Smt. Veena Wd/O Naresh Seth vs Seth Industries Limited on 29 October, 2010

Author: S.J. Vazifdar

Bench: S.J. Vazifdar

This Order is modified/corrected by Speaking to Minutes Order

1 ARBP

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 180 OF 2007

1. Smt. Veena wd/o Naresh Seth, age about 52 years, occupation: Housewife, residing at Simplex House, 44, Jai Hind Co-op..Hsg. Soc. Ltd., J.V.P.D.Scheme, Mumbai 400 049.

2. Suchit Naresh Seth, a minor, aged about 7 ½ years by his mother and natural guardian Smt. Veena wd/o Naresh Seth, both residing at Simplex House, 44, Jai Hind Co-op. Hsg. Soc. J.V.P.D. Scheme, Mumbai 400 049.

In their capacity as the heirs and legal representatives of Naresh Seth the deceased

Petitioner who died on 22nd June, 2007. ... Petitioners

Versus

1. Seth Industries Limited, a company which was]
incorporated under the Companies Act, 1956 on]
30.5.1975 as public limited company and ceased]
as legal entity by General Body Resolution at]
meeting of 7.1.2002 filed with Registrar of]
Companies, Maharashtra of which company the]
registered office was at Sadhana Rayon House]
2nd Floor, Dr.D.N. Road, Fort, Mumbai 400001]
and even after it ceased as legal entity it]
purported to be carrying on illegally by the]
Claimant and to the care Shiv Prakash Seth]
(Resp.No.2) at Sadhana Rayon House, 2nd floor,]
Dr.D.N. Road, Mumbai 400001]

2. Shiv Prakash Seth son of Benarsidas Seth,]
Indian Inhabitant, Occupation Business, aged]
about 77, residing at Usha Kiran, 9th Floor,]
Carmaicheal Road, Mumbai 400026.]

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3. Janak Raj Seth since deceased by his heirs and]
legal representatives;
a) Shukla Janak Raj widow of Janak Raj, Indian]

Inhabitant, Housewife, aged about 69 years,]
residing at 30 Maqbool Road, Amritsar, Punjab]

b) Benu Bharany (incorrectly mentioned as Belu] Baharani in Award) daughter of Janak Raj,] Indian Inhabitant, housewife, aged about 43] years, residing at 8/2, Shanti Niketan New Delhi]

c) Bela Sehgal daughter of Janak Raj Seth,] Indian inhabitant, Housewife aged about 45] years, residing at Kothi No.76, Sector 5,] Chandigarh.]

4a) Smt. Asha Ramesh Seth, Indian inhabitant]
Indian inhabitant, age not known,
ig]
Occupation : Not known]

4b) Dinesh Ramesh Seth, Indian inhabitant]
age not known, Occupation : Not known]

4c) Ashok Ramesh Seth, Indian inhabitant]
Occupation : Not known]

4d) Nisha d/o Ramesh Seth, Age Not known,]
Occupation : Not known.]
All Adults, widow, 2 sons and one daughter]
of Ramesh Kumar Seth,]

All residing at 31-B, Jolly Maker Apartment,]
Cuffe Parade, Mumbai - 400005]

In their capacity as the legal representatives]
of the deceased Respondent No.4, Ramesh]

Kumar Seth, s/o Benarsidas Seth who died]
on 4th July, 2007.]

5. Seth Industries Pvt. Ltd., incorporated under]
the Companies Act, 1956 as a Pvt. Ltd.]
Company as per certificate dated 12..4.2001]
issued by the Registrar of Companies,]

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Maharashtra, and having its registered office]
at Sadhana Rayon House, 2nd Floor,]
Dr.D.N. Road, Fort, Mumbai 400001.]... Respondents

.....

Mr. Feredun DeVitre, senior counsel with Mr. Arif Bookwala, senior counsel and Mr. Farhan Dubash i/b M/s. Bharat Shah & Co. for the Petitioners.

Mr. S.U. Kamdar, senior counsel with Mr. Dinyar D. Madon, senior counsel and Mr. A.H. Gokhale i/b Mr. Madhukar Harmawar for Respondents Nos.1, 2, 4A to 4C and 5.

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ig CORAM : S.J. VAZIFDAR, J.

DATED : 29th OCTOBER , 2010.

ORAL JUDGMENT :

1. This is a petition under section 34 of the Arbitration & Conciliation Act, 1996 to challenge an award dated 1st December, 2006.

The learned arbitrator declared that a mortgage deed of Rs.10,45,000/- and interest thereon is fully satisfied and stood discharged as on 31st March, 1991, directed the original Petitioner to reassign and deliver the mortgaged property to the Claimant i.e. Respondent No.1, admeasuring about 2000 square feet on the second This Order is modified/corrected by Speaking to Minutes Order 4 ARBP180.07 floor and the entire first floor of a building named Simplex House which was part of the mortgaged property, latest by 31st January, 2007.

The original Petitioner was also directed to return to Respondent No.1 by 31st January, 2007, the original deed of mortgage as also the original deed of transfer of the mortgage and all like documents. The arbitrator also directed the original Petitioner to pay Respondent No.1, a sum of Rs.27,36,351/- with simple interest thereon at eighteen per cent per annum from 1st September, 2000, till payment and compensation at the rate of eighteen per cent per annum on Rs.

1,42,60,046/-, being the value of the said first and second floor premises from 12th April, 2000, being the date of expiry of the notice period given by the first Respondent to the original Petitioner till reassignment thereof. The original Petitioner's counter-claim was dismissed as not pressed.

2. Respondent No.1 was the Claimant before the arbitrator. The original Petitioner, Naresh Seth, Respondent No.2 Shiv Prakash Seth, original Respondent No.3 Janak Raj Seth and original Respondent No. 4, Ramesh Seth were brothers. After this petition was filed, the original Petitioner died and his heirs viz. his widow and his minor son This Order is modified/corrected by Speaking to Minutes Order 5 ARBP180.07 were brought on record as Petitioners. After the petition was filed, Respondent No.4 Ramesh Seth died and his heirs have been brought on record as Respondent Nos.4(a) to 4(d). Respondent No.3 Janak Raj Seth died before the award was made. His heirs Respondent Nos.

3(a), (b) and (c) were brought on record by the arbitrator in the circumstances which have been challenged by the Petitioner. The original Petitioner alleged that the learned arbitrator brought them on record without even an application for the same. Respondent No.5 Seth Industries Private Limited is only the new name of Respondent No.1. I will in the judgment refer to it as Respondent No.1.

3. A property admeasuring 800 square yards of land was leased in favour of one Chunilal Shah for 999 years who assigned the same to one Sumanben Shah and Shantilal Shah. They, in turn, assigned

the lease in favour of Respondent No.2 Shiv Prakash Seth as a Director and for and on behalf of the first Respondent. The first Respondent paid the consideration for the same and constructed a building thereon.

4. Respondent No.1 executed an English mortgage in favour of This Order is modified/corrected by Speaking to Minutes Order 6 ARBP180.07 one Ravi Madan Shah, his wife, their son and daughter as security for a loan availed of by Respondent No.1 from them in the sum of Rs.

10,00,000/-. The repayment of the loan was guaranteed by the original Petitioner, Respondent No.2 and original Respondent No.3, who were the Directors of the first Respondent.

Respondent No.1 was unable to repay the loan although the time for repayment was extended. Ultimately, the mortgagees insisted upon the loan being repaid failing which they threatened to enforce their rights under the mortgage.

5(a). The original Petitioner was in occupation of the premises on the second floor admeasuring 2000 square feet as a Director of the first Respondent. At the request of the first Respondent, the original Petitioner on 28th September 1984 paid the mortgagees a sum of Rs.

10,45,000/- of which Rs.45,000/- was towards interest. By a deed of transfer dated 28th September, 1984, the mortgagees transferred the mortgage in favour of the original Petitioner. The transfer deed provided that the sum of Rs.10,45,000/- together with interest at eighteen per cent per annum on the principal sum of Rs.10,00,000/-

would be paid to the original Petitioner by Respondent No.1 on or This Order is modified/corrected by Speaking to Minutes Order 7 ARBP180.07 before 1st September, 1985.

(b) The original Petitioner, by a letter dated 20th June, 1985, informed the parties herein and the mortgagees that he had taken over possession of the property pursuant to the deed of transfer dated 28th September, 1984 and that he would auction the property in the event of the mortgagors and the guarantors committing default in payment of the amounts thereunder. By a further letter dated 27th September, 1985, the original Petitioner stated that as there was a failure to pay the mortgage debt, he became entitled to recover his dues under the indenture of mortgage dated 24th December, 1979 read with the deed of transfer dated 28th September, 1984.

(c) Respondent No.1 by a letter dated 22nd February, 1986, addressed to the original Petitioner stated that he could sell the mortgaged properties and realise his dues from the sale proceeds.

(d) The original Petitioner created a monthly tenancy in favour of one S. Agarwal with effect from 1st April, 1986, in respect of the ground floor of the said building. Thereafter, by a conveyance dated 30th June, 1986, he sold the ground floor premises to the said S. Agarwal for a sum of Rs.11,00,000/-.

