

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION**

APPELLATE SIDE

FMA 1390 of 2022

**Ashiana Represented by its Proprietor
Ashoke Kumar Shaw**

Vs

Biva Dutta Roy & Ors.

Before: The Hon'ble Justice Arijit Banerjee

&

The Hon'ble Justice Om Narayan Rai

For the Appellant

Mr. Arijit Bardhan, Adv.
Mr. Sarosij Dasgupta, Adv.
Mr. Biswaroop Mukherjee, Adv.
Ms. Saheli Bose, Adv.
Mr. Gourab Mondal, Adv.

For Respondent No. 1

Mr. Sudip Deb, Sr. adv.
Ms. Ipsita Ghosh, Adv.

For Judgment

24.12.2025

Arijit Banerjee, J. :-

1. This appeal is directed against a judgment and order dated February 8, 2022, passed by the learned Additional District Judge, 3rd Court, North-24 Parganas, in Misc. Case no. 47 of 2017 [Arbitration] being an application filed by the appellant herein under Section 34 of the Arbitration and Conciliation Act, 1996 (in short '1996 Act'). The application was filed challenging an arbitral award dated December 12, 2016, passed by a learned sole Arbitrator in an arbitration

proceeding initiated by the opposite party no. 1 herein (claimant and in short referred to as 'Biva') against the appellant and the proforma respondents herein (compactly referred to as 'Ashiana').

2. Three partnership deeds were executed by and between Biva and Ashiana for developing three different properties. Under a partnership deed dated July 19, 2003, the partners proposed to build an apartment called 'Bhagawati Apartment'. By another partnership deed dated July 19, 2003, the partners proposed to construct 'Shyamkunj Apartment'. By a third partnership deed dated January 25, 2002, the partners decided to construct 'Subhankar Apartment'.

3. All the three projects were completed. Biva claimed that she did not receive her share of profits in each of the projects. She filed three civil suits being Title Suit No. 516 of 2008, Title Suit No. 517 of 2008 and Title Suit No. 523 of 2008 before the learned Civil Judge (Senior Division) 1st Court at Barasat claiming her share of profits in the three projects. However, the suits were dismissed but not on merits.

4. Thereafter, Biva served notices of arbitration on the other partners of the aforesaid three partnerships, invoking the arbitration clause in each of the partnership deeds. Since, no Arbitrator could be appointed by consent of the parties, Biva filed three applications under Section 11 of the 1996 Act in this Court being A.P. No. 426 of 2010, A.P. No. 427 of 2010 and A.P. No. 428 of 2010, for appointment of an Arbitrator. By an order dated December 4, 2012, a learned Judge of this Court disposed of the three arbitration petitions by appointing a learned Advocate of this Court as the sole Arbitrator.

5. The parties filed their pleadings before the Arbitrator. Evidence was tendered on behalf of the claimant. The Arbitrator made and published his award, the relevant portion whereof reads as follows: -

“After the pleadings were filed, the evidence tendered and arguments made by both parties, it appeared that the only disputes is that dispute

relating to the accounts of the three Partnership Firms. Despite repeated directions given by me none of the parties could produce the entire books of accounts, bank statements, audited accounts or income-tax returns. Even after going through the pleadings and evidence on record, it was not possible for the Arbitrator to arrive at a finding with regard to the entitlement of the claimant in each of the Partnership Firms. The claimant, on whose behalf her husband Mr. Dipankar Dutta Ray appeared, had all along submitted that she was not in possession of the complete books of accounts and the same were in possession and control of the respondent no.1. The respondent no.1 has also denied being in possession of any books of accounts other than those produced and tendered in evidence before the Arbitrator. No other partner appeared before the Arbitrator.

