

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

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OMP No.245/2008

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Date of decision: 7th January, 2011

M/S M.SONS ENTERPRISES PVT. LTD. & ANR. Petitioners

Through: Mr. P.V. Kapoor, Sr. Advocate with Mr.
S.S. Jain & Mr. Sudhir Sukhija,
Advocates.

Versus

SHRI SURESH JAGASIA & ANR. Respondents

Through: Mr. Sandeep Sethi, Sr. Advocate with Mr.
Arvind Nayar, Mr. Nikhil Bhalla,
Advocates for the R-1.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may
be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported
in the Digest? | No |

RAJIV SAHAI ENDLAW, J.

1. Petition under Section 34 of the Arbitration Act, 1996 is preferred with respect to the arbitral award dated 7th March, 2008. The said award inter-alia records that after the petitioners herein namely M/s M. Sons Enterprises Pvt. Ltd. and Shri Mahavir Prasad Jain & Sons (HUF) had approached the arbitrator (respondent no.2 herein) and sought arbitration in terms of agreement dated 30th July, 2007 and mortgage dated 30th July, 2007 with respect to the disputes with the respondent no.1 Shri Suresh Jagasia, the arbitrator during the course of hearing had encouraged the parties to settle

their disputes amicably and acted as mediator and conciliator; that various “suggestions” were exchanged by the parties; the parties reached a broad understanding; that the parties thereafter filed fresh agreements dated 4th March, 2008 executed by the parties and requested the arbitrator to pass an award. The arbitrator thus proceeded to pass an award on the terms agreed by the parties and as enumerated also in the award.

2. As per the said consent award, the petitioner No.1 M/s M. Sons Enterprises Pvt. Ltd. admitted that -

- (i) as on that day, a sum of ₹785 lacs was due from it to the respondent no.1 and the respondent no.1 admitted that he will not claim any amount more than that to be due, notwithstanding cheques issued by the petitioners for any amount and handed over to the respondent no.1;
- (ii) the petitioner no.1 issued cheques for the amount due of ₹785 lacs and also undertook to have issued from the Smt. Meeru Jain, Guarantor under one of the agreements dated 30th July, 2007 but not party to the arbitration, cheques for the same amount, as guarantor;
- (iii) the petitioner no.2 Sh. Mahavir Prasad Jain & Sons (HUF) also issued cheques for ₹220 lacs in favour of the respondent no.1 and also agreed that the cheques for ₹380 lacs already issued in favour of the respondent no.1 shall remain with the respondent no.1 as guarantee for payment of the said amount;

- (iv) the respondent no.1 agreed to handover the original title deeds of the property at Mehrauli lying deposited with him in terms of the mortgage deed dated 30th July, 2007 to the petitioners and the petitioners in lieu thereof agreed to execute registered mortgage deeds of agricultural land situated at Ballabhgarh and owned by Mr. Rajiv Jain, Mr. Praveen Jain, Smt. Deepali Jain all members of petitioner no.2 HUF as well as by Smt. Shobha Rani Jain;
- (v) the property at Mehrauli the title deeds whereof were released by the respondent no.1 was agreed to be sold and a sum of ₹500 lacs agreed to be paid to the respondent no.1 out of the sale consideration thereof on or before 12th March, 2008;
- (vi) it was further agreed that upon failure to pay ₹500 lacs on or before 12th March, 2008 the respondent no.1 shall be entitled to encash the cheques aforesaid given by either of the petitioners for payment;
- (vii) it was agreed that the land at Ballabhgarh shall remain mortgaged with the respondent no.1 till payment of the entire sum of ₹785 lacs and till the property of the respondent no.1 bearing No.D-926, New Friends Colony mortgaged with M/s Global Trade Finance Ltd., as collateral security for the financial assistance taken by the petitioner no.1 from the said M/s Global Trade Finance Ltd., was redeemed back;
- (viii) future interest at 24% per annum with quarterly rests on amount of the cheques not honoured was also agreed to be paid.

3. The petitioners filed this petition within the prescribed time (from 11th March, 2008 when photocopy of the award was stated to have been received) on 5th May, 2008 pleading:-

- a. That the respondent no.1 was known to the Director of the petitioner No.1 and the Karta of the petitioner No.2 HUF for several years being a neighbor and also being a old customer of the business of the petitioner No.1 of sale, purchase & export of Gems, Jewellery etc;
- b. That the parties had a cordial relationship and had been dealing and transacting business with each other running into crores of rupees;
- c. That the petitioner No.1 for its business had arranged financial assistance from M/s Global Trade Finance Ltd. which had agreed to advance loan first of ₹4.50 crores and subsequently of additional ₹2 crores to the petitioner No.1;
- d. The said Global Trade Finance Ltd. had required the petitioner No.1 to provide collateral security to secure the initial amount of ₹4.50 crores;
- e. That the petitioner No.1 had informed the respondent no.1 of the same and the respondent no.1 had come forward and offered to help the petitioner by providing collateral security of his house No.D-926, New Friends Colony, New Delhi and had created a mortgage by deposit of title deeds of his said property by way of security with M/s Global Trade Finance Ltd.;

