

(2019) 10 BOM CK 0047
In the Bombay High Court
Case No : Arbitration Petition No. 990 Of 2016

Hemant D. Shah And Anr

APPELLANT

Vs

Chittaranjan D. Shah And Anr

RESPONDENT

Date of Decision : 15-10-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 8, 9, 11, 33, 34
Securitisation And Reconstruction Of Financial Assets And Enforcement Of Securities
Interest Act, 2002 — Section 13, 17
Evidence Act, 1872 — Section 101, 102, 114, 114(g)
Code Of Civil Procedure, 1908 — Order 21 Rule 58, Order 21 Rule 97, Order 21 Rule
98, Order 21 Rule 99, Order 21 Rule 100

Citation : (2019) 10 BOM CK 0047

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Nikhil Sakhardande, Mayur Khandeparkar, Shubra Swami, Ajay
Panicker, Amit, Phiroz Colabawalla, Rohan Savant, Gobinda C. Mohanty

Final Decision : Dismissed

Judgement

1. By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996, the petitioners have impugned the arbitral award dated 15th April, 2016 rejecting the claims filed by the petitioners and directing the petitioners to pay cost of Rs.7,00,000/- to the respondents. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The petitioners were the original claimants whereas the respondents were the original respondents in the arbitral proceedings. On 2nd April, 1977 V.U.Shah Family Trust and N.U.F.Shah Family Trust and C.U.Shah Family Trust constituted a partnership firm in the name and style of M/s. Prospective Traders. On 9th December, 1985, the original partners thereafter took the petitioners and the respondents as partners of the said firm. Clause 11 of the said Deed of Partnership provided that upon retirement of any of the partners, the partnership shall not be dissolved but the same shall continue as regards the continuing

partners. Clause 16 of the said Partnership Deed provides for arbitration.

3. It is the case of the petitioners that on 24th April, 1998, the original partners served notice of retirement through their advocates giving three months notice of their intention to retire from the said firm. Upon retirement of the original partner, the petitioners and the respondents are the only partners of the said firm having equal share in the said firm pursuant to the said Deed of Partnership dated 9th December, 1985. It is the case of the respondents that by a Partnership-cum-Retirement Agreement dated 30th December, 1987 and 3rd July, 1995, the original partners had retired on 30th December, 1987. The petitioners themselves had retired on 3rd July, 1995. The share of each partners under clause (7) of the said partnership were (a) petitioner no.1 HUF - 36%, (b) petitioner no.2 - 14%, (c) respondent no.1 HUF - 22%, (d) respondent no.2 - 28%. The petitioners have disputed their signatures on the Retirement Deed dated 30th December, 1987.

4. On 9th March, 1994 with a view to settle the disputes between the family members, an MOU was executed between the petitioners, their son Samir, respondent no.1, his wife, his two sons and respondent no.2. It is the case of the petitioners that the petitioners were not parties to the said MOU. The suit firm was not part of the said MOU because MOU pertained only to family of Mr. Hemant D. Shah and Mr. Chittaranjan D. Shah and excluded entities in which third parties were involved. It was the case of the respondents that in accordance with the said MOU dated 9th March, 1994, on 3rd July, 1995, the petitioners had allegedly signed a Deed of Retirement cum Partnership dated 3rd July, 1995 and the petitioners allegedly retired from the suit firm. It is the case of the petitioners that they did not sign any such alleged Retirement Deed dated 3rd July, 1995.

5. On 15th December, 1995, Mr. N. U. Shah a partner of the suit firm addressed a letter to the petitioner no.1 enclosing the Balance Sheet and Profit and Loss Account of the suit firm as on 31st March, 1995. According to the petitioners, the said Balance Sheet as on 31st March, 1995 showed the names of the original partners as well as the names of the petitioners and the respondents in the column of 'Partners Capital'. On 25th March, 1996, the petitioners addressed a letter to the Allahabad Bank alleging that they were the partners of the suit firm and informed that they had not authorized any partner to deal with the said Allahabad Bank for the property of the said firm.

6. It is the case of the petitioners that on 8th July, 1996, a draft letter dated 'NIL' which had to be sent to Allahabad Bank and a draft of the letter of authority which had to be given by all the 7 partners including three original partners to the said Bank giving authority to respondent no.1 to deal with Allahabad Bank was sent by respondent no.1 to petitioner no.1 for his signatures. On 9th July, 1996, the petitioners addressed a letter to the respondent no.1 regarding the draft letter to Allahabad Bank which was received from the respondent no.1. The petitioner no.1 sought details of the deal which was being negotiated with

Allahabad Bank by respondent no.1 and Mr.V.U.Shah. The petitioner no.1 pointed out that the petitioners had written a letter on 25th March,1996 because the deal was being discussed without the knowledge of other partners. The petitioner no.1 asserted that Mr.V.U.Shah group were the partners in the suit firm.

7. On 9th July, 1996, the respondent no.1 responded to the said letter dated 9th July, 1996 addressed by the petitioner no.1 and informed that there was no deal with Allahabad Bank but because of the letter of the petitioner no.1 dated 25th March, 1996, the bank presumed that there was some dispute amongst the partners and so required an authority letter from all the partners. The respondent no.1 enclosed four letters which were addressed by him to Allahabad Bank. It is the case of the petitioners that even in the said letters it would clearly indicate that the petitioners were the partners of the suit firm even on 9th July, 1996.

8. On 19th May, 1997, the petitioner no.1 addressed a letter to the suit firm seeking balance-sheet and profit and loss account for the years 1994, 1995 and 1996 and also on 31st March,1997 if they were finalized. On 24th July, 1997, Mr.N.U.Shah, one of the original partner of the suit firm addressed a letter to the petitioner no.1 and enclosed the balance-sheet and profit and loss account of the firm for the year 1994, 1995 and 1996 which showed the names of the original partners as well as names of the petitioners and the respondents in the column of 'Partners Capital'. It is the case of the petitioners that even those balance-sheet and profit and loss account would clearly show that even on 24th July, 1997, the petitioners and the original partners were the partners of the suit firm.

9. On 24th April, 1998, the three original partners to the remaining partners i.e. V.U.Shah Family Trust, N.U.F.Shah Family Trust and C.U.Shah Family Trust retired from the suit firm. It is the case of the petitioners that the petitioners who originally held 35% and the respondents who also originally held 35% continued as partners of the firm. The petitioners were thus entitled to 50% share and the respondents were also entitled to 50% share respectively.

10. It is the case of the petitioners that another partnership firm viz. Shah Thakur & Sons consisting of respondent no.1 C.D.Shah HUF and petitioner no.1 H.D.Shah HUF had entered into a development agreement with NABARD. For the purpose of carrying out construction, Allahabad Bank had granted overdraft facility of Rs.95 lacs to the said firm for which the property owned by the suit firm was mortgaged. Since there was a default in repayment, Allahabad Bank initiated securitization proceedings by issuing a notice under section 13 of SARFAESI Act. The respondents had entered into a Lease Deed dated 2nd April, 2005 with Allahabad Bank for the property owned by the suit firm. The rental income received was to be adjusted as against the installment to be paid to Allahabad Bank towards overdraft facility obtained by M/s.Shah Thakur & Sons. It is the case of the petitioners that since both the respondents were declared insolvents on the relevant dates they could not have signed the lease deed with Allahabad Bank.

11. It is the case of the petitioners that the petitioner no.1, respondent no.1 and the suit firm along with M/s.Shah Thakur & Sons filed an application under section 17 of the SARFAESI Act. In the securitization proceedings, the petitioner no.1 was described as one of the partners of M/s.Shah Thakur & Sons. It is the case of the respondents that by a Deed of Dissolution dated 1st July, 2005, respondent no.2 retired from the partnership as from the close of business on 31st March, 2005 and as a result thereof the respondent no.1 become the sole proprietor of the suit firm from 1st April, 2005.

12. On 22nd November, 2005, the petitioners through their advocates addressed a letter to the respondents and placed various facts on record and called upon the respondents to produce certified copies of the alleged Deed of Retirement purported to have been signed by the petitioners within seven days from the date of receipt of the said notice. There was no response to the said notice dated 22nd November, 2005. On 9th December, 2005, the petitioners through their advocates sent a reminder to the respondents for complying with the requisitions made in the petitioners' advocates letter dated 22nd November, 2005. There was no response to the said letter also from the respondents.

13. On 24th January,2006, the petitioners through their advocates addressed a letter to the Allahabad Bank on behalf of the petitioners as partners of the suit firm highlighting the alleged illegality in the Lease Deed dated 2nd April, 2005 and referred to the letter dated 25th March, 1996 by which the Allahabad Bank was informed that the petitioners had not given any authority to any partners to deal with the property of the suit firm. The petitioners called upon the Allahabad Bank to provide a true copy of the Partnership Deed and any other document concerning the lease.

14. On 10th April,2006, the petitioner no.1 filed a reply to the second Miscellaneous Application filed by the respondent no.1 on behalf of the suit firm and contended that the respondent no.1 had no authority to represent the suit firm and to file the said application on behalf of the suit firm.

15. On 13th April, 2006, the respondent no.1 filed rejoinder in the Securitization Application and annexed a copy of the alleged authority letter dated 4th September, 1986, a copy of the alleged Retirement-cum-Partnership Deed dated 30th December, 1987 by which the original partners had been purported to have been shown as having retired from the firm. It is the case of the petitioners that it is not pleaded by the respondent no.1 that the petitioners had retired from the partnership firm. The petitioner no.1 filed a detailed written statement on 2nd May, 2006 to the said Securitization Application and once again asserted that the respondent no.1 had no authority to represent the suit firm in the said proceedings.

16. It is the case of the petitioners that on 24th May, 2006, the respondent no.1 filed a rejoinder in the Securitization Application and alleged for the first time that the petitioners had retired from the suit firm on 3rd July, 1995. The

respondent no.1 however did not annex a copy of the said alleged Deed of Retirement to the said affidavit in rejoinder filed in the said Securitization Application. On 17th June, 2006, the petitioner no.1 invoked arbitration agreement recorded in the Partnership Deed dated 9th December, 1985. There was no response to the said notice invoking arbitration agreement from the respondents.

17. On 30th September, 2006, the petitioners through their advocates' letter issued a notice of dissolution of the suit firm to the respondents. In the month of August 2009, the petitioners filed an arbitration petition bearing no. 681 of 2009 under section 9 of the Arbitration Act against the respondents and prayed for appointment of the Court Receiver and injunction restraining the respondents from alienating the only property of the suit firm at Manish Commercial Centre, Worli.

