
(2015) 05 BOM CK 0052

In the Bombay High Court

Case No : Arbitration Petition Nos. 974 and 1069 of 2011

Sachin C. Shah and Others

APPELLANT

Vs

Hemant D. Shah and Others

RESPONDENT

Date of Decision : 06-05-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 34, 9
Contract Act, 1872 — Section 29
Evidence Act, 1872 — Section 93, 93, 94, 94, 95, 95, 95
Registration Act, 1908 — Section 17

Citation : (2015) 4 BomCR 636

Hon'ble Judges : S.C. Gupte, J

Bench : Single Bench

Advocate : Sanjiv Puri, Senior Advocate and Sanjay Sarin, i/b. Bipin Joshi, for the Appellant; Riyaz Chagla, Vibhav Krishna and Hamed Kadiani, instructed by Juris Consillis, Advocates for the Respondent

Final Decision : Dismissed

Judgement

S.C. Gupte, J.—These arbitration petitions arise out of an award passed by a Pg 1 of 22 sole arbitrator on 12 July 2011 (and corrected on 24 August 2011) in an arbitration reference. By this impugned award, the learned arbitrator partly allowed the claims of the Claimants, who are Respondents in these arbitration petitions. Arbitration Petition No. 974 of 2011 is filed by Respondent No. 5 before the sole arbitrator, whilst Arbitration Petition No. 1069 of 2011 is filed by the other Respondents before the arbitrator, both under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act").

2. The Claimants and Respondents before the sole arbitrator are two groups of family members. The Claimants are a group of family members represented by one Hemant D. Shah ("HDS group"), whilst the Respondents are represented by Chittaranjan D. Shah ("CDS group"). Hemant D. Shah ("HDS") and Chittaranjan D. Shah ("CDS") are brothers. It is the case of the Claimants (i.e. Respondents to both these petitions) that the larger family comprising of both the groups had

diverse properties including interests in various concerns including partnerships and companies and held properties in which one or the other or more members of both groups were interested; that on 9 April 1994, a family settlement was arrived at between the two groups under which the various concerns and properties and other interests were divided between the groups and separately allotted to the two groups; that a record of such family arrangement or settlement was prepared in the form of a Memorandum of Understanding ("MOU"); that the MOU was substantially implemented and acted upon voluntarily and with free consent of both sides, before disputes arose between the parties in connection with the interpretation, and mode and manner of enforcement of the clauses of the MOU; that these disputes led to the filing of a suit by the HDS group before this Court, being Suit No. 1421 of 1997; that by consent of parties, the subject matter of that suit was referred to the arbitration of Mr. Justice V.D. Tulzapurkar (Retd.), who entered upon reference and held several meetings and heard the matter; that during the pendency of the reference, Mr. Justice Tulzapurkar (Retd.) expired; that thereafter, by another consent order, Mr. Justice Dhanuka (Retd.) was appointed as a sole arbitrator in substitution; that the learned arbitrator proceeded to hear the reference further; and that the learned arbitrator proceeded to hold partly in favour of the HDS group and awarded some of the claims of the HDS group. This award is challenged by CDS and others of his group on various grounds in Arbitration Petition No. 1069 of 2011. The award is separately challenged by Respondent No. 5 before the arbitrator, a member of the CDS group, in Arbitration Petition No. 974 of 2011. Apart from adopting the grounds of challenge in the petition of the CDS group, the Petitioner in Arbitration Petition No. 974 of 2011 challenges the jurisdiction of the learned arbitrator on the ground that he was not a party to the arbitration agreement and the learned arbitrator had no authority to bind the Petitioner or his property whilst passing the impugned award. This, in a nutshell, is the controversy in these petitions.

3. Let us first take up the plea of lack of jurisdiction of the arbitral tribunal insofar as the Petitioner in Arbitration Petition No. 974 of 2011 is concerned. He was Respondent No. 5 before the sole arbitrator. He had challenged the jurisdiction of the sole arbitrator under Section 16 of the Act before the arbitrator on the footing that he was neither a party to the MOU nor did he consent to the appointment of the arbitrator. The Petitioner was concerned with the arbitration in two capacities, one as a member of Shri Chittaranjan D. Shah HUF and the other as an individual belonging to the CDS group. The Petitioner submitted that at any rate, assuming that CDS as the karta could bind him as a member of the HUF, CDS had no authority to bind him as an individual member of the family. The learned arbitrator rejected the Petitioner's application under Section 16 and proceeded to hear the reference. That order was initially challenged by the Petitioner by filing an arbitration petition under Section 34. That petition was eventually withdrawn with liberty to raise an appropriate plea at the time of challenge to the final award. That is how, after the impugned award was passed,

the challenge to the jurisdiction has been included as part of the challenge to the award in the present petition.