(e) Respondent No.1 contended that as on 30th June, 1986, it owed This Order is modified/corrected by Speaking to Minutes Order 8 ARBP180.07 the original Petitioner a sum of Rs.13,75,000/-, inclusive of interest and that after adjusting the amount of Rs.11,74,000/-, a sum of only Rs.2,01,220/- was due and payable by it to the original Petitioner. A sum of Rs.74,00,000/- was alleged to be payable by the original Petitioner for his occupation of the second floor of the said building.

6. Original Respondent No.3 filed Company Petition No.158 of 1986 for winding up the first Respondent. By an order dated 27th September, 1984, in interlocutory proceedings taken out by the parties, the Court Receiver was appointed as the Receiver of the property. The original Petitioner was allowed to continue as the agent of the Receiver in respect of the premises in his possession, subject to payment of royalty which was fixed at Rs.6,000/- per month.

7. The parties ultimately executed a Memorandum of Understanding dated 20th July, 1995, clause 12 whereof contains an arbitration agreement. The relevant clauses of the Memorandum of Understanding are as under :-

> "1. All the assets and properties of the said Seth Industries Ltd (Props : of Simplex Woollen Mills) and the said two firms viz: Messrs Shiv Prakash Janakraj and M/s. Seth Textiles shall be sold at the price and on the This Order is modified/corrected by Speaking to Minutes Order 9 ARBP180.07 terms to be expressly agreed upon in writing by and between Shiv Prakash Seth, Janakraj Seth, Ramesh Kumar Seth and Naresh Seth as expeditiously as possible and the sale proceeds thereof shall be accumulated in a common pool. The parties hereto shall procure orders/sanctions/ approvals, if any required for sale of the said assets and properties.
>
> .....
>
> 7. All payments made since 1986 either by Shiv Prakash Seth, Janakraj Seth, Ramesh Kumar Seth and Naresh Seth for and on behalf of the said Company and the said two firms or personally relating thereto from his private and personal sources shall be reimbursed out of the said common pool.
>
> 7-A. All the moneys received by the sale of properties under the Memorandum of Understanding will be paid into a separately opened bank account in the name of SETH INDUSTRIES LTD., which will be operated jointly by all the four parties, namely Shiv Prakash Seth, Janakraj Seth, Ramesh Kumar Seth and Naresh Seth. Any party desiring that any payment should be made from such account will give one week's written notice to the remaining parties as far as possible unless all parties agree in writing to waive such notice. It is agreed that for the day-to-day operations a separate account including existing account may be used, as mutually agreed, by transferring limited funds from the above common joint account to this account.

8. The balance remaining in the said common pool after satisfying all the dues and liabilities of the said Company and the said two firms including all taxes and other legal liabilities shall be distributed by the said Company as mutually agreed, subject to payment of tax thereon according to law. This distribution must be done within five years or if so agreed mutually by all parties within further extended period of three more years.

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9. The parties hereto and Shiv Prakash Seth, Janakraj Seth, Ramesh Kumar Seth and Naresh Kumar agree to withdraw all legal proceedings filed by one against the other immediately after execution of this Memorandum of Understanding.

10. T%he parties agree to execute all documents/writings required for carrying out and implementation of the terms of this Memorandum of Understanding.

11. The Memorandum of Understanding shall be binding upon the parties hereto and Shiv Prakash Seth, Janakraj Seth, Ramesh Kumar Seth and Naresh Seth and their heirs, executors and administrators and share- holders of the said Company.

12. The parties agree to have all differences and disputes, if any, among them in relation to or in connection with this Memorandum of Understanding decided by arbitration for which purpose, their Lordships, S.C. Pratap and failing him, P.B. Sawant and failing him, B. Lentin, who are all retired Judges will be the sole arbitrator, if possible."

8. By an order dated 20th December, 1996, this court discharged the Receiver. According to the first Respondent, the original Petitioner delivered to Respondent No.1, vacant and peaceful possession of the entire first floor of the said building which consisted of two flats one of which was given by the first Respondent to a third party on leave and licence and the other is in its possession. The first Respondent further contended that it requested the original Petitioner This Order is modified/corrected by Speaking to Minutes Order 11 ARBP180.07 to vacate the second floor to enable the sale thereof pursuant to the Memorandum of Understanding but that he failed to do so. The Petitioners' case as to what transpired thereafter, after the discharge of the Court Receiver is as follows :-

"The claimants also requested Naresh Seth (original Petitioner) to vacate the second floor so that the same could be sold pursuant to the Memorandum of Understanding. Naresh Seth requested the claimants to let him occupy the same for a period of three years so that he could find alternative premises. Since he was one of the former directors of the claimant company and a close relation of the respondents being their brother, the claimants allowed him to occupy the premises on the second floor for a period of three years from 1st January 1997 to 31st December 1999 on payment of compensation at the then prevailing market rate of Rs.60,000/- per month. Naresh

Seth agreed. Even so, however, he consistently failed to pay the agreed compensation and also failed to vacate the premises despite repeated demands. As on 29th February 2000 a sum of Rs.

27,36,351/- (less Rs.3,25,139/- received from the Court Receiver) fell due and payable by him to the claimants towards compensation for use and occupation of second floor premises."

9. The first Respondent, by a notice dated 28th March, 2000, called upon the Petitioner to vacate the said premises stating that in default thereof, it would adopt legal proceedings. The original Petitioner, by his letters, dated 10th May, 2000 and 28th July, 2000 contended that he was the owner/tenant/mortgagee in possession of the second floor This Order is modified/corrected by Speaking to Minutes Order 12 ARBP180.07 premises.

10. In view thereof, the first Respondent invoked the arbitration agreement contained in clause 12 of the Memorandum of Understanding.

11.(A) Mr. DeVitre, the learned senior counsel appearing on behalf of the Petitioner challenged the award on the following grounds:

(I) The arbitrator had no jurisdiction to decide the claims.

The submission was based on the following grounds :--

(a) The arbitrator wrongly granted the relief of reassignment of the property although the same was not prayed for.

(b) The arbitrator awarded claims sought in the statement of claim but not raised in the letter invoking the arbitration agreement.

(c) The Memorandum of Understanding deals only with the sale of the properties and not with the inter-se disputes between the parties thereto.

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(d) The arbitrator wrongly proceeded on the basis that the Claimant/Respondent No.1 had sought specific performance of the Memorandum of Understanding.

(e) The arbitrator had no jurisdiction to decide the disputes arising in respect of the licence allegedly created by Respondent No.1 in favour of the original Petitioner in view of the provisions of the Presidency Small Cause Courts Act, 1882 and in particular section 41 thereof.

(f) The disputes and claims did not fall within the arbitration agreement contained in clause 12 of the Memorandum of Understanding.

II A. Having come to the conclusion that he had no jurisdiction to consider the issue of tenancy raised by the original Petitioner, the arbitrator could not have made any observations in regard thereto.

II B. The arbitrator, therefore, was also not entitled to grant the monetary compensation.

(III) The award is contrary to the record and is, therefore patently absurd.

This Order is modified/corrected by Speaking to Minutes Order 14 ARBP180.07 (IV) The arbitrator did not consider the relevant evidence.

(B) I have rejected submissions I(a) to (d). Submission I(e) is answered in the Petitioner's favour resulting in the entire award being set aside in so far as it pertains to the second floor. Submission I(f) is answered in the Petitioner's favour in so far as it pertains to the second floor in respect of the monetary amounts awarded furnishing an additional ground for setting aside the award in respect thereof.

I have answered submissions IIA and IIB against the Petitioners with the clarification that the enforceability of the award of monetary amounts would be dependent upon and subject to the findings/judgment of the appropriate court or tribunal regarding the Petitioner's claim of tenancy in respect of the property.

Submission III is answered in the Petitioner's favour in so far as it relates to the grant of monetary compensation in respect of the first floor.

Submission IV is rejected.

In the result I have set aside the entire award.

This Order is modified/corrected by Speaking to Minutes Order 15 ARBP180.07 Re: (I) : The arbitrator had no jurisdiction to decide the claims.

12. Mr. DeVitre submitted that the arbitrator wrongly directed the original Petitioner to reassign the mortgaged property and to hand over and deliver the same to the first Respondent as the first Respondent had not even prayed for the same.

13. To accept the submission would be taking far too technical a view of the pleading in the statement of claim. The claim, in my view, was clearly made in the statement of claim filed before the arbitrator.

In prayer a(ii), the first Respondent sought a declaration that the original Petitioner was bound and liable to give vacant and peaceful possession of the said premises on the second floor admeasuring 2000 square feet and the entire first floor of the said building. Prayer a(ii) bases this declaration "in view of the redemption of the loan covered by the agreement dated 28th September, 1984 i.e. the

deed of transfer of the mortgage from the original mortgagees to the original Petitioner." In prayer b(ii) of the statement of claim, the first Respondent sought an award ordering and decreeing the original Petitioner to give vacant possession of the said premises on the same basis viz. in view of the repayment of the loan covered by the deed of This Order is modified/corrected by Speaking to Minutes Order 16 ARBP180.07 transfer of mortgage dated 28th September, 1984.

