

(2015) 02 BOM CK 0161

In the Bombay High Court

Case No : Arbitration Petition No. 1200 of 2012

Raviuday Construction Co.

APPELLANT

Vs

Bhaktiyog Co-operative Housing Society Ltd.

RESPONDENT

Date of Decision : 10-02-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 34(3), 34(4), 68(3), 69(7)
Civil Procedure Code, 1908 (CPC) — Order 22 Rule 3, 105(2)
Criminal Procedure Code, 1973 (CrPC) — Section 309(2)

Citation : (2015) 02 BOM CK 0161

Hon'ble Judges : Anoop V. Mohta, J.

Bench : Single Bench

Advocate : Girish Godbole and Sumit Kothari i/by Jaykar and Partners, for the Appellant; A.M. Vernekar and Samarth Pai, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Anoop V. Mohta, J.—The Petitioner-Contractor/Developer, has challenged award dated 15 May 2012 passed by the Arbitral Tribunal as appointed by the consent, based upon the agreements between the parties. Two learned Arbitrator's majority award, is under challenge. Other Arbitrator expressed dissenting view, stated to be, in support of the Petitioner (Original-Respondent), against the Respondent (Original-Claimant).

2. The operative part of the majority award is as under:-

"a. Respondents do pay to the Claimants Rs. 7,35,000/- towards last installment and Rs. 10,80,000/- for excess FSI with 18% interest thereon from 1/10/2007 till actual payment.

b. Respondents shall further pay to the Claimants Rs. 25,00,572/- towards interest as per chart annexed.

c. Respondents shall further pay to the Claimants Rs. 9,73,753/- towards construction of community hall.

- d. Respondents shall further pay to the Claimants Rs. 7,00,000/- towards costs.
(Respondents No. 1 to 7 are liable to make above payments jointly and severally)
- e. Respondents shall bear their own costs.
- f. Counter claim of the Respondents is hereby rejected.
- g. Respondents' request in letter dated 10/08/2001 for one more sitting of the Tribunal has to be rejected."

3. The basic facts are as under:-

The Respondent Society is the owner of 4 constructed buildings and the plot. Even after the construction of 4 buildings, there remained balance FSI admeasuring 13400 sq. ft. on the property. On 12 October 1995, the Petitioner (The Developer) submitted its offer accepting all the terms and conditions laid down in the Notice inviting offer. The Petitioner offered to pay the Society at the rate of Rs. 11,025/- per sq. ft. for available built up area.

4. On 9 April 1996, an agreement was executed between the Society and the Petitioner whereby, it was agreed that the Society would assign the Development rights with respect to the utilization of balance FSI admeasuring 13000 sq. ft. in favour of the Petitioner for construction of the balance FSI. On 2 July 1996, the income tax clearance was made. On 22 June 1998, the commencement certificate was issued. On 3 June 2001, a supplementary agreement was executed between the Society and the Petitioner recording the terms and conditions, by which earlier obligations, were stated to be waived and discharged including the Claims. The Respondent was to execute a Power of Attorney in favour of the Petitioner as per the terms of the agreement, but the same was never executed. As per the supplementary agreement the Petitioner was to utilize 6300 sq. ft. of TDR for further construction.

5. On 16 August 2001, the construction of A-wing consisting of stilt + 6 upper floors was completed and an Occupation Certificate was obtained from the Brihan Mumbai Municipal Corporation (for short, "the BMC"). Till the receipt of Occupation Certificate, the Petitioner had made payment of Rs. 1,43,40,000/- On 25 March 2002, a certificate was issued by an Architect stating that the FSI of 13650 sq. ft. was consumed by the Petitioner which was 250 sq. ft. in excess of the agreed FSI of 13400 sq.ft. On 29 March 2002, the Respondent demanded unpaid balance of Rs. 7,35,000/- and charges for use of FSI to the extent of Rs. 2,81,250/-.

