

**CORAM : DR.D.Y.CHANDRACHUD AND
A.A.SAYED, JJ.**

DATE : 8 March 2013

JUDGMENT - (PER : DR.D.Y.CHANDRACHUD, J.) :

1. By a judgment dated 1 October 2009 the learned Single Judge dismissed petitions filed by the Appellants under section 34 of the Arbitration and Conciliation Act, 1996. The petitions sought to question the legality of an arbitral award dated 4 August 2008 of a sole arbitrator, Mr. Justice S.N. Variava.

2. On 21 February 1980 a deed of partnership was constituted in which three branches of the Singhanian family were represented. The three branches, in these proceedings, would for convenience of reference, be referred to as the Kanpur, Kolkata and Mumbai branches. Clause-10 of the deed of partnership provided that a partner could retire with a stipulated period of notice and unless mutually agreed to, upon retirement, an outgoing partner would be entitled to receive his proportionate share in the properties of the firm in specie after deducting the liabilities. Clause-11 of the deed of partnership provided as follows :

“That in the event of dissolution of the firm accounts shall be settled between the partners in accordance with the provisions of Section 48 of the India Partnership Act as applicable at the relevant time. **The assets of the firm shall be valued on the basis of the values standing in the books of accounts and not on the basis of market value.** Unless otherwise agreed upon, on dissolution the

partners will be entitled to and will receive their proportionate share in the assets of the firm in specie after paying the liabilities, so however that they will be entitled to a share in each category of assets equivalent to their share of profit. The share of each company shall be considered as a separate category.”

(emphasis supplied)

Clause-13 of the deed of partnership contained an agreement to refer disputes to arbitration. The partnership was dissolved on 26 March 1987 by a deed of dissolution which took effect from 19 March 1987.

Clause-4 of the deed of dissolution provided as follows :

“The parties hereto have agreed to distribute the immovable properties, mentioned in Annexure-II hereto in specie free from encumbrances as provided in the Deed of Partnership dt. 21 February 1980 in proportion to their shares in the said partnership. The distribution shall be completed as soon as possible and the parties will strive to accomplish the same by 31 May 1987.”

An arbitration agreement was also contained in the deed of dissolution. On 28 March 1987, a supplementary agreement was entered into under which it was provided that the allotment and distribution of the immovable properties of the dissolved firm shall be free from all tenancies, licenses or leases that may be subsisting in favour of group companies, firms, trusts, societies, relatives and family members. Between 1987 and 1989, there was an exchange of correspondence on matters relating to the winding-up of the affairs of the firm.

3. A suit under section 20 of the Arbitration Act, 1940 was instituted on 8 May 1992 by Harishankar Singhania representing the Kolkata

group. The Defendants to the suit comprised of the Kanpur group and Mumbai group. The suit was dismissed as barred by limitation by a Single Judge on 20 February 1986. An appeal was dismissed by a Division Bench on 8/9 June 2004. The Supreme Court allowed a Civil appeal against the order of the Division Bench by a judgment dated 4 April 2006 and held that the suit under section 20 was not barred by limitation. By the judgment of the Supreme Court in **Hari Shankar Singhania Vs. Gaur Hari Shankar Singhania**¹, the disputes and differences between the parties were referred to the arbitration of a sole arbitrator Mr. Justice S.N. Variava. While disposing of the civil appeal, the judgment of the Supreme Court, inter alia, specified the nature of the disputes that had arisen and which would have to be resolved in arbitration viz. :

“65. (a) to the extent the defendants themselves are occupying such properties, the defendants should be directed to vacate the properties to enable distribution of the said properties in specie free from encumbrances;

(b) the defendants' obligation to have vacant possession of the immovable properties listed at Items 1 to 13 of Exhibit `D' hereto and to ensure that persons other than themselves actually vacate the said properties so that the same are available for distribution in specie free from encumbrances between the plaintiffs and the defendants pursuant to the said deed of dissolution;

(c) directions and steps be taken by the defendants to achieve the vacant possession mentioned in paras (a) and (b) above;

(d) distribution of the above mentioned properties in specie free from encumbrances between the plaintiffs and the defendants;

1 (2006)4-SCC-658

(e) distribution of the properties mentioned at Items 14 and 15 of Exhibit `D' hereto subject to the encumbrances;

(f) fixation of equalization amount, if necessary;

(g) If for any reason any of the defendants do not permit and comply with the direction for getting vacant possession of any of the immovable properties listed in Items 1 to 13 of Ext.`D' to the plaintiff, then the same should be valued on the basis of vacant possession and the plaintiffs should be paid their share on the basis of the vacant possession by the defendants.”

4. During the course of the arbitral proceedings before the sole arbitrator, five properties were sold, by consent. On 20 March 2007, an agreement was arrived at between the parties during the course of reference to the following effect :

“AGREEMENT

With reference to the arbitration pending before the Hon'ble Arbitrator Mr.Justice S.N.Variava, Former Judge, Supreme Court of India, in relation to the distribution of the properties described at items 1 to 10 set out in Annexure II to the Deed of Dissolution dated March 27, 1987, **the parties have agreed that the properties will be distributed on the basis of market value and the date of valuation and the Valuer would be decided by the Hon'ble Arbitrator. The Valuer will hear the parties before giving his report.**

It is clarified that the properties mentioned at items 11 to 15 of the said Annexure II are not to be included in this Agreement. Parties agree that the property at Item 11 is sold, the properties at items 12, 13 and 15 are to be sold and proceeds distributed. The property at item 14 is not part of this Agreement.

