

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

163

+ O.M.P. 444/2006

MRS. RUCHI AGARWAL & ORS.
Through

..... Petitioners
Mr. T.K. Ganju, Senior Advocate
with Mr. Rohit Choudhary,
Ms. Divya Kesar, Ms. Preeti
Khiwani, Mr. Manmohit Puri,
Mr. Gaurav Dudeja and
Ms. Aradhana Kaura, Advocates

versus

NICOLIAN (INDIA) & ORS.
Through

..... Respondents
Mr. Jayant Nath, Senior Advocate
with Mr. S. Kumar and Mr. Krishna
M. Singh, Advocates for R-1.

Mr. Alok Singh with Ms. Ratna,
Advocates for R-2.

AND

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MRS. RUCHI AGARWAL & ORS.
Through

..... Petitioners
Mr. T.K. Ganju, Senior Advocate
with Mr. Rohit Choudhary,
Ms. Divya Kesar, Ms. Preeti
Khiwani, Mr. Manmohit Puri,
Mr. Gaurav Dudeja and
Ms. Aradhana Kaura, Advocates

versus

NICOLIAN BROS & ORS.
Through

..... Respondents
Mr. Jayant Nath, Senior Advocate
with Mr. S. Kumar and Mr. Krishna
M. Singh, Advocates for R-1.

Mr. Alok Singh with Ms. Ratna,
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MRS. RUCHI AGARWAL & ORS.
Through

..... Petitioners
Mr. T.K. Ganju, Senior Advocate
with Mr. Rohit Choudhary,
Ms. Divya Kesar, Ms. Preeti
Khiwani, Mr. Manmohit Puri,
Mr. Gaurav Dudeja and
Ms. Aradhana Kaura, Advocates

versus

NICOLIAN (I) PVT. LTD. & ORS. Respondents
Through Mr. Jayant Nath, Senior Advocate
with Mr. S. Kumar and Mr. Krishna
M. Singh, Advocates for R-1.

Mr. Alok Singh with Ms. Ratna,
Advocates for R-2.

AND

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MRS. RUCHI AGARWAL & ORS. Petitioners
Through Mr. T.K. Ganju, Senior Advocate
with Mr. Rohit Choudhary,
Ms. Divya Kesar, Ms. Preeti
Khiwani, Mr. Manmohit Puri,
Mr. Gaurav Dudeja and
Ms. Aradhana Kaura, Advocates

versus

C.S. PROPERTIES PVT. LTD. & ORS. Respondents
Through Mr. Jayant Nath, Senior Advocate
with Mr. S. Kumar and Mr. Krishna
M. Singh, Advocates for R-1.

Mr. Alok Singh with Ms. Ratna,
Advocates for R-2.

AND

174

+ O.M.P. 511/2006 & I.A. 12068/2006

APOGEE INTERNATIONAL LTD. Petitioner
Through: Mr. Alok Singh with Ms. Ratna,
Advocates

versus

NICOLIAN INC. & ORS. Respondents
Through: Mr. Neeraj Kishan Kaul, Senior
Advocate with Mr. S. Kumar,
Advocate for R-1.

Mr. T.K. Ganju, Senior Advocate
with Mr. Rohit Choudhary,
Ms. Divya Kesar, Ms. Preeti
Khiwani, Mr. Manmohit Puri,
Mr. Gaurav Dudeja and
Ms. Aradhana Kaura, Advocates
for R-2 to 4.

AND

175

+ O.M.P. 512/2006 & I.A. No. 12080/2006

APOGEE INTERNATIONAL LTD. Petitioner
Through: Mr. Alok Singh with Ms. Ratna,
Advocates

versus

NICOLIAN (INDIA) PVT. LTD. & ORS. Respondents
Through: Mr. Neeraj Kishan Kaul, Senior
Advocate with Mr. S. Kumar,
Advocate for R-1.

Mr. T.K. Ganju, Senior Advocate
with Mr. Rohit Choudhary,
Ms. Divya Kesar, Ms. Preeti
Khiwani, Mr. Manmohit Puri,
Mr. Gaurav Dudeja and
Ms. Aradhana Kaura, Advocates
for R-2 to 4.

AND

176

+ O.M.P. 513/2006 & I.A. No. 12081/2006

APOGEE INTERNATIONAL LTD. Petitioner
Through: Mr. Alok Singh with Ms. Ratna,
Advocates

versus

NICOLIAN SECURITIES &
FINANCE (P) LTD. & ORS. Respondents
Through: Mr. Neeraj Kishan Kaul, Senior
Advocate with Mr. S. Kumar,
Advocate for R-1.

Mr. T.K. Ganju, Senior Advocate
with Mr. Rohit Choudhary,
Ms. Divya Kesar, Ms. Preeti
Khiwani, Mr. Manmohit Puri,
Mr. Gaurav Dudeja and
Ms. Aradhana Kaura, Advocates
for R-2 to 4.

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APOGEE INTERNATIONAL LTD. Petitioner
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 Through: Mr. Neeraj Kishan Kaul, Senior
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 Ms. Aradhana Kaura, Advocates
 for R-2 to 4.

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Date of Decision : 15th January , 2010

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

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

J U D G M E N T

MANMOHAN, J (ORAL)

1. Eight petitions have been filed under Section 34 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as “Act, 1996”) challenging four Awards dated 10th June, 2006 passed by Mr. Justice P.N. Nag (Retd.), Sole Arbitrator. While four objection petitions have been filed by the legal representatives of Late Mr. Rakesh Agarwal, the other four objection petitions have been filed by M/s. Apogee International Ltd. (in short “AIL”).

