IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.07.2018

DELIVERED ON : 24.08.2020.

THE HONOURABLE MR. JUSTICE M.GOVINDARAJ

Arbitration.O.P.Nos.17, 117, 118 & 181 of 2010

O.P.No.17 of 2010

1.Abdul Majid Ahmed

2.Moosa Ahmed (Deceased)

3.Bilkis Moosa

4.Ashfaaq Moosa

5.Faheem Moosa

6.Zoheb Moosa

7.Arsheen
[Petitioners 3 to 7 are brought on record as legal heirs of the deceased 2nd petitioner as per order dated 19.10.2012 in A.No.4638 of 2012] ... Petitioners in O.P.No.17/2010

Vs.

1.Justice S.A.Kader
H33, Parvathy Street,
Kalakshetra Colony,
Besant Nagar,
Chennai – 600 090
Sole Arbitrator.

2.Hajira Bai

3.Dr.Akbar Omar

4.Aslam Omar

5.Amreen Omar

6.Abida Ahmed (Deceased)

7.Abdul Razak Osman

8.Mohamed Hanif Osman

9.Munira Haroon

10.Shirin Iqubal

11.Mohamed Abdul Majid

12.Farhaan Abdul Majid

13.Ashfaaq Moosa

14.Faheem Moosa

15.Zoheb Moosa

16.Osman Abdul Razak

17.Farzana Hanif

18.Hanif Bros

19.M/s.Hamotex Apparels Private Ltd.,
Rep.by its Managing Director,
Abdul Razak Osman,
New Door No.60, Godown Street,
Chennai – 1.

20.Ahmed A.Rehman

21.Fuad Ahmed

22.Afroz Merchant ... Respondents

O.P.No.117 of 2010

1.Dr.Akbar Omar

2.Aslam Omar (Deceased)

3.Amreen Omar

4.Seema Aziz Paniwala

5.Aalim Aslam Omar

6.Suleiman Aziz Omar

7.Nargis Imar
[Petitioners 4 to 7 are brought on record as legal heirs of the deceased Aslam Omar 2nd petitioner as per order of this Court dated 25.03.2014 in A.No.2138 of 2014] ... Petitioners in O.P.No.117/2010

Vs.

1.Justice S.A.Kader
H33, Parvathy Street,
Kalakshetra Colony,
Besant Nagar,
Chennai – 600 090
Sole Arbitrator.

2.Hajira Bai

3.Abdul Majid Ahmed

4.Moosa Ahmed

5.Abida Ahmed (Deceased)

6.Abdul Razak Osman

7.Mohamed Hanif Osman

8.Munira Haroon

9.Shirin Iqubal

10.Mohamed Abdul Majid

11.Farhaan Abdul Majid

12.Ashfaaq Moosa

13.Faheem Moosa

14.Zoheb Moosa

15.Osman Abdul Razak

16.Farzana Hanif

17.Hanif Bros

18.M/s.Hamotex Apparels Private Ltd.,
Rep.by its Managing Director,
Abdul Razak Osman,
New Door No.60, Godown Street,
Chennai – 1.

19.Ahmed A.Rehman

20.Fuad Ahmed
21.Afroz Merchant ... Respondents

O.P.No.118 of 2010

1.Ahmed A.Rehman
2.Fuad Ahmed .... Petitioners

Vs.

1.Justice S.A.Kader
H33, Parvathy Street,
Kalakshetra Colony,
Besant Nagar,
Chennai – 600 090
Sole Arbitrator.

2.Hajira Bai

3.Abdul Majid Ahmed

4.Moosa Ahmed

5.Dr.Akbar Omar

6.Aslam Omar

7.Amreen Omar

8.Abida Ahmed (Deceased)

9.Abdul Razak Osman

10.Mohamed Hanif Osman

11.Munira Haroon

12.Shirin Iqubal

13.Mohamed Abdul Majid

14.Farhaan Abdul Majid

15.Ashfaaq Moosa

16.Faheem Moosa

17.Zoheb Moosa

18.Osman Abdul Razak

19.Farzana Hanif

20.Hanif Bros

21.M/s.Hamotex Apparels Private Ltd.,
Rep.by its Managing Director,
Abdul Razak Osman,
New Door No.60, Godown Street,
Chennai – 1.