- f. That the respondent no.1 had offered his property as security because he was himself indebted in the sum of ₹5,27,07,355/- with interest at 24% per annum i.e. for a total sum of ₹7,67,34,760/- (though para 9 of the petition does not state to whom the respondent no.1 was so indebted but on a holistic reading it transpires that the plea is that the respondent no.1 was indebted in the said amount to the petitioners);
- g. That subsequently, the respondent No.1 approached the petitioners and represented that he had sentimental attachment to the property so mortgaged by him and that the said property was worth over ₹10 crores and expressed fears of losing the said property upon failure of the petitioners to discharge their liability to M/s Global Trade Finance Ltd.;
- h. Respondent no.1 thus pressed the petitioners to secure him adequately for the same by providing security in the shape of post dated cheques and immovable property;
- i. That the petitioners believing the assurances of the respondent no.1 issued cheques in the total sum of over ₹10 crores issued by the petitioner No.1, Smt. Meeru Jain and the petitioner No.2 in favour of the respondent no.1 and also deposited with the respondent no.1 the original title deeds of property at Mehrauli in the name of the petitioner No.2 HUF;
- j. That subsequently on request of petitioners the respondent no.1 released the title deeds of Mehrauli property to enable sale

thereof by petitioner no.2 and which was so sold on 5th March, 2008 but in lieu thereof the respondent no.1 insisted for providing another security and also insisted for issuance of fresh cheques in lieu of the earlier cheques;

- k. That the petitioners accordingly deposited with the respondent no.1 the original title deeds of the property at Ballabgarh in the name of the Karta of the petitioner No.2 HUF, his wife and other members of the HUF, as security and in lieu of Mehrauli property;
- l. The petitioners also arranged and provided fresh cheques for over ₹15 crores in favour of the respondent no.1;
- m. It is further pleaded that all the aforesaid cheques and title deeds of property at Ballabgarh were obtained by the respondent no.1 as security and the respondent no.1 was not to use the same for any purposes whatsoever;
- n. That the respondent no.1 however did not return the earlier cheques and as pre-condition therefor insisted upon registered mortgage of the Ballabgarh property being executed in his favour;
- o. The petitioners believing the respondent no.1 and being left with no option agreed to create registered mortgage and five deeds of mortgage were executed and registered in good faith with respect to Ballabgarh property in favour of the respondent no.1;

- p. That the respondent no.1 at that time, also got signatures on various blank, stamp and plain papers from the petitioners and their other family members;
- q. That after registration of the mortgage deeds the petitioners demanded the old cheques and the blank signed papers but the respondent no.1 refused to return the same;
- r. That the petitioners thereafter collected the copies of the mortgage deeds executed by them from the respondent no.1 and on reading they were stunned and shocked to know the contents thereof;
- s. It is the case of the petitioners that neither they nor any of their family members had received any monies from the respondent no.1 but in the mortgage deeds, admission was contained of monies being due from the petitioners to the respondent. It is alleged that the said mortgage deeds being without consideration are illegal and were got executed by the respondent from the petitioners malafidely, dishonestly, fraudulently, under pressure, force, in good faith and without free consent or will.
- t. That the petitioners from the mortgage deeds also learnt of the respondent no.1 having played a fraud in collusion with the arbitrator by forging and fabricating and manipulating the documents on the blank papers on which signatures of the petitioners and their other family members were obtained;

- u. That the petitioners in the circumstances got sent a legal notice dated 11th March, 2008 to the respondent;
- v. That on 11th March, 2008 itself after the issuance of the legal notice the petitioners were shocked to receive an envelope from the arbitrator who has rendered the award aforesaid, containing *inter alia* a document purporting to be the award aforesaid.

4. It is the contention of the petitioners that all the documents referred to in the award were signed by them in blank; that they had not entered into any arbitration agreement and had not participated in any arbitration proceedings and had not consented to any award and all the papers have been manipulated.

5. This Court vide *ex parte* order dated 7th May, 2008, while issuing notice of the petition, stayed the operation of the award. The respondent no.2 arbitrator in response to notice issued to him has filed in this Court the original arbitration record along with proof of payments made by the petitioners to him.

6. Needless to state that the respondent no.1 has contested the petition and, in fact, contended that the petitioners have filed and have taken a false stand before this Court. The respondent no.1 has also filed Cr. Misc. No.5/2008 under Section 340 r/w Section 195 of Cr.PC for proceeding against the petitioners.