2. The brief facts relevant to the present controversy are that according to the first respondent -claimant, it had advanced to M/s. Gulmohar Estates Ltd. (in short 'GEL') various sums of money totaling to about Rs.2.20 Crores for booking property in Garden Estates, Gurgaon. Since, according to first respondent -claimant, GEL had failed to construct and deliver possession of flats in question by 31st March, 1996 and was not in a position to deliver the same in the near future, an Agreement dated 18th November, 1999 was entered into by and between the first respondent-claimant, Hotal Banjara Ltd. (in short 'HBL'), Mr. Rakesh Agarwal, GEL, M/s. Rakesh Agarwal HUF and AIL. In the said agreement, it was stated that the entire share -holding of HBL held by Mr. Rakesh Agarwal and his HUF as well as AIL would be transferred in favour of the first respondent-claimant so as to discharge the entire liability of GEL, Mr. Rakesh Agarwal, his HUF and AIL. The agreement according to the respondent/claimant was signed by Mr. Rakesh Agarwal on behalf of GEL, AIL, HBL, M/s. Rakesh Agarwal HUF and himself.

3. In fact, it is the first respondent's case that in consideration for Rs. 2.20 Crores, Mr. Rakesh Agarwal had also executed Deeds of Personal Guarantee and Indemnity dated 15th May, 1991 and Corporate Guarantee dated 15th May, 1991 on behalf of AIL.

4. According to respondent-claimant, as Mr. Rakesh Agarwal, AIL

and GEL had failed to repay the amount of Rs.2.20 Crores with the stipulated interest @ 24% per annum with semi-annual interests, respondent-claimant invoked the arbitration clause.

5. From the arbitral record in particular the order sheets of the Arbitrator, it is apparent that Mr. Rakesh Agarwal was served on the basis of a postal certificate wherein it was stated that Mrs. Ruchi Agarwal wife of Mr. Rakesh Agarwal had refused to accept service. The order sheet also reveals that though notice in the 'Hindu' newspaper had been published, none had appeared for GEL and for Mr. Rakesh Agarwal and his HUF. Accordingly, by order dated 11th January, 2003, the aforesaid three respondents in the arbitral proceedings were proceeded ex-parte.

6. AIL was the only party to the arbitral proceedings who had appeared before the Arbitrator and sought time to file a reply/written statement. The order sheets reveal that despite three opportunities, AIL had not filed any reply/written statement but had only filed applications under Section 16 of Act, 1996 as well as for production of original documents and for interrogatories. All these applications were dismissed by the Arbitrator on 10th April, 2003. While dismissing the application under Section 16, the Arbitrator held that it involved highly complicated questions of fact which could not be decided without trial. Immediately after dismissal of the aforesaid applications including the one under Section 16, the Arbitrator closed the right of defence of the

respondents to the arbitral proceedings. The Arbitrator thereafter fixed the matter for filing of evidence by way of affidavit. Before the ex-parte evidence was filed, Mr. Rakesh Agarwal unfortunately passed away on 22nd October, 2003.

7. Upon an application being filed by respondent-claimant, the legal representatives of Mr. Rakesh Agarwal were impleaded as parties to the arbitral proceedings on 27th August, 2004. By virtue of the same order, legal representatives of Mr. Rakesh Agarwal were given time to file replies/written statements to the Claim-petitions.

8. However on 18th March, 2005, the Arbitrator at the instance of respondent no.1 recalled his earlier order dated 27th August, 2004 and held that the replies/written statements filed in the meantime by the legal representatives could not be taken on record as the stage for filing of the same was over long time back and Mr. Rakesh Agarwal had already been proceeded ex-parte.

9. Subsequently, on 10th June, 2006, the Arbitrator passed the four impugned Awards against all the respondents including the legal representative of Mr. Rakesh Agarwal to transfer the shareholding held by them in HBL or in the alternative to personally pay the stipulated amount in each Award with interest.

10. Mr. T.K. Ganju, learned senior counsel appearing for the legal

representatives of the deceased Mr. Rakesh Agarwal submitted that the impugned Awards were liable to be set aside under Section 34(2)(iii) of Act, 1996 inasmuch as the petitioners-objectors had not been allowed to present their case. According to him, the impugned Awards were violative of the public policy of India as well as the principles of natural justice. He pointed out that Section 18 of Act, 1996 required the Arbitral Tribunal to give all the parties full opportunity to present their case. In this connection, Mr. Ganju relied upon the following judgments :-

A) ***Wazir Chand Karan Chand Vs. Union of India & Anr.*** reported in ***AIR 1989 Delhi 175***

B) ***S.L. Kapoor Vs. Jagmohan & Ors.*** reported in ***AIR 1981 SC 136*** and

C) ***Power Grid Corporation of India Ltd. Vs. Electrical Mfg. Co Ltd. & Anr.*** reported in ***153 (2008) DLT 440.***

11. Since, Mr. Ganju placed heavy reliance upon the judgment of this Court in ***Power Grid Corporation's*** (supra), the relevant portion of the said judgment is reproduced hereinbelow :-

20. In Halsbury's Laws of England, Fourth Edition, Vol. 2 Page 590 page 306 it has been stated as under:

"Where the arbitrator proposes to proceed with the reference notwithstanding the absence of one of the parties, it is advisable that he should give that party distinct notice of his intention to do so. If reasonable excuse for not attending the appointment can be shown, the Court will set aside an award made by an arbitrator who has proceeded ex parte."

21. In *Russell on Arbitration, Nineteenth Edition* page 271 the following passage appears.

“Notice of intention to proceed ex parte:

In general, the arbitrator is not justified in proceeding ex parte without giving the party absenting himself due notice. It is advisable to give the notice in writing to each of the parties or their solicitors. It should express the arbitrator’s intention clearly, otherwise the award may be set aside. An ordinary appointment for a meeting with the addition of the word ‘Peremptory’ marked on it is, however, sufficient.

If the Arbitrator declines to proceed on the first failure to attend a peremptory appointment, and gives another appointment, he is not authorised to proceed ex-parte at the second meeting, unless the appointment for it was also marked ‘peremptory’ or contained a similar intimation of his intention.”

