

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

% *Judgment Reserved On : May 19, 2016*

Judgment Delivered On : June 03, 2016

+ **FAO(OS) 677/2015**

MOHAN LAL KUKREJAAppellant

Represented by: Mr.Arvind Nigam, Sr.Advocate
instructed by Mr.P.K.Dubey,
Mr.P.K.Mullick, Ms.Soma
Mullick, Ms.Priyanka Kakkar and
Mr.S.K.Deuria, Advocates

versus

SUNDER KUKREJA & ORS.Respondents

Represented by: Mr.P.V.Kapur, Sr.Advocate
instructed by Mr.Navin Chawla,
Mr.Aditya V.Singh, Mr.Ricky and
Mr.Anurag Sharma, Advocates for
R-1 & all LRs of R-3
Ms.Meenakshi Arora, Sr.Advocate
instructed by Ms.B.Swaraj,
Mr.Sidesh Kotwal,
Ms.S.Bhatnagar and Ms.Aasha
Kukreja, Advocates for R-2
Mr.Suman Kapur, Advocate with
Ms.Nachiketa Suri, Advocate for
R-4

FAO(OS) 29/2016

MADAN LAL KUKREJAAppellant

Represented by: Mr.Suman Kapur, Advocate with
Ms.Nachiketa Suri, Advocate

versus

SUNDER KUKREJA & ORS.

.....Respondents

Represented by: Mr.P.V.Kapur, Sr.Advocate
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Ms.S.Bhatnagar and Ms.Aasha
Kukreja, Advocates for R-3
Mr.Arvind Nigam, Sr.Advocate
instructed by Mr.P.K.Dubey,
Mr.P.K.Mullick, Ms.Soma
Mullick, Ms.Priyanka Kakkar and
Mr.S.K.Deuria, Advocates for R-4

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. Whereas Mohan Lal Kukreja fights for not only his reputation but even an asset, his brother Madan Lal Kukreja fights to protect his reputation because a finding of fact has been returned against them that they have forged a deed of retirement dated August 16, 1990. It is a slippery slope for Madan Lal and Mohan Lal because the challenge is to an award and the issue concerns a plea of an oral family settlement pleaded by Madan Lal and Mohan Lal with the deed of retirement dated August 16, 1990 at the fulcrum of the plea; and needless to state it is apparent that the award returns a finding of fact. Challenge to such awards is concededly on limited grounds. The slope to be climbed in

such a terrain is obviously a very slippery slope. The task of Mr.Arvind Nigam, Senior Counsel, on whose back Mr.Suman Kapoor Advocate, piggy rode, was obviously arduous, and learned Senior Counsel guided us through the climb very slowly, with care and caution to cross the bridges and the spurs, and as a surveyor, we plotted the path of the journey. The present decision would determine whether the learned Senior Counsel successfully reached the peak. Or the slippery slope took its toll.

2. To set the setting of the scene for our opinion, the Kukreja family did well for itself when it stood united. Dropadi Devi Kukreja and her husband Late Shri D.R.Kukreja were blessed with six sons named: (i) Jethanand, (ii) Shyam Lal, (iii) Lekhraj, (iv) Ram Chand, (v) Mohan Lal and (vi) Madan Lal. The family had incorporated a company: M/s. Mohan Overseas Pvt. Ltd. Business was carried on under the name and style: (i) M/s. M.M. Enterprises, (ii) M/s. Super Fashions (iii) Karan Exports (iv) Chander Creations, and (v) D.R.Kukreja & Co. A plot bearing No.13, Sant Nagar, East of Kailash, a flat at Indraprakash Building on Barakhamba Road, plot No.1055, New Friends Colony, 3 flats at DCM Building at Connaught Place and a cinema plot in East of Kailash where Sapna Cinema was established were acquired, and we must indicate in this paragraph itself that the pleadings are hazy and so is the evidence concerning the business of M.M. Enterprises, M/s. Super Fashions and Karan Exports. There is evidence that the plot at Sant Nagar was acquired by M/s. Mohan Overseas Pvt. Ltd. The plot at New Friends Colony was acquired in the name of Ram Chand Kukreja and currently is owned by his wife Chander Kukreja. The three flats at DCM Building in Connaught Place are currently in the name of Sunder, Raj Kumar and Mohan. The family had some business in the United States of America evidenced by admissions before the learned Arbitrator of bank

accounts in the United States of America. The family appears to have acted very inofficiously in their inter-se dealings, a facet which we shall highlight as we proceed along while noting the evidence.

3. The dispute with which we are concerned is the partnership business under the name and style D.R.Kukreja & Co. which owns Sapna Cinema.

4. The partnership firm was constituted on June 24, 1969 and from time to time was reconstituted when one or the other brother retired. Undisputedly with effect from July 10, 1984 five partners remained: (i) Mohan Lal, (ii) Madan Lal, (iii) Sunder, (iv) Raj Kumar and (v) Ram Chand. The dispute pertains to a claim by Mohan Lal and Madan Lal that on August 16, 1990 the other three brothers: (i) Sunder, (ii) Raj Kumar and (iii) Ram Chand retired from the partnership firm and executed the deed dated August 16, 1990 and took their share in the partnership firm being ₹50,000/- each, a fact which the three dispute and question their signatures on the deed dated August 16, 1990. Madan Lal who also is shown as having retired from the partnership firm accepts the execution of the deed, but as noted in para 1 above, joins his brother Madan Lal because the allegation by the three brothers is that both of them have connived to forge the deed. Therefore, Madan Lal fights the battle to save his honour and reputation. Mohan Lal fights to save not only his honour and reputation but even the asset of the partnership firm: Sapna Cinema.

