

Jayesh M.Gandhi vs Yogendra N.Thakkar on 9 April, 2013

Author: R.D. Dhanuka

Bench: R.D. Dhanuka

This Order is modified/corrected by Speaking to Minutes Order
kvm
1/35

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION APPLICATION NO. 244 OF 2012

1. Jayesh M.Gandhi)
of Mumbai, Indian Inhabitant,)
having his office at Universal)

Insurance Building, Sir P.M.Road,)
Fort, Mumbai 400 001)

2. Vinay D.Balse)

of Mumbai, Indian Inhabitant,)
having his office at Universalig)
Insurance Building, Sir P.M.Road,)
Fort, Mumbai 400 001)

3. S.N.Shivakumar)
of Delhi, Indian Inhabitant, having)
his office at E7/14, Vasant Vihar,)

New Delhi 110057

)

..... Applicants

VERSUS

Yogendra N.Thakkar)
of Mumbai, Indian Inhabitant,)
residing at 133/134, Chandramani,)

701/702 Telang Cross Road No.3,)
Matunga, Mumbai 400 019) Respondent

Mr.Simil Purohit, i/b. M/s.Kanga & Co. for the Petitioners in Arbitration

Petition No. 856 of 2012 and for Applicants in Arbitration Application No. 244 of 2012.

Ms.Snehal Shah, a/w. Ms.Deepti Panda, Mr.Ayaz Bilawala, Ms.Neha Bhatt and Ms.Bhagyashree Warikar, i/b. M/s.Bilawala & Co. for the Respondent.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 04th APRIL, 2013

PRONOUNCED ON : 09th APRIL, 2013

::: Downloaded on -

This Order is modified/corrected by Speaking to Minutes Order

kvm

2/35

JUDGMENT :

By this application under section 11(6) of the Arbitration and Conciliation Act, 1996, the applicant seeks appointment of an arbitrator on behalf of the respondent or in the alternative seeks that Mr.Justice S.K.Shah (retired) be appointed as a sole arbitrator to resolve the dispute which have arisen between the applicants and the respondent.

2. Some of the relevant facts which have emerged from the pleadings filed by both the parties are as under :-

3. By a deed of partnership entered into on 24th April, 2000 between the applicants, the respondent herein and five other parties, the partners decided to continue the profession in partnership w.e.f. 1st April, 2000 on the terms and conditions set out therein. It was agreed that the partnership shall be a partnership at Will and may be dissolved with the unanimous consent of all the partners. It is agreed that no partners shall have a right to dissolve the partnership. Under clause 2 of the said partnership deed, it was agreed that any partner shall be at liberty to retire from the partnership on giving at least six calendar months' notice in writing to the other partners and on the expiration of such period, the partnership shall continue with the remaining partners on the terms decided mutually by the remaining partners. Under the said deed, each partner was entitled to receive a monthly salary mentioned in clause 5(a) of the said deed. The profit sharing ratio was agreed as per clause 5(b) of the said deed. This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 deed. According to the said clause, respondent was entitled to 5% share in the net profit after charging the salaries stated in the clause 5(a) as an expense of the firm. The applicants were entitled to 17.50%, 9%, 4.25% respectively.

Each of the partners were entitled to reimbursement of various expenditure incurred in carrying out their work and duties as partners. Clause 12(b) of the said Deed provided that every partner shall retire from the firm at the end of the firm's financial year in which he attains the age of 65. Clause 13 provided that the death or retirement of a partner shall not dissolve the partnership as to the other partner. Clause 18 of the said partnership deed provided for arbitration agreement which is extracted as under :-

18. All dispute and questions in connection with the Partnership or this Deed arising between Partners or their representatives shall be referred to Mr. Arun Jaswantlal of Matubhai Jamietram, Attorneys as sole Arbitrator and in case he is not available or declines to act or resigns, then to a single Arbitrator if the Partners agree upon one otherwise to the Arbitrators to be appointed by each party to the difference in accordance with the provision of the Arbitration and Conciliation Act, 1996 or any statutory modification thereof.

4. During the period between April 2000 and 2007, four partners out of nine retired. According to the applicants, the respondent who was entitled to 5% share in the net profit of the firm under the said deed of partnership dated 24th April, 2000, his share was increased to 13.97% in the profit and losses of the said firm by reason of the retirement or cessation of the other five partners.

This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12

5. During the period 2001-02, dispute arose between the parties. The respondent had invoked arbitration clause in terms of the partnership deed.

The applicant filed a petition under section 9 of the Arbitration and Conciliation Act, 1996 in this court (543 of 2004) against the respondents and other partners. This court by an order dated 16th December, 2004 passed an order and direction regarding operation of the bank account of the firm by joint signature of two partners for the limited purpose for meeting day-to-day business expenses and liability of the firm. It was ordered that in so far as the partners salary is concerned, the same would be permitted to be withdrawn in accordance with their entitlement. By an order dated 8th September, 2005, this court disposed of the Arbitration Petition No. 543 of 2004 in terms of the consent terms signed and tendered by the parties. Under the said consent terms, parties agreed and confirmed that Mr.B.L.Bhanu retired as a partner of the said suit firm with effect from 30th June, 2005. Parties agreed to withdraw certain amount by way of share in profits, salary etc. and agreed to pay the salary of the staff etc. Clause 2(a), (b) and 12 of the said consent terms are extracted as under :-

2(a) The parties hereto agree and confirm that without prejudice to their respective rights and contentions which they will be entitled to raise in the arbitration proceedings initiated by Respondent No.1 challenging the Accounts of the said Firm for the year ended 31st March 2004 each of the parties hereto shall be entitled to withdraw the amount lying to his credit in the Current Account with the said Firm as on 31st March This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 2004/1st April 2004 provided, any amount already withdrawn by a partner subsequent to 1st April 2004 shall be deducted at the time of withdrawal of the amount by him as contemplated under this clause.