6. On 5 April 2002, the Respondent requested the Petitioner to proceed with the construction of the Community Hall and also to pay the balance amount of Rs. 7,35,000/- along with Rs. 2,81,250/- being the price for an additional FSI consumed by the Petitioner. Since, the Petitioner was informed not to proceed with the work of construction of B-Wing unless plans for community hall were sanctioned, the Petitioner filed Small Cause Suit No. 3909 of 2002 to restrain the

Respondent from obstructing the Petitioner's construction. On 29 April 2002, the Petitioner sent a letter that the Plans of Community Hall could not be submitted as no Layout Plan had been annexed to the agreement as the Respondent had not executed Irrevocable Power of Attorney. The security deposit was towards the last installment, however, the said deposit was appropriated nearly 1 year before the Petitioner obtained the Occupation Certificate.

7. On 23 July 2002, the learned Civil Judge passed order refusing ad-interim reliefs. On 13 August 2002, the Petitioner had withdrawn Suit No. 3909 of 2002. Thereafter, the Petitioner got the plans for community hall sanctioned and began the construction. On 13 March 2005, the Petitioner obtained Occupation Certificate for 6th floor, A and B wing.

8. On 11 August 2005, the Petitioner sent a letter for the information with respect to FSI consumed for D.P. Road, staircases FSI and balcony FSI. The Respondent refused to provide the information. Respondent further recorded that the Petitioner had deposited Rs. 14,00,000/- with BMC towards development charges of the property. The receipt of the deposit had been issued in the name of the Respondent and therefore, the Respondent was required to obtain the refunds from the BMC. However, till date the Respondent had failed to refund the amount due to financial constrain, the Petitioner was unable to go ahead with construction work. On 22 August 2005, the Respondent sent a letter denying the allegations so raised. On 25 September 2005, since the Petitioner refused to complete the work, the Respondent informed of a survey to be held to evaluate the cost involved in the construction of the community hall. On 17 January 2006, the Petitioner invoked arbitration. On 15 November 2006, the Respondent, issued a notice terminating the services of Architect. The parties lead their evidence and filed respective documents. After hearing, the Tribunal has passed the award as recorded above. On 15 January 2012, the Award was passed.

9. The learned counsel appearing for the Petitioner has cited and relied upon the following Judgments.

- a) Harsha Constructions Vs. Union of India (UOI),
- b) Budh Ram and Others Vs. Bansi and Others,
- c) N. Balakrishnan Vs. M. Krishnamurthy,
- d) New India Civil Erectors (P.) Ltd. Vs. Oil and Natural Gas Corporation,
- e) Govind Laxman Jadhav Vs. Namdeo Balu Jadhav,

10. The learned counsel appearing for the Respondent relied upon the Judgment of Vastu Invest and Holdings Pvt. Ltd. Vs. Gujarat Lease Financing Ltd.,

11. The learned counsel appearing for the Petitioner, basically raised the points revolving around the Limitation, Novation of Agreement, Estoppel and effect of death of four partners of the Petitioner partnership firm during the pendency of the Arbitration proceedings. The learned counsel appearing for the Respondent

resisted the same and supported in all respect the majority decision.

12. First thing, we have to deal with the issue of death of partners during the pendency of the Arbitration proceedings. The Award passed is jointly and severally against all the six partners of the partnership firm, out of which four are dead. We have to see the effect of such death and specifically under Section 34 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act), to what extent and to at which stage, the proceedings are abated by the process of law in such matter, because of the issue of death of four partners, pending the Arbitration proceedings before the Arbitral Tribunal. No effective steps taken by the parties and the advocates who were appearing for such deceased partners prior to the death. The submission was raised that the oral communication was made about the death during the pendency of Arbitration proceedings itself. There is nothing on record to show the same. The learned Tribunal, as recorded above, has passed the award inspite of death of four partners against all six partners of the Petitioner partnership firm. The Respondent's submission and it appears to be correct, that no such steps were taken by the parties though the death of such partners took place pending the Arbitration proceedings before the Tribunal. The law is clear in this regard. It is the obligation of the respective parties/advocates to report the death immediately and/or at the earliest, so that the appropriate proceedings/steps can be taken by the parties to bring legal heirs on record, if necessary within prescribed period. No such steps taken, neither recorded even by the Tribunal. The Award so passed is against all the partners including 4 dead partners, and the firm and held all of them jointly and severally liable. The fact of death of four partners, as not denied, cannot be overlooked in such Petition before confirming or revoking the award.