4. At the outset, I must note that the Court is conscious of the position that insofar as challenge to the jurisdiction of the arbitrator is concerned, it is for this Court to examine it for itself and not merely to see if the arbitrator's own view of the challenge is a possible view unlike in the case of other challenges on merits of the disputes.

5. With these prefatory remarks, let me examine the aspect of jurisdiction. First of all, it is important to consider whether the Petitioner was a party to the family arrangement, the record of which is said to have been kept in the MOU. The MOU specifically mentions that the Petitioner is a party thereto both in his individual capacity and as part of Shri Chittaranjan D. Shah HUF. The MOU is actually executed by CDS on his behalf. Now the question is whether CDS had the requisite authority to represent him or sign the MOU on his behalf. It is important to bear in mind that the MOU was between the two groups represented respectively by CDS and HDS; this MOU not only was signed but substantially implemented; and it was only when disputes arose between the parties regarding its implementation, that the matter was brought before this Court by the HDS group in Suit No. 1421 of 1997. In this suit, the petitioner, who was not at that time in India, was a party. He was represented through Counsel in this suit. He never disputed his father's authority to enter into the family arrangement or sign the MOU on his behalf. By consent of parties, which included the Petitioner himself, the disputes under the MOU were referred to the arbitration of Mr. Justice V.D. Tulzapurkar (Retd.) by an order of the Court dated 9 February 2000. Even at that stage, not only did the Petitioner not question his father's authority, but agreed to refer the disputes out of the MOU to arbitration. The Petitioner's advocate gave consent to the order. That same advocate later appeared as a common advocate of all members of the CDS group including the Petitioner in proceedings before the then arbitrator (Mr. Justice Tulzapurkar (Retd.)). (On some occasions he appeared instructed by the advocate for Respondent Nos. 1 to 4 and 6 before the arbitrator.) This fact has been admitted by the Petitioner when the minutes of meeting were shown to him in his cross-examination before the sole arbitrator. The Petitioner never even filed his separate defence in the arbitration reference at any time before Mr. Justice Tulzapurkar (Retd.). On these facts, by all accounts, on a preponderance of probabilities, it is a legitimate conclusion to draw that the Petitioner was a party to the family Pg 5 of 22 arrangement, in which he participated through his father, and his father, in turn, had the requisite authority of the Petitioner. Secondly and at any rate, the Petitioner was certainly a party to the arbitration agreement between the parties contained in the order of this Court dated 9 February 2000. This fact is not even disputed by the Petitioner before this Court. Now the only question is, whether the Petitioner consented to the appointment of the new arbitrator, i.e. Mr. Justice Dhanuka (Retd.), when this Court appointed him on 27 June 2005 in place of the deceased arbitrator. It is to be noted at the outset that the arbitration agreement

between the parties is contained in the order dated 9 February 2000. It was on the basis of that agreement that an arbitration petition was filed by the HDS group, namely, Arbitration Petition (L) No. 238 of 2005, under Section 9 of the Act; the Petitioner was a party to that arbitration petition; and the order of 27 June 2005 was passed in that petition "by consent of parties", appointing Mr. Justice Dhanuka as an arbitrator. Evidently all parties to the proceeding proceeded on a footing that the arbitration agreement already existed and the new arbitrator was being appointed in substitution of the arbitrator who had deceased. Though the Petitioner's appearance is not shown in the order of 27 June 2005, it is too late in the day for him to contend (he came up with this contention only on 30 September 2008 before the new arbitrator) that he did not consent to such appointment. In the first place, the Petitioner never applied to the Court to vary the order appointing the new arbitrator "by consent of parties". If he was a party to the petition and the order on the petition stated that it was passed by consent of parties, he cannot go behind that order and contend lack of his consent except by approaching that very court and Pg 6 of 22 getting the order recording consent varied. Secondly, since the order was passed by consent, the HDS group had no reason to apply for a substitute arbitrator, for which consent of the other group, including the Petitioner, was anyway not necessary. After the parties acted on the basis of consent of all parties and actually went ahead substantially with the reference before the new arbitrator, it would be impermissible to thereafter allow the Petitioner to successfully challenge the jurisdiction of the arbitrator on the ground of want of his consent. In the premises, it must be held that appointment of Mr. Justice Dhanuka (Retd.) as an arbitrator was proper, the same having been consented to and acquiesced in by all parties including the Petitioner.

