2023:BHC-OS:12607-DB
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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL APPEAL NO.18 OF 2023
IN
COMM. ARBITRATION PETITION NO.1286 OF 2019

1] Azizur Rehman Gulam Rasool of Mumbai Indian Inhabitant residing at 317A Lokhandwala Building, 1st Floor, 30 Bapty Road, Mumbai-400 003

2] Jabbar Gulam Rassol Jamal of Mumbai, Indian Inhabitant, residing at 317A Lokhandwala Building, 1st Floor, 30 Bapty Road, Mumbai-400 003

..... Appellants (Org. Petitioners)

Vs.

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)

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(through legal heirs]
Respondent Nos.3 to 8)]
]
3] Maaz Abdul Wahid]
Sheru of Mumbai, Indian]
inhabitant, residing at]
802, Paramount Tower,]
Sahakar Road, Bandivli]
Village, Jogeshwari (West),]
Mumbai – 400 102]
]
4] Huzefa Abdul Wahid]
Sheru of Mumbai Indian]
inhabitant, residing at]
802, Paramount Tower,]
Sahakar Road, Bandivli]
Village, Jogeshwari (West),]
Mumbai – 400 102]
]
5] Mariyam Abdul Wahid]
Sheru of Mumbai Indian]
inhabitant, residing at]
802, Paramount Tower,]
Sahakar Road, Bandivli]
Village, Jogeshwari (West),]
Mumbai – 400 102]
]
6] Romana Zahid Lal]
of Mumbai Indian]
inhabitant, residing at]
802, Paramount Tower,]
Sahakar Road, Bandivli]
Village, Jogeshwari (West),]
Mumbai – 400 102]
]
7] Mariya Sadiq Sunesara]
of Mumbai Indian]
inhabitant, residing at]

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802, Paramount Tower,]
Sahakar Road, Bandivli]
Village, Jogeshwari (West),]
Mumbai – 400 102]
]
8] Maesra Abdul Wahid]
Sheru of Mumbai Indian]
inhabitant, residing at]
802, Paramount Tower,]
Sahakar Road, Bandivli]
Village, Jogeshwari (West),]….. Respondents
Mumbai – 400 102] (Org. Respondents)

Mr. Subhash Jha a/w Mr. Harekrishna Mishra, Mr. Siddharth Jha, Ms. Linisha Seth, Mr. Clifford Gonsalves, Ms. Shraddha Kataria, Mr. Ritesh Kesarwani, Mr. Krunal Jadhav, Ms.Praveena Venkatraman and Ms. Alka Pandey i/by Law Global Advocates for the Appellants.

Mr. Karl Tamboly a/w Mr. Anuj Desai, Ms. Rujuta Patil, Mr. Yohaan Shah and Mr. Hasan Mushabeer i/by Negandhi Shah & Himayatullah for Respondent No.1.

Mr. Ghanshyam Upadhyay a/w Mr. Ankit Upadhyay and Mr. Vijay Jha i/by Law Juris for Respondent Nos.2 to 8.

Mrs. Rucha Ambekar, Section Officer for Court Receiver present.

CORAM : DEVENDRA KUMAR UPADHYAYA, CJ. &
ARIF S. DOCTOR, J.
Reserved on : 11th September 2023
Pronounced on : 25th October 2023.

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JUDGMENT (PER ARIF S. DOCTOR, J.)

1. The present Appeal is filed under Section 37 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act") and impugns an order dated 30th August 2019 ("Impugned Order") by which the Learned Single Judge has dismissed the Appellants' challenge to an Arbitral Award dated 7th January 2019 ("Arbitral Award").

2. Before, however, adverting to the rival contentions, it is necessary to set out the following facts, viz.

i. The Appellants are the sons of one Gulam Rasool Jamal Sheru ("Sheru"). It is not in dispute that Sheru along with one Yusuf Miyaji ("Miyaji") and one Gulam Rasool Suleman ("Suleman") were partners of Respondent No. 1 ("the Firm"). The Firm carried on the restaurant business from 10 Musafirkhana Road, off. Carnac Road, Mumbai, 400 001 ("the Restaurant Premises"). The First Deed of Partnership by which the said Firm was constituted was dated 7th November 1960 ("the First Deed").

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ii. It is also not in dispute that thereafter, the partners of the Firm periodically executed various Deeds of Partnership, *inter alia* revising the shares of the partners in the Firm. On 21st January 1965, a Second Deed of Partnership (Second Deed) was executed by which the share of Sheru was 25%. On 1st July 1970, a Third Deed of Partnership (Third Deed) was also executed between the partners.

iii. On 15th March 1975, the Partners executed (a) a Fourth Deed of Partnership (Fourth Deed) and (b) a Conducting Agreement. By the Fourth Deed, the share of Sheru in the Firm was reduced to 12% and by the Conducting Agreement it was *inter alia* agreed that Sheru would conduct the business of the Firm for a period of one year from the date of execution of the said Conducting Agreement, i.e., between 15 March 1975 and 14 March 1976. In terms of the said Conducting Agreement, Sheru was to pay an amount of Rs. 16,000/- as royalty/hire charge to Miyaji and Suleman.

iv. It is not in dispute that Sheru thereafter infact continued to conduct the business of the Firm up to 1 April 1992. The

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said arrangement was ended by mutual consent and the Firm thereafter from 1 April 1992, started conducting the business on its own as it had been prior to the execution of the Conducting Agreement in terms of the Fourth deed.

v. On 10th July 1992, a Fifth Deed of Partnership (Fifth Deed) was executed in which the share of Sheru continued to be 12%. The Fifth Deed also provided that, in case of the death of a partner, the surviving partners would continue the Firm's business, with or without inducting the heirs of the deceased partner as partners into the Firm.

vi. On 26th August 2002 Sheru passed away. It is not disputed that, the surviving partners of the Firm did not induct the legal heirs of Sheru i.e., the Appellants and one Abdul Wahid as partners of the Firm. The disputes and differences appear to have arisen between the surviving partners and the sons of Sheru from this point in time. The parties are at variance as to the events as transpired post the demise of Sheru as also qua the conduct of the business of the Firm and possession of the said Restaurant Premises. It is the

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Appellants' contention that the business was continued by them, and it is the contention of the Firm that the business was shut down with effect from 2nd May 2003 after the dues of all the employees of the Firm were settled. It is the Appellants' contention that the surviving partners caused the doors of the Restaurant Premises to be broken open and have certain articles stolen. It is not in dispute that thereafter, an FIR was filed against the surviving Partners, i.e. Miyaji and Suleman.