22. Afroz Merchant ... Respondents

O.P.No.181 of 2010

Abduk Razak Osman .... Petitioner

Vs.

1.Justice S.A.Kader
H33, Parvathy Street,
Kalakshetra Colony,
Besant Nagar,

Chennai – 600 090
Sole Arbitrator.

2.Hajira Bai

3.Abdul Majid Ahmed

4.Moosa Ahmed

5.Dr.Akbar Omar

6.Aslam Omar

7.Amreen Omar

8.Mohamed Hanif Osman

9.Munira Haroon

10.Shirin Iqubal

11.Mohamed Abdul Majid

12.Farhaan Abdul Majid

13.Ashfaaq Moosa

14.Faheem Moosa

15.Zoheb Moosa

16.Osman Abdul Razak

17.Farzana Hanif

18.Hanif Bros

19.M/s.Hamotex Apparels Private Ltd.,
Rep.by its Managing Director,
Abdul Razak Osman,
New Door No.60, Godown Street,
Chennai – 1.

20.Ahmed R.Rahman

21.Fuad Ahmed

22.Afroz Merchant .... Respondents

Common Prayer in O.P.Nos.17, 117, 118 & 181 of 2010: Original Petitions filed under Section 34 of the Arbitration & Conciliation Act of 1996, to set aside the Arbitral award passed in Case No.502 of 2003 dated 07.10.2009 by the Arbitrator.

For Petitioners
In O.P.Nos.17,117 & 118/2020 : M/s.Gupta and Ravi
In O.P.No.181 of 2010 : Mr.A.K.Mylsamy & Associates

For Respondents
In O.P.Nos.17 of 2010 : Mr.S.Natana Rajan [for R2]
Mr.A.K.Mylsamy & Associates [for R7]
In O.P.No.181 of 2010 : Ms.A.Sushmaharini for Mr.N.Muthukumar [RR8, 9, 10 & 17]
Mr.S.Natana Rajan [for R2]
In O.P.Nos.117 & 118 of 2010 : Mr.A.K.Mylsamy & Associates [For R6]
Mr.S.Natana Rajan [for R2]

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COMMON ORDER

Originally four items of properties belonged to late Hajee Mohammed, Hajee Moosa and late Amna Bai Hajee Moosa. They had 2 sons and 3 daughters. After their death the properties devolved on their legal heirs namely;

(i) Ahammed Mohammed	-	2/7 shares
(ii) Osman Mohammed	-	2/7 shares
(iii) Kulsum Bai Kareem	-	1/7 shares
(iv) Zubaida Osman Latif	-	1/7 shares
(v) Hajira Bai	-	1/7 shares

2. The two daughters namely Kulsum Bai Kareem and Zubaida Osman Latif settled their shares in favour of some family members, the details of which is not necessary for the disposal of the above original petitions. The 1/7th share of the daughter Hajira Bai remained intact and she filed a suit for partition of her 1/7th share and for mesne profits in C.S.No.502 of 2003 before this Court. In a meeting held between the parties on 22.09.2005, wherein the shares and issues for reference were reduced down in writing as follows:-

MINUTES OF THE MEETING HELD AT THE OFFICE OF MR.B.T.SESHADRI

ON 22.09.2005 BETWEEN 5.30 TO 6.30 PM

PRESENT:

1.MR.MOINUDDIN MOHAMMAD

2.MR.ABDUL RAZAK OSMAN

3.MR.MOOSA AHMED

4.MR.B.T.SESHADRI

5.MR.ZAFFARULLAH KHAN

The meeting related to identifying a solution for the partition by Meets and Bounds of the esteate of Late Hajee Mohammed, Hajee Moosa and late Amna Bai Hajee Moosa. After detailed discussion it was resolved that apportionment of the estate as of 1988 and detailed below is unanimously accepted.