All other contentions of the parties, except the valuation at market value, are kept open.”

(emphasis supplied)

The agreement was taken on record by the arbitrator on 20 March 2007. By an order of that date, the arbitrator heard the parties on the date with reference to which the market value would be determined by the valuer. On 30 July 2007, all the parties informed the arbitrator that they were agreed on the name of the valuer to be appointed for the purposes of conducting a valuation of the properties. All parties agreed to a valuation by HDFC Limited. The valuer circulated a draft of the valuation report. During the course of the arbitration, on 5 February 2008, the arbitrator declined to entertain the submissions of the Mumbai group on the draft since this was allowed before the valuer. The arbitrator, however, observed that it was necessary for the valuer to consider and take into account the views and facts which may be brought to its attention by any of the parties. The arbitrator recorded that the parties had already made representations to the valuer, but to leave no room for complaint, it was directed that if any of the parties desired to bring any fact or submission before the valuer, they could do so on 13 February 2008. The valuer was thereafter directed to take into account the perspectives of the parties. On 4 February 2008, the arbitrator recorded that all parties had in pursuance of the previous directions met the valuer to convey their points of view and three weeks' time was granted to the valuer to submit the final report. At that stage, on behalf of the Mumbai group, it was urged that under Section 26(2) of the Arbitration and Conciliation Act, 1996, parties had a right to insist that after the submission of the final report, the valuer should participate

in an oral hearing to submit itself to questioning by the parties and to enable the parties to present their expert evidence on the valuation of the properties. The arbitrator rejected this submission holding that the deadlock between the parties had been resolved when they entered into an agreement dated 20 March 2007. Section 26(2), the arbitrator noted, is subject to an agreement otherwise entered into between the parties and the agreement dated 20 March 2007 was held to be an agreement where the parties have otherwise provided. The arbitrator noted that by the agreement dated 20 March 2007, the parties had agreed that all contentions, except the valuation at the market value, are kept open and this stipulation was inserted in order that the independent valuer, who would be appointed by the Tribunal, would finally resolve the deadlock of valuation by fixing the market value. The arbitrator observed as follows :

“3. The whole purpose and intention was that once the market value was fixed by the valuer, no question arose of parties bringing in other experts on the question of market value or of cross examining the valuer on the market value. Parties have agreed that on the question of market value the Final Report will be binding on all. As the Final Report was to be binding, it was considered proper by this Tribunal that the parties themselves agree to the name of a valuer.

They were requested to do so. Accordingly parties chose HDFC as valuers and this Tribunal appointed them as agreed valuers.

4. As the Final Report was to be binding on all parties they were granted opportunities to meet the valuers and present their points of view, including what according to them should be the method of valuation and what according to them were the facts which should be taken

into consideration. Parties had earlier met HDFC. After 5 January 2008 they again met HDFC. I am told that all the parties have given written submissions to the valuer. HDFC have been informed that, they have to consider the submissions and give reasons in writing as to why they are accepting or not accepting their submissions. Thus, the principles of natural justice i.e. that the parties be heard, have been fully complied with.

5. The principles of natural justice have been fully complied with. Even otherwise, as per the Agreement dated 20 March 2007, it is now not open to parties to question the valuation fixed by the agreed independent valuer. There is now no question of cross-examination of the valuer and/or of leading evidence of other valuers. Accordingly, I reject the submission that after the Final Report is submitted, an opportunity be given under Section 26(2) of the Arbitration and Conciliation Act, 1996. As stated above this Section is inapplicable to the facts of this case.”

5. The arbitrator thereafter heard the parties on several dates and rendered his award on 4 August 2008. The arbitrator thereafter corrected certain clerical and typographical errors in the award on 12 September 2008.

6. By the award, the arbitrator has partitioned the properties of the partnership in the following manner :

“a) The Claimants are allotted the property at Sr.No.5 i.e. Kamala Cottage, property No.6 at Juhu, Mumbai. As the market value of this property is fixed at Rs.89.66 crs. and each group is entitled to assets worth Rs.43,55,00,000/- the Claimants will have to bring into the pool to the family, in the manner set out hereafter, a sum of Rs.46,11,00,000/-. This then will have to be distributed amongst the other two groups as per their entitlement.

(b) Respondents 1 to 9 are allotted the following properties at the prices mentioned below :

(i) Property at Sr.No.1 i.e. Property no.29/1 at Kanpur known as Kamla Towers. The value of this property is fixed at Rs.4 crores;

(ii) Property at Sr.No.2 i.e. Property No.22/134 at Kanpur known as J.K.Kothi. The value of this property is fixed at Rs.1.63 crores;

(iii) Property at Sr.No.3 i.e. Property No.11 at Cantt. Kanpur, known as Ganga Kutti. The value of this property is fixed at Rs.10.44 Crores;

(iv) Property at Sr.No.4 i.e. Property No.6 at Cantt. Kanpur. The value of this property is fixed at Rs.4.54 crores.