vii. The Firm thereafter, on 4th June 2003 filed a Suit (Suit No.1557 of 2003) against the Appellants and Abdul Wahid (sons of Sheru), *inter alia* seeking an injunction restraining them from entering upon and/or remaining and/or continuing to remain upon the Restaurant Premises and further restraining them from dealing with or damaging the Restaurant Premises or part thereof in any manner. By an order dated 10th June 2003, this Court was pleased to appoint a Court Commissioner, to visit the Restaurant Premises and submit a report as to whether the business of

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the Firm was running and who was running the same. On 5th August 2005, this Court was pleased to dismiss the Notice of Motion taken out by the Firm on the ground that the surviving Partners had failed to produce independent evidence to prove their actual possession of the Restaurant Premises.

viii. The Firm thereafter filed a Second Suit (Suit No. 1668 of 2006) *inter alia* seeking recovery of possession of the Restaurant Premises from the Appellants and Abdul Wahid as also for mesne profits.

ix. On 12th September 2006, this Court after recording the consent of the parties, referred the disputes and differences forming part of both suits along with all other disputes and differences of the parties to arbitration. The Arbitral Tribunal, by the Arbitral Award disposed of the reference, *inter alia* by ordering that vacant and peaceful possession of the Restaurant Premises be handed over to the Firm as also payment of compensation be made to the Firm by the Appellants for wrongful use and occupation of the

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Restaurant Premises by the Appellants, as more particularly detailed in the Arbitral Award.

x. The Appellants challenged the Arbitral Award by filing Commercial Arbitration Petition (L) No. 746 of 2019 ("Arbitration Petition") which came to be dismissed by the Impugned Order.

xi. It is thus that the present Appeal has been filed.

Submissions of Mr. Jha on behalf of the Appellants :-

3. Mr. Jha *first* assailed the Arbitral Award on the ground that the same was patently illegal, perverse, arbitrary, and whimsical. He invited our attention to the order of reference dated 12th September 2006 and pointed out that while the same had specifically referred "*all the disputes and differences*" to arbitration, the Arbitral Tribunal had completely ignored the written statement filed by the Appellants (who were the Defendants in both the Suits). He submitted that the Arbitral Tribunal had framed issues only taking into consideration the claim of the Firm i.e., the Plaintiff in both the Suits and not a

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single issue had been framed pertaining to the claims, contentions and/or disputes raised by the Appellants in the written statement. It was thus he submitted that the Arbitral Award was patently illegal, perverse, arbitrary, and whimsical and was liable to be set aside on this ground alone. In support of his contention, he placed reliance upon the following judgements, namely ***Patel Engineering Limited Vs North Eastern Electric Power Corporation Limited[1], Associate Builders Vs. Delhi Development Authority[2],*** and ***Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.[3]***

4. Mr. Jha's *second* ground of challenge to the Arbitral Award was that the same reflected a complete non-application of mind on the part of the Arbitral Tribunal, which he submitted amounts to legal misconduct. He pointed out from the Arbitral Award that there was no reference therein to any of the Deeds of Partnership, much less the Fifth Deed or to the Conducting Agreement which formed the basis of the Arbitral Award. He

1 (2020) 7 SCC 167
2 (2015) 3 SCC 49
3 (2003) 5 SCC 705

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submitted that neither the fact that the Firm had been in existence since 7th July 1960, or that the Second Deed was the only one which was registered found mention in the Arbitral Award. Basis this he submitted that the Arbitral Award was completely unexplained and unreasoned inasmuch as in the Arbitral Award, there was no intelligible basis to explain how the Arbitral Tribunal had arrived at the conclusion that the Appellants were entitled to the 12% share of Sheru or that the share of Sheru was 12% and not 25%. He submitted that though the Arbitral Award was a speaking Award, since the same did not consider the previous Deeds of Partnership, the Arbitral Award could be termed as a `hybrid award' in which the error was apparent on the face of the Award. Basis this he submitted that the Award was susceptible to challenge. In support of his contention that such an Award was liable to be set aside, he placed reliance upon the following judgements, namely, ***Bharat Coking Coal Ltd Vs. L.K. Ahuja & Co.***[4], ***Oil and Natural Gas Corporation Limited Vs. Western Geco International***

4 (2001) 4 SCC 86

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Limited[5] and ***SsangYong Engineering and Construction Company Limited Vs. National Highways Authority of India (NHAI)***[6].

5. Mr. Jha's *third* ground of challenge to the Arbitral Award was that no evidence had been led by the Firm in respect of any of the Deeds of Partnership. He submitted that only those documents in respect of which evidence had been led could be read in evidence. He therefore submitted that the Arbitral Tribunal could not have based the Arbitral Award on any of the Deeds of Partnership since the same were of no evidentiary value. Mr. Jha also submitted that the Arbitral Tribunal had permitted cross-examination of Appellant No. 2 in the absence of any Evidence in Chief of Appellant No.2 first being led. He then placed reliance upon Section 138 of the Indian Evidence Act, 1872 (Evidence Act) to submit that cross-examination must necessarily be preceded by Examination-in-Chief. In support of his contention that there could be no cross examination without first having Examination-in-Chief, he placed reliance upon the

5 (2014) 9 SCC 263
6 (2019) 15 SCC 131

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judgement of the Hon'ble Supreme Court in the case of ***Ashok Debbarma Vs State of Tripura***[7]. He submitted that since there was no cross-examination of Appellant No.2, the entire proceedings before the Arbitral Tribunal stood vitiated.

6. The *fourth* ground of challenge on which Mr. Jha assailed the Arbitral Award was that none of the Deeds of Partnership except for the Second Deed were registered. In support of his contention that the Deeds of Partnership were required to be registered, he first invited our attention to Section 17 of the Registration Act, 1908 ("Registration Act") and then to Section 63 (1) and (2) and Section 69 of the Indian Partnership Act, 1932 ("Partnership Act"). Mr. Jha similarly submitted that none of the Deeds of Partnership had also been stamped and thus by virtue of Section 33 and 34 of the Maharashtra Stamp Act 1958 ("Stamp Act"), the same were also not admissible in evidence. In support of his contention, that in the absence of proper stamping, the very reference to the arbitration clause in the said Deed was bad in law, he placed reliance upon the

7 (2014) 4 SCC 747

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judgements of the Hon'ble Supreme Court in the case of ***Garware Wall Ropes Limited Vs. Coastal Marine Constructions and Engineering Limited***[8]***, NN Global Mercantile Private Ltd Vs. Indo Unique Flame Ltd. and Ors.***[9]***, U. P. State Sugar Corporation Ltd. Vs. Jain Construction Co. and Another***[10]***, Geeta Marine Services Pvt. Ltd. and Anr. Vs. State and another***[11]. Mr. Jha then submitted that since the Arbitral Tribunal had relied upon a document which was not admissible in evidence, the Arbitral Tribunal had passed an Arbitral Award with total non-application of mind. In support of his contention that such an Award would therefore be vulnerable to challenge, he placed reliance upon the following judgements namely ***Dandasi Sahu Vs. State of Orissa***[12] and ***Gati Limited Vs. Union of India***[13]. Basis this, he submitted that since the basis of the Arbitral Award was the Fifth Deed which was both unregistered and unstamped, the Arbitral Award was *ex facie* bad in law.