22. *The elementary Principle of Natural Justice implies a duty to act fairly i.e. fair play in action. The Principle of Natural Justice is not dogmatic in character and a duty is cast upon on every adjudicatory body be it judicial or quasi-judicial to strictly adhere to the Principle of Natural Justice unless such adherence is dispensed with under any particular Statute. The Rules of Natural Justice are although not embodied Rules, but the same afford minimum protection to the rights of any person against the arbitrariness of any authority be it judicial, quasi-judicial or administrative whose decision involves any civil consequences or can affect the rights of an individual. The aim of Rules of Natural Justice is to secure justice or to put it in the negative to prevent miscarriage of justice.*

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25. *As already discussed above, the Arbitral Tribunal has acted in utter haste in rushing through the arbitration proceedings without affording proper and adequate opportunity to the appellant in presenting its case, we, therefore, feel that the interest of justice will be best served if we refer the matter again to a Sole Arbitrator to adjudicate the disputes between the parties afresh after giving due opportunity to both the parties. The appointment of a Sole Arbitrator would in our opinion cut short delay in the disposal of the controversy which will remain raging for another decade if we are to direct the process of appointment of the Arbitrators to be started de novo.”*

12. Mr. Ganju further submitted that impleadment of legal representatives of Mr. Rakesh Agarwal was not by virtue of Order 22 CPC but by virtue of Section 40 of Act, 1996. According to him, by virtue of Section 19 of Act, 1996 the provisions of CPC did not apply to arbitral proceedings. He further contended that legal representatives' right to file a defence was not governed or controlled by CPC but by the larger and general principles of natural justice inasmuch as every person who had been impleaded as a party to an arbitral proceeding was entitled to raise a defence. In any event, according to Mr. Ganju, even under Order 22 Rule 4 CPC the right of newly impleaded respondent to file a defence was not restricted or limited in any manner. In this connection, he relied upon a judgment of Apex Court in ***Vidyawati v. Man Mohan & others*** reported in ***(1995) 5 SCC 431*** wherein it has been held as under :-

"4. This Court in Bal Kishan v. Om Parkash [AIR 1986 SC 1952] has said thus:

"The sub-rule (2) of Rule 4 of Order 22 authorises the legal representative of a deceased defendant to file an additional written statement or statement of objections raising all pleas which the deceased-defendant had or could have raised except those which were personal to the deceased-defendant or respondent."

13. Mr. Ganju also submitted that after the death of Mr. Rakesh Agarwal, petitioners being the only members of HUF were entitled to file their written statements/replies as a matter of right.

14. On merits, Mr. Ganju contended that the Arbitrator had committed gross misconduct in not adjudicating upon the issue as to

whether the documents relied upon by respondent no. 1 were genuine or fabricated. Mr. Ganju laid great emphasis on the fact that the Agreement dated 18th November, 1999, the Deeds of Personal Guarantee and Indemnity dated 15th May, 1991 and Corporate Guarantee dated 15th May, 1991 were forged and fabricated. In support of his plea, Mr. Ganju relied upon the following facts:-

- i) The Board Resolution dated 15th May, 1991 filed by respondent-claimant in support of the guarantees revealed that it had been passed in accordance with Section 372A of Companies Act, 1956 even though the said provision had come into force with effect from 31st October, 1998. Consequently, according to Mr. Ganju, no such resolution could have been passed by AIL in the year 1991 when the said provision did not even exist in the Statute Book.
- ii) The Official Liquidator in his report to the High Court dated 22nd August, 2008 filed in C.P. No. 122/1997 after a detailed enquiry had come to the conclusion that the alleged guarantees, Board Resolution dated 15th May, 1991 and other documents relied upon by respondent-claimant were forged and fabricated. The Official Liquidator in the said report had also concluded that Mr. B.B. Patel had been selling properties of Company in liquidation even after the Official Liquidator had been appointed and that Mr. Patel was also operating the account of the Company for the

purposes of receiving and appropriating the monies belonging to the Company.

- iii) The four agreements dated 18th November, 1999 were similar, but had been drawn in favour of four different concerns belonging to one person, Mr. B.B. Patel. Mr. Ganju stated that the entire shareholding of Mr. Rakesh Agarwal, his HUF and AIL were sought to be transferred in default to four different parties, which was clearly impossible.
- iv) The interest rate stipulated in the agreement was not only usurious but also unconscionable as no party would have agreed to pay interest @ 24% per annum with half yearly interests. He further stated that the agreements were contrary to human conduct inasmuch as entire shareholding of a running five star hotel could not have been agreed to be transferred for a meager sum of Rs. 2 Crores as claimed by respondent-claimant.
- v) Though there was a specific admission by respondent's sole witness that there were several other transactions between respondent-claimant and GEL, but none of the said transactions had been shown in the alleged statement of account filed by the respondent-claimant along with its claim statement.

15. Mr. Ganju also contended that it was settled position of law that

power of review could not be exercised until and unless the same was specifically conferred upon an authority or tribunal under a Statute. He pointed out that in the present case, the Arbitrator had recalled the order dated 27th August, 2004 by virtue of which he had granted the legal representatives of Mr. Rakesh Agarwal an opportunity to file written statements/replies to the Claim statements. Mr. Ganju also pointed out that the Arbitrator had also recalled his order by virtue of which he had permitted the AIL to file affidavit by way of evidence.

16. Mr. Ganju also stated that as GEL was in liquidation and an Official Liquidator had been appointed, no proceedings could have been initiated against the said Company without taking leave of the Court under Section 446 of Companies Act, 1956. He pointed out that the Arbitrator had erroneously held that no leave was necessary on the ground that no relief had been claimed against GEL.

17. Mr. Ganju submitted that though the respondent-claimant's claims were ex-facie barred by limitation as they were based on documents executed in the year 1991, the Arbitrator in his impugned Award had given no finding on the said issue.

18. Mr. Alok Singh, learned counsel appearing for AIL emphasised that the Agreement dated 18th November, 1999 and both the Personal and Corporate Guarantee dated 15th May, 1991 were forged and fabricated. He stressed the fact that the Board Resolution dated 15th

May, 1991 referred to Section 372A of the Companies Act, 1956 even though the same came into effect in the year 1998. In this connection, he drew my attention to the following cross-examination of Mr. B.B. Patel, the sole witness produced by respondent-claimant :-

Question: Please see document C-3 and C-4 and tell who has signed these documents?

Answer: Rakesh Aggarwal himself.

Question: Did he sign these documents in your presence?

Answer: Yes

Question: When and where he signed these documents?

Answer: These documents had been signed by Rakesh Aggarwal at his office at A-5, Gulmohar Park, New Delhi on 15.05.91.

