

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 03.08.2010

% **Judgment delivered on: 27.09.2010**

+ **O.M.P. No.457/2010**

COLUMBIA HOLDINGS PVT. LTD. Petitioner
Through: Dr. A.M. Singhvi & Mr. N.K. Kaul, Sr.
Advocates with Mr. Amitabh Chaturvedi
and Mr. Nikhil Srivastava, Advocates

versus

S.R BUILDERS LIMITED & ANR. Respondents
Through: Mr. Aseem Mehrotra, Advocate

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | : | No |
| 2. | To be referred to Reporter or not? | : | No |
| 3. | Whether the judgment should be reported in the Digest? | : | No |

J U D G M E N T

VIPIN SANGHI, J.

1. The petitioner has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') to seek the setting aside of the arbitral award dated 29.06.2010 made by Mr. Justice R.C. Lahoti, former Chief Justice of India, acting as the sole Arbitrator in relation to the disputes that arose between the parties.

2. The parties entered into an agreement dated 09.05.2001. Under that agreement, the petitioner-claimant agreed to develop and build multiple-storeyed commercial buildings on land belonging to the respondent at their own cost and upon obtaining all the necessary permissions from various authorities. The respondent was to retain 31.25% share in the whole of the constructed property, which the respondent was to be entitled to sell on its own and/or through the petitioner-claimant. The land in question at the relevant time was jointly held by the respondent along with ten other co-sharers. It was the understanding of the parties that the respondent would pursue its partition suit to have its share partitioned and demarcated.

3. Under clause 7 it was mutually agreed that the petitioner shall pay to the respondent (who was described in the agreement as the Second Party), a sum of ₹ 1.25 crores as refundable security for due performance of the obligations undertaken by the petitioner under the agreement. ₹ 62.50 lacs was paid by the petitioner by various demand drafts at the time of signing of the agreement. The petitioner agreed to pay a further sum of ₹ 62.50 lacs within 30 days of receipt of licence from the competent authority. For delay in making the said payment the petitioner was liable to pay interest @ 24% per annum on the said amount.

4. The petitioners (who were described in the agreement as the Second Party) was obliged to apply for change of land use/licence at

the earliest. It was specifically mentioned in clause 7(c) that *"Should they fail to obtain this permission for any reason whatsoever within 8 months from the date of agreement/Partition subject to reasons beyond their control then the amount received by the FIRST PARTY will be refunded to the SECOND PARTY without any interest"*. It was further agreed that *"No liability however will be passed on to the FIRST PARTY for any expenses incurred. In case any amount/fees deposited with the Government/any other authority is refunded to the FIRST PARTY, the same will be returned to the SECOND PARTY within 30 days of the receipt of the same and in the event of any delay beyond this period the FIRST PARTY will pay an interest @ 24% p.a. on the amounts as received. The agreement will come to an end under these circumstances."*

5. Under clause 8 it was agreed that if the licence to develop the said land into a multi-storeyed commercial complex is not granted by the authorities, or the petitioner was not permitted to commence the construction of the said building on the said land as per sanctioned plans or an order is passed by the appropriate authority under Section 269 UC of the Income Tax Act, 1961, the respondent shall refund to the petitioner the amount of ₹ 62.50 lacs along with any other amount received under the agreement without interest.

6. Under clause 9 of the agreement, the respondent had undertaken to deliver and hand over the actual physical vacant

possession of the entire land to the petitioner simultaneously with the issuance of the letter of intent or NOC from the Income Tax authorities.

7. Clause 10(a) provided that time for completion of the complex was of the essence of the contract. If the petitioner neglected or failed to carry out and complete the work of construction within the period of 30 months from the date of start of construction or within such extended period as may be mutually agreed, then the respondent was entitled to get his share completed at the risk and cost of the petitioner. The petitioner undertook to start the construction within 15 days of the approval of the sanctioned plans. The respondent undertook to supply and provide all documentary evidence required to be submitted to the Director Town and Country Planning (DTCP), Haryana Urban Development Authority or any other authority concerned with the matter.

8. Clause 26 provided that the possession of the land in question once delivered/handed over to the petitioner, for the purpose of the complex being built, shall not be disturbed and they shall not be dispossessed therefrom till the complex is complete.

9. The income tax clearance certificate dated 21.05.2001 was obtained by the respondent. It was provided to the petitioner on 28.05.2001. On 02.08.2001 the respondent executed a power of attorney in favour of Sh. Shravan Gupta, the nominee of the claimants,

whereby wide ranging powers were conferred upon the petitioners to accomplish the execution of the project.

10. On 28.05.2001 the petitioner filed an application in the name of the respondent with the DTCP for grant of necessary licences under the provisions of Haryana Development and Regulation of Urban Area Act, 1975 and the rules framed thereunder. The petitioner deposited licence fee to the tune of ₹ 51,21,500/-. In September, 2000 land acquisition proceedings were initiated by the State of Haryana having a bearing on the land forming subject matter of the agreement. However, the land in question was released from acquisition. On 12.12.2001 the respondent obtained the khatauni taqseem and the same was supplied to the petitioner. The partition documents of the suit property were received finally on 29.09.2003. They were supplied by the respondent to the claimant for being filed before the DTCP. They were filed on 30.09.2003. The mutation documents pursuant to the partition were prepared on 03.11.2003 and they were filed in the office of the DTCP on 10.11.2003.

11. On 24.06.2004 the respondent sent a letter through its director Sh. Brij Bhushan Singla complaining to the petitioner about the delay and defaults in performance of the agreement. The letter was replied to by the petitioners only after their director Sh. Shravan Gupta returned from his foreign trip on 11.07.2004. The allegations made by the respondent against the petitioner were denied.

12. On 14.07.2004 the respondent revoked the power of attorney by a deed of cancellation registered in the office of Sub-Registrar of Deeds. The agreement was also terminated and the termination letter along with the cancellation deed were delivered to the petitioners on 17.07.2004.

13. The petitioners preferred a petition under Section 9 of the Act registered as OMP No.231/2004 in this Court. In this petition, it was the case of the petitioners that the actual physical possession of the land, forming subject matter of the agreement, was delivered by the respondent to the petitioners on 28.01.2002. It was also claimed that the petitioners had paid a further amount of ₹ 20 lacs in cash to Mr. Brij Bhushan Singla, the Director of the respondent on 09.01.2004. The Court granted an ex parte ad interim order of injunction in the aforesaid OMP, whereby the respondent's letter dated 15/16.07.2004, and the cancellation deed dated 14.07.2004 were directed not to be given effect to. The Court also directed maintenance of status quo as to possession.

14. The petitioners alleged that the respondent, however, repeatedly attempted to dispossess the petitioners which led to the lodgment of formal police reports. The petitioners also preferred I.A. No.4733/2004 to seek police protection against dispossession and also filed contempt case No.99/2004 in OMP No.231/2004 alleging willful disobedience of the ex parte ad interim order passed by this Court.

15. On 15.12.2005, this Court disposed of OMP No.231/2004 leading to the appointment of Hon'ble Mr. Justice R.C. Lahoti (retd. Chief Justice of India) as the sole arbitrator. The interim order dated 19.07.2004 passed by this Court in OMP No.231/2004 was directed to continue to remain in operation unless vacated or varied by the learned arbitrator. The pending interim applications and contempt petition were also to be looked into by the learned arbitrator.

16. Before the arbitral tribunal the petitioners preferred their statement of claim thereby challenging the action of the respondent in cancelling the power of attorney and terminating the aforesaid agreement. The petitioners, in effect, sought the specific performance of the agreement between the parties. The petitioners also sought damages and other amounts from the respondent for their aforesaid actions. The claim for damages, I may note, was made only in the alternative and the primary relief sought was the enforcement of the aforesaid agreement through specific performance.

