
(2008) 05 BOM CK 0033

In the Bombay High Court

Case No : Appeal No. 583 of 2003 in Arbitration Petition No. 155 of 2002 in Award No. 2 of 2002 and Appeal No. 680 of 2003 in Arbitration Petition No. 155 of 2002 in Award No. 2 of 2002

Satinderpal Singh Anand

APPELLANT

Vs

Sharanpal Balmukund Chopra
 Sharanpal Balmukund
Chopra Vs Satinderpal Singh Anand

RESPONDENT

Date of Decision : 05-05-2008

Acts Referred:

Arbitration Act, 1940 — Section 20, 30, 33, 41
Civil Procedure Code, 1908 (CPC) — Order 22 Rule 2, Order 22 Rule 3, Order 22 Rule 4, Order 22 Rule 9

Citation : (2008) 4 ALLMR 239 : (2008) 5 BomCR 179 : (2008) 110 BOMLR 1859 : (2008) 6 MhLj 86

Hon'ble Judges : S. Radhakrishnan, J;Anoop V. Mohta, J

Bench : Division Bench

Advocate : H.J. Thakkar, instructed by Geeta Shastri, for the Appellant; O. J. Menezes and R.S. Tripathi, for the Respondent

Judgement

Anoop V. Mohta, J.—As the parties, issues and impugned judgment are common, we are disposing of both the Appeals by this common judgment.

2. The original Petitioner- Appellant (also called hereinafter for reference "Anand"s) has preferred this Appeal No. 583/2003 against the impugned order passed in Arbitration Petition No. 155/2002 in Award No. 2 of 2002. The original respondent (called hereinafter for reference Chopra"s) has also preferred Appeal No. 680 of 2003 on limited ground against the said judgment. The appellant"s case in Appeal No. 583/2003 is as under:

3. Prior to 24/07/1979, Chopra and his brother were owners of a plot of land admeasuring 4644 sq.yards. By an Agreement of Sale dated 10/11/1979, both the brothers agreed to sell to M./s. Emkay Construction Co., 3300 sq. yards which was demarcated from the rest of the property by a red boundary line in the plan annexed to the Agreement. A compound wall was thereafter constructed

separating the said two pieces of land. The respondent is the owner of immovable property at Bandra admeasuring 1344 sq. yds., with a structure of a ground floor and part first floor standing thereon having 4 flats besides a portion of the said structure in possession of the respondent. Flat No. 3 was in occupation of the appellant who resided there with his family. On the first floor of the building there were two rooms and a toilet. They were also in occupation of the appellant.

4. Flat No. 4 was in the occupation of a tenant named Mr. Naik and Flat Nos. 1 and 2 were in the occupation of a tenant named Mr. Pereira who had also encroached on a portion of the open land surrounding his flats. Tenant named Mr. Pereira was not on speaking terms with the respondent for more than 15 years due to acrimonious litigation between the two of them. The respondent is an Engineer, Builder and Contractor by profession. The appellant is one of the legal heirs and representatives of Mr. Sardar Singh Gurdit Singh Anand (father of the appellant).

5. In the year 1987, pursuant to instructions of respondent the appellant negotiated with tenant Pereira for vacating the flats in his occupation and securing alternate accommodation elsewhere. The respondent and late Sardarsingh Anand and appellant were also negotiating for sale of a portion of land of the respondent. Sometime prior to July, 1987, the respondent approached the appellant along with a broker. Both of them impressed upon the appellant the possibility of developing the property. The appellant was reluctant as there was problem from the two tenants occupying the flats. The ejectment proceedings initiated against tenant Pereira was pending in Small Causes Court. Besides, BMC was not ready to give permission to sub divide the plot of land in view of previous sale of the land of a portion admeasuring 3300 sq. yards to M/s. Emkay Construction Co. The issue of extra FSI used by Emkay Construction Co. was also one of the problem.

6. On 23/06/1987, pursuant to negotiations tenant Pereira agrees to vacate the two flats on the respondent paying him Rs. 11.60 lacs to secure alternate accommodation elsewhere. The respondent executed document with tenant Pereira stating that on respondent paying Pereira a sum of Rs. 11.60 lacs the tenant shall vacate the premises (2 flats) in his occupation.

7. On 01/07/1987, the respondent executed agreement with tenant Naik for obtaining possession of flat No. 4 in his occupation on payment of Rs. 3.35 lacs by the respondent.

8. On 05/07/1987, tenant Naik addresses letter to the respondent stating that he had secured accommodation at Andheri and calls upon the respondent to make arrangement to pay him Rs. 3.35 lacs as per agreement.