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Q. Who has signed Ex. C-3 i.e. Personal Guarantee dated 15.5.1991

A. Mr. Rakesh Aggarwal and on behalf of HUF as Karta

Q. Who gave this document?

A. Mr. Rakesh Aggarwal

Q. When did you receive this document

A. On 15.5.1991

Q. Please see document Ex. C-4, (Corporate Guarantee) and who has signed this document?

A. Mr. Rakesh Aggarwal has signed this document on behalf of M/s. Appoge International, as its POA.

19. Mr. Singh further contended that even if the Arbitrator was of the view that Section 16 application involved complicated questions of fact, the Arbitrator should not have dismissed the said application but should have adjudicated upon it at the final hearing stage after

allowing the parties to lead their evidence.

20. On the other hand, Mr. Jayant Nath, learned senior counsel for respondent-claimant stated that as despite service Mr. Rakesh Agarwal and his HUF had chosen not to enter appearance, they were rightly proceeded ex-parte. In this connection, he pointed out that postal authority had confirmed service of summons for hearing scheduled for 13th November, 2002 and further for hearing dated 3rd December, 2002, postal authority had confirmed that his wife Mrs. Ruchi Agarwal had refused to accept the summons on Mr. Rakesh Agarwal and his HUF. Mr. Nath further pointed out that by way of abundant precaution, substituted service had also been effected by way of publication in the 'Hindu' newspaper on 11th December, 2002. Mr. Nath also laid great emphasis on the fact that Mr. Rakesh Agarwal held 72% shareholding in AIL and as AIL had been served it was inconceivable that Mr. Rakesh Agarwal was not aware of the arbitral proceedings.

21. Mr. Nath pointed out that AIL had appeared before the Arbitrator on 24th November, 2002, 3rd December, 2002, 11th January, 2003 and 8th March, 2003. On each of these dates, AIL had sought an opportunity to file a reply/written statement. However, on 29th March, 2003 instead of filing a reply/written statement, it had with a view to delay and obstruct the arbitral proceedings, filed applications for interrogatories, production of documents as well as under Section 16 of Act, 1996.

22. Mr. Nath stated that the Arbitrator had rightly dismissed these applications as they were gross abuse of process of law and closed the right of AIL to file its written statement. According to Mr. Nath, right from beginning, the petitioners had participated in the arbitral proceedings with the sole intention to somehow or the other delay the same and to deprive the respondent-claimant of its rightful claims against HBL.

23. Mr. Nath contended that from the aforesaid facts, it would be apparent that principles of natural justice had been duly complied with as several opportunities had been given to Mr. Rakesh Agarwal, his HUF and AIL to file their defences but none of them had availed of the same.

24. Mr. Nath submitted that this Court in exercise of power under Section 34 of Act, 1996 should not interfere with the procedure adopted by the Arbitrator. In this connection, Mr. Nath relied upon a judgment of Supreme Court in ***Hari Om Maheshwari Vs. Vinitkumar Parikh*** reported in (2005) 1 SCC 379 wherein it has been held as under:-

“4. Two disputes pertaining to the claims of the appellants against the respondent herein were referred to arbitration and the same were numbered as Arbitration Reference No. 313 of 1995 in the case of Deepa Jain and Arbitration Reference No. 316 of 1995 in the case of Hari Om Maheshwari, the appellants herein. Though both the arbitration proceedings were taken up for consideration together. In Reference Case No. 313 of 1995 i.e. case of

Deepa Jain the evidence of both the parties concluded on 29-1-1999 while the evidence of the appellant in Reference Case No. 316 of 1995 pertaining to Hari Om Maheshwari was concluded on 8-4-1999 and the matter was listed for evidence of the respondent in that case to 10-5-1999/11-5-1999. On that day i.e. on 10-5-1999 the respondent herein remained absent. The arbitrators on that day closed the evidence and posted the matter for making awards. Before the said awards were made on 20-5-1999 the respondent herein sent an application to the arbitrators seeking further opportunity to lead evidence in Reference Case No. 313 of 1995 of Deepa Jain in which the evidence of both the parties had closed. No application was made in Reference Case No. 316 of 1995 which is the arbitration case of Hari Om Maheshwari. From the record it is seen that the said application was not entertained by the arbitrators and they delivered the award sometime in November 1999. It is against the two awards the respondent herein preferred two applications to set aside the said awards under Section 30 of the Arbitration Act, 1940 (hereinafter referred to as "the Act") before the learned Single Judge of the Bombay High Court. It was his contention that he could not attend the arbitration proceedings on 10-5-1999 because on the previous date of the proceedings he had wrongly noted down the next date of hearing. Hence, the arbitrators ought to have given him an opportunity of presenting his evidence before making an award."

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14. A bare reading of the said section shows that the civil court has very limited jurisdiction to interfere with an award made by the arbitrators and it certainly does not permit the civil court including the High Court to interfere with the discretionary order of granting or refusing an adjournment. This Court in Arosan Enterprises Ltd. v. Union of India considering Section 30 of the Act held thus: (SCC pp.454-55) "Section 30 of the Arbitration Act, 1940 providing for setting aside an award of an arbitrator is rather restrictive in its operation and the statute is also categorical on that score. The use of the expression 'shall' in the main body of the section makes it mandatory to the effect that the award of an arbitration shall not be set aside excepting for the grounds as mentioned therein to wit: (i) arbitrator or umpire has misconducted himself; (ii) award has been made after the supersession of the arbitration or the proceedings becoming invalid; and (iii) award has been improperly procured or otherwise invalid. These three specific provisions under Section 30 thus can only be taken recourse to in the matter of setting aside of an award. The legislature obviously had in its mind that the arbitrator being the judge chosen by the parties, the decision of the arbitrator as such ought to be final between the parties. Reappraisal of evidence by the court is not permissible and as a matter of fact exercise of power by

the court to reappraise the evidence is unknown to proceedings under Section 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, the interference would still be not available within the jurisdiction of the court unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. In the event however two views are possible on a question of law as well, the court would not be justified in interfering with the award. The common phraseology 'error apparent on the face of the record' does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record. The court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined."