5. The legal journey commenced when Sunder, Raj Kumar and Ram Chander filed a petition under Section 20 of the Arbitration Act, 1940, impleading Madan Lal and Mohan Lal as respondents, pleading that the three had been ousted from the partnership business from D.R.Kukreja & Co. and relied upon a deed of partnership dated July 10, 1984 which has

an arbitration clause. The deed is exhibit CW1/3 and is in Volume III of the record of the learned Arbitrator, in respect of which document we find a controversy, which needs to be noted only for the purpose to bring home that the brothers appear to be executing multiple documents on the same subject, contents being the same but type scripts are different, and this we note because Mr.Arvind Nigam, learned senior counsel appearing for Mohan Lal Kukreja used the document in conjunction with others and the deposition of the witnesses to urge that instant case warranted the learned sole Arbitrator: Justice (Retd.) D.P.Wadhwa to scan the evidence with hawk's eye.

6. The dispute was referred by the Supreme Court to the sole arbitration of Justice (Retd.) D.P.Wadhwa. Such part of the proceedings, the pleadings and the orders passed therein concerning the journey traveled by the petition filed under Section 20 of the Arbitration Act, 1940 would be noted by us as would be relevant to adjudicate the validity of the award pronounced by the learned sole Arbitrator.

7. Since the dispute relates to whether the partnership firm D.R. Kukreja & Co. was dissolved and a deed of retirement dated August 16, 1990 was executed by the five partners thereof i.e. on a question of fact, it is apparent that whereas Mohan and Madan Lal deposed the due execution of the deed of retirement and cited witnesses to support due execution thereof who deposed in sync and Sunder, Raj Kumar and Ram Chand deposed to the contrary. The evidence being voluminous we shall be noting the evidence led before the learned Arbitrator concerning : (i) the conduct of the parties, (ii) prior admissions concerning the deed dated August 16, 1990, (iii) admissions during evidence before the learned Arbitrator, and (iv) percipient and expert witness evidence regarding the deed dated August 16, 1990, in respect whereof learned

Senior Counsel for Mohan and Madan urged that by ignoring the same the judicious approach warranted by law to be adopted by an Arbitrator is missing and the countervailing evidence relied upon by Sunder, Raj Kumar and Ram Chand.

8. In the statement of claim filed by Sunder and Ram Chand and a separate statement of claim filed by Raj Kumar, they denied having executed any deed dated August 16, 1990 and asserted that the partnership continued. In the reply filed by Mohan Lal, who was the principal opponent, he pleaded that the family acquired a number of assets and established the business like M/s M.M.Enterprises, M/s Super Fashion, M/s Chander Creation and Mohan Overseas Pvt.Ltd. He referred to the family conducting business abroad and having a bank account in the USA operated by Raj Kumar. He pleaded that as per family decision the partnership firm D.R.Kukreja & Co. was dissolved on August 15, 1990 and a deed of retirement of said date was executed. He pleaded that Ram Chand took over the business of M.M.Enterprises, Madan Kukreja took over the business of Super Fashion, Sunder Kukreja took over the business of Mohan Overseas Pvt.Ltd. The business and assets of the firm D.R.Kukreja & Co. were taken over by him. He pleaded that after adjusting the debit balance in the name of the four partners as on August 15, 1990 they were paid ₹50,000/- each.

9. Relevant would it be to highlight that what was the jural status of M/s M.M.Enterprises, M/s Super Fashions and M/s Chander Creation was not stated. Who took over Chander Creations was not pleaded.

10. Needless to state, in the replication filed to the reply to the statement of claim, the claimants denied said assertion of any larger family decision and pursuant thereto businesses being divided. It was pleaded that M/s M.M.Enterprises was a partnership firm of only two

brothers who continued to be the partner thereof. It was pleaded that four brothers were partners of the firm M/s Super Fashion. Admitting that Mohan Overseas Pvt.Ltd. was a company in which the brothers and their wives had shares it was pleaded that after the assets and liabilities of the company were valued the shares were purchased by Sunder and his family members.

11. A little flash back is warranted. The journey travelled by the petition filed under Section 20 of the Arbitration Act, 1940. As noted above, Sunder, Raj Kumar and Ram Chand had filed the petition pleading ouster from the business. In the reply filed the stand taken by Mohan and his brother Madan was that the partnership stood dissolved when the deed dated August 16, 1990 was executed. No plea of a larger family settlement was pleaded by the two. In the replication filed, the petitioners denied their signature on the deed of dissolution and by consent the document was sent to the FSL laboratory for an opinion regarding signatures thereon of Sunder, Raj Kumar and Ram Chand. The report came that the signatures of Ram Chand and Sunder on the deed did not tally or match their signatures i.e. the signatures on the deed were forged, and as regards Raj Kumar the opinion was that no conclusive opinion could be given. But before the report was filed, IA No.900/1997 was filed under Order 6 Rule 17 of the Code of Civil Procedure to amend the reply filed to the petition under Section 20 of the Arbitration Act, 1940. The amendment sought to incorporate the plea of a larger family settlement. The application was dismissed on January 31, 2006 giving reason that this was an afterthought after FSL report had been submitted, a finding of fact which is incorrect because the FSL report was filed later and we simply note that contention of the respondents was that when IA No.900/1997 was filed the reference had

already been made to the handwriting expert for his opinion and in all probability Mohan and Madan got wind that the game was up. Vide order dated January 31, 2006 the dispute was referred to the sole arbitration of Justice (Retd.) D.S.Tewatia, an order which was set aside in the appeal by a Division Bench of this Court with a view taken that the learned Single Judge ought to have decided whether the partnership firm was dissolved; for if it was dissolved the question of any arbitrable dispute surviving did not arise. Matter reached the Supreme Court where Justice (Retd.) D.P.Wadhwa was appointed by consent as an Arbitrator with the mandate to decide whether the deed was genuine as also whether there was an overall family settlement which embrace dissolution of the partnership firm D.R.Kukreja & Co. as well.