(v) Property at Sr.No.9 i.e. Property No.20/193 Chatai Mohal, Kanpur. The value of this property is fixed at Rs.0.23 Crores.

Thus properties worth Rs.20.84 crores are allotted to Respondents 1 to 9. As they are entitled to assets worth Rs.43,55,00,000/- they will, in addition to the above, receive a sum of Rs.22.71 crores from out of the sum of Rs.46,11,00,000/- which has to be brought in by the Claimants. They will receive this amount only against delivery of vacant possession, free from encumbrances, of all the properties allotted to Respondents 10 to 16. In other words it will not be open to them to receive a part of this sum of Rs.22.71 crores on the ground that they have handed over vacant possession of some of the properties.

(c) Respondents 10 to 16 are allotted the following properties at the prices mentioned below :

(i) Property at Sr.No.6 i.e. Property No.37, Kanpur known as Kamla Retreat. The value of this property is fixed at Rs.9.62 crores.

(ii) Property at Sr.No.7 i.e. Property No.88/473, Hiranpur, Kanpur. The value of this property is fixed at Rs.2 crores.

(iii) Property at Sr.No.8 i.e. Property No.80/80, Kanpur known as Oil Mills land. The value of this property is fixed at Rs.7.90 crores and Rs.0.30 crores.

(iv) Property at Sr.No.10 i.e. Property No.20/131 Patkapur, Kanpur. The value of this property is fixed at Rs.0.33 crores.

Thus, Respondents 10 to 16 are allotted properties worth Rs.20.15 crores. As they are entitled to assets worth Rs.43,55,00,000/- they will, in addition to the above, receive a sum of Rs.23.40 crores from out of the sum of Rs.46,11,00,000/- which has to be paid by the Claimants. They will receive this amount only on handing over vacant possession, free from encumbrance, of the Juhu property to the Claimants.”

7. Essentially as the award would indicate, ten properties have been partitioned. One of the properties is a property at Juhu, Mumbai, which has been in the possession of the Mumbai group and which has been awarded to the Kolkata group. Nine properties at Kanpur were in the occupation of the Kanpur group. Out of these nine properties, five have been awarded to the Kanpur group while four have been awarded to Mumbai group. Having regard to the valuation of the properties fixed by HDFC Limited, the arbitrator has directed payment of amounts in order to effectuate an equalization of the shares of the three groups. This is indicated in the following table, a copy of which has been placed on the record of the Court during the course of submissions.

Particulars of Properties

Sr.No. as per Award	Description of the Property	Possession/User by	Awarded to	Valuation by HDFC Rs.	Moneys to be given	Moneys to be received	Pages of HDFC Valuation Report
5.	6, Juhu Road, Mumbai	Bombay Group	Kolkotta Group	89.66 Crores			282-287
TOTAL				89.66 Crores	46.11 Crore	NIL	
1.	29/1, Kamla Tower, Kanpur	Companies of Kanpur Group	Kanpur Group	4.00 Crores			243-247
2.	22/134, J.K.Kothi, Kanpur	Companies of Kanpur Group	Kanpur Group	1.63 Crores			266-271
3.	11, Cantts. "Ganga Kuti" Kanpur	Residence of Kanpur Group	Kanpur Group	10.44 Crores			260-265
4.	6, Cantts. Kanpur	Servants quarters for Kanpur Group	Kanpur Group	4.54 Crores			228-232
9.	20/193, Chatai Mohal, Kanpur	Scooter/Cycle stand for Co. Employees of Kanpur Group	Kanpur Group	0.23 Crores			238-242
TOTAL				20.84 Crores	NIL	22.71 Crore	
6.	Kamala Retreat, Kanpur	Offices of companies of Kanpur Group	Bombay Group	9.62 Crores			272-278
7.	88/473, Hiranman Purva, Kanpur	Outside tenants	Bombay Group	2.00 Crores			254-259
8.	80/80, Cooper Ganj, Kanpur	Partly by JK Jute/Oil Mills and partly by outside tenants	Bombay Group	8.20 Crores			248-253
10.	20/131, Patkapur Kanpur	Multiple tenants	Bombay Group	0.33 Crores			233-237
TOTAL				20.15 Crores	NIL	23.40 Crores	

8. Each of the three groups is entitled to a share in the assets of Rs.43.55 crores. Since the valuation of the property at Juhu is Rs.89.66 crores, the Kolkata group which has been awarded the Juhu property, is required to pay an amount of Rs.46.11 crores in aggregate to the other two groups. The Kanpur group has been awarded properties of a value of Rs.20.84 crores and would receive an amount of Rs.22.71 crores towards equalization of its share. The Mumbai group has been awarded four properties at Kanpur of a value of

Rs.20.40 crores and would receive an amount of Rs.23.04 crores in equalization of its share.