(b) The parties hereto agree and confirm that each partner shall be entitled to withdraw 50% of his share of profits for the year ended 31st March, 2005, calculated on the basis of unaudited accounts of the said Firm which would be done latest by 31st October, 2005.

12. The parties hereto agree and confirm that they have arrived at and agreed to the arrangement/agreement contained in these presents with a view to ensure smooth day to day working and operations of the said Firm and the same is without prejudice to the respective rights and contentions of the parties hereto in various legal/arbitration proceedings which are at present pending amongst the parties hereto.

6. By an order dated 10th October, 2005 passed by the Hon'ble Chief Justice in Arbitration Application No. 69 of 2005, Mr.Justice R.J.Kochar, former Judge of this Court was appointed as a sole arbitrator. The operative part of the award dated 25th June, 2007 made by the Arbitral Tribunal reads as under :-

OPERATIVE PART

(a) I, therefore, conclude that I cannot order expulsion of the Respondent Nos. 1 to 4 from the partnership deed even though I have recorded my findings against them that they have committed breaches of the Partnership Deed on 2 counts as discussed

hereinabove. i.e. (i) Not executing a fresh Partnership Deed and (ii) illegal suspension of Shri Y.N.Thakkar In view of my findings in This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 negative on the issue of expulsion of the Respondent Nos. 1 to 4 as prayed in prayer (b), I answer in negative the issue of consequential reliefs as stated in prayer (c).

(b) Since the Respondent Nos. 1 to 4 have failed to execute the fresh Deed of Partnership and since a number of other partners have retired, as a mandatory term of the Deed, a fresh Deed must be executed. This breach can be remedied or cured.

The Respondent Nos. 1 to 4 and the Claimant shall execute a fresh Deed of Partnership on or before 31.7.2007.

(c) The letter dated 1.10.2003 purporting to suspend Shri Y.N.Thakkar from the partnership firm and demanding a sum of Rs.7 Crores from him is hereby quashed and set aside being totally illegal, improper and contrary to the provisions of the Indian Partnership Act, 1932 and also the Partnership Deed.

7. Being aggrieved by the said award made by the Arbitral Tribunal, the respondent herein filed petition under section 34 of the Arbitration Act, 1996 in this court. The said arbitration petition was dismissed by the learned Single Judge of this court on 6th August, 2008. Appeal filed by the respondent against the said order was dismissed on 4th May, 2009. Special Leave Petition filed by the respondent was dismissed on 26th March, 2010. The applicants did not challenge the said award dated 25th June, 2007 made by the Arbitral Tribunal.

8. Within a short span of the award made by the Arbitral Tribunal, the parties entered into a Memorandum of Understanding recording and thereby agreeing to various terms and conditions. Perusal of the terms and conditions This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 of the Memorandum of the Understanding reveals that the same was entered into between the parties as partners of N.M.Raiji & Co., Chartered Accountants. Under the said Memorandum of Understanding, parties agreed to distribute the balance of the undistributed profit in the year ending 31 st March, 2006 and 31st March, 2007 amongst all the partners including relevant ex-partners. Clause 12 of the said Memorandum of Understanding provided that the consent terms dated 8th September, 2005 arrived at between parties thereto in Arbitration Petition No. 543 of 2004 shall continue to be in force as modified by the said Memorandum of Understanding. The said Memorandum of Understanding was signed by the petitioners as well as respondent duly witnessed by a partner of M/s.Kanga & Co.

9. By letter dated 26th September, 2009, the applicants herein invoked arbitration clause i.e. clause 18 of the partnership deed dated 24th April, 2000 and appointed Mr.Justice V.P.Tipnis, Former Judge as an arbitrator and called upon the respondent to concur in his appointment as a sole arbitrator within 30 days from the date of receipt of the said notice and in the event of any disagreement about the name of the arbitrator suggested by the applicant, to appoint his nominee arbitrator within a period of 30 days.

10. On 26th October, 2009, the respondent vide his advocate's letter replied to the notice dated 26th September, 2009 and contended that there was no arbitration agreement. It was stated in the said reply that in view of the This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 arbitration award dated 25th June, 2007, which was accepted by the applicants, the deed of partnership dated 24th April, 2000 stood nullified and became infructuous and consequently clause 18 referred by the applicants in their notice was non-existent. It is submitted that in view of the said award, a fresh deed has to be executed effective from 1st August, 2003 and pending such execution, the terms of the partnership is governed by order dated 8th September, 2005 passed by this Court. Paragraphs 6 and 7 of the said reply are extracted as under :-

6. P-10-As stated above, the Deed of Partnership dated 24.4.2000 does not survive in view of the Award. Consequently there is no Arbitration agreement.

7. P-11-As stated above, your reference is void abinitio, illegal, etc. Without prejudice, I do not concur and also do not agree with the appointment of Mr Justice V.P.Tipnis(Retd) as a Sole Arbitrator.

I appoint Mr.F.S.Broacha, Advocate having his address at-Yeshwant Chambers, 2nd Floor, 18-B, Bharucha Marg, Kala Ghoda, Mumbai - 400 023 as my Arbitrator.

11. The applicants thereafter filed a petition under section 9 of the Arbitration Act, 1996 in this court (543 of 2010) for seeking interim measures.