12. Before the learned Arbitrator Mohan Lal led evidence. Because it was he who was affirming the execution of deed dated August 16, 1990 and the onus was on him. He examined himself as RW-1, one Pramod as RW-2, Jugal Uppal as RW-3 and his brother Madan as RW-4. The opponent to the claim petition examined themselves.

13. In his affidavit by way of evidence Mohan deposed that there was a larger family settlement concerning various family firms and he made a reference therein to proceedings before the Income-tax authorities wherein issue of capital gain arose and from said documents required the learned Arbitrator to infer that Sunder, Raj Kumar and Ram Chand admitted their signatures on the deed of dissolution and in any case had knowledge thereof much before they filed petition under Section 20 of the Arbitration Act, 1940 in June 1992 in the Delhi High Court. Madan deposed in sync. Pramod and Jugal Uppal who appeared as RW-2 and RW-3 claimed to be witnesses to the execution of the deed dated August

16, 1990, the latter having signed as a witness and the former as a chance witness.

14. The learned Arbitrator has disbelieved the two witnesses and since the grievance in the appeal is that the learned Arbitrator has overlooked the critical aspects of the testimony of the two witnesses, to disbelieve the two by overlooking the critical aspects amounts to a non-judicious approach and hence the finding in the award to said effect is liable to be set aside. We shall therefore be noting the argument of learned Senior Counsel for the appellants qua said aspect distinctly.

15. On the subject of admissions made by the three brothers, Sh.Arvind Nigam, learned Senior Counsel for Mohan Lal firstly drew our attention to question No.26 put to Mohan Lal as to what were the businesses of the family in the United States of America, to which he replied that before 1980 the family used to import almonds (*badam*) from America and the money was kept in an account maintained in Wells and Fargo Bank in the United States of America in the name of Cook & Co. which was transferred to Raj Kumar and at that time a sum of US\$ 10 million was lying in the account. The year of transfer was 1990. Learned Senior Counsel urged that no attempt was made to demolish this answer given by his client and therefore the inference of an admission by the three brothers that US\$ 10 million was given to Raj Kumar in the year 1990. Learned Senior Counsel referred to affidavit by way of evidence filed by Raj Kumar before the learned Arbitrator, in para 5 whereof he admitted money lying in a foreign account in USA but denied having got any money therefrom.

16. Learned Senior Counsel then took us through the testimony of Raj Kumar wherein he admitted ownership of the property at Sant Nagar, but denied that it was part of a settlement and claimed it to be his self-

acquired property. With reference to his deposition in said affidavit in paras 6 and 9, learned Senior Counsel urged that Raj Kumar claimed having acquired knowledge of the existence of the retirement deed dated August 16, 1990, on June 03, 1992 when he went to the office of the partnership firm in Sapna Cinema Complex, but as per his claim was denied entry. Drawing attention to the petition filed under Section 20 of the Arbitration Act, 1940, learned Senior Counsel urged that filed on June 11, 1992, Raj Kumar, a co-signatory to the petition made no reference to the deed of dissolution. Meaning thereby, at the first available judicial Forum he did not challenge the existence of the dissolution deed. With reference to his cross examination and in particular answers to questions No.1 to 11, learned Senior Counsel drew our attention to the fact that Raj Kumar admitted that the family had business in the United States of America with a specific admission by him that he had an account with Citi Bank, New York but said that he could not produce the account maintained by the bank in his name. Contrary to his claim in the affidavit by way of evidence that he had acquired the property at Sant Nagar in his name from his own funds, learned Senior Counsel drew our attention to the answers given by him to questions No.33 and 34, wherein he admitted that the property was owned by Mohan Overseas Pvt.Ltd. and that thereafter it was transferred in his name, but claimed that because he was the director in Mohan Overseas Pvt.Ltd. the ownership was transferred in his name. Learned Senior Counsel then drew our attention to further questions put to the witness wherein it was suggested to him that the property in Sant Nagar was of approximately ₹15 crores in the year 1990, to which he feigned ignorance. Confronted with his assertion that on what basis he was pleading that his share in the property i.e. Sapna Cinema, owned by the partnership firm, would be ₹5

crores, the answer given was that he could not justify his assertion. Learned Senior Counsel therefore urged that the inference would be that Raj Kumar got a property of equivalent value of his share in the land and building of Sapna Cinema. With reference to questions 60 to 75, in which Raj Kumar admitted that he was filing personal income-tax returns but feigned ignorance whether income derived from Sapna Cinema business was shown by him when he filed the returns post 1990, learned Senior Counsel urged that the witness was obviously lying or at least was hiding the truth. Emphasis was laid to the answer to question No.76 put to the witness during cross examination wherein he was confronted with the photocopy of an income-tax return filed by him on March 22, 1990 in which he had written that he was a partner in the firm till August 15, 1990; the answer being that the signatures appeared to be his. Referring to the document which the witness was confronted with, learned Senior Counsel urged that an admission was contained therein of he ceasing to be a partner of a firm post 1990. Referring to questions No. 77 to 88, wherein we find that Raj Kumar has been evasive regarding income tax return filed by him for the year 1991-1992 and statements made by him before the Income-tax department on March 06, 1995, and when confronted with documents he said that either he did not remember or that he did not want to say anything with regard thereto. Therefore learned Senior Counsel urged that there was sufficient material emerging therefrom of past admissions by Raj Kumar that he had ceased to be a partner of the firm. All of which as per learned Senior Counsel were not noted by the learned Arbitrator.