9. On 11/07/1987, the respondent executes stamped receipt in favour of father of the appellant acknowledging receipt of a sum of Rs. 4.50 lacs for sale of open land admeasuring 4533 sq.ft. @ Rs. 1000/- per sq.ft., for a total consideration of

Rs. 45 lacs. The said receipt states that possession of open land given to the appellant's father. Out of the consideration of Rs. 4.50 lacs paid, Rs. 3.35 lacs paid in cheque and balance amount of Rs. 1.15 lacs paid in cash. This fact is recorded in the receipt executed.

10. On 11/07/1987, tenant Naik executes receipt for Rs. 3.35 lacs received from the respondent and hands over vacant possession of flat No. 4 to the respondent.

11. On 24/07/1987, the respondent addressed letter of authority to the tenant Pereira authorising him to deal with the Appellant's father for obtaining vacant possession of 2 flats in Pereira's possession within the limits mentioned in the agreement i.e. Rs. 11.60 lacs.

On 24/07/1987, prior to the hearing of the Motions the respondent produced a forged Letter of authority wherein in his own handwriting he has inserted the sentence "as the liability to vacate is that of S.S. Anand". He also forged the signature of tenant Pereira on the same for which he was prosecuted for forgery. (By doing so he wanted to cast the burden of shifting the tenant Pereira on S.S. Anand and create a dispute about the price of the land which was sold.

12. The respondent paid a sum of Rs. 11,60,000/- to tenant Pereira and obtained vacant possession on 31/07/1987 from him on behalf of the appellant. Pereira executing a writing recording that he had received Rs. 7,50,000/- by cheque and Rs. 4.10 lacs by cash from S.S. Anand and handed over vacant possession of the flat Nos. 1 and 2 to S.S. Anand as per instructions from S.P. Chopra. S.S. Anand also obtained writing from tenant Pereira recording the above facts. The said writing further stated that he or the owner S.P. Chopra shall have no claim in respect of the flat required by Pereira as an alternative accommodation.

13. As alleged, on 12/09/1987, as respondent not executing a regular Agreement for sale the respondent gave appellant's father a copy of the application addressed to B.M.C. and signed by him for the construction of a building on 4533 sq.ft. of land in accordance with the plans annexed.

14. On 20/01/1988, the respondent's Advocate's letter to Advocate at Baroda stating that the draft agreement ready and would be forwarded separately.

15. On 02/02/1988, the respondent filed suit No. 363/1988 against the appellant and his father for eviction from only 2 flats on the ground that they are trespassers therein. No prayer in the plaint for declaration that they are trespassers in the flats. Said suit filed even before receipt of letter dated 29/01/1988. In his plaint the respondent annexed only 2 documents and no other correspondence prior to the suit i.e. letter of authority dated 24th July, 1987 without the interpolation and police complaint. In the plaint, the respondent clearly states that the appellant had removed his material from the open space and that cars are being parked in the compound. Mesne profits sought @ Rs. 15000/- p.m., for 2 flats. Possession of open space and shed not claimed.

16. On 29/02/1988, the appellant's father files Suit No. 721/1988 against the respondent for specific performance of the agreement for sale cum development. In the plaint it is clearly stated that possession of open land had been given as per receipt dated 11/07/1987 and the said area of 4533 sq.ft., had been demarcated and that the late Sardar Singh and his family were freely, openly and exclusively occupying the said 2 flats and surrounding land. About occupation of land admeasuring 4533 sq.ft. and it has been stated that after filing of the suit he had received letter dated 29/01/1988 enclosing respondent's draft agreement for sale cum development. In the plaint it has been stated that the respondent is wanting to take possession of the 2 flats and land which was in exclusively possession of the appellant.

17. On 27/05/1988, this Court, passed Ad-interim Order whereby pending the hearing of the Motions taken out by both parties, the shed shall be under lock and key of the appellant and his father, that they are allowed to bring their cars in the compound and that the open space claimed by the appellant and his father would not be put to use by either party.

18. On 18/10/1991, this Court made appellant's Notice of Motion No. 944/1988 absolute and the respondent is restrained by an injunction order from interfering with appellant's possession of the 2 flats and open space admeasuring 4533 sq.ft. The order further allows the appellant and his father non- residential use of the flats on payment of Municipal taxes.

19. The appellant took out Notice of Motion No. 1071 of 1988 in suit No. 363 of 1988. The late father of the respondent took out Notice of Motion No. 944 of 1988 in Suit No. 721 of 1988 and also Notice of Motion No. 545 of 1988 in Suit No. 363 of 1988. All the Motions were disposed of by a common order dated 18/10/1991. The appellant had filed affidavit dated 29/03/1988 in Notice of Motion No. 944 of 1988 in Suit No. 721 of 1988, wherein in para 23, had offered to return the amount paid to Mr. Periera and Rs. 3,35,000/- paid to Mr. Naik to late S.S. Anand but late S.S. Anand in his affidavit in rejoinder dated 09/06/1988 in para 25 had stated that it is too late for the appellant to refund the same.