1.Property at No.10, Purasawakkam High Road, Vepery, Chennai – 7, Roxy Theatre.

Ahmed Mohammad Family	-	*28.56% (2/7th share)*
Osman Mohammad Family	-	*57.15% (4/7th share)*
Hazara Bai Moinudden	-	*14.29% (1/7th share)*

2.Property at No.11, Purasawakkam High Road, (Brixton House), Chennai – 7.

Ahmed Mohammad Family	-	*28.56% (2/7th share)*
Osman Mohammad Family	-	*57.15% (4/7th share)*
Hazara Bai Moinudden	-	*14.29% (1/7th share)*

3.Property at No.12, Purasawakkam High Road, (Majid Manzil) Chennai – 7.

Ahmed Mohammad Family	-	*28.56% (2/7th share)*
Osman Mohammad Family	-	*57.15% (4/7th share)*

Hazara Bai Moinudden - 14.29% (1/7th share)

4.Property at No.60, Godown Street, Chennai – 600 001.

Ahmed Mohammad Family - 57.15% (4/7th share)

Osman Mohammad Family - 28.56% (2/7th share)

Hazara Bai Moinudden - 14.29% (1/7th share)

5.Property at Erskine Road, Mumbai

Ahmed Mohammad Family - 57.15% (4/7th share)

Osman Mohammad Family - 28.56% (2/7th share)

Hazara Bai Moinudden - 14.29% (1/7th share)

Towards allocation of properties, towards the share by Meets and Bounds it was resolved that the matter be referred to an Arbitrator whose award shall filed into Honourable High Court and a Decree be obtained in terms of the said Award.

It was also resolved that the Arbitration references, would pertain to the following issues:-

a.Allotment of Property in accordance with aforementioned ratio.

b.Settlement of rental arrears between the parties inter se.

c.Settlement of Statutory dues in respect of the estate.

It was also resolved that Honble Justice S.A.Khader, Retired Judge Honourable High Court, Madras, be requested to Arbitrate above issues. In the event of Justice S.A.Khader expressing his inability to Arbitrate under such circumstances, Justice M.A.Hadi be requested to Arbitrate.

It was also resolved that all expenses pertaining to the

Arbitrator's fee and the Valuer's fees would be born by the Branch Mr.Ahmed Mohammad, Mr.Osman Mohammad and Hazara Bai Moinudden in proportion to their entitlement.

3. Pursuant to the agreement an application vide Application No.1589 of 2006 in the above suit for appointment of Arbitrator, Mr.Justice S.A.Khader, a Retired Judge of this Court, which was ordered on 12.04.2006. The operative portion of the order reads as under:-

> *“Under such circumstances, the matter is referred to the Arbitrator, Mr.Justice.S.A.Khader, a Retired Judge of this Court, for the purpose of taking a decision in the partition. Apart from that, the parties are at liberty to raise all the contentions. In particular, what has been raised herein above. The Arbitrator is also requested to look into the contentions raised both factual and legal position, and to take a decision in the matter. The application is ordered accordingly.”*

4. The petitioners in the Original Petition and other respondents filed their counter around August 2006. On the basis of the claims the Arbitrator framed the following '6' issues for resolution.

"(1) What is the mode in which Item 1 of the Schedule bearing present Door No.10, Purasawakkam High Road, Chennai 7, is to be divided amoung the sharers?

(2) What is the mode in which Item 2 of the Schedule bearing present Door No.11 & 12, Purasawakkam High Road, Chennai -7, are to be divided amount the sharers?

(3) How is Item 3 of the Schedule bearing Door No.60,Godown Street, Chennai, is to be divided among the sharers?

(4) How is Item 4 of the Schedule in Erskin Road, Mumbai to be divided amount the sharers?

(5) What is the amount of rental income payable by the 7th respondent to other sharers in respect of his possession and management of Item 1 of the Schedule?