The parties tendered Minutes of the Order before this Court in the said Arbitration Petition (543 of 2010) on 14th July, 2010. By an order dated 14th July, 2010 passed by this Court, the said petition was disposed of in terms of the Minutes of the Order duly signed by advocates representing the parties. By This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 the said Minutes of Order, both parties agreed to interim order without prejudice to their respective rights and contentions in the arbitration initiated by the applicants. Both parties agreed to withdraw various amounts towards their respective share of the profits of the firm for the years 2007-08 and ad hoc amount towards their respective share of profits of the firm for the year 2007-08, 2008-09 and 2009-10. It was also agreed that the audit staff of the firm shall be paid revised/increased salary as was mutually agreed by and between the parties.

It was agreed that the parties were at liberty to make applications for interim reliefs as they were deemed fit including applications for withdrawal of any such application is made, the Arbitral Tribunal shall decide the issue without being influenced by the said consent order.

12. By letter dated 4th February, 2010, the applicants through their advocate requested the arbitrator nominated by the applicants and the arbitrator nominated by the respondent to appoint the presiding arbitrator and to fix the date and time for a meeting to give preliminary directions in the matter.

13. The applicants thereafter filed Arbitration Application (97/2011) seeking appointment of presiding arbitrator. By order dated 26th August, 2011, the said arbitration application was disposed of. By consent of parties, the designate Judge of the Hon'ble Chief Justice appointed Mr. Justice V.P. Tipnis, Former Judge as a sole arbitrator. It was directed that the dispute between the parties were referred to the learned arbitrator. It was clarified that the parties were at This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 liberty to raise all the issues including existence of arbitration clause. It is not in dispute that the said order passed by the designate Judge of the Hon'ble Chief Justice passed on 26th August, 2011 appointing Mr. Justice V.P. Tipnis, Former Judge as a sole arbitrator has not been challenged by either parties by which all the issues including the existence of arbitration clause were allowed to be raised by the parties before the learned arbitrator.

14. By letter dated 16th September, 2010 Mr. F.S. Broacha, the arbitrator nominated by the respondent resigned.

15. By his letter dated 14th May, 2012, the respondent addressed to Mr. Justice V.P. Tipnis, the Former Judge of this court, the then arbitrator appointed by this court, the respondent contended that by order dated 26th August, 2011, the learned sole arbitrator had to first decide whether arbitration agreement exist or not. It is submitted that the learned arbitrator did not have jurisdiction to decide that issue as the same could be decided only by the court in view of the Supreme Court decision in case of Bharat Ashra vs. Gautam Ashra & Ors. and unless and until the Court including the Supreme Court decides about the existence of the arbitration agreement, the learned arbitrator could not proceed in the matter. It was also contended that as per award dated 25th June, 2007, the partnership deed dated 24th April, 2000 containing the arbitration clause was nullified in terms of clause 2 of the said deed and there did not exist any arbitration agreement. It was also contended that the partners This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 had not agreed, how to share the profit of the firm from 1st April, 2000 onwards and the question of any dispute therefore could not arise. However without prejudice to the various contentions raised by the respondent in the said letter, it was suggested by the respondent that the fees payable to the learned arbitrator would be minimum prescribed by the Arbitration Council of India or any other body of arbitrators which prescribed the lowest fees. By the said letter, the respondent requested the then Arbitral Tribunal not to proceed in the matter till the court including the Supreme Court decides the issue whether the arbitration agreement exist or not between the parties.

16. By letter dated 15th May, 2012, the learned arbitrator Mr. Justice V.P. Tipnis, former Judge of this Court after referring to the letter dated 11th May, 2012 addressed by the applicants through their solicitor and letter dated 15th May, 2012 addressed by the respondent conveyed that he did not wish to continue as arbitrator and withdrew from the said office. By letter dated 5th July, 2012, the applicants through their solicitors appointed Mr. Justice S.K. Shah, former Judge of this court as an arbitrator and called upon the respondent to concur in his appointment as the sole arbitrator and in case of disagreement to nominate his nominee arbitrator within a period of 30 days.

The respondent by letter dated 2nd August, 2011² once again reiterated his contention that there was no arbitration agreement between the parties and unless and until the said preliminary issue was decided by the High Court as This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 held by the Supreme Court in the matter of Bharat Ashra vs. Gautam Ashra & Ors., the arbitration initiated by the applicants could not proceed any further.

Without prejudice to the said contentions, it was stated that as per the arbitration award dated 25th June, 2007 which had attained finality by order of the Supreme Court dated 26th March 2010, the partnership deed dated 24th April, 2000 containing the arbitration clause was nullified in terms of clause 2 of the said deed and there does not exist any arbitration agreement. It is contended that the arbitration initiated by the applicants in terms of the letter dated 26th September, 2009 is in respect of profit sharing ratio w.e.f. 1st April, 2007. The question of any dispute therefrom did not arise. The respondent refused to appoint any arbitrator on his behalf.

17. In response to various correspondence addressed by the applicants to the respondent by letter sent by e-mail on 6th July 2012, 27th July 2012, 29th July 2012, 2nd August 2012, 10th August 2012 and 13th August 2012 in response to the notice issued by the applicants for compliance of various obligations on the part of the respondent, the respondent replied that though months had passed, the applicants had not appointed their arbitrator in the arbitration initiated by them on 26th September, 2009. It was also stated that various issues raised by the applicants would be taken up in the arbitration. The respondents also forwarded a list of 19 issues which issues were before the arbitrator as on 27th July, 2012. The respondent also disputed the authority of the applicants to This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 question his authority as the matter was in arbitration. The respondent also stated that the allegations regarding losses suffered by the applicants may be taken up in the ongoing arbitration. The respondent vide e-mail dated 2nd August, 2012 informed the applicants regarding servicing client that he would deal with the said issue in arbitration. The respondent stated that he would refer the matter to the ongoing arbitration. By e-mail dated 10th August, 2012, the respondent informed that since the matter was going to be referred to the ongoing arbitration, he was unable to deal with the letter dated 8th August, 2012 from the applicants. By e-mail dated 13th August, 2012, the respondent stated that he confirmed that he had given list of 19 issue to be referred by him to the ongoing arbitration initiated by the applicants on 26th September, 2009 and respondent had every legal right to raise the issues before the ongoing arbitration. It is submitted that the exercise of legal rights cannot cause any harassment to anybody. By the said e-mail respondent reminded the applicants to appoint their arbitrator alleging that the applicants were deliberately delaying it for the reasons best known to them.