After the hearing was concluded the Arbitrator again called both the parties and enquired of them whether they would agree to the appointment of a Chartered Accountant to scrutinize the accounts of the three Partnership Firms as the Arbitrator felt that an expert was required to scrutinize the Books of Account and the entries made therein. Before the Arbitrator both parties agreed to the appointment of a Chartered Accountant. However, later the respondent no.1's Advocate by letter dated August 1, 2016, addressed to the Arbitrator refused to share the remuneration of the Chartered Accountant and declined to give any consent to the appointment of any Chartered Accountant. The Arbitrator appointed S.N. Guha & Co., Chartered Accountants, to scrutinize the accounts of the three partnership firms. The Chartered Accountant filed its Report dated 7 November, 2016, before the Arbitrator. Copies of the Report were sent to both the parties and the last sitting was held on 16 November, 2016. The respondent was not present at the sitting. The

counsel for the claimant submitted that he does not take any exception to the Report of the Chartered Accountant.

The Arbitrator's finding in respect of the dues of the claimant in each of the three projects is based on the evidence on record and the Report of the Chartered Accountant.

i) SUBHANKAR APARTMENTS

Admittedly the claimant had 25% share in this partnership. A copy of the Balance Sheet in this Partnership for the year ended March 31, 2006 being Exhibit No.5 at page 56 of the Evidence in Chief of the claimant, a sum of Rs. 1,03,526/- is shown the amount payable to the claimant.

ii) SHYAMKUNJ APARTMENTS

Admittedly the claimant's share of profit was 25% in this partnership. Clause 4 of the said Deed records provides that the claimant initially contributed to Rs.2.00 lacs as capital in the firm. She further contributed a sum of Rs.1.25 lacs after execution of the Partnership Deed. The claimant's 25% of the share of profit amounts to Rs. 10,72,303/-. The claimant had admittedly received a sum of Rs.6,50,000/-. The claimant is, therefore, entitled to receive the balance amount of Re.7,47,303/- in respect of Shyamkunj Apartment.

iii) BHAGAWATI APARTMENT

Admittedly the claimant's share in respect of this partnership is 17.5%. The Partnership Deed records that the claimant had initially contributed Rs.1.5 lacs. The Balance Sheet records that the claimant contributed a further sum of Rs.3.40 lacs to this Partnership. The share of profit of the

claimant is Rs.4,92,010/-. The claimant contributed a sum of Rs.4.90,000/-as capital. The claimant has also admittedly received a sum of Rs.8,22,500/-. Therefore, in my view in respect of Bhagawati Apartment, the claimant is entitled to the balance amount being a sum of Rs. 1,59,510/-.

The claimant is, therefore, entitled to an Award for the sum of Rs. 10,10,339/-. The claimant shall be entitled to interest at the rate of 6% from 15th July, 2008, the date when the claimant requested for reference of the disputes to arbitration, to 6th November 2013 the date the Arbitrator entered reference of the dispute, and, thereafter at the rate of 10% till the date the claimant's claims are paid by the respondent no.1. The respondent no. 1 shall also pay a sum Rs 17,250 to the claimant being its 50% share of the remuneration of the Chartered Accountant. Since several adjournments have taken by both parties no costs are awarded.”

6. The appellant herein, i.e., ‘Ashiana’ filed an application for setting aside the Award. By the judgment and order impugned herein, such application was dismissed. Hence this appeal.

7. Appearing for the appellant Mr. Arijit Bardhan, learned Advocate, submitted as follows: -

(i) The award is an un-reasoned one and hence is violative of Section 31(3) of the 1996 Act.

(ii) The Arbitrator has taken an unfathomable and impossible view.

(iii) The Arbitrator has committed an error of jurisdiction by wandering outside the contract and dealing with matters not referred to him. Hence, the Award is bad on the ground of being patently illegal.

(iv) The conclusions of the Arbitrator are based on no evidence and are perverse.

(v) The learned Trial Judge did not examine whether or not the Award is vitiated by patent illegality appearing on the face of the Award and has therefore, ignored Section 34(2A) of the 1996 Act.