14. The submission that the award is bad for having granted the relief of reassignment of the said property on the ground that the first Respondent had not prayed for the same is, therefore, rejected.

15. Mr. DeVitre submitted that the first Respondent's letter dated 26th July, 2000, invoking arbitration restricted the disputes and the claim to possession of the second floor. Despite the same in the statement of claim additional reliefs were sought including declarations and decrees in respect of the first floor and claims for monetary compensation as well. According to Mr. DeVitre an arbitrator is not entitled to consider any claims or reliefs other than those stated in the letter invoking arbitration. He submitted that the arbitrator having considered and awarded the same, acted in excess of his jurisdiction.

16. In support of this submission, Mr.DeVitre relied upon a judgment of the Supreme Court in Indian Aluminium Cables Ltd. vs. Haryana State Electricity Board & Ors., 1996 (5) SCALE 768.

This Order is modified/corrected by Speaking to Minutes Order 17 ARBP180.07 The facts in this case were that the Respondent had served a notice in relation to the purchase of material for Rs.11,300/-

as against the contractual rate of Rs.4390/-. The difference in price was claimed by way of damages. The rate had increased from time to time during the period 31st March, 1974 to 26th May, 1975. The Respondent had placed an order for purchasing the material with one M/s. Industrial Cables Limited. The differential amount claimed as damages was stated in the notice to be Rs.37,61,465/-. (In paragraph 2 of he judgment, the figure is Rs.87,81,465/-. This, as the report itself indicates, was a typographical error and the correct figure is stated later in paragraph 2 of the judgment itself while quoting the arbitrator's award). However, in the statement of claim, the rate was stated to be Rs.12,100/-. The party which supplied the material was stated to be M/s. J.J.H Industries and the relevant date was stated to be 10th February, 1976. The claim made in arbitration, therefore, was Rs.

63,56,737.42. The arbitrator noticed the change, but observed that the question whether the Respondent was entitled to the rate claimed is a matter of evidence which could not be decided "at this stage". The arbitrator observed that the effect of the inconsistency would have to be decided on merits and that the claim cannot be held to be This Order is modified/corrected by Speaking to Minutes Order 18 ARBP180.07 unsustainable and beyond the scope of the arbitration clause or the reference to arbitration so as to oust the jurisdiction of the arbitrators on account of such inconsistency. The Supreme Court held as under :-

> "..... We are afraid this approach of the Arbitrators is not correct. If the claim made by HSEB is outside the scope of the reference made

> to the Arbitrators, the Arbitrators must confine themselves to the reference and cannot travel outside it merely because under the terms of the contract the dispute in regard to this matter would have been covered and could have been referred to arbitration.
>
> In the instant case, since the reference is in relation to the item set out in the notice, the jurisdiction of the Arbitrators stands confined to those matters only and cannot travel outside it. Therefore, there is no question of examining the claim which is totally different from the one made in the notice which is the basis of the reference as to whether or not damages could be awarded on that claim. Once the claim is outside the reference, it is outside the scope and ambit of the inquiry by the Arbitrators and, therefore, the Arbitrators cannot go into it. Therefore, in our view, the claim made in the reference, which is inconsistent with paragraph 6 of the notice, cannot be entertained by the Arbitrators."

17. I do not read the judgment to hold as an absolute proposition that the claim made in arbitration must in every case be limited to the claim stated in the notice/letter invoking arbitration. Indeed in many, if not most cases, the letter/notice of invocation of the arbitration agreement does not stipulate and crystallize the claims. The judgment does not set out the arbitration agreement that applied between the This Order is modified/corrected by Speaking to Minutes Order 19 ARBP180.07 parties therein. It does not indicate the nature of the arbitration agreement.

If Mr. DeVitre's submission is accepted, it would denude the arbitral tribunal of the power to even allow an amendment to a statement of claim.

Mr. DeVitre's submission would be valid only in those cases where the arbitration agreement stipulates a demand for a reference of the disputes to the arbitral tribunal to be preceded by a notice and further provides that the claim in the arbitration shall be limited to those raised in such notice. This is not an unusual provision in arbitration agreements. Such limitations are found in several arbitration agreements. Clause 12 of the Memorandum of Understanding which contains the arbitration agreement between the parties herein, does not place any such limitation.

18. There is nothing in the Arbitration and Conciliation Act, 1996, or in principle, which requires the notice invoking the arbitration to state the claims proposed to be made in the reference. A notice merely indicating the disputes or that disputes have arisen and invoking the arbitration clause is sufficient unless the arbitration agreement itself This Order is modified/corrected by Speaking to Minutes Order 20 ARBP180.07 requires the invocation to be in a particular manner.

Mr. DeVitre's submission is, therefore, not well founded.

19. The reliance placed by Mr. Kamdar, the learned senior counsel appearing on behalf of the Respondent Nos.1, 2, 4A to 4C and 5, on the judgment of the Supreme Court in State of Orissa vs. Asis Ranjan Mohanty (1999) 9 SCC, 249, in regard to this submission is well founded. The Supreme Court held that the original statement of claim reserved the right to file additional claims. This was

not, however, the only ground upon which the submission that the additional claims could not be raised before the second arbitrator was rejected. Indeed if Mr. DeVitre's submission is correct, such a reservation in the statement of claim would make no difference. One of the learned Judges was also a party to the judgment in Indian Aluminium Cables Limited.

20. Even on the facts of this case, the submission is not well founded.

(A) Firstly apart from the Memorandum of Understanding and the letter of invocation dated 26th July 2000, the parties had even before the arbitrator expressly agreed to all the disputes and differences being This Order is modified/corrected by Speaking to Minutes Order 21 ARBP180.07 referred to arbitration in respect of the entire property. This is clear from a "Recorded Note" dated 19th June, 2002, filed by counsel on behalf of all the parties. Before the arbitrator, the counsel for all the parties filed the following statement describing it a Recorded Note :-

> "Recorded Note
>
> 1. Advocate and parties on either side agree that this reference be considered as related and restricted only to the disputes and differences concerning the property Simplex House (except ground floor thereof) at Juhu which is at item no.5 in annexure "A" to the Memorandum of Understanding dated 20h July 1995.
>
> 2. Advocates and parties on either side further agree that all other disputes and differences and all other claims and contentions constituting the subject matter of their respective pleadings (including the statement of claim and reply thereto as also the counterclaim and reply thereto) and/or arising out of the Memorandum of Understanding dated 20th July 1995 and/or otherwise, are not pressed in this arbitration and should, therefore, not be considered in this arbitration. Parties are, however, at liberty to raise and agitate the same in separate proceedings including separate arbitration proceedings."

The parties had thus agreed that the reference be considered as related and restricted only to the disputes and differences concerning the property Simplex House (except the ground floor thereof) which is at item 5 of Annexure A to the Memorandum of Understanding dated 20th July, 1995. The first This Order is modified/corrected by Speaking to Minutes Order 22 ARBP180.07 Respondent was, therefore, entitled to raise before the arbitrator, all claims in respect of Simplex House, except in respect of the ground floor thereof. There is no restriction as regards the first floor or any other part of the property, except the ground floor. In view of the Recorded Note also, the submission is rejected.

(B) Secondly, another notice also dated 26th July, 2000, was addressed by Respondent No.1 to the original Petitioner wherein all the disputes with respect to the redemption of the mortgage of the entire property, including the claim for the surplus amount payable upon redemption, were referred to and raised. The claims were not restricted to the second floor, but to the entire property and included therein all the claims which were raised in the statement of claim.

The notice refers "to the premises being Simplex House" in general and not merely to the second floor.

21. Moreover, the original Petitioner did not, in reply to the notices both dated 26th July, 2000, contend that the claims made therein were beyond the scope of the reference and the arbitrator's jurisdiction, including on the ground that the claims raised before the arbitrator in the statement of claim were outside the scope/purview of the letters This Order is modified/corrected by Speaking to Minutes Order 23 ARBP180.07 dated 26th July, 2000. It is, therefore, not open to the Petitioners now to raise this contention.

22. The submission is, therefore, rejected both in law and on facts.

That the above findings are in the ultimate analysis of no avail to the Respondents qua the second floor on account of the license agreement pleaded by Respondent No.1 is another matter. These findings are without taking into consideration the said license agreement which I will deal with later.

23. Mr.DeVitre submitted that the arbitrator had no jurisdiction to consider the reliefs sought by the Respondents for possession of the premises, return of the mortgage property and the monetary amounts as the same do not fall within the ambit of the arbitration clause of the Memorandum of Understanding. He contended that the Memorandum of Understanding deals only with the sale of the properties mentioned therein. It does not deal with the inter-se rights of any of the parties therein qua such properties. He submitted that the original Petitioner by entering into the Memorandum of Understanding did not agree to having the disputes between himself and the others including the first This Order is modified/corrected by Speaking to Minutes Order 24 ARBP180.07 Respondent being referred to arbitration.