18. Mr.Purohit, the learned counsel appearing for the applicants submits that it is not in dispute that the partnership firm is existing and is in operation till today. It is submitted that the last partnership deed executed by and between the parties was on 24th April, 2000. The learned counsel submits that though during the period between 24th April, 2000 and 2007, some of the partners This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 retired and profit sharing ratio in respect of the other partners were revised, all other rights and obligations of the parties continued under the existing partnership deed dated 24th April, 2000. The learned counsel placed

reliance upon section 17 of the Partnership Act in support of the plea that till a fresh deed of partnership is executed, the existing deed of partnership would continue. Section 17 of the Partnership Act is extracted as under :-

Section 17 in The Indian Partnership Act, 1932

17. Rights and duties of partners-- Subject to contract between the partners,-

(a) after a change in the firm - Where a change occurs in the constitution of a firm, the mutual rights and duties of the partners in the reconstituted firm remain the same as they were immediately before the change, as far as may be;

(b) after the expiry of the term of the firm, and.

- Where a firm constituted for a fixed term continues to carry on business after the expiry of that term, the mutual rights and duties of the partners remain the same as they were before the expiry, so far as they may be consistent with the incidents of partnership at will; and

(c) where additional undertakings are carried out. - where a firm constituted to carry out one or more adventures or undertakings carries out other adventures or undertakings, the mutual rights and duties of the partners in respect of the other adventures or undertakings are the same as those in respect of the original adventures or undertakings.

This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12

19. The learned counsel submits that the dispute which was referred to the earlier arbitration proceedings were then existing between the parties whereas the present disputes are for the period post declaration of the award made by the earlier arbitrator and such disputes were not subject matter of the previous arbitration. The learned counsel invited my attention to award and the notice invoking arbitration clause to demonstrate the difference in the nature of the dispute which were subject matter of the first arbitration and which would be the subject matter of the arbitration for which the applicants seek appointment of the learned arbitrator. The learned counsel submits that in the previous arbitration proceedings, the respondent invoked arbitration clause and prayed for expulsion of the applicants as partners of the suit firm whereas the disputes now arisen between the parties relates to the disbursement of profit, withdrawal of capital account and other related issues which are separate and distinct. The learned counsel submits that thus in view of the parties not having entered into any fresh partnership deed, rights and obligation of the parties were governed by the partnership deed dated 24th April, 2000 which is inclusive of rights of parties to get their dispute resolved through arbitration.

The learned counsel submits that the successive reference under the same contract is permissible. Arbitration clause is not exhausted merely because during the existence of partnership firm, dispute relating to other issues then arisen between the parties were referred to the arbitration. It is submitted that the dispute which have now arisen post declaration of the award could not have This

Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 been raised in the first round of arbitration and thus arbitration agreement is not exhausted by declaration of the award in the first arbitration.

20. Mr.Purohit, the learned counsel lastly submits that the arbitration clause is very wide and thus issues as to whether respondent would be entitled to share in the profit and loss at 13.97% or in any other ratio and issues relating to accounts and withdrawal of profit and other amounts are the disputes arising out of the partnership and thus considering the wider scope of arbitration clause, these issues can be referred to arbitration. It is submitted that the arbitrator would have wide power to decide all such issues which are arising out of the partnership and the claims proposed to be made by the applicants are the disputes arising out of partnership and thus falls within the ambit of the arbitration clause.

21. Mr.Purohit, the learned counsel appearing for the applicants placed reliance upon the judgment of the Calcutta High Court in case of Balmukund Rina vs. Gopiram Bhotica¹ and in particular pages 676 and 677 which reads thus :-

This is an appeal by the plaintiff in a suit to restrain two arbitration proceedings pending before the Tribunal of Arbitration of the Bengal Chamber of Commerce. By a contract, dated the 1st December 1917, made on the ordinary form of the Indian Jute Manufactures' Association, the plaintiff agreed to sell to the defendant three lacs of yards of Hessian cloth. The terms which require 1 AIR 1920 Calcutta 676 This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 consideration in this appeal were three:

" Delivery of the said goods to be given and taken as follows : December, 1917.

Each month's delivery to be treated as a distinct and separate contract.

Any dispute whatsoever arising on or out of this contract shall be referred to arbitration under the rules of the Bengal Chamber of Commerce, applicable for the time being, for decision, and such decision shall be accepted as final and binding on both parties to this contract. The award may, at the instance of either party and without any notice to the other of them, be made a rule of the High Court of Judicature at Fort William."

These three terms are all part of the printed form with the exception of the words "December, 1917," at the end of the first. Of the three lacs of yards contracted for, one-half lac was duly delivered and may now be ignored. No delivery was in fact made of any part of the remainder, which divides itself into three separate lots. As regards the first lot of 50,000 yards which was not delivered, on the 28th February 1918 the defendant demanded arbitration by the Bengal Chamber of Commerce and proceedings were confined to this particular claim. On the 25th July 1918 on this portion of the claim an award was made by the Board in favour of the plaintiff with

costs and interest. Subsequently, on the 9th April 1918 and the 21st June 1918 two other arbitration proceedings were started by the buyer and the object of the present suit is to stay these proceedings before the Chamber of Commerce. Mr. Justice Rankin has held that there is no foundation for the claim. In our opinion, this conclusion is so manifestly right, on the terms of the contract itself, that it is not necessary to elaborate the matter.