9. Now it is in this background that the submissions which have been urged on behalf of the Appellants would have to be considered. On behalf of the Appellants in the Mumbai group, two submissions have been urged while challenging the judgment of the learned Single Judge affirming the award :

(i) Section 26(2) of the Arbitration and Conciliation Act, 1996 stipulates that unless otherwise agreed by the parties, an expert appointed by the arbitral tribunal is required after submission of his report to participate in an oral hearing where the parties have an opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue. The arbitrator, however, barred the Appellants from cross-examining the valuer and from leading evidence in support of its case on the valuation of the properties on the basis that by the agreement between the parties dated 20 March 2007, the report of the valuer was to be final and binding. According to the Appellants, what the agreement dated 20 March 2007 brought about was an alteration in the basis of the valuation of the properties from book value to market value. What the agreement between the parties stipulated was that the alteration in the basis of valuation to the market value of the properties would be binding. The agreement, in the submission, did not treat the report of the valuer as final and binding. The arbitrator deprived the Appellants of a right to challenge the report of the valuer and precluded them from exercising their rights under Section 26(2) of the Act of 1996;

(ii) The arbitrator specifically raised an issue of limitation. The arbitrator, however, proceeded to hold that the claim was not barred on the basis that the issue of limitation was concluded by the judgment of Supreme Court in **Harishankar Singhania (supra)**. This statement of law on the face of the award is erroneous because, what the Supreme Court decided was whether the suit under Section 20 was barred by limitation and not whether the claim before the arbitrator in the arbitral proceedings was within time. The issue as to whether an application invoking arbitration has been filed within limitation is distinct from whether a claim in arbitration is within limitation and the arbitrator, it has been submitted, has committed an error apparent on the face of the record by confounding one for the other.

10. While adopting the submissions that were urged by the Mumbai group, the learned counsel appearing on behalf of the Kanpur group has submitted that :

(i) The arbitral award is not in terms of the agreement between the parties since the agreement envisaged that the distribution of the assets of the dissolved partnership was to take place in specie;

(ii) The arbitrator has applied principles of owelty which are relevant to a partition of undivided properties of a family and not to the distribution of the assets of a dissolved partnership. There was no finding by the arbitrator that the properties of the partnership are incapable of division and hence there was no justification for the arbitrator to award amounts for equalization of shares when a distribution in specie could have been carried out;

(iii) There is an inherent inconsistency in the arbitral award which vitiates the award rendering it liable to be set aside.

11. Each of these submissions now falls for determination.

12. At the outset, it would be necessary to understand the background of the proceedings which resulted in the judgment of the Supreme Court **inter partes** and to elucidate the principles laid down in the judgment of the Supreme Court. An arbitration suit that was filed in this Court under Section 20 of the Arbitration Act, 1940 was dismissed by a learned Single Judge as barred by limitation and which decision was confirmed by the Division Bench. The points for consideration that were formulated by the Supreme Court were : (i) when the right to file an application under Section 20 had accrued and when it would become time barred, and (ii) whether in the context of Section 20, a difference or dispute could be said to have arisen between the parties when there was a denial or repudiation of a claim. The judgment of the Supreme Court noted that upon the dissolution of the partnership, there was an exchange of correspondence between the parties and if a letter dated 29 September 1989 is taken in to account, it would show that the suit under Section 20 was within limitation. The Supreme Court was of the view that the policy of the law is in the first instance to promote the efficacy of family settlements and as long as parties are in dialogue, it could not be asserted that limitation had commenced. Otherwise, parties would be compelled to resort to litigation or arbitration, even though they were in dialogue with each other in order to resolve their disputes. The Supreme Court observed thus :

“35. It cannot be said that merely because nominees were appointed for working out an arrangement, which could not ultimately be arrived at, a dispute or difference arose way back in February 1988. In fact, even immediately after this, the correspondence exchanged between the parties reveals a forthcoming attitude and amiable efforts made towards implementing the deed of dissolution.”

The judgment of Supreme Court has laid down the principles which must be borne in mind in dealing with disputes involving family settlement.

In that context, the following observations are of significance :

“42. Another fact that assumes importance at this stage is that, a family settlement is treated differently from any other formal commercial settlement as such settlement in the eye of the law ensures peace and goodwill among the family members. Such family settlements generally meet with approval of the courts. Such settlements are governed by a special equity principle where the terms are fair and bona fide, taking into account the well being of a family.

43. The concept of “family arrangement or settlement” and the present one in hand, in our opinion, should be treated differently. Technicalities of limitation, etc. should not ... put at risk ... the implementation of a settlement drawn by a family, which is essential for maintaining peace and harmony in a family. Also it can be seen from decided cases of this Court that, any such arrangement would be upheld if family settlements were entered into to allay disputes existing or apprehended and even any dispute or difference apart, if it was entered into bona fide to maintain peace or to bring about harmony in the family”.

The judgment of Supreme Court took note of the fact that the assets of the partnership were largely with the Kanpur group and an amicable settlement for the division of the assets had not been arrived at for over eighteen years, since those who were enjoying the assets in question were “merely trying to drag proceedings endlessly forever and for another period of uninterrupted enjoyment of the assets”². The Supreme Court observed that it was an admitted fact that the three branches of the Singhanian family are each entitled to a one third share in the immovable properties. In regard to the conduct of the Kanpur group, the Supreme Court made the following observations in the course of the judgment :

“62. it is thus seen that the above facts would clearly go to show that the contesting **Respondents 1-9 are not at all interested in any conciliation, mediation or arbitration but only interested in enjoying the bulk of the immovable properties of the firm and refusing to carry out their obligations under and pursuant to the said deed of dissolution by permitting the distribution of the said properties in specie** and free from any encumbrance as contemplated by the said deed of dissolution dated 26 March 1987 and the supplementary agreement dated 28 March 1987.