13. The learned counsel appearing for the Respondent, on instructions during final hearing, submitted that they would not execute the award against the dead partners and also not against their Legal Heirs and the property/share of such partners. The Award be modified accordingly. Any such modification at Section 34 stage, would cause further complications, at the time of execution, as the award is passed against the four dead partners. The other remaining partners and the firm would definitely suffer injustice and hardship, as the monetary liability will be upon them and their property, though as per the award, all the partners and firm are liable. There is nothing that they have consented and/or accepted such liability. Such restrictions and waiver by the remaining Respondents, in my view, is not the solution, as it affects all other surviving partners. The award, therefore, cannot be dissected or modified under Section 34, in such fashion. Its execution also will create problems. It will be unexecutable award against all the Partners and the firm. Such award's execution may not be only against the remaining Partners and the firm, when all are severally and jointly liable. The effect of abatement and not bringing Legal Heirs in time, need to be considered by the Arbitral Tribunal afresh. The case of remand is made out, instead of modifying the award to make it duly executable and/or executable. As not brought all Legal Heirs, the decree/award will not be

executable against such dead partners, but only against firm and the surviving partners" assets. The Arbitral Tribunal needs to consider the fact of abatement again (Budhram) (supra). In such circumstances, the award cannot be dissected and/or severable. It needs to be set aside for above admitted position. Harsha (supra).

14. This Court by order dated 28 November 2014 after hearing both the parties by a reasoned order granted the amendment and permitted to add the grounds so raised, which reads thus:-

"Heard the learned counsel appearing for the parties.

2 This Chamber Summons is taken out by the Petitioner to amend the Petition which was admitted on 25.02.2013 under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, "Act of 1996"). The chamber summons is taken out in October 2014. Respondents filed reply and opposed both the amendments. The amendment is with regard to the death of a managing partner, who was appointed to look after the business of the Petitioner firm and one who had verified the Petition, the defects need to be removed. Even otherwise, it is necessary for deciding the present Petition.

3 So far as the second issue is concerned, the averments based upon the oral information even with regard to the death of some of the partners pending the proceedings, stated to be orally informed to the Respondent also required to be dealt with, at the time of final hearing of the present admitted Petition. That is relevant even for execution of the Award once confirmed under Section 34 of the Act of 1996. Therefore, by keeping all points/defences open, in the interest of justice, I am inclined to grant this chamber summons. Amendment to be carried out forthwith.

4 The submission is made by the learned counsel appearing for the Respondent that in view of a judgment of a Division Bench of this Court in Vastu Invest and Holdings Pvt. Ltd. Vs. Gujarat Lease Financing Ltd., , that such amendment to add grounds, after 90/120 days, ought not have been allowed. However, the Supreme Court in State of Maharashtra Vs. Hindustan Construction Company Ltd., , considering the circumstances, permitted such grounds to be added in the interest of justice. Even otherwise, in the present facts and circumstances, a death of parties, though orally informed, but not taken care of by both the parties by taking steps in writing, that cannot be the reason to overlook the present affidavit placed on record and intimating to the Court about the death of those partners, who were parties to the main Arbitration proceedings. The effect of death of three partners out of six partners, need to be tested at the time of final hearing. This fact/ground just cannot be overlooked at the time of final disposal of Petition under Section 34 of the Act of 1996. The amendment requires for adjudication of the issues so raised. All points kept open so also the defences.

5 Chamber Summons stands allowed accordingly. No costs."

The issue of legal representatives to be brought on record and/or ought to have been brought on record at appropriate state before the Tribunal, goes to the root of the matter.