18. It is the case of the petitioners that only on 24th November, 2010, in the sur-rejoinder filed by the respondents in the said Arbitration Petition No.681 of 2009, the respondent no.1 produced alleged Deed of Retirement cum Partnership dated 3rd July, 1995, alleged Deed of Dissolution dated 1st July, 2005, alleged Deed of Partnership cum Retirement dated 30th September, 2009 and alleged Deed of Retirement dated 4th November, 2009. Under the said alleged Deed of Partnership cum Retirement dated 30th September, 2009, new partners were alleged have been inducted in the suit firm i.e. respondent no.1 - 10%, Ms.Gayatri Sachin Shah - 45% and M/s.Sachin Trust - 45%. By the alleged Deed of Retirement dated 4th November, 2009, the respondent no.1 alleged to have been retired from the suit firm w.e.f. 31st October, 2009. According to the said Deed of Partnership, Ms.Gayatri Sachin Shah and M/s.Sachin Trust are entitled to equal share in the profit and loss and assets of the suit firm.

19. Sometime in the year 2010, the petitioners filed an arbitration application under section 11 of the Arbitration Act bearing Arbitration Application No.43 of 2010 in this Court inter alia praying for appointment of the sole arbitrator. On 27th January, 2011, this court disposed of the said arbitration application and appointed the learned sole arbitrator.

20. It is the case of the petitioners that on 28th January, 2011, the petitioners obtained report from the handwriting expert which stated that the disputed signatures of the petitioners did not match the admitted signatures and showed a different penmanship. On 22nd March, 2011, the petitioners obtained second handwriting expert's opinion which stated that the disputed signatures/initials have not been written by the writer of the specimen signature i.e. the petitioner no.1. On 12th April, 2011, the petitioners filed a police complaint against the respondents for commission of offences pertaining to criminal breach of trust, cheating, forgery and criminal conspiracy/common intention punishable under Indian Penal Code.

21. The learned arbitrator framed various issues. The petitioners led evidence of

Mr.Hemant D.Shah, the petitioner no.1 in support of their claim. The respondents examined the respondent no.1 as their witness. The said Mr.C.D.Shah filed his affidavit in lieu of examination in chief. However, after his cross examination for sometime, the said Mr.C.D.Shah did not remain present for further cross examination by the petitioners' counsel.

22. The petitioners through their advocates' letter dated 5th December, 2013 invited kind attention of the learned arbitrator that the only witness of the respondents Mr.Chittaranjan D.Shah was avoiding his cross examination. It is the case of the petitioners that in the said letter, the petitioners brought out various instances on record to show that Mr.Chittaranjan D.Shah was physically and mentally fit. The petitioners requested for completion of the cross examination of the respondents' witness on day to day basis before the commissioner to be appointed by the learned arbitrator and also to complete the evidence formalities of Mr.Chittaranjan D.Shah at either at his office or at his residence. The petitioners also invited kind attention of the learned arbitrator to the fact that any adjournment or postponement of the arbitral meeting shall cause severe prejudice to the petitioners and would encourage the respondents to further delay the disposal of the matter.

23. In the arbitral meeting held on 10th January,2014, the learned arbitrator directed that the final arguments should take place without the evidence of the respondents' only witness Mr.Chittaranjan D.Shah being conducted and recording that no other witness had been produced by the respondents in support of their case. The petitioners and the respondents thereafter filed their respective written submissions before the learned arbitrator.

24. On 15th April, 2016, after the period of almost a year from the closure of the final arguments, on 29th April, 2015, the learned arbitrator rejected the claims made by the petitioners with cost quantified at Rs.7,00,000/- and directed the petitioners to pay the said amount to the respondents. The learned arbitrator held that the petitioners as well as the original partners ceased to be partners of the suit firm by virtue of the Deeds of Retirement cum Partnership dated 3rd July, 1995 and 30th December, 1997 respectively. The petitioners have impugned the said arbitral award in this petition filed under section 34 of the Arbitration Act.

25. Mr.Sakhardande, learned counsel for the petitioners invited my attention to some of the exhibits annexed to the arbitration petition, compilation of documents filed by the parties, grounds raised in the arbitration petition and various portions of oral evidence led by the parties and the findings rendered by the learned arbitrator. It is submitted by the learned counsel that the petitioners and the respondents had equal shares in the suit firm. The Partnership Deed dated 9th December 1985 is the only valid and subsisting Deed of Partnership. The said partnership was a partnership at Will. He submits that the respondents, on the other hand, had placed reliance upon two alleged Partnership-cum-Retirement Deeds dated 30th December 1987 and 3rd July 1995 respectively in support of their case that the original partners had first retired on 30th

December 1987 and the petitioners had retired on 3rd July 1995.

26. Learned counsel invited my attention to the points for determination framed by the learned arbitrator and more particularly point nos.(3A) and (3B) and would submit that the onus was on the respondents to prove that the petitioners ceased to be the partners of the suit firm by virtue of documents dated 30th December 1987 and 3rd July 1995. He submits that both these documents were admittedly disputed by the petitioners before the learned arbitrator. None of these documents were marked as exhibits before the learned arbitrator in view of the objections raised by the petitioners.

27. The petitioners had examined the petitioner no.1 in support of their claim and to discharge the burden cast on the petitioners in respect of some of the points framed by the learned arbitrator. He submits that the respondents, on the other hand, had examined only the respondent no.1 i.e. Mr.Chittaranjan D. Shah who had filed his affidavit in lieu of examination-in-chief. He submits that the cross-examination of the said witness examined by the respondents could not be completed in view of the said witness remaining absent for further cross-examination after replying to 42 questions on the ground of his alleged sickness. Learned counsel submits that the petitioners had specifically raised this issue before the learned arbitrator and had specifically addressed a letter on 5th December 2013 inviting the attention of the learned arbitrator that the respondent no.1 who was the only witness examined by the respondents was avoiding his cross-examination.

28. It is submitted that the petitioners had demonstrated before the learned arbitrator that the respondent no.1 had been physically and mentally fit and requested the learned arbitrator for completion of the cross-examination of the respondents' witness on a day to day basis before a Commissioner who could be appointed by the learned arbitrator either at his office or at his residence for convenience of the said witness. The petitioners had also brought to the notice of the learned arbitrator that any adjournment or postponement of the arbitral meeting would cause severe prejudice to the petitioners and would encourage the respondents to further delay the disposal of the matter.

29. Learned counsel invited my attention to the Minutes of Meeting held on 10th January 2014 by the learned arbitrator recording the statement made by the learned counsel for the respondents that the respondent no.1 was medically not in a position to continue giving evidence in cross-examination. The respondents also made a statement before the learned arbitrator that they did not propose to examine any other witness and they closed their case. Learned arbitrator accordingly adjourned the matter to 31st January 2014 for arguments.

30. Learned counsel for the petitioners invited my attention to the findings rendered by the learned arbitrator on the issue as to whether the evidence of the respondents' witness could be considered or not in view of the said witness having remained absent for the purpose of his further cross-examination and

more particularly in paragraphs 17 to 21. He submits that the finding of the learned arbitrator that both the sides were aware of medical condition of the witness and there was no dispute that he was not in a position to give further evidence is *ex facie* contrary and overlooking the letter dated 5th December, 2013 addressed by the petitioners through their advocate to the learned arbitrator. The petitioners had placed on record that during the period from April 2013 till the writing of the said letter, the respondent no.1 had been physically and mentally fit and had personally attended various proceedings before the Debt Recovery Tribunal, Mumbai, had attended Annual General Meeting and collected monies from the Debt Recovery Tribunal, Mumbai in his capacity as the Treasurer of the Society on 30th October 2013, had addressed various letters on his letterhead to the members of the society dated 14th October 2013 and 20th November 2013, had filed affidavit-in-reply dated 6th September 2013 in the Notice of Motion No.3087 of 2013 in S.C. Suit No.3805 of 2011 before the Bombay City Civil Court, had attended the proceedings in this Court on 10th July 2013 and subjected himself for cross-examination in Suit No.466 of 1991, had filed CAAST No.28529 of 2013 and had regularly attended his business at his office from 11.00 a.m. to 4.30 p.m. from August 2013 till date.

31. The petitioners had specifically raised an issue that the respondent no.1 was avoiding his cross-examination in the arbitral reference and delaying the proceedings though during the same period i.e. from April 2013 to December 2013, he had systematically attended to his business in usual course and had attended various proceedings in different Courts. He submits that the finding of the learned arbitrator thus shows patent illegality.

32. It is submitted by the learned counsel that since the alleged Partnership-cum-Retirement Agreements dated 30th December 1987 and 3rd July 1995 strongly relied upon by the respondents in support of their submission that the petitioners had retired on 3rd July 1995 and the original partners had retired on 30th December 1987 were not proved by the said witness examined by the respondents, learned arbitrator could not have rendered a finding by relying upon those disputed documents that the petitioners stood retired from the suit firm by virtue of the documents dated 30th December 1987 and 3rd July 1995 as alleged by the respondents.

33. Learned counsel invited my attention to the findings rendered in paragraph 24 of the impugned arbitral award and would submit that the finding rendered in the said paragraph that the original partners had not disputed their signatures on the documents nor had taken any steps to set aside those documents is thus totally perverse. He submits that the finding of the learned arbitrator that there was no fresh Deed of Partnership continuing partnership thereafter under which the shares of the continuing partners i.e. the petitioners and the respondents had been specified on the alleged retirement of the original partners is also *ex facie* perverse and is rendered ignoring the vital documents produced by the petitioners.

34. It is submitted by the learned counsel that the contention of the petitioners that signature of the petitioners were forged and fabricated had been rejected by the learned arbitrator on the ground that the petitioners had not examined any handwriting expert is also totally perverse. The onus was on the respondents to prove that the petitioners had signed the said two disputed documents which onus was not discharged by the respondents. The petitioners had produced sufficient evidence on record before the learned arbitrator such as balance sheet and profit and loss account of the suit firm for the subsequent date of the alleged retirement of the petitioners as well as the original partners from the suit firm and also various correspondence exchanged between the respondents and the Allahabad bank and the respondents and the petitioners accepting the petitioners as partners of the suit firm even after the date of the alleged execution of the Partnership-cum-Retirement Agreements dated 30th December 1987 and 3rd July 1995.

35. It is submitted by the learned counsel that the balance sheet and the profit and loss account of the suit firm and various such correspondence produced on record by the petitioners between the petitioners and the respondents, the respondents and the Allahabad bank have been totally ignored by the learned arbitrator which documents were duly proved by the petitioners and in any event not disputed by the respondents. The award shows patent illegality on this ground alone. Learned counsel for the petitioners strongly placed reliance on the judgment of the Supreme Court in the case of Ssangyong Engineering & Construction Co. Ltd. Vs. National Highways Authority of India, 2019 SCC OnLine SC 677 and in particular paragraph 42 in support of the submission that the learned arbitrator having ignored the vital evidence in arriving at her decision is perverse and is liable to be set aside on the ground of patent illegality.

