arbitration and the petitioners herein became the respondents. The respondent no.1 also filed an additional statement of claim. The petitioners filed reply to the said additional statement of claim before the learned arbitrator.

17. The learned arbitrator framed four issues. The respondent led evidence of Mr.Suleman and also evidence of a valuer. The petitioners led evidence of the petitioner no.1 and the evidence of another valuer. By consent of parties, the learned arbitrator appointed Mr.Harshad S.Maniar as valuer who submitted his report before the learned arbitrator. Both parties were granted liberty to cross examine the said valuer. The said valuer was cross examined by the petitioners. The respondent no.1 did not cross examine the said valuer.

18. On 7th January,2019, the learned arbitrator made an award directing the petitioners to deliver to the respondent no.1 the vacant and peaceful possession described in Ex.A to the plaint in Suit No.1668 of 2006. The learned arbitrator directed the petitioners to pay a sum of Rs.32,40,000/- as compensation for the wrongful use and occupation of the premises described in Ex.A to the plaint in Suit No.1668 of 2006 for the period from 3rd May, 2003 to 5th August, 2005. The petitioners were further directed to pay a sum of Rs.95,40,000/- for the wrongful use and occupation of the suit premises for the period 5th August, 2005 till the date of the award and the interest thereon if any earned by the Court Receiver.

19. The learned arbitrator directed that the respondent no.1 is entitled to claim the full amount paid by the petitioners as agent as commission to the Court Receiver and interest, if any, thereon. The learned arbitrator directed the petitioners to pay compensation to the respondent no.1 for the wrongful use and occupation of the suit premises from the date of the award till possession was handed over to the petitioners at the rate of Rs.3,00,000/- per month. The learned arbitrator directed the respondent no.1 to pay to the petitioners a sum of Rs.34,97,040/- being their 12% interest in the premises as heirs of the deceased erstwhile partner Sheru. The learned arbitrator directed the petitioners to bear the full amount of fees payable to Mr.Maniar and the full amount of the arbitrator's fees.

20. On 1st February, 2019, the respondent no.1 made an application under section 33(1) of the Arbitration Act before the learned arbitrator requesting for correction of certain errors in the arbitral award dated 7th January,2019. On 14th February,2019, the petitioners opposed the said application dated 1st February,2019 before the learned arbitrator. On 26th March,2019, the learned arbitrator fixed the date of the hearing of the said application dated 1st February,2019 filed by the respondent no.1 under section 33 of the Arbitration Act. On 16th April, 2019, the learned arbitrator passed an order thereby making few corrections in the arbitral award dated 7th January,2019. On 10th July, 2019, the petitioners filed this arbitration petition *inter alia* impugning the arbitral award dated 7th January,2019 and order making corrections dated 16th April, 2019 in the arbitral award dated 7th January,2019.

21. Mr.R.A. Dada, learned senior counsel appearing for the

petitioners invited my attention to some of the paragraphs from the pleadings filed by both the parties before the learned arbitrator, order passed by this Court in the notice of motion filed by the respondent no.1 in the suit filed before this Court, some of the provisions of the Deed of Partnership dated 10th July, 1992 including clauses 5 and 15 and some of the findings rendered by the learned arbitrator.

22. It is submitted by the learned senior counsel that the petitioners are the heirs and legal representatives of Sheru, who was admittedly one of the partner of the respondent no.1 firm and had 12% share in the assets and profit of the said firm. He submits that the said Sheru died on 18th March, 2006. Even during the life time of the said Sheru, the petitioners as well as their brother Abdul Wahid were assisting the said Sheru in conducting the business of the respondent no.1. It is submitted that on 15th March, 1975, a conducting agreement was executed between the parties thereof. The said Sheru was appointed to conduct the said business and was empowered to manage and look after the shares of the partnership firm in the said business. He submits that the said Sheru was to pay certain amounts to the other two partners as royalty. The said conducting agreement continued even after the death of the said Sheru. The petitioners and their brother Abdul Wahid continued to conduct the business of the respondent no.1 all throughout.

23. It is submitted by the learned senior counsel that on 2nd May, 2003, large number of hirelings entered the suit premises with various weapons with a view to destroy the premises of the restaurant and to dispossess the petitioners. The petitioners had lodged an FIR dated 3rd May, 2003 to bring these facts on record with nearby police station

and for action against the culprits. He submits that the learned arbitrator rendered perverse findings that the said FIR filed by the petitioners was false.

24. It is submitted by the learned senior counsel that in the Notice of Motion No.1634 of 2003 filed by Mr. Yusuf Miyaji and Mr. Suleman in the suit filed by them, by a detailed order dated 5th August, 2005, the said notice of motion filed by said Mr. Yusuf Miyaji and Mr. Suleman came to be dismissed. Various prima-facie observations were made against the said Mr. Yusuf Miyaji and Mr. Suleman and in favour of the petitioners. This Court appointed a Court Commissioner to visit the premises and to submit a report with regard to whether the business was a running business and to find out who was running the business and since when. Learned senior counsel strongly placed reliance on the said report submitted by the learned Court Commissioner after his visit on 19th June, 2003. He submits that the Court Commissioner found that the business of the respondent no.1 was being run by the petitioners along with their deceased father Sheru since 1960. The petitioners were paying for purchase of raw materials, telephone bills, electricity charges etc.

25. Learned senior counsel submits that by an order dated 22nd September, 2006, this Court referred the disputes and differences to the sole arbitration of Shri R.A. Kapadia, senior advocate of this Court. This Court appointed the Court Receiver, High Court, in respect of the said business and directed the Court Receiver to appoint the petitioners as his agents to run the said business on payment of royalty but without security. It is submitted that pursuant to the said order, the petitioners were appointed as agents of the Court Receiver to run the

said business on payment of royalty but without security. Learned Court Receiver fixed the royalty in the sum of Rs.60,000/- per month. The petitioners have been depositing the said amount every month with the Court Receiver which amount has been invested by the Court Receiver.

26. Learned senior counsel invited my attention to various parts of the impugned award and would submit that though the petitioners were appointed as agents of the Court Receiver and were having found in possession of the property and suit business of the respondent no.1 and were paying royalty all through out as directed by this Court by an order dated 12th September, 2006, learned arbitrator has rendered a finding that the petitioners were in unlawful use and occupation of the premises from 19th June, 2003 to 5th August, 2005 and thereafter till the date of award. It is submitted that since the petitioners were appointed by this Court as the agents of the Court Receiver to run the business, there was no question of the petitioners being in wrongful possession and occupation of the premises described in Exhibit "A" to the plaint.