6. That brings us to the merits of the impugned award. The grounds of challenge urged at the bar were common to both arbitration petitions except the challenge on the ground of not allowing the written statement of the Petitioner in Arbitration Petition No. 974 of 2011 to be taken on record. At the outset, we may dispose of the challenge to the refusal of the learned arbitrator to take the written statement on record. It is important to note that the arbitration reference commenced before Mr. Justice Tulzapurkar (Retd.) in February 2000. The statement of claim of the HDS group was filed on 18 February 2000; the written statement and counterclaim were filed by CDS respectively on 14 February 2002 and 18 February 2002. The matter thereafter proceeded to trial. An affidavit of evidence was filed by HDS, when Justice Tulzapurkar expired. All throughout, the Petitioner participated in the arbitration proceeding before Justice Tulzapurkar. He never filed his own defence and went by the defence filed by CDS on behalf of the whole CDS group. Thereafter, as noted above, Mr. Justice Dhanuka was appointed as an arbitrator on 27 May 2005. Cross-examination of HDS was conducted before Justice Dhanuka. After conclusion of the evidence of HDS, CDS proceeded to lead evidence. In the meantime, various miscellaneous applications, including an application for amendment, were considered by Justice

Dhanuka. It was only thereafter that on 30 September 2008, the Petitioner in Arbitration Petition No. 974 of 2011 for the first time sought to tender his written statement along with his application under Section 16. The learned Arbitrator refused to take the written statement on record. That appears to be a perfectly reasonable and legitimate course to adopt. It cannot be said in the facts of the case that the Petitioner was thereby denied an opportunity to present his case. No fault can be found with the conduct of the arbitration proceedings in this respect within the framework of the law of challenge to an arbitral award.

7. We may now advert to the challenges on merits. Learned Counsel for the Petitioners challenge the impugned arbitration award on the following grounds :

(i) It is firstly submitted that the MOU dated 9 March 1994 is inadequately stamped and also not registered. It is submitted that the MOU purports to create, declare, assign and extinguish right, title and interest in respect of immovable properties and is, thus, required to be stamped as a document of transfer or partition and also registered under Section 17 of the Registration Act, 1908. It is submitted that the MOU is not admissible in evidence on account of inadequacy of stamp and want of registration.

(ii) It is secondly submitted that the MOU dated 9 March 1994 was not existing, subsisting or binding on parties. It is submitted that the MOU was an incomplete document and incapable of being completed. It is submitted that the learned Arbitrator has committed a patent error of law by creating a contract when none existed; the contract purportedly created by the Arbitrator was not even pleaded by either sides. It is submitted that Respondent Nos. 1 to 5 did not seek specific performance of the MOU, which was ultimately found by the learned Arbitrator. It is submitted that the MOU was void for uncertainty within the meaning of Section 29 of the Contract Act and the attempt on the part of the arbitrator to formulate and write the contract for the parties was contrary to the express bar contained in Section 93 of the Evidence Act.

(iii) Thirdly, it is submitted that the Respondents were not and had not at all material times been ready and willing to perform their part of the contract and thus, not entitled to claim specific performance.

8. On the question of stamp duty and registration, the learned Arbitrator held that family arrangements or settlements are covered by a special equity principle and are not to be disturbed by courts on technical or frivolous grounds. The learned Arbitrator also found that the MOU was properly stamped. The learned Arbitrator found that the MOU operated only as an agreement (and did not by itself create rights in the property) and was, thus, not required to be registered. The conclusion of the arbitrator in this behalf is a reasonable conclusion drawn after applying the law on the subject to the facts of the present case.