8 (2019) 9 SCC 209
9 2023 SCC OnLine SC 495
10 (2004) 7 SCC 332
11 2009 (2) Mh.LJ 410
12 (1990) 1 SCC 214
13 2019 SCC OnLine Bom 4068

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7. Mr. Jha's *fifth* submission was that the Arbitral Tribunal was required to adopt a judicial approach when deciding a reference and failure to do so would render an Award vulnerable to challenge. He submitted that an Arbitral Tribunal was required to pass an Award based on the same principles by which a Court would pass a decree in a Suit. He submitted that in the present case, the Arbitral Tribunal had failed to adopt a judicial approach since (i) the issues as framed were only one-sided (ii) the written Statement/defense of the Appellants was not considered and (iii) cross examination had been permitted without any evidence being led etc. Basis this he submitted that the Arbitral Tribunal had failed to decide the reference in a judicial manner.

8. Mr. Jha's *sixth* submission was that it was well settled that an Arbitral Tribunal was required to decide a reference in accordance with the terms of the contract which were to be read as a whole and not piecemeal. He therefore submitted that even assuming the Award was based upon the Fifth Deed, it was

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incumbent upon the Arbitral Tribunal to have read and construed the Fifth Deed as a whole and not in isolation as had been done. He submitted that the fact that the Arbitral Tribunal had determined the share of Sheru to be 12% dehors the provision of equitable distribution in the goodwill of the Firm as also ignoring that clause 16 of the Fifth Deed which provided for giving the partners an equal opportunity to *inter alia* bid for the tenancy rights as also to purchase the running business of the Firm, had also not been complied with. He submitted that this made manifest the fact that the Arbitral Tribunal had acted with complete non-application of mind, perversity, and arbitrariness. He placed reliance upon a judgement of the Hon'ble Supreme Court in the case of ***Continental Construction Co. Ltd. Vs. State of Madhya Pradesh***[14] in support of his contention that failure to consider the clauses of a contract by an Arbitral Tribunal amounted to misconduct which rendered an Award liable to be set aside***.*** He also placed reliance upon a judgement of the Hon'ble Supreme Court in the case of ***Delhi Development Authority Vs. R. S. Sharma and Company,***

14 (1988) 3 SCC 82

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New Delhi[15] to submit that since arbitration is a creation of contract, if under the guise of doing justice an Award is found to be contrary to the terms of the contract then it would result in misconduct by the arbitrator. In this case, he submitted that clause 16 of the Fifth Deed provided that in case of dissolution of the Firm or in the case of dispute among the partners, the running business including the tenancy rights and goodwill of the Firm were to be first auctioned among the partners and each partner would have the right to bid for the same. He submitted that despite this, no such opportunity was given to the Appellants. He therefore submitted that the Arbitral Tribunal having failed to act in accordance with the terms the Fifth Deed had committed an error of jurisdiction resulting in a decision which was perverse and patently illegal.

9. Mr. Jha's *seventh* submission was that there was judicial misconduct on the part of the Arbitral Tribunal since according to him, the Arbitral Tribunal had failed to consider evidence of an unimpeachable character to the effect that the

15 (2008) 13 SCC 80

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Appellants father i.e., Sheru was running the business of the Firm without interruption from the year 1975 and after his demise, the Appellants and Abdul Wahid continued to conduct the business of the Firm. He submitted that the Arbitral Tribunal's failure to take into consideration such a glaring fact which was evident from the record as also from the documents and the report of the Court Commissioner dated 3rd July 2003 amounted to judicial misconduct. Mr. Jha then placed reliance upon the following judgements in support of his contention that an Arbitral Award could be set aside on the ground of judicial misconduct, namely, ***M.D., Army Welfare Housing Organisation Vs. Sumangal Services (P) Ltd***.[16], ***Union of India Vs. V. Pundarikakshudu and Sons and Another***[17] and ***State of Rajasthan Vs. Nav Bharat Construction Co***.[18]

10. Mr. Jha then submitted that the Second Suit filed by the Firm i.e., Suit No. 1668 of 2006 was based on the same cause of action as the First Suit i.e., Suit No. 1557 of 2003 and

16 (2004) 9 SCC 619
17 (2003) 8 SCC 168
18 (2006) 1 SCC 86

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was filed without seeking leave of the Court under the provisions of Order II Rule 2 of the Code of Civil Procedure, 1908 (CPC). He pointed out that there was no fresh cause of action that had arisen between the filing of the First and the Second Suit, and therefore nothing had prevented the Firm from including in the First Suit, the reliefs sought for in the Second Suit. He submitted that the Firm having omitted to include the reliefs in the First Suit was barred from doing so in the Second Suit without first obtaining the leave of the Court under the provisions of Order II Rule 2 of the CPC. In support of his contention that failure to obtain leave under Order II Rule 2 of the CPC would render the Second Suit not maintainable, he placed reliance upon the judgement of the Hon'ble Supreme Court in the case of ***State Bank of India Vs. Gracure Pharmaceuticals Limited***[19]

11. Basis the above, Mr. Jha submitted that the Arbitral Award, being bad in law and patently illegal was thus liable to be set aside.

19 (2014) 3 SCC 595

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Submissions of Mr. Upadhyay on behalf of Respondent Nos. 2 to 8 :-

12. Before Mr. Upadhyay could commence his submissions, Mr. Tamboly Learned Counsel appearing on behalf of the Firm, raised a preliminary objection. He pointed out that Respondent No's 2 to 8 had neither challenged the Arbitral Award by filing a Petition under Section 34 of the Arbitration Act nor had they challenged the Impugned Order by filing an Appeal under Section 37 from the Impugned Order. He thus submitted that the Arbitral Award had become final and binding upon Respondent No. 2 to 8 and therefore there was no question of any submissions being made on behalf of Respondent No. 2 to and 8 to assail either the Arbitral Award or the Impugned Order. He then invited our attention to Section 34 of the Arbitration Act and pointed out therefrom that a challenge to an Arbitral Award could only be by way of an application filed under Section 34 of the Arbitration Act. He submitted that if a party chose not to file an Application as contemplated under Section 34 of the Arbitration Act, then the question of countenancing any challenge to the Arbitral Award by such a party did not arise.