36. Learned counsel for the petitioners also placed reliance on the judgment of this Court in the case of Zee Entertainment Enterprise Limited Vs. Klassic Studios & Films Pvt. Ltd., (2013) 7 Bom CR 357 and in particular paragraphs 20 and 22 thereof. He submits that in the said judgment, this Court had held that since the material and crucial evidence were not considered by the learned arbitrator in the impugned award, such award warranted interference under Section 34 of the Arbitration and Conciliation Act, 1996.

37. In support of his submission that the respondent no.1 having failed to offer himself for cross-examination and thus his evidence in examination-in-chief could not have been considered by the learned arbitrator, learned counsel for the petitioners placed reliance on the judgment of the Supreme Court in the case of Vidhyadhar Vs. Manikrao & Anr., (1999) 3 SCC 573 and in particular paragraph 17 thereof.

38. Learned counsel for the petitioners invited my attention to the compilation of documents of the respondents (Compilation II-A) consisting of 7 documents. He submits that the learned arbitrator in the Notes of Evidence dated 17th July 2013 clearly recorded that documents at Serial Nos.1 to 5 of the said Compilation II-A

were marked as Exhibits "RW-10 to RW-14" respectively subject to proof of contents thereof. He submits that contents of those documents could be proved only by the author of those documents who did not make himself available for further cross-examination.

39. Learned counsel invited my attention to the order passed by this Court on the application filed under Section 11 observing that the alleged Deed of 2005 will have to be proved before the learned arbitrator. He invited my attention to the Notes of Evidence and more particularly cross-examination of the respondent no.1 by the petitioners till question no.42 answered by the said witness and would submit that there was no cross-examination conducted by the petitioners in respect of the disputed documents till such time. Since the respondent no.1 did not make himself available for further cross-examination after question no.42, the petitioners could not cross-examine the said witness on the existence and contents of the said alleged documents. He invited my attention to the affidavit in lieu of examination-in-chief filed by the respondent no.1 and would submit that admittedly paragraph nos.3, 9 to 11, 14 to 19, 21, 23 and 25 were struck off by the learned arbitrator and were not part of affidavit of evidence filed by the respondent no.1.

40. Mr. Colabawalla, learned Counsel for the respondents on the other hand submits that the petitioners had come to the arbitration with a case that Deeds of Retirement dated 30th December, 1987 and 3rd July, 1995 were forged. He invited my attention to the paragraphs 25, 27 and prayer clause 2 of the statement of claim filed by the petitioners. Learned Counsel also placed reliance on the order dated 27th January, 2011 passed by this Court in Arbitration Application No. 43 of 2010 and in particular paragraph 3 and would submit that the said arbitration application was admittedly filed by the petitioners. The petitioners were aware of the alleged Deed of Retirement dated 3rd July, 1995 by which the petitioners allegedly retired from the suit firm. He submits that some of the partners were not even parties to the said arbitration application.

41. Learned Counsel invited my attention to the Partnership Deed dated 30th December, 1987 and Deed of Retirement-cum-Partnership dated 3rd July, 1995. He placed reliance on the issues/points for determination framed by the learned Arbitrator and more particularly issue no.3, 3A and 3B. The learned Counsel invited my attention to the written submissions filed by his clients and in particular paragraph 1E and would submit that the petitioners themselves made a request for framing an additional issue/point for determination i.e. "Whether the claimants prove that their Retirement Deed dated 9th July, 1995 is a forged/fabricated document and is null and void and the claimants continue to be the partners of the firm, M/s. Prospective Trader?".

42. Learned Counsel for the respondent submits that the onus was thus admittedly on the petitioners to prove that the Deed of Retirement dated 9th July, 1995 was forged/fabricated document and was null and void. Learned Counsel also invited my attention to the others issues/points framed by the

learned Arbitrator and would submit that except issue no.3B, the onus was on respective parties as is apparent from the issue framed by the learned Arbitrator. He submits that issues nos. 3, 3A and 3B have to be read together. It is submitted that since the petitioners had not discharged the initial onus and have not proved that the documents were forged, the onus was not shifted upon the respondents.

43. Learned Counsel for the respondents relied upon the deposition made in paragraphs 35 and 36 of the affidavit of evidence filed by the petitioner no.1 on the issue of alleged forgery of documents and would submit that the petitioner no.1 had relied upon the complaint letter dated 12th April, 2011 filed by him to the Azad Maidan Police Station and the opinion of Hand-Writing Experts dated 28th January, 2011 and 22nd March, 2011. It is submitted that the learned Arbitrator however after considering the evidence produced by the petitioners has rightly rendered a finding that the petitioners had failed to prove that those documents were forged. Learned Counsel placed reliance on the judgment of the Supreme Court in case of Anil Rishi v/s. Gurbaksh Singh (2006) 5 SCC 558 and in particular paragraphs 3, 4, 8, 17 to 19 and 21 and would submit that since the petitioners had failed to prove that they were still the partners of the suit firm and that the Deeds of Retirement dated 30th December, 1987 and 3rd July, 1995 were forged, the respondents were not required to prove that the petitioners were no longer the partners and that the Deeds of Retirement dated 30th December, 1987 and 3rd July, 1995 were genuine. In support of this submission, the learned Counsel for the respondents also relied upon various portions of the written arguments filed by the petitioners before the learned Arbitrator and would submit that the petitioners had rightly understood that initial onus was on the petitioners to prove that those Deeds of Retirement dated 30th December, 1987 and 3rd July, 1995 were forged and fabricated, which onus the petitioners failed to discharge.

44. Learned Counsel invited my attention to the letter dated 5th December, 2013 addressed by the petitioners through their advocate to the learned Arbitrator alleging that the respondent no.1 was physically and mentally fit to attend the proceedings for cross-examination but had intentionally not done so. He submits that however during the course of the arguments, the petitioners did not argue the said issue before the learned Arbitrator. In support of this submission, learned Counsel invited my attention to the written submission filed by the petitioners before the learned Arbitrator and more particularly paragraph 8 thereof. He submits that it was not the case of the petitioners in the written arguments also that the respondent no.1 was lying about his health and that he was in a position to attend the proceedings for further cross-examination. The petitioners also did not refer to the said letter dated 5th December, 2013 addressed by the petitioners through their advocate to the learned Arbitrator.

45. It is submitted that it was also not the case of the petitioners that the respondent no.1 had not offered himself for further cross-examination on the

false premise that he was keeping ill-health. Learned Counsel placed reliance on the finding rendered by the learned Arbitrator in paragraph 17 of the arbitral award and would submit that the learned Arbitrator has rightly held that both the sides were aware of the medical condition of the witness and there was no dispute that the witness of the respondents was not in a position to give further evidence. It is submitted that the petitioners admittedly did not apply for clarification before the learned Arbitrator under Section 33 of the Arbitration Act that the submissions in this regard though allegedly made by the petitioners had not been considered by the learned Arbitrator. The petitioner thus cannot be allowed to raise an issue at this stage that the learned Arbitrator has erroneously held that both sides were aware of the medical condition of the respondent no.1.

46. In support of this submission, learned Counsel placed reliance on the Judgment of the Supreme Court in case of Mohd. Akram Ansari v/s. Chief Election Officer and Others (2008) 2 SCC 95 and in particular paragraphs 13 to 15. It is submitted by the learned Counsel that the issue now sought to be raised by the petitioners was given up at the stage of arguments before the learned Arbitrator. Learned Counsel for the respondents placed reliance on the minutes of the meetings recorded by the learned Arbitrator which are at pages 218, 202, 200, 197 and 198 of the compilation of documents and also placed reliance on the paragraphs 18 to 21 of the arbitral award. Learned Counsel for the respondents invited my attention to the part of the cross-examination of the respondent no.1 conducted by the petitioners' Counsel, which are at pages 296 to 305 and would submit that the said cross-examination itself was conducted on 17th July, 2013 and 18th July, 2013 for 202 minutes respectively comprising of 42 questions.

47. Learned Counsel invited my attention to the minutes of meeting held on 4th October, 2013 recorded by the learned Arbitrator. He submits that the learned Arbitrator recorded the statement made by the Dr. Viral C. Shah, who is son of respondent no.1 and is a Neuro-Radiologist and was present in the said meeting and stated that the respondent no.1 was not in a position to depose. He was under the treatment of Dr. B.S. Singhal and Dr. Hemant Thacker and had developed severe anemia following trauma with injury to his leg, which had caused a space occupying lesion and was causing severe iron loss in his body and electrolyte imbalance. He had also allegedly developed tremors and was diagnosed with Parkinsonism. He was on medication to increase his dopamine levels. The Doctors expected the witness to achieve optimum level within about two months. The learned Arbitrator recorded the statement made by the learned Counsel for the respondents that the position of the said witness may be improved within two months and if the same was improved, he may be in a position to continue giving his evidence and on that ground, the respondents applied for cancellation of the hearing fixed on 23rd and 24th October, 2013.

48. Learned Counsel for the respondents submits that in paragraphs 4 of the said minutes of meeting dated 4th October, 2013, the learned Arbitrator recorded that

in the event of the respondent no.1 not being in a position to continue his evidence in cross-examination by 9th December, 2013, the respondents should consider their absence and decide on another witness if they so think fit. The learned Arbitrator directed the respondents to file the affidavit of evidence of such other witness on or before 30th November, 2013 and to serve a copy thereof on the other side by that date. If the respondent no.1 however would be available on 9th December, 2013, the parties will continue with his cross-examination. The learned Counsel for the respondents invited my attention to the letter dated 5th December, 2013 from the petitioners' advocate to the learned Arbitrator alleging that during the period from April 2013 till the date of addressing the said letter, the respondent no.1 had been physically and mentally fit for various reasons mentioned therein.

49. The petitioners had requested the learned Arbitrator that the meeting proposed to be held on 9th December, 2013 be held to enable the petitioners to make appropriate application in the matter and for direction for expeditious completion of arbitral reference, completion of cross-examination of the witness of the respondents on day to day basis before the Commissioner appointed by the learned Arbitrator and also to complete the evidence of the respondent no.1 at his residence or office. It is submitted that since the respondent no.1 was medically not in a position to continue giving evidence in cross-examination, the respondents made a statement before the learned Arbitrator in the meeting held on 10th January, 2014 that the respondent no.1 was medically not in a position to continue giving evidence in cross-examination. The respondents also made a statement that they did not propose to examine any other witness and they close their case. The learned Arbitrator adjourned the matter to 31st January, 2014 for arguments.