24. Considering the nature of the arbitration clause, this submission is not well founded. I have set out the arbitration clause earlier. The parties had agreed to have all differences and disputes, if any, among them 'in relation to or in connection with' the Memorandum of Understanding decided by arbitration. The expressions 'in relation to' and 'in connection with' are of wide amplitude. I need go no further than to refer to the judgment of the Supreme Court in Renusagar Power Co. Ltd. v. General Electric Co., (1984) 4 SCC 679 where the Supreme Court held :

"25. Four propositions emerge very clearly from the authorities discussed above:

> (1) Whether a given dispute inclusive of the arbitrator's jurisdiction comes within the scope or purview of an arbitration clause or not primarily depends upon the terms of the clause itself; it is a question of what the parties intend to provide and what language they employ.
>
> (2) Expressions such as "arising out of" or "in respect of" or "in connection with" or "in relation to" or "in consequence of"

or "concerning" or "relating to" the contract are of the widest amplitude and content and include even questions as to the existence, validity and effect (scope) of the arbitration agreement.

(3) Ordinarily as a rule an arbitrator cannot clothe himself with power to decide the questions of his own jurisdiction (and it will be for the court to decide those questions) but there is nothing to prevent the parties from investing him with power This Order is modified/corrected by Speaking to Minutes Order 25 ARBP180.07 to decide those questions, as for instance, by a collateral or separate agreement which will be effective and operative.

(4) If, however, the arbitration clause, so widely worded as to include within its scope questions of its existence, validity and effect (scope), is contained in the underlying commercial contract then decided cases have made a distinction between questions as to the existence and or validity of the agreement on the one hand and its effect (scope) on the other and have held that in the case of former those questions cannot be decided by the arbitrator, as by sheer logic the arbitration clause must fall along with underlying commercial contract which is either non-existent or illegal while in the case of the latter it will ordinarily be for the arbitrator to decide the effect or scope of the arbitration agreement i.e. to decide the issue of arbitrability of the claims preferred before him."

25. If the property was in the possession of a third party, it would have been necessary for the parties to the Memorandum of Understanding to take steps for obtaining possession thereof as well as recovery of monetary compensation for the use thereof if the same was illegal. Such third party not being a party to the Memorandum of Understanding and the arbitration agreement contained therein, the dispute could not be referred to arbitration. However, in the case of parties to the Memorandum of Understanding, the situation would be different.

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26. The Memorandum of Understanding contemplates the sale of the properties mentioned therein.

When some of the parties to the Memorandum of Understanding demand for the sale of a property mentioned therein, they in effect state that the first Respondent is entitled to do so being the owner thereof. One of the questions that would arise is whether the parties to the Memorandum of Understanding inter-alia by having agreed to the properties mentioned therein being sold in the manner stated therein acknowledged the title of the first Respondent in respect thereof. Whether the representation in the Memorandum of Understanding by the parties thereto are evidence of clear title of the first Respondent in respect of such properties is a question of fact.

However, when one or more of the parties to the Memorandum of Understanding wishes that the properties mentioned therein be sold in terms of the Memorandum of Understanding and another party thereto either denies the first Respondent's title thereto or clear title thereto, an issue to this

effect arises. The property then can be sold only after an adjudication thereof. The property can be sold effectively only upon determining the title or the extent of the title of the first Respondent to such property. This is a dispute between the This Order is modified/corrected by Speaking to Minutes Order 27 ARBP180.07 parties to the Memorandum of Understanding and in respect of the subject matter of the Memorandum of Understanding. It is a dispute a decision in respect whereof precedes the grant of an award to sell the property as provided in the Memorandum of Understanding. In other words, the award for the sale of the property as per the Memorandum of Understanding is dependent upon the adjudication regarding the saleability thereof by the first Respondent. A dispute as to the first Respondent's title is therefore certainly "in relation to" or "in connection with" the Memorandum of Understanding.

27. The parties having agreed to the sale of the said properties, when one of them raises an objection as to the saleability of such property based on his title, it is equally a question in connection with or in relation to the sale or saleability of the property. The question as to the parties title is only the other side of the coin - the first Respondent's title. The title of one determines as a consequence the question of the title of the other.

28. Clause 10 of the agreement supports the Respondents in this regard. While effecting the sale of the property, the arbitrator would This Order is modified/corrected by Speaking to Minutes Order 28 ARBP180.07 be entitled to call upon the parties to the Memorandum of Understanding to execute all documents/writings required for carrying out and implementing the terms thereof. Before the arbitrator can call upon the parties to execute any documents/writings contemplated in clause 10 of the agreement, it would of necessity require him to decide the rival contentions of the parties as regards the nature and details of such documents/writings that he may call upon the parties to execute for carrying out and implementing the terms of the Memorandum of Understanding one of which is the sale of the property. It is implicit, therefore, if not explicit that the rival claims and contentions of the parties as regards the property mentioned in the Memorandum of Understanding can be decided by the arbitrator.

29. A dispute relating to the title of the parties in respect of the properties mentioned in the Memorandum of Understanding therefore falls within the ambit of the arbitration clause.

30. The arbitrator inter alia relied upon the fact that the parties having included the property in the schedule to the Memorandum of Understanding admitted that the first Respondent is the owner thereof.

This Order is modified/corrected by Speaking to Minutes Order 29 ARBP180.07 The learned arbitrator, therefore, rejected the contention on behalf of the original Petitioner that he had become the owner of the property on account of the first Respondent having failed to redeem the mortgage. These are questions of fact which fall within the jurisdiction of the arbitrator and warrant no interference, even if I were to interpret and analyse the facts differently.

31. Mr.DeVitre submitted that in any event the arbitrator would have no jurisdiction to decide the monetary claims granted by him for the same reason.

32. I do not agree. These claims for monetary compensation are inextricably linked to the issue of title and are attached to the property and are necessary incidents of ownership thereof. If the arbitrator has jurisdiction to adjudicate issues relating to a mortgage, he would also have jurisdiction to adjudicate the claims for the amounts due by a mortgagee for wrongful occupation of the mortgage property after the mortgagees right to continue in possession thereof ceases. The monetary claims would form part of and represent the rights of the parties in the property itself. That the original Petitioner had not undertaken to or incurred liability in or under the Memorandum of This Order is modified/corrected by Speaking to Minutes Order 30 ARBP180.07 Understanding to vacate the premises or to pay compensation for the use thereof is irrelevant.

33. In the circumstances, Mr.DeVitre's submission that the claims made before the arbitrator and the reliefs granted in the award did not fall within the ambit of the arbitration agreement contained in clause 12 of the Memorandum of Understanding on the above grounds is rejected.

34. Mr.DeVitre challenged the basis on which the arbitrator answered issue nos.4 and 15. Issue Nos.4 & 15 reads as under :

> Issue No.4 : Is this reference to arbitration valid ?
>
> Issue No.15 : Does the arbitrator have jurisdiction to decide the claimant's monetary claim against the Respondent Naresh Seth(original Petitioner) ?

35. The learned arbitrator answered these issues in the affirmative on the basis that an arbitrator has jurisdiction to consider and grant the relief of specific performance. He submitted that the claims made by first Respondent in effect are for specific performance of the Memorandum of Understanding.

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36. Mr.DeVitre submitted that the first Respondent had not even claimed specific performance. Nor had the first Respondent averred that it was ready and willing to perform the Memorandum of Understanding which indicates that even the first Respondent did not considered its claim to be in the nature of specific performance.

37. Although the basis on which issue nos.4 & 15 have been answered in the affirmative may not be accurate I would set not aside the award on that ground. For the award read as a whole indicates that the arbitrator even otherwise came to the conclusion that the claims fall within the scope of the arbitration clause.

38 Mr.DeVitre submitted that the first Respondent had not even sought an order for the sale of the said property. He submitted that it was therefore, clear that the reference claimed before the arbitrator was not in accordance with the Memorandum of Understanding.

39. It was not necessary for any of the parties to have sought an order for the sale of the property. It was sufficient for them to have raised the dispute to the limited extent that they did. The parties This Order is modified/corrected by Speaking to Minutes Order 32 ARBP180.07 would or may proceed to sell the property in exercise of rights under the Memorandum of Understanding after the dispute as to the title is determined. The other parties are not obliged to proceed on the basis that an award declaring the rights of the parties to the Memorandum of Understanding qua the property would not be honoured. The presumption is that the parties would abide by the orders and judgments of Courts, Tribunals and other authorities. If however, the original Petitioner did not implement the Memorandum of Understanding on the basis of such a award, it would be open to the other parties to adopt appropriate proceedings including making a further reference for the sale thereof. Nothing prevented a limited reference as to the title and consequential reliefs without also seeking a sale of the said property. The reference was necessitated in view of the original Petitioner having denied the first Respondent's title.

40. Mr.Kamdar submitted that the record note establishes that the original Petitioner had agreed to refer the disputes regarding redemption to arbitration. I do not agree.