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13. Mr. Upadhyay, then replied by submitting that as long as there was a challenge subsisting to the Arbitral Award, submissions, in support of why the same was bad in law, could always be canvassed. He submitted that in the present case, the very reference to arbitration was bad since the same fell foul of the provisions contained in Section 89 of the CPC. He submitted that the order of reference dated 12th September 2006 was not in terms of Section 89 and thus the very reference to arbitration was non est. He submitted that for there to be a valid reference under Section 89 of CPC the same must (a) formulate the terms of reference and (b) be signed by the Parties. He then invited our attention to the order of reference and pointed out that the same did not formulate any terms of reference nor had the same been signed by the parties. Basis this he submitted that the same was not in conformity with the provisions of the requirements of Section 89 of the CPC and thus the reference to arbitration was *ex facie* bad in law. In support of his contention that the Court could not refer parties to arbitration absent strict compliance with the provisions of Section 89 of the CPC, he

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placed reliance upon the judgement of the Hon'ble Supreme Court in the case of ***Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Another***[20]. He submitted that simply on the oral consent given by Counsel without written instructions from the parties there could be no valid reference to arbitration. Basis this, he submitted that since there was no valid reference to arbitration the entire proceedings stood vitiated as being without jurisdiction.

14. He then invited our attention to the prayers in the Second Suit and pointed out that the same were not arbitrable since the same were in the nature of a landlord and tenant dispute. He submitted that such a dispute was by its very nature non-arbitrable. He therefore submitted that such *a lis* could never have been referred to arbitration and could only be decided by the appropriate Civil Court, which in this case was the Small Causes Court. He submitted that the Learned Judge when referring the dispute to arbitration, was required to apply his mind and consider as to whether the dispute being referred

20 (2018) 4 SCC 793

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to arbitration was one which was arbitrable. He submitted that in the present case the Learned Judge had at the time of passing of the order of reference, failed and neglected in considering this aspect, thus rendering the very reference bad in law and *non-est.*

15. Mr. Upadhyay then essentially repeated the submissions made by Mr. Jha on behalf of the Appellants and submitted that the Arbitral Award ignored important clauses of the Fifth Deed and thus suffered from non-application of mind that amounted to judicial misconduct. He also submitted that the Arbitral Award was passed without referring to any of the documents which were before the Arbitral Tribunal. Mr. Upadhyay submitted that once it was shown that an Arbitral Award falls foul of Section 34 (2A), a Court was obliged to set aside the same even if a ground of challenge was not raised. He submitted that in the present case, the Arbitral Tribunal lacked inherent jurisdiction and thus the entire Arbitral Award stood vitiated on that ground alone. Mr. Upadhyay placed reliance upon the following judgements, in support of the various contentions

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raised by him, viz.

1] ***Jivarajbhai Ujamshi Sheth and Others Vs. Chintamanrao Balaji and others***[21]

2] ***Associated Engineering Co. Vs. Government of Andhra Pradesh and another***[22]

3] ***State of Rajasthan and another Vs. Ferro Concrete Construction Private Limited***[23]

4] ***General Manager, Northern Railway and another Vs. Sarvesh Chopra***[24]

5] ***Inder Sain Mittal Vs. Housing Board, Haryana and others***[25]

6] ***N. Radhakrishnan Vs. Maestro Engineers and others***[26]

7] ***Pawan Kumar Gupta and Anr. Vs. Vinay Malani***[27]

8] ***Dodsal Private Ltd. Vs. Delhi Electric Supply Undertaking of the Municipal Corporation of Delhi***[28]

9] ***The State of Tamil Nadu rep. By the Superintending Engineer, P.W.D./W.R.O. Vs. R. Sundaram***[29]

10] ***Workmen of Cochin Port Trust Vs. Board of***

21 (1964) 5 SCR 480
22 (1991) 4 SCC 93
23 (2009) 12 SCC 1
24 (2002) 4 SCC 45
25 (2002) 3 SCC 175
26 (2010) 1 SCC 72
27 2014 SCC OnLine Del 3370
28 (2001) 9 SCC 339
29 2006 (1) CTC 178

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Trustees of the Cochin Port Trust and Another[30]

11] ***State of U.P. Vs. Nawab Hussain***[31]

12] ***Ahmedabad Manufacturing & Calico Printing Co. Ltd. Vs. Workmen and Another***[32]

13] ***The Union of India Vs. Shri Om Prakash***[33]

14] ***Chhabba Lal Vs. Kallu Lal and Others***[34]

15] ***Chief General Manager (IPC), Madhya Pradesh Power Trading Company Limited and Another Vs. Narmada Equipments Private Limited***[35]

16] ***Kurein E. Kalathil Vs. State of Kerala and others***[36]

17] ***Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Another***[37]

Submissions of Mr. Tamboly on behalf of Respondent No. 1 :-

16. Mr. Tamboly, at the very outset submitted that the Appellants had in the present Appeal canvassed issues which were not only never raised before the Arbitral Tribunal but also

30 (1978) 3 SCC 119
31 (1977) 2 SCC 806
32 (1981) 2 SCC 663
33 (1976) 4 SCC 32
34 AIR 1946 PC 72
35 (2021) 14 SCC 548
36 Unreported Judgment dated 28/01/2009 in WP(C) No.31108 of 2007
37 2009 SCC OnLine Ker 6769

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never raised before the Learned Single Judge in the Petition filed under Section 34.

17. He then submitted that the contentions raised on behalf of the Appellants were entirely without merit. He submitted that the Appellants contention that the Arbitral Award was based on no evidence or that the Partnership Deed had not been introduced in evidence was both factually as also legally untenable. He pointed out that the Appellants had not only admitted all the Deeds of Partnership as also the Conducting Agreement but had infact themselves produced and relied upon the Fourth Deed and Fifth Deed as also the Conducting Agreement along with the Memo of Appeal. He pointed out from the Written Statement filed by the Appellants in both Suits and Arbitration Petition filed by the Appellants, that the Appellants had specifically admitted the said Deeds of Partnership and the Conducting Agreement. Basis this he submitted that the question of the Appellants now contending that the Deeds of Partnership were not proved or raising any issue as to the

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existence, validity or otherwise of the said Deeds did not arise. He submitted that given this factual scenario, the Arbitral Tribunal was well within its jurisdiction to consider the said documents and arrive at a finding based thereon. He submitted that this was precisely what the Arbitral Tribunal had infact done and that no finding which was contrary to what the Fifth Deed provided for had been rendered.