(6) What is the amount of rental income payable by the 2nd respondent to other sharers in respect of his possession and management of Items 2,3 & 4 of the Schedule?"

5. Since Item 1 & 2 namely Roxy Theater and adjacent buildings could not be divided, they were sold and the sale proceeds were shared between the family members amicably. It was recorded before the Arbitrator. Hence the first two issues were settled.

6. In so far as the 3rd issue is concerned the property contained several shops and the same was partitioned unit wise and allotments were made

taking into consideration of the requests made by the share holders. The parties accepted to pay & receive owelties as decided by the Arbitrator.

7. In so far as the 4th issue, the property was purchased by Group II consisting of respondents 1 to 5, 11 to 15 and 20 to 22 in the claim petition and they were ordered to deposit the money as apportioned to the other parties.

8. Thus except the 5th and 6th other issues were amicably solved. In so far Issue no.5 & 6, the issue is with regard to sharing of mesne profits gained from the properties under the management of 2nd & 9th respondent. Except for Group II, where as mentioned above, consisting of respondents 1 to 5, 11 to 15, and 20 to 22 and Group III consisting of 7th respondent and his son, it was settled between parties.

9. The Arbitrator has held that Group II & Group III have not raised any claim with respect to arrears of rental and other income from the properties and hence it cannot be decided by the Tribunal as it did not fall within the scope of reference.

10. Challenging this part of the award, the petitioners belonging to Group II have preferred the above Arbitration Original Petitions'.

11. I have heard the elaborate arguments advanced by the parties to the litigation.

12. At the outset, it can be safely inferred that the award is accepted with respect to partition of properties. Only in respect of sharing the rental income payable by 7th respondent and 2nd respondent *inter-se*, the dispute resolves. Except for the 2nd respondent and 7th respondent it has been determined by the Arbitrator and it need not be interfered.

13. As stated above, it has to be seen as to whether the issue falls within the ambit of Arbitration or exceeds the scope of reference. As admitted by all parties, this Court by its order dated 12.04.2006, granted liberty to raise all the contentions before the Arbitrator and the Arbitrator was also requested to look into the contentions raised both factual and legal position.

14. The learned counsel for the petitioners would vehemently contend that the minutes of the meeting held between parties dated 22.09.2005 made a specific reference as to "settlement of rental arrears between the parties *inter-se*". Therefore, the understanding between the parties was to appoint an Arbitrator to resolve the above issue also. Therefore it cannot be said that it will fall out of the scope of reference. He would rely on the judgment of the Hon'ble Supreme Court in ***V.H.Patel & Company and others Vs. Hirubhai Himabhai Patel and others [(2000) 4 SCC 368]***, for the proposition that when the parties were granted liberty to raise all issues, Arbitrator is bound to decide all the issues raised, he cannot leave out the issue only with respect to one party while deciding on the said issue in respect of other parties. Hence it amount to bias. The relevant paragraphs read as under:-

" 8. The contention of the learned counsel for the petitioners in this case pertains to the scope of reference to arbitration which turns around the terms of the order made by this Court on February 15, 1991 in Special Leave No. 11533 of 1990 and the Consent Terms on which the said order is based. It is no doubt true that in the two suits that had been filed there is no specific prayer for dissolution of the firm. The Consent Terms indicate that disputes relating to the rights and obligations of the parties arising out of the agreement dated July 3, 1987 and retirement deed dated August 1, 1987 and to