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41. The record note by itself does not establish the same. It merely refers to the subject matter of the reference namely Simplex House except the ground floor thereof. This was the reason for my holding earlier that the "Recorded Note" negated Mr.DeVitre's submission that the arbitrator exceeded his jurisdiction by awarding claims not raised in the letter invoking the arbitration. If however, the questions of redemption and payment of monetary compensation were not within the purview of the Memorandum of Understanding, the arbitrator would not have had jurisdiction to decide the same merely in view of what is recorded in the note dated 19th June 2002, which is extracted in paragraph 14 of the award.

42. The fact that the original Petitioner had made a counter-claim in respect of the mortgage debt itself does not indicate that he had abandoned any objection as to jurisdiction. The counter-claim was made expressly without prejudice to the original Petitioner's contentions as to jurisdiction as is evident from the written statement and counter-claim. Thus, the counter-claim having been made by itself would not confer jurisdiction upon the arbitrator to decide the issue if he otherwise did not have such jurisdiction.

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43. Mr.DeVitre's next submission pertains only to the second floor .

He submitted that it is the case of the Respondents themselves that with effect from 1st January 1997, the first Respondent granted a licence in favour of the original Petitioner in respect of the premises on the second floor for a period of three years at the rate of Rs.

60,000/- per month. The submission is based inter-alia on the following averments in the statement of claim :-

> "21. After the aforesaid order dated 20.12.1996 was passed the Respondent gave vacant and peaceful possession of the entire premises situate on the first floor of the said property to the Claimants. There are two flats situate on first floor of the said property. The smaller of the said two flats thereafter was given by the Claimants on Leave and License basis whereas the other flats is in possession of the Claimants.
>
> At that time, the Claimants requested the Respondent to also vacate the said second floor premises (more particularly described in Exhibit 'D' hereto) occupied by the Respondent so that the same could be sold by the Claimants in pursuance of the Memorandum of Understanding, when the Respondent requested the Claimants to allow him to occupy the same for a period of three years so that in the meantime he would find alternative premises. Since the Respondent was one of the former Directors of the Claimants and since the Respondent was the brother of one of the Claimant's Directors, the Claimants allowed the Respondent to occupy the premises situate on the second floor of the said property though the mortgage amount alongwith interest thereon had stood repaid long back i.e., on or about 31.3.1991 as is evident from statement annexed as Exhibit 'H' hereto.
>
> At that time, the Claimants had specifically informed the Respondent that he could continue to remain in possession of This Order is modified/corrected by Speaking to Minutes Order 35 ARBP180.07 the said premises for the period of three years as requested by the Respondent, but, only upon payment of compensation / mesne profits at the then prevailing market rate of Rs.60,000/-
>
> p.m. i.e., Rs.7,20,000/- p.a. inasmuch as the mortgage amount alongwith interest thereon stood repaid to the Respondent long back i.e., on 31-3-1991. The Respondent had agreed to the above. Accordingly, the Claimants allowed the Respondent to occupy the said premises only for a period of three years from 1.1.1997 i.e., upto 31.12.1999.
>
> 22. The Claimants say that on or about 3.3.1997, the Claimants received a cheque of Rs.3,25,139/- from the Court Commissioner of the Hon'ble Bombay High Court from the moneys paid on account of the aforesaid Company Petition. The Claimants have duly given credit for the said amount to the Respondent in the particulars of their claim made herein. The Claimants have made correspondence with the Court Receiver to know the exact amount paid by the Respondent in pursuance of the aforesaid order dated 27.2.1997. However, the Claimants have still not received the entire details in that behalf. The Claimants crave leave to refer to and rely upon the relevant evidence in regard to the aforesaid such as their bank statements, the aforesaid correspondence, when produced.

Claimants say that if the Respondent proves that certain other payments were also made by him in the said Company Petition towards royalty, the Claimants are ready and willing to give the necessary credit for the same to the Respondent.

23. The Claimants say that despite the aforesaid, the Respondent consistently failed to pay the agreed compensation of Rs.60,000/- p.m. to the Claimants. Further, the Respondent did not vacate the said premises despite repeated requests of the Claimants and therefore, the Claimants could not sell the aforesaid premises as per the said Memorandum of Understanding dated 20.7.1995. In view of the above as on 29.2.2000, a sum of Rs.27,36,351/- was due and payable by the Respondent to the Claimants towards the amount of compensation payable by the Respondent for retaining This Order is modified/corrected by Speaking to Minutes Order 36 ARBP180.07 possession of the said second floor premises. The Claimants says that due to some mistake and/or inadvertence, the aforesaid amount of Rs.3,25,139/- was not taken into account by them while calculating the aforesaid figure of Rs. 27,36,351/-. However, in the present claim, the Claimants have duly given credit to the Respondent for the said amount."

44 . It is, therefore, clear that both the monetary amounts and possession of the premises on the second floor were claimed on the basis of the first Respondent allegedly having permitted the original Petitioner to occupy the second floor premises for three years from 1st January 1997 to 31st December 1999 upon payment of compensation/mesne profits at the market rate of Rs.60,000/- per month.

45. Based on this pleading and nothing more Mr.DeVitre submitted that the arbitrator had no jurisdiction to adjudicate upon the claims for two reasons :

Firstly, he submitted that disputes in respect of the alleged licence are not arbitrable in view of the provisions of the PSCC Act, in particular section 41 thereof.

Secondly, he submitted that it was the Respondent's case that the first Respondent had granted the original Petitioner a licence This Order is modified/corrected by Speaking to Minutes Order 37 ARBP180.07 to occupy the premises on the second floor on payment of compensation of Rs.60,000/- per month. This alleged subsequent agreement between the original Petitioner and the first Respondent does not fall within the Memorandum of Understanding. The arbitration clause therefore cannot apply to any disputes arising in respect of the alleged licence.

46. Mr.Kamdar submitted that it is not open to the Petitioners to raise this contention as it had not been raised before the arbitrator. I have proceeded on the basis that the contention was not raised before the arbitrator. My conclusions on this submission in a nutshell are as follows :

(i) The first Respondent itself contended at all times including in the statement of claim that it had granted a licence in favour of the original Petitioner for the period

1st January 1997 to 31st December 1999 at the market rate of Rs.60,000/- per month.

(ii) The reliefs claimed before and awarded by the arbitrator pertained to and were a consequence of the said licence agreement.

(iii) An arbitral tribunal lacks inherent jurisdiction to decide disputes relating to licence agreement in view of Section 41 of the PSCC Act.

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(iv) An objection as to such inherent lack of jurisdiction is non-derogable and cannot be waived.

(v) Such an objection can be raised even in a petition under section 34 even if it was not raised before the arbitral tribunal.

47. Mr.DeVitre submitted that disputes pertaining to a licence agreement are not arbitrable. This issue is concluded in favour of the Petitioner by the judgment of a Full Bench of this Court in case of Central Warehousing Corporation Vs. Fortpoint Automotive Pvt.

Ltd. 2010 (3) LJOFT 49 = (2001) 1 Bom.C.R.562. The Full Bench held that the Small Causes Court has exclusive jurisdiction to decide disputes relating to possession of premises and recovery of compensation in respect of licence agreements. No other court or tribunal including an arbitral tribunal has jurisdiction to decide such disputes. The Full Bench further held that the term 'licence' must be determined on the basis of section 52 of the Easements Act. It was submitted that there being an inherent lack of jurisdiction in the arbitrator to decide the disputes that arose in respect of the said licence even if the point had not been raised before him, it can be taken as a ground of challenge in a petition under section 34 of the Act.

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48. Mr.Kamdar firstly submitted that the pleadings in the statement of claim and even in the correspondence prior thereto was not one of a licence. He submitted that the contentions raised on behalf of the Respondent was not that it had agreed to creating a licence in favour of the original Petitioner, but that the original Petitioner was liable to pay the amount as a mortgagee continuing in possession after the mortgage was discharged. The reliefs claimed, therefore, are not against the original petitioner as a licensee but as a trespasser continuing in possession after the discharge of the mortgage.

49. It may have been entirely different, had the pleading been that the original petitioner wrongly continued in possession even after the extinguishment of the mortgage. In that event, the first Respondent's claim would have been for compensation for the wrongful use and occupation of the premises even after the original petitioner's entitlement to do so as a transferee of the mortgage came to an end.

However, what is pleaded is entirely different. The specific case of the Respondents is that upon discharge of the Court Receiver, the original Petitioner was bound and liable to handover possession of the premises to the first Respondent. Here again the matter may have This Order is modified/corrected by Speaking to Minutes Order 40 ARBP180.07 been different had it ended there.