63. **It has now come to a stage that the real dispute has arisen between the parties.** Already the matter is pending adjudication from 1987 onwards, **Respondents 1-9 are admittedly in possession and enjoyment of the valuable immovable properties depriving the valuable rights of the appellants and the other Respondents 10-20.** We should not, therefore, allow Respondents 1-9 to drag the proceedings any further. The parties have to settle their disputes one day or the other. In our opinion, the time has now come to nominate a single arbitrator as provided under clause 13

² At paragraph 40, page 671 of the judgment of Supreme Court in (2006)4-SCC-658

of the agreement. It was argued that in case this Court allows the appeal, the matter may be remitted to the High Court for appointment of a single arbitrator and in case the parties are unable to agree upon a single arbitrator a panel of three arbitrators shall be appointed as provided in the said agreement. We feel that such a course, if adopted, would only enable the contesting Respondents 1-9 to squat on the property and enjoy the benefits, income, etc. arising therefrom.”

(emphasis supplied)

13. These observations which were made by the Supreme Court were undoubtedly in the context of a decision on the issue as to whether the arbitration suit under Section 20 of the Arbitration Act, 1940 was barred by limitation. While reversing the judgment of this Court and holding that the suit was not barred by limitation, the Supreme Court has laid down the basic frame work of the underlying principles that must be applied in dealing with a family settlement. The fundamental principles which have been emphasized by the Supreme Court are that :

(i) In dealing with a family settlement, the effort of an adjudicatory tribunal must be to promote the efficacy of a family arrangement which is intended to achieve a resolution of disputes; and

(ii) Family settlements are governed by a special equity which postulates that where the terms are fair and bona fide, such settlements must be enforced even at the cost of diluting technical objections.

In the present case one branch which was in possession of properties had made every effort to obstruct the distribution of the properties in order to continue to retain possession. Now it is in this background that the submissions which have been urged would have to be evaluated.

14. During the pendency of the arbitral proceedings, an agreement was arrived at between the parties on 20 March 2007. The agreement contemplated in its first part that the distribution of the properties would take place on the basis of market value. This was in substitution of the book value which was to be treated as the basis of distribution under the deed of partnership and the deed of dissolution. By their agreement dated 20 March 2007, the parties while stipulating that the distribution of the properties would take place on the basis of market value, agreed that the date of the valuation and the valuer would be decided by the arbitrator. The valuer was required to hear the parties. In the concluding part of the agreement, the parties stipulated that “all other contentions of the parties, except the valuation at the market value, are kept open.” Now at this stage, it would be necessary to note that two of the three contesting groups in these proceedings, namely the claimants consisting of the Kolkata group and one of the Appellants namely the Kanpur group, were ad-idem, on the meaning of this stipulation. The arbitrator has noted in the course of the award the submissions of learned counsel who appeared on behalf of the **Kanpur group** that “**by an agreement dated 20 March 2007, all parties have agreed that they will not challenge the valuations as fixed by the valuer**”³. This, in our view, assumes significance because both before the learned Single Judge in challenging the arbitral award and before this Court, both the Mumbai group and the Kanpur group, are acting together in their objections to the award. Hence, it is material to note that two of the three contesting groups construed the agreement dated 20 March 2007 to mean that parties had agreed that they would not challenge the valuation as fixed by the valuer.

³ Paragraph 20C

15. By the first part of the agreement the parties agreed that (i) the basis of the valuation would be the market value; (ii) the date of the valuation and the valuer would be decided by the arbitrator; and (iii) the valuer would hear the parties before giving his report. As a matter of fact, HDFC Limited was the valuer agreed upon by the parties. The parties had a full opportunity to and did in fact submit their perspectives to the valuer. The valuer made available a draft report for inspection before the parties and allowed the parties an opportunity to respond. The arbitrator furnished a further opportunity to the parties to place their submissions before the valuer and it was only thereafter that the valuer arrived at its final determination.

16. Section 26(1) empowers an arbitral Tribunal to appoint an expert to report to it on a specific issue to be determined by the arbitral Tribunal. Under Sub-Section 2 of Section 26, unless otherwise agreed by the parties, if a party so requests or if the arbitral Tribunal considers necessary, an expert shall, after submitting the report, participate in an oral hearing where the parties have opportunity to put questions and to present expert witnesses in order to testify on the points at issue. The arbitrator has held that in the present case, the agreement dated 20 March 2007 was an agreement as contemplated by Section 26(2) between the parties. The parties, as we have noted earlier, by the terms of their agreement, contemplated that the expert would hear them before submitting his report. The expert, HDFC Limited, was one in whom the parties reposed confidence since the appointment was made by consent. The underlying purpose and object of the provisions of Section 26(2) was duly fulfilled by the parties by (i) participating in the proceedings