17. In their reply, the respondent seriously contested the claim and the stand of the petitioners that actual physical possession of the land had been delivered to the petitioners on 28.01.2002. The respondent contended that it was in actual physical possession of the land in question. The respondent also seriously disputed the alleged payment of ₹ 20 lacs claimed to have been made in cash to the respondent by the petitioners on 09.01.2004. It was alleged that the

petitioners had interpolated in the memorandum of confirmation dated 28.01.2002 executed by the respondent in token of acknowledgement of receipt of the payment of ₹ 62.50 lacs by inserting the words "*we do confirm the above statement and confirm delivery of possession of land on 28.01.2002*". It was also pleaded that the signatures of the Director of the respondent Shri Brij Bhushan Singla on the receipt dated 09.01.2004 of Rs. 20 lakhs was not genuine.

18. The stand of the respondent was that upon the partition of the land in question being carried out by Tehsildar/Assistant Collector, Gurgaon on 29.09.2003 the partition orders/documents were immediately made available to the petitioners on 30.09.2003. From 30.09.2003 the 8 months' time, as stipulated in clause 7(c) of the agreement commenced and the same expired on 31.05.2004, but the petitioners did not take any action of whatsoever nature by that date to obtain the requisite licence. Consequently, the respondent served a noticed dated 24.06.2004 pointing out the failure on the part of the petitioner in obtaining the licence/LOI as time was of the essence of the agreement. The reply sent by the petitioners on 12.07.2004 was evasive and devoid of explanation for the continuous delay, and did not meet the respondent's grievance contained in notice dated 24.06.2004. Consequently, by letter dated 15/16.07.2004 the respondent terminated the agreement and cancelled the power of attorney in favour of the petitioners.

19. The respondent also filed a counter claim to seek recovery of ₹ 73.20 crores as loss of income caused to the respondent by the inaction of the petitioners.

20. On the basis of the pleadings before the learned tribunal, the tribunal framed the following issues:

“1. Whether the termination letter dated 15/16.07.2004 issued by the respondent to the claimants is legal and valid?

2. Whether the respondent could cancel and/or revoke the registered power of Attorney dated 02.08.2001 executed by the respondent in favour of the claimant's nominee?

3. Whether the registration of the Cancellation Deed dated 14.07.2004 executed by the Director of the Respondent company is valid and legal?

4. Whether the Respondent could terminate/cancel/revoke the Agreement dated 09.05.2001 in view of the negative covenants i.e Clause 25,26,32 and 37(b) in the agreement dated 09.05.2001?

5. Whether the Claimants are entitled to damages as claimed in the Claim Petition for illegally terminating the agreement dated 09.05.2001 and the Power of Attorney dated 02.08.2001?

6. Whether the Respondent had handed over possession of the land in dispute to the Claimant on 28.1.2002 as alleged in the Memo of Confirmation dated nil?

7. Whether the Receipt dated 09.01.2004 is a genuine document having been signed by Brij Bhushan Singla?”

21. The parties agreed to lead their oral evidence by filing examination-in-chief statements on affidavit, with liberty to the opposite party to conduct cross-examination. On the part of the petitioners/claimants four witnesses were examined, which included Mr. Rajiv Gupta (CW-1), the chartered accountant authorized by the petitioners to depose on their behalf. He was in regular employment of the petitioner No.1 company and was with the petitioner group of companies for about 15 years. On behalf of the respondent Sh. Brij Bhushan Singla appeared as RW-1 apart from three other witnesses.

22. The arbitral tribunal took note of the fact that Sh. Shravan Gupta, who was signatory to the agreement in question on behalf of the petitioner, and who figured almost at every material stage of the events which intervened between the commencement of the deal and leading upto the termination/cancellation followed by initiation of legal proceedings, did not depose before the arbitral tribunal without any justification or explanation. Even Sh. Rajiv Gupta, CW-1, who appeared as the claimants witness many times pleaded ignorance about facts pertaining to the transactions which had taken place by or in the presence of Sh. Shravan Gupta. The arbitral tribunal held that upon marshalling of the evidence on several issues and particularly on issue Nos.6 & 7, it appeared that Sh. Shravan Gupta could only have deposed and lent support to strengthen the case of the claimants. The failure of Sh. Shravan Gupta to appear before the arbitral tribunal as a

witness and depose in favour of the petitioners/claimants was held to be fatal to the case of the claimants.

23. The tribunal also held that since the petitioners/ claimants were claiming the relief of specific performance under the Specific Relief Act, to claim the said discretionary relief, it was essential for the claimants to establish their continuous readiness and willingness to perform their part of the obligations under the contract from the date of agreement till upto the date of claim, and in the absence of such proof the claim would be refused in the exercise of discretionary jurisdiction governing the grant of such relief.

24. The tribunal also noted that the interim order passed by this Court, directing maintenance of status quo as to possession and also, in effect, staying the termination of the agreement and cancellation of the power of attorney were relevant factors in the light of the fact that the petitioners/claimants were not prohibited from pursuing the application for grant of licence before the DTCP. The fact that the petitioners had failed to show that they had pursued the application for obtaining the licence (to demonstrate their continuous readiness and willingness to perform their obligations under the agreement) showed their lack of commitment to fulfill their undertaken obligations.

25. While discussing issue No.1, the arbitral tribunal, in paragraph 41, of the award has concluded that the time was of the essence of the contract in the light of the nature of the transaction and

the terms thereof. The tribunal returned a finding that the accusation of the petitioners that the respondent was responsible for the delay was not correct. On the contrary, it was found that the respondent acted with promptitude in providing all the relevant documents to the petitioners. The tribunal also returned the finding that the petitioners rendered no effective help in expediting the partition proceedings which were pending in Haryana. Another finding returned by the tribunal on the basis of various letters issued from the office of DTCP is that the petitioners were not attending to the hearings held by the DTCP. Despite the delivery of the mutation papers in respect of the land in question to the petitioners/claimants on 10.11.2003, the petitioners failed to obtain the licence or even the LOI from the office of DTCP even till the date of issuance of the notice dated 24.06.2004 or the termination notice dated 15/16.07.2004. The tribunal concluded that the petitioners/claimants were not able to fulfill their part of the agreement within the time granted under the contract and they were in breach of the agreement. Yet another finding returned by the tribunal on the basis of the evidence before it was that the petitioners/claimants could not claim to be continuously ready and willing to perform their part of the agreement upto the date of commencement of the dispute. Even after commencement of the dispute, the petitioners showed no inclination to enforce the agreement, as despite the stay of the cancellation of the power of attorney and termination of the agreement, the petitioners did not

pursue their obligation to seek grant of licence from the concerned authorities. In the light of the findings returned on issue No.1, the tribunal decided issue Nos.2 to 5 in favour of the respondent.

26. Issue Nos.6 & 7, as it appears from the impugned award, were extremely crucial. After a detailed examination of the evidence brought on record by the parties and after a close scrutiny of the documents in relation to which there were serious disputes between the parties in the light of the respondents' allegations of interpolation of the documents by the petitioner, the tribunal returned findings of fact to the effect that the respondent had not confirmed delivery of possession of land on 28.01.2002 and that the respondent had, in fact, not delivered possession of land in question to the petitioners at any point of time. The tribunal has also returned a finding of fact that the alleged payment of ₹ 20 lacs set up by the petitioners was untrue. The arbitral tribunal, therefore, disallowed the claim made by the petitioners/claimants. However, the tribunal awarded in favour of the petitioner, an amount of ₹ 62.50 lacs with interest calculated @ 12% per annum w.e.f. 16.07.2004 till the date of payment. The other directions made by the tribunal read as follow:

“(ii) (a) The Respondent shall, within a period of one month from today opt and decide whether he wants to proceed further with the application for grant of license and if that be so then the Respondent shall serve a notice in writing on the Claimants asking for all the papers relating to the application including the

receipts and photo copies of the DDs deposited by the Claimants with the DTCP and all the papers shall then be handed over by the Claimants to the Respondent and the Respondent shall within 15 days reimburse the Claimants to the extent of Rs.51,21,500/-.