the user of the trade marks in question were indeed referred to the arbitrator. The High Court is conscious of the question that the relief for dissolution of the firm was not one of the matters on which there was a dispute which was referred to arbitrator. However, the High Court is of the view that though in the plaint there is no prayer for dissolution of firm it was possible for the respondent to claim that relief in the civil suit and as the civil suit was withdrawn pursuant to the agreement reached before this Court, such a prayer is, therefore, made before the arbitrator as all the disputes between the parties in the suits filed by the parties were referred to the arbitrator. The High Court placed strong reliance upon the decision of this Court in Orissa Mining Corporation Ltd. v. M/s Prannath Vishwanath Rawlley (supra). Distinction is sought to be made between the aforesaid case and the present case on the basis that the reference was made of all the disputes between the parties, a counter claim in the written statement could arise only after the order of reference and in those circumstances, the reference would cover all disputes between the parties, including one raised in the counter claim. In answer to this aspect it is noticed that the first respondent filed a suit as partner of the firm M/s. V.H. Patel & Company for enforcing some of his rights as a partner and seeking dissolution of the firm is also a right of a partner and had the suit remained pending, it was possible for him to amend his plaint seeking an order for dissolution of the firm, the cause of action for seeking *such relief would be the same on which his claim in the suit was based. Cause of action for a counter claim can be different from the cause of action for the suit and, therefore, it would be permissible to hold that a claim which is based on the same cause of action on which the suit is based cannot be considered. The High Court is of the view that once the matter is referred to the arbitrator his jurisdiction to consider all questions raised before him by the parties which relate to the dispute could be considered and driving a party to a separate litigation for the relief which relates to the dispute referred to the arbitrator would not be proper. Therefore, the High Court held that the it is open to respondent No. 1 to claim a decree for dissolution of the firm in exercise of his rights as a partner of the firm which he could have made by amending his pleadings in the civil suit and, therefore, it is within the jurisdiction of the arbitrator to consider that question. It is further to be seen that the parties are from the same family, there were disputes between them, they tried to resolve the disputes by entering into an arrangement which ultimately failed.*

....

12. So far as the power of the arbitrator to dissolve the partnership is concerned, the law is clear that where there is a clause in the Articles of Partnership or agreement or order referring all the matters in difference between the partners to arbitration, arbitrator has power to decide whether or not the *partnership shall be dissolved and to award its dissolution. [See:Phoenix v. Pope & Ors., (1974) 1 All E.R. 512]. Power of the arbitrator will primarily depend upon the arbitration clause and the reference made by the court to it. If under the terms of the reference all disputes and difference arising between the parties have been referred to arbitration, the arbitrator will, in general, be able to deal with all matters, including dissolution. There is no principle of law or any provision which bars an arbitrator to examine such a question. Although the learned counsel for the petitioner relied upon a passage of Pollock & Mulla, quoted earlier, that passage is only confined to the inherent powers of the court as to whether dissolution of partnership is just and equitable, but we have demonstrated in the course of our order that it is permissible for the court to refer to arbitration a dispute in relation to dissolution as well on grounds such as destruction of mutual trust and confidence between the partners which is the foundation therefor."*

15. According to the learned counsel for the petitioner the scope of reference cannot be understood on the actual wording used in the course of the order made by this Court or the memorandum concerned filed before this Court, but it should be looked from the angle as to what was the spirit behind the reference to the arbitration. The idea was to settle all the disputes between the

parties and not to confine the same to any one or the other issue arising thereunder.

16. He would further contend that the petitioners filed a statement of claim dated 29.09.2009. It was referred as a document in the award. Inspite of receiving the same, the failure to consider the same and rejecting the claim is illegal and the conduct of Arbitrator in ignoring the reference with respect to settlement of rental arrears between parties *inter-se*. To buttress his argument he would rely on ***(2017) 5 SCC 743 [Sharma and Associates Contractors Private Limited Vs. Progressive Constructions Limited],*** for the proposition that ignoring the terms of reference would amount to jurisdictional error.

17. The Arbitrator, while deciding the issue of rental arrears payable by the 7th respondent with respect to other claimants, ought to have considered the same in the case of the petitioners exercising its discretionary powers. The learned counsel brought the attention of the Court to the judgment of ***Hindalco Industries Ltd. Vs. Union of India and others [(1994) 2 SCC 594],*** wherein it is observed as follows:

" 7. It is settled law that it is no longer necessary to specifically ask for general or other relief apart from the specific relief asked for. Such a relief may always be given to the same extent as if it has been asked for provided that it is not inconsistent with that specific claim which the case raised by the pleadings. The court must have regard for all the relief and look at the substance of the matter and not its forms. It is equally settled law that grant of declaring relief is always one of discretion and the court is not bound to grant the relief merely because it is lawful to do so. Based on the facts and circumstances the court may on sound and reasonable judicial principles grant such declaration as the facts and circumstances may so warrant. Exercise of discretion is not arbitrary. If the relief asked for is as of right. something is included in his cause of action and if he establishes his cause of action, the court perhaps has been left with no discretion to refuse the same, But when it is not as of right, then it is one of the exercise of discretion by the court. In that event the court may in given circumstances grant which includes 'may refuse' the relief. It is one of exercising judicious discretion by the court. Same consideration would apply to the causes under the Act and the Tribunal has such discretion. The Tribunal, while keeping justice, equity and good conscience at the back of its mind, may when compelling equities of the case oblige them, shape the relief consistent with the facts and circumstances established in the given cause of action. Any uniform rigid rule,

if be laid, it itself turns out to be arbitrary. If the Tribunal thinks just, relevant and germane, after taking all the facts and circumstances into consideration, would mould the relief, in exercising its discretionary power and equally would avoid injustice. Likewise when the right to remedy under the Act itself arises on the presence or absence of certain basic facts, at the time of granting relief, may either grant the relief or refuse to grant the same. It would be one of just and equitable exercise of the discretion in moulding the ancillary relief. It is not as of right. In Associated Provincial Picture Houses Ltd. case' under Sunday Entertainments Act, 1932, the licensing authority while granting permission to exhibit cinematographs, imposed certain conditions, prohibiting the children under age of 15 years to be admitted in the theatre. It was challenged as being arbitrary. Dealing with the discretionary power of the licensing authority, the Court of Appeal held that the law recognised certain principles on which discretion must be exercised but within the four comers of those principles. The discretion is not absolute one. The exercise of such a discretion must be a real exercise of the discretion. If in any statute conferring the jurisdiction, there are to be found, expressly or by implication, matters to which the authorities exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject- matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter *in question, they must disregard those matters. Expressions have been used in cases where the powers of local authorities came to be considered relating to the sort of thing that may give rise to interference by the court. Bad faith, dishonesty - those, of course, stand by themselves, unreasonableness, attention given to extraneous circumstances, disregard of public policy, and things like that have all been referred to as being matters which are relevant for consideration. The discretion must be exercised reasonably. A person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said to be acting unreasonably."*

18. On these grounds, the petitioners would pray for setting aside the Award on the basis of ratio laid down ***ONGC Ltd Vs. Saw Pipes Ltd [(2003) 5 SCC 705]*** *and* ***[2008 – 1 -L.W.814].***

19. Per contra, the learned counsel appearing for 7th respondent would contend that it is true that the Hon'ble High Court granted liberty to the parties to raise all issues while referring the matter to Arbitration. The parties

have raised claims on all issues. Curiously, the 2nd and 7th respondent omitted to raise the claim as he was in possession and enjoyment of a valuable property in Godown street. He deliberately avoided the issue of payment of rental arrears as it would affect him / put him adversely. The Arbitrator was appointed on 12.04.2006. The issues were framed as early as in 2006 and the process of selling the properties mentioned in item 1 & 2 consumed more time. The award was passed on 07.10.2009. Just a week before, on 29.09.2009, the statement of accounts was circulated but it was not properly placed before the Arbitration. Therefore, without raising any claim as to payment of arrears of rental income, cannot raise any hue and cry. The Arbitrator has rightly accepted the objections raised by the parties that award shall not be granted to relief not claimed.

20. A perusal of the order dated 12.04.2006, clearly reveal that an issue with regard to compensation for relinquishment of the share by two daughters was very meager. The Court observed that the issues can be raised before the Arbitrator and it could be resolved. Therefore parties were granted liberty to raise all the contentions, in particular raised therein. The Arbitrator was requested to look into the contentions raised, both factual and legal positions and to take a decision.