before the expert and being allowed a full opportunity to produce material and advance submissions; (ii) being furnished with a copy of the draft report; (iii) being allowed to present their suggestions on the draft report; and above all (iv) making submissions before the arbitrator in regard to their choice of properties based on the valuation of the properties as made. The submission of the Appellants in the Mumbai group is that in the concluding part of the agreement dated 20 March 2007, the parties agreed that all other contentions (except the valuation at market value) would be kept open and what was concluded was only the principle that the basis of valuation was to be market value in stead of book value. We cannot accede to the submission. The arbitrator in the present case was called upon to interpret the terms of an agreement between the parties. The arbitrator was acting within jurisdiction in interpreting the terms of the agreement. Where an arbitrator takes a view on a provision of an agreement and which is a possible view, the Court under Section 34 will not interfere. This principle has been laid down in the recent judgment of the Supreme Court in **Rashtriya Ispat Nigam Limited Vs. Dewan Chand Ram Saran**⁴ :

“43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.”

17. Undoubtedly, under the provisions of Section 28, the arbitral Tribunal is required to decide a dispute submitted to the arbitrator in

4 (2012)5-SCC-306 at paragraph 43

accordance with the substantive law for the time being in force in the country. The arbitral Tribunal is required to decide in accordance with the terms of the agreement. An arbitrator, it is well settled, is a creation of a contract between the parties and if he ignores the specific terms of the contract, that would constitute a jurisdictional error which is susceptible of being corrected by the Court (**Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and another**⁵ and **Ispat Engineering and Foundry Works, B.S.City, Bokaro Vs. Steel Authority of India Ltd., B.S. City, Bokaro**⁶) In the present case, the question of construing the terms of the agreement dated 20 March 2007, arose before the arbitrator in the course of the arbitral proceedings. As we have noted, two of the three contesting parties were in fact in agreement before the arbitrator that the valuations fixed by HDFC Limited were binding on all parties. This was not merely the position of the Claimants namely, the Kolkata group but a solemn statement made before the Arbitrator by the counsel appearing for the Kanpur group. But apart from that, the construction that has been placed by the arbitrator on the terms of the agreement which envisaged that all other contentions of the parties, except **the** valuation at the market value are kept open, was a possible construction which would not warrant interference in proceedings under Section 34 of the Act of 1996. The learned Single Judge has found no basis to set aside the arbitral award on this aspect. Surely, as a Division Bench exercising appellate jurisdiction from a decision of a learned Single Judge declining to set aside an arbitral award under Section 34, we must exercise caution and circumspection. The construction of the agreement fell within the province and domain of the arbitrator. Where a possible

5 (1999)9-SCC-283

6 (2001)6-SCC-347

view is taken, no case arises for interference with the award under Section 34. Less so in appeal.

18. Now, insofar as the aspect of limitation is concerned, certain important facets of the matter need to be stated at the outset. Firstly, no plea of limitation was raised before the arbitral Tribunal in the written statement that was filed by the Mumbai group. As a matter of fact, the written statement of the Mumbai group in the course of the proceedings, sought to emphasise that since the reference was in essence in relation to a family arrangement, technicalities and strict principles of law applicable to commercial agreements, must be subservient to achieve harmony in the family. A defence of limitation was raised in the written statement of Kanpur group in paragraph 2 where there was an averment that the claim was barred by limitation. This was reiterated in paragraph 18. The Kanpur group emphasized, inter alia, that there was no consensus as to the mode and manner in which the distribution was to be made and there was in the circumstances no failure on their part to divide or distribute the immovable properties of the partnership firm. The basis of the challenge to the arbitral award is that the arbitrator, having raised the issue of limitation, erroneously came to the conclusion that the judgment of the Supreme Court dated 4 April 2008 having held that the suit was within limitation and having referred the disputes to the arbitral tribunal, the consequence was that the claims as set out in the statement of claims, would have to be held within limitation.

19. The Appellants have relied on the judgment of the Supreme Court in **Union of India Vs. M/s.L.K.Ahuja and Co.**⁷ in which a distinction

⁷ (1998)3-SCC-76

has been made between whether : (i) a claim made in arbitration is barred by limitation under the relevant provisions of the Limitation Act; and (ii) a claim made for an application under Section 20 of the Arbitration Act, 1940 is barred. The Supreme Court has observed as follows :

“8. In view of the well settled principles we are of the view that it will be entirely a wrong to mix up the two aspects, namely, whether there was any valid claim for reference under Section 20 of the Act and, secondly, whether the claim to be adjudicated by the arbitrator, was barred by lapse of time. The second is a matter which the arbitrator would decide unless, however, if on admitted facts a claim is found at the time of making an order under Section 20 of the Arbitration Act, to be barred by limitation.”

The Supreme Court has in that context referred to a judgment of the Kolkata High Court in **Jiwani Engineering Works Pvt. Ltd. Vs. Union of India**⁸.