27. It is submitted that the entire basis of awarding compensation against the petitioners by the learned arbitrator for alleged wrongful use and occupation of the said premises is perverse and contrary to the order passed by this Court on 12th September, 2006 and overlooking the Court Commissioner's report who was appointed by this Court in the said notice of motion filed by said Mr. Yusuf Miyaji and Mr. Suleman. It is submitted that the petitioners were admittedly paying royalty amount at the rate of Rs.60,000/- per month and thus the learned arbitrator could not have directed the petitioners to pay compensation at the rate of Rs.1,20,000/- per month for the period

from 19th June, 2003 to 5th August, 2005 and at the rate of Rs.3,00,000/- per month from the date of award till possession is handed over by the petitioners to the respondent no.1. He submits that for the period from 5th August, 2005 till the date of award, the learned arbitrator though fixed the compensation at the rate of Rs.60,000/- per month which was fixed by the learned Court Receiver, the learned arbitrator for the earlier period, has awarded compensation at double the rate i.e. at the rate of Rs.1,20,000/- per month.

28. Insofar as compensation awarded by the learned arbitrator at the rate of Rs.3,00,000/- per month from the date of award till possession is concerned, it is submitted by the learned senior counsel that the learned arbitrator has awarded the said amount based on the report filed by Mr. Harshad Maniar, who was appointed as a Valuer. He submits that the said valuer could not prove the contents of his valuation report. The said Mr. Maniar had not even visited the said premises before submitting any such report. In support of this submission, learned senior counsel invited my attention to some of the answers of the said Mr. Harshad Maniar in his cross-examination conducted by the learned counsel for the petitioners before the learned arbitrator. He submits that the amount of compensation at the rate of Rs.3,00,000/- per month is thus without any evidence on record or is in ignorance of the evidence on record in the cross-examination of the said Mr. Harshad Maniar by the petitioners. It is submitted by the learned senior counsel that even otherwise the said amount of compensation of Rs.3,00,000/- per month could not have been awarded till payment and/or realization and is very harsh and unreasonable since the learned arbitrator could not fixed any meeting expeditiously in deciding the application under section 33 of the Arbitration Act filed

by the respondent no.1.

29. It is submitted by the learned senior counsel that the learned arbitrator could not have entertained the application filed by the respondent no.1 under section 33(1) of the Arbitration Act and could not have enhanced the amount of Rs.32,40,000/- awarded as compensation in paragraph 21(ii) of the arbitral award to Rs.46,80,000/-. He submits that the learned arbitrator even could not have reduced 95,40,000/- to Rs.87,60,000/- by passing an order under section 33(1) of the Arbitration Act.

30. Learned senior counsel submits that there were more than 20 typographical errors in the arbitral award. Learned arbitrator has also corrected the period from 3rd May, 2003 to 5th August, 2005 mentioned in paragraph 21(ii) of the arbitral award to 19th June, 2003 to 12th September, 2005. This Court had appointed the Court Receiver in respect of the said business and the petitioners were directed to be appointed as the agents of the Court Receiver. He submits that the learned arbitrator also corrected the period from 5th August, 2005 in paragraph 21(iii) of the arbitral award. He submits that these corrections made by the learned arbitrator were substantial in nature and were not within the parameters of the corrections permitted under section 33(1) of the Arbitration Act. The order passed by the learned arbitrator on 16th April, 2019 thus was beyond his jurisdiction and is contrary to section 33 (1) of the Arbitration Act and thus deserves to be set aside by this Court.

31. It is submitted by the learned senior counsel that even otherwise the learned arbitrator could not have passed the said order dated 16th

April, 2019 beyond the period of 30 days from the date of receipt of reply filed by the petitioners to the said application filed by the respondent no.1 under section 33(1) of the Arbitration Act. Learned arbitrator could not have extended the time to pass an order under section 33(4) of the Arbitration Act *suo-moto*. The said order thus deserves to be set aside on this ground itself.

32. Learned senior counsel submits that in the plaint which was treated as statement of claim filed by the respondent no.1, it was clearly pleaded by the respondent no.1 that the cause of action for filing the said suit arose on 2nd May, 2003. Learned arbitrator further corrected the date of 3rd May, 2003 as 19th June, 2003 which would have drastic effect on the claim for compensation awarded by the learned arbitrator against the petitioners and also on the merits of the matter. Learned arbitrator has erroneously held that the respondent no.1 was in dispossessed by the petitioners on 19th June, 2003 contrary to the pleadings filed by the respondent no.1 itself.

33. It is submitted by the learned senior counsel that under clause 5 of the Deed of Partnership dated 10th July, 1992, the father of the petitioners was getting Rs.30,000/- per month which was more than the salary paid to the other partners though the share of the father of the petitioners in the assets and share of profit in the partnership firm was 12% which was less than the share of other two partners in the partnership firm. He submits that clause 5 of the Partnership Deed providing for higher salary to the father of the petitioners itself would indicate that the business was being run by the father of the petitioners on payment of royalty to other two partners. After the demise of the father of the petitioners, the petitioners continued the said conducting

business to the knowledge and with the consent of the other two partners of the respondent no.1 firm.

34. It is submitted by the learned senior counsel that on one hand the learned arbitrator has directed the petitioners to pay compensation for the alleged wrongful use and occupation of the premises from 19th June, 2003 till the date of possession to be handed over to the respondent no.1 at various rate, on the other hand, the learned arbitrator has also declared that the respondent no.1 would be entitled to claim full amount paid by the petitioners as agency commission to the Court Receiver and interest accrued, if any, thereon. He submits that the learned arbitrator has thus allowed the claim for compensation twice against the petitioners.

35. It is submitted by the learned senior counsel that though the father of the petitioners Mr. Sheru was entitled to 12% share in the premises owned by the respondent no.1 and the said amount was not paid by the respondent no.1 to the legal heirs of the said Sheru i.e. the petitioners herein and the brother of the petitioners, the learned arbitrator has determined a sum of Rs.34,97,040/- as in the year 2002 and not on the date of award. Learned arbitrator has not even considered the payment of interest on the said amount since 2002 though the said amount has not been admittedly paid by the respondent no.1 to the legal heirs of the said deceased partner Sheru. Learned arbitrator could not have taken the valuation of the share of the deceased father of the respective petitioners as of 2002 without recording any reasons. He submits that the learned arbitrator has not even considered strong *prima-facie* opinion of this Court in the Notice of Motion No.1634 of 2003 filed by the said Mr. Yusuf Miyaji and Mr.

Suleman and in favour of the petitioners regarding possession of the petitioners in respect of the suit premises.

36. Learned senior counsel placed reliance on the judgment of the Delhi High Court in case of ***NTPC Limited vs. Marathon Electric Motors India Ltd.*** 2013(2) R.A.J. 327 (Del) and in particular paragraph 27 and the judgment of the Supreme Court in case of ***Dwarka Das vs. State of M.P. & Another***, (1999) 3 SCC 500 in support of his submission that section 33 of the Arbitration Act is in *pari-materia* with section 152 of the Code of Civil Procedure, 1908 and thus the learned arbitrator could at the most correct the clerical or arithmetic error and could not have passed an order thereby substantially modifying the arbitral award by purportedly exercising powers under section 33(1) of the Arbitration Act. He submits that the learned arbitrator had no power to review the arbitral award.