(vi) The award is based entirely on a purported expert report prepared by a Chartered Accountant firm, unilaterally appointed by Biva. Such report is nothing but a mere opinion and is biased in favour of Biva at whose instance the report was prepared. Expert evidence is a weak type of evidence which is not substantive in nature. An adjudicating authority must be cautious while evaluating expert evidence. It is never safe to solely rely on such evidence. Expert evidence as regards a fact is not to be regarded as conclusive proof of such fact and the adjudicating authority must seek independent and reliable corroboration thereof. In this connection reliance was placed on the Hon'ble Supreme Court's decision in the case of ***Chennadi Jalapathy Reddy v. Baddam Pratapa Reddy & Anr., reported at (2019) 14 SCC 220, paragraphs 10 and 12 and 13.***

(vii) The alleged expert did not record reasons in support of his conclusions. In fact, he admitted that the data and material furnished, on the basis of which his report was prepared, were incomplete. The said report is perverse. Further, such report could not be used as evidence by the Arbitrator since the so-called expert was not examined or allowed to be cross-examined.

(viii) The report of the Chartered Accountant records that they “were not in a position to certify the net profit of the three firms”. However, the Arbitrator based his Award solely on such expert report. Therefore, the Award is based on no evidence and is perverse. In this connection reliance was placed on the Hon’ble Supreme Court’s decisions in the cases of ***Associate Builders v. Delhi Development Authority reported at (2015) 3 SCC 49*** and ***State of Chhattisgarh & Ors. v. Sal Udyog Private Limited, reported at (2022) 2 SCC 275, paragraphs 25-56.***

(ix) There were three partnership agreements between the parties containing three different arbitration clauses. All the three agreements could not be combined in a single arbitration/composite reference. The arbitration proceeding was *non-est* in the eye of law and the resulting Award is a nullity. Participation by the appellant in the arbitration will not prevent him from urging this plea. The parties to the three partnership deeds were not the same. The parties to the first partnership deed dated January 25, 2002, were the appellant, the respondent no. 1 and the proforma respondents nos. 2, 3, 5 and 6 and one Surajit Ghosh. The parties to the second partnership deed executed on July 19, 2003, were the appellant, the respondent and the proforma respondent nos. 3, 4, and 5. The parties to the third partnership deed, also dated July 19, 2003, were the appellant, the respondent and the proforma respondent nos. 3, 7 and 8. Hence, separate arbitration references should have been made for each of the three projects. In this connection reference was made to the decision of the Hon’ble Supreme Court in the case of ***Jagmittar Sain Bhagat v. Director, Health Services, reported at (2013) 10 SCC 136 paragraph 9*** and in the case of ***Duro Felguera,***

S.A. v. Gangavaram Port Ltd. reported at (2017) 9 SCC 729, paragraphs 3-6, 18-26, 30-42.

(x) The award is liable to be set aside being in conflict with the public policy of India. The award is based solely on a Chartered Accountant's report. The Arbitrator has not sought to evaluate the same or have the same corroborated independently. This is in conflict with the fundamental principles of natural justice.

8. Appearing on behalf of the respondent no. 1 (Biva Dutta Roy), Mr. Sudip Deb, learned Senior Advocate, submitted as follows: -

(i) The appellant herein, who was in charge and effective control of the three projects, failed to make over to Biva her share of profits in the three projects. This resulted in the arbitration reference. The parties appeared before the Arbitrator and adduced evidence after filing their respective pleadings. Since the dispute essentially related to accounts, the Arbitrator appointed a chartered accountant firm on the basis of consent given by the parties, to scrutinise the accounts of the three partnership firms. Such direction was recorded in the minutes of the 26th meeting held before the Arbitrator on July 8, 2016, in the presence of Ashiana and Biva.

(ii) However, Ashiana did not cooperate with the Chartered Accountant as is evident from the Chartered Accountant's report. After appointment of the Chartered Accountant, the Ashiana avoided the arbitration proceedings and stopped appearing in such proceedings.

(iii) The proforma respondents herein never appeared before the learned Arbitrator.

(iv) The respondent no. 1 (Biva) examined two witnesses before the Arbitrator. The appellant (Ashiana) examined none. Since the dispute related to a money claim raised by Biva, the Arbitrator with the consent of Ashiana appointed a Chartered Accountant to go into the accounts of the three firms. However, after the Arbitrator appointed the Chartered Accountant, Ashiana took the stand that he did not consent to such appointment. He never appeared before the Chartered Accountant or before the Arbitrator thereafter. The Arbitrator published his award after considering the entire material on record including the Chartered Accountant's Report. There is no perversity or illegality in the Award nor the same suffers from the vice of non-application of mind. The Section 34 application, was, therefore, rightly dismissed by the learned Trial Court.