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16. From the above it is seen that the jurisdiction of the court entertaining a petition or application for setting aside an award under Section 30 of the Act is extremely limited to the grounds mentioned therein and we do not think that grant or refusal of an adjournment by an arbitrator comes within the parameters of Section 30 of the Act. At any rate the arbitrator's refusal of an adjournment sought in 1999 in an arbitration proceeding pending since 1995 cannot at all be said to be perverse keeping in mind the object of the Act as an alternate dispute resolution system aimed at speedy resolution of disputes."

25. Mr. Nath submitted that principles of natural justice were not an unruly horse and the same would be attracted only if the petitioners were able to show that any prejudice had been caused to them. He pointed out that neither in the replies/written statements filed by the legal representatives of Mr. Rakesh Agarwal nor in Section 16 application filed by AIL, the signatures of Mr. Rakesh Agarwal on various documents were specifically denied or the factum of payment made to GEL was ever disputed. He pointed out that the only plea taken by AIL was that Mr. Rakesh Agarwal was not authorised to act

as a power of attorney holder.

26. According to Mr. Nath, the authority of Mr. Rakesh Agarwal to execute the documents on behalf of AIL was apparent as Mr. Rakesh Agarwal was not only its promoter director but was holding 72% shares of the said Company and further his wife Mrs. Ruchi Agarwal without holding any share was its Managing Director.

27. According to Mr. Nath, the petitioners' submission that in view of Section 40 of Act, 1996, Order 22 Rule 4 CPC would have no application, was untenable. According to him, in the absence of anything to the contrary in Act, 1996 reliance on provisions of CPC could not be said to be erroneous. He submitted that Order 22 Rule 4 CPC clearly indicated that on the death of one of the defendants, the legal representatives stepped into the shoes of the deceased party and the proceedings would continue from the stage at which the said party expired. Mr. Nath repeatedly emphasised that the proceedings could not commence *de novo*. In this connection, Mr. Nath referred to the following judgments :-

A) ***Smt. Manju Parthi & Others v. Sh. Rohit Parthi*** reported in **2007 (99) DRJ 257** wherein it has been held as under:-

"4. For the following reasons, I locate no substance in these submissions. The law laid down in the above said authority does not dovetail with the facts of the present case. The facts of the present case are altogether different. It must be borne in mind that in this case the deceased defendant was proceeded against ex parte. He was deprived of the right to file the written statement. The petitioner has stepped into his shoes. The petitioner is not authorised to alter or amend that

situation. The proceedings are to start from that stage where the same were left by his father. Merely because he is legal representative of the deceased defendant, he does not get a new right to put the clock back and file the written statement as if the case had started afresh. Procedure is not meant to hamper the cause of justice or sanctify miscarriage of justice. The only remedy open to the petitioner is to move application for setting aside the ex parte decree, if sufficient grounds exist in his favor or that of his predecessor, or, if, he has got independent right, he can move an application for impleadment nor merely as a LR of the deceased but also in his personal capacity.

5. The above said view finds support from a case titled as Ramgopal and Anr. v. Khiv Raj and Ors. MANU/RH/0203/1998, wherein it was held:

7. In my opinion, the contention of the learned Counsel appearing for the petitioners is devoid of any force. It is settled law that the legal representatives are stepped into the shoes of the deceased-plaintiff or defendant, as the case may be, and they must adopt the position occupied by his predecessor plaintiff or defendant. The legal representatives, therefore, must proceed with the litigation from the stage where death of defendant or plaintiff had taken place. They are legally bound by the pleading of his predecessors-in-interest in whose place they have been substituted. Hence, the legal representatives substituted under Order 22, Rule 4; C.P.C. cannot set up a new case. The petitioners are bound by the proceedings taken so far against the deceased-defendant. They cannot be allowed to file the written statement, the right of which was closed as soon as the ex parte order was passed against the deceased-defendant-Govind Ram.

8. In this connection, I may refer to a decision of the Madras High Court in Thavazhi Kanavan v. Sankunni MANU/TN/0314/1934 : AIR1935Mad52 , wherein it has been observed as under:

A party who comes into the suit as the legal representative of another party cannot be allowed to depart from or vary or contradict the attitude taken up by the party whose legal representatives he is, it is obvious that if he were permitted to do so, it would be impossible to conduct any litigation where legal representatives come in.

9. I further place reliance on a decision of the Calcutta High Court in Babulal v. Jeshankar MANU/WB/0107/1972 : AIR1972Cal494 , wherein it has been observed as under:

A legal representative substituted in place of a deceased-defendant cannot be permitted to make out a new case afresh in another written statement at this stage. He has to take up the suit at the stage at which it was left when the original party died and to continue it. The only right he has is to make a defense appropriate to his character as a legal representative of the deceased-defendant. His case is on a different footing than the addition of a new defendant which is governed by Order 1, Rule 10(iv). therefore, only the order for substitution would be served on the substituted defendant and no fresh writ or summons could be issued for service on the substituted defendant.”

B) *Ramgopal & Anr. v. Khiv Raj & Others* reported in AIR 1998

RAJ 98 wherein it has been held as under:-

“2. The plaintiff-respondents No. 1 and 2 filed a suit for ejectment and arrears of rent against the deceased-defendant-Govind Ram and defendant-respondent No. 3 Moolchand. During the pendency of the said suit, defendant-Govind Ram expired on 29-7-1993. The plaintiff-respondents' No. 1 and 2 filed an application purporting to be under Order 22, Rule 4, C.P.C. along with an application under Section 5 of the Limitation Act. That application was allowed. It may be stated here that in that suit, an ex parte order was already passed against the defendants-Govind Ram and Moolchand because their counsel Hariram pleaded no instructions on their behalf;

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6. The learned counsel appearing for the defendants-petitioners has contended that an ex parte order was passed against the defendants when their counsel without contacting them pleaded no instructions. It caused lot of prejudice to the defendants but since Govind Ram died, his cause could not be pleaded. The legal representatives of deceased-defendant-Govind Ram, in the interest of justice, be given an opportunity to file the written statement contesting the suit filed by the plaintiff-respondents No. 1 and 2 so that justice may be done.