18. He then invited our attention to the Conducting Agreement and pointed out therefrom that, it was an admitted position as recorded therein that Sheru was only conducting the business of the Firm for and on behalf of the Firm and nothing more. He submitted that though the Conducting Agreement contemplated that Sheru would conduct the business of the Firm for only one year and it was not in dispute that he had infact done so until 1992. He then pointed out from the Fifth Deed that Sheru had specifically therein recognized that his right to conduct the said business of the Firm had come to an end in the year 1992 and that the Restaurant Premises belonged to the

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Firm. Mr. Tamboly further pointed out from the Fifth Deed that the same *inter alia* made two things clear, viz. (i) that Sheru's share in the Firm was 12% and (ii) that on the death of any of the Partners of the Firm, the surviving partners were not obligated to take on as partners the legal heirs of the deceased partner. Basis this he submitted that the Appellants having not only admitted the Fifth Deed but also relied upon the same. It was an undisputed position that (a) the Restaurant Premises belonged to the Firm (b) Sheru had admitted he was only conducting the business of the Firm (c) his right to conduct the business had come to an end in the year 1992 and (d) the said Firm was entitled to possession of the said Restaurant Premises.

19. Mr. Tamboly, then invited our attention to clause 15 of the Fifth Deed and pointed out that the surviving partners had the right to continue the business of the Firm, with, or without inducting the legal heirs of the deceased partner as Partners of the Firm. He therefore submitted that after Sheru passed away in the year 2002 the surviving Partners admittedly did not induct the legal heirs of Sheru, i.e., the Appellants and Abdul Wahid as

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partners of the Firm. He submitted that therefore after the death of Sheru the surviving Partners were well within their rights, to continue to carry on the business of the Firm as also to occupy the Restaurant Premises, without any interference and/or hindrance from anyone including the legal heirs of Sheru. He submitted that, therefore, without permission from the Firm, the Appellants had no legal right to either be in possession of the Restaurant Premises or for that matter run any business from the Restaurant Premises. He thus submitted that the Firm was entitled to recover possession of the Restaurant Premises from the Appellants. He submitted that this was precisely the view taken by the Arbitral Tribunal which had been upheld by the Learned Single Judge in the Impugned Order. He thus submitted that there was absolutely no infirmity of whatsoever nature in the Impugned Order or the Order of the Arbitral Tribunal. Mr. Tamboly, then placed reliance upon the following judgements of the Hon'ble Supreme Court namely ***Associate Builders*** *(supra)* ***SsangYong Engineering & Construction Co. Ltd*** *(supra),* ***PSA SICAL Terminals Pvt. Ltd. Vs. Board of Trustees of***

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V.O. Chidambranar Port Trust Tuticorin and others[38] and ***Reliance Infrastructure Ltd Vs. State of Goa***[39] to submit that an Arbitral Award could only be set aside if it is against the basic notions of law, morality or justice or it is perverse, meaning thereby that the view formed by Arbitral Tribunal was one which could not have been taken by any right-thinking person and was one which shocks the conscience of the Court. He submitted that in the facts of the present case the view taken by the Arbitral Tribunal was in fact the only legally tenable view, and it was for this reason that the same was not disturbed by the Learned Single Judge in the Impugned Order.

20. Mr. Tamboly then in dealing with the contention that the Arbitral Tribunal had not fairly interpreted and dealt with the said Fifth Deed, invited our attention to Clause 16 of the Fifth Deed and pointed out that the same would operate only in case of dissolution of the said Firm, and it was, admittedly, nobody's case that the said Firm had been dissolved. He therefore submitted that the Appellants contention that the Arbitral

38 2021 SCC OnLine SC 508
39 2023 SCC Online SC 604

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Tribunal had acted in a manner which was contrary to the very terms of the Fifth Deed was also plainly devoid of merit.

21. Mr. Tamboly, then submitted that even the contention that the Arbitral Tribunal had permitted cross-examination of Appellant No.2 without there being any Examination-in-Chief was factually erroneous. He pointed out that the Appellants themselves had produced the Notes of Evidence which specifically recorded that Examination-in-Chief of Appellant No.2 had been conducted. He further pointed out from the Arbitral Award that the same also recorded that the Examination-in-Chief of Appellant No.2 had also been led. Basis this he submitted that the contention of the Appellants that cross-examination of Appellant No.2 was permitted in absence of Examination-in-Chief being recorded was not only patently false but also contrary to the Appellants' own pleaded case.

22. In dealing with the contention that the Partnership Deeds were not stamped and registered he submitted that these objections were also taken for the first time in the present

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Appeal and were infact never raised before either the Arbitral Tribunal or before the Learned Single Judge. He then pointed out that both the contentions were devoid of merit. Firstly, he submitted that the Partnership Deeds were not documents which were compulsorily registrable within the scope of Section 17 of the Registration Act. Secondly, insofar as the objection of stamping was concerned, he submitted that the said objection was both factually as also legally not tenable. He pointed out that the Fourth and Fifth Deeds of Partnership were both on stamp paper of Rupees One Hundred which was the requisite amount of stamp duty payable as per the provisions of Article 47 of The Bombay Stamp Act, 1958. He then pointed out that an objection of inadequacy/insufficiency of stamping had to be raised at the first instance and not later. He pointed out that in the present case this contention was taken for the first time in the present Appeal and was never raised either before the Arbitral Tribunal or before the Learned Single Judge. Without prejudice to his submission, he invited our attention to Section 35 of the Stamp Act and pointed out that once a document had

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been marked in evidence, the same could not be called into question at any later stage of the same proceedings. In support of his contention, he placed reliance upon a full bench judgement of this Court in the case of ***Hemendra Rasiklal Ghia Vs. Subodh Mody***[40] as also the judgement of the Hon'ble Supreme Court in the case of ***Shyamal Kumar Roy Vs. Sushil Kumar Agarwal***[41]. He then, without prejudice to this pointed out that the objection was wholly irrelevant since the reference to arbitration in the present case was not under any of the Deeds of Partnership but was by consent of the Parties as recorded in the order dated 12th September 2006. He therefore submitted that the judgement of the Hon'ble Supreme Court in the case of ***N.N. Global Mercantile Pvt Ltd.*** (supra) and ***Garware Wall Ropes Limited*** (Supra) ***U. P. State Sugar Corporation Ltd.*** (supra) and ***Geeta Marine Services Pvt. Ltd. and Anr.*** (supra) would have absolutely no application to the facts of the present case.