(v) The scope of Section 34 as well as Section 37 of the 1996 Act, is very limited. The Section 34 Court does not sit in appeal over the arbitral award. Re-appreciation of evidence is not permissible. Reliance was placed on the decisions of the Hon'ble Supreme Court in the cases of ***Associate Builders v. Delhi Development Authority reported at (2015) 3 SCC 49 (paragraphs 19 to 40) and Ssangyong Engg. & Construction Co. Ltd. v. NHAI reported at (2019) 15 SCC 131 (paragraphs 34 to 43)***. None of the grounds for setting aside explained by the Hon'ble Supreme Court in the aforesaid cases exists in the present case.

(vi) The arbitral award in question is a well-reasoned one and has been made after considering the evidence of the parties. While dismissing the Section 34 application, the learned Trial Court looked into all the

documents and all aspects of the matter. The law is that if the Arbitrator's approach is not found to be arbitrary or capricious, then he is the last word on facts. The award is also not contrary to the interest of justice, fundamental policy of India or morality nor is it patently illegal or perverse.

(vii) The sole intention of the appellant is to delay the proceedings. An execution case has been filed by the respondent no. 1 in which the claim is Rs. 22 lakhs plus interest. However, the appellant, by filing a revisional application being CO no. 3952 of 2022 has obtained an order dated January 10, 2023 staying the execution proceedings.

(viii) The learned Arbitrator in no manner erred in considering the report of the Chartered Accountant. The appellant never disputed or challenged such report.

(ix) The appellant deliberately withheld the relevant documents which he had in his custody. He withheld the best evidence that was in his possession. Hence, an adverse inference has to be drawn against him to the effect that if such evidence was produced, the same would have gone against him. In this connection reliance was placed on the decision of the Hon'ble Supreme Court in the case of ***K.M. Patel v. Firm, Mohamadhussain Rahimbux reported at AIR 1981 SC 977, paragraph 10.***

(x) The appellant never took the point before the learned Arbitrator that since there were three projects, three separate references should have been made. After participating in the proceedings before the Arbitrator, the appellant is estopped from raising this point.

(xi) Section 34 (2)(a) of the 1996 Act does not have any manner of application in the instant case.

(xii) The appeal under Section 37 of the 1996 Act should be dismissed.

(xiii) Alternatively, if it is found that there is an error in the award and that such error is curable, the matter should be remanded back to the Arbitrator for curing such defect. No formal application is necessary therefor. The purpose is to remove the grounds for setting aside the Award as contemplated in Section 34(4) of the 1996 Act. The Court can *suo moto* exercise this power. In this connection reference was made to the decision of the Hon'ble Supreme Court in the case of ***Gayatri Balasamy v. ISG Novasoft Technologies Ltd. reported at (2025) SCC OnLine SC 986 (paragraphs 55 to 65).***

Court's view

9. This is an appeal under Section 37 of the Arbitration and Conciliation Act, 1996. Under challenge in this appeal is a judgment and order of the learned Trial Court dismissing an application of the appellant herein for setting aside an arbitral award passed in favour of the respondent no. 1 herein, under Section 34 of the 1996 Act. What we need to consider is whether or not the learned Trial Judge acted within the parameters of Section 34 of the 1996 Act. It is trite law that while exercising jurisdiction under Section 34 of the 1996 Act, the Court does not act as an Appellate Court. The Section 34 Court does not sit in appeal over the arbitral award. The Court has to only see as to whether or not the petitioner assailing the Award has made out at least one of the grounds for setting aside the arbitral award as enumerated in Section 34 of the 1996 Act.

10. Section 34 of the 1996 Act reads as follows: -

“34. Application for setting aside arbitral awards.

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application [establishes on the basis of the record of the arbitral tribunal that]—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappraisal of evidence.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to

take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

[(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.]”