However, in the statement of claim, it is specifically pleaded by the Respondents that the first Respondent allowed the original Petitioner to occupy the premises for a period of three years upon payment of compensation at the market rate of Rs.60,000/- per month. This is an arrangement de hors and unconnected to the mortgage, the agency of the Court Receiver and the Memorandum of Understanding. It is not the Respondent's case that under this arrangement/agreement the original Petitioner was permitted to continue under or in terms of the mortgage or as a tenant or as a owner. The agreement pleaded is nothing but a licence created by the first Respondent in favour of the original Petitioner. Even if it was a gratuitous licence, it would make no difference. The judgment of the Full Bench would apply even to a gratuitous licensee. The Full Bench held that :

> "40. In summation, we would hold that section 41(1) of the Act of 1882 is a special law which in turn has constituted special Courts for adjudication of disputes specified therein between the licensor and licensee or a landlord and tenant. The effect of section 41(2) of the Act of 1882 is only the suits or proceedings for recovery of possession of immovable property or of licence fee thereof, to which, the provisions of specified Acts or any other law for the time being in force apply, have been excepted from the application of non-obstante clause contained in section This Order is modified/corrected by Speaking to Minutes Order 41 ARBP180.07 41(1) of the Act. The expression "or any other law for the time being in force" appearing in section 41(2) will have to be construed to mean that such law should provide for resolution of disputes between licensor and licensee or a landlord and tenant in relation to immovable property or licence fee thereof, to which immovable property, the provisions of that Act are applicable. The Act of 1996 is not covered within the ambit of section 41(2) in particular the expression "or any other law for the time being in force"

contained therein. The question whether the exclusive jurisdiction of the Small Causes Court vested in terms of section 41 of the Act of 1882 is ousted, if an agreement between the licensor and licensee contains a clause for arbitration, the same will have to be answered in the negative. For,section 5 of the Act of 1996 in that sense is not an absolute non-obstante clause.section 5 of the Act of 1996 cannot affect the laws for the time being in force by virtue of which certain disputes may not be submitted to arbitration, as stipulated in section 2(3) of the Act of 1996.

We hold that section 41 of the Act of 1882 falls within the ambit of section 2(3) of the Act of 1996. As a result of which, even if the Licence Agreement contains Arbitration Agreement, the exclusive jurisdiction of the Courts of Small Causes under section 41 of the Act of 1882 is not affected in any manner. Whereas, Arbitration Agreement in such cases would be invalid and inoperative on the principle that it would be against public policy to allow the parties to contract out of the exclusive

jurisdiction of the Small Causes Courts by virtue of section 41 of the Act of 1882."

41. Accordingly, we answer the question referred to us in the negative. We, therefore, hold that inspite of Arbitration Agreement between the parties and non-obstante clause in section 5 of the Act of 1996, the exclusive jurisdiction of the Small Causes Court to try and decide the dispute specified in section 41 of the Act of 1882 is not ousted."

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50. The learned arbitrator therefore lacked inherent jurisdiction to decide the disputes in respect of the licence agreement. That being so, if the decision had been rendered in a suit the Petitioners would have been entitled to raise this contention in appeal or in execution proceedings even if it was not taken before the trial court. This is established by the following judgments of the Supreme Court :

(A) The Supreme Court in "Hira Lal Patni v. Kali Nath,(1962) 2 SCR 747 held :

"4. The only ground on which the decision of the High Court is challenged is that the suit instituted on the original side of the Bombay High Court was wholly incompetent for want of territorial jurisdiction and that, therefore, the award that followed on the reference between the parties and the decree of Court, under execution, were all null and void. Strong reliance was placed upon the decision of the Privy Council in the case of Ledgard v. Bull 1. In our opinion, there is no substance in this contention. There was no inherent lack of jurisdiction in the Bombay High Court where the suit was instituted by the plaintiff-decree holder. The plaint had been filed after obtaining the necessary leave of the High Court under clause 12 of the Letters Patent. Whether the leave obtained had been rightly obtained or wrongly obtained is not a matter which can be agitated at the execution stage. The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject-matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it. But in the instant case there was no such inherent lack of jurisdiction. The decision of the Privy Council in the case of Ledgard v. Bull1 is an authority for the proposition that consent or waiver can cure defect of jurisdiction but cannot cure inherent lack of jurisdiction. In that case, the suit had been instituted in the Court of the Subordinate Judge, who was incompetent to try it. By consent of the parties, the case was transferred to the Court of the District Judge for convenience of trial. It was laid down by the This Order is modified/corrected by Speaking to Minutes Order 43 ARBP180.07 Privy Council that as the court in which the suit had been originally instituted was entirely lacking in jurisdiction, in the sense that it was incompetent to try it, whatever happened subsequently was null and void because consent of parties

could not operate to confer jurisdiction on a court which was incompetent to try the suit. That decision has no relevance to a case like the present where there could be no question of inherent lack of jurisdiction in the sense that the Bombay High Court was incompetent to try a suit of that kind. The objection to its territorial jurisdiction is one which does not go to the competence of the court and can, therefore, be waived. In the instant case, when the plaintiff obtained the leave of the Bombay High Court on the original side, under clause 12 of the Letters Patent, the correctness of the procedure or of the order granting the leave could be questioned by the defendant or the objection could be waived by him. When he agreed to refer the matter to arbitration through court, he would be deemed to have waived his objection to the territorial jurisdiction of the court, raised by him in his written statement. It is well settled that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like section 21 of the Code of Civil Procedure. Having consented to have the controversy between the parties resolved by reference to arbitration through court, the defendant deprived himself of the right to question the authority of the court to refer the matter to arbitration or of the arbitrator to render the award. It is clear, therefore, that the defendant is stopped from challenging the jurisdiction of the Bombay High Court to entertain the suit and to make the reference to the arbitrator. He is equally stopped from challenging the authority of the arbitrator to render the award. In our opinion, this conclusion is sufficient to dispose of the appeal. It is not, therefore, necessary to determine the other points in controversy, including the question whether the Decrees and Orders Validating Act, 1936 (Act 5 of 1936) had the effect of validating what otherwise may have been invalid."

(B) In Kiran Singh v. Chaman Paswan,(1955) 1 SCR 117, the Supreme Court held :

"6. The answer to these contentions must depend on what the position in law is when a court entertains a suit or an appeal over which it has no jurisdiction, and what the effect of section 11 of the Suits Valuation Act is on that position. It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity This Order is modified/corrected by Speaking to Minutes Order 44 ARBP180.07 could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was coram non judice, and that its judgment and decree

> would be nullities. The question is what is the effect of section 11 of the Suits Valuation Act on this position."

(C) In Harshad Chiman Lal Modi v. DLF Universal Ltd.,(2005) 7 SCC 791 the Supreme Court held :

> 30. We are unable to uphold the contention. The jurisdiction of a court may be classified into several categories. The important categories are (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject-matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject-matter, however, is totally distinct and stands on a different footing.

Where a court has no jurisdiction over the subject-matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is a nullity.

31. In Halsbury's Laws of England, (4th Edn.), Reissue, Vol. 10, para 317, it is stated:

> 317. Consent and waiver.--Where, by reason of any limitation imposed by a statute, charter or commission, a court is without jurisdiction to entertain any particular claim or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the court, nor can consent give a court jurisdiction if a condition which goes to the root of the jurisdiction has not been performed or fulfilled. Where the court has jurisdiction over the particular subject-matter of the claim or the particular parties and the only objection is whether, in the circumstances of the case, the court ought to exercise jurisdiction, the parties may agree to give jurisdiction in their This Order is modified/corrected by Speaking to Minutes Order 45 ARBP180.07 particular case; or a defendant by entering an appearance without protest, or by taking steps in the proceedings, may waive his right to object to the court taking cognizance of the proceedings. No appearance or answer, however, can give jurisdiction to a limited court, nor can a private individual impose on a judge the jurisdiction or duty to adjudicate on a matter. A statute limiting the jurisdiction of a court may contain provisions enabling the parties to extend the jurisdiction by consent."

32. In Bahrein Petroleum Co.13 this Court also held that neither consent nor waiver nor acquiescence can confer jurisdiction upon a court, otherwise incompetent to try the suit. It is well settled and needs no authority that "where a court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing". A decree passed by a court having no jurisdiction is non est and its invalidity can be set up whenever it is sought to be enforced as a foundation for a right, even at the stage of execution or in collateral proceedings. A decree passed by a court without

jurisdiction is a coram non judice.

51. I had considered the above judgments in a judgment dated 14th September 2010 in United Spirits Limited Vs. Paras Collins Distilleries Private Limited & Ors, in Arbitration Petition 1072 of 2010. It was contended that the first two judgments, both delivered by a Bench of four learned Judges were conflicting. I held that they were not and attempted to reconcile them. In the present case, however it is not even necessary to do so. If Mr.DeVitre's submission is correct namely that the arbitrator does not have jurisdiction to decide the matters relating to licensee agreements in view of section 41 of the PSCC Act, it is a question of inherent lack of jurisdiction as the arbitrator had no jurisdiction in respect of the subject matter of the This Order is modified/corrected by Speaking to Minutes Order 46 ARBP180.07 reference.

52. If the above principle applies to arbitral proceedings under the 1996 Act, the arbitrator having lacked inherent jurisdiction, did not have seisin of the case because the subject matter was alien to his jurisdiction. The award was therefore made by a tribunal entirely lacking in jurisdiction in respect of the subject matter of the dispute.

The arbitrator having lacked inherent jurisdiction to decide the matter his lack of jurisdiction was not curable and could not have been waived. The award would therefore be void.