50. Learned Counsel for the respondent placed reliance on the Judgment of the Calcutta High Court in case of Dever Park Builders Pvt. Ltd. and Ors. v/s. Smt. Madhuri Jalan and Ors. AIR 2002 Calcutta 281 and in particular paragraphs 2, 3, 10 to 13, 20 and Judgment of Madras High Court in case of Maharaja of Kolhapur v/s. S. Sundaram Ayyar and Others AIR 1925 Madras 497 and in particular at page no 537 and would submit that when the parties are unable to submit themselves for cross-examination after evidence is partly given, the evidence is admissible but the weight to attach to such evidence should depend upon the circumstances of each case. He also placed reliance on the judgment of this Court in case of Banganga Cooperative Housing Society Ltd. v/s. Mrs. Vasanti Gajanan Nerurkar (2015) 5 Bom CR 813 and in particular paragraphs 11, 12 and 13 and would submit that in the said Judgment this Court considered two situations, in which a party who is absent and does not offer himself for cross-examination, his evidence whether should be considered or not. He submits that in view of the respondent no.1 having been medically unfit, the part of the evidence already led by the petitioners in the examination-in-chief and part of the cross-examination cannot be ignored by this Court.

51. It is submitted that the cross-examination of the respondent no.1 was not incomplete by reason of the respondent no.1 intentionally not attending the proceedings for the purpose of the cross-examination by way of legal strategy. He submits that the learned Arbitrator thus rightly relied upon the evidence and the documents produced by the respondent no.1. Learned Counsel invited my attention to paragraphs 18 to 35 of the arbitral award and would submit that the learned Arbitrator had decided the matter in accordance with the settled principles of law and thus no interference with such award on this ground is warranted in this petition. Learned Counsel for the respondents placed reliance on reply of the witness examined by the petitioners to question nos. 161, 163, 165 and 166 in his cross-examination and would submit that those questions clearly related to the alleged letter dated 24th April, 1998 addressed by the petitioners advocate regarding notice of retirement from the firm "Prospective Traders". He submits that the said letter was not delivered by the petitioners upon the respondents.

52. It is submitted that the said letter dated 24th April, 1998 was a got up document by the petitioner in collusion with the original partners. In support of this submission learned Counsel placed reliance on letters dated 22nd November, 2005, 9th December, 2005 and 24th January, 2006. It is submitted that the case of the petitioners in those letters was that the petitioners along with the respondents, M/s. V.U. Shah Family Trust, M/s. N.U. Shah Family Trust and M/s. C.U. Shah Family Trust had been partners of Prospective Traders under the Deed of Partnership dated 9th December, 1985. The petitioners had asserted themselves to have a 35% share in the partnership along with respondents and original partners. He submits that in the said letters there was no mention about the alleged letter dated 24th April, 1998 allegedly addressed by the petitioners advocate to the respondents. In the letter dated 24th January, 2006 also there was no mention of the alleged letter dated 24th April, 1998.

53. It is submitted by the learned Counsel for the respondents that even in the affidavit dated 16th March, 2006 filed by the petitioners before the Debt Recovery Tribunal, Mumbai, the petitioners had only referred the partnership deed of 1985 and asserted that the petitioners and the respondents had joined the partnership in 1985. There was no mention of the said letter dated 24th April, 1998 in the said affidavit filed by the petitioners before the Debt Recovery Tribunal, Mumbai. He submits that the said letter dated 24th April, 1998 was referred for the first time in the notice of dissolution dated 17th June, 2006 and more particularly in paragraph 2(vii).

54. Learned Counsel for the respondents submits that the original partners had retired by virtue of a Retirement Deed dated 30th December, 1987. The original partners had never challenged the said Retirement Deed dated 30th December, 1987. There was no Deed of Reconstitution after the alleged retirement notice dated 24th April, 1998. He submits that if according to the petitioners, the original partners had in fact retired by virtue of the notice dated 24th April, 1998

there would have been a Deed of Reconstitution entered into between the parties giving the petitioners a 50% share in the partnership.

55. In so far as the letter dated 9th July, 1996 addressed by the petitioner no.1 to the respondent no.1 is concerned, it is submitted that the said letter was replied by the respondent no.1 because the petitioner no.1 was his brother and was a partner at one time in the firm "Prospective Traders" and he being also a partner in M/s. Shah Thakur and Sons for whose dues the property of the Prospective Traders was mortgaged. There was no positive statement or admission in the said letters stating that the petitioners were the partners of the suit firm as on 9th July, 1996. He submits that merely because those details were furnished in the said letter dated 9th July, 1996 addressed by the respondent no.1 to the petitioner no.1, it cannot be construed that the petitioners were the partners of the firm as on that date.

56. It is submitted by the learned Counsel for the respondents that by the letter dated 9th July, 1996, the respondents had sought a copy of the said letter dated 25th March, 1996 written by the petitioners to the Allahabad Bank. The respondents did not have a copy of the said letter dated 25th March, 1996 till then.

57. In so far as the draft undated letter addressed to Allahabad Bank by Prospective Traders and letter of authority annexed at pages 1252 and 1253 of Vol. VI of the compilation of documents is concerned, the said documents were fabricated. In support of this submission, learned Counsel placed reliance on the cross-examination of the petitioner no.1 and more particularly in reply to question no. 242. He submits that though the petitioners had specifically given authority to respondent no.1 to deal with Allahabad Bank previously United Industrial Bank Limited by their letter dated 4th September, 1986, the petitioners wrote letter to Allahabad Bank on 25th March, 1996 falsely contending that they had not given any authority to any partner to deal with Allahabad Bank. The petitioners had admittedly issued a letter dated 4th September, 1986. He submits that the learned Arbitrator in paragraphs 31 to 35 of the arbitral award has rightly rendered a finding that the petitioners had in the past, alleged forgery in respect of Deeds of Retirement of various firms and had subsequently admitted their signatures. He submits that petitioners in collusion with the original partners had produced got up documents to show that the petitioners and the original partners were still partners in the firm "Prospective Traders".

58. It is submitted by the learned Counsel that in the facts of this case, even if the learned Arbitrator has not considered the letters dated 9th July, 1996 at pages 443 and 444 and documents at pages 1252 and 1253, those documents were not being material and / or vital so as to render the arbitration award perverse. He submits that the most vital and material documents were the hand writing experts opinions. The petitioners though having produced the reports did not prove the same by leading the evidence of the hand-writing experts. He submits that the award thus cannot be set aside on the ground that those three

documents had not been considered by the learned Arbitrator in the impugned award.

59. In so far as the submission of the petitioners that the learned Arbitrator has not considered the documents at pages 439 and 450 of Vol. III i.e. the accounts of the Prospective Traders showing the petitioners as the partners of the firm along with original partners and the respondents are concerned, learned Counsel for the respondents submits that the learned Arbitrator has dealt with those documents in paragraphs 29 and 30 of the arbitral award. It is held by the learned Arbitrator that the petitioners had not shown any amount if received by them as partners of Prospective Traders in their income tax return. The learned Arbitrator has considered the said documents in relation to the petitioners being partners of the said firm. The said documents were alleged to have been given to the petitioners by the original partners and were not given by the respondents. Those documents were also got up and fabricated documents produced by the petitioners in collusion with the original partners. In support of this submission of the learned Counsel, he placed reliance on the cross-examination of the petitioner no.1 and more particularly in the answers to question nos. 180 and 185 at pages 243 and 266 of the notes of evidence.

60. In so far as the reliance placed by the learned Counsel for the petitioners on the TDS certificates at pages 1360 onwards of the compilation of documents is concerned, it is submitted by the learned Counsel for the respondents that in those TDS certificates, the name of the respondent no.1 was shown. The said certificates were issued by Allahabad Bank however no money was paid at that time by Allahabad Bank.

61. It is submitted by the learned Counsel for the respondents that the petitioners did not examine the original partners as their witness before the learned Arbitrator in support of their plea that the two Deeds of Retirement were forged and fabricated. In these circumstances, the learned Arbitrator was right in holding that the petitioners have failed to prove that the Deeds of Retirement were forged, fabricated or got up documents. Learned Counsel for the respondents placed reliance on the rejoinder to the written statement filed by the respondents in Securitization Application where it was placed on record that the original partners as well as the petitioners had retired. He also placed reliance on the order passed by this Court on 27th January, 2011 under Section 11 of the Arbitration Act and would submit that the petitioners were fully aware of various third party rights already having been created by inducting new partners in the firm even before the dispute was referred to the learned Arbitrator by an order passed by this Court. He strongly placed reliance on paragraph 5 of the said order dated 27th January, 2011 recording that any award that may be passed cannot and will not affect the rights of third parties including the alleged new partners in any manner whatsoever. The petitioners through their learned Counsel did not dispute the said position as recorded in the said order dated 27th January, 2011.

62. Learned Counsel for the respondents placed reliance on paragraph 25 of the statement of claim filed by the petitioners and would submit that the petitioners themselves have furnished details regarding the induction of new partners and showing that the respondents were no longer partners in the suit firm. In spite of such facts to the knowledge of the petitioners, the petitioners still referred their dispute to arbitration. The respondents in the arbitral proceedings are admittedly no longer partners in the suit firm. The petitioners thus ought to have filed a Civil Suit by impleading the current partners also as their rights would be seriously prejudiced.

63. Learned Counsel placed reliance on the judgment of Supreme Court in case of Atul Singh and Ors. v/s. Sunil Kumar Singh and Ors. AIR 2008 SC 1016 and in particular paragraph 9 and would submit that unless the subsequent agreement is set aside, the party cannot ask for dissolution of the firm under an earlier agreement. He also placed reliance on the judgment of Orissa High Court in case of Dushasan Sahoo & Anr. v/s. Geetarani Mohanty & Ors. In Arbitration Application Nos. 7 and 9 decided on 1st July, 2008 by the Orissa High Court. He submits that no relief can be granted on the basis of earlier partnership deed.

64. It is submitted by the learned Counsel that though the petitioners had invoked the arbitration agreement in the year 2006, moved an application under Section 9 of the Arbitration Act only in the year 2009 and thereafter filed an application under Section 11 of the Arbitration Act for the appointment of an arbitrator in the year 2010. The respondents had already ceased to be the partners of the suit firm when the matter was referred to arbitration. These facts were brought to the notice of the petitioner that unless and until the subsequent deeds of partnership in relation to the firm "Prospective Traders" were set aside, no relief even otherwise could be granted by learned Arbitrator in favour of the partners.