37. Learned senior counsel placed reliance on the order dated 14th / 16th September, 2011 passed by this Court in Chamber Summons No.1360 of 2010 in Suit No.1668 of 2006 filed by the respondent no.1 herein against the petitioners and would submit that this Court after considering the valuation report submitted by the Valuer had derived the royalty amount at Rs.60,000/- per month. Learned arbitrator thus could not have derived the compensation at any amount other than the said amount of royalty fixed by this Court. He submits that the said order was not modified in an appeal filed by the respondent no.1. The said appeal was simpliciter admitted on 11th January, 2012 against the said order dated 14th / 16th September, 2011.

38. Mr.Samdhani, learned senior counsel for the respondent no.1 on

the other hand invited my attention to the averments made by his client in the suits filed by his client in this Court , the written statement filed by the petitioners in the said suits, various annexures to the arbitration petition and other pleadings and documents forming part of record, oral evidence led by the parties and the Valuer and the findings rendered by the learned arbitrator. He relied upon the Partnership Deed dated 15th March, 1975, Conducting Agreement dated 15th March, 1975, Partnership Deed dated 10th July, 1992 and would submit that admittedly after the demise of the said Sheru on 26th August, 2002, the petitioners were not admitted to the partnership of the respondent no.1 firm. He submits that admittedly the premises in which the said restaurant was being run belongs to the respondent no.1 firm. He submits that till 2nd May, 2003 the said business was continued by the respondent no.1 firm. The petitioners were the employees of the respondent no.1 firm and were being paid the salary. On 4th June, 2003, the respondent no.1 filed a suit bearing No.1557 of 2003 for injunction against the petitioners and Abdul Wahid which as a suit *qua timet* action apprehending dispossession of the respondent no.1 by the petitioners and said Abdul Wahid from the suit premises.

39. Learned senior counsel also invited my attention to the averments made by the respondent no.1 in Suit No.1668 of 2006 filed on 5th June, 2006, *inter-alia* praying for possession of the suit premises against the petitioners and Abdul Wahid. The case of the respondent no.1 all through out in Suit No.1678 of 2006 was that the respondent no.1 was dispossessed by the petitioners and Abdul Wahid on 19th June, 2003. He submits that on 10th June, 2003, this Court appointed a Court Commissioner to visit the site on 19th June, 2003. The respondent no.1 was dispossessed by the petitioners and Abdul Wahid

just before the visit of the Court Commissioner with the help of police.

40. It is submitted by the learned senior counsel that sons of Suleman Miyaji were admitted as the partners. Learned senior counsel invited my attention to the written statement filed by the petitioners before the learned arbitrator in which the petitioners had relied upon Conducting Agreement dated 15th March, 1975, executed between the partners of the respondent no.1. It was the case of the petitioners in the written statement that at all times the business of the respondent no.1 restaurant was conducted by the deceased Sheru as a partner of the said firm and since the amendment in the Income Tax Law, it was conducted by the said deceased Sheru in the capacity of the partner and the conductor and thereafter by mutual consent of the said Sheru continued the said business. In paragraph 34 of the written statement, the petitioners contended that the said deceased Sheru was having 12% share in the partnership business and after negotiations for his conducting the said business and earning the goodwill in the said firm, he was further given 25% in the profit. The petitioners admitted the Partnership Deed dated 31st March, 1992 entered into between the parties in continuation of the previous agreement.

41. Learned senior counsel invited my attention to the averments made in paragraph 43 of the written statement filed by the petitioners admitting that the petitioners and the said Abdul Wahid had not paid any compensation /royalty to the respondent no.1 from June, 2003 till date of the suit filed by the respondent no.1. Learned senior counsel invited my attention to the averments made in paragraph 3(f) of the arbitration petition filed by the petitioners contending that after the demise of the said Mr. Sheru on 26th August, 2002, the petitioners and

the said Abdul Wahid continued to run the said restaurant business in the same manner in their capacity as the legal heirs of the said Mr. Sheru. He submits that the petitioners did not have any right or any interest of any nature whatsoever in the business of the respondent no.1 and were in unauthorized use and occupation of the said business. It was the case of the petitioners that the petitioners and said Mr. Abdul Wahid were given oral assurances by the said Mr. Yusuf Miyaji and Mr. Suleman that the license to continue the said business was irrevocable and that they would be made partners in the said firm.

42. It is submitted that the petitioners neither filed any counter claim nor any separate suit against the respondent no.1 for any reliefs, including the reliefs for seeking partnership in the respondent no.1 firm or for seeking share of the said Mr. Sheru in the respondent no.1 firm upon his demise. He submits that the title of the respondent no.1 in the said property is not disputed by the petitioners. Learned senior counsel invited my attention to the portion of oral evidence led by the petitioners and considered by the learned arbitrator in paragraph 12 of the impugned award and more particularly the answer in the cross-examination to question nos.94 and 96. The said witness examined by the petitioners admitted that during his life time, the said Mr. Sheru and until 2003 the said Mr. Sheru and his brother continued work with other partners. After 2003, the question of continuing work did not arise. The witness admitted that as far as he knew the distribution of profits was right upto May,2003 i.e. until the incident of 2nd May, 2003.

43. Learned senior counsel invited my attention to the findings rendered by the learned arbitrator in paragraph 13 of the impugned award and would submit that the learned arbitrator rightly held that the

heirs of the deceased partner have no right to join the partnership in place of the deceased partner, unless the Partnership Deed contents positive provision in that behalf. No such provision existed in the partnership deed between the said Mr. Yusuf Miyaji, Mr. Suleman and said Mr. Sheru. He submits that the petitioners and the said Abdul Wahid were not taken as the partners by the continuing partners of the respondent no.1. Learned arbitrator recorded the statement made by the petitioners that they were helping the said Mr. Sheru in conducting the said business and after the death of Mr. Sheru, continued to carry on business of the said firm. There was however, no documentary proof in support of their contention produced by them. Learned arbitrator thus rightly held that once the respondent no.1 had discontinued the said permissive user of the petitioners, the possession of the petitioners and said Mr. Abdul Wahid became wrongful. He submits that the petitioners have admitted in the written statement that they were not admitted as the partners of the respondent no.1 firm.

44. Insofar as the directions issued by the learned arbitrator in paragraph 21(i) of the impugned award directing the petitioners to deliver to the respondent no.1 vacant and peaceful possession of the premises described in the said Suit No.1668 of 2006 is concerned, learned senior counsel for the respondent no.1 submits that the only ground in respect of possession is that the learned arbitrator could not have considered the possession of the petitioners as wrongful. The said direction issued by the learned arbitrator is not impugned in the arbitration petition.