20. On 05/12/1991, the respondent filed Written Statement on Suit No. 363 of 1988 denying the claim of the appellant and contending that they had right to possess the property under alleged writing dated 11/07/1987 and claimed possession not only of 2 flats but of land admeasuring 4533 sq.ft. and shed in the compound alleged to have been sold them and they were put in possession in part performance.

21. On 22/10/1991, the respondent's application for continuation of the Ad-interim order passed by this Court rejected. Pursuant to the same, the appellant renovated the dilapidated shed and starts using the same. It is submitted from the above facts and is clear that the appellant and his father were in possession of not only the 2 flats but also the open land admeasuring 4533 sq.ft. and the shed even prior to the respondent's suit No. 363/1988 which for eviction from

only 2 flats.

22. On 05/12/1991, the appellant and his father file written Statement in respondent's suit No. 363/1988. In para 1, it is clearly stated that they are in possession of not only the 2 flats but also the open space of 4533 sq.ft. and the shed. It has been stated that the area of 4533 sq.ft. has been demarcated by constructing a small bund (which is also reflected at page 58 of the appellant's suit No. 721/88), and it has been stated that respondent's suit No. 363/1988 is bad for non-joinder of causes of action as the said suit is restricted only to possession of 2 flats. It has also been stated that the appellant and his father are not trespassers and as the foundation of the respondent's suit is false the same was liable to be dismissed.

23. On 23/06/1992, two Appeals filed by the respondent against the order of the learned Single Judge and the same disposed of by filing consent terms and the two suits are referred to arbitration. All differences, claims and counter claims between the parties arising out of and in relation to suit No. 363 of 1988 and suit No. 721 of 1988 were referred to arbitration of Sole Arbitrator, Mr. S.R. Shah.

24. On 09/09/1992, the respondent files his written statement in appellant's Suit No. 721/1988 and he still states that he is in possession of the open land and denies the appellant's possession. Same fact is repeated at page 140 and 141 which is submitted in contrary to the Ad-interim order dated 27th May, 1988 passed by this Court and the Interim Order dated 18/10/1991 passed by this Court. Various meetings held before the Arbitrator and the respondent suddenly stopped attending the meetings as he was in the process of disposing off the entire property in violation of the Interim injunction. The said fact was not known to the appellant at that time.

25. On 27/10/1994, the respondent sells the entire property including the subject matter of the injunction and receives Rs. 90 lacs as earnest money.

26. On 20/12/1994, the respondent convicted for forgery by trial Court for forgery and cheating and sentenced to one month's rigorous imprisonment and fine of Rs. 1 lakh.

27. On 21/12/1995, the appellant's father expires and Chamber Summons No. 633/1996 taken out to bring on record the legal heirs in appellant's Suit No. 721/1988. Said Chamber Summons allowed vide order dated 19th March, 1997 and legal heirs of deceased S.S. Anand bought on record and described as such in Suit No. 721/1988. The said Chamber Summons was allowed on 19/03/1997. After amendment, the plaint in Suit No. 721 of 1988 was reaffirmed and signed by the respondent for himself and as Constituted Attorney of the other heirs of deceased S.S. Anand.

28. On 02/09/1997, the respondent terminates agreement for sale with third party and forfeits Rs. 90 lacs. Third party files suit for specific performance against the respondent.

29. In the month of February, 1998, the appellant comes to know about sale of the property to the third party.

30. On 29/04/1998, all the legal heirs of the deceased file Contempt Petition against the respondent and third party and on 27/07/1998 this Court issues a bailable warrant against the respondent. Heirs of deceased Mr. S.S. Anand, including Smt. Basant Kaur filed Appeal No. 308 of 2002 against order dated 25/01.2002 though Ms. Basant Kaur had expired on 20/07/2000. In the said Appeal, Advocate Mr. Owen Menezes represented the respondent and all other heirs of deceased S.S. Anand. The said Appeal was admitted on keeping the plea of maintainability raised by appellant open to be decided at stage of hearing. The said Appeal No. 308 of 2002 dismissed by Division Bench of this Court.

31. On 24/11/1998, the respondent filed Petition for appointment of Arbitrator under the new Act and in the petition all legal heirs of deceased S.S. Anand are shown.

32. On 08/04/1999, the Respondent took out interim application before Arbitrator for dismissal of suit No. 363 of 1988 under Order 22 Rule 9 of CPC and also to strike off defence under Order 39 Rule 11 of CPC in Suit No. 721 of 1988 for alleged contempt. The appellant filed reply and same was argued and the order was to be passed with main Award. The common evidence was lead in both suit No. s 721/1988 and 363 of 1988. Examination in chief and cross examination was done of the respondent and Mr. Rohira before the Arbitration.

33. On 13/08/1999, an order passed appointing Arbitrator under the 1940 Act without prejudice to rights and contentions of the parties.