(b) If the Respondent does not wish to proceed with the application, then within one month from today the Respondent shall inform the Claimants accordingly, and either within 15 days obtain refund of the amount and pass on the same to the Claimants or else, execute a power of attorney in favour of a nominee of the Claimants authorizing him to receive the refund from the DTCP for an on behalf of the Respondent. The amount so received back by the Attorney need not be passed on to the Respondent and shall be available to appropriated by the Claimants towards the money invested by them in payment of the license fee.

(c) In case of default of the Respondent in compliance with any of the directions above said the amount of Rs.51,21,500/- shall carry interest @ 12% p.a. w.e.f. 45 days after the date of this Award.

(d) In either case, the undertaking given by Claimants to DTCP in support of application for license shall stand discharged."

27. The submission of learned senior counsel for the petitioners primarily is that the various findings of fact returned by the arbitral tribunal are not borne out from the record or the evidence led before the tribunal. It is argued that material evidence had been withheld from the arbitral tribunal by the respondent, namely, the

communication sent by the respondent to DTCP dated 20.07.2004 asking DTCP to keep the licence application on hold till further notice. It is argued that after the issuance of the said letter there was no question of the petitioner being in a position to pursue the licence application. It is further submitted that DTCP vide its letter dated 28.12.2005 returned the licence application to respondent No.1. However, this fact was suppressed by the respondent from the arbitral tribunal. Therefore, the findings of the arbitral tribunal that petitioners had not exhibited their readiness and willingness to fulfill their obligations under the agreement, after stay of the cancellation of power of attorney and termination letter, is unjustified.

28. It is also argued that the delay was due to the partition document being handed over by the respondent No.1 to the petitioner only on 10.11.2003 and the suit land being under acquisition, which was denotified only on 16.04.2004. It is argued that the acquisition proceedings were beyond the control of the petitioners and the delay caused thereby could not be attributed to the petitioners. The prescribed time of 8 months started only on 16.04.2004 i.e. when the land was denotified from acquisition. However, the agreement was terminated by the respondent on 15/16.07.2004 i.e. within three months. The respondent did not even wait for the expiry of 8 months period from the date of denotification of land from acquisition. It is argued that the arbitral tribunal has ignored the statutory provisions contained in Section 3 of the Haryana Development and Regulation of

Urban Areas Act, 1975 and Rule 8 of the Haryana Development and Regulation of Urban Areas Rules, 1976, which provides that the applicant is required to show, inter alia, its clear title of land and extent and situation of land. It is argued that the observation, that the petitioner had failed to provide supporting documents in respect of its submission that the disposal of licences application by DTCP was due to non-finalisation of the partition proceedings, is in the teeth of the aforesaid facts and statutory provision.

29. The finding of the arbitral tribunal that Sh. Bhupender Singh of the petitioners made no positive contribution in expediting the partition proceedings is also challenged on the ground that it was the obligation of respondent No.1 to get the land partitioned, as it was respondent No.1 who was the co-owner of the suit land forming part of the larger holding. It is argued that Sh. Bhupender Singh attended the partition proceedings which shows the commitment of the petitioners for performance of the agreement. It is argued that no suggestion was given to Sh. Bhupender Singh (CW-2) that he did not make any contribution in expediting the partition proceedings. It is further argued that the finding that the petitioners were not ready and willing to perform their obligation under the agreement is contrary to the facts that the petitioners had paid ₹ 62.50 lacs to the respondent No.1 at the time of execution of the agreement; they had filed the licence application on 28.05.2001; they had paid licence fee of ₹ 51.21 lacs to DTCP; the partition papers were filed immediately with DTCP on

10.11.2003 itself without any delay; the petitioners paid a sum of ₹ 20 lacs to respondent No.1 on 09.01.2004; the petitioners vigorously acted for denotifications of the suit land from acquisition, and the petitioners appointed consultants and agencies for the development of the project. It is argued that before the issuance of the letter dated 24.06.2004 alleging delay by the petitioners, not a single communication had been issued making any such allegation by the respondent.

30. It is further argued that the finding on issue No.2 that the power of attorney was revocable and was rightly revoked by respondent No.1 is contrary to law. The power of attorney was irrevocable as it was executed in terms of clause 17 of the agreement; the same was executed for consideration as to petitioners had paid ₹ 62.50 lacs to respondent No.1 under the agreement; the power of attorney created an agency in favour of the claimants in terms of Section 182 of the Contract Act; under Section 201 of the Contract Act the claimant companies had interest in the suit land and the power of attorney was irrevocable in terms of Section 202 of the Contract Act. It is argued that the cancellation of the power of power of attorney was fraudulent, illegal and ought not to have been countenanced. It is further argued that the arbitral tribunal has failed to decide the aforesaid issues raised by the petitioners by observing that it is not necessary to deal with submissions of the petitioners in this respect.

31. Before proceedings further to deal with the objections raised by the petitioners in relation to the findings returned on issue Nos.6 & 7, it think it appropriate to deal with the aforesaid submissions of learned senior counsel for the petitioners. So far as the letters dated 20.07.2004 issued by respondent No.1 to DTCP and the letter dated 28.12.2005 of DTCP are concerned, the same did not form part of the arbitral proceedings. The finding of the tribunal that the petitioners did not pursue the application for grant of licence with the DTCP after obtaining stay order 19.07.2004 does not get diluted even in the face of the aforesaid two communications. On the contrary, the same only gets further strengthened. Had the petitioners made any attempts to follow up the licence application with DTCP after the issuance of the letter dated 2.07.2004 by the respondents, they would have certainly come to know of the issuance of the said communications by the respondent earlier, and would not have learnt of the said documents when they were filed by the respondent in legal proceedings. Moreover, the said communication of respondent could easily have been placated by the petitioners by producing the order dated 19.07.2004 passed by this Court in OMP No.231/2004.

32. The finding of the tribunal that the petitioners did not make any positive contribution through Sh. Bhupender Singh in expediting the partition proceedings does not get shaken by the fact that it was the obligation of the respondent to get the partition proceedings concluded. It was in response to the allegations made by the

petitioners (that the respondent delayed the conclusion of the partition proceedings), that the tribunal notes that even though Sh. Bhupender Singh is claimed to have been associated for early disposal of the partition proceedings, he has not been shown to have played a concrete or positive role for early disposal of those proceedings.

33. The finding that the petitioners did not fulfill their obligations under the agreement and, therefore, they were in breach of the agreement, and that they were not ready to perform their obligations under the agreement is fortified by the fact that after obtaining the stay order of the letter of termination and cancellation deed on 19.07.2004, the petitioners did not pursue the licence agreement with DTCP.

34. The finding on issue No.2 cannot be said to be perverse, because the power of attorney was given for the limited purpose of facilitating the successful implementation of the agreement. However, if the agreement has been terminated for cause, the said power of attorney must also perish with it.

35. So far as the submission of learned counsel for the petitioners with regard to the findings of the arbitral tribunal contained in paras 43 & 44 are concerned (to the effect that even after the mutation papers had been submitted on 10.11.2003 the petitioners did not obtain the LOI or licence until termination of the agreement, and that the petitioners had not produced any document in support of their case

that for disposal of licence application the DTCP was insisting on finalization of the partition proceedings), there may be some merit in the submissions of learned counsel for the petitioners. However, that by itself cannot be a reason to set aside the award as even without those findings, the arbitral award deserves to be sustained, particularly in the light of the findings of fact returned by the arbitral tribunal on issue Nos.4, 6 & 7.

36. It is well settled that the Court while hearing objections to an award under Section 34 of the Act cannot interfere with findings of fact returned by the arbitral tribunal unless the findings returned by the tribunal are based on absolutely no evidence. Appreciation and evaluation of evidence, as also interpretation of documents primarily falls within the domain of the tribunal and is beyond the pale of interference by the Court hearing objections to the award. There are extremely limited grounds on which such findings may be interfered with by the Court. In the facts of this case, in my view, the petitioners have failed to make out a case calling for interference with the findings of fact returned by the arbitral tribunal which, in my view, are very well reasoned and deduced on the basis of the evidence brought on record.