45. Insofar as the finding of the learned arbitrator that the petitioners were in wrongful possession is concerned, it is submitted by the

learned senior counsel that since the petitioners were admittedly not the partners of the respondent no.1 firm, nor were the owner of the suit property and even if it was considered that they were conducting the said business pursuant to an alleged assurances given by the other partners of the respondent no.1, the said user was permissive user which was already terminated by the respondent no.1. After termination of such permissive user, the petitioners were in unlawful possession of the suit premises. The respondent no.1 who is admittedly the owner of the said suit premises and the said business were totally derived of the suit premises and the income generated out of the said business from 2003 till date. The findings of fact thus rendered by the learned arbitrator that the petitioners were in unlawful use and occupation of the premises from 19th June, 2003 on wards being not perverse cannot be interfered with by this Court.

46. At this stage, it is submitted by the learned senior counsel that the date of 3rd May, 2003 mentioned by the learned arbitrator in paragraph 21(ii) was corrected as 19th June, 2003 in the order dated 16th April, 2019 on the application filed by the respondent no.1 under section 33 of the Arbitration Act. He submits that in paragraph 10 of the impugned award, the learned arbitrator had already rendered a finding that the date of wrongful possession of the petitioners was considered as 19th June, 2003. He submits that the said date was however, inadvertently mentioned as 3rd June, 2003 in paragraph 21(ii) and 13 of the impugned award. He also invited my attention to paragraph 15 of the arbitral award and would submit that even in the said paragraph while considering the claim for compensation, insofar as the first prayer is concerned, learned arbitrator has considered the compensation from 19th June, 2003 and not 3rd May, 2003 which was

inadvertently mentioned in paragraph 21 (ii) and was a typographical error. He submits that in any event since the petitioners were in wrongful use and occupation of the suit premises where the said date which was inadvertently taken as 3rd May, 2003 instead of 19th June, 2003, the correction of date would be immaterial in view of the fact that the learned arbitrator has allowed the claim for compensation against the petitioners not from 3rd May, 2003 but from 19th June, 2003.

47. Insofar as the relies granted in paragraph 21 (ii) is concerned, it is submitted by the learned senior counsel that the learned arbitrator had appointed a Valuer – Mr.Maniar by consent of the parties, who was also cross-examined by the petitioners' counsel. He submits that the said Mr.Maniar had in his valuation report valued the market rental in the premises of the firm at Rs.70/- per month per sq. ft. for the period 2002 to 2006 i.e. a sum of Rs.3,80,116.80 per month. The said Mr. Suleman another partner of the respondent no.1 had valued the monthly rent / license fees at Rs.60/- to Rs.70/- per sq. ft. for lower floor and Rs.20/- to Rs.30/- per sq. ft. of mezzanine floor in the year 2006. The said Suleman in his affidavit had also referred to various offers received by him for conducting the said business on leave and license basis. The offers received by him were for Rs.1,20,000/- per month.

48. It is submitted that the learned arbitrator considered the compensation for the first period i.e. 19th June, 2003 to 5th August, 2005 at Rs.1,20,000/- though the Valuer had suggested the compensation at Rs.3,80,116.80 ps. per month. He submits that since the Court Receiver was appointed by this Court on 12th September, 2006, the learned arbitrator rightly corrected the typing error insofar as

the date 5th August, 2005 mentioned in paragraph 21 (ii) is concerned and corrected the same as 12th September, 2005 when the petitioners were appointed as the agents of the Court Receiver. He submits that the findings of fact rendered by the learned arbitrator based on the evidence led by the parties cannot be interfered with by this Court in view of those findings not being perverse.

49. Insofar as the compensation awarded by the learned arbitrator in paragraph 21 (iii) i.e. for the second period i.e. from 5th August, 2005 which was corrected as 12th September, 2005 till the date of award is concerned, it is submitted by the learned senior counsel that the learned arbitrator has considered the compensation only at the rate of Rs.60,000/- per month and not even at Rs.1,20,000/- which was considered by the period from 19th June, 2003 to 5th August, 2005 based on the royalty fixed by the Court Receiver. He submits that no interference thus with that part of the arbitral award is thus warranted.

50. Insofar as the compensation awarded in paragraph 21 (iii) is concerned, it is submitted by the learned senior counsel that the learned arbitrator has awarded the compensation at the rate of Rs.3,00,000/- per month from the date of award till possession is handed over by the petitioners to the respondent no.1. He submits that though the Valuer had recommended a sum of Rs,9,55,727.24 ps. per month, the learned arbitrator granted the compensation / mesne-profit only in the sum of Rs.3,00,000/- per month. Insofar as the directions issued in paragraph 21 (iv) issued by the learned arbitrator holding that the respondent no.1 is entitled to claim full amount paid by the petitioners as the agency commission to the Court Receiver and interest, if any, thereon is concerned, it is submitted by the learned

senior counsel that the learned arbitrator had allowed the compensation for the second period i.e. from 5th August, 2005 till the date of award only at the rate of Rs.60,000/- per month which was on much lower side. The learned arbitrator was thus justified in declaring that the respondent no.1 was entitled to claim full amount paid by the petitioners as agency commission to the Court Receiver with interest accrued thereon, if any. He submits that in any event if this Court comes to the conclusion that the said part of the relief could not have been granted by the learned arbitrator, the said part of the award can be severed from the other parts of the award rendered by the learned arbitrator.

51. Insofar as the reliefs granted in paragraph 21(v) is concerned, it is submitted that the compensation at the rate of Rs.3,00,000/- per month is just and proper and cannot be interfered with by this Court from the date of award till handing over possession by the petitioners to the respondent no.1.

52. Insofar as the reliefs granted in paragraph 21(vi) of the impugned award directing the respondent no.1 to pay to the petitioners a sum of Rs.34,97,047/- being their 12% in the premises as heirs of the deceased Mr. Sheru is concerned, it is submitted by the learned senior counsel that though there was no counter claim made by the petitioners for seeking share of their deceased father who was one of the partners in the respondent no.1 firm having 12% share, the learned arbitrator granted the said reliefs in favour of the petitioners. Learned senior counsel invited my attention to various grounds raised by the petitioners in the arbitration petition and would submit that no such ground is raised by the petitioners impugning that part of the award on

the ground that no such relief could be granted by the learned arbitrator in favour of the petitioners or that reliefs granted by the learned arbitrator was on lower side.