15. This Court in Govind Laxman Jadhav (Supra), while dealing with Order 22 Rule 3 dealt with the aspect of bringing Legal Heirs and effect of payment and the effect of not bringing Legal heirs of the deceased partners on record, pending the award as all the partners of the firm and their Legal Heirs are jointly and severally liable for the award. The award, as well as, the decree therefore, is undissectable and/or indivisible.

16. In any way, the issue required to be dealt with afresh by the Tribunal by giving opportunity to all the concerned before passing and/or modifying the award, so passed against the dead persons/partners. The date of death and the fact of death of partners, irrespective of completion of formalities of bringing Legal Heirs on record for want of no knowledge or otherwise, in my view, is relevant and therefore, the Court would not be in a position to confirm such award and permit the claimant to execute the same, without bringing Legal Heirs on record by modifying the award for the first time in Section 34 Petition. I am inclined to observe that it is desirable and appropriate for the same Arbitral Tribunal to consider all these aspects, including bringing Legal Heirs on record, in accordance with law so that the award once passed after hearing the Legal Heirs and/or bringing them on record, the Court will be in a position to reconsider the case again, as the decree/judgment so passed under Section 34 confirming the award, needs to be executable in law.

17. The Apex Court has recognized the principle and purpose of remand in many cases, even under Arbitration Act. The relevant paragraphs of some of the Supreme Court Judgments are as under:-

In Shipping Corporation of India Ltd. Vs. Mare Shipping Inc.,

"8. As the said claim was disputed, arbitration was invoked by the parties under the provisions of the Arbitration and Conciliation Act, 1996.

10. The said Award was challenged by the Petitioners/Charterers in the Bombay High Court on the ground that the respondents had not proved that the notice of readiness had been tendered at Vadinar and consequently the respondents were not entitled to demurrage for the period that MT Prestige was detained at Vadinar. The learned Single Judge of the High Court accepted the submission made on the petitioners" behalf and by his order dated 25-4-2005 remitted the matter to the arbitration for a proper finding in this regard, with leave to the respondents/owners to lead evidence to prove tender of the notice of readiness to the petitioners/Charterers."

In H.P. Housing and Urban Devt. Auth. and Another Vs. Ranjit Singh Rana,

"2. On 12-8-1998, the arbitrator passed the award. Aggrieved thereby, the appellants filed objections under Section 34(3) of the Arbitration and Conciliation

Act, 1996 (for short "the Act"). The objections were accepted by the High Court to the extent that the reasons were not given by the arbitrator and, accordingly, the matter was sent back to the arbitrator for giving reasons in support of the award."

18. I have already recorded, based upon the Supreme Court Judgments, the power of the Court under Section 34 of the Arbitration Act to remand the matter to the Arbitral Tribunal to resume the Arbitration proceedings and to give the parties an opportunity to put their case by observing as under:-

In M/s. Aawas Builders and Ors. Vs. Mr. Ajit Pathare and Ors. Arbitration Petition No. 163 of 2012 dated 5 December 2014

"19 There is no bar to dissect the severable part and to modify the award. The Supreme Court recently in Oil and Natural Gas Corporation Ltd. Vs. Western Geco international Ltd., observed that-

"40 It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."

20 In Axios Navigation Co. Ltd. Vs. Indian Oil Corporation Limited, Refineries Division, I have already taken a similar view in paragraph 60, which reads thus:-

"60 I have already observed in Anupam Engineer, Mumbai Vs. Indian Oil Corporation Ltd., Mumbai 2010 (2) Mh. L.J. 632 that Arbitral Award can be modified by the Court under Section 34 of the Arbitration Act by referring the various Supreme Court Judgments, and further in Union of India (UOI) and Dy. Chief Engineer (Const.) Vs. Sagar Thermit Corp. Ltd., by referring to R.S. Jiwani (Supra). Therefore, if the Court has power to modify the award, then there is no reason not to modify the majority award in part. It is also made clear that if there is a question of reappraisal of documents and material on record, then it will be difficult for the Court under Section 34 to grant the award for the first time by reappraising the material on record, but if there is a question of law involved and/or only question of interpretation or clause and/or related aspects, whether appreciation of evidence is not necessary, the Court may pass and/or modify the award accordingly."