37. Turning to the findings of the arbitral tribunal on issue nos.6 and 7, the same have been extensively dealt with by the learned arbitrator. The objections raised by the petitioners to assail the findings recorded by the arbitral tribunal are argumentative, as if this

Court is hearing an appeal from the award of the arbitral tribunal. It is urged that in the partition proceedings, spot report was prepared on 19.10.2001 and that the case of the respondent before the revenue authorities was that he was in possession of the land in question. So far as the finding on Issue No.7 is concerned, it is assailed by the petitioner on the ground that the conclusion drawn by the arbitral tribunal is contrary to the admission made by the witness of respondent No.1. The petitioners also seek to rely upon the statements made by RW-2 and RW-4 during their cross-examinations. It is urged that the receipt relied upon by the petitioner had been signed by Mr. Jaipal and Mr. Ashu Singla son of Mr. B.B. Singla as witnesses to the effect that a sum of ₹ 20 Lacs was paid by the petitioners to Mr. B.B. Singla. The petitioners raise the question that if the amount of ₹ 20 Lacs was not paid by them to Mr. B.B. Singla on the fateful day, what is it that the said witnesses had witnessed while appending their signatures on the receipt for ₹ 20 Lacs?

38. Neither of these arguments of the petitioner are good enough to challenge the findings of the arbitral tribunal on Issue Nos.6 & 7 as they are merely argumentative. I can do no better than to reproduce the relevant extracts from the discussion found in the impugned award in Issue Nos.6 & 7. The purpose of quoting in extenso from the discussion in the award on these two issues is to demonstrate the exhaustive manner in which the learned arbitrator has analysed

the evidence before him threadbare and on that basis arrived at his findings.

“Issue No. 6.

59. Two issues namely Issues No. 6 and 7 are most crucial issues in the case. Major part of the pleadings and evidence is focused on these two issues. A discussion on these two issues demonstrates the age old principle of appreciation of evidence that the man may lie but the circumstances do not. On both the issues, as the findings would show, the claimants have tried to build up a false case and the whole edifice which though attractive has collapsed like a castle of cards.

60. The trump card exhibited (or played) by the claimants is the document Ex. C/13 which, according to the Claimants confirms the factum of such delivery of possession of land having taken place on 28.1.2002.

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64. Undisputedly, the respondent had only a share in the agricultural holding jointly held by it with other 10 co-owners. The land was not portioned. The case of the claimants (as it has been developed and as has been urged during the course of final hearing) is that though the land was joint but the respondent was in actual physical possession of a parcel of land proportionate with its share. The possession of that piece of land was physically handed over by the respondent to the claimants. The proceedings in partition of holding before the Tahsildar ultimately ended in the same parcel of land falling to the share of the respondent. In my opinion, this plea is false. Several circumstances support the opinion which I have formed.

65. Firstly, if the plea of the claimants is correct then there was no difficulty in possession over that

piece of land being delivered to the claimants simultaneously with the signing of the agreement on 9.5.2001 itself. Even if possession was not delivered then, and was agreed to be delivered at a later point of time (see Clause 9 of the Agreement), in that case, it would have been specifically mentioned that possession over that particular parcel of land would be delivered to the claimants and somewhere in the agreement, either in its opening part or in Clause 9 or somewhere else, the exact description of the land would have been given by stating that Respondent (FIRST PARTY) was in actual physical possession of a particular piece of land proportionate with its share in the joint holding. In a meticulously well drafted agreement as the deed Ex.C/1 is, at least a map of the land could have been annexed. Nothing such has been done.

66. Secondly, Clause 9 of the agreement recites that the respondent had agreed and undertaken to deliver and hand over the actual physical vacant possession of the entire said land to the claimants simultaneously with the issue of letter of intent or NOC from the Income Tax, that is, Form 37-I clearance. Admittedly, letter of intent by DTCP has not been issued till this day but NOC from the Income Tax in Form 37-I was certainly obtained and delivered to the claimants. Admittedly, the possession was not delivered simultaneously therewith. The claimants have also not insisted on delivery of possession at that point of time though they would have been fully justified in such insistence, in view of the Agreement. No where an explanation is forthcoming why the possession was neither delivered nor insisted on by the claimants simultaneously with the income tax clearance and consistently with clause 9 of the agreement.

67. Thirdly, What happened on 28.1.2002 calling for delivery of possession? Till that day, admittedly partition proceedings of the land had not been finalised. If the land was undivided and was not in separate possession of the respondent (as ample documentary evidence available on record goes to show), possession by the respondent could not have been delivered to the claimants except by the consent of the other co-owners. Vide para 13 of the affidavit of Rajeev Gupta C.W.I, the factum of

delivery of possession over the land on 28.1.2002 has been recited by the witness. The witness states *inter alia* 'the possession memo was signed in my presence by Mr. Shravan Gupta and Mr. Brij Bhushan Singla'. On this oral evidence, I have necessarily to make certain comments. Firstly Mr. Shravan Gupta who was admittedly present at the time of the delivery of possession and had also signed the possession memo has not been examined. Secondly, Rajeev Gupta states that Mr. Bhupendra Singh and Mr. Amiya Kumar are the persons who were present at the time of the delivery of possession. Amiya Kumar C.W.3 has not stated even one word about the possession over the land having been delivered by the respondent to the claimants. In his cross-examination vide para 36, Rajeev Gupta C.W.1 has stated that there were 2 or 3 persons of security present. None of them has been identified and examined. Thirdly, Mr. Shravan Gupta and Brij Bhushan Singla have not jointly signed the memo of possession as alleged by Rajeev Gupta. A bare look at the manner in which the document Ex.C/13 appears and its language go to show that it is not a document drawn up simultaneously with delivery of possession and between the parties delivering and taking possession. Ex.C/13 (the first part thereof) as written and signed by Mr. Shravan Gupta recites merely payment of money. The acknowledgement therein (i.e. the second part) is worded as the factum of delivery of possession of land on 28.1.2002 being 'confirmed'. The manner in which endorsement has been made at some point of time later to the date of alleged delivery of possession and is meant to 'confirm' the factum of delivery of possession which had taken place on a date before the date of endorsement.

68. Fourthly, there is no date on the document. Neither the principal part addressed by Mr. Shravan Gupta to the Respondent bears any date nor is there a date showing the date on which 'endorsement part' came into existence.

69. Fifthly, Mr. Rajeev Gupta has vide paras 37-38 of his cross-examination admitted that normally a company dealing with the property takes a separate possession letter at the time of taking possession of the property. There is a proforma of

possession letter. Sometimes that proforma is filled up and sometimes possession letter is taken in the hand writing of the person delivering the possession. However, in the present case, neither the proforma possession letter was filled in and signed nor a letter reciting delivery of possession in the hand writing of the person concerned was taken. So also, he has stated that the possession letter may be witnessed or may not be. In the present case, if Ex.C/13 is the possession letter and there were persons other than parties to the delivery of possession present at the site, there is no reason why it would not have been witnessed by others.

70. Sixthly, if the case of the claimants is correct and the respondent was in actual physical possession of 16 Kanals (9680 Sq. Yards) parcel of land then there would be certain boundary marks enabling identification of such piece of land as being in separate and actual physical possession of the respondent. In ordinary and natural course, the Patwari would be present or atleast there would be someone who would have measured and identified the area of the land forming subject matter of delivery of possession. Nothing such has been done. Statement of claim and oral evidence adduced do not go beyond making a bald assertion that possession of the land was delivered to the claimants on 28.1.2002. Nobody states that there were any boundary marks which were identified and that any measurements were taken.

71. Seventhly, The letter dated 12.7.2004 (Ex. R-7) was written by Shravan Gupta to the respondent at point of time when dispute had already arisen and yet the letter does not make a mention of the factum of delivery of possession which would have been ordinarily stated if delivery of possession had taken place and possession was with the Claimants.