53. Insofar as the submission of the learned senior counsel for the petitioners that the learned arbitrator could not have awarded the compensation more than the amount of royalty already fixed by the Court Receiver at Rs.60,000/- per month which order was not interfered with by the appellate Court is concerned, learned senior counsel for the respondent no.1 submits that the Court Receiver was appointed in the notice of motion filed by the respondent no.1. The petitioners were appointed as the agents of the Court Receiver on payment of royalty as and by way of interim arrangement during the pendency of the suits which were referred to arbitration. The Court Receiver did not have any power to determine the *mesne-profit* nor the Court Receiver in this case had fixed any such *mesne-profit*. The *mesne-profit* could be determined only by the Court in case of a suit and by the learned arbitrator in the arbitral proceedings. After determining the *mesne-profit* by the learned arbitrator for the period when the petitioners were held to be wrongful use and occupation of the suit premise, the parties were bound by such final determination of *mesne-profit* by the learned arbitrator and not by the royalty fixed by the Court Receiver during the pendency of the suit.

54. Insofar as the submission of the learned senior counsel for the petitioners that the valuation suggested by Mr. Maniar was on higher side and could not have been accepted by the learned arbitrator for determining the payment of compensation is concerned, it is submitted by the learned senior counsel for the respondent no.1 that the said Mr.

Maniar was appointed by consent of both the parties. The said valuer was cross-examined by the petitioners. The petitioners did not produce any other opinion or did not examine any other valuer as a witness in support of their plea that the said valuation report submitted by Mr. Maniar was on higher side or could not be relied upon as an authentic valuation report. It is submitted by the learned senior counsel that in any event the learned arbitrator has not accepted the amount of compensation suggested by the said valuer and has scaled down the amount of compensation mentioned in the said report submitted by Mr. Maniar substantially the learned arbitrator has also considered the other evidence produced on record by the witness examined by the respondent no.1.

55. Learned senior counsel for the respondent no.1 invited my attention to various portions of the arbitral award, the application dated 1st February, 2019 filed by the respondent no.1 under section 33 of the Arbitration Act, reply filed by the petitioners dated 14th February, 2019 to the said application and the order dated 16th April, 2019. It is submitted by the learned senior counsel that the arbitral award was admittedly rendered on 7th January, 2019. He submits that there were few typographical / clerical errors in the name of the deceased son of Mr. Sheru, date of dispossession of the respondent no.1 by the petitioners, the date of appointment of the Court Receiver etc. crept in the arbitral award dated 7th January, 2019. He submits that all these inadvertent errors crept in the arbitral award were in the nature of clerical or typographical errors or in any event of a similar nature occurring in the award and were capable of being corrected under section 33(1) (a) of the Arbitration Act. He submits that admittedly the said application for correction of the award was made within thirty

days from the date of receipt of the arbitral award from the learned arbitrator.

56. The said application was opposed by the petitioners by filing a reply on 14th February, 2019. It is submitted that the learned arbitrator in the said order dated 16th April, 2019 had made it clear that he was not able to make the corrections within 30 days due to his difficulty in calling for a meeting. Learned arbitrator also observed that none of the parties were liable to suffer due to the learned arbitrator not fixing the meeting immediately. He submits that the learned arbitrator had granted extension of time within which he could make corrections in the order under Section 33(6) of the Arbitration Act.

57. Learned senior counsel invited my attention to the relevant paragraphs of the arbitral award dated 7th January, 2019 and also of the order dated 16th April, 2019 and would submit that it clearly indicated that the typographical errors corrected by the learned arbitrator were within his powers under section 31(1)(a) of the Arbitration Act. Learned senior counsel placed reliance on section 33(6) of the Arbitration Act and would submit that the learned arbitrator is empowered to extend the time if necessary for making a correction and to give an interpretation or make an additional award under sub-sub-section 2 of sub-section (5) of section 33 of the Arbitration Act. He submits that the computation error contemplated in section 33(1)(a) of the Arbitration Act would include arithmetic error, correction of dates etc.

58. Learned senior counsel placed reliance on section 37 of the Indian Partnership Act, 1932, and would submit that though the

petitioners did not make any claim under the said provision before the learned arbitrator, the learned arbitrator in the interest of justice has directed the respondent no.1 to pay the amount considering the valuation of the suit property in the year 2002 when the said Mr. Sheru expired . No such ground is raised by the petitioners in the arbitration petition impugning the said relief granted by the learned arbitrator. The entire award rendered by the learned arbitrator is an equitable award. Learned arbitrator has not awarded any interest on the *mesne-profit* awarded in favour of the respondent no.1. The suit property was a *custodia legis* since 12th September, 2006. Though the other partners of the respondent no.1 had 88% share in the suit property and also in the profit and loss of the firm, they were fully deprived thereof since last several years.

59. Insofar as the correction of the amounts in paragraph 21(ii) from Rs.32,40,000/- to Rs.46,80,000/- by the learned arbitrator in the order dated 16th April, 2019 is concerned, it is submitted by the learned senior counsel that the said amount or Rs.32,40,000/- mentioned by the learned arbitrator in the said paragraph was a computation error. Similarly the amount mentioned in paragraph 21(iii) of the award as Rs.95,40,000/- was also corrected and reduced to Rs.87,60,000/- was also a computation or arithmetic error which was capable of being corrected under section 33(1)(a) of the Arbitration Act.

60. Insofar as the judgment of the Delhi High Court in case of ***N.T.P.C. Limited*** (supra) relied upon by Mr.Dada, learned senior counsel for the petitioners is concerned, Mr.Samdhani, learned senior counsel for the respondent no.1 distinguished the said judgment on the ground that the learned arbitrator has not passed any effective judicial

order after the arbitral award dated 7th January, 2019 was rendered but has corrected the typographical or computation or arithmetic errors which corrections are permissible under section 33(1)(a) of the Arbitration Act. Learned senior counsel also distinguished the judgment of the Supreme Court in case of **Dwarka Das** (supra) relied upon by Mr. Dada, learned senior counsel for the petitioners on the similar grounds.

61. Mr.Dada, learned senior counsel for the petitioners in rejoinder submits that only a single meeting was held by the learned arbitrator after filing an application dated 1st February, 2019 by the respondent no.1. He submits that extension of time to pass the said order under section 33(1)(a) of the Arbitration Act was given by the learned arbitrator directly in the order dated 16th April, 2019 and not prior thereto. He submits that even the reduction of amount already mentioned in the award dated 7th January, 2019 was not permissible to be made in the order dated 16th April, 2019. Learned arbitrator did not have any power to review the arbitral award already rendered. He had also become *functus officio*.

62. It is lastly submitted by the learned senior counsel for the petitioners that the learned arbitrator in any event could not have awarded compensation at the rate of Rs.3,00,000/- per month from the date of award till the date of handing over possession of the suit premises to the respondent no.1 which amount according to the petitioners is exorbitant.