17. With respect to the testimony of Sunder and urging that the learned Arbitrator failed to note the evasiveness of Sunder, Shri Arvind Nigam, learned Senior Counsel drew our attention to the letter dated

March 27, 1997 with which the witness was confronted. The letter written by the ITO of Ward No.12(6) to the Inspector (Vigilance) makes a reference to the Income Tax returns filed by Sunder Kukreja, recording the fact that for the assessment years 1991-1992, 1992-1993 and 1993-1994 filed on December 30, 1991, August 31, 1992 and October 30, 1993 and Wealth Tax returns for the first two assessment years filed on April 26, 1994, Sunder has not shown any income from the firm M/s.D.R.Kukreja & Co. The letter makes a reference to the fact that Sunder gave a justification that he was wrongly removed from the partnership w.e.f. August 16, 1990 and therefore he does not have account of the partnership firm M/s.D.R.Kukreja & Co. The return referred to in the letter, bearing Sunder's signatures is at page 123-128 of Volume III (b) of the learned Arbitrator, and the same shows that Sunder has not mentioned while drawing up the statement of his assessable income, that he was unable to show the income from the partnership firm because he was denied access to the accounts thereof. With reference to these two documents our attention was drawn to question No.121 to 124 put to Sunder during cross-examination, wherein he replied that for the assessment year 1991-1992 the return filed by him was correct and tried to explain that in the return he did not show any income as a partner of the firm because as per him the return of the partnership firm was filed separately. The inference therefrom, as urged by learned Senior Counsel Shri Arvind Nigam, was that the same was good evidence of admission by Sunder that in his return for the assessment year 1991-1992 he had not shown any income as partner of the firm because he had retired therefrom in the year 1990 and his justification that a separate return was filed was just an assertion of fact without any proof. The argument was that the learned Arbitrator ought to have noted the same in his Award. Referring

to the Wealth Tax Rules as applicable for the assessment year 1992-1993, learned Senior Counsel urged that the return was filed beyond the stipulated date without an application for condoning the delay in late filing, meaning thereby the return was probably planted in the record. Linking Sunder's admissions made in the past or evasive answers, learned counsel drew our attention to Sunder's statement recorded by the I.T.O. on March 06, 1995 regarding he being a partner of the firm M/s.D.R.Kukreja & Co., in which Sunder said : *"As per the information gathered the books have been written up to 15.08.1990 but I have not seen the books"*. Concerning statement made by Ram Chand to the same Income Tax Officer on March 06, 1995 even he said *"Upto 15.08.90 has been written as per information. But I have not seen the books and the I.Tax return is also filed for part year 01.04.90 to 15.08.90."* Learned Senior Counsel urged that this was Sunder's admission that he was a partner of the firm only uptill 15.08.1990, and the grievance was that the learned Arbitrator has not noted the same. Linking these past statements of Sunder made before the Income Tax Officer, learned Senior Counsel took us back to Sunder's cross-examination before the learned Arbitrator from question No.129 onwards till question No.167 to bring home the point that the witness could give no satisfactory explanation of the wealth tax returns filed by him with regard to the date on which they were filed. The answer given by the witness to question No.141 that prior to August 1990 his signatures used to be obtained upon the balance sheet of the company, and the witness admitting the same, but giving no reasons as to why he never protested in the year 1991 by querying as to why his signatures were not being obtained on a balance sheet, learned counsel urged that this was good evidence of conduct and the grievance was this conduct being not even noted by the learned Arbitrator. Learned Senior

Counsel linked the documentary evidence to the questions put, being the statement of assessable wealth (revised) which is at page 124 of Volume III(A) of the record of the learned Arbitrator. Learned Counsel urged that what was produced by Sunder was the revised statement of assessable wealth and the date showed that it was filed to create evidence after the petition under Section 20 was filed. In said wealth tax return Sunder has valued his interest in the partnership firm and the valuation we note is as of the date March 31, 1990, a date prior to the date of the alleged dissolution of the firm, but criticality assumed with reference to the return being filed after the dispute between the parties had arisen and the argument being the filing thereof to create self-serving evidence. Similar is the position to the wealth tax returns for the next two assessment years, all of which have been filed after the petition was filed under Section 20 of the Arbitration Act, 1940. Taking us back to the initial part of cross-examination of Sunder qua Mohan Overseas Pvt. Ltd. learned Senior Counsel urged that the witness admitted that from the funds of M/s.D.R.Kukreja & Co. the company Mohan Overseas Pvt. Ltd. was incorporated as also firms such as Site International Vishnu Marbles, Karan Exports and Super Fashion. The witness admitted that funds generated by M/s.D.R.Kukreja & Co. were used to set up the capital of these firms. The argument advanced by learned Senior Counsel Shri Arvind Nigam was that all these admissions evidenced that the family acted inofficiously in its dealings and all the firms were the offsprings of M/s.D.R.Kukreja & Co. and the grievance was that the learned Arbitrator has not noted all this; which probalitized the defence of his client that springing from the partnership firm were other companies and firms which went to the other brothers and thus there was evidence of a larger family settlement. The witness was cross-examined by counsel for

Madan at length. Concerning his assertion in the affidavit by way of evidence that his entry was prevented in the cinema hall in May and June 1992 and on May 30, 1992 and June 01, 1992 he had made complaints Ex.CW-1/7 and Ex.CW-1/8 to the police. The purport of reading said cross-examination was to bring home the point that there was no mention of the deed of dissolution dated August 16, 1990 and learned counsel linked the admissions made by the witness which we have noted above regarding he having knowledge of the fact that the opposite side was claiming a deed of dissolution of said date and the knowledge was on dates prior to May 30, 1992. The argument was that the vacillating stand of the witness needed to be noted by the learned Arbitrator.