20. In the reply that was filed by the Kolkata group before the learned Single Judge to the arbitration petitions, it was stated that the Appellants had made no submissions in respect of the contention of limitation before the arbitrator; that the Appellants had participated actively in the arbitration proceedings and had entered into further agreements during the process, which had resulted in the passing of the award and that the disputes related to the distribution of the family properties in which each group consisted of co-owners. Once again it was reiterated that no oral submissions had been made on behalf of the Appellants at any point before the arbitral Tribunal in regard to the

⁸ AIR-1978-Calcutta-228

alleged bar of limitation. The rejoinder that was filed on behalf of the Appellants before the learned Single Judge does not contain an adequate traverse. According to the Appellants, they were not called upon and/or were not permitted to make submissions in respect of the contention of limitation before the learned arbitrator. The entire traverse on the part of the Appellants, is, hence vague and bereft of material particulars. Undoubtedly, as a matter of first principle, the issue as to whether the invocation of arbitration is within limitation has to be distinguished from the question as to whether a substantive claim in the arbitral proceedings is within limitation. At the same time, having regard to the broad canvass of the observations of the Supreme Court in the judgment inter partes noted earlier, it cannot be postulated that those observations were to be completely ignored in dealing with the question as to whether the claim in arbitration was barred by limitation. In several parts of the judgment to which a reference has already been made earlier, the Supreme Court while laying down the principle of special equity that applies to what are essentially family settlements, held, that following the dissolution of the partnership, the parties were in serious negotiations and that as a result, the first dispute that arose between them related to September 1989.

21. During the course of these proceedings, it was urged on behalf of Kanpur group that the governing period of limitation would be that which is prescribed by Article 5 to the Schedule to the Limitation Act in respect of a suit for accounts and a share of the profits of a dissolved partnership. The period of limitation is three years and limitation commences to run from the date of dissolution. The claim in the arbitral proceedings in the present case was certainly not one that meets

the description of a suit on accounts and for a share in the profits of a dissolved partnership referred to in Article 5 of the Schedule to the Limitation Act. That apart, we find substance in the submission that it will be manifestly unfair to the arbitral tribunal to find fault with it on the ground that the Tribunal had not dealt with a submission which was neither agitated nor advanced. The parties in the present case have allowed a distribution to take place and it is not in dispute that five properties have been sold through their agreement during the course of arbitration. For all these reasons, we are of the view that the challenge to the arbitral award on the ground of limitation must fail.

22. Now it is in this background that it would be necessary to advert to the circumstances in which the Juhu property at Mumbai came to be awarded to the Kolkata group. The objection of the Mumbai group is that the valuation of the Juhu property should be lower than Rs.89.66 crores as determined by the valuer. The Mumbai group had submitted a proposal before the arbitrator suggesting that the three groups may be mutually allowed to bid for every single property and that the property may be given to the highest bidder. The proposal contemplated that thereafter the total value fetched would be divided into three parts with each group would having credit of one third of the bid amount which would be debited with the amount of the property retained by the group. The Kanpur group proposed that a party in occupation of a property should be allowed to retain the property at a value determined by the valuer, but if it was not willing to do so, then in that event the other party may be allowed to retain the other property at the determined value. Before the arbitral Tribunal on 7 April 2008 (which was after the valuation report valuing the property at Rs.89.66 crores was received),

the Claimants stated that they were willing to take the Juhu property at the price fixed by the valuer at Rs.89.66 crores. The Claimants representing the Kolkata group further stated that though the Mumbai group had stated that they were not interested in taking the Juhu property at the price as valued, the Kolkata group was still willing to give the first option to the Mumbai group to take the Juhu property at the said price. The Kanpur group stated that they had no objection to either the Kolkata group or the Mumbai group purchasing the Juhu property. The Mumbai group made a statement before the arbitrator that they would consider whether they are willing to purchase the property at Juhu at Rs.89.66 crores. The arbitrator during the course of the award noted that thereafter the Mumbai group did not intimate its willingness to be allotted the Juhu property at Rs.89.66 crores. Significantly, the Mumbai group had submitted a valuation report to the arbitrator in which the Juhu property was valued at Rs.62.57 crores. Even then, as the arbitrator noted, the Mumbai group was willing to pay no more than an amount of Rs.32.00 crores for the Mumbai property.

23. It was in this background that the arbitrator observed that in a case as the present, it was impossible to exactly divide in specie the immovable properties as that would mean a physical division of some of the properties and that none of the parties had asked for such a physical division. The arbitrator held that though the distribution was to be in specie, there would have to be an equalization of shares in terms of money. The shares of the parties were not in dispute. Since the Juhu property was valued at Rs.89.66 crores, the party to whom the Juhu property was to be allotted, would have to pay a sum of Rs.46.11 crores which would be distributed between the other two groups considering

the value of the properties allotted to them. The Kanpur group which was in possession of the Kanpur properties desired to retain the **entirety** of the Kanpur properties but this conduct, as we have noted earlier, has been the subject matter of adverse comment in the judgment of the Supreme Court. The Juhu property, as the arbitrator noted, could not be allotted to the Mumbai group since it was not willing to accept the allotment of the property at Rs.89.66 crores whereas the Kolkata group was willing to accept allotment at that price. The arbitrator, in our view, was justified in holding that when one group was willing to accept the allotment of the Juhu property at Rs.89.66 crores, there was no justification for the Mumbai group to expect that the property be allotted to them at a lower price. The submission of the Mumbai group was that the Juhu property had been over valued by the valuer. The arbitrator noted that if according to them the property had been over valued, they ought to willingly accept their share from the consideration of the Juhu property, which was offered by the Kolkata group. Moreover, the proposal of the Mumbai group, as noted earlier, was to allow bids and to allot properties to the highest bidder. They cannot possibly have an objection to the Juhu property being allotted at a much higher value than they were willing to offer.