7. The respondent no.1 on 28th November, 2008 filed IA No.12733/2008 under Section 9 of the Arbitration Act, 1996 in the present proceedings stating

that the Ballabhgarh property which admittedly stood mortgaged with the respondent no.1 was in physical possession of the petitioners themselves and that the said property was otherwise unencumbered and was of the value of more than ₹10 crores and sufficient to satisfy the award in the event of the present petition being dismissed. The respondent no.1 sought interim protection with respect to the said property. The petitioners through their counsel gave a statement on 28th November, 2008 itself that they, till the disposal of this petition shall not part with the possession of or encumber the Ballabhgarh property in any manner whatsoever and shall not enter into any transaction whatsoever with respect thereto.

8. After substantial hearing, the petitioners filed IA No.6342/2009 for amendment of the petition under Section 34 of the Act and IA No.6343/2009 for consolidation of the present proceedings with CS(OS) No.865/2008. Arguments have been heard on all the applications aforesaid as well as the OMP.

9. The senior counsel for the petitioners in the opening arguments contended that the arbitral award, though with respect to crores of rupees was engrossed on the stamp paper of ₹100/- only and no cognizance thereof could be taken on this ground alone. On enquiry, as to how this court, in view of the judgment of the Supreme Court in *Anasuya Devi Vs. M. Manik Reddy* (2003) 8 SCC 565 laying down that deficiency in stamping or registration are not within the purview of Section 34 of the Act and can be agitated only at the stage of enforcement of award under Section 36 of the Act, entertain such an

objection, the senior counsel for the petitioners contended that the said judgment was *per incuriam*. It was contended that the said judgment is in ignorance of Section 33 of the Stamp Act which is mandatory. Reliance in this regard is placed on ***Mayuram Subramanian Srinivasan Vs. CBI*** (2006) 5 SCC 752 and on in ***N. Bhargavan Pillai Vs. State of Kerala*** (2004) 13 SCC 217 holding that decision made without considering the effect of relevant mandatory provisions must be treated as rendered *per-incuriam* and having no precedential value. It is also contended that neither in the reply to the petition nor in the award were any particulars whatsoever given of the huge amount of ₹9.68 crores allegedly paid by the respondent no.1 to the petitioners; it was further contended that not a single document had been produced evidencing such transaction. It was further contended that it was admitted that the house of the respondent no.1 at D-926, New Friends Colony was mortgaged as security for dues of petitioners. It was urged that it is inconceivable that if the respondent no.1 was the creditor of the petitioners he would mortgage his property for loans availed by the petitioners. It was contended that the only inference was that the respondent no.1 had mortgaged his property because he was the debtor of the petitioners. Reference was also sought to be made to the documents filed by the petitioners along with their rejoinder, namely the cross examination of the respondent no.1 in the complaint filed by the respondent no.1 against the petitioners of the offence under Section 138 of the Negotiable Instruments Act. It was suggested that in fact M/s. M. Gems carrying on business at Dubai and controlled by the respondent no.1 had purchased huge volume of jewellery from the petitioners and for which monies were due; that

the respondent no.1 being unable to pay the same immediately had agreed to mortgage his house to enable the petitioners to take loan from M/s Global Trade Finance Ltd. It was further urged that though the respondent no.1 was now taking a stand that he had nothing to do with the said M/s M. Gems but the respondent no.1 had along with his reply himself filed a handwritten document dated 29th July, 2007 wherein reference is made to M/s M. Gems.

10. The recent judgment of the Apex Court in *Anasuya Devi* (supra) cannot be brushed aside as *per-incuriam* or as *sub-silentio* on the provisions of the Stamp Act. The Apex Court was very much conscious of the said provisions and it is not as if it pronounced the judgment in ignorance of the same or that the provisions of the Stamp Act have been given a go by. What the Supreme Court has held, examining the scheme of the Arbitration Act, 1996, is that the objections on account of deficiency in stamping and registration fall outside the ambit of Section 34 of the Act. It is not as if, the Supreme Court by adopting the said procedure has contravened the mandatory provisions of the Stamp Act; it is not as if benefits have been permitted to be derived under an insufficiently stamped award. The Supreme Court however has held that the said objection has to be taken at the time of enforcement of the award. In my humble opinion, this is but a pragmatic approach. The common thread running through the 1996 Act is of expediency. If objections under the Stamp Act or the Registration Act were to be permitted to be taken at the stage of Section 34, it would indefinitely delay the disposal of the said proceedings. The Supreme Court thus held that the objections under Section 34 be decided expeditiously without reference to the said pleas. In this manner, the rights of

persons against whom the award is pronounced have been preserved. If they are able to establish that on account of insufficiency in stamping of the award or non-registration of the award, the person in whose favour the same is made is not entitled to benefit thereof, the award would not be enforced against them. I, therefore, do not find any merit in the contention of the petitioners of the award being liable to be set aside for the said reason and the same is dismissed.