41. On 08/09/1999, the appellant makes an application before Arbitrator for passing Interim Award (1) for dismissal of respondents Suit No. 363/1988 on the ground that legal heirs of deceased S.S. Anand not brought on record (2) for striking defense of Respondent in Appellant's Suit No. 721/1988 in view of the fact that the respondent had disposed off the entire property in violation of the Interim order passed by this Hon"ble Court.

34. On 22/10/1999, the respondent files affidavit of evidence claiming possession of only 2 flats and in para 42 for the first time claims possession of only the shed. Possession of open land admeasuring 4533 sq.ft. not claimed. In para 41 he still asserts that he is in physical and legal possession of all structures including the shed. For the first time he claims mesne profits @ Rs. 15,000/- p.m. per flat in contrast to his claim in Suit No. 363/1988.

35. On 25/10/1999, the arbitrator settled issues in both suits.

36. On 14/12/1999, at the very first date of the respondent's cross14 examination objection is taken by the appellant's Advocate that the respondent's evidence is beyond his pleadings and the same recorded by the Arbitrator.

37. On 24/01/2000, the appellant files his affidavit of evidence and in para 14 repeats that the respondent's Suit No. 363/1988 is bad for non- joinder of causes of action in that open space admeasuring 4533 sq.ft. not claimed, as well as, the shed.

38. On 06/10/2000 , cross-examination of all parties completed and matters posted for argument.

39. On 21/03/2001, during the course of argument and after 13 years respondent makes application to amend his suit No. 363/1988 to claim possession of the open space admeasuring 4533 sq.ft. and shed. Also increase in mesne profits from Rs. 15,000/- for 2 flats to Rs. 45000/- p.m. per flat.

40. On 09/04/2001, detailed affidavit- in-reply filed by the appellant to the respondent's amendment Application. Arbitrator hears amendment application but declines to pass an order stating that the same would be passed at the time of final award.

41. On 17/01/2002, Award passed by the arbitrator who condones delay in bringing legal heirs on record of the deceased S.S. Anand even though no application made by respondent for the same and has rejected the amendment application of the respondent. The Arbitrator awards possession of not only 2 flats but also open land admeasuring 4533 sq.ft. and shed to the respondent directly in conflict with Issue No. 1 framed. He also awards mesne profit of Rs. 15000/- p.m. for both flats and Rs. 30,000/- p.m. if possession is not given. The respondent is also directed to refund the appellant Rs. 11.60 lacs @ 6% interest.

42. On 15/04/2002, Arbitration petition filed by the appellant and stay granted by the learned single Judge.

43. On 13/06/2002, the respondent filed his affidavit- in- reply.

44. On 24/06/2002, the arbitration petition was admitted, expedited and interim reliefs granted.

45. On 25/02/2003, the Judgment of this Court modifying the award, the learned Judge hold that the appellant is not a trespasser but yet awards possession of 2 flats and open space admeasuring 4533 sq.ft. and shed to the respondent contrary to issue No. 1 framed. The learned Judge does not grant specific performance only on the ground that a view taken by the arbitrator was a possible view. No appeal filed by the respondent challenging these findings. The appeal of the respondent only restricted to learned Judge declining to grant mesne profit and increasing rate of interest from 6% to 18%.

46. On 28/07/2003, Appeals admitted.

47. On 10/09/2003, Notice of Motion disposed of. The Court records that the Appellant Chopra had already deposited in Court a sum of Rs. 31,50,600/- interim order passed by Division al Bench of this Court.

48. First of all, it is necessary to consider the scope of the Appellate Court in such matter arising out of Section 30 and 33 of the Arbitration Act-1940 in view of the following judgments:

1. (2005) 6 S.C.C. 462, Bhagawati Oxygen Ltd. v. Hindustan Copper Ltd.
2. State of U.P. Vs. Allied Constructions,
3. Shyama Charan Agarwala and Sons Vs. Union of India (UOI),
4. Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another,
5. State of Orissa and Another Vs. Kalinga Construction Co. (P) Ltd.,
6. 2007 (2) Mh.L.J. 499 Union of India v. Ghanekar Builders and Chemicals Pvt. Ltd.

The following are the basic principles which can be taken note of in this background.

- a) An arbitrator is a Judge, appointed by the parties and as such the award passed by him is not to be likely interfered with.
- b) The Court while exercising the power u/s 30 cannot reappreciate the evidence or examine correctness of the conclusions arrived at by Arbitrator.
- c) The jurisdiction is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous.
- d) It is not open to the Court to interfere with the Award merely because in the opinion of the court, another view is equally possible.
- e) It is only when the Court is satisfied that the Arbitrator had misconducted himself or the proceedings or the award had been improperly procured or is "otherwise" invalid that the Court may set aside the award.
- f) The Court cannot reappreciate the evidence. The interpretation of the contract is a matter within the jurisdiction of the Arbitrator.

(Vide Bhagwati Oxygen (Supra))

- g) Unless one or the other condition u/s 30 is satisfied, an Award cannot be set aside.