This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 The clause which opens with the words 'any dispute whatsoever arising on or out of this contract shall be referred to arbitration,' obviously means that each and every dispute as it arises, on or out of this contract, shall be referred to the arbitration of the Bengal Chamber of Commerce. As each month's delivery was to be treated as a distinct and separate contract, the defendant properly obtained an award as regards the first portion of his claim;

this clearly does not prevent him from proceeding with arbitration in respect of matters arising out of subsequent breaches of contract. We agree with Mr. Justice Rankin that as in the present case there were several and separate contracts, there is no foundation for the contention that the right conferred by the arbitration clause was fully exhausted as soon as a complete award was made upon the first reference. We may add that the decision of the House of Lords in the case of Chandanmull v. Donald Campbell and Co. 54 Ind.

Cas. 289 : 23 C.W.N. 707 footnote shows that there may be successive awards even in the same matter.

There, a dispute arose as to the effect of the award on the first arbitration; for the settlement of this dispute, a second reference to arbitration was made : it was ruled that such second arbitration was valid.

22. The learned counsel also placed reliance upon the judgment of the Supreme Court in case of Naraindas vs. Vallabhdas & Ors.² and in particular paragraph 8 thereof in support of the plea that successive reference is permissible under the Arbitration Act. Para 8 of the said judgment reads thus :-

8. We are also not impressed by the contention raised on behalf of the appellant that because there had been earlier litigation about the house allotted to the appellant and his brothers, the same could not be the subject matter of arbitration dispute. A dispute is referred to arbitration because the parties agreed to such a reference and the mere fact that the property which is the subject matter of dispute was also the subject matter of an earlier litigation, cannot prevent the parties to refer the dispute about that property to arbitration. What is referred to arbitrators in such a case is the fresh dispute and although the finding of the Court in the previous litigation may have a bearing on the dispute referred to the arbitrators, it would not stand in the way of reference of the fresh dispute to the arbitrators. It is

not the case of the appellant before us that the precise dispute which was the subject matter of the award dated 20th October, 1956 had been adjudicated upon earlier in a civil Court.

23. The learned counsel also placed reliance upon the judgment of this Court in case of International Airports Authority of India vs. M/s.Mohinder Singh & Co.³ and in particular paragraph 12 in support of the plea that successive reference is permissible. Paragraph 12 of the said judgment reads thus :-

12. As per the arbitration agreement between the petitioners and the respondents, the disputes were required to be referred to the sole arbitration of the person appointed by the Chief Engineer of the petitioners in charge of the work at the time of the disputes or if there be no Chief Engineer, the Head of the Department of Engineering of the petitioners at the time of such appointment, it is therefore clear that the sole arbitrator was required to be appointed by the Chief Engineer of the petitioners in charge of the work at the time of the disputes and it was only if there was no such Chief Engineer that the arbitrator was required to be appointed by the Administrator or the Administrative Head of the Department of 3 1996(1) Bom C.R.666 This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 Engineering of the petitioners. In each of the aforesaid references, the arbitrator was appointed by the Chief Engineer of the petitioners in charge of the work at the time of arising of the disputes between the petitioners and the respondents and consequently the appointment of the sole arbitrator on each occasion was in consonance with the said arbitration agreement and as such, valid and legal.

It may also be mentioned here that the Chief Engineer of the petitioners in charge of the work, the appointing authority, at the time of arising of the disputes between the petitioners and the respondents and at the time, of appointment of the said K. D. Bali as sole arbitrator, was the Administrative Head of the Department of Engineering of the petitioners and the controversy raised by the petitioners in this regard is devoid of any merit. Moreover, the appointment of the arbitrator was made by the petitioners themselves and the petitioners by long participation of the arbitration proceedings before the arbitrator accepted such appointment and it is neither valid nor legal nor proper on the part of the petitioners now to allege that the appointment of the arbitrator by the Chief Engineer of the petitioners in charge of the work at the material time was not proper.

The appointment of the arbitrator in each of the said references being in accordance with the arbitration between the petitioners and the respondents was valid and legal and all subsequent proceedings before the arbitrator so appointed were also valid and legal. The reference to arbitration made in each of the said references was properly, validly and legally made. There is also no merit in the contention of the petitioners that after making reference of the disputes in the first reference, the rights of the parties to the arbitration agreement to make further references of their claims against each other for arbitration got exhausted. There is equally no merit in the contention of the petitioners that all the claims and/or disputes which have been referred for arbitration of the arbitrator after the first reference This Order is modified/corrected by Speaking to Minutes Order

kvm ARBAP244.12 were beyond the scope of the reference to arbitration already made and as such, could not be entertained by the arbitrator. It is correct that the first reference made for arbitration was confined to five items of claims of the respondents included in the letter dated 23rd February 1985 addressed by the Chief Engineer of the petitioners while appointing the arbitrator. However, the completion of the work under the contract by the respondents even after making the first reference to arbitration had continued and since the further claims of the respondents arose out of and/or in relating to the work subsequently carried out by the respondents under the contract, the respondents wanted the same to be referred to arbitration in the first reference itself. Since the petitioners objected to such reference being made and themselves agreed for separate references in respect of such subsequent claims of the respondents against the petitioners, the second reference and the third reference were made by the Chief Engineer of the petitioners, the appointing authority, to the said K. D. Bali, the arbitrator. Such second and third references made to K. D. Bali, incidentally the same arbitrator, can under no circumstances be said to have been made after the right of the parties to the contract for making reference to arbitration was exhausted. The disputes which constituted the subject matters of the first reference, the second reference and the third reference consisted only of such disputes which were referred by the Chief Engineer of the petitioners to the arbitrator who was appointed in accordance with the arbitration agreement between the petitioners and the respondents. Once the arbitrator in accordance with the said agreement to refer the disputes to arbitration between the petitioners and the respondents was appointed, the disputes and/or claims and/or counterclaims arising out or in relation to the contract could be referred to the Arbitrator by or at the instance of either of the parties to the Contract and this exactly was done in the said references. Needless to state that in This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 arbitration proceedings under same arbitration agreement, successive references of various disputes arising from time to time under the same contract between the parties thereto can be referred to arbitration and be made the subject matter of successive references.