72. Eighthly, the case of the claimants as it appears during the evidence has been that the claimants had promptly taken steps for preparation of development plans and those plans were also shown to the respondent Brij Bhushan Singla in the meeting held on 9.1.2004 in the office of the Claimants situated at Asaf Ali Road in Delhi. Mr. H.B. Singh and Mr. A.K. Dhir were engaged by the

claimants as consultants for planning and development. No plans could have been prepared until and unless the consultants and their teams had visited the site, identified the land and taken measurements. None of the consultants has been examined. The visit of the consultants or any team member of theirs to the land would have lent support to the case of the Claimants being in possession.

73. Ninthly, Mr. Rajeev Gupta has been specifically asked as to who wrote the hand written matter on Ex.C/13. He would have been able to answer if only he was present at the point time. In his cross examination (Para 34), he has disowned having any knowledge about the person in whose hand writing the endorsement was made. Though specifically asked, he is not able to say whether the hand writing is of Brij Bhushan Singla or not. Even till the date of filing of his affidavit and even till the date of his cross-examination (14.3.2007), he has not made any effort at finding out the person who made that endorsement.

74. When Brij Bhushan single entered the witness box, it has not been suggested by the claimants that the endorsement is in the hand handwriting of B.B.Singla. He is a literate person. If he had delivered possession then he could have also made the endorsement in his own hand; rather, someone on behalf of the claimants present at the site and taking possession would have insisted on this. Thus, who actually made the endorsement is something which remains shrouded in mystery.

75. The case of the respondent as regards Ex.C/13 is that Brij Bhushan Singla had signed this letter at Chandigarh (and not at the site of the land in dispute). This letter was sent by Shravan Gupta as authorized signatory of the claimants to the respondent at Chandigarh before signing of the agreement (Ex.C/1) and at a point of time when the negotiations had only finalized, a draft agreement was prepared and the amount of Rs.62,50,000/- was paid to the respondent by way of bank drafts. The purpose of this letter was to obtain confirmation of the payment only. This explanation of the respondent sounds to be natural and probable by bare look at Ex.C/13 apart from the

oral evidence adduced by the respondent and cross-examination held on the claimants' witnesses.

76. Mr. Bhupendra CW-2 though a Government servant was engaged in the private activity of dealing in real estate. This fact is admitted by Rajeev Gupta C.W.1 vide Para 36 of his cross-examination wherein he has stated tht Bhupendra was not the employee of the Claimants; he was an estate agent engaged by Mr. Shravan gupta for the Claimants companies. He was associated with the Claimants since before this transaction and since beginning. Bhupendra has himself (vide Paras 17 and 21 of his cross examination) admitted that he was associated with this project since very beginning and as he was known to Mr. Shravan Gupta as he was assisting him in all his projects. What was his interest? He clearly asserts that he was not being paid anything by Mr. Shravan Gupta. The cross-examination on the affidavit of Bhupendra C-W.2 was recorded on 4.9.2007. Beofre signing he read out the cross-examination as recorded. After reading thestatment, he volunteered to say that this may also be recorded that on April 25, 2001, Mr. Shravan Gupta handed over 5-6 demand drafts of a total amount of Rs.62,50,000/- to the company owning the land as goodwill gesture and from that money S.R.Builders purchased some part of 2 acres of land through five sale-deeds dated 3rd, 4th and 7th May. This statement of Bhupendra highly probablises and indirectly lends support to the cased of the respondent and testimony of Brij Bhushan Singla, that some document must have been signed by way of acknowledgement on April 25, 2001 at the time of consideration of Rs.62,50,000/- being passed over to Brij Bhushan Singla by way of the demand drafts. Obviously, this was before 9.5.2001, the date of the agreement.

77. The language and tenor of endorsement also speak aloud. If this endorsement was made on 28.01.2002 simultaneously with the act of delivery of possession, the language would not have been ".....and confirms delivery of possession of land on 28.1.02."

78. Look at a few circumstances. Firstly, if the agreement was already executed and date, there is

no reason why the date of the agreement should not have formed part of type written matter and should have been left blank to be filled in at a later point of time. This circumstance makes it highly probable that the date on which Ex.C/13 came into existence is certainly a date before the date 9.5.2001 (the date of agreement Ex.C/1). Secondly, a bare look at endorsement part of the document (marked as A to A by the Tribunal) shows that the part- "Confirmation:- We do confirm the above statement" is written in a different rhythm and the other part- "and confirms delivery of possession of land on 28.1.2002" has been subsequently added as that part shows a different rhythm of writing. One of the two probabilities sounds highly natural and probable. Either the letter Ex.C/13 originating from the claimants was sent to the respondent at Chandigarh and with the first part of the endorsement as already written. The intention was to obtain the signature of the respondent and bring document (Ex.C/13) back to Shravan Gupta. Or, alternatively, Mr. B.B.singla simply signed with rubber stamp the letter addressed to him and by way of acknowledgment. The claimants have made misuse of the document by fabricating and interpolating either the entire endorsement or the latter part of the endorsement by taking advantage of the document being available with them with space available for interpolation.

79. The report of the hand writing expert Mr. vijay Rustagi (Annexure R-1) supports the opinion formulated by me. Mr. Vijay Rustagi has taken several factors into consideration. He has found hand writing endorsement in Ex.C/13 to be 'not written in the normal course of business' and to be a case of 'forgery over a genuine signature'. The principal out of several suspicious circumstances found by him are : (i) the spacing between the hand writing lines and signature of Brij Bhushan is very narrow and improper; (ii) the available blank space if utilized in normal course for the purpose of writing would not given such cramped appearance; (iii) the letters and words are written in squeezed form giving the writing an awkward and cramped shape. He has cited extracts from the books written by mr. M.K.Mehta and Mr. J. newton Baker, well known authroiteis on the subject in support of his opinion. I do not find Mr. Vijay Rustagi having

been discredited or shaken in any manner during his cross-examination on the above findings arrived at by him.

80. On the contrary, the documentary evidence available on record (filed as - 'certified copies of partition proceedings') shows that first order of partition of the land was passed on 18.12.2001 and pursuant thereto a partition map was directed to be prepared but the co-owners preferred an appeal which was decided on 28.4.2003 by an order of remand. On 25.8.2003, the Tahsildar ordered finalization of partition map which is called 'Naksha B' which was prepared and finalized. On 29.9.2003 the partition papers were obtained by the respondent and handed over to the claimants on 30.9.2003.

81. During the course of final submissions made by the learned counsel for the parties, on behalf of the claimants forceful reliance was placed on the partition map, certified copy whereof was obtained on 28.1.2002 to show that this map very clearly demarcated the land which had actually fallen to the share of respondent, shown in yellow colour in the map and that is the piece of land on which possession was delivered to the claimants. A compilation containing various certified copies including a few order, applications and maps etc. obtained from the record of Tahsildar-cum-Assistant Collector has been filed by the respondent. These documents are not disputed. It will be useful to sum up briefly what is reflected in this compilation of the documents.