7. In my opinion, the contention of the learned counsel appearing for the petitioners is devoid of any force. It is settled law that the legal representatives are stepped into the shoes of the deceased-plaintiff or defendant, as the case may

be, and they must adopt the position occupied by his predecessor plaintiff or defendant. The legal representatives, therefore, must proceed with the litigation from the stage where death of defendant or plaintiff had taken place. They are legally bound by the pleading of his predecessors-in-interest in whose place they have been substituted. Hence, the legal representatives substituted under Order 22, Rule 4, C.P.C. cannot set up a new case. The petitioners are bound by the proceedings taken so far against the deceased-defendant. They cannot be allowed to file the written statement, the right of which was closed as soon as the ex parte order was passed against the deceased-defendant-Govind Ram.”

28. Mr. Nath submitted that petitioners have repeatedly and knowingly made false allegations to frustrate a valid Award. He rebutted the various contentions to the said effect.

29. Mr. Nath stated that the contention of petitioners that residential address of Mr. Rakesh Agarwal had been wrongly given by the respondent-claimant was false. He relied on HBL documents filed before the Registrar of Companies (in short “ROC”) showing the address of Mrs. Ruchi Agarwal and Mr. Rakesh Agarwal as 68, Uday Park, that is, the address at which Mr. Rakesh Agarwal was served. The same address had been mentioned by Mrs. Ruchi Agarwal as her address in the present petition. He further relied upon the Annual Report of GEL dated 30th September, 1991, and 30th September, 1993 filed before the ROC wherein the address of Mr. Rakesh Agarwal and Mrs. Ruchi Agarwal was shown as A-5, Gulmohar Park, New Delhi. He submitted that in view of same, the contention that Mr. Rakesh Agarwal was wrongly served at 68, Uday Park, Delhi was a false

submission made knowing it to be false.

30. Mr. Nath also denied the contentions of petitioners that respondent-claimant had fraudulently sold properties of GEL situated at Sohna. He pointed out that the Balance Sheet of GEL as on 31st March, 1995 showed receipt of consideration of Rs.122.72 lacs for the sale of Sohna lands. The said balance sheet also noted that lands other than Garden Estate were transferred during the year along with possession and had been booked as sale pending execution of a registered sale deed. He submitted that this was also a false submission made by petitioners knowing it to be false.

31. Mr. Nath also contended that the submission of petitioners that Mr. B.B. Patel was operating a bank account of GEL was also totally false. He stated that the respondent-claimant at no stage ever operated any account through Mr. B.B. Patel or otherwise in the name of GEL. He also stated that the allegation of the Official Liquidator to the said effect was simply based on no evidence whatsoever. The land at Sohna was sold by respondent-claimant to various purchasers and consideration received from sale of such land was accepted by the respondent-claimant in their own name.

32. Mr. Nath further stated that the plea taken by petitioners before this Court that GEL did not receive the consideration which is subject matter of the present arbitral proceedings was also absolutely false and

that no such a plea was ever raised before the Arbitrator and had been raised for the first time before this Court. He contended that all payments which are subject matter of the arbitral proceedings, namely, Rs.2.2 Crores were made by the respondent-claimant vide cheques drawn on Union Bank of India, F Block, Connaught Place, New Delhi. The Encashment Certificates from the said public sector bank form part of the record of arbitral proceedings/evidence. Accordingly, Mr. Nath stated that the submissions of petitioners to the contrary regarding non receipt of consideration were absolutely false.

33. Mr. Nath also contended that the petitioners were given several opportunities by the Arbitrator to cross-examine the witness of respondent-claimant, namely, Mr. B.B. Patel. The said witness was cross-examined at length for several hours on various dates.

34. Mr. Nath also stated that much had been made of the Board Resolution dated 15th February, 1991/31st July, 1991 in view of the provision incorporating the subsequent amendment of 1999. He further stated that although the witness might have stated in evidence that it was handed over in 1991, it might have been inadvertent and a matter of not proper reexamination. The Agreement pertaining to HBL was dated 18th November, 1999. It was possible that Mr. Rakesh Agarwal handed over the resolution during the negotiations for the said Agreement in view of the long outstanding overdue payment and obvious insistence of the respondents to secure themselves. Nothing much therefore should turn on the said document. He further stated

that the transaction was quite old.

35. Mr. Nath also stated that the Official Liquidator's report dated 28th August, 2008 was never filed before the Arbitrator though the Official Liquidator had appeared in the arbitral proceedings. He submitted that the aforesaid report was false and totally perverse as it ignored facts as well as the correct legal position. He stated that this Court in *Asha M. Jain Vs. Canara Bank & Ors.* reported in **94 (2001) DLT 841** had clearly recognised power of attorney sale and held them to be protected from attachment on account of dues of the transferor.

36. Mr. Nath lastly submitted that the grounds of challenge in Section 34 proceedings were limited and this Court cannot sit in appeal over the conclusion arrived at by the Arbitrator. He submitted that this Court cannot go into the merits of the case as a Court of appeal and delve into the arbitration record to find out the correctness or otherwise of the Award of the Arbitrator. He submitted that the Arbitrator is the sole judge both on law and facts and even if his decision was erroneous, it cannot be interfered with by a Court. According to him, sufficiency of reasons cannot be gone into by the Courts and the grounds relied upon and urged by petitioners were not available to them. According to him, the Arbitrator had dealt with all the said defences by giving sufficient and cogent reasons. In this connection, Mr. Nath relied upon judgments of Supreme Court in *Puri Construction Pvt. Ltd. Vs. Union of India* reported in **(1989) 1 SCC**

411, Hindustan Tea Co. Vs. K. Sashikant Co. & Anr. reported in *1986 Supp.(1) SCC 506* and *Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan & Ors.* reported in *AIR 1999 SC 2102*.