11. I will next take up the application being I.A. No.6343/2009 of the petitioners for consolidation of the present proceedings with CS (OS) No.865/2008. The said suit is stated to have been filed, besides the two petitioners herein, also by Shri Rajiv Jain and Smt. Meeru Jain aforesaid and against, besides the respondent no.1 herein, also against M/s. M Gems, *inter alia* for declaration that the agreement dated 30th July, 2007 to pay debt, mortgage deed dated 30th July, 2007, agreement dated 4th March, 2008 to pay debt, MOU dated 4th March, 2008 allegedly executed by the petitioners and their family members are illegal, invalid, null & void *ab initio* and *non est* and do not confer any legal right upon the respondent no.1 herein against the petitioners and the other plaintiffs in the suit.

12. Though the suit is not before the undersigned but since the plea for consolidation of the present proceedings and which would necessarily result in deferment of the disposal of the present proceedings, with the suit, the question as to the maintainability of the suit itself was raised. It was informed to the senior counsel for the petitioners that I have recently in ***Roshan Lal***

Gupta vs. Sh. Parasram Holdings Pvt. Ltd. 157 (2009) DLT 712, in relation to a domestic arbitration held that a suit for declaration that an agreement containing an arbitration clause relied upon by the other party was fabricated, forged and thus void and for perpetual injunction restraining the other party as well as the arbitrator named in the agreement (in that case Stock Exchange) from taking any arbitration proceedings did not lie. While holding so, reliance was inter alia placed upon the judgment of the Apex Court in ***Kvaerner Cementation India Ltd. vs. Bajranglal Agarwal*** 2001 (6) Supreme 265 and which for easy reference is set out hereinbelow:-

- “1. These special leave applications are directed against an order of a learned Single Judge of Bombay High Court refusing to interfere with an order of the Civil Court vacating an interim order of injunction granted by it earlier. The suit in question had been filed for a declaration that there does not exist any arbitration clause and as such the arbitral proceedings are without jurisdiction. The learned Single Judge of Bombay High Court came to hold that in view of Section 5 of the Arbitration and Conciliation Act, 1996 read with Section 16 thereof since the arbitral Tribunal has the power and jurisdiction to make rule on its own jurisdiction, the Civil Court would not pass any injunction against an arbitral proceeding.
2. Mr. Dave, the learned Senior Counsel appearing for the petitioner contends that the jurisdiction of the civil Court need not be inferentially held to be ousted unless any statute on the face of it excludes the same and judged from that angle when a party assails the existence of an arbitration agreement, which would confer jurisdiction on an arbitral Tribunal, the Court committed error in not granting an order of injunction. There cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an arbitral Tribunal. But, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the arbitral Tribunal to rule on its own jurisdiction including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the Civil Court cannot have jurisdiction to go into that question. A bare

reading of Section 16 makes it explicitly clear that the arbitral Tribunal has the power to 'rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised and a conjoint reading of Sub-section (2), (4) and (6) of Section 16 would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Act. In this view of the matter, we see no infirmity with the impugned order so as to be interfered with by this Court. The petitioner who is a party to the arbitral proceedings may raise the question of jurisdiction of the Arbitrator as well as the objection on the ground of non-existence of any arbitration agreement in the so-called dispute in question and such an objection being raised, the Arbitrator would do well in disposing of the same as a preliminary issue so that it may not be necessary to go into the entire gamut of arbitration proceedings.'"

The same view was followed by me in *Spentex Industries Ltd. Vs. Dunavant SA* MANU/DE/4166/2009 appeal whereagainst was dismissed by the Division Bench vide judgment reported as MANU/DE/2736/2009.

13. The senior counsel for the petitioners has not been able to persuade me to hold that the suit with which the present proceedings are sought to be consolidated is maintainable. In my view, the matter is squarely covered by the judgment aforesaid. I.A. No.6343/2009 is therefore dismissed.

14. That brings me to the application being I.A. No.6342/2009 of the petitioners for amendment of the petition under Section 34 of the Act. The application for amendment has admittedly been filed after the expiry of the time prescribed in Section 34(3) of the Act for preferring an application under Section 34 of the Act. It was thus enquired from the senior counsel for the petitioners as to whether, allowing the application for amendment would not amount to allowing the petitioners to prefer the petition under Section 34 of the Act, at least qua the grounds sought to be taken for the first time by way of

amendment, beyond the time prescribed therein. It is now no longer *res intergra* that the time prescribed in Section 34(3) cannot be extended beyond 30 days (See *Union of India Vs. M/s. Popular Construction Co.* (2001) 8 SCC 470).