24. The learned counsel submits that the respondent has taken advantage of the increase in the share of the profit and loss from 5% provided under the partnership deed dated 24th April, 2000 which is increased to 13.97% after execution of the said partnership deed. It is submitted that all other rights and obligations of the parties are being implemented by the parties under the provisions of the said deed and thus respondent cannot be permitted to plead that the said partnership deed has come to an end and the rights and obligations of the parties has ceased to operate under the said partnership deed and are governed by only Memorandum of Understanding and Consent Terms which are arrived at between the parties after the declaration of the award by the learned arbitrator.

25. The learned counsel submits that in any event by virtue of the correspondence entered into between the parties, it is clear that it was the grievance of the respondent himself that the applicants were not taking steps to appoint arbitrator in accordance with the arbitration clause and that the respondent was not under any obligation to deal with any of the issues raised by the applicants as the same would be dealt with by him in the arbitration This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 proceedings. It is thus submitted that even by correspondence, the parties have recorded arbitration agreement and thus it satisfies the definition of an arbitration agreement under clause 7(4) (b) of the Arbitration and Conciliation Act, 1996.

26. Mr.Shah, the learned counsel appearing for the respondent on the other hand submits that the arbitration clause recorded in the partnership deed dated 24th April, 2000 is exhausted on the declaration of the award by the erstwhile arbitrator. It is submitted that the learned arbitrator had rendered a finding that the parties continuing under the partnership deed dated 24th April, 2000 was in contravention of law and in violation of clause 2 of the partnership deed and had directed both the parties to enter into a fresh partnership deed, the applicants have not challenged the said award, the finding of the Arbitral Tribunal that the partnership deed does not exist has become final and therefore the arbitration agreement forming part of such partnership deed, also thus cease to exist. The learned counsel submits that though it is correct that the parties to the said partnership continue to run the said firm till today, the rights and obligations of the parties are not implemented under the provisions of the said partnership deed but are under the provisions of the Memorandum of Understanding and Consent Terms arrived at between the parties.

This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12

27. It is submitted that in the said Memorandum of Understanding as well as Consent Terms entered into between the parties which are being under implementation, no arbitration agreement is recorded between the parties and thus the applicants can not be allowed to invoke arbitration agreement which was recorded in the partnership deed dated 24th April, 2000 which does not exist. It is submitted that the arbitration application is thus not maintainable.

28. The learned counsel submits that if the applicants seek enforcement of the rights and obligations under the said partnership deed dated 24th April, 2000, in view of the stand of the applicants themselves that profits and loss sharing ratio have been changed from time to time at different rate then what was recorded in the partnership deed, the stand of the applicants would be inconsistent with the rights and obligations recorded in the said partnership deed. It is submitted that in view of the retirement of some of the partners who were parties to the said partnership deed dated 24th April, 2000 are not parties to the present proceedings, dispute only inter se between the applicants and this respondent arising out of the same partners, deed as claimed by the applicants cannot be referred to arbitration.

29. The learned counsel submits that the applicants not having challenged the award delivered by the erstwhile Arbitral Tribunal, the findings rendered by the Arbitral Tribunal in the said award are final and binding also on the applicants.

This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12

30. The learned counsel further submits that section 17(a) of the Partnership Act, 1932 would be of no assistance to the applicants as the respondent has not agreed to be governed by the provisions of the said partnership deed dated 24 th April, 2000 inspite of change in constitution of the firm. The learned counsel submits that the transactions are operated between the parties under Memorandum of Understanding dated 9th October, 2007. It is submitted that there are no averments in the arbitration application made by the applicants that the business continued under the partnership deed dated 24th April, 2000.

The learned counsel invited my attention to paragraph 21 of the petition filed by the applicants herein under section 9 of the Arbitration Act, 1996 to demonstrate that it is not the claim of the applicants that the shares of the respondent at 13.97% in the profit and loss of the partnership firm was under

partnership deed dated 24th April, 2000.

31. As far as correspondence addressed by the respondent regarding alleged existence of arbitration clause referred to and relied upon by the applicants is concerned, the learned counsel submits that by such correspondence respondent has not waived his rights to take a plea that such arbitration agreement does not survive. It is submitted that right since inception, it was the stand of the respondent that in view of the declaration of the award by the erstwhile Arbitral Tribunal the arbitration agreement ceased to have effect and is exhausted. It is submitted that the respondent did not confirm by the said This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 correspondence that the arbitration agreement survives but it was contended that the issues raised by the applicants could be decided by the arbitrator. It is submitted that under the Memorandum of Understanding read with Consent Terms, all parties continued to do business on new terms recorded therein which does not include arbitration clause. The learned counsel submits that in arbitration application filed by the applicants, it is not the case of the applicants that the arbitration agreement is recorded by correspondence in terms of section 7(4) (b) of the Arbitration and Conciliation Act, 1996 and thus reference to any such correspondence would be of no assistance to the applicants in support of the plea that arbitration agreement independently exist by recording such agreement in the correspondence entered into between the parties.