11. A bare reading of the aforesaid Section would make it clear that the grounds for challenging an arbitral award have been restricted by the legislature. Under the Arbitration Act, 1940, an award could be challenged on various grounds. This resulted in protraction of the process of resolution of disputes between the parties by resorting to arbitration as an alternative dispute resolution mechanism since in a large number of cases the arbitral award was challenged before the competent Court. Thereafter the legal process continued up to the Hon’ble Apex Court. The intention of the legislature of making arbitration an expeditious procedure for dispute resolution was often defeated. This was one of the reasons for promulgation of the 1996 Act. The grounds of challenging an arbitral award are now limited. As would appear from the opening words of Section 34(2) of the 1996 Act, the grounds of challenge mentioned under that provision are exhaustive. An arbitral Award may be set aside “only if” one or more of the grounds enumerated in that provision is/are made out by the petitioner. Subsequently sub-section (2A) was introduced which provided an additional ground for setting aside an award.

12. The proviso to Section 34(2A) of the 1996 Act clarifies that an arbitral award shall not be set aside only because the award has resulted from an erroneous application of law. The proviso further clarifies that an award will not be set aside

on the ground of there being patent illegality on the face of the award *by reappreciation of evidence*.

13. We, therefore, see that the intention of the legislature was to reduce the role of the Court to the minimum so that there is minimal interference with the arbitral process by taking recourse to Court. In ***Laxmi Pat Surana v. Voltas Ltd and Anr, reported at 2019 SCC OnLine Cal 1008***, at paragraph 7 of the judgement, after discussing various decisions of the Hon'ble Supreme Court and also of various High Courts, a Division Bench of this Court held as follows:

“7. We do not find it necessary to multiply the references. It is sufficient to recall some of the legal principles which have emerged from a vast body of ever-growing case law of the various High Courts and the Hon'ble Supreme Court of India pertaining to Section 34 of the Act that may be summarised as follows:-

- a) On a cumulative reading of Section 5 and Section 34 of the Act, it is now well settled that an award passed by an Arbitrator can be set aside on the limited grounds and the supervisory role of a Court is reduced to a minimum level.*
- b) It is not permissible for a Court to examine the correctness of the findings of the Arbitrator as if it were sitting in appeal over an award. As such, a Court while considering the objections under Section 34 of the Act is not expected to re-appreciate the entire findings and reassess the whole case of the parties.*
- c) If the conclusion or the final decision of the Arbitrator is based on a possible view of the matter, a Court should not interfere with an award. Generally, the conclusion of the Arbitrator with regard to the construction of a contract is not to be interfered with, if there is a plausible view of the matter, and even an error relatable to interpretation of the contract by an Arbitrator is regarded as an error within its jurisdiction and as such it is an error which is not amenable to correction by Courts.*
- d) “A perverse finding is one which is based on no evidence or one that no reasonable person would have arrived at. Unless it is found that*

some relevant evidence has not been considered or that certain inadmissible material has been taken into consideration the finding cannot be said to be perverse. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse.” But, if there is some evidence on record which is acceptable and which could be relied upon, howsoever concise it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.”

14. The learned Trial Judge has noticed several judgments of the Hon’ble Supreme Court including that in the case of **Associate Builders v. Delhi Development Authority reported at (2015) 3 SCC 49**. Paragraph 33 of that judgment reads as follows:-

“33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows: “General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong”. It is very important to bear this in mind when awards of lay arbitrators are challenged.]. Once it is found that the arbitrator’s approach is not arbitrary

or capricious, then he is the last word on facts. In *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.* reported at (2012) 1 SCC 594:

21. *A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”*

15. Before expressing our opinion as to whether or not the impugned judgment and order warrants interference, we may note certain observations of the learned Trial Court in the judgment under appeal, which are as follows:-

“....when the impugned arbitral award is examined, it is found that the Ld. Arbitrator observed that the only dispute between the parties is a dispute relating to the accounts of three partnership firms and evidence was recorded, thereafter, one Chartered Accountant was appointed to scrutinize the accounts of three partnership firms as the learned Arbitrator was of the opinion that an Expert was required to scrutinize the books of account and the entries made therein.