37. Mr. Neeraj Kishan Kaul, learned senior counsel appearing for respondent-claimant in the batch of petitions filed by AIL submitted that the petitioners at the same time could not approbate and reprobate. He stated that as the petitioners had stated in their Section 16 application that Mr. Rakesh Agarwal in collusion with respondent-claimant had signed the Agreement dated 18th November, 1999 as well as Personal and Corporate Guarantees, petitioners were estopped from now contending that the said documents had not been executed by Mr. Rakesh Agarwal. He further submitted that as the petitioners themselves had filed an application to file a written statement under Order 22 Rule 4 CPC, it did not lie in their mouth to now contend that the said provisions did not apply to the present case.

38. Initially, Mr. Kaul during the course of arguments suggested that the arbitral award should be read as having been passed against the petitioners in OMP Nos. 444-447/2006 in their capacity as legal representatives of the deceased Mr. Rakesh Agarwal and not either in their personal capacity or against their personal wealth. However, when asked to file a statement in writing to this effect, respondent-claimant did not do so as they were subsequently of the view that the said legal representatives might have dealt with the shares of HBL in a

bid to dilute the effect of the agreement executed between the parties and to frustrate the dues of the respondent-claimant. Learned senior counsel for respondent-claimant stated that they were not aware of the present shareholding of the petitioners and they would like to claim the entire shareholding which Mr. Rakesh Agarwal, his HUF and AIL owned on the date of the Agreement dated 18th November, 1999. According to him, the aforesaid petitioners may be personally liable in their individual capacity.

39. Having heard the parties at length and having perused the impugned Award, I am of the view that it would be appropriate to first outline the circumstances in which a Court can interfere with an arbitral award passed under the Act, 1996. The Supreme Court in *Delhi Development Authority Vs. R.S. Sharma and Company, New Delhi* reported in (2008) 13 SCC 80 after referring to a catena of judgments has held that an arbitration award is open to interference by a court under Section 34(2) of the Act, 1996 if it is:-

- (i) contrary to substantive provisions of law; or
- (ii) contrary to the provisions of the Arbitration and Conciliation Act, 1996; or
- (iii) against the terms of the respective contract; or
- (iv) patently illegal; or
- (v) prejudicial to the rights of the parties.

40. Supreme Court has further held in the aforesaid judgment that an award can be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality.

41. The Supreme Court in *McDermott International Inc. Vs. Burn Standard Co. Ltd. & Ors.* reported in (2006) 11 SCC 181 has also held as under :-

“The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc...”

42. In my opinion, arbitration is an alternative dispute resolution mechanism which binds only those parties who opt for it. Arbitration is consensual in nature. The arbitration clause normally does not bind those who are not parties to the arbitration agreement. The only exceptions to this rule are those who are bound either by virtue of statutory provisions like the legal representatives or by virtue of the contractual provisions like successors-in-interest. In fact, Section 40 of Act, 1996 stipulates that in the event of death of a party, the mandate of an arbitrator shall not terminate and the arbitration agreement shall not stand discharged except where by operation of law the right of action is extinguished.

43. In my opinion, legal representatives having become a party to the arbitral proceedings by virtue of a legal provision would be entitled to be treated with equality and would be entitled to full opportunity to present their case. The Act, 1996 itself explicitly states that an arbitral tribunal is not bound by the provisions of Code of Civil Procedure,

1908 and Evidence Act, 1872. In fact, the only principles by which an arbitral tribunal is bound are the principles of natural justice. In this connection, I may refer to Sections 18, 19 and 40 of Act, 1996. The relevant portion of Sections 18, 19 and 40 are reproduced hereunder:-

“18. Equal treatment of parties. –The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

19. Determination of rules of procedure. – (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

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40. Arbitration agreement not to be discharged by death of party thereto. – (1) An arbitration agreement shall not be discharged by the death of any party thereto either as respects the deceased or as respects any other party, but shall in such event be enforceable by or against the legal representative of the deceased.

(2) The mandate of an arbitrator shall not be terminated by the death of any party by whom he was appointed.

(3) Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person.”

44. In the present instance, the Arbitrator while recalling his initial order by which he had granted the legal representatives of Mr. Rakesh Agarwal a right to file a reply/written statement had observed that the legal representatives by virtue of Order 22 Rule 4(2) of CPC were entitled to file a reply/written statement, *“only appropriate to the character of the deceased from whom they have inherited the property.”* In my opinion, this observation of learned Arbitrator is based on a wrong proposition of law as the same is contrary to Sections 18 and 19 of Act, 1996 inasmuch as the Arbitrator was not bound by

technical rules of CPC. In any event, I am of the view that even if the Arbitrator was bound by the provisions of CPC, the said test is contrary to even Order 22 Rule 4(2) of CPC. The Supreme Court in ***Sumtibai and Others v. Paras Finance Co.*** reported in (2007) 10 SCC 82 has held as under :-

4. The appellants are the legal representatives of late Kapoor Chand. A suit was filed by the respondent herein against Kapoor Chand for specific performance of a contract for sale. It was alleged that Kapoor Chand had entered into an agreement to sell the property in dispute to the respondent-plaintiff, M/s Paras Finance Co. In that agreement Kapoor Chand stated that the property in dispute was his self-acquired property. During the pendency of the suit Kapoor Chand died and his wife, sons, etc. applied to be brought on record as legal representatives. After they were impleaded they filed an application under Order 22 Rule 4(2) read with Order 1 Rule 10 CPC praying, inter alia, that they should be permitted to file additional written statement and also be allowed to take such pleas which are available to them. The trial court rejected this application against which a revision was filed by the appellant which was also dismissed by the High Court. Hence this appeal by special leave.

5. We are of the opinion that a party has a right to take whatever plea he/she wants to take, and hence the view taken by the High Court does not appear to be correct.

6. Learned counsel for the respondent submitted that in view of Order 22 Rule 4(2) a person who has been made a party can only take such pleas which are appropriate to his character of legal representative of the deceased. Learned counsel also submitted that two of the applicants/legal representatives of deceased Kapoor Chand i.e. Narainlal and Devilal, had applied to the court under Order 1 Rule 10 to be impleaded, but their applications were rejected. An application was also filed by late Kapoor Chand praying that his sons be impleaded in the suit but that application was also rejected. Hence, the learned counsel submitted that the appellants cannot be permitted to file an additional written statement in this suit.