65. In so far as the submission of the learned Counsel for the petitioners that the admission of new partners in the partnership firm, the factum of retirement of respondents as partners would be decided at the execution stage is concerned, it is submitted by the learned Counsel for the respondents that such rights of new partners cannot be decided in the execution proceedings. He submits that in this case the learned Arbitrator has rightly held that no relief can be granted under the Partnership Deed dated 9th December, 1985 in view of all the subsequent Deeds which are in existence having been not set aside and thus the learned Arbitrator even otherwise could not have given any finding as to whether the Deeds of Retirement dated 30th December, 1987 and 3rd July, 1995 were forged. In so far as the judgment of Supreme Court in case of Ssangyong Engineering & Construction Co. Ltd. (supra) relied upon by the learned Counsel for the petitioners is concerned, learned Counsel for the respondents placed reliance on paragraph 42 of the said judgment and would submit that the documents not considered by the learned Arbitrator in this case are not vital and/or that material so as to render the award perverse and thus the said judgment of the

Supreme Court is distinguishable in the facts of this case.

66. In so far as the judgment of this Court in case of Zee Entertainment Enterprise Limited (supra) relied upon by the learned Counsel for the petitioners is concerned, it is submitted by the learned Counsel for the respondents that in that matter, the learned Arbitrator had not considered part of the oral evidence led by the petitioner or the cross-examination of the witness examined by the respondent as well as the detailed written submissions filed by the petitioner in the impugned award at all. He submits that in the facts of this case, the learned Arbitrator has considered the oral evidence of the petitioners, the conduct of the petitioner no.1 and has also considered several other documents on record and thus the judgment of this court in case of Zee Entertainment Enterprise Limited (supra) is distinguishable in the facts of this case.

67. In so far as the judgment of Supreme Court in the case of Ishwar Bhai C. Patel alias Bachu Bhai Patel (supra) relied upon by the learned Counsel for the petitioners is concerned, it is submitted by the learned Counsel for the respondents that in that case the appellant had not entered the witness box and did not present himself for cross-examination. However, in this case the respondent no.1 had submitted his evidence by filing affidavit in lieu of examination-in-chief and had also submitted himself for cross-examination on two occasions. However, due to medical reasons, the cross-examination could not be completed. He submits that the judgment relied upon by the petitioners does not deal with a situation where a person was unable to come for cross-examination due to medical reasons. He submits that the judgment of Supreme Court in case of Ishwar Bhai C. Patel alias Bachu Bhai Patel (supra) is thus clearly distinguishable in the facts of this case.

68. In so far as the judgment of Supreme Court in case of Vidhyadhar (supra) relied upon by the learned Counsel for the petitioners is concerned, it is submitted by the learned Counsel for the respondents that in the said judgment it was held by the Supreme Court that where a party to the suit does not appear in the witness box and sets his own case and does not offer himself to be examined by the other side, a presumption would arise that the case setup by him was not correct. He submits that however in the facts of this case, the respondent no.1 had stated his case of oath and did not offer himself to be cross-examined after two dates due to medical reasons. He submits that judgment of Supreme Court in case of Vidhyadhar (supra) thus would not apply to the facts of this case.

69. In so far as the judgment of Supreme Court in case of Gian Chand and Brothers (supra) relied upon by the learned Counsel for the petitioners is concerned, the said judgment had dealt with a situation where the defendant had except making a bald denial of the averments had not stated anything else. The documents were accepted in the said case. He submits that in the facts of this case, it was the case of the petitioners themselves that the documents were forged. The respondents had extensively cross-examined the witness examined

by the petitioners to disprove the case of the petitioners. He submits that the said judgment is distinguishable in the facts of this case.

70. In so far as the judgment of this Court in case of Pradyuman Kumar Sharma and Anr. (supra) relied upon by the learned Counsel for the petitioners is concerned, it is submitted by the learned Counsel for the respondents that the respondents in this case had led evidence and had proved their case and documents. However, the cross-examination of the respondent no.1 could not be completed for medical reasons and thus the evidence of the respondents in this case could be looked into as the case stated by the said witness stood proved.

71. In so far as the judgment of this Court in case of Rashmi Housing Private Limited (supra) relied upon by the learned Counsel for the petitioners is concerned, it is submitted by the learned Counsel for the respondents that in the said judgment, it is held that though Evidence Act may not be strictly applicable to the arbitration, the principles contained therein continue to apply to arbitration would support the case of the respondents. He submits that the petitioners in this case were unable to discharge the onus cost on them and have failed to prove their case.

72. In so far as the judgment of Supreme Court in case of Narayan Govind Gavate and Others (supra) relied upon by the learned Counsel for the petitioners is concerned, it is submitted by the learned Counsel for the respondents that the said judgment deals with various facets of onus, burden of proof and number of other provisions of the Evidence Act. The said judgment does not support the case of the petitioners.

73. Mr. Sakhardande, learned Counsel for the petitioners in rejoinder submits that the arbitral proceedings in this case had already commenced on 17th June, 2006. The partnership deeds alleged to have been entered into between the respondents and some of their relatives were purportedly entered into after commencement of the arbitration proceedings. These alleged documents were surfaced only in the year 2010. There was no response to various queries raised by the petitioners upon the respondents. He submits that the provisions of Order XXI Rule 97 to 100 read with Order XXI Rule 58 would apply in this situation. The reliefs sought by the petitioners were for declaration inter-se between the partners which reliefs are in personam. All the alleged subsequent partners are relatives of the respondents.

74. Learned Counsel for the petitioners relied upon the ruling of the learned Arbitrator clearly stating that the documents at serial nos. 1 to 5 of the Documents List were marked as exhibits subject to proof of contents by the respondents. None of these documents were proved by the respondent no.1 in his evidence led before his refusal to attend the arbitral proceedings for cross-examination. The learned Counsel distinguished the judgment of Supreme Court in case of Atul Singh and Ors. (supra) relied upon by the learned Counsel for the respondent. He relied upon paragraph 3 of the said judgment and would submit

that in the Civil Suit, the plaintiff had prayed for a declaration that the reconstituted partnership firm was illegal, void and without jurisdiction and an application under Section 8 of the Arbitration Act was filed, which was pending. The Supreme Court in the facts of that case held that the relief for such a declaration could be granted by the Civil Court and not by the Arbitrator as one of the party through whom the plaintiff had derived title was not party to the said Deed and thus the matter could not be referred to the arbitration. However, in the facts of this case, the petitioners rightly invoked the arbitration agreement and filed arbitral proceedings.

75. It is submitted by the learned Counsel for the petitioners that though various crucial documents of the suit firm post the period of alleged dissolution of the partnership firm were produced in the arbitral proceedings showing the continuation of the partnership firm, these vital and crucial documents necessary for adjudication of the issues before the learned Arbitrator, have not been considered in the impugned award. Learned Counsel for the petitioners also invited my attention to written arguments filed by his clients strongly relying upon those crucial documents of the suit firm for the period subsequent to the date of alleged date of retirement of the petitioners as canvassed by the respondents, the learned Arbitrator however did not consider those vital documents in the impugned award.

76. Learned Counsel for the petitioners placed reliance on the letter dated 9th July, 1996 from the respondent no.1 to the petitioner no.1 in which there was a reference to letter dated 25th March, 1996 addressed by the petitioner no.1 to the respondent no.1. He also placed reliance on an undated letter from the respondent no.2 to Allahabad Bank and Letter of Authority dated 19th May, 1997 from the petitioners and the original partners to the respondent no.1 and would submit that except those authority letters no other authority letters were produced by the respondents. Those letters have not been discussed by the learned Arbitrator in the impugned award at all. Mr. Colabawalla, learned Counsel for the respondents did not dispute this submission of the learned Counsel for the petitioners. Learned Counsel for the petitioners submit that the judgment of the Supreme Court in case of *Ssangyong* (supra) would squarely apply to the facts of this case.

77. In so far as the submission of the learned Counsel for the respondents that the onus was on the petitioners to prove that two Deeds of Retirement relied upon by the respondents were forged and fabricated or that the petitioners not having examined the hand-writing experts in support of such plea of forgery and fabrication, the learned Arbitrator was right in holding the petitioner had failed to discharge the onus cast on them is concerned, learned Counsel for the petitioners invited my attention to the issues nos. 3, 3A and 3B framed by the learned Arbitrator. He submits that in so far as the issue no. 3 is concerned, the onus was cast on the petitioners whereas in so far as issue no. 3A is concerned, the onus was cast on the respondents. The petitioners had examined the

petitioner no.1 as the witness and had produced various documents in support of the plea that the alleged Deeds of Retirement produced by the respondents were forged and fabricated and had discharged the onus cast on the petitioners in issue no.3. The petitioners were thus not required to examine any hand-writing expert as sought to be canvassed by the respondents. The petitioners placed reliance on the judgment of Supreme Court in case of Narayan Govind Gavate and Others (supra) in support of this submission. He submits that the petitioners had accordingly proved that the respondents had forged the Retirement Deeds.

78. Learned Counsel for the petitioners submits that the petitioners had independently proved that the suit firm continued beyond 3rd July, 1995 and thus though the petitioners had not examined any hand-writing expert, the claim of the petitioners could not have been rejected on that ground. He strongly placed reliance on the judgment of the Supreme Court in case of Gian Chand & Brothers (supra) and submits that on the contrary the respondents have failed to prove the existence and contents of the alleged Deeds of Retirement before the learned Arbitrator. The findings rendered by the learned Arbitrator that Deeds of Retirement were proved by the respondents shows patent illegality.

79. In so far as the consequence of the respondent no.1. remaining absent for further cross-examination deliberately is concerned, learned Counsel for the petitioners invited my attention to paragraphs 8 and 9 of the written arguments filed by his clients before the learned Arbitrator contending that it was only the evidence of the petitioner no.1, which could be considered by the learned Arbitrator in determining various points for determination framed by the learned Arbitrator and the evidence of respondents no.1 ought to be disregarded. He also strongly placed reliance on letter dated 5th December, 2013 addressed by the petitioners through their advocate to the learned Arbitrator disputing the case of the respondent no.1 that he was not in a position to remain present in cross-examination on the medical grounds and demonstrating as to how the story of the respondent was totally false and misleading. He submits that the petitioners had disputed all throughout that the respondent no.1 was unable to present himself for further cross-examination on medical ground. The said issue was never given up by the petitioners at any stage.

80. Learned Counsel for the petitioners placed reliance on paragraph 14A of the written arguments filed by the respondents before the learned Arbitrator and would submit that the petitioners have not admitted that the respondent no.1 was not able to attend personally for further cross-examination due to medical reasons. Learned Counsel invited my attention to ground C and D raised in the arbitration petition on those issues and would submit that these ground are not specifically controverted by the respondents in the affidavit in reply filed by the respondents in this petition.