9. As held by the Supreme Court in the case of *Kale and Others Vs. Deputy Director of Consolidation and Others*, AIR 1976 SC 807 : (1976) 3 SCC 119 : (1976) 3 SCR 202 , registration of a family arrangement would be necessary only

if terms of such family arrangement are reduced into writing, not in the sense of a mere memorandum prepared after the family arrangement had already been made, but in the sense of a written memorandum by itself creating or extinguishing rights in respect of immovable properties. The family arrangement in the instant case, as held by the learned Arbitrator, is merely an agreement to distribute properties jointly held by the family amongst the two branches respectively represented by CDS and HDS. The agreement contemplated further agreements, declarations, indemnities, powers, transfers and other writings in pursuance of the MOU to give effect to the understanding therein. Accordingly, and as noted particularly below, the parties also partly gave effect to the terms reflected in the MOU by executing further documents and writings.

10. In the first place, the family arrangement recorded in the MOU covered properties being the interests of family members belonging to the two groups in various partnership businesses, companies and association of persons and HUFs as also a number of office premises and residential properties. The division and allotment of these properties amongst the two groups separately inter alia envisaged retirements of members of the other group, transfer of shares and execution of formal documents of transfer of immovable properties. In pursuance of the family arrangement, some retirements from partnership firms, transfers of shares in limited companies and resignations from directorships did follow. So also, some properties were transferred by one group to the other and possessions were handed over. All of this goes to show that the family arrangement found recorded in the MOU was merely an agreement to distribute the properties between the two groups, which was to be followed by various deeds and documents of transfer. The document of MOU did not by itself create or transfer rights in immovable properties. It need not, therefore, be either stamped as a document of transfer or partition or be registered. The conclusions of the learned arbitrator in this behalf are all possible conclusions on a fair view of the law and facts of the case.

11. On the validity and enforceability of the MOU, the main contention of the Petitioners is that the contract was incomplete and vague and, therefore, void under the provisions of Section 29 of the Contract Act. It is the case of the Petitioners that the very annexures, namely, Annexures A and B to the MOU, which purportedly contain the description of the properties and other interests in which both CDS and HDS groups had interest on the date of the family arrangement and the properties and other interests that were allotted to the CDS group, respectively, were kept blank; the proposal of CDS concerning the manner of filling in of these blanks was vehemently rejected by Respondent Nos. 1 to 5 hereto; these blanks were not even filled up at any time prior to the filing of the statement of claim; the Respondents in fact sought specific performance of the MOU as it stood with blank Annexures A and B; though Exhibits A and B were attached to the statement of claim, they were not claimed to be Annexures A and B to the MOU and even if they were to be so treated, that case was not accepted by the learned Arbitrator; the learned Arbitrator, on the other hand, proceeded to

prepare these Annexures himself, thereby writing the contract for the parties; and this was impermissible under Section 93 of the Evidence Act.

12. The learned Arbitrator repelled these contentions, firstly, by holding that the MOU itself provided the basis for filling up of Annexures A and B to the MOU. The learned Arbitrator noted that Annexure A, which was to comprise of concerns, properties and other interests in which both CDS and HDS groups had interest on the date of the family arrangement, was to contain of entities and properties in which both the groups had joint interest save and except such individual properties for which the MOU contained special provisions. (The MOU specifically recorded that the properties, residential accommodations, personal belongings, etc. owned, held, possessed and/or enjoyed by the individual member or members of any group and/or standing in their individual name or in joint names of the same groups, save and except as stipulated specifically, did not form part of the settlement recorded in the MOU.) The learned Arbitrator then proceeded to hold that the joint interest regarding firms, entities and properties of both the groups was a matter already known to both the parties; both parties were expected to prepare an agreed list of what was to be incorporated in Annexure A; and both parties did prepare such list. The learned Arbitrator noted that as regards this list of entities and properties, the contested items were only few. In other words, the award proceeds on the footing that it was clearly possible and permissible to prepare Annexure A by following the basis of filling up the Annexure disclosed in the MOU itself. Once this list was prepared, preparing of Annexure B was simply a matter of deducting (i) entities and properties listed out in Annexure C for allotment to HDS group and (ii) those specific items of individual properties held by one or more of the members of the two groups which were to go to the other group, from the properties listed out in Annexure A, since whatever was not allotted to HDS group in terms of Annexure C or not provided for otherwise in the MOU was to be allotted to CDS group. Such few items as were matters of dispute between the parties could be adjudicated upon by the Arbitral Tribunal by applying the agreed basis already set out in the MOU and after taking into account such evidence as may be permissible under Section 29 of the Contract Act and other provisions of law and that adjudication of such disputes would not amount to rewriting of the MOU. That is the basis of this part of the award.