It is also found from the impugned award that the learned tribunal appointed S.N. Guha & Co., Chartered Accountant to scrutinize the accounts of three partnership firms and the Chartered Accountant filed report dated 07/11/2016 before the learned Arbitrator and no exception

to the report of the Chartered Accountant was taken by the respondent no. 1.

The perusal of the impugned award will show that initially Ld Arbitrator proceeded with the proceedings and thereafter, he opined that the dispute in between the parties pertain to the accounts of the three partnership firms and in order to ascertain the entitlement or otherwise of the parties, the Ld Arbitrator deemed it appropriate to get the assistance of Chartered Accountant being an Expert in the field of accounts to arrive at a logical conclusion. The Chartered Accountant filed report dated 07.11.2016 before Ld Arbitrator wherein the Chartered Accountant namely S.N.Guha & Company made certain observations including the observation at point 2.1 of the report that they were not in a position to certify the net profits of the three firms due to non-production of the books of accounts, bank statement and various other records and documents as contained in their letter dated 20.07.2016 to the petitioner Ashoke Kumar Shaw as well as copies of the audited accounts, Income Tax return, Tax Audit reports and other details mentioned in their letter dated 20.07.2016. The Chartered Accountant further opined that their report is based on the available records provided to them and in respect of two apartments namely Subhankar and Bhagabati. Similarly, the Chartered Accountant made observation with regard to land in respect of Bhagabati Apartment, unsold stock, sundry creditors, salary. In respect of Shyamkunj also the Chartered Accountant made observation as to justification for incurring labour charges, closing stock, work in progress, parking space etc and also prepare separate details as to income, expenditure, net profit /loss and net divisible profit/loss. In this manner the Chartered Accountant prepared a tabulation statement of balance sheet, thereby calculated the divisible share of profit in respect of the respondent No.1 by taking into consideration the percentage in the respective partnership firm(s).

Ld Advocate for the petitioner has further contended in the written argument that the Chartered Accountant ought to have submitted their report expressing their inability to comply with the requirement and the report has been submitted on the basis of incomplete material. When the argument of Ld Advocate is appreciated in the light of the material on record including the proceedings of Arbitration filed by respondent No.1, it appears that the Ld Arbitrator appointed the Chartered Accountant in

presence of both parties and also fixed remuneration. However, subsequently, the petitioner did not provide the Chartered Accountant with the documents as sought by him as per letter dated 20.07.2016. It is the case of the OP No.1 that the petitioner being the main functionary into the partnership firm was having the possession of the complete records, accounts etc and he ought not to have concealed those accounting records. So far as the other partners are concerned, it appears that the other partners did neither appear before Ld Arbitrator nor appeared in this case despite service. Meaning thereby that the contesting parties remained in this case, the petitioner herein and the respondent No.1. It also appears that before Ld Arbitrator the two parties were contesting ie the petitioner and respondent No.1. The evidence was adduced before Ld Arbitrator by the petitioner and the respondent No.1 only and the Chartered Accountant also formed opinion on the basis of the records which were provided by the parties before Ld Arbitrator. In this connection when the evidence of one Swapan Kumar Roy is seen, it is found that the petitioner Ashoke Kumar Shaw, proprietor of Ashiana entrusted him for preparation of accounts, balance sheet, income tax statement etc in respect of Shyamkunj, Subhankar and Bhagabati Apartment and he prepared the accounts, balance sheet and income tax statement for Subhankar Apartment for the financial year 2005 & 2006 and also prepared the said papers for Shyamkunj Apartment for the financial year 2003-2004 and 2005-2006. He also prepared statement of accounts and income tax etc, balance sheet etc for the financial year 2003-2004, 2004-2005 and 2005-2006. His evidence reveal that he is a tax consultant and he knew about the three projects namely Subhankar, Shyamkunj and Bhagabati Apartments. His evidence further revealed that in all the projects Mr Shaw himself used to keep all the books and records wherefrom he used to prepare the returns and filed the same and he knew that Mr Shaw himself is a B.Com (Hons). He also stated that the accounts of the three firms for recent years were audited as they have crossed the maximum limit of turnover under Income Tax Act.