21. Accordingly, it is incumbent on the parties to raise all the contentions with regard to partition. Those who were at the receiving end raised the issue of mesne profits and filed the statement of accounts and their claims before the Arbitrator. The 2nd and 7th respondent who were in possession and enjoyment of the properties and were receiving the income fetched, have not whispered anything on this aspect. Only when they were directed to produce the accounts and objections to the claim made by other parties, they came out with details. The Arbitrator considered the claims and passed an award on this aspect. But the petitioners have produced their claim statement on 29.09.2009 on the eve of passing the award. But strong objections were raised, particularly by 7th respondent therein, that the Arbitrator has no jurisdiction to decide a claim which was not raised. Hence the Arbitrator has not decided the issue in respect of which the claim was not raised. It is well settled that the Arbitration Tribunal is bound by the terms of reference. In this case the direction was to decide partition and all the contentions raised by parties. The petitioners herein raised their right to get the appropriate share. The counter filed on their side has not raised any issue of entitlement of rental income and no claim was made. As held by the Hon'ble Supreme Court in Sharma & Associates case "an Arbitrator is not a conciliator and cannot ignore law or misapply law in order to do what he thinks just and reasonable". The judgment relied on by the petitioner in

V.H.Patel Company and Others, the Arbitrator did not entertain the counter claim, but in the present case no such counter claim was raised. Mere filing of statement of accounts as to the money payable to them will not take the nature of claim as construed by law. There was no claim made by the petitioners and hence the arbitrator has held that he cannot exceed his jurisdiction in taking up contentions not raised. Hence without raising the contentions as to payment of rental arrears, the petitioners cannot find fault with the award of the arbitrator. The claim was neither rejected or closed but it was left open. The Arbitrator has bound himself with the directions of this Court while referring the matter to arbitration. The understanding between the parties in the minutes dated 22.09.2005, prior to the reference is of no consequence. If there is some consensus at the time of reference before the Court or post reference might have had some impact. Therefore, the award passed in terms of order of reference by this Court is in order.

22. The Hon'ble Supreme Court in the judgment of ***ONGC Ltd Vs. Saw Pipes Ltd [(2003) 5 SCC 705]*** has held that grounds to interfere with an award is limited. It is observed as under:-

> "31. Therefore, in our view, the phrase 'Public Policy of India' used in Section 34 in context is required

to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar's case (supra), it is required to be held that the award could be set aside if it is patently illegal. Result would be - award could be set aside if it is contrary to: -

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void."

23. In the present case this Court do not find that the award is unfair

or unreasonable shocking the conscience of the Court. In ***MMTC Ltd Vs. Vedanta Ltd [2019 4 SCC 163]*** it is held that patent illegality held to mean contravention of the substantive law of India, contravention of 1996 Act and contravention of the terms of the contract. In the case on hand, I do not find any contravention of substantive law of India or contravention of terms of contract. On the other hand, it is only a finding of fact. In ***Swan Gold Mining Ltd Vs. Hindustan Copper Ltd [(2015) 5 SCC 739]*** it is categorically held that "the Arbitrator appointed by the parties is the final Judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of contract were not correctly interpreted by him".

24. In view of the ratio laid down by the Hon'ble Supreme Court in battery of cases repeatedly this Court is not inclined to interfere with the award on the factual finding. I do not find any patent illegality on the face of the award. It is well settled that there is scope for two views, the decision of the arbitrator is final. The Court cannot sit on the award and re-appreciate the factual aspects as an Appellate Court. The Arbitrator had given his finding setting out reasons therefor. Therefore also within the limited scope specified under Section 34 of the Arbitration & Conciliation Act, 1996, the award cannot be interfered.

25. However, it is made clear that the petitioners are entitled to work out their remedy in accordance with law, as the issue has been left open by the Arbitrator.

In fine, the above Arbitration Original Petitions stand dismissed.

24.08.2020

Index: Yes/No
Internet:Yes
Speaking order / Non-Speaking Order

M.GOVINDARAJ, J

kpr

O.P.Nos.17, 117, 118 & 181 of 2010

24.08.2020