40 2008 (6) Mh.L.J. 886
41 (2006) 11 SCC 331

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23. Mr. Tamboly then submitted that the contention that the Second Suit was barred by the provisions of Order II Rule 2 of the CPC was *ex-facie* untenable. He pointed out that both the Suits were infact based on different and distinct causes of action. He submitted that the First Suit i.e., Suit No. 1557 of 2003 was filed by the Firm for protection of its possession and carriage of business from the said Restaurant Premises whereas the Second Suit, i.e., Suit No.1668 of 2006 was filed by the Firm on the ground that the Appellants and Abdul Wahid had trespassed into the Restaurant Premises and was thus for recovery of possession. In support of his contention that both Suits were based on distinct causes of action and therefore the Second Suit would not be barred under Order II Rule 2 of the CPC, he placed reliance upon a judgment of the Madras High Court in the case of ***K. Palaniappa Gounder Vs. Valliammal***[42]

24. Basis the above he submitted that the present Appeal was entirely devoid of merit. He submitted that the Appellants had absolutely no right, title and interest in the Restaurant

42 **AIR 1988 Mad 156**

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Premises in their own right or as heirs of the late Sheru and wrongfully continued to use, occupy and benefit from the same. He submitted that the Restaurant Premises were prime and valuable real estate which the Firm had been deprived of due to the patently illegal conduct of the Appellants. He thus submitted that the Appeal be dismissed with a direction that the Appellants hand over vacant, quiet, and peaceful possession of the Restaurant Premises to the Firm, forthwith.

Reasons and Conclusions: -

25. We have heard learned counsel for the Parties as also considered the various case law cited and after a careful consideration of the same, we find that the present Appeal is one that lacks merit in its entirety and deserves to be dismissed on the following two fundamental grounds as set out in (**A**) and (**B**) below as also on merits as set out in (**C**) below. Insofar as the submissions made on behalf of Respondent Nos. 2 to 8, the same are dealt with separately under (**D**) and (**E**) below.

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A. The present Appeal is filed under Section 37 of the Arbitration Act. Section 37 *inter alia* provides as follows, viz.

> *"37. **Appealable orders.**-- (1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-*
>
> *(a) …..*
> *(b) …..*
> *(c) setting aside or refusing to set aside arbitral award under section 34."*

An appeal is a creation of statute and scope of a statutory appeal has to be found out within the contours of the language it is couched in. Hence a plain reading of Section 37 (1)(c) leaves no manner of doubt that *it is only* the order passed under Section 34 which is appealable and nothing else. The Hon'ble Supreme Court in the case of ***UHL Power Company Limited vs. State of Himachal Pradesh***[43] had occasion to consider the scope of Section 37 and in that context, held as follows: -

> *"16. As it is, the jurisdiction conferred on Courts under Section 34 of the Arbitration Act is fairly*

43 (2022) 4 SCC 116

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> *narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an Appellate Court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed."*

Hence it is clear that the scope of Appeal under Section 37 is one which is extremely limited and narrow. In this context we must note that in the present case not once were we even shown the Impugned Order nor was a single submission made to assail the Impugned Order on any ground whatsoever. The Appellants' entire challenge in the present Appeal *was only to* the Arbitral Award. Thus, the Impugned Order has therefore infact remained entirely unassailed in the present Appeal. Hence, in our view, the Appeal must necessarily fail on this ground alone.

B. Additionally, we must note that every ground of challenge to the Arbitral Award in the present Appeal was neither raised as a ground of defense before the Arbitral Tribunal nor was taken as a ground of challenge to the Arbitral Award in the Petition filed under Section 34. The Hon'ble Supreme Court

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in the case of ***MMTC Ltd. vs. M/s. Vedanta Ltd.***[44] has specifically held as follows, viz.

> "*14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the Court cannot undertake an independent assessment of the merits of the award and must only ascertain that the exercise of power by the Court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the Court under Section 34 and by the Court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."*

What the Appellants have therefore sought to do in the present Appeal is to effectively challenge the Arbitral Award afresh on grounds never taken before. We find that such a course of arguments, apart from being in the teeth of the law laid down by the Hon'ble Supreme Court in the case of ***MMTC Ltd.*** *(Supra)*, if allowed, would infact unsettle the entire scheme of Chapters VII, VIII and IX of the Arbitration

44 2019 SCC OnLine SC 220

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Act. Thus, equally on this ground alone, the present Appeal must also fail.

C. Even considering the challenge on merit, we find that the same is devoid of any worthiness. None of the grounds canvassed, would in our view, amount to a patent illegality which would render the Award liable to be set aside, even assuming the same could be considered by this Court at this stage. Each of the grounds canvassed on behalf of the Appellants are dealt with as follows, viz.

(i) *First*, the contention that the Arbitral Award is patently illegal, perverse, arbitrary, and whimsical, and that the Arbitral Tribunal has completely ignored the Written Statement of the Appellants and framed issues that are one sided, to our mind is wholly untenable. Mr. Jha, learned counsel for the Appellants, was unable to show from the record whether the Appellants had infact made any such application to the Arbitral Tribunal to consider certain

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issues which the Arbitral Tribunal had failed to consider and/or rejected. There is absolutely no material on record to substantiate such an allegation. To sustain such an allegation, it was incumbent upon the Appellants to have first shown that infact they had called upon the Arbitral Tribunal to frame certain issues, which the Arbitral Tribunal had not or alternatively had expressed their reservation to the issues as framed. The Appellants having failed to do so, the question of the Appellants now raising a grievance in respect of the same, much less a contention that the Arbitral Tribunal had acted in patently illegal, perverse, arbitrary, and whimsical manner, does not arise, and therefore the same is entirely without merit and baseless. In view thereof reliance placed by the Appellants on the judgments in the case of ***Patel Engineering Limited*** (supra)***, Associate Builders*** (supra) and ***Oil & Natural Gas Corporation Ltd.*** (supra) is wholly without merit.