19. Above opinion has foundation of various other Supreme Court Judgments, including State of U.P. and Others Vs. Combined Chemicals Company Private Limited,

"33. The same view was reiterated in Tamil Nadu Electricity Board Vs. M/s. Bridge Tunnel Constructions and others, and Punjab State Electricity Board and Another Vs. Punjab Pre-Stressed Concrete Works, . In the second judgment, the Court referred to some of the earlier judgments and observed:(SCC p. 743, para 11)-

"..... Once Claim I is not tenable, the award has to be set aside inasmuch as it is not possible to say that the award did not relate to Claim I. This is a sufficient reason for setting aside the award and remitting the matter back to the arbitrator."

20. The principle of remand and the reason has been reinforced by the Apex Court in Anand Brothers P. Ltd. Vs. Union of India (UOI), again, by observing as under:-

"14. It is trite that a finding can be both; a finding of fact or a finding of law. It may even be a finding on a mixed question of law and fact. In the case of a finding on a legal issue the Arbitrator may on facts that are proved or admitted explore his options and lay bare the process by which he arrives at any such finding. It is only when the conclusion is supported by reasons on which it is based that one can logically describe the process as tantamount to recording a finding. It is immaterial whether the reasons given in support of the conclusion are sound or erroneous. That is because a conclusion supported by reasons would constitute a "finding" no matter the conclusion or the reasons in support of the same may themselves be erroneous on facts or in law. It may then be an erroneous finding but it would nonetheless be a finding. What is important is that a finding presupposes application of mind. Application of mind is best demonstrated by disclosure of the mind; mind in turn is best disclosed by recording reasons. That is the soul of every adjudicatory process which affects the rights of the parties. This is true also in the case of a finding of fact where too the process of reasoning must be disclosed in order that it is accepted as a finding in the sense the expression is used in Clause 70.

16. In the case at hand the Arbitrator's award was admittedly unsupported by any reason, no matter the Arbitrator had in the column captioned "findings" made comments like "sustained", "partly sustained", "not sustained". The High Court was, therefore, justified in setting aside the award made by the Arbitrator and remitting the matter to him for making of a fresh award."

21. In the present case, in view of factual position so recorded above, to avoid further delay in deciding the issue so raised and agreed by the parties to be settled through the Arbitration proceedings, now just cannot be delayed further and/or parties cannot be directed to go and seek an appropriate remedy by not remanding the matter and/or by permitting the same Tribunal to resume the Arbitration proceedings to decide on the issues so referred, based upon the material already placed on record. The Court under Section 34 of the Arbitration Act, can modify the award. The law is settled in this regard, as referred in the

Judgments. The issues are interlinked and interconnected, including all the claims therefore, it is not difficult to restrict and/or dissect the claim on particular point, therefore, this is a fit case, where I am inclined to remand the whole matter for re-consideration and re-hearing.

22. By setting aside the award on the grounds so referred above, without remitting the matter, would cause great injustice and hardship to the parties, one who agreed to settle their matter through the Arbitration proceedings. To set aside the award fully for the Arbitral Tribunals misconduct and/or illegality in the award and the parties permitted and/or directed to go to an appropriate Civil Forum/Court, after so many years spent by the parties in the Arbitration proceedings, would definitely against the scheme and purpose of alternative resolution remedy and specially against the Arbitration and Conciliation Act itself. No prejudice cause to the parties if the matter is remitted and the Tribunal is permitted to resume for the issues so re-referred and remanded as contemplated even under Section 34(4) of the Arbitration Act, which is reproduced as under:-

"34 (4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

23. The basic principle of "remand" as well as, "remit" are elaborated as follows:-

"Remand"

A) As per "The Oxford English Dictionary", Volume VIII, Poy-Ry, Oxford at the clarendon press":-

"Remand. Law. To remit (a prisoner, indictment, record, etc.) back to a court or judge. Obs."