(Vide State of U.P. (Supra)).

- h) The Award can be set aside if there is a jurisdictional error acting without jurisdiction or beyond jurisdiction, ignoring relevant clauses.

(Vide Shyam Charan Agarwala (Supra))

- i) Reasonableness of the reason given by an Arbitrator in making award when there is no evidence of violation of principle of natural justice and or two views are possible.

(Municipal Corporation Delhi (Supra).)

j) In proceeding to set aside the award Appellate Court cannot sit in appeal over the conclusion of the Arbitrator by re-examining and re-appraising the evidence considered by the Arbitrator and hold that the conclusion reached by the Arbitrator is wrong specially when the finding of the Arbitrator is not perverse.

(Vide The president Union of India (Supra))

k) The Appellate Bench would not be justifying in enlarging the scope upon the controversy, in an Appeal against dismissal of petition challenging the Arbitral Award.

(Union of India v. Ghanekar Builders. (Supra))

49. The learned Single Judge after considering the record and rival submissions of the parties, by the impugned Judgment principally passed the decree in terms of the award except the following modifications which is reproduced as under:

(1) Mesne profits awarded in favour of Chopra are set aside.

(2) The amount of Rs. 16,10,000/- to be paid by Chopra to legal heirs of Sardar Singh who are on record in Suit No. 721/88, with interest thereon for prference period at the rate of 18% p.a. on the principal sum of Rs. 16,10,000/- from 11/7/1987 till judgment and thereafter at the rate of 18% from the date of the suit till date of the award and thereafter, at the same rate from the date of the award till realisation. This is both towards compensation and interest.

(3) Mr. Chopra to deposit the said amount in this Court on or before 31/8/2003. On such deposit, legal heirs of Sardar Singh including Satinder to hand over possession of the property to Chopra within two months of deposit. On possession being handed over, the amount deposited along with interest, if any, to be paid to the L.Rs. of Sardar Singh Anand. Petition stands disposed of accordingly.

50. The operative part of the award is as under: "In result I pass the final order of award as under:

(a) The Respondents are ordered and decreed to handover vacant and peaceful possession of flat No. 1 and 2, the shed and vacant area admeasuring 4533 sq.ft. in the suit premises viz. 108, Chopra House, Dr. Ambedkar Road, Bandra, Bombay 400 050 to the Claimant within eight weeks from the date of service of the Award.

(b) If the Respondents remain in the occupation of the suit premises after the expiry of eight weeks from the date of service of the award the mesne profits payable by them to the Claimant will be @ Rs. 30,000/- p.m. till peaceful possession is given to the Claimant.

c) The Respondents are ordered and decreed to pay to the Claimant the sum of

Rs. 90,000/- being the amount of arrears of compensation from 1st August, 1987 till 31st January, 1988 and further mesne profits / compensation at the rate of Rs. 15,000/- p.m. with effect from 1st February, 1988 till possession is handed over to Claimant, within the time mentioned in (a) and thereafter at the rate of Rs. 30,000/- per month till possession is given to the Claimant.

d) The Claimant is directed to refund to the Respondents the sum of Rs. 16,10,000/- with interest thereon at 6% p.a. with effect from 1st August, 1987 till payment.

e) The Claimant will be at liberty to adjust his dues and compensation towards the amount of Rs. 16,10,000/- and interest payable by him to the Respondents taking into consideration what is stated in (b) and (c) above.

f) The claim of the Respondents for specific performance of the agreement for sale is dismissed.

g) The Claim of the Respondents for Rs. 50,00,000/- against the Claimant dismissed.

h) The Respondent is not entitled to any reliefs except the one relating to their claim.

i) Each party to bear its own costs. Mumbai. (S.R. Shah) Dated: 17th January, 2002. Sole Arbitrator."

51. Admittedly, both the suits and the disputes arising out of the same parties and the same subject were referred for Arbitration by consent dated 23/06/1993. By an order dated 13/08/1999 even subsequent to the death of Sardar Singh in the month of December, 1995 this Court directed the parties to Arbitration, therefore, the parties before the Arbitrator of both the Suits. The Arbitrator in view of the reference by consent of the parties, proceeded and decided accordingly. The legal heirs of Sardar Singh were the parties to the proceedings. Therefore, before the Arbitrator all the parties including L.Rs. of Sardar Singh were on record and as the subject matter of both the suits were referred, it is difficult to accept the contention of the Appellant and rightly observed by the learned Single Judge, that the proceedings stood abated. The learned Single Judge, in this background after considering the authorities cited by the parties rightly rejected the contention of the appellant with this regard by observing as under:

At this stage, issue may be considered whether suit No. 363 of 1988 stands abated. In the normal course, proceedings have to be taken out for bringing on record the legal heirs. In the instant case, in an application u/s 20 which was taken out in Suit No. 363 of 1988, legal heirs of Sardar were brought on record. At the state of reference, there was no objection raised on the part of the legal heirs of Sardar that the reference could not be made in Suit No. 363/88 on the ground that the suit filed by Chopra stood abated. That reference was in proceeding in appeal arising out of interim order. In other words, in appeal itself

arising from interim orders by conduct of the parties it can be said that the legal heirs of Sardar were brought on record. If that be the case, all that was required is a formal amendment of the suit. It is true that if the legal heirs are not brought on record within the stipulated time, the suit stands abated. However, consequent to bringing on record the legal heirs of Sardar, necessary action must follow that abatement was set aside as otherwise reference could not have been made to arbitrator in respect of the subject matter of Suit No. 363 of 1988. Even otherwise, on the facts of this case, effective decree could have been passed without bringing on record the L.Rs. of Sardar Singh Anand to meet the ends of justice.

In the light of that, there will be a decree in terms of the award. Interest on the principal amount awarded would be at the rate of 18% from the date of decree till payment. Both the Suits stands disposed of accordingly.

52. It is difficult to accept the contention that the suit abated as submitted and even otherwise as observed by the learned Single Judge, we see no reason to interfere with the finding so arrived at even with this regard specially when the Court is not powerless and or there is no bar with the L.Rs. cannot be brought on record by the Court and secondly, as both the suits were tagged together, the estate of deceased was represented by the legal heirs and therefore, also proceedings cannot be said to be abated. On this ground, therefore, award passed cannot be said to be nullity.

53. It is not in this matter that Appeal would abate due to failure of substitution of heirs of deceased. In other suit, the Estate of the deceased was represented and as both the suits were tried together, such heirs as fully represented the whole estate as contemplated under Order 22 Rule 2 of the CPC (for short, ""CPC"). In the present case, as noted, the learned Single Judge has rightly passed the order and allowed to bring legal heirs on record as observed and done by the Apex Court in Newanness alias Mewajannessa Vs. Shaikh Mohamad and others, . The relevant portion is as under:

Therefore, the appeal as a whole should be dismissed as having been abated. We find no force in the contention. Since the third defendant is already on record representing all the heirs of the first defendant widow, the question of abatement does not arise. Even otherwise, we find that substitution should be allowed, since no injustice would be done in bringing the legal representatives on record. Thus the objection is over ruled. The application for substitution is allowed.

54. In AIR (30) 1943, Bombay 457, Ishwarlal Laxmichand Patel v. Kuber Mohan Lawar and Ors. , this Court held that appeal does not abate only because the son was brought on record and not the widow after the death of sole Appellant. In Ramnibas Jhunjhunwalla Vs. Benarashi L. Jhunjhunwalla, , in the Arbitration proceedings after the death of both the parties before Judgment, it is observed that the Court has inherent power to bring the L.Rs. On record. The provisions of Order 22 of the CPC do not apply. In Rani Ramakant Vs. The First Additional Civil

Judge (SD), , by referring to Section 41 of the Arbitration Act 1940 and Order 22 Rule 3 and 4 of C.P.C. reiterated that the Arbitration Proceedings does not abate on death of party.

55. Apart from this, in the present facts and circumstances, we find that no perversity in the impugned order. On the contrary, still it is within the framework of law and record and it is in the interest of justice.

56. In view of peculiar facts and circumstances of the case, the Judgment cited by the appellants are distinct and distinguishable on facts itself. The law with regard to the scope and effect of Order 22 of C.P.C. need no discussion, in view of the peculiarity of the present matter as referred above. The Hon'ble Supreme Court in Union of India (UOI) Vs. Ram Charan and Others, observed that the Application for bringing Legal Representatives on record is necessary. Therefore, as noted, the learned Single Judge in the facts of the case has given full justice to the parties and modified the order. The judgments, as cited by the appellant, are not based on Arbitration Proceedings under Arbitration Act-1940.

57. The defendants in Suit No. 363 of 1988 (Chopra's) are in use and occupation of the two flats being flat Nos. 1 and 2 and the vacant area of 4533 sq. fts. in the compound wall pursuant to the receipt dated 11th July, 1987 and letter of authority dated 24th July, 1987 addressed by the Plaintiff to the Tenant Mr. Perreira and further held that the defendant failed to prove that the vacant possession of the said two flats were given in part performance pursuant to the amount of Rs. 11,60,000/- paid by them to the tenant Mr. Perreira which amount was to be adjusted towards the purchase price of Rs. 45,00,000/- (Rupees forty five lacs only). The plaintiff i.e. Anand in Suit No. 721 of 1988 failed to prove that there was a valid, concluded and binding contract between the parties in respect of the suit premises and therefore, not granted specific performance of the Agreement for sale of the suit property described in Scheduled "'A" and "B" to the plaintiff. The Arbitrator, therefore, rightly declined to grant specific performance based upon the alleged draft agreement (Exhibit "J"). Furthermore, Anand's failed to prove the loss and damage suffered as per the particulars to the Plaintiff. The learned Single Judge also, rightly observed as under:

The next aspect, however, is that even assuming that the said finding of trespass is set aside, whether it is possible to hold that the relief for specific performance ought to have been granted or can be granted. The learned arbitrator has given a finding that the parties were not at ad idem in so far as consideration and the terms concerned. Before the arbitrator there were documents. One such document is the unsigned agreement forwarded to Chopra by counsel of late Sardar Singh and the other, the draft of agreement sent by Chopra to advocate for Sardar Singh styled as development agreement. In order to grant specific relief, it must be proved that there was agreement to sell and that agreement was not purely an agreement for development and further that all terms had been settled. In so far as agreement to sell is concerned, the material on record would evidence firstly that the area to be sold was specified. Secondly

the price was specified. This can be evidenced from the receipt and other documents. However, the correspondence exchanged between the parties will also have to be examined. By letter of 29/08/1987 addressed by Chopra to Anand, Chopra informed Sardar Singh that as he had not given further details about dealings with other tenants the authority is cancelled. By letter dated 06/10/1987 addressed to Shri. Chopra it is pointed out that Chopra has gone back on his original commitments. On 03/11/1987 Chopra wrote to Sardar setting out the flats as and when vacated were to remain in his possession. It was further pointed out that there were no commitments made by Chopra as a lot of things had to be done before concrete shape could be taken to the agreement to reduce it in writing. On 22/12/1987 Advocate for Sardar Sing sent Chopra a draft agreement styled as agreement for sale and development. There is some dispute as to which is the correct document. It is not necessary to go into that aspect. On 13/01/1988 Advocate of late Sardar Anand wrote to Chopra that draft agreement had been sent and it had not been returned back and it was therefore, thought that Chopra was agreeable to all the terms and conditions of the agreement of sale and development and therefore should now execute the document. On 20/01/1988 in answer to letter of Advocate for Sardar, received by Chopra's Advocate on 31/12/1987, informed that the matter was still at negotiation stage, various terms still had to be agreed upon before the agreement can be concluded and the permission of appropriate authority had to be obtained. The letter also says that Chopra had drafted agreement for development and the same was being forwarded to Sardar. There is another letter of 27/01/1988 addressed to Sardar about flats, taken in possession by Sardar. There are police complaints. On 29/01/1988 draft of the development agreement, on behalf of Chopra, was forward to advocate of late Sardar. There is also other correspondence which need not be reproduced. It is therefore, clear that it was agreed to sell a specific area for a particular price. There were disputes as to whether the transaction would be an agreement to sell or development agreement and other terms and conditions. It is on this basis that the arbitrator came to the finding that the parties were not at ad idem as to the nature of the contract. Once that be the case, in my opinion and considering the material, it is not possible to reappreciate the evidence and come to the different finding than that arrived at by the Arbitrator in so far as decree for specific performance is concerned. The view taken is a possible view. In my opinion, therefore, it is not possible to interfere with the findings by the arbitral Tribunal on that count. Once that be the case, relief by way of specific performance will have to be rejected.

58. The Arbitrator can award or grant specific performance if case is made out but the fact that it is a discretionary relief which Court and or Arbitrator need to consider while granting the specific performance. In view of the finding given by the Arbitrator as well as the learned Single Judge, we are of the view that there is no case made out by the appellant to interfere with the above possible view expressed by the Arbitrator and confirmed by the learned Single Judge. There is

no perversity and or illegality in the order. The impugned judgment is within the framework of law and the record.

59. While considering the above reasoning given by the learned Single Judge as observed with the possession of the Anand's is based on the receipt dated 11/07/1987 which is admitted in evidence. Another document is dated 06/11/1986 to the B.M.C. seeking inspection of documents and an application for development dated 12/09/1987 by Chopra referring to the area i.e. 4533 sq. fts. The evidence of Mr. Perreira laid in Criminal case is also material. The said Perreira had in fact handed over the possession to Sardar. He was in possession pursuant to the agreement and letter of authority. The finding, therefore, given by the Arbitrator that Satindarpal and his son was trespassers by ignoring the documentary evidence on record has rightly observed by the learned Single Judge. The grant of specific performance on the same ground though rejected based on the material available that itself is no reason to held that Satindarpal and his son were trespassers. Their possession is permissive in nature and not of trespassers. In this background, the interim order passed by this Court protecting possession of late Sardar not only to the two flats but to the shop, garage and land, just cannot be overlooked unless it is affected. Therefore, undisputedly, possession of the Sardarsingh has been in this background permissive in nature and therefore, cannot be said to be authorized and or of trespassers. The act of payment of Rs. 16,10,000/- (Rupees sixteen lacs, ten thousand only) i.e. 11,60,000/- (Rupees eleven lacs sixty thousand only) paid to the Tenant Mr. Perreira and other amounts paid to the Tenant Naik and Rs. 5,000/- paid for legal proceedings is also material. In other words, Mr. Chopra has using the said money without any interest to Sardarsing. The finding, therefore, as arrived by the learned Single Judge and the modification of the Award in our opinion following finding is also correct.