63. Mr.Samdhani, learned senior counsel for the respondent no.1 submits that the suits filed by his clients were already disposed of on

12th September, 2006 in view of the parties having agreed to referred the disputes to arbitration. The appeal was preferred by the respondent no.1 against the interim order passed by the learned single Judge of this Court. The said appeal is still pending. He submits that since the Court Receiver is yet to be discharged and the accounts are yet to be drawn up by the Court Receiver and since the petitioners have continued the wrongful use and occupation of the suit premises, the compensation awarded by the learned arbitrator from the date of award till physical possession of the suit premises is handed over to the respondent no.1 by the petitioners is fully justified.

REASONS AND CONCLUSION :

64. It is an admitted position that the father of the petitioners i.e. said Mr. Sheru was a partner along with Mr. Yusuf Miyaji and Mr. Suleman in the respondent no.1 firm. The last partnership deed executed between the parties was dated 10th July, 1992. A recital in the said partnership deed clearly provided that the agreement for conducting business by the said Gulam Rasool Jamal (Sheru) had come to an end on 31st March, 1992 and all the parties to the partnership firm continued the said business again in the partnership as before with effect from 1st April, 1992 upon the terms and conditions recorded in the earlier deed of partnership dated 15th March, 1975. Under the said partnership deed dated 10th July, 1992, the said Mr. Sheru was entitled to 12% share in the net profits and losses of the business of the partnership firm, whereas Mr. Yusuf Miyaji was entitled to 63% share and said Suleman was entitled to 25% share.

65. It was also agreed by and between the partners that the said Mr.

Yusuf Miyaji would get salary of Rs.12,000/- per year, the said Mr. Suleman would get the salary of Rs.6,000/- per year and said Mr. Sheru would get salary of Rs.30,000/- per annum in addition to the suit profit and loss in the business of the respondent no.1. Clause 15 of the said partnership firm provided that in case of death of a partner, surviving partners shall continue the business of the firm or without taking heir or heirs of the deceased partner.

66. It is an admitted position that the petitioners were not admitted to the respondent no.1 firm as the partners at any point of time. A perusal of the written statement filed in the suits filed by the petitioner which was treated as written statement in the arbitral proceedings indicates that it was the case of the petitioners that the suit premises belonged to the respondent no.1 firm. The case of the petitioners was that the conducting agreement dated 15th March, 1975 was executed by and between the three partners, including the said Mr. Sheru, who was the father of the petitioners by which agreement the said Mr. Sheru was to pay to the other partners a sum of Rs.16,000/- jointly as royalty for the management towards their share in the business for a period of one year. It was the case of the petitioners that even after the execution of the partnership deed in the year 1992, the father of the petitioners continued the said business in the capacity of a partner as well as the conductor by mutual consent till his death. The petitioners and Wahid were allegedly helping their father in conducting the said business.

67. The petitioners have admitted the partnership deed dated 31st March, 1992 in the written statement filed before the learned arbitrator. In paragraph 3(f) of the arbitration petition. It is the case of the

petitioners that after the demise of their father Mr. Sheru on 26th August, 2002, the petitioners along with their brother Abdul Wahid continued to run the restaurant in the capacity as legal heirs of said Mr. Sheru at the request of other partners. The said partners had given oral assurance to the petitioners that the license to conduct the said business was irrevocable and they would be the partners in the said firm. The petitioners have also admitted in paragraph 43 of the written statement filed before the learned arbitrator that the petitioners and the said Wahid had not paid any compensation / royalty to the respondent no.1 from June, 2003 till the date of the suit. In the oral evidence of the witness examined by the petitioners, the said witness admitted that during the life time of the father of the petitioners, their father and the brothers until 2003 were used to do the accounting work and thereafter the question of doing any accounting work did not arise. He also admitted that the distribution of the profit was right upto May, 2003 until the incident of 2nd May, 2003.

68. The petitioners have neither filed any counter claim before the learned arbitrator nor in the said two suits filed by the respondent no.1 for declaration of the petitioners and Wahid as partners of the respondent no.1 or for any relief of any nature whatsoever including the share of 12% of their father Mr. Sheru in the partnership firm. The petitioners also failed to prove their alleged license to conduct the said business in any event after the demise of the said Mr. Sheru on 26th August, 2002. On the other hand, it was the case of the respondent no.1 that they had closed the partnership business on 2nd May, 2003 and had paid all the employees. It was also the case of the respondent no.1 that the petitioners were working as the employees in the respondent no.1 firm and were not conducting any business on behalf

of the firm.

69. Insofar as the submission of Mr.Dada, learned senior counsel for the petitioners that since the petitioners were conducting the business of the respondent no.1 or in any event, were allowed to conduct the said business as an agent of the Court Receiver, pursuant to the order passed by this Court on 5th August, 2005, they could not have been considered as the persons in wrongful use and occupation of the suit premises is concerned, in my view, there is no merit in this submission of the learned senior counsel for the petitioners. The last partnership deed on record i.e. 10th July, 1992, clearly indicated that the said conducting agreement in favour of the said Mr. Sheru had come to an end on 31st March, 1992 and thereafter, all the partners continued the said business again in partnership as before upon the terms and conditions recorded in the earlier deed of partnership dated 15th March, 1975. After considering the oral and documentary evidence, the learned arbitrator thus rightly rendered a finding of fact that the petitioners were in wrongful use and occupation of the premises with effect from 19th June, 2003 when the Court Receiver was appointed by this Court who found the petitioners in possession.

70. The petitioners could not prove any independent rights in the suit premises of the respondent no.1 either, as the partners or the owners of in any other capacity. The petitioners have also not admittedly paid any amount to the other partners of the respondent no.1, who admittedly held 88% share in the said partnership business and assets for last several years.

71. Insofar as the submission of Mr.Dada, learned senior counsel for

the petitioners that the learned arbitrator did not consider the F.I.R. filed by the petitioners against the partners of the respondent no.1 firm and other persons in the impugned award is concerned, merely because the F.I.R. was filed by the petitioners against the other partners of the respondent no.1 firm would not prove the legal possession of the petitioners in respect of the suit premises. The petitioners have admitted the title of the respondent no.1 in respect of the suit premises. The petitioners failed to prove their lawful possession in respect of the suit premises nor could prove the contents of the said F.I.R. against the respondent no.1 before the learned arbitrator.

72. Insofar as the relief granted in paragraph 21(i) of the arbitral award directing the petitioners to hand over vacant and peaceful possession to the respondent no.1 is concerned, a perusal of the grounds raised by the petitioners clearly indicates that there is no challenge to that part of the award. The only grounds raised in the arbitration petition insofar as the possession is concerned, are that the learned arbitrator could not have declared the petitioners in wrongful use and occupation of the suit premises. Learned senior counsel for the petitioners even during the course of argument did not raise any issue as to why his clients could not be directed to hand over vacant and peaceful possession of the suit premises to the respondent no.1.