18. Concerning the report of the handwriting expert that signatures on the deed of dissolution were not those of Sunder learned Senior Counsel urged that Sunder admitted having changed his signatures when he learnt that somebody had tried to forge his signatures, an admission by Sunder not denied by his counsel. The argument took us to the report of the handwriting expert and learned Senior Counsel for Mohan took us to the testimony of the expert witness and his cross-examination to urge that the learned Arbitrator did not notice the documents picked up by the expert to compare Sunder's signatures on the deed of dissolution. The expert is one Mr.Mukhi. Learned Senior Counsel Shri Arvind Nigam took us through the testimony of the witness to highlight the document at page 169 that Ex.CW-4/N7 was Sunder's specimen signature dated September 05, 1989 when Sunder opened a saving bank account with Bank of Madurai. Learned Senior Counsel urged that the report of Mr.Mukhi overlooked that Sunder's admitted signatures closest to August 16, 1990 had to be considered, and this was the best document. Learned Senior Counsel argued that the report of the handwriting expert which has been

heavily relied upon by the learned Arbitrator had a fundamental flaw, of not comparing Sunder's disputed signatures with his admitted signatures closest to the point of time, coupled with the fact that Sunder admitted having changed his signatures when he learnt that an attempt was made to fraudulently withdraw money from his account. Learned Senior Counsel referred to Mr.Mukhi's examination-in-chief and his admissions as to which documents he has used as Sunder's admitted signatures to compare with the disputed one on the deed of retirement dated August 16, 1990. At the centre of gravity was the contention that such documents were considered which were far away from the date August 16, 1990 and the closest one being the one pertaining to when Sunder opened a saving bank account with Bank of Madurai on September 05, 1989 was ignored.

19. As regards Ram Chander, where once again the report of the handwriting expert was conclusive, that the signature on the deed of retirement were not those of Ram Chander, contention advanced was that the learned expert did not properly analyze his disputed signatures with the admitted ones. In this connection learned counsel drew our attention to a written statement filed by Ram Chander when his elder brother Jethanand had filed Suit No.2571/1988 questioning his exclusion from the partnership firm, which as noted above was re-constituted on July 10, 1984. In said suit Jethanand had filed a deed of partnership dated July 10, 1984, which Ram Chander admitted as the correct deed of partnership, but in the instant proceedings, though contents being the same, Ram Chander filed another deed of partnership where the typed script was different and the argument was that Ram Chander takes a stand convenient to him from time to time. He was capable of producing the same documents having two different transcripts and suggestive of even he capable of masking his signatures.

20. Pramod Bhargava RW-2 deposed that he was in marble business and Mohan Lal was also in marble business under the name M/s.Vishnu Marble having office in Sapna Cinema. He had supplied marble and stone to M/s.Mohan Overseas at Okhla Industrial Area. On August 16, 1990 he went to Sapna Cinema to settle account with Mohan and found Mohan sitting in his office with his brothers whom he knew from before. The Manager of the Cinema Sh.I.K.Malhotra and one Jugal Uppal were also in the office and he learnt that the brothers had assembled because Ram Chand, Madan Lal, Raj Kumar and Sunder were to retire as partners of D.R.Kukreja and Company. After sometime he saw the four brothers leave and Mr.Mohan Lal showed him the retirement deed bearing signatures of the brothers. Relevant would it be to highlight that the witness has not said that he witnessed the execution of the deed. On being cross examined he said that he reached Sapna Cinema at around 1:00 PM and stayed there for about an hour. Questioned whether his account was settled by Mohan, he replied in the affirmative and when asked whether he can produce any record to show that he had business with Mohan he said that the amount being small the settlement was in cash and he had no proof. With reference to his deposition that he had supplied marble to Mohan Overseas at Okhla on being questioned whether he remembered the address at Okhla, he could not give the address.

21. Jugal Uppal who appeared as RW-3 deposed that he was a businessman and knew Mohan and his brothers. All brothers executed the deed of retirement on August 16, 1990 in his presence and in the presence of the Manager of the cinema Sh.I.K.Malhotra. He said that one Pramod Bhargava had also come to office of Sapna Cinema. On being cross examined whether the writing work concerning the dissolution was

in his presence he replied in the affirmative but contradicted himself when asked how many papers were prepared and he answered that no document was prepared in his presence. He was questioned how many documents were brought for being executed. He replied that he did not remember. Questioned whether the papers were 20, 30 or 40, he replied that he did not remember but said there were a few. Questioned as to how many documents he witnessed, he said he witnessed only the dissolution deed. Questioned whether any money was transacted in his presence he replied that the amount was very small. Questioned whether any vouchers were signed in his presence, he said that some were signed but did not remember how many. Questioned whether any discussions were held between the brothers, he replied in the affirmative and said that the discussions were that Mohan would retain the cinema and the others would retire.

22. The argument of learned senior counsel Sh.Arvind Nigam for Mohan was that with passage of time persons forget minute details of events but remember the broad nature of the event and thus the witnesses could not be disbelieved. Nothing startling emerges from the cross-examination to discredit the witnesses.

23. On this aspect of the matter we need to note that when Mohan was cross-examined he said that Sunder had purchased the stamp papers for the retirement deed to be drawn. Since he had relied upon four vouchers signed by his four brothers in token of having accepted ₹50,000/- each he was questioned regarding the vouchers and said that the vouchers were prepared on the spot when the deed of retirement was signed.

24. In the impugned award dated May 26, 2014 the learned Arbitrator has first dealt with the testimony of the two witnesses Pramod Bhargava and Jugal Uppal, both of them claimed to be friends of Mohan. The

learned Arbitrator has held that Pramod Bhargava was not a dependable witness because he said that his accounts were settled on one day but would produce no documents and said that he had received the settled amount in cash. The witness was obviously a chance witness. As regards Jugal Uppal the learned Arbitrator has noted that as per Madan the separation took place on October 15, 1990. His cross examination with respect to the four vouchers wherein initially he maintained that the vouchers were prepared on August 16, 1990 but when confronted with the date August 15, 1990 put thereon he said that perhaps this was a mistake. Disbelieving him the reasoning of the learned Arbitrator proceeds:-

“When put to Madan Kukreja that signatures of three Claimants bearing on the Retirement Deed dated 16.08.1990 and on the vouchers bearing dated 15.08.1990 for having received ₹50,000/- were forged by Madan Kukreja in collusion with Mohan Kukreja, he stated that it was wrong. It was also suggested to Madan Kukreja that he has taken substantial amounts from Mohan Kukreja at the time of retirement from the partnership and for forging documents to that effect; he said it is wrong. Then questions were also put to Madan Kukreja as to how he withdrew from D.R.Kukreja & Co. and other business of the family as alleged by him, he said that he withdrew from the business in October – November, 1989 and August, 1990. He was also questioned as to which business he withdrew from and at what time and if amount was received by him as consideration for that. He said he received ₹12-15 lacs from Mohan Overseas which was on surrender of shares and from MM Enterprises. More questions in this regard were put to the witness as to what was the business of the family other than partnership business of Sapna Cinema. There was nothing in these questions as to when these businesses were acquired and from what funds.