15. The senior counsel for the petitioners contended that since only a photocopy of the award had been served on the petitioners and the present petition under Section 34 of the Act was filed on the basis thereof only and further since no signed copy of the award had been delivered to the petitioners till then, the period of limitation for filing the petition under Section 34 of the Act had in fact not even commenced.

16. Attention of the senior counsel for the petitioners was then invited to the recent judgment of the undersigned in *Continental Telepower Industries Ltd. Vs. Union of India* MANU/DE/1691/2009 holding to the contrary.

17. I am of the opinion that once the Supreme Court has held that grounds for setting aside of the award have to be taken and filed in the Court within a maximum period of 120 days from the delivery of the award, allowing the petitioners to take fresh/new grounds for setting aside of the award after the said period is not permitted. However, an amendment merely elucidating and/or elaborating a ground already taken can be allowed.

18. The petitioners by way of amendment seek setting aside of the award on the following additional grounds:-

- i. The award deals with the matters pertaining to parties not before the arbitrator as parties to the arbitration. It is stated that the award deals with the properties of Smt. Shobha Rani Jain, Smt. Deepali Jain & Sh. Praveen Jain who were not parties to the arbitration.
- ii. There was no arbitration agreement.
- iii. That the arbitration proceedings have not been conducted in accordance with the substantive provisions of law as provided by Section 28 of the Act.
- iv. That there were no disputes between the parties.
- v. That the adequate opportunity of being heard was not provided to the petitioners by the arbitrator.
- vi. That if CS(OS) No.865/2008 instituted by the petitioners is decreed, the award will have no foundation.
- vii. That the respondent no.1 appearing as a witness in a complaint case of an offence under Section 138 of the Negotiable Instruments Act had been unable to produce any documents of having advanced such a huge sum of money to the petitioners.
- viii. That the arbitration agreement was contained in documents though required to be registered but unregistered.
- ix. That the claims of the respondent no.1 before the arbitrator were for unaccounted and thus illegal transactions and no Court should come to the aid of such a party.

19. From the aforesaid, it would be clear that while some of the proposed amendments are totally new grounds for setting aside of the award, the others are mere elaborations.

20. In the opinion of this Court, the application in so far as taking new grounds for setting aside of the award is dismissed and the amended pleas viz-a-viz others shall be considered.

21. There is no merit in the contention of the petitioners of the award being bad for the reason of dealing with the properties of non-parties to the arbitration proceedings. No such non-party had approached this Court. The petitioners cannot be permitted to challenge the award on the said ground in as much as they are not affected thereby.

22. The moot question which arises for consideration is whether an objection to the effect that no arbitration proceedings took place can be taken under section 34 of the Act. In my view, yes. A victim of fraud, if any, as to the very conduct of the arbitration proceedings cannot be left remediless. The Supreme Court has already held as aforesaid that a suit for the said purposes would not lie. Once a suit would not lie, the aggrieved person has no other remedy but to take such an objection under Section 34 of the Act. The Court, when so approached and if satisfied that there were in fact no arbitration proceedings and/or that the arbitration proceedings have been fabricated/concocted in collusion with the arbitrator, would be entitled to set aside the award. The question which falls for consideration is whether any such case is made out herein. In my opinion, no, for the following reasons:-

- a. The petitioners have not disputed their signatures, neither on the documents containing the arbitration agreement nor on the arbitration proceedings.
- b. The version of the petitioners of the circumstances in which they appended their signatures to the documents and arbitration proceedings does not disclose that the petitioners were under some incapacity and/or is not believable.
- c. The petitioners are not uneducated lay persons. They claim to be carrying on business transactions worth crores of rupees including with the respondent no.1. They are presumed to be in the know of the impact/effect of appending their signatures on blank papers.
- d. The circumstance in which the petitioners claimed to have been compelled to sign blank papers is not believable.
- e. It is not as if the parties are strangers to each other, for the petitioners to owe the amounts awarded to the respondent no.1, to be an impossibility. The petitioners have in the petition itself admitted business/commercial relationship with the respondent no.1 since long. Thus, the monetary claim of the respondent no.1 against the petitioners is not so outrageous as to be unbelievable.
- f. Though the petitioners have as aforesaid, claimed that the respondent no.1 was/is indebted to them in the sum of ₹7,67,34,760/- but have shied from making an express averment to the said effect, probably to avoid the rigors of the taxation

authorities. The petitioners have also not placed any material before this Court to show that they were possessed of such monies or had loaned the same to the respondent no.1 or that the said monies are outstanding in the books of the petitioners from the respondent no.1. From the same, it appears that there were unaccounted transactions between the parties.