73. Insofar as the award of compensation in paragraph 21(ii) for the period 19th June, 2003 to 12th September, 2005 is concerned, a perusal of the award indicates that the learned arbitrator has appointed Mr.Manian as a Valuer by consent of both the parties. Learned arbitrator had granted liberty to both the parties to cross-examine the

said valuer. The petitioners had admittedly cross-examine the said valuer before the learned arbitrator. The said valuer had recommended the compensation as far as the first period is concerned in the sum of Rs.3,80,116.80 ps. on the basis of the market rent for the premises at Rs.70/- per sq. ft. per month for the period 2002 to 2006. Learned arbitrator accordingly considered the evidence produced by the said valuer and the witness examined by the respondent no.1 and also considered the cross-examination of these two witnesses by the petitioners and held that on a practical basis, he could not discard the practical value put by men of commerce and did not consider the valuation of Rs.3,80,116.80 ps. suggested by the valuer and fixed the compensation only at Rs.1,20,000/- per month for the first period i.e. between 19th June, 2003 to 12th September. 2005.

74. Learned arbitrator in the order dated 16th April, 2019 corrected the said amount of Rs.32,40,000/- granted as compensation in the arbitral award to Rs.46,80,000/- and corrected the period from 3rd May, 2003 to 5th August, 2005 to 19th June, 2003 to 12th September, 2005. The compensation awarded by the learned arbitrator is based on the evidence led by both the parties and is reasonable. The findings rendered by the learned arbitrator on this claim is not perverse.

75. I am not inclined to accept the submission of Mr.Dada, the learned senior counsel for the petitioners that the learned arbitrator has accepted the valuation report submitted by Mr. Maniar in toto. The petitioners did not examine any other valuer or did not produce any other material on record to show that the compensation for any of the period considered by the learned arbitrator was on lower side and not as suggested by Mr.Maniar. Be that as it may, the learned arbitrator has

not accepted the compensation as suggested by Mr.Maniar, but has substantially reduced the amount of compensation suggested by Mr.Maniar. Insofar as the period of compensation awarded by the learned arbitrator is concerned, it is admitted position that the petitioners did not pay any compensation to the respondent no.1 from 3rd June, 2003 till the date which fact is admitted in paragraph 43 of the written statement filed by the petitioners before the learned arbitrator.

76. Insofar as the compensation amount and the period mentioned in paragraph 21(ii) by the learned arbitrator in the order dated 16th April, 2019 is concerned, there was computation error in mentioning the amount of Rs.32,40,000/- as compensation based on the compensation derived for the period 3rd May, 2003 to 5th August, 2005. The said date as 3rd June, 2003 was corrected rightly by the learned arbitrator as 19th June, 2003 when the Court Commissioner appointed by this Court visited the suit premises and found the petitioners in possession. The date mentioned as 5th August, 2005 was rightly corrected as 12th September, 2005 was appointed by this Court. In paragraph 10 of the arbitral award, the learned arbitrator had already rendered a finding that the petitioners had wrongly entered the suit premises on 19th June, 2003 and accordingly the date of 19th June, 2003 was adopted by the learned arbitrator as the date of wrongful use and occupation of the petitioners. In consonance with the date of 19th June, 2003 as the date of wrongful entry into possession of the premises by the petitioners, in paragraph 15(i), the learned arbitrator considered the compensation for the period from 19th June, 2003 to 5th June, 2005 till 12th September, 2005 when the Court Receiver was appointed. The date 5th August, 2005 was obviously a typographical error in the impugned award which is rightly corrected by the order dated 16th April, 2019.

77. Insofar as the compensation awarded in paragraph 21(iii) i.e. for the period 5th August, 2005 till the date of award is concerned, there was a typographical error in mentioning the date as 5th August, 2005 instead of 12th September, 2005. Learned arbitrator accordingly corrected the said date 5th August, 2005 as 12th September, 2005 i.e. the date on which the Court Receiver was appointed and consequently the learned arbitrator accordingly corrected the computation error and corrected the figure of Rs.95,40,000/- to Rs.87,60,000/- in the order dated 16th April, 2019.

78. Insofar as the quantification is concerned, though the learned arbitrator could have considered the computation higher than Rs.1,20,000/- per month, which was considered for the period 19th June, 2003 to 12th September, 2005, the learned arbitrator awarded such compensation for the period 5th August, 2005 till the date of award i.e. 7th January, 2019 only Rs.60,000/- per month i.e. at the amount of royalty fixed by the learned Court Receiver. Since the respondent no.1 has not challenged this part of the award, this Court cannot grant any relief and enhance the claim for compensation for the said period in this judgment. The petitioners are benefited by the liberal view taken by the learned arbitrator and cannot make any grievance in respect thereof. The amount of compensation mentioned by the learned arbitrator at Rs.95,40,000/- is reduced to Rs.87,60,000/- by correcting the computation error. I am not inclined to accept the submission made by Mr.Dada, learned senior counsel for the petitioners that the learned arbitrator has not corrected the computation error but has awarded any additional relief in favour of the respondent no.1.

79. Insofar as the reliefs granted in paragraph 21(v) i.e. the compensation at the rate of Rs.3,00,000/- per month from the date of award till handing over possession by the petitioners to the respondent no.1 is concerned, it is not in dispute that the petitioners are still continuing the possession in the premises owned by the respondent no.1 and depriving the other two partners who are having 88% share in the profit and loss and the assets of the respondent no.1. The learned arbitrator has rightly awarded the said claim of compensation at the rate of Rs.3,00,000/- per month. Though the valuer had recommended Rs.9,55,722.24 p.m., the learned arbitrator scaled down the said compensation suggested by the valuer to Rs.3,00,000/- per month after considering the evidence on record. Learned arbitrator also considered the reply to the questions from 37 to 47, 50 and 58 and accordingly arrived at *mesne-profit* of Rs.3,00,000/- per month from the date of award till the date of handing over vacant and peaceful possession of the suit premises to the respondent no.1. The petitioners who are continued to be in wrongful use and occupation of the suit premises for last several years and have been carrying on business in the suit premises cannot be allowed to urge that they are not liable to pay compensation to the respondent no.1 though having found in wrongful use and occupation of the suit premises.

80. Insofar as the submission of Mr.Dada, learned senior counsel for the petitioners that since the royalty amount was already fixed by the Court Receiver at the rate of Rs.1,20,000/- per month for the period 19th June, 2003 to 12th September, 2005 and thereafter at the rate of Rs.3,00,000/- per month from the date of award till the date of handing over peaceful possession of the premises is concerned, it is not in

dispute that during the pendency of the suits filed by the respondent no.1, this Court had appointed the Court Receiver in respect of the suit premises and had appointed the petitioners as the agents of the Court Receiver on payment of royalty. The said interim order appointing the petitioners as the agents of the Court Receiver came to an end when the learned arbitrator fixed the amount of *mesne-profit* in the final award. Court Receiver had not fixed any *mesne-profit* nor could fix any such *mesne-profit*. The *mesne-profit* is determined after proper enquiry by the learned arbitrator based on the evidence led by the parties. The amount of royalty thus fixed by the Court Receiver could not be considered as *mesne-profit* in the final award. There is thus no substance in this submission of the learned senior counsel for the petitioners.