Both Madan Kukreja and Mohan Kukreja admit that various parts of the vouchers have been prepared in their writing

except for the signature of the Claimants. These vouchers bearing name of D.R.Kukreja & Co. are prepared for evidencing payment of ₹50,000/- to each of the recipients (Claimants) and received by them under their signatures. Time and again Madan Kukreja stressed that the Retirement Deed and the vouchers were prepared at the same time on 16.08.1990. When confronted with the vouchers being prepared on 15.08.1990, the story advanced was that there was mistake in writing the date. When again confronted story changed that vouchers were prepared before 15.08.1990 when it was mutually agreed to dissolve the firm by retiring the claimants and Madan Kukreja and this were put in the Retirement Deed on 16.08.1990. There is more conflict evidently that both the Respondents could not explain as to when and how Retirement Deed was prepared and why stamp paper for executing Retirement Deed was prepared and why stamp paper for executing Retirement Deed was purchased 2½ months earlier to 16.08.1990.

The evidence of execution of the Retirement Deed and signatures of the witness on the document are not reliable.

Jugal Uppal who is one of the witnesses on Retirement Deed did not inspire confidence and rather points to the forgery of the Retirement Deed. As signatures of the claimants have been proved to be not their general signatures and they have been stating that they never signed the Retirement Deed and signatures purportedly to be theirs were not their signatures.

Madan Kukreja has not explained as to why he partly prepared the vouchers which did not appear to have borne the genuine signatures of the Claimants. The story put forward by Madan Kukreja, he withdrew from the business of D.R.Kukreja & Co. just getting ₹50,000/- inasmuch as Cinema business was no longer lucrative business. A bare perusal of the cross-examination of Madan Kukreja would show that he does conceal many facts, is not truthful witness and is coming in connivance with Mohan Kukreja. Certain questions were put to Madan Kukreja regarding the value of the property of Sapna Cinema and how the amount of ₹50,000/- paid to the claimants as retiring partners was

arrived at. Madan Kukreja expressed his ignorance. This would be quite evident from the following questions and answers in the cross-examination of the witness Madan Kukreja.

Q.35 I put it to you that you even did not go through the contents of the Retirement Deed dated 16.08.1990 and blindly signed the same?

Ans. It is incorrect. I read the Retirement Deed before signing.

Q.36 When did you first time see the Retirement Deed?

Ans. On 16.08.1990.

Q.37 At what time the Retirement Deed was produced before you and who else were with you?

Ans. It was noon time and all the retiring brothers were present.

Q.38 I put it to you that the Retirement Deed was prepared about two months before the date of Retirement Deed dated 16.08.1990?

Ans. I do not know.

Q.39 On what basis did you think that the share of a partner should be ₹50,000/- of a company having worth ₹25 crores?

Ans. We mutually decided.

Q.40 Did you offer your share to any other partner except Mohan Kukreja for ₹50,000/-?

Ans. It was mutually decided.

Q.41 I put it to you that retirement dated 6.08.1990 is the outcome of your only mind which you executed in collusion with Mohan Kukreja after taking hefty sum from him?

Ans. It is incorrect.”

25. Concerning the evidence that the dissolution was a part of the overall family settlement the learned Arbitrator found that there was just no material to show any such larger family settlement. Lastly, the learned Arbitrator has just discussed the opinion of Sh.S.N.Mukhi CW-4.

26. The learned Arbitrator concluded by posing some questions and some observations, highlighting as to what could be the best evidence. The conclusion arrived at is against Madan Lal and Mohan Lal. Said part of the award needs to be reproduced it reads:-

“(i) On Independent Day, 15.08.1990 that payment of ₹50,000/- to each of the partners was given in cash. Why not by cheques?”

(ii) Books of accounts have not been produced by the Respondents to show on 15.08.1990 how each of the retiring partner was entitled to ₹50,000/- as per the books of accounts of the partnership.

(iii) When this cash amount was withdrawn from the bank or was cash available with the Respondents from the proceeds of sale of tickets of cinema?

(iv) Market value of the Sapna Cinema on that day was running into crores though exact figure is not coming from the Respondents. It is also not shown by the Respondent as to how the figure of price of cinema hall would equate with the properties given to the retiring partners as alleged by the Respondents.

(v) The records of the Registrar of Firms, and that of the Motion Picture Association in respect of D.R.Kukreja & Co. show that the erstwhile partnership was still continuing.

(vi) There are different dates on the Retirement Deed and the vouchers and no acceptable explanation has been given.

(vii) The Non Judicial stamp paper on which alleged Retirement Deed has been written was purchased much before the date of its execution. Again no explanation is forthcoming as to how come that stamp paper should have been purchased much earlier and who got the stamp paper

purchased. Who prepared and how the subject of the Retirement Deed was written.

(viii) There have been changing of version as to how Retirement Deed got to be executed and when the settlement is alleged to have taken place.