- g. The reason given by the petitioners for the respondent no.1 to mortgage his property for the loan taken by the petitioners from M/s Global Trade Finance Ltd. is unbelievable. From the other averments, it is borne out that the petitioners were/are possessed of sufficient properties which could have been mortgaged with M/s Global Trade Finance Ltd. It is thus not as if the petitioners were not possessed of any mortgageable property.
- h. If the respondent no.1 owed over ₹7 crores as claimed to the petitioners and for which reason had mortgaged his New Friends Colony house for loan taken by the petitioners from M/s Global Trade Finance Ltd., there was no reason for the petitioners to be under any pressure to agree to the proposal of the respondent no.1 for the petitioners to issue post dated cheques and furnish security of their immovable property to secure the respondent no.1.
- i. If over ₹7 crores were already due from the respondent no.1 to the petitioners, the security of New Friends Colony house given by the respondent no.1 to secure repayment of ₹4.50 crores to

M/s Global Trade Finance Ltd. was well matched and there was no need for the petitioners to issue post dated cheques or to give security by deposit of title deeds of Mehrauli property in favour of the respondent no.1.

- j. There is no match of the amounts of the post dated cheques given and the amount for which security by way of New Friends Colony house was furnished by the respondent no.1.
- k. The post dated cheques are for odd figures of ₹1,22,00,000/-, ₹3,80,000/- and not for the value of the New Friends Colony property.
- l. Even if the value of the New Friends Colony property of the respondent no.1 was ₹10 crores as claimed and a sum of ₹7,67,34,760/- was already due from the respondent no.1 to the petitioners as claimed, the post dated cheques for the balance amount only would have been given.
- m. The petitioners could have given security of their Mehrauli property directly to M/s Global Trade Finance Ltd. rather than to adopt such a circuitous route.
- n. No urgency for the petitioners to sell the Mehrauli property is pleaded or shown. No reason is therefor made out for the petitioners to agree to furnish additional cheques as security and/or for mortgaging the Ballabhgarh property in favour of the respondent no.1.
- o. There is no basis for the value of the cheques subsequently given.

- p. No pleas in the eye law of compulsion on the part of the petitioners to execute registered mortgage deed of their Ballabgarh property on 5th March, 2008 have been taken.
- q. The petitioners could have furnished security of their Ballabgarh property directly to M/s Global Trade Finance Ltd. rather than executing mortgage deeds with respect thereto in favour of the respondent no.1.
- r. The petitioners had paid a sum of ₹1.10 lacs to the respondent no.2 arbitrator. The petitioners' explanation of the said payment being for drafting the mortgage deeds is unbelievable. The petitioners did not make any such averment in the objection petition filed inspite of award recording payment of fees and furnished the said explanation only on being caught. In any case the same establishes that the petitioners knew the arbitrator, to make payment to him and it is not as if the arbitrator was a stranger to the petitioners. The explanation even otherwise does not inspire confidence; when the petitioners are challenging the mortgage deeds also, why would they pay the legal fee for drafting thereof.
- s. The admitted transactions match with the settlement arrived at between the parties and in terms whereof the award has been made.

23. The senior counsel for the petitioners has in the written arguments cited, ***G. Pankajakshi Amma Vs. Mathai Mathew*** 2005 (9) SCALE 614 to

contend that unaccounted transactions being illegal, no court should come to the aid of the party in an illegal transaction and in such cases the loss must be allowed to lie where it falls. However, I do not find the principle of *pari delicto* to be attracted to the present situation. It is not the respondent no.1 who has approached this Court or is seeking the assistance of this Court. It is the petitioners, who by contending that the respondent no.1 had loaned his unaccounted monies to them, are attempting to avoid repayment thereof by invoking the said doctrine. It is not as if the petitioners have in their own books of accounts reflected receipt of said monies from the respondent no.1. The petitioners, as aforesaid have also taken a stand of having advanced a sum of ₹5,27,07,355/- to the respondent no.1 and a sum of ₹7,67,34,760/- inclusive of interest being so due from the respondent no.1 to the petitioners. The petitioners as aforesaid have also not been able to show any such transaction in their books of accounts. Even if the pleas of the petitioners were to be true and accepted, the petitioners being equally guilty are not entitled to have the award set aside by invoking the said plea/doctrine.

24. Once the pleas of the petitioners of fabrication of documents containing arbitration clause, the arbitration proceedings, the settlement agreement and the award are disbelieved, the award on its face is a consent award and is in consonance with the settlement agreement filed by the parties before the arbitrator. No objections for setting aside of the said award lie. The senior counsel for the petitioners in the written arguments has cited –

- i. ***Ruby Sales and Services (P) Ltd. Vs. State of Maharashtra***
(1994) 1 SCC 531 to the effect that a compromise decree does

not stand on a higher footing than the agreement which preceded it;

- ii. ***K.D. Sharma Vs. Steel Authority of India Ltd.*** JT 2008 (8) SC 57 to the effect that any agreement obtained by fraud is a nullity.
- iii. ***Union Carbide Corporation Vs. Union of India*** (1991) 4 SCC 584 to the effect that the validity and durability of a consent order which wholly depends on the legal validity of the agreement on which it rests and such an order is amendable to be set aside on any ground which would justify a setting aside of the agreement itself.
- iv. ***A.A. Gopalakrishnan Vs. Cochin Devaswom Board*** (2007) 7 SCC 482 holding that the bar contained in Order 23 Rule 3A of the CPC will not come in the way of the High Court examining the validity of the compromise decree on the allegations of fraud/collusion.