The only question is whether the ratio of these judgments would also apply to a Court hearing a petition under section 34 of the Arbitration and Conciliation Act, 1996. If the ratio applies to matters under the 1996, Act it would be open to the Petitioners to urge these contentions in a petition under section 34 of the said Act even if it was not raised before the arbitrator.

53. In my view, the principle in this regard would apply to an arbitral tribunal with as much force as it does to a Civil Court. The ratio of this judgment was based on principle. It was not confined to This Order is modified/corrected by Speaking to Minutes Order 47 ARBP180.07 civil courts. The judgments had only incidentally been delivered in proceedings which originated in a civil court. These principles were not discussed in the context of the proceedings initiated in a civil court. It would be incorrect then to confine the ratio of these judgments to such proceedings. It applies to all courts, tribunals and authorities.

54. Mr.Kamdar however submitted that if a question of even inherent lack of jurisdiction is not raised before the Arbitral Tribunal, it cannot be raised in a petition under section 34. He relied upon sections 16 and 34 of the 1996, Act which read as under:

> 16. Competence of arbitral tribunal to rule on its jurisdiction.--(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,--
>
> (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a This Order is modified/corrected by Speaking to Minutes Order 48 ARBP180.07 later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

34. Application for setting aside arbitral award.--(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3). (2) An arbitral award may be set aside by the Court only if--

(a) the party making the application furnishes proof that--

(i) a party was under some incapacity; or

(ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that--

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.--Without prejudice to the generality of sub-

This Order is modified/corrected by Speaking to Minutes Order 49 ARBP180.07 clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

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

55. There is nothing under section 16 which indicates that a plea of inherent lack of jurisdiction cannot be raised in a petition under section 34 of the said Act even if it was not raised before the arbitrator.

56. I cannot persuade myself to accept Mr.Kamdar's submission that as the term 'validity' in section 16(1) includes questions of inherent lack of jurisdiction, if an objection of inherent lack of jurisdiction is not raised, it cannot be raised in a petition under section

34. This Order is modified/corrected by Speaking to Minutes Order 50 ARBP180.07 Questions relating to the lack of jurisdiction which can be waived or cured, must be raised as required under

section 16 of the Act. In that event, the challenge to such findings under section 34 of the Act would be dealt with in the same manner and on the same principles as a challenge to an award in any other respect. Questions relating to inherent lack of jurisdiction may also be raised before the arbitrator. However, that does not imply that if not raised before the arbitrator questions relating to inherent lack of jurisdiction cannot be raised in a petition under section 34 of 1996 Act.

57. Mr.DeVitre's submission that section 34 answers the question in the Petitioner's favour in this regard is well founded. He drew a distinction between clauses (a) and (b) of sub section (2) of section

34. Sub section 2(a) provides that the Court may set aside the award only if a party making an application furnishes proof of the circumstances and facts mentioned therein. Sub section 2(b) on the other hand provides that an arbitral award may be set aside by the Court "if the Court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being enforce." In other words while scrutinizing an award under sub This Order is modified/corrected by Speaking to Minutes Order 51 ARBP180.07 section 2(b), it is not necessary for the party making the application to furnish proof that the subject matter of the dispute is not capable of settlement by arbitration. The award may be set aside even if the Court itself finds that the subject matter of the disputes is not capable of settlement by arbitration. Indeed, if the Arbitral Tribunal lacks inherent jurisdiction which cannot be cured or waived, the Arbitral Tribunal award would also be in conflict with the public policy of India for section 41, as held by the Full Bench is based on public policy.

58. Mr.Kamdars reliance upon the judgment of the Supreme Court in (2007) 5 SCC 38 is of no assistance in this regard. He relied upon paragraph 24 & 25 of this judgment. It is however necessary to note that this was not a case of inherent lack of jurisdiction. The Petitioner had challenged the constitution of the Arbitral Tribunal. It is, therefore, necessary also to note para 4 of the judgment. The Supreme Court held as under:

> "4. The principal ground on which the petition under section 34 of the Act had been filed by Respondent 1 was that it had invoked the arbitration clause by sending a notice to Appellant 1 on 17-7-1999 and accordingly Appellant 1 was required to send a panel of three names This Order is modified/corrected by Speaking to Minutes Order 52 ARBP180.07 for arbitration within 30 days of receipt of notice. Since Appellant 1 did not respond to the notice and did not send a panel within 30 days, it forfeited its right to nominate a panel and thereafter Respondent 1 sent its own panel on 28-10-1999. Appellant 1 again did not make any response and did not choose anyone from the panel nominated by Respondent 1 and accordingly it informed Appellant 1 on 10-12-1999 that it had selected Brig. Nardip Singh (Retd.) as an arbitrator and the said arbitrator entered upon the reference on 6-1-2000. Appellant 1 appointed Justice N.N. Goswami (Retd.) as an arbitrator subsequently on 13-1-2000, which appointment was not valid being contrary to the terms of the agreement entered into between the parties. Respondent 1 thus submitted that the appointment of Justice N.N. Goswami (Retd.) was invalid and the award given by him was liable to be set

aside in view of section 34(2)(a)(v) of the Act.

24. The whole object and scheme of the Act is to secure an expeditious resolution of disputes. Therefore, where a party raises a plea that the Arbitral Tribunal has not been properly constituted or has no jurisdiction, it must do so at the threshold before the Arbitral Tribunal so that remedial measures may be immediately taken and time and expense involved in hearing of the matter before the Arbitral Tribunal which may ultimately be found to be either not properly constituted or lacking in jurisdiction, in proceedings for setting aside the award, may be avoided. The commentary on Model Law clearly illustrates the aforesaid legal position.

25. Where a party has received notice and he does not raise a plea of lack of jurisdiction before the Arbitral Tribunal, he must make out a strong case why he did not do so if he chooses to move a petition for setting aside the award under section 34(2)(a)(v) of the Act on the ground that the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties. If plea of jurisdiction is This Order is modified/corrected by Speaking to Minutes Order 53 ARBP180.07 not taken before the arbitrator as provided in section 16 of the Act, such a plea cannot be permitted to be raised in proceedings under section 34 of the Act for setting aside the award, unless good reasons are shown."

In this case, the Supreme Court did not deal with a case of inherent lack of jurisdiction.

59. Mr. Kamdar then relied upon the judgment of a Division Bench of the Karnataka High Court in K.S.R.T.C. Vs. M.Keshava Raju, AIR 2004 Karnataka 109. The judgment not only does not support his submission but in fact militates against it. In that case, an arbitrator had been appointed by an order passed under section 11. In a petition to challenge the award the Petitioners contended that the appointment of the arbitration under section 11 was not appropriate. The Division Bench of the Karnataka High Court analysed the provisions of section

16. It referred to the public policy of reducing the scope of interference by Courts with arbitral awards and the need for expediting the process. Mr.Kamdar relied upon paragraphs 16 and 17 of the judgment, which read as under :

"16. Thirdly, the appellant should be deemed to have waived his right to object to the jurisdiction of the Arbitrator to pass the impugned award in terms of the provisions of section 4 of the Act. Section 4 reads as follows :--

This Order is modified/corrected by Speaking to Minutes Order 54 ARBP180.07 "4. Waiver of right to object A party who knows that ---

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non- compliance without undue delay or, if a time limit is provided for stating that objection, without that period of time, shall be deemed to have waived his right to so object."

17. Section 4 narrates the circumstances in which the party, who knowingly fails to object the non-compliance of any non-mandatory provisions of Part-I or any requirement under the arbitration agreement by the other party, is deemed to have waived his right to object. This section is based on general principles such as "estoppel" or "venire contra factum proprium". It is intended to help the arbitral process function efficiently and in good faith. If there is non-compliance of any non-mandatory provision of Part I or of any requirement of the arbitration agreement by a party to an arbitration agreement of which the other party to the agreement though has the knowledge of such non- compliance but does not object without undue delay, or if a time limit is provided for stating that objection and no objection is taken within that period of time, such a party later on can neither raise objection about that non- compliance of any provision of Part I nor any requirement of the arbitration agreement since such party shall be deemed to have waived its objection. Though, in order to apply the doctrine of waiver by invoking section 4, the first condition is that the non-compliance must be of non- mandatory provision of Part I of any requirement under the arbitration agreement, certain mandatory provisions of the Act also provide for a grant of waiver in the event of failure to object. For example, sub-sections (2) and (3) of section 16 are one of such mandatory provisions. Section 16(2) of the Act provides that a plea that the Arbitral This Order is modified/corrected by Speaking to Minutes Order 55 ARBP180.07 Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence,section 16(3) of the Act provides that a plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings."

I am concerned here with a mandatory, non-derogable provision. The observations, therefore, regarding non-mandatory provisions can be of no assistance to the Respondents. Reliance, however, was placed on the two sentences in paragraph 17 which state that certain mandatory provisions of the Act also provide for a grant of waiver such as sub sections (2) and (3) of section 16. With respect sub sections (2) and (3) are not non-derogable provisions. They in any event do not denude the arbitral tribunal of inherent jurisdiction. The judgment does not deal with a question as to whether an award can be challenged on the ground that the arbitrator lacked inherent jurisdiction over the subject matter of the reference.