(ix) During the cross-examination of Claimant No.2, Raj Kumar Kukreja, it was put to him that the value of the land of 300 sq.yd. on which his house is built situated at Sant Nagra (Next to East of Kailash) was ₹15 to 20 crores during 1992, Sapna Cinema building is on land of 2500-300 sq.yd. value of the land on which Sapna Cinema is built would therefore run into crores.

Best evidence would have been the Income Tax Returns from 1985 to 1990 and from 1990 to 2009 and the Assessment Orders which have become final. Attempt has been made to conceal the real value of the property – Sapna Cinema.

For me the issue is simple that there is a partnership dated 10.07.1984 which defines the specific shares of the five partners. It contains the terms of the partnership. Each partner has 20% share in the profit & loss of the business. Partnership is at Will. Each partner shall be entitled to retire from the partnership by giving six months' notice in writing to other partners of his intention to do or so by mutual agreement in writing. Admittedly no retiring partner has given notice. Books of accounts of the partnership have not been brought to show as to what of the funds were taken out and from which capital account or otherwise of the partner to invest in other business or for buying any property. Retirement Deed dated 16.08.1990 does not contain any recital as to which partner is to get which business/property. I would not therefore, go beyond the terms of Partnership Deed Retirement Deed.

Mr.Chawla referred to recitals in the Retirement Deed dated 16.08.1990 where it is mentioned that retirement took place with effect from 15.08.1990. Vouchers are dated 15.08.1990. Jugal Uppal, witness to the Retirement Deed stated that Retirement Deed was prepared in his presence which he signed. He did not say if any document was

prepared at that time i.e. 16.08.1990. Madan Kukreja, Respondent No.2 talked of Retirement Deed dated 15.08.1990. According to him the Retirement Deed and the voucher were all signed at the same time. According to Respondent No.2 it was Sunder Kukreja who brought the Retirement Deed. When confronted with the date of retirement and that appearing on the vouchers, Respondent No.2 said there was a mistake in nothing the date on the voucher which is 15.08.1990 and according to him it would have been 16.08.1990. No explanation is forthcoming as to how come that stamp paper on which the Retirement Deed is purported to have been executed was purchased on 22.06.1990. Endorsement on the stamp paper does not however show as to who purchased the stamp paper and for what purpose.”

27. In relation to a fact, the Indian Evidence Act, 1872 defines the word ‘Proved’: *‘A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.’* Easy said, but difficult to apply. For more often than not the rival parties bring on record material, some of which probabilizes the fact in issue and some which de-probabilizes it. Therefore, to succeed in proving a fact in issue, the party asserting the fact has to provide sufficient proof to convince the trier of the fact of the truth of the facts proved by the party, for the reason the trier of the fact in issue has to record the reason for the conviction in the belief of the truth of the facts proved; which reason has not to be subjective.

28. The problem now arises. What should be the degree of the conviction required to be objectively stated by the trier of the fact in issue to come to the conclusion that the asserter of the fact in issue has given sufficient proof to convince regard the truth thereof.

29. Since it is an incline to be climbed, the degree of conviction to cross the incline must be such which silences doubt for practical purposes; and not completely eliminate the doubt – for that would be near impossible. It is by now well recognized that absolute certainty is impossible to achieve and thus, at a civil trial, a preponderance of probability would suffice and at a criminal trial the proof must be beyond reasonable doubt.

30. No code has, and perhaps none can, specified any standard of persuasion and therefore the trier's discretion in reaching the conviction, based on his or her '*free evaluation*' of all the available evidence and the weighting of different types of evidence has to be recognized.

31. It simply means this. To '*establish by a preponderance of the evidence*' means to prove that something is more likely than not so. In other words, a preponderance of the evidence in the case is such evidence which, when considered and compared with that is opposed to it, has more convincing force and produces in the mind belief that what is sought to be proved is more rightly true than not true. The phrase '*more likely than not*' does not mean a 50+ per cent statistical probability, but to the formation of a minimal belief in the truth of what actually happened on the particular occasion.

32. When analyzing what actually happened on a particular occasion, one generally compares the coherence of the particularistic evidence with the various possible applicable causal theories. The more particularistic evidence there is that fit with a possibly applicable causal theory, the greater the fit. Although the assessment of level of fit would depend on the relative significance of the abstract element being instantiated in the overall story and particularly with respect to the central causal issue. But one has to be careful. One has to avoid attributing a causal relationship

based on spurious correlations. To wit : upon proof that every day B boards the bus to go to work place every morning exactly one hour after his neighbour has boarded a bus on the same route, does not mean that the neighbour boarding a bus is the cause for B to board a bus after one hour. Both actions are independent caused by factors such as the reporting time in the office and the distance to be travelled by the two from their house to reach their office.

33. Thus, in relation to appreciation of evidence, the judicial approach would therefore be limited to see whether the trier of the fact in issue has correctly directed himself, because in some cases, and as indeed in the present case, there is so much oral and documentary evidence which has been put in the midst, it may well be impossible to weigh sentence by sentence of what the parties have deposed and writing line by line the countervailing effect thereof.

34. Tested on the anvil aforesaid, we find that the award does not suffer from lack of judicial approach. The voluminous evidence was not to be seen by the Arbitrator by listing countervailing testimonies sentence by sentence or even paragraph by paragraph. It was enough for the learned Arbitrator to broadly note the contours of the evidence. We need not therefore deal with a plethora of judgments cited wherein awards have been set aside as either a perverse finding returned or sans any evidence but since they were cited we note the same:-

(i) (1987) 4 SCC 497 Municipal Corporation of Delhi Vs. M/s.Jagan Nath Ashok Kumar & Anr.

(ii) AIR 1989 SC 1263 Food Corporation of India Vs. Joginderpal Mohinderpal & Anr.

(iii) AIR 1995 SC 2423 Trustees of the Port of Madras Vs. Engineering Constructions Corporation Ltd.