81. Learned Counsel for the petitioners submits that in paragraph 4 of the Minutes of the Meeting dated 4th October, 2013 held by the learned Arbitrator, it was clearly recorded that in the event of the respondent no.1 being not available

for cross-examination and was not in a position to continue his evidence in cross-examination on 9th December, 2013, the respondents should decide on another witness as they think fit. The respondents however did not examine any other witness to prove the disputed documents and disputed facts. He submits that the petitioners had even suggested before the learned Arbitrator that the further cross-examination of the respondent no.1 can be completed by recording evidence by appointing a Commissioner for recording evidence at the residence or office of the respondent no.1. He submits that thought sufficient opportunities were given to the respondents including respondent no.2 to lead evidence, he also did not enter the witness box and did not examine any other witness and closed their case on 10th January, 2014.

82. It is submitted by the learned Counsel for the petitioners that after replying to 42 questions in the cross-examination of the respondent no.1, he chose to remain absent for the purpose of further cross-examination. No weightage or evidence therefore could be given to the depositions made by the respondent no.1 in the affidavit in lieu of examination-in-chief of the respondent no.1 by the learned Arbitrator. He submits that those 42 questions asked to the witness by the respondents' Counsel were all preliminary questions. The learned Arbitrator however has considered the substantial part of the examination-in-chief and unproved documents while rejecting the claims made by the petitioners. He placed reliance on the List of Documents, which were not proved by the respondents and also on the Minutes of the Meeting dated 17th July, 2013 held by the learned Arbitrator clearly recording that items at serial no. 1 to 5 of the respondents' compilation II-A were exhibited subject to the proof of contents thereof. He submits that those documents at serial nos. 2 to 5 were alleged Deed of Retirement-cum-Partnership, alleged to have been executed. He submits that the entire award of the arbitral award rejecting the claim of the petitioner is relying upon those 5 unproved documents.

83. Learned Counsel for the petitioners placed reliance on the TDS certificate dated 9th March, 2010 issued by Allahabad Bank in the name of respondent no.1 c/o Prospective Traders. Similar TDS certificates are also annexed at pages 1361 to 1379 for the subsequent periods. He submits that these documents which were though on record clearly falsifying the case of the respondents that respondent no.1 had retired from the suit firm on 3rd July, 2005 have been totally overlooked and ignored by the learned Arbitrator.

84. The learned Counsel for the petitioners also cited the following judgments in support of his aforesaid submissions :-

a) Judgment of Supreme Court in case of Ishwar Bhai C. Patel alias Bachu Bhai Patel v/s. Harihar Behera and Another, (1999) 3 SCC 457.

b) Judgment of Supreme Court in case of Narayan Govind Gavate and Others v/ s. State of Maharashtra and Othres, (1977) 1 SCC 133.

c) Judgment of Supreme Court in case of Gian Chand & Brothers and Another v/

s. Rattan Lal alias Rattan Singh, (2013) 2 SCC 606.

d) Judgment of this Court in case of Pradyuman Kumar Sharma & Anr. v/s. Shri Jaysagar M. Sancheti & Ors., 2013(4) ALL MR 286.

e) Judgment of this Court in case of Rashmi Housing Private Limited v/s. Pan India Infraprojects Private Limited, 2015(2) Bom. C.R. 697.

85. Mr. Colabawalla, learned Counsel for the respondents in sur-rejoinder submits that it was the case of the respondents that after retirement of the petitioners from the suit firm, the petitioners had fabricated various documents in collusion with the original partners. The learned Counsel placed reliance on paras 29 and 30 of the arbitral award and would submit that the petitioner no.1 in his cross-examination had clearly stated that he did not recall whether he had received any share in profit of the suit firm after 1985 or whether there were any losses after 1985. He also did not remember whether he had disclosed any profit or loss coming to his share from the suit firm in his Income Tax returns. The petitioner no.1 also did not sign any Balance Sheet of the suit firm. He submits that findings thus rendered by the learned Arbitrator cannot be held as perverse.

REASONS AND CONCLUSION :

86. I shall first decide the issue as to whether the impugned award rendered by the learned arbitrator shows patent illegality on the ground that though the respondent no.1 who was the only witness examined by the respondents did not offer himself for further cross-examination on the ground as alleged medical sickness, the evidence of such witness has been considered by the learned arbitrator while rejecting the claims made by the petitioners or not.

87. It was the case of the petitioners that they were admitted as the partners of the said partnership firm by Deed of Partnership dated 9th December, 1985. It was the case of the petitioners that the original partners of the suit firm retired from the suit firm by a notice sent through their advocates dated 24th April, 1998. The petitioners however, continued to be the partners of the said firm. The petitioners have filed the statement of claim before the learned arbitrator inter-alia praying for an order and declaration that the petitioners and the respondents were the only partners of the suit firm and were having 50% shares in the profit and loss of the firm and the jointly owned the only assets i.e. the premises belonging to the suit firm. The petitioners had applied for an order and declaration that the suit firm stood dissolved in the statement of claim dated 15th April, 2011. On the other hand it was the case of the respondents that the petitioners already stood retired from the close of business dated 30th June, 1995.

88. The petitioners had disputed the existence and contents of the alleged Deed of Retirement relied upon by the respondents under which the petitioners were alleged to have retired from 30th June, 1995. The petitioners had also alleged that the signatures of the petitioners were forged on the alleged Deed of

Retirement relied upon by the respondents.

89. A perusal of the Points for Determination framed by the learned arbitrator clearly indicates that insofar as point no.3 is concerned, the onus was on the petitioners to prove that they were the partners of the suit firm as on the date of statement of claim. However, point no.3-A, the onus was on the respondents to prove that the petitioners ceased to be the partners of the suit firm by virtue of the documents dated 30th December, 1987 and 3rd July, 1995. Insofar as point no.3-B is concerned, the Point for Determination framed by the learned arbitrator was "whether the alleged signatures of the claimants on the documents dated 30th December, 1987 and 3rd July, 1995 are genuine or are forged. The onus insofar as the said point no.3-B is concerned was on both the parties.

90. The petitioners had examined the petitioner no.1 as the witness who filed examination in chief. The respondents had relied upon various documents including the said two alleged Deeds of Retirement dated 30th December, 1987 and 3rd July, 1995 in the arbitral proceedings. The existence and contents of five documents including those two alleged Deeds of Retirement was disputed by the petitioners before the learned arbitrator. In the Minutes of Meeting held by the learned arbitrator on 17th July, 2013, the learned arbitrator had clearly recorded that the documents at serial nos.1 to 5 of Compilation A which included the said two alleged Deeds of Retirement relied upon by the respondents were marked Exhibits RW-10 to RW-14 respectively subject to proof of contents thereof.

91. The respondents had examined the respondent no.1 as the only witness to discharge the burden cast on them in some of the Points for Determination framed by the learned arbitrator. The said witness had relied upon those two documents in his affidavit in lieu of examination in chief. The said witness was asked 42 questions in the cross-examination on two days hearing before the learned arbitrator. There were no questions asked by the petitioners on the existence and contents of the said two alleged Deeds of Retirement in those 42 questions asked to the respondent no.1 in the cross-examination. Before any further questions could be asked by the petitioners in the cross-examination of the respondent no.1 on the subsequent dates fixed for recording further cross-examination of the respondent no.1, the respondent no.1 did not offer himself for further cross-examination on the ground of his alleged sickness.

92. The petitioners had admittedly through their advocates letter dated 5th December, 2013 had invited kind attention of the learned arbitrator that the only witness of the respondents i.e. the respondent no.1 was avoiding his cross-examination. The petitioners had also alleged in the said letter that the said witness of the respondents was attending the other proceedings in various Courts, attending his business all through out, was attending the meetings of the companies and was medically fit for offering himself for further cross-examination. However, he was deliberately avoiding the cross-examination. The petitioners had also made a request before the learned arbitrator to appoint a Court Commissioner for recording further cross-examination of the respondent

no.1 either at his residence or in his office to avoid any further delay in the proceedings with the matter expeditiously. The respondents did not controvert the said allegations made by the petitioners in the advocates letter thereby seriously disputing the alleged medical sickness of the respondent no.1.

93. In view of the said letter addressed by the petitioners strongly disputing the alleged sickness of the respondent no.1, the learned arbitrator made it clear that if the said witness was unable to attend the next meeting for the purposes of further cross-examination, the respondents would be at liberty to examine any other witness. It is not in dispute that in the meeting held on 10th January, 2014 by the learned arbitrator in the respondents through their advocate made a statement that the respondent no.1 was allegedly medically not fit and was not in a position to continue giving evidence in the cross-examination. The respondents also made a statement before the learned arbitrator that they did not propose to examine any other witness and closed their case. Learned arbitrator accordingly adjourned the matter to 31st January, 2014 for arguments.

94. A perusal of the record further indicates that in the order passed by this Court in the application filed under section 11 of the Arbitration Act, this Court made it clear that the alleged Deeds of Retirement relied upon by the respondents will have to be proved before the learned arbitrator by the respondents. There is no dispute that the paragraphs 3, 9 to 11, 14 to 19, 21, 23 and 25 of the affidavit in lieu of examination in chief of the respondent no.1 was struck off by the learned arbitrator and were not part of affidavit of evidence filed by him. It is thus clear beyond reasonable doubt that though the onus was on the respondents to prove that the petitioners stood retired under the said alleged Deeds of Retirement and had signed the alleged Deeds of Retirement, though the respondent no.1 offered himself for cross-examination on two occasions, he did not turn up for further cross-examination on the ground of alleged sickness.

95. It is also an admitted position that the respondents did not examine any other witness before the learned arbitrator though an opportunity in that regard was rendered by the learned arbitrator. A perusal of the cross-examination recorded in 42 questions asked by the petitioners' counsel to the respondent no.1 clearly indicates that till that time, no questions were asked by the petitioners in the cross-examination on the existence and contents of the alleged Deeds of Retirement. It was for the counsel appearing for the petitioners to decide the sequence of cross-examination of the witness. The fact remains that before the petitioners' counsel could ask any questions on the Points for Determination nos.3, 3-A and 3-B and more particularly on the existence and the contents of the alleged Deeds of Retirement, the respondent no.1 refused to remain present before the learned arbitrator.

96. A perusal of the record further indicates that though the petitioners had made a request to the learned arbitrator to appoint the Court Commissioner for recording the cross-examination of the respondent no.1 at his residence or in his office on day to day basis to test the veracity of the alleged sickness, the

respondent no.1 did not agree to that suggestion made by the petitioners. Learned arbitrator also did not issue any directions to test the veracity of the respondent no.1 by appointing a Court Commissioner for recording evidence of the respondent no.1 at his residence or in his office on day to day basis. In my view, there was thus substance in the objections raised by the petitioners before the learned arbitrator disputing the alleged sickness of the respondent no.1 for not offering himself for further cross-examination before the learned arbitrator on the dates fixed. The allegations of the respondent no.1 that he was medically unfit to remain present before the learned arbitrator was false and misleading.