..... The evidence was led by the parties and the minutes of proceedings will show that the petitioner did not challenge the appointment of Chartered Accountant by the learned Arbitrator. It further appears that the scope of Section 34 of the Arbitration and Conciliation Act is very limited

after the amendment in the Act and this Court in this proceeding cannot reappreciate the evidence led by the parties before learned Arbitrator.

..... the scope of interference has been explained in detail by the Hon'ble Supreme Court in the above referred two decisions in Associate Builders (Supra) and Ssangyong Engineering and Construction Co. Ltd. (Supra). The reappraisal of evidence into the proceedings before learned Arbitrator is permissible only if there exists a total perversity in the award or the same is based on a wrong proposition of Law. If two views are possible on a question of Law as well, the Court would not be justified in interfering the award."

16. The material facts of the case have been recorded above. The dispute between the parties and in particular the appellant and the respondent no. 1 herein, pertain to the accounts of the three partnership firms. The Arbitrator, being a lawyer and not an accountant, thought it fit, and rightly so in our opinion, to commission the services of a professional Chartered Accountant. Initially, the appellant had consented to such proposal. However, subsequently, the appellant withdrew such consent and refused to share the remuneration of the Chartered Accountant. Such withdrawal of consent does not appear to be bona fide in the facts of the case. However, the same did not vitiate the appointment of the Chartered Accountant. An arbitral tribunal is statutorily empowered to appoint experts to report to the Tribunal on specific issues. In this connection, Section 26 of the 1996 Act may be noticed: -

“26. Expert appointment by arbitral tribunal.

(1) Unless otherwise agreed by the parties, the arbitral tribunal may—

(a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, and

(b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have

the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

(3) Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report.”

17. In spite of the Chartered Accountant calling for the relevant documents, the parties supplied incomplete documents to him. It is the consistent stand of the respondent no. 1 that all relevant accounting documents pertaining to the business activities of the three partnership firms were in the custody and under the control of the appellant. The appellant supplied incomplete balance sheet of one particular financial year, to the Chartered Accountant. His stand that he did not have any further documents, does not appear to be bona fide since from the evidence on record it appears that all such documents were under his control. He was instrumental in getting the accounts of the three firms audited and balance sheet prepared. It seems fairly clear that to foil the effort of the Chartered Accountant to prepare proper accounts to determine the share of profits of the respondent no. 1, the appellant adopted a policy of deliberate non-cooperation and withheld the relevant documents from the Chartered Accountant. In the aforesaid circumstances, the Chartered Accountant prepared and returned a report to the Arbitrator based on whatever documents and materials were made available to him by the appellant. The appellant neither challenged the appointment of the Chartered Accountant nor assailed his report. In the aforesaid factual matrix, can it be said that the Arbitrator was unreasonable in relying on the Chartered Accountant's report? We think not. The appellant having kept away the best evidence from the Chartered Accountant and the Arbitrator, cannot be heard to complain of the Chartered Accountant's report or the arbitral award being based on insufficient material or inadequate evidence.

18. In any event adequacy or otherwise of evidence is for the Arbitrator to decide. He is the sole adjudicator of the quantity and quality of evidence. Unless his decision in that regard is perverse, the Court will not interfere. The present case is not one where there was no evidence at all before the learned Arbitrator.

19. In our considered opinion, the arbitral award in question is not hit by any of the grounds for setting aside enumerated in Section 34 of the 1996 Act. It did not warrant interference. This was rightly appreciated by the learned Trial Judge who applied the correct principles of law relating to setting aside of an arbitral award. In our view, in the facts of the present case, had the learned Trial Court interfered with the award, it would have transgressed its jurisdiction under Section 34 of the 1996 Act.

20. We see no reason to interfere with the judgment and order of the learned Trial Court. It is a well-reasoned judgement and order and within the four corners of Section 34 of the 1996 Act. Hence, this appeal fails and is dismissed. There will be no orders as to costs.

21. Urgent Photostat certified copies of this judgment and order, if applied for, be supplied to the parties on compliance of all necessary formalities.

I agree.

(Arijit Banerjee, J.)

(Om Narayan Rai, J.)