B) As per "Advanced Law Lexicon", The encyclopedic Law Dictionary with legal maxims, latin terms and words and phrases, compiled and edited by P. Ramanatha Aiyar-Volume 4.

"Remand. After a preliminary or partial hearing before a Court or Magistrate, to send a prisoner back to the custody, to be kept until the hearing is resumed or the trial comes on; to remit or send back a cause to the Court from which it was removed, appealed, or transferred into another Court, in order that some further action may be taken upon it in the original Court. See also 21IC842.

The act of sending back (a prisoner) into custody, specially in order that further evidence on the charge may be obtained; the act of sending back a case or suit or an appeal to the lower Court or authority for re-hearing [S. 105(2), CPC (5 of 1908) and S. 309(2), Expln., Cr.P.C. 1973 (2 of 1974)]; to send back.

To send back to a lower Court for further proceedings. (CRAIG R. DUCAT-

Constitutional Interpretation]

\$\$SEE ALSO (1) "MOTION TO REMAND"; (2) "ORDER OF REMAND"; (3) "REASONABLE CAUSE FOR REMAND".

"Remit"

A) As per "The Oxford English Dictionary", Volume VIII, Poy-Ry, Oxford at the clarendon press":-

"Remit. III. 8. To refer (a matter) for consideration, decision, performance, etc., to a person or body of persons, now usu. to one specially empowered or appointed to deal with it; also spec. in Law, to send back (a case) to an inferior court."

B) As per "Advanced Law Lexicon", The encyclopedic Law Dictionary with legal maxims, latin terms and words and phrases, compiled and edited by P. Ramanatha Aiyar-Volume 4.

"Remit a cause. "To remit a cause is to sent it back to the same Court from which it has been removed by appeal or otherwise, for the purpose of retrying the cause when judgment has been reversed, or of issuing execution when it has been affirmed."

24. The concept and purpose of remittance and/or remand are also recognized and accepted even under Article 34(4) of the Uncitral Model Law and so also the International Arbitration Laws. There is no specific bar in view of clear acceptance of procedure of remand and/or remission for every such related purpose. The concept "remission" is similar to the concept of "remand" as those terms are not specifically defined in any of the Arbitration Acts. The purpose and object of both these concepts is same and similar, even under the English Law, as contemplated under Section 68(3) and 69(7) of "The (English) Arbitration Act 1996", which read thus:-

"68(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may-

- (a) remit the award to the tribunal, in whole or in part, for consideration,
- (b) set the award aside in whole or in part, or
- (c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."

"69(7) On an appeal under this section the court may by order-

- (a) confirm the award,
- (b) vary the award,

(c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or

(d) set aside the award in whole or in part.

The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."

25. Strikingly, the Supreme Court Judgment so referred and relied upon, has not been read and referred in and/or pointed out to the Division Bench Judgments, Geojit Financial Services Limited (Presently known as Geojit BNP Paribas Financial Services Limited Vs. Kritika Nagpal 2013(8) LJSOFT 24 and Indian Oil Corporation Limited Vs. M/s. Saibaba Automobiles Appeal (L) No. 257 of 2013, dated 10 October 2013, and basically when the facts are different and distinguishable, as the case interfered by the Division Bench based upon the facts of that case by maintaining and/or modifying the award passed by the Arbitral Tribunal.

26. The Supreme Court has accepted the position of law of remand, even under the Arbitration Act of 1996, and therefore, to avoid further delay and injustice to the parties, in the present facts, and as both the parties have consented and agreed to proceed before the same Arbitral Tribunal, on the basis of existing material and unless specifically required to add more material, the procedure of remand and to resume arbitration proceedings will be within the frame work of law, I see those two Division Bench judgments are not sufficient to overlook the binding law so laid down by the Supreme Court on the principle of remand under the Arbitration Act. In view of the present facts and circumstances also, I am inclined and bound to follow the law laid down by the Supreme Court, which has binding effect on all the Courts, so referred above. Those Supreme Court Judgments are not referred and dealt with as probably not pointed out in the Division Bench Judgments (Geojit and Indian Oil Corporation) (supra).