97. It is not in dispute that the learned arbitrator had marked those Exhibits RW-10 to RW-14 respectively which included the said two Deeds of Retirement subject to proof of contents. Though the learned arbitrator is not bound by the provisions of the Indian Evidence Act, the principles of the Indian Evidence Act are applicable even in the arbitral proceedings. The principles of natural justice which are part of the provisions of the Indian Evidence Act apply to the arbitral proceedings. The respondent no.1 therefore having remained absent inspite of having given an opportunity by the learned arbitrator to prove the documents and for the purpose of further cross-examination, the learned arbitrator could not have relied upon those unproved and disputed documents while rejecting the claims made by the petitioners. In my view, by relying upon the disputed documents which were not proved by the respondents, the learned arbitrator has committed violation of principles of natural justice and the award thus shows patent illegality.

98. A perusal of the award indicates that the learned Arbitrator has recorded a finding that both the sides were aware of medical condition of the witness and there was no dispute that he was not in a position to give further evidence. In my view, this finding of the learned Arbitrator is ex-facie perverse and overlooking the contentions raised by the petitioners in their Advocate's letter dated 5th December, 2013, disputing the allegations that the respondent no.1 was medically unfit for the purpose of further cross-examination in the arbitral proceedings. On the contrary, in the said letter dated 5th December, 2013, the petitioners had specifically contended that the respondent no.1 was attending various proceedings, attending the office work, was giving evidence in other proceedings, etc. In my view, this finding rendered by the learned Arbitrator is overlooking the vital evidence i.e. letter dated 5th December, 2013 addressed by the petitioners through their advocate, which allegations remain uncontroverted. The impugned finding of the learned Arbitrator thus shows patent illegality.

99. The Supreme Court in case of Ssangyong Engineering & Construction Co. Ltd. (supra) has held that a finding based on no evidence at all or an award which ignore vital evidence in arising at its decision would be perverse and liable to be set aside on the ground of patent illegality. In my view, since the respondent no.1 failed to remain present for the purpose of further cross-examination deliberately though an opportunity was given by the learned Arbitrator, the

absence of the respondent no.1 could not be considered to be an absence on the medical grounds. Such alleged medical grounds were not proved by the respondent no.1. Be that as it may, the respondents could examine other witnesses who could prove the disputed documents and facts, though opportunity was rendered by the learned Arbitrator.

100. The Supreme Court in case of Vidhyadhar (supra) has held that where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct. The Supreme Court in that case held that if a party abstains from entering the witness-box, it would give rise to an adverse inference against him. A presumption has to be drawn under Section 114 of the Evidence Act, 1872 against the party who did not enter the witness-box. In this case, the respondent no.1 who claimed to be one of the signatory to the alleged Deeds of Retirement, thus ought to have proved the existence and contents of the said alleged Deeds of Retirement and ought to have subjected himself for cross-examination. The learned Arbitrator thus ought to have drawn an adverse inference against the respondents in view of the respondent no.1 having remained absent before the learned Arbitrator for further cross-examination.

101. The learned Arbitrator instead of drawing an adverse inference against the respondents and to discard the deposition made in the affidavit in lieu of examination-in-chief filed by the respondent no.1 has relied upon such unproved part of the evidence deposed by the respondent no.1 while rejecting the claims made by the petitioners. The impugned award is in violation of the principles laid down by the Supreme Court in case of Vidhyadhar (supra) and thus deserves to be set aside on this ground alone.

102. The Supreme Court in case of Ishwar Bhai C. Patel alias Bachu Bhai Patel (supra) has held that a witness having not entered into the witness-box and having not presented himself for cross-examination, an adverse presumption has to be drawn against him on the basis of the principles contained in Illustration (g) of Section 114 of the Evidence Act, 1872. In the said judgment, the Supreme Court considered a situation where one of the party had asserted the fact, which was not controverted by the other party by entering into the witness-box to make a statement of oath denying the statement of other party. The Supreme Court held that an adverse presumption has to be drawn against that party. The principles laid down by the Supreme Court in case of Ishwar Bhai C. Patel alias Bachu Bhai Patel (supra) apply to the facts of this case.

103. Supreme Court in case of Narayan Govind Gavate and Others (supra) has held that in judging whether a general or a particular or special onus has been discharged, the Court will not only consider the direct effect of the oral and documentary evidence led but also what may be indirectly inferred because certain facts have been proved or not proved though easily capable of proof if they existed at all which raise either a presumption of law or of fact. In my view,

the principles of law laid down by the Supreme Court in this judgment will also apply to the facts of this case.

104. Supreme Court in case of *Gian Chand and Brothers (supra)* has held that the onus is on the party who asserts a fact. In this case, the respondent no.1 strongly placed reliance on the alleged Deeds of Retirement, the contents and existence whereof were strongly denied by the petitioners. The onus was thus on the respondents to prove the existence and contents of the said Deed of Retirement, which onus respondents failed to discharge.

105. This Court in case of *Pradyuman Kumar Sharma and Anr. (supra)* has held that though arbitrator is not bound by the provisions of Code of Civil Procedure or Evidence Act, principles of Evidence Act and Code of Civil Procedure are applicable even to arbitration proceedings. A document which is disputed by a party and if not proved, cannot be considered even by the arbitrator to be on record or as a piece of evidence. Taking into consideration an unproved document by an arbitrator, thus would be in violation of principles of natural justice. The principles laid down by this Court in the said Judgment, squarely apply to the facts of this case.

106. This Court in case of *Rashmi Housing Private Limited (supra)* has held that the documents which are disputed by the party and if not proved by another party, cannot be considered even by the arbitrator to be on record or as piece of evidence. If such disputed documents are considered by an arbitrator, which are not proved, it would amount to violation of principles of natural justice. The principles laid down by this Court in the said judgment, apply to the facts of this case. I am respectfully bound by the said judgment.

107. In so far as the finding rendered by the learned Arbitrator in paragraph 24 of the impugned arbitral award that the original partners had not disputed their signatures on the documents nor had taken any steps to set aside those documents is concerned, in my view, merely because the original partners did not come forward to dispute their signatures on the documents or were not examined as witness, cannot be conclusive against the petitioners that the signatures on the disputed documents remained uncontroverted. In my view, this finding of the learned Arbitrator is ex-facie perverse and is rendered ignoring the vital documents produced by the petitioners. The findings rendered by the learned Arbitrator thus shows patent illegality and deserves to be set aside.

108. In so far as the submission of Mr. Colabawalla, learned Counsel for the respondents that though the petitioners have disputed the alleged sickness of the respondent no.1 in the letter dated 5th December, 2013 addressed by the petitioners through their advocate to the learned Arbitrator, the said issue was not ultimately argued before the learned Arbitrator and was alleged to have been given up is concerned, there is no substance in this submission of the learned Counsel at all. A perusal of the record indicates that the petitioners had raised this issue even in the written arguments filed before the learned Arbitrator and

more particularly in paragraph 14A. It was specifically contended that the petitioners did not admit that the respondent no.1 was unable to attend personally for cross-examination due to alleged medical reasons. The petitioners have also raised specific grounds in ground C and D of the Arbitration Petition, which have not been controverted by the respondents in the affidavit in reply filed by them in this petition specifically.

109. The learned Counsel for the respondents does not dispute that in the Minutes of the Meeting held by the learned Arbitrator on 4th October, 2013, the learned Arbitrator had granted an opportunity to the respondents to inform the learned Arbitrator on the next date whether the respondent no.1 would attend the arbitral proceedings or not and if would not attend, the respondents could examine any other witness. The factum of receipt of the said letter addressed by the petitioners through their advocate, by the respondents was not disputed before the learned Arbitrator. A perusal of the award clearly indicates that the learned Arbitrator has not taken any cognizance of the said letter dated 5th December, 2013 addressed by the petitioners through their advocate thereby seriously disputing the sickness of the respondent no.1.

110. There is no substance in the submission made by the learned Counsel for the respondents that it was not the case of the petitioners that the respondent no.1 had not offered himself for further cross-examination on the false premise that he was keeping ill-health. The findings rendered by the learned Arbitrator in the paragraph 17 of the arbitral award that both the sides were aware of the medical condition of the witness and that there was no dispute that the witness of the respondents was not in a position to give further evidence is ex-facie perverse and is rendered ignoring the vital evidence produced by the petitioners on record, which remain uncontroverted. There is also no substance in the submission of the learned Counsel for the respondents that the petitioners ought to have apply for clarification before the learned Arbitrator under Section 33 of the Arbitration Act contending that the submission in that regard though were allegedly made by the petitioners had not been considered by the learned Arbitrator.

111. In so far as the judgment of Supreme Court in case of Mohd. Akram Ansari (supra) relied upon by the learned Counsel for the respondents is concerned, Supreme Court in the said judgment has held that there is a presumption in law that the Judge deals with all the points, which have been placed before him. If a point was not mentioned in the judgment of the Court, the presumption is that point was never placed before the learned Judge and it was given up. However, that is rebuttable presumption. A perusal of the written submission filed by the respondents before the learned Arbitrator also would clearly indicate that it was not the case of the respondents that the petitioners had given up the arguments regarding the alleged sickness of the respondent no.1, which contention was raised in the written submission filed by the petitioners. There is no dispute about the principles of law laid down by the Supreme Court in the said judgment

in case of Mohd. Akram Ansari (supra). However, in the facts of this case since the petitioners had not given up the said issue at any point of time, the said judgment would not assist the case of the respondents. Learned Counsel for the respondents does not dispute that in the subsequent meeting held by the learned Arbitrator, the respondents made a statement before the learned Arbitrator that respondent no. 1 was not in a position to depose. The respondents also made an statement that they did not want to examine any other witness and closed their evidence. The respondents have not disputed the contents of the Minutes of the Meeting dated 4th October, 2013 or any other Minutes of the Meeting recorded by the learned Arbitrator.

112. In so far as the judgment of Calcutta High Court in case of Dever Park Builders Pvt. Ltd. and Ors. (supra) relied upon by the learned Counsel for the respondents is concerned, the witness in that matter could not remain present to face cross-examination fully in view of his death. Calcutta High Court thus held that on a portion of the examination-in-chief, there had been cross-examination, such portion should be admissible in evidence and be considered without any hesitation. In the facts of that case, it is held that the evidence of said witness, who could not remain present for further cross-examination in view of his death, cannot be expunged and/or rejected all together. It is held that it shall be considered as to how much weightage shall be given to such part of evidence considering the facts and circumstance surrounding it. In my view, the said judgment would not even remotely assist the case of the respondents. The petitioners in this case had seriously disputed the alleged sickness of the respondent no.1. The respondent no.1 had failed to prove the existence and contents of the disputed documents by remaining absent for the purpose of cross-examination.