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8. Every party in a case has a right to file a written statement. This is in accordance with natural justice. The Civil Procedure Code is really the rules of natural justice which are set out in great and elaborate detail. Its purpose is to

enable both parties to get a hearing. The appellants in the present case have already been made parties in the suit, but it would be strange if they are not allowed to take a defence. In our opinion, Order 22 Rule 4(2) CPC cannot be construed in the manner suggested by learned counsel for the respondent.

(emphasis supplied)

45. In view of the aforesaid Supreme Court judgment, I am afraid that ***Smt. Manju Parthi and Ramgopal & Anr.***'s cases (supra) relied upon by Mr. Nath are no longer good law.

46. Even on first principles, I am of the view that a legal representative is entitled to raise all defences open to him provided such defences are not inconsistent with the stand taken by the deceased. Let us take a case where a deceased had not taken either a legal or a factual defence which was open to him. In my view, even in such a case the legal representative would be entitled to take this new plea as to deny him such a defence would be contrary to basic principles of fairness and justice as enshrined in the Indian Constitution.

47. As far as the respondent-claimant's submission that adopting such a course would lead to a fresh *de novo* trial causing serious injustice to them, I am of the view that in the present case when the legal representatives of Mr. Agarwal had filed their replies/written statements, the proceedings were at an initial stage as the trial had not commenced and no admission and denial of documents had taken place. In fact, subsequent to Mr. Rakesh Agarwal having been proceeded ex parte, no major development had taken place till the legal

representatives of Mr. Aggarwal had filed their replies/written statements. It is pertinent to mention that after Mr. Rakesh Agarwal had been proceeded ex parte, respondent-claimant had filed their evidence by way of affidavit after approximately a year.

48. I am further of the view that though the Arbitrator had not permitted the legal representatives of Mr. Rakesh Agarwal to file a reply/written statement in their personal capacity, yet while passing the final Award the Arbitrator had passed orders against their personal wealth and in their personal capacity. This would be apparent from the operative portion of the final Award in OMP No.444/2006 which reads as under :-

“In the light of the foregoing :-

a) I pass an award in favour of the claimant and against respondent no. 1 to 5 directing the said respondents to transfer their entire share holding held by them in M/s. Hotel Banjara Ltd. in favour of the claimant.

b) In the alternative, the respondents 1 to 5 will refund to the claimant an amount of Rs. 6,73,11,273/- along with interest @18% per annum pendente lite and future interest @ 18% per annum from the date of the award till the amount is actually paid to the claimant.

c) The respondent (1 to 5) are burdened with costs of Rs. 25,000/- “

(emphasis supplied)

49. I am also not in agreement with respondent-claimant's argument that in the present case, principles of natural justice had been duly complied with and no prejudice had been caused to the petitioners. In view of the fact that petitioners' replies/written statements were not taken on record, the petitioners were prevented from leading evidence

in support of their allegations and averments. Though petitioners and respondent-claimant made a number of allegations and counter-allegations on the factual aspects, I am not entering into the said controversy as I am of the view that it is for the Arbitrator to examine the said contentions. I may also mention that in view of the petitioners' allegations with regard to Board Resolution dated 15th May, 1991 read with the cross-examination of Mr. B.B. Patel as well as the report of Official Liquidator dated 28th August, 2008 in C.P. No. 122/1997, some prima facie doubts have been raised with regard to the validity of the transactions. I may emphasise that these are only prima facie doubts which can very well be explained and/or rebutted by respondent-claimant. But all that I say is that the said doubts need to be examined by an Arbitrator.

50. I agree with Mr. Nath that scope of interference with an arbitral award under Section 34 proceedings is limited and, consequently, I am of the opinion that principles of natural justice must be strictly complied with by an Arbitrator and every party must have a chance to at least once have a say before a forum of its choice. I emphasise that observations with regard to the Board Resolution and final report of Official Liquidator are tentative and the Arbitrator would be well within its right to arrive at any finding with regard to the same after allowing the parties to lead their evidence.

51. As far as the case of AIL is concerned, I am of the view that the Award against it is contradictory and inconsistent as on the one hand

the Arbitrator had dismissed the application filed under Section 16 of Act, 1996 on the ground that complicated question of facts were involved which required trial but on the other hand he simultaneously refused to permit AIL to file a reply/written statement and/or lead evidence. In fact, by this strange process of reasoning, the pleas raised by AIL in their Section 16 application have escaped adjudication.

52. In view of aforesaid discussion, I am of the opinion that the impugned Awards are violative of principles of natural justice and based on wrong proposition of law. Accordingly, the impugned Awards dated 10th June, 2006 are set aside.

53. Consequently, with consent of parties but without prejudice to the rights and contentions of respondent-claimant to file an appeal, Mr. Justice (Retd.) R.C. Chopra, N-7, Greater Kailash, Part-I, New Delhi, Mobile No.9818097777 is appointed as the new Arbitrator to adjudicate upon all the disputes between the parties. Learned Arbitrator would be entitled to fix his own fee schedule, which shall be equally paid by both the parties. Since initially claim statements were filed way back in the year 2002, I would request the newly appointed Arbitrator to conclude the present proceedings preferably within a period of nine months from today. The petitioners in present proceedings are directed to file their replies/written statements within a period of four weeks' from today. Parties are directed to appear before the Arbitrator on 20th February, 2010 at 11.30 a.m. It is made clear that learned Arbitrator would not grant any adjournment to either of the

parties for any reason whatsoever. I may mention that this categorical direction is being given as the disputes between the parties to the Agreement dated 18th November, 1999 have been pending for quite some time.

54. I once again clarify that anything said in the present judgment is not a reflection on merits of the case and would not prejudice the rights and contentions of either of the parties.

55. However, till the new Arbitrator appointed by this Court passes a final award, petitioners shall be bound by the voluntary statement made yesterday by Mr. Ganju, Senior Advocate that in the meantime petitioners would not transfer, alienate or create any third party rights in 75,000 shares of HBL held by M/s. Rakesh Agarwal HUF.

56. With the aforesaid observations, present petitions stand allowed but with no order as to costs.

MANMOHAN,J

JANUARY 15, 2010
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