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(ii) The *second* ground of challenge to the Arbitral Award namely that there is no reference to any of the Deeds of Partnership and/or Conducting Agreement in the Arbitral Award, which reflects a complete non-application of mind on the part of the Arbitral Tribunal amounting to legal misconduct, is equally devoid of merit. The Appellants have themselves not only admitted but relied upon the Deeds of Partnership and Conducting Agreement, including the Fifth Deed which sets out the share of Sheru in the Firm as being 12%. It is basis this that the Arbitral Tribunal has considered and arrived at the finding *inter-alia* that the share of the Appellants' father i.e., Sheru was 12%. In view thereof and since the Appellants had themselves specifically admitted all the Partnership Deeds, the absence of any specific mention of any or all the Deeds in the Arbitral Award cannot be stated to be non-application of mind, much less legal

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misconduct on the part of the Arbitral Tribunal. The Arbitral Tribunal has admittedly not fixed Sheru's share to be one which was outside what was provided for in the Fifth Deed, which is an admitted document and hence the question of any misconduct let alone legal misconduct on this ground does not arise. On perusing the Arbitral Award, we find that the same is a well-reasoned and speaking Award and is not a '*hybrid award*' as contended by the Appellants. There is absolutely no error or non-application of mind in passing the Arbitral Award much less an error which is apparent on the face of the Arbitral Award. Thus, the judgments in the case of ***Bharat Coking Coal Ltd*** (supra)***, Oil and Natural Gas Corporation Limited*** (supra) and ***SsangYong Engineering and Construction Company Limited*** (supra) have absolutely no application to the facts of the present case.

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(iii) The *third* ground of challenge to the Arbitral Award namely that the same has been passed in absence of any evidence qua proof of the said Deeds of Partnership is as untenable as the contention that cross examination was conducted without there being any evidence led in chief. *Firstly*, the Appellants having specifically admitted the Deeds of Partnership and Conducting Agreement, the contention that the Firm has failed to prove the same does not arise, aside from the fact that such a contention/objection was never taken either before the Arbitral Tribunal or the Learned Single Judge. *Secondly*, the contention that cross examination of the Appellants' witness was permitted in absence of evidence in chief being led is factually incorrect, as is evident from the Appellants' own admission in Arbitration Petition as also from the Notes of Evidence produced by the Appellants themselves in the Appeal, which makes clear that the Examination-in-Chief of Appellant No.2 was infact

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conducted. The Arbitral Award also mentions that the Examination-in-Chief of Appellant No. 2 was infact recorded. Hence, the contention of lack of evidence is entirely without substance and misconceived.

(iv) The *fourth* ground of challenge of the Appellants i.e., that none of the Deeds of Partnership (except the Second Deed) were registered is also equally of no substance and wholly irrelevant for two reasons. First, we find that a plain reading of Section 17(1)(c) of the Registration Act does not mandate registration of any of the Deeds of Partnership and the same are not documents which must be registered. Secondly, it is well settled that such an objection where valid, must be taken at the first instance. In the present case, it is not in dispute that no such objection was ever taken by the Appellants at any stage prior to the present Appeal. Equally, we find that the issue of the Deeds of Partnership not being stamped and thus

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being inadmissible in evidence is also untenable since (a) in the facts of the present case infact it was shown to us that the Deeds of Partnership were on stamp paper of Rs.100/- which was the relevant stamp duty payable under the provisions of The Bombay Stamp Act, 1958 and (b) the reference to arbitration in the present case was not on the basis of the Partnership Deeds but was by consent of the parties pursuant to an order of this Court and (c) the issue was never raised at any stage either before the Arbitral Tribunal or before the Learned Single Judge. Hence, the judgments in the case of ***Garware Wall Ropes Limited*** (supra)***, NN Global Mercantile Private Ltd*** (supra)***, U. P. State Sugar Corporation Ltd.*** (supra) and ***Geeta Marine Services Pvt. Ltd. and Anr.*** (supra) would have absolutely no application to the facts of the present case. Also, we must note that even assuming the contention of insufficiency of stamp was a valid one, we find that

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since the same was never raised before the Arbitral Tribunal, the judgment of this Court in the case of ***Hemendra Rasiklal Ghia*** (supra) would squarely apply, in which this Court has held as follows:-

> *72. In the first case, the Court, before which the objection is taken about admissibility of document on the ground that it is not duly stamped, has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case as held by the Constitution Bench in Zaver Chand v. Pukhraj Surana (supra). Once a document has been marked as an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, section 36 comes into operation. Once a document has been admitted in evidence, as aforesaid, it is not open either to the trial Court itself or to a Court of Appeal or Revision to go behind that order. Such an order is not one of those judicial orders which are liable to be reviewed or revised by the same Court or a Court of superior jurisdiction. Similar view is expressed by the Supreme Court in the case of Bipin Shantilal Panchal (supra); wherein it is made clear that if the objection relates to deficiency of stamp duty of a document, the Court has to decide the objection before proceeding further.*
>
> *73. In the case of Ram Ratan v. Bajarang Lal (supra) the Apex Court reiterating the above view has observed that the Court, as of necessity it would be trial Court, before which the objection is taken about admissibility of document on the ground that it is not duly stamped, has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case. So the objection relating to deficiency of duty cannot be raised or decided at the later stage of the*

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> *suit. It has to be decided there and then unless taken on record subject to objection so as to avoid the rigour of section 36 of the Stamp Act.*

Equally, reliance placed upon Section 63 (1) and (2) and Section 69 of the Indian Partnership Act 1932 is also entirely untenable since apart from the fact that no such contention was ever raised before the Arbitral Tribunal, the same would only apply in cases arising from a contract. In the present case neither of the said Suits were filed either arising from or to enforce any contract but were filed *inter alia* for injunction and possession of the Restaurant Premises.

(v) The *fifth* submission to assail the Arbitral Award i.e., that the Arbitral Tribunal had failed to adopt a judicial approach in deciding the reference is also wholly untenable and entirely devoid of merit. We find that in the present case the Arbitral Tribunal has decided the reference within the four corners of the order of this Court dated 12th September 2006 and in accordance

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with the Deeds of Partnership and the Conducting Agreement all of which were admitted by the Appellants. We find that the Arbitral Tribunal has taken all the requisite steps *inter alia* for ascertaining valuation of the Firm's premises by appointing a Valuer etc. It was basis this that the Arbitral Tribunal has decided the reference based on documents as also report of the expert/valuer appointed. Thus, we find that the Arbitral Tribunal has acted both judiciously and meticulously in the discharge of its duties and passed an Arbitral Award entirely within the realm of its jurisdiction.