24. We do not find any merit in the submission of the Kanpur group that the arbitrator transgressed the limitations of the contract or ignored the terms of the contract. The distribution of the properties was undoubtedly to be carried out in specie. This stipulation must bear a robust understanding, one that accords with common sense. As noticed in the judgment of the Supreme Court in **Harishankar Singhania (supra)**, the fixation of an equalization amount was part of the exercise

that was to be carried out by the arbitrator, if necessary. The arbitral Tribunal has noted that while carrying out a physical division in specie, an exact division is impossible. Hence, an equalization in terms of money would necessarily be warranted. In a petition under Section 34, the test is not whether another division or a better division could have been carried out. The only question that has to be answered is as to whether the arbitrator has transgressed the terms of the agreement and the governing principles of law that are applicable. An exact physical division in specie was not possible. As the Supreme Court has held, in such a case, there is no alternative but to resort to the process called owelty according to which the rights and interests of the parties in the properties are protected by allowing only one to retain the same (**Badrinarain Prasad Choudhary and others Vs. Nil Ratan Sarkar**⁹). In the present case, however, the arbitrator in accordance with his mandate, which was to effect a distribution in specie, has carried out that exercise, to the extent to which it was practicable and feasible and for the purposes of equalization of the shares, directed payments of money in balance. We find no error apparent that would warrant setting aside the award under Section 34.

25. On behalf of the Appellants it has been urged that there is an inconsistency in the arbitral award in regard to the manner in which the arbitrator has construed the agreement dated 20 March 2007. Learned counsel submitted that in paragraph 20(a), the arbitrator noted the submission of the Kolkata group that by the agreement dated 20 March 2007 the parties had only changed the method of valuation from book value to market value. Learned counsel submitted that in paragraph 21,

9 (1978)3-SCC-30

the arbitrator noted that by the agreement “all that was done” was that in respect of the distribution on the basis of book value, the parties have now agreed that the distribution be on the basis of the market value. The arbitrator also observed that the parties have agreed that the distribution should be on the basis of market value and that the contention regarding the market value is no longer open to the parties. It was urged that having taken this view in one part of the award, the learned arbitrator erred in coming to the conclusion that the parties had agreed that on the question of market value, the final report would be binding on all the parties. This submission, in our view, seeks to lift out of context the observations of the arbitrator. The submissions noted in paragraph 20(a) were with reference to the stipulation in the deed of partnership and the deed of dissolution that the division had to be in specie. It was in the context of this submission that it was urged on behalf of the Kanpur group that once the parties had agreed to a distribution of the properties at the market value, there was no necessity of distribution in specie, as the equalization should be by adjustment of monies. Hence, the submission of the Kanpur group was that the distribution of properties in specie was applicable only so long as the distribution was to take place in accordance with book value. The learned arbitrator rejected the submission that was urged on behalf of the Kanpur group that the agreement dated 20 March 2007 waived the requirement of a distribution in specie. It was in that context that the arbitrator held that all that the agreement had done is to substitute distribution on the basis of market value in stead of distribution by book value. These observations cannot be read out of context on the question as to whether the parties had kept open to themselves a right to agitate against the final report of the valuer.

26. On behalf of the Kanpur group, it has been submitted that in paragraph 23 of the award, the arbitrator has noted that the property at sr.no.7 is fully in the occupation of outsiders and that it has been agreed that it should not be allotted free from all encumbrances. Similarly the arbitrator noted that the property at sr.no.8 is also in possession of an outsider except for a small portion in possession of J.K.Oil Mills. The property which was in the possession of the outsider was valued at Rs.7.90 crores, whereas that in the possession of J.K.Oil Mills was valued at Rs.0.04 crores. However, it was urged that in the operative part of the award in paragraph 26(b), the arbitrator has directed that the Kanpur group would receive the amount due to them against delivery of vacant possession free from all encumbrances of all the properties allotted to Mumbai group. In our view, the direction of the learned arbitrator in paragraph 26(b) to the effect that the Kanpur group would receive an amount of Rs.22.71 crores only against the delivery of vacant possession free from all encumbrances of all the properties allotted to the Mumbai group is severable and has to be read subject to the findings in paragraph 24, which is to the effect that it was agreed between the parties that the properties at sr.nos.7 and 8 would not be allotted free from all encumbrances since they were in the possession of outsiders. The operative direction of the learned arbitrator, as noted above, is therefore, to be subject to the aforesaid stipulation. Parties have agreed in arbitration that the properties at serial no.7 (which is in the occupation of an outsider) and serial no.8 (which is substantially in the occupation of an outsider) do not have to be allotted free of encumbrances. We, however, do not find any merit in the submission that the entirety of the award is liable to be set aside merely on that ground.

27. For these reasons, we are of the view that there is no merit in the appeals. The appeals shall accordingly dismissed. There shall be no order as to costs.

(DR.D.Y.CHANDRACHUD, J.)

(A.A.SAYED, J.)

MST