60. Mr.Kamdar submitted that in view of section 16(6), a finding on a question of jurisdiction can be challenged under section 34. If however the objection was not taken, no award in that respect would obviously be made. In that even, there is nothing to challenge in a This Order is modified/corrected by Speaking to Minutes Order 56 ARBP180.07 petition under section 34.

61. This submission is not well founded. Even in a Civil Court, and even in execution proceedings, the same situation would obtain namely that the judgment of the trial court would not have dealt with the question of inherent lack of jurisdiction where the point was not raised. That, however, it

has been held cannot prevent the Appellate Court or even the executing court from considering the question of inherent lack of jurisdiction. On a parity of reasoning Mr.Kamdar's submissions in this regard is rejected.

62. In view of this contention the entire award is liable to be set aside. The claims were consequent to the alleged licence granted with effect from 1st January 1997 i.e. after the Memorandum of Understanding. The licence was not pleaded in the alternative. Nor was it pleaded that upon the expiry of the licence the rights of the parties prior thereto revived. It is doubtful whether it would make any difference even if such pleas were raised.

63. This brings me to Mr.DeVitre's other contention viz. that the This Order is modified/corrected by Speaking to Minutes Order 57 ARBP180.07 licence was created after the Memorandum of Understanding and therefore disputes relating thereto clearly fell outside the ambit of the arbitration agreement contained therein. The Memorandum of Understanding is dated 20th July, 1995 whereas the alleged licence was granted only thereafter with effect from 1st January, 1997.

64. Mr.Kamdar submitted that the contention that the Memorandum of Understanding did not cover the reliefs claimed was not raised by the Petitioner in the first or the second affidavits, in the draft issues tendered on behalf of the Petitioner, in the written statement and the additional written statement. It is not open, therefore, for the Petitioner to raise this issue in a petition under section 34 in any event. Relying upon the judgment of the Supreme Court in Gas Authority of India Ltd. v. Keti Construction (I) Ltd.,(2007) 5 SCC 38, he submitted that even assuming there is any force in Mr.DeVitre's submission it cannot be raised in this petition.

65. I will presume Mr.Kamdar's submission in this regard to be well founded as regards the claim for possession and to Rs.

27,36,351/-. However, with regard to the claim for compensation at This Order is modified/corrected by Speaking to Minutes Order 58 ARBP180.07 eighteen percent per annum on the value of the property after 31st December 1996 it is not. This claim was raised by the first Respondent for the first time by an amendment which was allowed by an order of the arbitrator dated 6th May 2005. The challenge to the jurisdiction of the arbitrator as regards this claim was specifically raised by the original Petitioner in paragraphs 2 & 27 in the additional written statement dated 8th June 2005.

66. This claim was not related to or even in the contemplation of the parties when the Memorandum of Understanding was entered into on 20th July 1995. It was a subsequent, independent agreement of license unrelated to the Memorandum of Understanding. The arbitrator, therefore, did not have jurisdiction to entertain this claim.

67. The learned arbitrator has not dealt with this aspect of the matter at all. The contention was also raised in the written submissions. I would normally not consider the parties written submissions. However, the learned arbitrator has himself while considering the claim being one for specific performance of the Memorandum of Understanding referred to the Respondent's written This

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68. Thus, the award so far as it grants compensation of eighteen per cent per annum on the value of the first and the second floor is liable to be set aside also on the ground that the dispute in this regard did not fall within the arbitration agreement and on the ground that the award in this regard contains no reasons.

69. In this view of the matter, it is not necessary for me to consider Mr.DeVitre's submission that the claim of compensation at eighteen percent per annum on the value of the property was without any particulars or evidence and is therefore bad.

Re. : (IIA) Having come to the conclusion that he had no jurisdiction to consider the issue of tenancy raised by the original Petitioner, the arbitrator could not have made any observations in regard thereto.

(IIB) The arbitrator, therefore, was also not entitled to grant the monetary compensation.

70. The learned arbitrator has rightly not decided the original Petitioner's case of tenancy as he had no jurisdiction to do so.

However, observations have been made regarding the claim of tenancy which with respect was not justified. Once it is held that the This Order is modified/corrected by Speaking to Minutes Order 60 ARBP180.07 arbitrator does not have jurisdiction to decide a particular issue, it ought not to make observations in that regard. It is made clear that the appropriate Court that may decide the Petitioner's case regarding their being tenants will decide the same on its own merits uninfluenced by any of the observations made in the award.

71. Mr.DeVitre submitted that the tenancy rights do not get extinguished upon the redemption of a mortgage in a case where a mortgagee was the tenant. In this regard, he relied inter alia on the judgment of the Supreme Court in the case of Nirmal Chandra Vs.Vimal Chand, AIR 2001 SC 2284.

72. It is not necessary for me to consider this issue as a question of tenancy cannot be the subject matter of the arbitration proceeding and accordingly of this petition. It is open to the Petitioners to raise this contention before the appropriate Court.

73. Mr.DeVitre submitted that having come to the conclusion that the issue of tenancy cannot be decided in arbitration, the arbitrator's award of compensation is unsustainable.

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74. I would agree with this submission only upto a point. The award of monetary compensation was granted on the basis that the Petitioner's claim for tenancy is not established. The award of monetary compensation cannot be executed until and unless the issue of tenancy is decided. If for instance, the issue of tenancy is decided in favour of the Petitioners, there would be no question of

their being liable to pay the monetary amounts. Mr.Kamdar also fairly stated that the question of the Petitioners being required to pay the monetary amount would arise only in the event of the issue of tenancy being decided against the Petitioners. He stated that the RAD suit filed by the original Petitioner has been dismissed for default only recently.

Had I upheld the award, the amounts would have been payable only in the event of the order of dismissal attaining finality and subject to any further proceeding that the Petitioners may adopt in respect of their alleged tenancy.

Re. : (III) : The award is contrary to the record and is, therefore, patently absurd.

75. Mr.DeVitre submitted that the award of monetary compensation for the alleged illegal use of the first floor was unsustainable, patently absurd and contrary to the record in view of the fact that it was the This Order is modified/corrected by Speaking to Minutes Order 62 ARBP180.07 Respondent's case that possession of the first floor was in fact given to the first Respondent after the order dated 20th December 1996. The Respondent reiterated this even in the affidavit in reply in this petition. He further stated that the arbitrator had himself in paragraph 9 noted the same as follows :

> "..... Thereafter Naresh Seth (original Petitioner) delivered to the claimants (first Respondent) vacant and peaceful possession of the entire premises situated on the first floor of Simplex House. ....."

In that view of the matter, he submitted that the arbitrator could never have awarded compensation for unauthorized occupation of the premises on the first floor with effect from 12th April 2000 till re-

assignment.

76. I had set out earlier paragraph 21 of the statement of claim. In the first sentence it is stated that after the order dated 20th December 1996, the original Petitioner gave vacant and peaceful possession of the entire premises situated on the first floor of the said property to the claimants i.e. the original Respondent. It is also pertinent to note that in the letter dated 20th March 2000, invoking arbitration possession is sought only of the second floor. By a letter dated 26 th July 2000, the first Respondent had demanded possession only of the second floor.

This Order is modified/corrected by Speaking to Minutes Order 63 ARBP180.07 This is consistent with the pleading in the statement of claim.

77. Mr.Kamdar offered no explanation in this regard. The award of compensation regarding the first floor is therefore set aside.

Re. IV: The arbitrator did not consider the relevant evidence and wrongly shut it out.

78. Mr.DeVitre in this regard submitted that the arbitrator erred in disregarding an affidavit dated 5th November 2005 of Janak Raj Seth, original Respondent No.3. He stated that although Janak Raj Seth was willing to be cross-examined, the other Respondents did not cross-examine him. Without such cross-examination, the affidavit could not have been disregarded.

79. This submission is incorrect. The arbitrator in paragraph 18 dealt with this aspect in considerable detail. The arbitrator extracted in extenso the earlier affidavits filed by original Respondent No.3, his wife and his daughters. The affidavit supported the first Respondent's case and affirmed the Memorandum of Understanding. That affidavit was dated 27th April 2001. The affidavit relied upon by Mr.DeVitre is dated 5th November 2005. The learned arbitrator noted that the heirs This Order is modified/corrected by Speaking to Minutes Order 64 ARBP180.07 of original Respondent No.3, did not filed such an affidavit. The learned arbitrator came to the conclusion that this subsequent affidavit dated 5th November 2005 does not inspire any confidence also, in view of the fact that it was totally contradictory to the previous affidavit and that it was made when original Respondent No.3 was not keeping well and was seriously ill and he unfortunately expired about three months thereafter.

80. It cannot therefore be said that the learned arbitrator did not considered the affidavit. The arbitrator was not bound to accept the contents thereof merely because original Respondent No.3 was not cross-examined. The arbitrator weighed the evidence, analyzed the circumstances and drew inferences which were entirely within his jurisdiction. The submission in this regard is, therefore, rejected.

81. In the result, the petition is dismissed but with no order as to costs.

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