(vi) The Appellants' *sixth* submission that the Arbitral Tribunal had failed to decide the reference in accordance with the terms of the contract is also one which is entirely without substance and infact of no relevance in the facts of the present case. A plain reading of clause 16 of the Fifth Deed makes it clear that the same was to apply *either* upon dissolution of

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the Firm *or* in the event of there being a dispute between the Partners. In the present case, neither of these contingencies had arisen as (a) it is not in dispute that there was no dissolution of the said Firm and (b) that neither the Appellants nor Abdul Wahid were partners of the said Firm, nor had they ever claimed to be. Hence the question of clause 16 being applicable does not arise. Thus, there is absolutely no merit in the contention that the Arbitral Tribunal has acted with complete non-application of mind, perversity, and arbitrariness. Hence, the judgment in the case of ***Continental Construction Co. Ltd.*** (supra) and ***Delhi Development Authority*** (supra) would not arise in the facts of the present case.

(vii) The *seventh* submission of Mr. Jha was that there was judicial misconduct on the part of the Arbitral Tribunal since the Arbitral Tribunal had failed to consider the evidence of an unimpeachable character to the effect that Sheru and the Appellants were running the

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business of the Firm from the Restaurant Premises without interruption since the year 1975. We find that this contention is wholly immaterial for the purpose of adjudicating the issues which were to be determined by the Arbitral Tribunal. The very issue which fell for determination before the Arbitral Tribunal was unauthorized use, occupation and possession of the Restaurant Premises by the Appellants and thus merely because Sheru and/or the Appellants were infact running the business of the Firm from the said Restaurant Premises would not give the Appellants any rights in the business of the said Firm or qua the use, occupation and possession of the said Restaurant Premises. The Appellants having admitted the said Deeds of Partnership and Conducting Agreement could not claim any higher rights than what was set out therein. Hence, there is absolutely no question of the Arbitral Tribunal taking into consideration these facts. Therefore the question of failing to do so

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amounting to judicial misconduct does not in any manner arise. Hence, reliance placed by the Appellants upon the judgments in the case of ***M.D. Army Welfare Housing Organisation*** (supra)***, Union of India*** (supra) and ***State of Rajasthan*** (supra) is also without any basis.

(viii) As regards the last submission made on behalf of the Appellants that the Second Suit i.e., Suit No.1668 of 2006 was barred since (a) it was based on the same cause of action as the First Suit i.e., Suit No.1557 of 2003 and (b) was filed without seeking leave of the Court under the provisions of Order II Rule 2 of CPC, we find that this submission is also entirely devoid of merit since (i) a plain reading of both Suits indicates that the causes of action in both Suits are distinct and separate and (ii) the order of reference refers all disputes and differences between the Parties to Arbitration. We find that in the facts of the present case, the judgement of the Madras High Court in the

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case of ***K. Palaniappa Gounder*** (supra) would squarely apply since both Suits were based on distinct and separate causes of action.

D. Insofar as the submissions made by Mr. Upadhyay on behalf of Respondent Nos. 2 to 8, we are in total agreement with the preliminary objection raised by Mr. Tamboly. Respondent Nos. 2 to 8 have admittedly neither challenged the Arbitral Award by filing a Petition under Section 34 of the Arbitration Act, nor have they assailed the Impugned Order by filing an Appeal under Section 37 of the Arbitration Act. In this context, it is necessary to note that Section 34 (1) and (2) (a) of the Arbitration Act specifically provides as follows, viz.

> "***34. Application for setting aside arbitral award***.—
> *(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—*

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(i) .....

(ii) .....
(iii) .....
(iv) .....
(v) .....

(emphasis supplied)

A plain reading of Section 34 of the Arbitration Act therefore makes clear that an application for setting aside an arbitral award can (i) only be by way of an application and (ii) by a party who makes such an application. Therefore, it is clear that Section 34 of the Arbitration Act does not contemplate a challenge to an Arbitral Award in the absence of an application or by a party who has not made any such application. Hence, Respondent Nos. 2 to 8, who having admittedly not filed an application under Section 34 cannot now be permitted to assail the Arbitral Award on any grounds whatsoever. The Arbitral Award has attained finality qua Respondent Nos. 2 to 8. Thus, at this stage, to permit the Respondent Nos. 2 to 8 to make submissions to assail the Arbitral Award solely on the basis that the present Appeal is pending, would effectively set to naught the entire

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machinery for challenge to an arbitration award as also the entire scheme of Chapters VII, VII and IX of the Arbitration Act.

E. We must note, that even on merits, the submissions of Mr. Upadhyay were, to put it mildly, entirely devoid of merit and substance. The contention that the reference to arbitration in the present case was not in conformity with Section 89 of the CPC is highly misplaced. The judgment of the Hon'ble Supreme Court in the case of ***Kerala State Electricity Board*** (supra) relied upon by Mr. Upadhyay is also wholly inapplicable to the facts of the present case since in the case of ***Kerala State Electricity Board*** (supra) the very subject matter of challenge was the order of reference under Section 89. In the facts of the present case, Respondent Nos. 2 to 8 have admittedly not challenged the said order of reference but have infact thereafter participated in the arbitral proceedings without any demur or protest including on the ground of jurisdiction. It is thus we say that this

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contention being raised for the first time and at this stage by the Respondent Nos 2 to 8 is highly misplaced. *Equally* the second contention of Mr. Upadhyay that the dispute between the parties was one which was non arbitrable in nature since the same was in the nature of a landlord and tenant dispute is also entirely devoid of merit since Respondent Nos. 2 to 8 were unable to establish on what basis this submission was advanced aside from the fact that such a contention was taken for the first time across the bar in these proceedings. Also, reliance upon clause 16 of Fifth Deed by Mr. Upadhyay is equally wholly misplaced since the said clause was to take effect only (a) in case of dissolution of the Firm or (b) in the case of a dispute among the partners. In the present case admittedly, neither of these eventualities had arisen and more importantly, Respondent Nos. 2 to 8 and the late Abdul Wahid were never partners of the Firm. Hence, the question of relying upon and/or the applicability of clause 16 of the Fifth Deed does not arise at all.

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26. Hence, for the reasons stated aforesaid, we pass the following order, viz.

a. Appeal Dismissed.

b. The Court Receiver, High Court Bombay, to handover possession of the said Restaurant Premises to the Respondent No.1 forthwith.

(ARIF S. DOCTOR, J.) **(CHIEF JUSTICE)**

AFTER PRONOUNCEMENT :-

At this stage, Mr.Jha, Learned Counsel appearing on behalf of the Appellants, prays for stay of operation of this order for a period of eight weeks. Mr.Tamboly, Learned Counsel appearing on behalf of Respondent No.1, vehemently opposes the said prayer.

Considering the facts and circumstances of the present case as noticed above, the prayer for stay of operation of this order is rejected.

(ARIF S. DOCTOR, J.) **(CHIEF JUSTICE)**

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