25. In my view, the aforesaid judgments also have no application to the matter in controversy. Here as aforesaid, no fraud has been found.

26. The senior counsel for the petitioners next contended that all the aforesaid questions cannot be decided without evidence. The said question does not arise for consideration in the present case in as much as for the plethora of reasons given in para 22 hereinabove, *prima facie* also this Court is not convinced of the allegations of fraud and fabrication qua the arbitration proceedings.

27. Much emphasis has been laid on the placement of the signatures on behalf of the petitioners in the arbitration proceedings filed by the respondent no.2 arbitrator before this Court. It is urged that the said placement of signatures demonstrates that the signatures were taken on blank papers on which material has been typed subsequently. I have perused the said arbitral record. The signatures of the appearing parties/their representatives therein are appearing against their presence and at different places on various sheets. It thus cannot be said that the placement of the signatures is indicative of the signatures having been made on blank sheets. Ordinarily, if signatures on blank sheets are to be taken, the same would be taken at the end of the sheet. That is not the position over here. Moreover, the whole purpose of arbitration is to do away with the formality and the procedure entailed in the court proceedings. The arbitration appears to have been conducted in a cordial fashion. There exists on arbitration record an authorization letter of the petitioner no.2 Shri Mahavir Prasad Jain & Sons (HUF) with the stamp of the said HUF and admittedly signed by Shri Mahavir Prasad Jain authorizing Shri Rajiv Jain to appear before the arbitrator. There is no explanation as to how the stamp of Shri Mahavir Prasad Jain & Sons (HUF) came to be affixed on one of the said documents only and not on the others. The proceedings before the arbitrator also disclose that the parties since the beginning were carrying on negotiations and there is thus nothing surprising in the consent award.

28. The senior counsel for the petitioners has also contended that there is nothing to show as to how notices were sent by the arbitrator – no receipts of posting/courier exist on the arbitration record. The said plea cannot prevail

upon this Court to set aside the award. The name of the respondent no.2 as arbitrator finds mention in the arbitration clause. It is thus not as if he was appointed by the respondent no.1 unilaterally and/or was unknown to the petitioners. The payment to the respondent no.1 has already been discussed above. The respondent no.2 who was agreed upon as the arbitrator appears to have been known to both the parties. In the circumstances, there would be nothing unusual in the respondent no.2 on being approached to commence arbitration, instead of sending a notice by post or courier to the respondent no.1, communicating with the respondent no.1 informally or telephonically and/or fixing the dates of hearing from time to time.

29. The senior counsel for the petitioners has next referred to the reply on behalf of the respondent no.1 to the legal notice dated 14th March, 2008 to contend that the same is contrary to the arbitration award. However a perusal of the reply does not show any inconsistency and merely because full facts are not disclosed in the reply would not constitute a ground for setting aside of the award.

30. The arbitration proceedings are leveled as dubious by also inviting attention to the minutes dated 10th December, 2007 & 14th December, 2007 of the arbitrator. It is contended that while as per the minutes of 10th December, 2007 the petitioners had approached the arbitrator only for certain changes to the mortgage deeds of 30th July, 2007 sought by the petitioners and refused by the respondent no.1, the scope of arbitration was expanded by the arbitrator on his own on 14th December, 2007. No merit is found in the said plea also,

though as per the minutes of 10th December, 2007 the petitioners had informed the arbitrator that the respondent no.1 was not agreeable to the changes in the mortgage deeds suggested by them, the same was only a preliminary statement to show that disputes had arisen between the parties. It thus cannot be said that the arbitrator has expanded the scope of the arbitration or on his own or dealt with the matters not referred to him and/or not arbitrable. The consent award seeks to put an end to all disputes and controversies between the parties.

31. The senior counsel for the petitioners has also contended that the consent award is contrary to Annexure R-1 to the reply filed by the respondent no.1 before this Court. The same is a handwritten document in which the respondent no.1 claims the petitioners admitted their liability in the sum of ₹9,69,89,570/- to the respondent no.1. The senior counsel for the petitioners contends that the said document does not make any sense and in any case was not on arbitrator's record.