81.1. The application for initiating the partition proceedings was file don 26.12.2004. Certified copy of *Taqseem jama Bandi* for the year 1991-92 shows the following survey numbers falling in the share of respondent:-

	Kita (Survey No.)	Raqwa (Area)
	41/24/2	4.0
	25/1	6.8
	46/4/1/1/2	2.16
	<u>5/1/1/</u>	<u>2.16</u>
Total	4 Kita	16.0

8.1.2 On 11.10.01, the Halqua Patwari prepared a Khatauni Taqseem according to which the land allotted to the share of the respondent was as under:-

	Kita (Survey No.)	Raqwa (Area)
	40/1/1	7.0
	41/25/2	5.2
	46/5/1/1/2	2.0
	<u>47/1/1/</u>	<u>1.18</u>
Total	Kita 4	16.0

81.3 The map for partition which was drawn up by the Patwari and endorsed by the Revenue Inspector was not acceptable to the Tahsildar and by order dated 10.12.01 it was directed to be corrected. The corrected map was accepted by the Tahsildar on 18.1.2001. There was an appeal which was dismissed. On 29.9.2003, the respondent moved an application for possession being delivered in accordance the partition map accepted by the Tahsildar and on the same day, the warrant for possession was also directed to be issued awaiting compliance to be reported by 14.10.2003. On 21.10.2003, possession was delivered in the presence of all the co-owners and revenue officials. Thus, it is on 21.10.2003 that the land which finally fell to the share of respondent was demarcated and came in its possession in the presence of all the other co-owners and also of the revenue officials including the Halqua Patwari. Obviously, the actual possession could not have been delivered by the respondent to the claimants on any day before 21.10.2003. Thus, it appears to be highly probable that until this date, the land which would actually fall to the share of the respondent was not decided at the site nor was identifiable and therefore, the respondent could not have delivered actual possession to the claimants on any date anterior to this.

82. On behalf of the claimants, reliance has been placed on the report of the Court Commissioner and in particular, to a sign board appearing to be standing at the site. Suffice it to make two

observations. Firstly, the order appointing the Court Commissioner was an *ex parte* order and the execution of the commission also took place *ex parte*. All this was behind the back of the respondent. Obviously, it is only the claimants or their representative who were present at the time of the execution of commission. Secondly, what is written on the sign board as it appears in the photograph (Ex.c.20) taken by the Court Commissioner reads:-

“THIS SITE IS UNDER AGREEMENT AND
POSSESSION WITH MGF DEVELOPMENTS
LTD. AND COLUMBIA HOLDINGS PVT.
LTD.W.E.F. MAY 9, 2001.”

S.R.BUILDERS LTD.”

Firstly, it is nobody's case that this sign board was affixed by the respondent. Why should the name of the Respondent appear on the sign board? Secondly, the sign board does not mention the date of delivery of possession. What it mentions is the date May 9, 2001. If it is in the context of possession, then it is nobody's case that possession was with Claimants w.e.f.9.5.01. There is no evidence to show when and who affixed the sign board. I have no hesitation in forming an opinion from the language used in the sign board itself that in all probability, it was installed by the claimants just before the execution of the commission by the Court Commissioner or soon before or during the commencement of Court proceedings and for the purpose of creating evidence of delivery of possession.

83. Before parting with discussion on Issue No.7, I may observe that in any ordinary case of specific performance wherein a piece of land like the present one is involved, I would not have attached much weight to the aspect of possession. The reason is that admittedly the land is an open piece of land on which no concrete activity in the direction of development of land has yet taken place. Nor is it the case of the respondent that it is making any actual use of the land. Whether the possession was delivered or not, in the event of success of the claimants, possession over the land could have been directed to be delivered by

respondent to the claimants as a relief consequential to the main relief. However, in the present case, the issue has been dealt with by me in details because this issue is subject matter of significant controversy between the parties and the claimants have relied on the factum of delivery of possession to support their plea of part performance of agreement and also to support the plea that the agreement and the power of attorney are irrevocable in view of the delivery of possession.

84. On an appreciation of the oral and documentary evidence adduced as also from the circumstances of the case which have all been briefly indicated hereinabove, I am unhesitatingly of the opinion that the possession over the land was not delivered by the respondent to the Claimants, much less on 28.1.2002 as pleaded by the claimants. Issue No.6 is answered in the negative, against the claimants and in favour of the respondent.

Issue no.7:

85. This is the second hotly contested issue between the parties. The proof or otherwise of this transaction of Rs.20,00,000/- in cash is focused on the receipt (Ex.C/14). The contents of the receipt are reproduced hereunder:-

RECEIPT

"I Brij Bhushan Singla, Director M/s S.R. Builders Ltd. on behalf of the company hereby confirm having received a sum of Rs.20,00,000/- (Rupees Twenty Lakhs only) in cash as refundable security deposit from m/s MGF Developments Ltd. & M/s Columbia Holdings Pvt. Ltd. having office at MGF House, 17-B, Asaf Ali road, New delhi-110 002 as per Clause 7(b) of the Agreement dated 7th may, 2001 (which states that the FIRST PARTY is to get Rs.62,50,000/- (Rupees Sixty Two Lakhs Fifty Two thousand only) as refundable security deposit to be paid by the SECOND PARTY within 30 days of receipt of Commercial license on the land of the Executant company). This amount is being given as a gesture of goodwill. The balance amount of Rs.42,50,000/- (Rupees forty Two Lakhs fifty Thousand only) shall be paid in terms of the agreement dated 7th May, 2001.

For S.R.BUILDER LTD.

Witnesses:-

1. Sd/- (Ashu Singla)
s/o B.B.Singla
R/o 104/4 PKL

Sd/- (Brij Bhushan)
BRIJ BHUSHAN SINGLA
DIRECTOR

2. Sd/- Jai Pal S/O Shri Ved
Singh Vill. & P.O. Jhersa
Distt. Gurgaon

3.Sd/- Bhupendra Singh
9.1.04
(BHUPENDRA SINGH)
6 PWD Civil Lines
Gurgaon HR."

[Note: The receipt is type written. Hand written parts therein have been shown in *Italics*.]

86. The case of the claimants, the details whereof as they have emerged in the evidence, is that on 9.1.2004 a meeting had taken place in the office of the claimants situated at Asaf Ali Road, Delhi sometime in the evening. In the meeting Brij Bhushan singla asked for a sum of Rs.20,00,000/- (Twenty Lacs) being paid to him. This demand though not apparently justified was yet accommodated by Mr. Shravan Gupta as a matter of courtesy and convenience to the respondent. The amount was given in cash as per the demand of Brij Bhushan Singla and also because it was available with the claimants in their office. The demand by Brij Bhushan Singla was put to Shravan Gupta and acceded to by the latter. The receipt (Ex.C/14) was typed in the office of the claimants on the instructions of Shravan Gupta who had also dictated the contents of receipt. Shravan Gupta has not been examined.

87. I am inclined to extract and reproduce paras 40, 41 and part of para 63 from the cross-examination of Rajveen Gupta C.W 1 as under:-

"40. It is not correct to say the plea of Rs. 20 lakhs having been paid to Mr. Brijbhushan Singla on 09.01.2004 is a false plea. I paid Rs. 20 lakhs to Mr. Brijbhushan Singla in the presence of Mr. Bhupendra singh, Mr. Shravan Gupta and one or two other persons whose names I do not remember Mr. Brijbhushan Singla had requested Mr. Shrasasn Gupta to make the payment of Rs. 20 lakhs and then I made the payment. The reason for making the payment in cash and not

through DD or cheque is that Mr. Brijbhushan Singla wanted the payment to be made in cash. The money was drawn from the Bank of India on the previous day. I did not ask why the payment had been asked for in cash as the request was made to my boss Mr. Shravan Gupta. Excepting this amount of Rs. 20 lakhs no other payment was made in cash. I was not present at any conversation between Mr. Shravan Gupta and Mr. Brijbhushan Singla regarding the demand for this payment of Rs.20 lakhs. The request for payment came in the month of December, 2003, the exact date whereof I cannot say. Pursuant to the demand, we had withdrawn the money from the bank. To my knowledge the Income Tax Act does not prohibit payment of Rs. 20 lakhs in cash (On attention being invited on page 122 of the document of the affidavit, the witness states that) the entry on 16-12-2003 described as 'CD11933' does not show cash deposit. It is only a transfer entry showing the amount transferred from some other account. I cannot tell orally the name of the company wherefrom the amount has been transferred. It is not correct to say that the amount of 20 lakhs withdrawn from the bank on 16-12-2003 was for some other purpose and not for payment to Mr. Brijbhushan Singla. Current accounts are described by the bank as CD, meaning current 'deposit' account. It is not correct to say Mr. Brijbhushan Singla has never demanded for payment of Rs. 20 lakhs in cash in the month of December 2003. The receipt exhibited as C-14 (original produced by the Ld Counsel for the claimant which is marked and signed) was executed in my presence.