In my opinion, the possession of Sardar Singh not being that of a trespasser, as he has parted with consideration, it was not open to the Arbitrator to grant relief by way of mesne profits unless Chopra had first returned the moneys paid on his behalf. In the light of that, award of the Arbitrator awarding mesne profits in the sum of Rs. 15,000/- and Rs. 30,000/- clearly discloses an error of law apparent on the face of record and is liable to be set aside.

60. The Arbitrator has directed refund of Rs. 16,10,000/- and fixed 6% interest thereon w.e.f. 01/08/1987 till the payment. There was no agreement for interest. Therefore, having once directed to refund, the said amount as no decree for specific performance can be granted. The money have not been using by Mr. Chopra, need to be compensated as rightly observed by the learned Single Judge. The interest was claimed @ 18% p.a. in the suit. The principal amount was also paid on different dates. We are of the view, therefore, that the said amount of Rs. 16,10,000/- as directed need to be paid with interest @ of 9% instead of 18% from 11/07/1987 till the filing of the suit and at the same rate from the date of filing of the suit till the award on the principal amount of Rs.

16,10,000/-. We are restricted the interest @ 9% instead of 18% for the reason that Sardarsingh, in this background admittedly occupied and used the premises without any compensation or consideration.

61. We are, therefore, maintain the modified award passed by the learned Single Judge except the rate of interest. It should be 9% instead of 18% on the principal sum as observed above. The rest of the order passed by the learned Single Judge is maintained.

62. The learned Single Judge has observed that the Arbitral Tribunal could not have gone beyond the terms of the reference. The terms of the reference was of two flats and not other property as at that time, as claimed, the possession is with the owner. The learned Single Judge has also rightly observed that, there is nothing on record to show that the possession of shop, garage and land handed over to Sardarsingh except for the receipt. There is no other documentary evidence on physical parting of possession by Chopra to late Sardar. Once this Court come to a conclusion that there was no agreement to sale and no specific performance can be granted and therefore, there is no question of retaining the possession of the said property except with the right owner. The grant of interim relief, pending the proceedings that itself cannot be reasoned to deny the deprived possession of the property to the true owner Late Sardarsingh or his L.Rs. who are admittedly the owner of the property. Even otherwise, the parties have led the evidence and contested the matter in all respect. One facet is also cannot be overlooked is based on the Suit No. 363 of 1988, the Arbitrator had framed the issue in respect of the two flats and vacant area admeasuring 4533 sq. fts. in the compound. The specific performance so claimed is of the suit premises in Suit No. 721 of 1988 by Anand against Chopra. The Arbitrator has also recorded that the Respondents claimed possession of not only of the sale of two flats but also the open space and the shop, garage pursuant to the alleged agreement for sale. The another facet is that admittedly the parties have by consent terms agreed to refer the disputes and differences, claims and counter-claims between arising out of and in relation to the suit property No. 363 of 1988 and 721 of 1988. Considering the purpose and object of Arbitration Act, such arbitral dispute between the same parties arising out of the common litigations need to be settled at once and not in piecemeal. In the present case, having once participated and availed all the opportunities, the impugned orders cannot be said to be without jurisdiction and illegal. Therefore, in this background also, the grant of award for whole property and as confirmed by the learned Single Judge in our view cannot be said to be perverse and beyond the reference as contended by the learned Counsel appearing for the appellants. The Judgments and authorities so cited are apparently distinct and distinguishable on the facts itself. The peculiar facts in the present case, as discussed above, though law and power of arbitrator to deal within the point of reference is clear, yet the circumstances in the present case itself is sufficient not to deal with those cases on respective facts and, therefore, we are not dealing with the citations so referred by the Appellant in Appeal No. 583 of 2003 of Anand.

63. In this background, we are confirming the opinion as expressed by the learned Single Judge that "the ultimate relief of directing handing over the possession need not be interfered with".

64. In the result, the award stand partly modified as ordered by the learned Single Judge i.e. The mesne profits awarded in favour of Chopra are set aside. The amount of Rs. 16,10,000/- to be paid by Chopra's Legal heirs to the Sardar Singh as directed with interest for pre- reference period @ 9% instead of 18% on the principal sum from 11/07/1987 till the Judgment and therefore, @ 9% from the date of the suit till the date of award and thereafter at the same rate from the date of the award till realisation. The rest of the order is confirmed.

65. In the light of this, there will be a decree in terms of the modified award.

66. Both the appeals are disposed of accordingly.

67. The interim order passed and pending during these Appeals are also stand disposed of in view of the above. No costs.