13. Learned Senior Counsel for the Petitioners relied upon the judgments of the Supreme Court in Keshavlal Lallubhai Patel and Others Vs. Lalbhai Trikumlal Mills Ltd., AIR 1958 SC 512 : (1959) 1 SCR 213 , Mayawanti Vs. Kaushalya Devi, (1990) 3 JT 205 : (1990) 1 SCALE 724 : (1990) 3 SCC 1 : (1990) 2 SCR 350 , India Meters Ltd., Madras Vs. Punjab State Electricity Board and Others, (1994) 1 ARBLR 118 : (1992) 2 SCALE 372 : (1993) 1 SCC 230 : (1992) 1 SCR 309 Supp : (1992) 2 UJ 716 and M/s. Rickmers Verwaltung GMB H Vs. The Indian Oil Corporation Ltd., AIR 1999 SC 504 : (1999) 1 ARBLR 1 : (1999) 1 CompLJ 13 : (1998) 8 JT 85 : (1999) 121 PLR 842 : (1998) 6 SCALE 197 : (1999) 1 SCC 1 : (1998) 3 SCR 42 Supp : (1998) AIRSCW 3672 : (1998) 8 Supreme 464 in

support of the case that unless there is consensus ad idem between the parties, there can be no case for specific performance. In *Keshavlal Lallubhai Patel (supra)*, the Court was concerned with a plea of extension of time for performance of contract. The Court found as a matter of fact that the conditions mentioned in the proposal for extension of time were so vague and uncertain that it was not possible to ascertain definitely the period for which the time for performance was intended to be extended. In the premises, it was held that the agreement for extension was vague and uncertain and as such void under Section 29 of the Contract Act. In *Mayawanti (supra)*, the dispute between the parties concerned an agreement for sale; respective cases of rival parties differed on what was the subject matter of this agreement did it include a certain building or did it exclude it. There also were other elements of uncertainty. The Supreme Court found various aspects of uncertainty which vitiated the contract, and rejected the plaintiff's claim for specific performance. The Court held as follows :

"18. The specific performance of a contract is the actual execution of the contract according to its stipulations and terms, and the courts direct the party in default to do the very thing which he contracted to do. The stipulations and terms of the contract have, therefore, to be certain and the parties must have been consensus ad item. The burden of showing the stipulations and terms of the contract and that the minds were ad idem is, of course, on the plaintiff. If the stipulations and terms are uncertain, and the parties are not ad idem, there can be no specific performance, for there was no contract at all. Where there are negotiations, the court has to determine at what point if at all, the parties have reached agreement. Negotiations thereafter would also be material if the agreement is rescinded."

The cases of *Indian Meters Ltd. (supra)* and *Rickmers Verwaltung GmbH (supra)* were cases of unconcluded contracts. The Court found the matters had not progressed beyond negotiations and there was no concluded contract. In the context of the respective facts of these cases, the Court found that there was no consensus ad idem. These last two cases do not really bear on the controversy in the present case.

14. What emerges from the cases of *Keshavlal Lallubhai Patel (supra)* and *Mayawanti (supra)* is that before specific performance of an agreement is sought, it must be shown that the parties were ad idem on the terms and conditions of the agreement. If the meaning of the terms and conditions is not certain or not capable of being made certain, the agreement is void under Section 29 of the Contract Act.

15. Section 29 of the Contract Act is as follows:

"29. Agreements void for uncertainty: Agreements, the meaning of which is not certain, or capable of being made certain, are void."