32. The learned counsel submits that though by the order passed by this court while appointing Mr.Justice V.P.Tipnis, former judge of this court as sole arbitrator in earlier application filed under section 11 all the contentions including existing of arbitration clause were kept open and the said order not having been challenged by the respondent, in view of the judgment of the Supreme Court that if any such issue regarding existence of arbitration agreement is raised, the same has to be decided by the Hon'ble Chief Justice or his designate Judge and thus the said issue shall be decided by me in this proceedings.

This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12

33. The question that arises for consideration in this proceeding is as to whether arbitration agreement recorded in partnership deed dated 24th April, 2000 entered into between the parties is exhausted and ceased to have effect on declaration of the award dated 25th June, 2007 made by the Arbitral Tribunal in the earlier proceedings and if the same is not exhausted whether dispute now having arisen between the parties can be referred to arbitration under the said arbitration agreement.

34. There is no dispute between the parties that arbitration agreement was recorded in the partnership deed dated 24th April, 2000. It is also not in dispute that the parties have carried on with the business in the name and style of M/s.N.M.Raiji & Co. It is not in dispute that the award

made by the learned arbitrator on 25th June, 2007 was not challenged by the applicants herein. The respondent had challenged the said award dated 25th June, 2000 in this court which petition was dismissed and appeal and Special Leave Petition arising therefrom also came to be dismissed. It is not in dispute that neither of the parties have applied for execution of the said award dated 25th June, 2007.

35. On perusal of the award, it is clear that the respondent had prayed for a declaration that Mr. Mahendra Thakkar be declared as senior partner of the firm. The respondent had also prayed that the applicants herein be expelled from the suit firm and should be directed to repay to the firm salary and profit received by them from the period 22nd August, 2003 or 1st October, 2003. It is This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 also clear that in the said award, the learned arbitrator rendered a finding that the partnership and its business continued on the date of award on the basis of the old partnership deed and was not permissible under clause 2 of the said deed. The learned arbitrator rendered a finding that the business of the firm was continuing in contravention of the mandatory condition stipulated in clause 2 of the existing partnership deed. On perusal of the prayers setout by the learned arbitrator in para (7) of the said award, it is clear that the respondent himself had sought a declaration that Mr. Mahendra Thakkar, opponent no.5 in the said proceedings be declared as senior partner of the firm as setout in clause 10(a) of the said partnership deed dated 24th April, 2000.

The respondent had also prayed for expulsion of the applicants herein from the said firm w.e.f. 22nd August, 2003 and on 1st October, 2003 in view of the alleged breaches of partnership deed as contemplated under clause 9(a) and 9(b) of the said partnership deed dated 24th April 2000. The respondent had also applied for resolution of dispute between the parties on the basis of the arbitration agreement recorded between the parties in the said deed of partnership dated 24th April, 2000. It is not the case of the respondent that there existed any other arbitration agreement between the parties other than the arbitration agreement recorded in the said deed of partnership dated 24th April, 2000. These findings of fact recorded by the learned arbitrator in the said award dated 25th June, 2007 are final and binding.

This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12

36. In my view, the respondent himself having invoked arbitration clause under the same partnership deed dated 24th April, 2000 which culminated in the said award, which proceedings were filed after 2000, in my view respondent cannot be permitted to raise a plea that the terms and conditions of the partnership deed including arbitration agreement ceased to exist in view of the parties not having executed a fresh partnership deed after 24th April, 2000.

From the arbitration proceedings initiated by the respondent himself which culminated in award, it is clear that the rights and obligations of the parties under the said deed of partnership dated 24th April, 2000 including arbitration agreement continued. The respondent has acted upon the said arbitration clause and had demanded various reliefs based on the provisions of the said partnership deed. It is not in dispute that the learned arbitrator has rendered a finding that the partnership business continued on the basis of the said partnership deed. Mr. Mahendra Thakkar also stood

retired from the partnership under clause 12(a) of the said partnership deed dated 24th April, 2000 on attaining the age of 65 years in the financial year 2006-07. In my view, respondent cannot be permitted to blow hot and cold at the same time. It is not in dispute that the respondent himself has applied for expulsion of the applicants of the said partnership by relying upon clause 9(a) and (b) of the said partnership deed dated 24th April, 2000 in the said arbitration proceedings.

This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12

37. On consideration of the findings rendered by the learned arbitrator in the said award dated 25th June, 2007 on which reliance is placed by the respondent in this proceedings, I am of the opinion that both parties have continued the business under the said partnership deed dated 24th April, 2000. In my view merely because the Memorandum of Understanding and the Consent Terms were entered into between parties subsequently, provisions of the partnership deed dated 24th April, 2000 did not stand superseded. The perusal of the Memorandum of Understanding and the Consent Terms relied upon by both parties would indicate that the Consent Terms dated 8th September, 2005 were arrived at between the parties in the proceedings filed under section 9 by the applicants. It also indicates that both parties had agreed that the Consent Terms dated 8th September, 1995 arrived at between the Arbitration Petition No. 543 of 2004 shall continued to be in force as modified by the said Memorandum of Understanding. Perusal of various letters addressed by the respondent to the applicants annexed to the affidavit dated 23rd November, 2012 in Arbitration Petition No. 856 of 2012 makes it clear that the arbitration agreement is not exhausted and continued to be in force and binding on both parties. The respondent himself has repeatedly referred to such arbitration agreement and proceedings initiated by the applicants by letter dated 26th September, 2009. The respondent refused to comply with various requisitions of the applicants by categorically inviting the attention of the applicants to the existence of such arbitration agreement and by repeatedly contending that all This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 such disputes were subject matter of arbitration.