113. In so far as the judgment of Madras High Court in case of Maharaja of Kolhapur (supra) relied upon by the learned Counsel for the respondents is concerned, the witness in that matter also had expired before cross-examination could be resumed. In the facts of that case, the Madras High Court held that the evidence of such witness could not be rejected as inadmissible. The facts before the Madras High Court were totally different. The said judgment also is clearly distinguishable in the facts of this case and would not assist the case of the respondents.

114. In so far as the judgment of this Court in case of Banganga Cooperative Housing Society Ltd. (supra) relied upon by the learned Counsel for the respondents is concerned, it is held by this Court that where the witness is no longer physically available i.e. he has expired between the time of filing of his evidence affidavit and the time for cross-examination, where the testimony is incomplete by reason of death or incapacity of the witness before cross-examination, the evidence is admissible when given, does not cease to be so merely on account of that intervening factual circumstance. What probative or evidentiary value is to be attached to this evidence is another matter and turns

on the circumstances of each case.

115. It is held that the Court may seek independent corroboration of that evidence. It may accept it, albeit cautiously and that is no infirmity per se in the final decision. The second situation is where, though available and though an evidence affidavit has been filed, the witness is not tendered for cross-examination at all as a sort of litigation strategy. In such an event, the party who led the evidence of a particular witness chooses to as it were take the high road. A witness files an evidence affidavit and then simply does not produce the witness for cross-examination, it is impossible to allow this without consequence. The right to cross-examination is a fundamental strut of our judicial process and is a vital facet of the principles of natural justice. It is held where a witness is withheld and not offered for cross-examination, so much of that evidence as is against the other party is liable to be ignored but so much of it as is in favour of the opposite party can be relied on as an admission. An opportunity must be given to the other side to test the evidence by cross-examination. Not doing so amounts to leading in evidence that which is inadmissible.

116. In the said judgment, it is also held that in the absence of cross-examination, the person propounding that document may not be allowed to rely on it but it may be used by other side as an admission. In my view, the said judgment of this Court supports the case of the petitioners and not the respondents. A perusal of the affidavit in lieu of examination-in-chief filed by the respondent no.1 and more particularly the deposition made in paragraph 22 thereof indicates that the respondent no.1 had allegedly identified the writing and various signatures thereon of the petitioners. Admittedly, there could not be any cross-examination on that part of the deposition, in view of the absence of the respondent no.1. A perusal of the cross-examination conducted by the petitioners in 42 questions clearly indicates that till such time the petitioners had not cross-examined the respondent no.1 on the aspect of existence and contents of the disputed documents. The principles of law laid down by this Court in case of Banganga Cooperative Housing Society Ltd. (supra) clearly supports the case of the petitioners. I am respectfully bound by the said judgment.

117. In so far as the submission of the learned Counsel for the respondents that since the petitioners have not examined any hand-writing experts to prove the contents of the opinions of the hand-writing experts dated 28th January, 2011 and 22nd March, 2011 to prove the allegations of forgery of the documents and thus the learned Arbitrator rightly rejected the allegations of forgery made by the petitioners is concerned, the petitioners had asserted these allegations in the deposition made in the affidavit in lieu of examination-in-chief. The said part of the deposition remain uncontroverted. The petitioners had also relied upon various documentary evidence including the Balance Sheet and the Profit and Loss Account of the suit firm for the subsequent period and also the correspondence exchanged between the petitioners, respondents and Allahabad Bank. The learned Arbitrator has totally overlooked those documents admittedly.

The documents produced by the petitioners clearly indicated that even after the date of alleged Deeds of Retirement strongly relied upon by the respondents, the names of the petitioners continued to show as partners in the Profit and Loss Account and the Balance Sheet of the suit firm and also in the correspondence exchanged between the petitioners, respondents and Allahabad Bank.

118. In my view, the petitioners had discharged their initial onus of proof on those issues and thus onus was thereafter shifted upon the respondents to lead evidence and to discharge their onus, which the respondents failed to discharge. There was enough evidence led by the petitioners to prove the allegations of forgery supported by documentary evidence. In my view, merely because the petitioners did not examine hand-writing experts in addition to the evidence already led to prove the allegations of forgery of documents against the respondents, no adverse inference could be drawn by the learned Arbitrator against the petitioners. The Judgment of Supreme Court in case of Narayan Govind Gavate and Others (supra) relied upon by Mr. Sakhardande, learned Counsel for the petitioners, in particular paragraph 21 thereof would clearly apply to the facts of this case and would assist the case of the petitioners.

119. In so far as the judgment of Supreme Court in case of Anil Rishi (supra) relied upon by the learned Counsel for the respondents is concerned, Supreme Court after construing Section 101 of the Evidence Act has held that in terms of the said provision, the burden of proving the fact rests on the party who substantially asserts the affirmative issue and not the party who denies it. The said rule may not be universal in its application and there may be an exception thereto. The Supreme Court in the said judgment after construing Section 102 of the Evidence Act has held that the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those those circumstances, if any, which would dis-entitle the plaintiff to the same. There is no dispute about the proposition of law laid down by the Supreme Court in the said judgment. The said judgment however would not assist the case of the respondents in the facts of this case. There is no substance in the submission made by the learned Counsel for the respondents that the respondent no.1 had not remained present intentionally for the purpose of cross-examination by way of legal strategy. The said submission made by the learned Counsel for the respondents is contrary to the evidence on record before the learned Arbitrator.

120. In so far as the submission of the learned Counsel for the respondents that letter dated 24th April, 1998 addressed by the petitioners' advocate was not delivered by the petitioners upon the respondents or that the same was got up document, the respondents did not lead any evidence to prove that the said letter was got up document. The learned Arbitrator has not rendered any such finding in the impugned award. No such plea thus can be allowed to be raised by the respondents across the bar. Similarly, the submission of the learned Counsel for the respondents that even in the affidavit dated 16th March, 2006 filed by the

petitioners before the Debt Recovery Tribunal, the petitioners have though referred the Partnership Deed of 1985, there was no mention of the letter dated 24th April, 1998 is concerned, there is no substance in this submission of the learned Counsel for the respondents. Mr. Sakhardande, learned Counsel for the petitioners pointed out before this Court that the learned Arbitrator has not rendered any such finding in the arbitral award.

121. In the letter dated 9th July, 1996 from the respondent no.1 to the petitioner no.1, there was a reference to the letter dated 25th March, 1996 addressed by the petitioner no.1 to the respondent no.1. The respondents did not dispute the correspondence exchanged between the petitioners and the respondents with the Allahabad Bank brought on record by the petitioners. The learned Arbitrator however did not consider the correspondence exchanged between the parties, which were vital piece of evidence to prove that the petitioners had not retired under the alleged Deeds of Retirement relied upon by the respondents and had continued to be partners in the suit firm.

122. In so far as the submission of the learned Counsel for the respondents that the TDS certificates relied upon by the petitioners would not prove that the respondent no.1 had not retired from the suit firm under the Deed of Retirement is concerned, a perusal of those TDS certificates clearly indicates that they were issued in the name of respondent no.1 c/o suit firm for the period subsequent to the execution of the alleged Deeds of Retirement relied upon by the respondents. The learned Arbitrator ignored these vital documents also in the impugned award.

123. In so far as the submission of the learned Counsel for the respondents that since the petitioners had not challenge the subsequent Deeds of Partnership by which the other partners were entered into the suit partnership firm and thus till those Deeds of Retirement were set aside and were declared illegal, no reliefs could be granted in respect of the Deeds of Retirement relied upon by the respondents is concerned, it is not in dispute that those alleged Deeds of Partnership were allegedly executed after filing of statement of claim by the petitioners. Be that as it may, those new partners were not the parties to the arbitration agreement invoked by the petitioners in the Deeds of Partnership relied upon by the petitioners. Those parties thus could not have been impleaded as parties to the arbitral proceedings and simultaneously petitioners also could not have prayed for setting aside the subsequent documents in the arbitral proceedings on that ground. The findings rendered by the learned Arbitrator in this regard shows patent illegality.

124. In so far as the submission of the learned Counsel for the respondents that even though the learned Arbitrator has not considered the letters dated 9th July, 1996 and documents at pages 1252 and 1253 in the impugned award, those documents were not being material and/or vital so as to render the arbitral award perverse is concerned, in my view there is no merit in this submission of the learned Counsel for the respondents. Those documents relied upon by the petitioners were not disputed by the respondents and were crucial and vital

documents to prove that the petitioners had not retired from the partnership firm under the alleged Deeds of Retirement relied upon by the respondents and were continued to be partners of the respondents even after execution of the alleged Deeds of Retirement relied upon by the respondents, which Deeds of Retirement were not proved by the respondents. Similar contentions in respect of documents at pages 439 and 450 of Vol. III i.e. the accounts of the M/s. Prospective Traders is also devoid of merit for the similar reasons.

125. In my view, the order dated 27th January, 2011 passed by this Court under Section 11 of the Arbitration Act that any award that may be passed cannot and will not affect the rights of the third party including the new partners in any manner whatsoever would clearly negate the submission made by the learned Counsel for the respondents that since documents of the third parties were not declared as nullity, Deeds of Retirement relied upon by the respondents could not be declared as forged or fabricated and nullity on that ground. The submission made by the learned Counsel for the respondents is contrary to and in teeth of the said order dated 27th January, 2011 passed by this Court while appointing the learned Arbitrator. The judgment of Supreme Court in case of Atul Singh and Ors. (supra) thus would not assist the case of the respondents and is clearly distinguishable in the facts of this case. Similarly, the judgment of Orissa High Court in case of Dushasan Sahoo & Anr. (supra) also is clearly distinguishable on the same ground and would not assist the case of the respondents.

126. In my view, the judgment of Supreme Court in case of Gian Chand and Brothers (supra) would clearly apply to the facts of this case and would assist the case of the petitioners. Various findings rendered by the learned Arbitrator are overlooking the vital documents produced by the petitioners and shows perversity and thus are liable to be set aside on the ground of patent of patent illegality. The principles of law laid down by the Supreme Court in case of Ssangyong Engineering & Construction Co. Ltd. (supra) relied upon by the learned Counsel for the petitioners would squarely apply to the facts of this case. I am respectfully bound by the said judgment.

127. I therefore pass the following order :-

- a) Arbitral Award dated 15th April, 2016 passed by the learned Arbitrator is quashed and set aside.
- b) Arbitration Petition is made absolute in terms of prayer Clause (a).
- c) No order as to costs.