41. It is not correct to say that purported signature of Mr. Brijbhushan Singla on this receipt is forged. The meeting on 09.01.2004 took place at our office on Asaf Ali road in the evening. The receipt was typed by a typist in our office whose name I do not remember. The receipt was typed on the instruction of Mr. Shravan Gupta. He dictated the contents of the receipt. I had also gone through the contents of the receipt before it was signed. It is not correct to say that the contents of the receipt are wrong. The receipt mentions the date of agreement as 07.05.2001 while the agreement in fact is dated 09.05.2001. The date is wrong. May be it has been erroneously mentioned. Normally, a receipt in property transaction would mention its date. Out of the three witnesses only one witness namely Mr. Bhupendra Singh has mentioned the date. This he has mentioned

on his own and not at my asking. It is not correct to say that receipt is forged and that the signature of Mr. Bhupendra Singh has been obtained later on. Although the receipt is not date. I did not ask Mr. Brijbhushan Singla or Mr. Ashu Singla or Mr. Jaipal to put the date along with the signature. As the receipt was executed late in the evening I did not insist on revenue stamp being affixed on the receipt. There may have been around 200 employees in the office of the company and the associated companies situated on Asaf Ali Road and at other places. In Asaf Ali Road office there may be about 70 employees working. The accounts office is also situated at Asaf Ali Road. Generally in the office the receipts obtained are stamped depending on the nature of the payment. Revenue stamps were available in the office. Failure to affix the stamp is just a human error as it just escaped. It is not correct to say that the receipt is forged and that the alleged forgery finds support from the omission to fix the rubber stamp of the respondents company below the signature of Mr. Brijbhushan Singla.

63. Vouchers are made for the payment done. As regards the payment of Rs.10 lacs from MGF and Rs. 10 lacs from Columbia made in cash to SR Builders only one receipt was taken. There are no vouchers. The reason is that the payment was made in late hours....."
(emphasis supplied by underlining.)

88. The oscillation in the statement of Rajeev Gupta as to how this amount of Rs.20,00,000/- (not a small or petty amount) would be available in cash reveals many a thing. Such a huge amount would not ordinarily be kept in any office for a period of 3 weeks unless required for a particular purpose. That is why Rajeev Gupta states at one place in his statement that money was withdrawn from the bank on the previous day and at another place he states that it was withdrawn on 16.12.2003 i.e more than 3 weeks before. Every other payment in connection with the disputed transaction whether to the respondent or to anyone else is being made by DDs or cheques. Why should Shravan Gupta have agreed to pay the amount in cash even without enquiring deeper into the unreasonability of such demand? Payment is not supported by any reliable voucher.

89. Vide Para 18 of his affidavit, Rajeev Gupta (C.W.1) has stated that on 9.1.2004 there was a

meeting between the claimants and the respondent at the claimants' office at Asaf Ali Road, New Delhi which was attended by Mr. Shravan Gupta and Mr. Brij Bhushan Singla. In this meeting Bhupendra Singh, Jaipal and Manish were also present. Referring to this meeting, Rajeev Gupta states: "during the said meeting, respondent requested the claimants that it was in need of money and although no amounts were payable to it under the agreement on the said date, purely as a gesture of goodwill on the part of the claimants, a sum of Rs.20,00,000/- (Rs. Twenty Lacs only) was paid by them to the respondent in cash, the receipt of which was duly acknowledged by the said Mr. Brij Bhushan Singla of the respondent company vide receipt dated 9.1.2004." The manner in which Rajeev Gupta has deposed clearly goes to show that demand of Brij Bhushan Singla for Rs.20,00,000/- was made for the first time in this meeting and was acceded to by Shravan Gupta and accordingly the payment was made. If that be so, then it is very strange that the money was withdrawn from the bank on 16.1.22003. It appears that the claimants were feeling uncomfortable in substantiating the plea of such payment in cash of an amount to the tune of Rs.20,00,000/- and therefore they digged into the record and could find out cash withdrawal from the bank of Rs.10,00,000/- each by the two claimant companies. They have tried to co-relate that withdrawal of the cash from the bank to the payment allegedly made to the respondent more than three weeks after the date of withdrawal. During cross-examination, this witness has tried to oscillate and state that the money was being demanded by Brij Bhushan Singla ever since December and the demand was made 2 or 3 times. Nobody has appeared to state that the claimants had either agreed for such payment or that they were mentally prepared to make such payment in the event of occasion arising for the purpose, Even if demand of the respondent was to be agreed to by the claimants, there was nothing to compel the claimants to make instantaneous payment and payment could have been made on the following day in cash or by DD or immediately by cheque. In short, this story of payment of Rs.20,00,000/- in cash on a simple demand by Brij Bhushan Singla without any corresponding obligation of the claimants to make such payment sounds highly improbable and unnatural.

90. Hand-writing experts have been examined by both sides on the genuineness or otherwise of the

signature of Brij Bhushan Singla on the RECEIPT Ex.C/14. Vijay Rustagi, hand-writing expert who has appeared for respondent has compared the disputed signatures with the admitted standard signatures of Brij Bhushan Singla, 10 in number. All the writing characteristics such as line quality, size and spacing, alignment, formation, movement, slant and so on have been taken into consideration by Mr. Rustagi and basing on the comparison of such characteristics as appearing in the standards with those in the disputed, he has drawn the conclusion that questioned signatures are not of the same person who had signed the standards. Additionally, Mr. Rustagi has found that in the questioned signature, there are pen-lifts and ill-defined curve and curvatures of the letters are also to be found. The signature is not written freely as in the normal course of business and shows some unnatural pen-pauses, pen-lifts, tremors and retouching etc. The signature is written slowly and hesitatingly and retouching can also be observed apparently. Each of the letters forming subject matter of the signatures (standard and disputed) has been individually examined and compared inter se. The conclusion is that though the pictorial appearance may show some similarity but it is a case of disputed signature having been forged with free hand forgery.

91. I have carefully gone through the cross-examination conducted on the statement of Mr. Rustagi and here again I do not find this witness having been shaken in any manner whatsoever so as to detract from the credibility of the opinion formed by him.

92(i). Mr. B. Lal (CW-4) the hand writing expert who has appeared for the Claimants, has submitted a brief report and filed a short affidavit in support thereof. He has compared the disputed signature of Brij Bhushan Singla on the receipt Exh. C-14 with certain standard signatures. In his opinion the signature of Brij Bhushan Singla on Exh. C-14 is genuine but having certain variations from the standards which shows that the author has made an attempt to 'disguise' his signature. The witness has been cross-examined. During the course of the cross examination, the witness admitted that there were ten pen pauses in the questioned signatures and also an obvious pen lift. There were other pen lifts at every spacing. Vide para 13 of the cross examination witness has stated: -

“The author of the questioned signature has tried to disguise the genuineness of the signature and because of this consciousness there are pen pauses at the turning points and the connecting points and an obvious pen lift at the end. There are modification of the rhythm, modification of the shape of the letters, modification of the speed, modification of underscoring, modification resulting in absence of top loop of letter ‘S’, modification by joining the dots over ‘i’ and ‘j’, modification in the intermediate loop of the letter ‘B’. These modifications have come in the questioned signature because of the consciousness of the author to disguise the genuineness of the signature.”

Thus all symptoms of forgery have been tried to be explained by describing the questioned signature as ‘disguise’: -

92(ii) There is another infirmity in the testimony of this witness. It is gravely doubtful whether the witness had seen the originals of B-13 to B-17 or he has carried out the comparison of the questioned signature with the standards available as photo copies only. Admittedly the standards are signed in ball pen. If that be so, then the data available for comparison was not adequate. The witness did not inspect the record of the Tribunal for the purpose of finding out suitable standards for comparison. By an over all reading of the report and the cross examination on the statement of Mr. B. Lal I am of the opinion that his finding is not as convincing as that of Mr. Rustagi, the handwriting expert examined by the other side i.e. the Respondent.