81. Insofar as the submission of Mr.Dada, learned senior counsel for the petitioners that though the learned arbitrator had fixed the compensation from the date of the alleged wrongful use and occupation, the learned arbitrator has declared the respondent no.1 entitled to claim the full amount paid by the petitioners as the agency commission and interest, if any, is concerned, in my view Mr.Dada, learned senior counsel is right in this submission. The said amount of royalty was deposited by the petitioners with the Court Receiver pursuant to the interim order passed by this Court in the notice of motion filed by the respondent no.1 in those two suits which arrangement was continued during the pendency of the said suits and thereafter during the pendency of the arbitral proceedings. The said amount of royalty was paid during this interim arrangement for conducting business of the respondent no.1 subject to payment of *mesne-profit*.

82. In my view, the learned arbitrator could not have declared the respondent no.1 entitled to claim amount of royalty deposited by the petitioners with the Court Receiver along with interest accrued thereon, if any, in addition to the payment of *mesne-profit*. I am not inclined to accept the submission of Mr.Samdhani, learned senior counsel for the respondent no.1 that since the learned arbitrator had allowed the compensation only at the rate of Rs.60,000/- per month from 12th September, 2005 till the date of award, the learned arbitrator had rightly allowed the respondent no.1 to withdraw the said amount of agency commission deposited by the petitioners with the Court Receiver with accrued interest. In my view, this part of the award shows patent illegality and can be served from the other parts of the award and deserve to be set aside.

83. Insofar as the submission of the learned senior counsel that the learned arbitrator could not have entertained the application filed by the respondent no.1 under section 33(1)(a) of the Arbitration Act on the ground that the said application was not in accordance with section 33(1)(a) of the Arbitration Act and also on the ground that the learned arbitrator has awarded additional relief in the order dated 16th April, 2019 is concerned, in my view, there is no substance in this submission of the learned senior counsel. Learned arbitrator had already recorded the finding in the arbitral award that the petitioners were in wrongful use and occupation of the suit premises with effect from 19th June, 2003. The date of 19th June, 2003 was wrongly mentioned as 3rd May, 2003. The Court Receiver was appointed admittedly on 12th September, 2005. The date mentioned by the learned arbitrator as 5th August, 2005 was *ex-facie* typographical error. Learned arbitrator has

thus rightly corrected those dates and accordingly based on the correction of the dates, had rightly corrected the amounts in paragraph 21(ii) and (iii). In my view, learned arbitrator has not awarded any additional claim in the said order dated 16th April, 2019.

84. Insofar as the submission of the learned senior counsel for the petitioners that the learned arbitrator could not have passed the said order dated 16th April, 2019 after expiry of 30 days from the date of receipt of the application filed by the respondent no.1 is concerned, it is not in dispute that the said application under section 33(1)(a) of the Arbitration Act was made within 30 days from the date of receipt of the arbitral award by the respondent no.1. The said application was opposed by the petitioners by filing a reply on 14th February, 2019. Under section 33(6) of the Arbitration Act, the arbitral tribunal is empowered to extend the time if necessary for making a correction, giving interpretation or making an additional award under section 33(2) or 33(5) of the Arbitration Act.

85. In this case, the learned arbitrator in the said order dated 16th April, 2019 made it clear that he had extended the period for passing the said order on the ground that he was not able to make correction within the period of 30 days due to his difficulties in calling for a meeting. In my view, there is no substance in the submission made by Mr. Dada, learned senior counsel for the petitioners that no extension could have been granted by the learned arbitrator in the said order itself directly. Be that as it may, the petitioners themselves have considered the said order dated 16th April, 2019 for the purpose of computation of limitation under section 34(3) of the Arbitration Act. The fact remaining that after expiry of 30 days from the date of filing

an application under section 33(1)(a) of the Arbitration Act by the respondent no.1 before the learned arbitrator, the petitioners immediately did not file this arbitration petition under section 34 and waited for passing of an order by the learned arbitrator. The petitioners thus cannot be allowed to raise this issue.

86. Insofar as the judgment of the Supreme Court in case of **Dwarka Das** (supra) and the judgment of the Delhi High Court in case of **N.T.P.C. Limited** (supra) relied upon by Mr.Dada, learned senior counsel for the petitioners is concerned, both the Courts had considered the situation where the learned arbitrator had passed the order granting additional reliefs not contemplated under section 33(1) of the Arbitration Act. In my view, the principles laid down by the Courts in those judgments would not apply to the facts of this Court. The arbitration petition is devoid of merit except insofar as the directions issued by the learned arbitrator in paragraph 21(iv) of the arbitral award is concerned.

87. I therefore, pass the following order :-

a) The relief granted by the learned arbitrator in paragraph 21(iv) of the arbitral award is set aside. Rest of the award dated 7th January, 2019 and order dated 16th April, 2019 is upheld. It is made clear that the petitioners would be entitled to adjust the amounts already deposited by the petitioners as and by way of agency commission with the Court Receiver with accrued interest thereon while making payment of other monetary reliefs granted by the learned arbitrator in paragraph 21(ii), (iii), (v) and (vii). The petitioners would be also entitled to adjust the amount awarded by the learned arbitrator in

favour of the petitioners in paragraph 21 (vi) of the arbitral award.

b) Court Receiver, High Court of Bombay is directed to take vacant possession of the suit premises from the petitioners and handover the same to the respondent no.1 within four weeks from today.

c) The Court Receiver, High Court, Bombay to stand discharged after the petitioners complying with the directions issued in paragraph 21(i) of the arbitral award and after petitioners withdrawing the amount lying deposited with the Court Receiver in terms of paragraph 21 (iv) of the arbitral award. Court Receiver to permit the petitioners to withdraw the amount after obtaining possession of the suit premises from the petitioners.

d) Commercial Arbitration Petition (Lodging) No.746 of 2019 is partly allowed. In view of disposal of the Arbitration Petition, Notice of Motion (Lodging) No.1727 of 2019 does not survive and is accordingly disposed off.

e) There shall be no order as to costs.

f) All parties as well as the Court Receiver to act on the authenticated copy of this order.

(R.D. DHANUKA, J.)

88. Mr.Shah, learned counsel for the petitioners seeks stay of the order passed by this court. Since this court has already directed the Court Receiver to take vacant possession of the suit premises from the

petitioners and handover the same to the respondent no.1 within four weeks from today, I am not inclined to grant stay of the order passed by this court. Application for stay is accordingly rejected.

(R.D. DHANUKA, J.)