- (iv) (2015) 3 SCC 49 Associate Builders Vs. Delhi Development Authority
- (v) 2015 (12) SCALE 370 Cochin Shipyard Ltd. Vs. Apeejay Shipping Ltd.
- (vi) (1994) 6 SCC 485 State of Rajasthan Vs. Puri Construction Co.Ltd.
- (vii) AIR 1989 SC 890 M/s.Sudarsan Trading Co. Vs. The Govt. Of Kerala & Anr.
- (viii) 2014 (3) ARBLR 116 (Delhi) Delhi State Industrial & Infrastructure Development Corporation Ltd. Vs. Rama Construction Company
- (ix) 2011 (123) DRJ 724 Thyssen Krupp Werkstoffe GMBH Vs. Steel Authority of India Ltd.
- (x) AIR 2010 SC 972 M/s.Ravindra Kumar Gupta & Company Vs. Union of India
- (xi) (1975) Vol.2 LLOYD'S LAW REPORTS 402 Exormisis Shipping S.A. Vs. Oonso, Democratic Peoples' Republic of Korea & Korean Foreign Transpiration Corporation
- (xii) (2003) 7 SCC 396 State of UP Vs. Allied constructions
- (xiii) (2004) 5 SCC 314 Sathyannarayana Brothers (P) Ltd. Vs. T.N.Water Supply & Drainage Board
- (xiv) (2013) 3 SCC 747 P.Radhakrishna Murthy Vs. National Buildings Construction Corporation Ltd.
- (xv) (2003) 12 SCC 144 Seth Mohanlal Hiralal Vs. State of M.P.
- (xvi) AIR 2001 SC 2062 M/s.Sikkim Subba Associates Vs. State of Sikkim
- (xvii) (2006) 13 SCC 401 Official Trustee of West Bengal Vs. Stephen Court Ltd.

35. A finding pertaining to a finding of fact being perverse or sans any evidence cannot be a precedent for it all depends on the material before the Arbitrator. At base is : has the Arbitrator taken a view which is plausible. If the Court find so, nothing beyond has to be seen by the Court.

36. The reasoning of the learned Arbitrator adopts the correct approach by considering the creditworthiness of Pramod Bhargava and Jugal Uppal the two percipient evidence witnesses and the view taken by the learned Arbitrator that their testimony does not inspire confidence is a plausible view. That the contraview is also possible is not be considered by us. Enough reasons have been recorded with reference to the claim of Mohan and Madan the other three brothers and the two also executed the deed of retirement to discredit the assertion and surely the view is a plausible view especially keeping in mind that as regards Mohan Overseas Pvt. Ltd. the account books were closed. Assets valued. Based thereon the shares were valued and one brother and his family members acquired the shares of the others for said value. This not having been the practice followed concerning separation of four brothers from Sapna Cinema shows that the parties were conscious that in the inter-se dealings through the partnership firm or company they could not act inofficiously. The law on the principles of appreciation of evidence to be applied inter-se dealing between family members would not apply in the instant case. Besides there is no evidence of what was the assets and liabilities of the other businesses which statedly were taken over exclusively by the brothers. No date is emerging when all this took place. We are using vague words for the reason the evidence is vague. There are assertions of various family businesses and that X was taken over by Y and A was taken over by B and so on, but without any material and interestingly

without even a date. If there was an overall family settlement regarding various business nothing prevented the parties from firstly drawing up a memorandum to act as the mother document. Further, there is just no date emerging; not even the year when all this happened. Surely, a larger family settlement for the brothers to separate and the family businesses being 7 or 8 would have the evidence of the separation taking place within a span of a few months. Concerning the shareholding in Mohan Overseas Pvt. Ltd. the testimony of Sunder shows that only those brothers who were share holders or whose wives or children were share holders had discussed for Sunder to take over the said company. This therefore could not be a part of an overall family settlement. Madan has admitted during cross-examination that a proper evaluation of the shares was got done through a chartered accountant. Mohan and Madan admit that for the value of the shares held by them they received money by a cheque. The evidence shows that the brothers have been speaking about M/s.M.N.Enterprises, M/s. Super Fashion and M/s.Chander Creation, with the stand of Madan and Mohan being that these businesses were established through the funds of the family nucleus, but there is just no evidence emerging in regard thereto. The evidence is very sketchy. Mohan admits in cross-examination that he was not a partner in M.M.Enterprises. Madan said that he does not remember when he ceased to be a partner. As regards Chander Creation Madan said '*Chander Creations was Ram Chand's baby. It was in his name.*' Regarding Super Fashion Mohan said that it was Madan's sole proprietary firm but as per Mohan, Madan got Super Fashion as his share in the family settlement. Evidence establishes that there was some business in Khandhar which was being s Jethanand and Lekh Raj. Mohan admits this. Mohan also admits in cross-examination that business in Germany and USA was

closed before 1980, and therefore these businesses could inherently not be a part of any family settlement. As regards the flats, the one at Indra Prakash building in the name of Sunder, Mohan's version that money was withdrawn from the account of the partnership firm has simply remained an assertion. Sunder admits that money went out of the firm but said that it was debited to his personal account. Mohan who was in possession of the books of accounts did not produce the same and thus an adverse inference needs to be drawn against him. Same is the position regarding a flat in the DCM building. Regarding the house at New Friends Colony, Mohan admits that he has no proof that any money was paid from the accounts of the firm. Another flat in the DCM building in the name of Raj Kumar is again sans any material that money was paid from the account of the firm. The property at Sant Nagar was transferred in name of Raj Kumar and this is simultaneous to when Sunder, Mohan and Madan transferred their shareholding in the company Mohan Overseas Pvt. Ltd. in the name of Raj Kumar. There is reference to another firm Karan International but without anything more.

37. The learned Single Judge has rightly repelled the challenge to the award. We concur.

38. The appeals are dismissed but without any order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

JUNE 03, 2016
mamta/skb/rk