92(iii) On the date and in the circumstances in which the amount of Rs.20 lakhs came to be paid by the Claimants to the Respondent as per the story set up by the Claimants, there is no reason why Brij Bhushan Singla would have attempted at ‘disguising’ his signature.

93. In the light of the reports of the two hand writing experts, I have myself compared the disputed signatures with the several standard signatures of Brij

Bhushan Singla available on record. I am too of the opinion that the disputed signature is a belaboured one and is certainly not a genuine signature. It appears that somebody has attempted to make the disputed signature by keeping a model for imitation before him.

94. The explanation offered by the respondent (See Para 47 of the cross-examination of Brij Bhushan Singla R.W.1) is that in the meeting held on 9.1.2004, he had told Mr. Shravan Gupta that there was delay on his part 'in the performance of the agreement' and therefore, balance payment should not be withheld. After some conversation, Mr. Shravan Gupta agreed to release an amount of Rs.20,00,000/- only but no amount was paid to him. A receipt was prepared on which Mr. Ashu Singla and Mr. Jai Pal had signed as witnesses but B.B. Singla did not sign as no payment was forthcoming. Arrangements for the money were tried to be made by the claimants but till the meeting was over and everybody left, the money was not received and therefore, neither it was paid to him nor did he sign the receipt. The unsigned receipt was left with Mr. Bhupendra Singh who had agreed to deliver the money to Brij Bhushan Singla on being arranged and then obtain his signature on the receipt. On behalf of the Respondent, Jai Pal R.W.2 has appeared in the witness box who has fully supported the testimony of Mr. Brij Bhushan Singla. Mr. Manish Kumar R.W.4 is another person who was present at the meeting held on 9.1.2004. He is a witness to the agreement dated 9.5.2001 and also involved in the dealing. His presence in the meeting dated 09.01.2004 is admitted by Mr. Rajeev Gupta, CW-1 in para 18 of his affidavit statement. He also states that in the meeting dated 9.1.2004, he was present and nothing was paid to the respondent. Thus the testimony of Brij Bhushan Singla finds support from the testimony of these two witnesses, namely Jaipal RW-2 and Manish RW-4.

95. The factum of payment of Rs.20,00,000/- does not also find reflected in the letter dated 12.7.2004 (Ex.R/T) written by Mr. Shravan Gupta to the respondent.

96. On the contrary, so far as claimants' side is concerned, adverse inference may be drawn against the claimants for the non-examination of Shravan Gupta. Bhupendra Singh C.W.2 who has tried to support the claimants has given a testimony which has to be

accepted only with a pinch of salt. He was in Government service as Assistant Engineer in PWD posted in Gurgaon and promoted as Executive Engineer in the year 2004. He resigned from P.W.D. in the end of the year 2005. It appears that he was also engaged in the private activity of dealing in real estate and associated with the claimants as there is no reason otherwise for his such thick involvement in the disputed transaction between the parties as deposed to by him.

97. On a critical evaluation of the oral evidence adduced, circumstances centering around the alleged payment in cash of Rs.20,00,000/- and the factum of receipt (Ex.C/14) having been forged, I am of the opinion that it is not correct to say that the claimants had paid an amount of Rs.20,00,000/- in cash to the respondent. The receipt dated 9.1.2004 is not a genuine document. It was not signed by Brij Bhushan Singla. The signature is forged. The issue No.7 is answered in the negative and in favour of the respondent and against the claimants."

39. The aforesaid discussion in the award shows that the learned arbitrator has appreciated the evidence led before him by the parties. The power of the arbitral tribunal to conduct proceedings in the manner which considers appropriate includes the power to determine the admissibility, relevance, materiality and weight of any evidence (see Section 19 of the Act).

40. The Supreme Court in ***State of Rajasthan v. Puri Construction Co. Ltd. & Anr.***, (1995) Vol.22 All India Arbitration Law Reporter, has held that the arbitrator is the final arbiter of dispute between the parties and that it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusion or has failed to appreciate the facts. The Supreme Court held that the courts

cannot substitute their own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If a view taken is a possible view though perhaps not only the correct view, the award cannot be examined by the court. Where the reasons have been given by the arbitrator in making the award, the court cannot examine the reasonableness of the reasons. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator.

41. In paragraph 26 of its decision, the Supreme Court made reference to another decision in ***Municipal Corporation of Delhi v. M/s. Jagan Nath Ashok Kumar & Anr.***, (1987) 4 SCC 497, wherein it had been held that the appraisal of the evidence by the arbitrator is ordinarily never a matter which the court questions and considers. It may be possible that on the same evidence the court arrive at a different conclusion than the one arrived at by the arbitrator, but that by itself is no ground for setting aside the award. The following extract of paragraph 31 is relevant and the same are reproduced herein below:

“The contentions about factual errors and omissions apparent on the face of record as raised in the written argument are essentially errors and omissions in not properly considering the materials on record, in misreading and misconstruing such materials and consideration of some documents and statements out of their contexts. The arbitrators have given the award by referring to various documents and statements available on record and indicating the reasons for basing

the findings. Even if it is assumed that on the materials on record, a different view could have been taken and the arbitrators have failed to consider the documents and materials on record in their proper perspective, the award is not liable to be struck down in view of judicial decisions referred to hereinbefore. Error apparent on the face of the record does not mean that on closer scrutiny of the import of documents and materials on record, the finding made by the arbitrator may be held to be erroneous. Judicial decisions over the decades have indicated that an error of law or fact committed by an arbitrator by itself does not constitute misconduct warranting interference with the award. It does not appear to us that the findings made by the arbitrators are without any basis whatsoever and are not referable to documents relied upon and such findings are so patently unjust or perverse that no reasonable man could have arrived at such findings. Hence, on the score of alleged misreading, misconstruction, mis-appreciation of the materials on record or failure to consider some of the materials in their proper perspective, the impugned award is not liable to be set aside."

42. The objections to the award on issue nos.6 and 7 as raised by the petitioner have no merits. I may note that apart from making reference to various documents placed on the arbitral record, in the body of the objection petition, at the time of arguments the petitioner has not demonstrated the relevance of the documents, namely, Ex.C-15 to C-18, the first recital in the agreement, the first recital in the power of attorney or any of the partition proceedings. Even if the submission of the petitioners that the respondent was in actual physical possession of a portion of the larger chunk of land, which was the subject matter of partition between the family members, were to

be accepted, it does not follow that the possession of the said land was delivered by the respondent to the petitioner. In fact, from the objections raised in relation to issue no.6, it is evident that even on the date of the so-called delivery of possession of the suit property by the respondent to the petitioner i.e. 28.01.2002, the partition proceedings had not attained finality, inasmuch, as appeal preferred by other co-owners was still pending. Since the right of the respondent to claim exclusive ownership and possession in respect of any parcel of land had not crystallized there was no question of the petitioner being placed in possession of any parcel of land in respect of which the partition proceedings was still pending at the appellate stage. I may also note that the issue as to whether possession was in fact delivered to the petitioner as claimed on 28.01.2002 or not, was a purely factual issue and the finding of the arbitral tribunal which is based on evidence led before him cannot be assailed in these proceedings.

43. So far as issue no.7 is concerned, the arbitral tribunal has examined the evidence in depth, as extracted above. The said finding is also finding of fact which cannot be assailed in these proceedings.

44. The arbitral tribunal has concluded that the petitioner failed to demonstrate its readiness and willingness to enforce the agreement between the parties and therefore, it has been held that the petitioner is not entitled to seek the relief of specific performance of the said

agreement. The said finding is premised on the law governing the subject and does not call for interference on any account whatsoever.

45. Consequently, I find no merit in this petition and dismiss the same, leaving the parties to bear their respective costs.

(VIPIN SANGHI)
JUDGE

SEPTEMBER 27, 2010
sr/rsk/as