27. In so far as the submission of novation based upon the supplementary agreement dated 3 June 2001, whereby by all the objections under agreement dated 9 April 1996 were stated to be discharged and remained not claimed by the Respondent against the Petitioner. Therefore, also detailed discussion is necessary on this issue, as the subsisting remains or claims arising out of agreement dated 9 April 1996 stated to be waived by the Respondent against the Petitioner. The submission of novation of original agreement dated 9 April 1996 therefore, relevant factor also from the point of view of principles of estoppel and waiver. The law laid down by the Supreme Court in New India Civil Erectors (P) Ltd. (Supra), with regard to the settled position that the parties are bound by the clause of agreement is also relevant factor, which required to be tested in the facts of the present case.

28. The above issue is also relevant to decide the case/submission revolving around the limitation aspect. The consumption of additional FSI was raised for

the first time on 29 March 2002, as the same was pointed out by the Architect's certificate dated 25 March 2002. The Arbitration entered into on 22 March 2007 and claimed the amount of Rs. 2,81,250/-, which is beyond 3 years of period. There was no specific demand raised about the interest even in the first letter dated 6 November 2006. The Claimant's letter dated 6 November 2011 refers only the amount and no claim was raised for excess FSI of 721.80 sq. fts. with amount of Rs. 8,11,328/-. Even as per agreement dated 9 April 1996, the interest claim was appeared from 5 September 2000 and/or by 16 August 2001, as the claim was made for the first time. The date of statement of claim is 5 October 2007. The claimant, as recorded, not made any grievance about the delayed payment. Reference is only made of the last payment of installment of Rs. 7,35,000/- in letter dated 29 March 2002. The amount of Rs. 7,72,500/- was paid towards the security deposit, which was appropriated towards the last installment of Rs. 15,07,500/- in view of the specific instruction of the Respondent.

29. The aspect of interest, even otherwise, in the facts and circumstances required to be considered by the law laid down by the Supreme Court in *Hyder Consulting (UK) Ltd. Vs. Governor, State of Orissa*, . The Arbitral Tribunal, therefore, needs to reconsider the same, including the unilateral process/procedure so adopted while calculating the interest in the present case. In view of the Supreme Court Judgment so referred above and the principle of calculating the interest, just cannot be the foreign mechanism/method unless specifically agreed. The Arbitral Tribunal therefore, needs to consider the principle of calculating interest as declared by the Supreme Court in *Haidar* (Supra), so referred above.

30. In view of above, I am inclined to observe that the award in question for the above reasons, cannot be modified as submitted by the learned counsel appearing for the Respondent referring to the submission that the award so passed will not be executed against the dead partners and/or Legal Heirs. The issues so raised above are need to be re-adjudicated by the Arbitral Tribunal. The award is not severable and dissectible in the present case. Therefore, I am inclined to set aside the award on all points with direction to the Arbitral Tribunal to re-hear all the aspects/points in accordance with law. The statement is made that the Tribunal is available, therefore, by consent the matter remanded and to be heard by the same Tribunal. If not, the parties are at liberty to re-consider to appoint a fresh Arbitral Tribunal.

31. For the reasons so recorded above, I am inclined to pass the following order:-

ORDER

- a) Impugned award dated 15 May 2012 is quashed and set aside.
- b) The matter is remanded back for re-consideration.
- c) The Arbitral Tribunal to resume and to re-hear all the aspects/points in

accordance with law.

d) If the same Tribunal/members are available, the matter may be placed before the same. If not, the parties are at liberty to re-consider to appoint a new Arbitral Tribunal.

e) It is made clear that there is no question of leading any fresh evidence by all the parties. The Arbitral Tribunal to proceed, based upon the material available on record, unless very necessary to add or file documents/material to decide the issues and/or by consent of the parties.

f) The parties are at liberty to take appropriate steps to bring on record the legal heirs of dead partners and even after considering to delete the names of the partners. However, the tribunal to decide the same in accordance with law.

g) Arbitration Petition is accordingly disposed of, with no order as to costs.