The Section, in terms, implies that the agreements which are capable of being

made certain, cannot be termed as void. Illustration (e) to Section 29 provides a pertinent example of such agreement. The illustration is quoted below:

"(e). A agrees to sell to B "one thousand maunds of rice at a price to be fixed by C". As the price is capable of being made certain, there is no uncertainty here to make the agreement void"

The general rule is that if the terms of the agreement are so vague or indefinite that the intention of the parties cannot be ascertained with reasonable certainty, there is no enforceable contract at law. At the same time, it is important to recognize that apparent vagueness or uncertainty may be capable of being removed by a process of proper interpretation. In interpreting the contract, the Court gathers the intention of the parties by adopting a commonsense approach. By applying such commonsense approach, the Court takes into account the various terms of the contract including implied terms to deduce the intention of parties and ascertain the meaning from such intention. If, after ascertaining such meaning, the agreement is capable of being made certain, the Court shall give effect to such agreement. Of course, whilst doing such exercise, the Court does not permit evidence to be given of facts which would show its meaning. That is expressly forbidden by Section 93 of the Evidence Act, 1872, which is in the following terms:

"93.Exclusion of evidence to explain or amend ambiguous document.- When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects."

It is important to remember that construction of a document involves two aspects : first, the meaning of the words used in it needs to be understood, and secondly, the legal effect of the words has to be ascertained. It may well be that the meaning of the words itself may be plain and perfectly clear, and yet there may be doubts as to the effect to be given to the words with reference to existing facts. It may then be possible to admit evidence to find out the correct effect to be given to Pg 16 of 22 the words of a document. When the meaning is not clear or, in other words, the document is on the face of it unintelligible, the ambiguity is said to be patent, but when the words are plain and intelligible, but some difficulty arises in applying them to existing facts, the ambiguity is said to be latent. Sections 93 and 94 of the Evidence Act deal with patent ambiguities and forbid evidence to deal with the same, whilst Sections 95 to 97 of the Evidence Act deal with latent ambiguities and allow evidence to clear the same. An example of a patent ambiguity is contained in illustration (a) to Section 93. An agreement to sell a horse for "Rs.1000 or Rs.1500", is patently ambiguous; no evidence can be given to show the correct price agreed. The illustration of a latent ambiguity is given under Section 95. In the case of a deed to sell "my house in Calcutta", if the vendor actually has no house in Calcutta, but has a house in Howrah of which the purchaser was in possession since the execution of the deed, the ambiguity is latent; it arises only when we try to apply clear words to existing facts. Such ambiguity can be resolved by leading extrinsic evidence. It

is possible to prove the facts of the case to show that the deed actually related to the house in Howrah. The effect to be given to the deed is thereby ascertained.

16. Thus, in cases of an apparent ambiguity, the Court first tries to ascertain the meaning by an interpretative process which is intrinsic to the document. After ascertaining the meaning thus, if there still remains a doubt as to the application of such meaning to the facts of the case, the Court considers whether the ambiguity is latent and if the Court finds it to be so, it even permits extrinsic evidence being given to clear such ambiguity. That is the combined effect of Section 29 of the Pg 17 of 22 Contract Act and Sections 93 to 97 of the Evidence Act.

17. In the present case, the learned Arbitrator took into account the various pronouncements of the Courts on the interpretation of the expression "capable of being made certain". On an analysis of these judgments, the learned Arbitrator noted that in dealing with commercial and business contracts, which have been acted upon by the parties, the Courts do not ordinarily term them as meaningless. The learned Arbitrator, after referring to the case law on the subject, considered the Petitioner's contention that no oral evidence was permissible to explain the omission of Annexures A and B from the MOU, which were kept blank. The learned Arbitrator noted the distinction between a latent ambiguity and a patent ambiguity and proceeded to note that in the present case there was no patent ambiguity, the agreed basis for filling up the blanks being evident and the evidence on record being overwhelming. The learned Arbitrator noted that both the parties did prepare Annexures A and B, which were kept blank at the time when the MOU was executed; that there were only a few disputed items and if there were some differences of opinion on the subject, the Arbitrator was expected to adjudicate upon the same in the light of the basis for filling up the blanks indicated in the MOU itself. The learned Arbitrator's view that the MOU itself provided the basis for filling up the blanks in Annexures A and B is certainly a possible view. It cannot be termed either as impossible or perverse. If the meaning of the document was thus clear, it was even permissible to take extrinsic evidence into account for giving effect to it. The award contains an extensive analysis of the evidence on record in this behalf and deduces that having regard to this evidence and a fair reading of the MOU in the light of this evidence, it was clearly possible to fill in these blanks by recourse to the machinery which was specifically set out in the MOU to ascertain what was to be allotted to each of the two groups from out of the property held by the joint family. This conclusion being a possible conclusion based on interpretation of documents on record and supported by evidence on record, can certainly be sustained under the jurisdiction of this Court under Section 34 of the Act.