38. In my view, the arbitration agreement recorded in the partnership deed dated 24th April, 2000 continues to exist and is binding on parties herein. Even otherwise in view of section 7(4) (b), in view of both the parties having recorded arbitration agreement in the correspondence exchanged between them, it satisfies the condition of an arbitration agreement under section 7(4)

(a) of the Arbitration and Conciliation Act, 1996. In my view the present application filed by the applicants for appointment of the arbitrator is maintainable. I am not inclined to accept the submission made by the learned counsel appearing for the respondent that though in such letters, the arbitration agreement is referred, respondent has not given up his plea that on declaration of the award by the erstwhile Arbitral Tribunal, the arbitration agreement is exhausted and ceased to have effect. I am also not inclined to accept the submission of the respondent that in view of the applicants not referring to section 7(4) (b) of the Arbitration and Conciliation Act, 1996 in their arbitration application, no reliance on the correspondence exchanged between the parties could be made to construe such correspondence as record of arbitration agreement in terms of clause 7(4) (b) of the Act.

39. On perusal of the dispute filed in the earlier arbitration proceedings, which was initiated by the respondent himself and the correspondence on record in the present proceedings by which the applicant had invoked This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 arbitration agreement indicates that the dispute in both proceedings are separate and distinct. In my view, Mr.Purohit, the learned counsel appearing for the applicants is right in his submission that the dispute which would be subject matter of the arbitration in the present proceedings have arisen after declaration of the said award by the erstwhile Arbitral Tribunal and in view of the existence of the arbitration agreement and continuation of the business by the parties under the said partnership deed with modification thereof, the successive reference of the dispute to arbitration on the basis of the existing arbitration clause is permissible. It is not the case of the respondent that the dispute which have arisen for which the applicants have invoked arbitration clause ought to have been the subject matter of the earlier arbitration proceedings. In my view Mr.Purohit, the learned counsel appearing for the applicants is right in placing reliance upon the judgment of this court in case of International Airports Authority of India (supra), the judgment of the Supreme Court in case of Naraindas (supra) and the judgment of the Calcutta High Court in case of Balmukund Rina (supra). In my view all the judgments referred to and relied upon by the applicants supports their plea that successive reference to arbitration is permissible. In my view successive reference to arbitration under the same arbitration agreement is permissible if the said clause is existing which in this case, in my view exists.

40. On perusal of the arbitration clause recorded in clause 18 of the This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 partnership deed, it is clear that the said clause is very wide and mandates that all dispute and question in connection with the partnership or the said deed arising between the partners and their representatives shall be referred to arbitration. In my view, the question as to whether profit and loss ratio of the partners remain the same that was recorded in the said partnership deed or was revised and if so, at what rate and distribution of the profit and withdrawal of capital account, disbursement of expenses etc. would be a dispute in connection with the partnership or the said partnership deed which can be referred to arbitration in terms of the said clause. I am also not inclined to accept the submission made by the respondent that the Memorandum of Understanding and the Consent Terms entered into between the parties after execution of the partnership deed dated 24th April, 2000 shall be read in isolation or that the said two documents signed by the parties were in substitution of the partnership deed.

41. I am not inclined to accept the submission made by Mr. Shah, the learned counsel appearing for the respondent that the applicants not having challenged the award rendered by the erstwhile Arbitral Tribunal by which both parties were directed to execute fresh deed of partnership and thus the earlier partnership deed and partnership executed on 24th April, 2000 ceased to exist. On perusal of the award, it is clear that the learned arbitrator had rendered a finding that the partnership firm continued under the said This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 partnership deed dated 24th April, 2000 till date. It is true that the respondent did not challenge the said award but at the same time it is not in dispute that the respondent also has not applied for execution of the said award so far. I am not inclined to accept the submission of the respondent that by the said award, the said partnership deed was put to an end. No such declaration is rendered by the Arbitral Tribunal in the said award declaring that the

said partnership deed came to an end.

42. As far as submission of the respondent that since some of the partners who were parties to the said deed dated 24th April, 2000 have retired and are not parties to the present arbitration proceedings, the matter cannot be referred to arbitration is concerned, in my view Mr.Purohit is right in his submission that the dispute sought to be raised by the applicants to arbitration for which the arbitration clause has been invoked is the dispute between the applicants and the respondent and not between the applicants and the partners who have already stood retired from the partnership business and thus arbitration application is not bad for non-joinder of retired partners.

43. On perusal of clause 18 of the partnership deed dated 24th April, 2000, it is clear that both the parties had agreed to appoint a single arbitrator and in the event of the disagreement, the arbitrator to be appointed by each party to the difference. It is not in dispute that the applicants by their letter dated 5th July, 2012 have nominated Mr.Justice S.K.Shah, former Judge of this Court. The This Order is modified/corrected by Speaking to Minutes Order kvm ARBAP244.12 respondent however by his letter dated 2nd August, 2012 has refused to appoint any arbitrator on his behalf.

44. The applicants in the present application have prayed that the arbitrator be appointed on behalf of the respondent or in the alternative to appoint Mr.Justice S.K.Shah, former Judge as the sole arbitrator. In view of the fact that the respondent has not agreed to appoint any arbitrator and did not agree to the name of Mr.Justice S.K.Shah, former Judge of this Court as arbitrator, Mr.Justice J.P.Devadhar, former Judge of this Court is appointed as an arbitrator on behalf of the respondent. Both the learned arbitrators are requested to appoint the presiding arbitrator in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

45. Arbitration Application is disposed of in the aforesaid terms.

46. There shall be no order as to costs.

(R.D. DHANUKA, J.)