32. The aforesaid document has been filed by the respondent no.1 only to meet the plea of the petitioners of the award being without any basis as no monies were due from the petitioners to the respondent no.1. In the said document on which the petitioners have not denied their signatures or writing, the petitioners have admitted and confirmed their liability to pay the respondent no.1 the loan taken by them. This Court is otherwise not concerned with the legality of the said document in as much as the admission of liability is sufficiently clear from the same. As aforesaid the parties are

commercial people who with respect to their transactions which the petitioners themselves claim were unaccounted, opted for the arbitration of disputes rather than adjudication thereof before the court and once the parties are found to have consented to a settlement incorporated in the award, the petitioners cannot be permitted to wriggle out of the same by taking the said pleas. This Court in the exercise of jurisdiction under Section 34 of the Act cannot enter into the question whether the awarded amount is in consonance with the books of accounts or not and when the document admittedly bears the signatures of the petitioners.

33. The senior counsel for the petitioners has next contended that all the documents are not to be found on the arbitrator's record. The said averment is again meritless. It is not as if the arbitrator on the basis of any documents on his record has found any amounts to be due from the petitioners to the respondent no.1. The arbitrator has made the award as per the settlement arrived at between the parties and in which settlement the petitioners admitted the said amounts to be due to the respondent no.1.

34. Upon it being put to the senior counsel for the petitioners as to why the petitioners admittedly issued cheques for large amounts in favour of the respondent no.1, all that could be replied was that it was for the respondent no.1 to explain as to why he obtained the said cheques from the petitioners i.e. of amounts more than that for which he has finally settled. The said explanation of the petitioners is also not satisfying. It is the issuer of the cheques who has to explain as to on what basis he issued the cheques. A

commercial person is not expected to issue a cheque merely on the same being demanded. The presumption is of the cheques being issued in discharge of the liability or by way of security. In either case the cheques would be for the amounts admitted and not for higher amount. It was thus for the petitioners to explain as to why they issued cheques for higher amount.

35. The senior counsel for the petitioners next contended that the mortgage deeds for Ballabhgarh land are for consideration of much lesser amounts than that claimed to be due on that date and with respect where to the award has been made. It is further stated that there is also no proof of the said amounts forming consideration for the mortgage deed having been paid. It is contended that the same casts a huge doubt on the veracity of the mortgage deed and on the conduct of the arbitrator.

36. The award is not of the amounts due under the mortgage for the same to be consistent with the mortgage deeds. The award is of the amounts admitted by the petitioners to be due to the respondent no.1. Mortgage, as per the settlement was but one of the several transactions between the parties.

37. The senior counsel for the petitioners has next contended that the same type font is used on all documents between the parties as well as on the arbitration record and therefrom contends that the arbitration was fabricated. It is also contended that the language in the documents and in the award is the same and it indicates that all documents were prepared by the same person at the same time. There is no merit in the said contention also. These pleas are no longer available in the present day world of laser printers and amongst

printers of the same manufacturers, there is no distinction between the print of one from the other.

38. The senior counsel for the respondent no.1 has also pointed out that it was term of the consent award that the respondent no.1 was to release the security of the Mehrauli property of the petitioners and which has admittedly happened. He has contended that the petitioners having taken benefit of the consent award are now not entitled to challenge the same. He also urges that the petitioners did not raise any dispute till their Mehrauli property remained as a security with the respondent no.1 and raised the dispute only after receiving benefit under the consent award and in an attempt to avoid the liability under the consent award to make the payment to the respondent no.1 upon sale of the Mehrauli property. I find considerable merit in the said contention. The facts do show that the petitioners did lead the respondent no.1 to release the Mehrauli property of the petitioners. There is nothing to show that the respondent no.1 did not release the said property as part of the consent award. The petitioners after availing benefits under the award are not entitled to challenge the same.

39. The senior counsel for the respondent no.1 also refers to *Narayan Prasad Lohia v. Nikunj Kumar Lohia* AIR 2002 SC 1139 laying down that arbitration is a creature of an agreement and there can be no arbitration unless there is an arbitration agreement in writing between the parties and further holding that the right to challenge the award even when the composition of the Arbitral Tribunal or the procedure is not in accordance with the agreement of

the parties is a restricted right. Relying on the said judgment he contends that even if there is any infirmity in the procedure followed by the arbitrator, it is not open to any party to question the same.

40. Having not found any merit in the objections to the arbitral award, the petition is dismissed with costs of ₹50,000/- payable by the petitioners to the respondent no.1. The Criminal Miscellaneous No.5/2008 under Section 340 r/w Section 195 of the Cr.PC filed by the respondent no.1 is also dismissed in the hope that commercial sense would prevail upon the petitioners to not drag on the matter further.

**RAJIV SAHAI ENDLAW
(JUDGE)**

7th January, 2011
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