18. As for the Respondents' readiness and willingness to perform the contract, the learned Arbitrator considered the judgments of P. D'Souza Vs. Shondrilo Naidu, (2004) 4 CTC 150 : (2004) 6 JT 126 : (2004) 6 SCALE 364 : (2004) 6 SCC 649 : (2004) 3 SCR 186 Supp : (2004) AIRSCW 4653 : (2004) AIRSCW

5364 : (2004) 8 Supreme 228 : (2004) 6 Supreme 28 and J.P. Builders and Another Vs. A. Ramadas Rao and Another, (2010) 12 JT 588 : (2011) 1 RCR(Civil) 604 : (2010) 12 SCALE 400 : (2011) 1 SCC 429 : (2010) 10 UJ 5288 to conclude that readiness and willingness cannot be treated as a straight jacket formula, but has to be determined from a variety of facts and circumstances relevant to the intention and conduct of the parties. The learned Arbitrator also took into account the law stated in these judgments that readiness and willingness on the part of the plaintiff to perform his part of the contract would also depend upon the question as to whether the defendant did everything which was required of him to be done in terms of the agreement. The learned Arbitrator took into account the fact that the Respondents had not done several acts which they were bound to do under the MOU. The learned Arbitrator then summarized the various facts which emerged from the evidence led on both sides on the issue of readiness and willingness. These included the following facts :

- (i) CDS group by 31 December 1996 started insisting on preparation of revised MOU, as a result of which disputes arose between the parties;
- (ii) The CDS group delayed return of keys of Industrial Estate of Kandivali;
- (iii) CDS group falsely contended that the letters of resignation from the directorship of Bonanza Industrial Estate Pvt. Ltd. were not to be acted upon and were ineffective;
- (iv) CDS group claimed in correspondence that the last date for payment of Rs. 20 crores had been extended.

After considering these facts together with certain other circumstances which showed that the conduct of HDS group also was not entirely without blemish, the learned Arbitrator concluded that the conduct of CDS group was more blameworthy; that the alleged breaches on the part of HDS group were comparatively minor and consequential to the defaults of CDS group; and that CDS group made attempts to resile from the MOU despite the MOU having been acted upon by both parties between March 1994 and November 1996. The learned Arbitrator took into account the various facts such as (i) retirement of H.D. Shah HUF and its karta from the firm of M/s. Viral Enterprises with effect from 9 March 1994, (ii) retirement of Smt. Kokila H. Shah (a member of HDS group) from the firm of Satyam Enterprises with effect from 1 March 1995, (iii) retirement of H.D. Shah HUF Pg 20 of 22 through its karta from the firm of Sundaram Enterprises with effect from 1 March 1995, (iv) retirement of Smt. Kokila H. Shah from Sachinam Enterprises with effect from 31 March 1995, (v) retirement of H.D. Shah HUF through its karta from the firm of Shah Thakur and Sons with effect from 31 March 1995, (vi) cessation of H.D. Shah HUF through its karta as a partner in Kshama Enterprises, all in pursuance of the MOU, which testified the circumstance of HDS group having acted upon the family arrangement. On an extensive analysis of the facts of the case as well as the documentary evidence placed on record by the parties, the Arbitrator came to a

conclusion that the MOU was partly acted upon and that omission to execute further acts in pursuance of the MOU on the part of the HDS group was attributable to defaults on the part of the CDS group, as noted above. In these circumstances, the conclusion of the learned Arbitrator that HDS group was ready and willing to perform its part of the contract is a reasonable conclusion, supported by evidence on record. This conclusion in the award passed by the learned Arbitrator or the basis thereof cannot be faulted under the jurisdiction of this Court under Section 34 of the Act.

19. In that view of the matter, none of the grounds of challenge to the impugned award has any merit. The Arbitrator has acted within jurisdiction, has construed the agreement between the parties on the basis of permissible material and his conclusions are supported by evidence. The conclusions contain a perfectly possible view of the material on record.

20. Accordingly, both the Arbitration Petitions are dismissed. There shall, however, be no order as to costs.