

(2013) 06 BOM CK 0125
In the Bombay High Court
Case No : Arbitration Appeal No. 12 of 2010

Satpal P. Malhotra and Others

APPELLANT

Vs

Puneet Malhotra and Others

RESPONDENT

Date of Decision : 14-06-2013

Acts Referred:

Advocates Act, 1961 — Section 30, 33
Arbitration Act, 1940 — Section 13(d), 14, 16(1), 39, 41
Arbitration and Conciliation Act, 1996 — Section 13, 13(d), 14, 14(1), 15
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 41 Rule 22, 115, 151, 47
Companies Act, 1956 — Section 10(F), 10F, 397, 397, 398
Constitution of India, 1950 — Article 19, 19(1)(g), 22
Limitation Act, 1963 — Section 5
Stamp Act, 1899 — Section 17

Citation : (2013) 06 BOM CK 0125

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

Bench : Single Bench

Advocate : F.E. D'vitre, assisted with Mr. M.S. Doctor, instructed by M/s. Bachubhai Munim and Co, for the Appellant; S.U. Kamdar , a/w. Mr. Chirag Kamdar and Mr. Sandeep Goyal, instructed by . M/s. Mulla and Mulla, for the Respondent

Judgement

R.D. Dhanuka, J.—By this appeal filed u/s 37 of the Arbitration and Conciliation Act, 1996 (for short "Arbitration Act, 1996"), the appellants seek to challenge the order dated 31st May, 2010 passed by the learned District Judge-1, Pune by which the learned District Judge allowed the arbitration application filed u/s 34 of the Arbitration Act, 1996 by the respondents and has set aside the award dated 21st July, 2007 made by the learned sole arbitrator appointed by the parties to adjudicate upon the dispute that had arisen between the parties. By the said award, the learned sole arbitrator had awarded some of the claims made by the appellants. Some of the relevant facts for the purpose of deciding this appeal and cross objections as emerge from the pleadings and documents filed by both parties are as under:-

FACTUAL MATRIX

The Appellants and Respondent Nos. 1 to 5 ("the Respondents") are all members of the Malhotra family of Pune. Appellant No. 1 is the father of Appellant Nos. 4 and 7 and Respondent No. 1 and the grand-father of Appellant Nos. 6, 9 and 10 and Respondent Nos. 2, 3 and 5. Appellant No. 3 is the brother of Appellant No. 1 and is the paternal uncle of the aforesaid persons. The Malhotra family owned, controlled and managed a company known as Weikfield Products Company (I) Private Limited and several other businesses, assets and properties including a partnership firm known as Weikfield Ventures International. Disputes arose within the family. It is the case of the appellants that in order to resolve all the family disputes and differences, the parties appointed one Mr. Rustam S. Gae, an old family friend of over 35 years who was well-known to all the family members and who was the former Law Secretary to the Government of India and who practiced as a Senior Advocate in the Supreme Court of India. It is the case of the appellants that the said arbitration was to be in the nature of an "informal" one, where the parties would make their proposals and claims which, in the absence of agreement between them, would be adjudicated upon by the Learned arbitrator.

2. According to the appellants for the purpose of the arbitration, the appellants and the respondents were initially divided into three groups and thereafter into five groups. Initially Appellant Nos. 1 to 3 consisted of Group A, Appellant Nos. 4 to 8 consisted of Group B and the Respondent Nos. 1 to 5 consisted of Group C. Thereafter, it was decided that the groups would be reconstituted in the following manner:

3. It is the case of the appellants that all the parties by two separate documents one undertaking and mandate dated 28th October, 2005 and 5th December, 2005 (addendum to undertaking and mandate) agreed to refer the dispute to arbitration and both these documents together constitute the reference to the arbitration between the parties including the lady members of the family.

4. On 10th November, 2005 Group C and D filed their "Statement of Case" in concurrence with Group A and B before the Learned Arbitrator. In the said statement of case, it was prayed that the learned arbitrator shall consider a fair, equitable and amicable division and separation of "the family businesses and assets" as per the proposals set out therein. In paragraph 6(s) of the said statement of case, it was specific claims and proposals relating to certain agricultural land standing in the name of Ankush Malhotra. It is the case of the appellants that the said agricultural lands were purchased from the family funds provided by the family partnership firm/the grand mother/grand aunt, for the benefit of the family. In para 6(t) and (u) of the said statement of case similar proposal and claims were made with regard to agricultural lands standing in the name of Akshay Malhotra (Group C) and Shikha Malhotra, daughter of Mukesh Malhotra (Group C). All these agricultural lands are located in the villages of Bhavadi, Lonikand and Wagholi (for short "the said agricultural lands").

5. The Respondents also filed their Statement of Case/Reply dated 14th November, 2005 and their reply dated 17th November, 2005 before the Learned Arbitrator. It is the case of the appellants that the Respondents did not deny therein (i) that the agricultural lands described in paragraphs 6(s), (t) and (u) were part of "the family businesses and assets"; and (ii) that the same had been purchased out of funds lent by various other family members. According to the appellants the only response to the said claim was that the Group "A" (later Group "A" and "B") had not made any claim and were not parties to the dispute and hence, the Group "C" (later Groups "C" and "D") could not raise these disputes relating to the agricultural lands.

6. It is the case of the appellants that at the first arbitration meeting on 3rd December, 2005, it was agreed that the arbitration proceedings would be conducted by the parties in person, without the presence of advocates or lawyers, and that the parties would not lead any evidence, oral or written and that the arbitrator would decide on the basis of the written/oral submission of the parties. According to the appellants the later agreement was minuted but the former was inadvertently not included in the minutes.

7. According to the appellants, respondent No. 1 sought adjournment of the hearing of the arbitration due to a forthcoming family wedding. In order to avoid any delay in the arbitration proceedings, the Learned Arbitrator, after hearing the parties, made an Interim Award dated 31st December, 2005. By the said interim award dated 31st December, 2005, the learned arbitrator held that the business assets and the properties be separated as it was not possible for the family to work or stay together. It is held that the parties were firmly against partial separation and strongly opposed joint ownership of the real estate and investment business of the company alongwith Group E. It is held that according to them, a permanent solution to the matter can only be achieved by the complete separation of the groups in all businesses including real estate and investment business of the company. The learned arbitrator held that there was no alternative to a complete separation of all businesses i.e. food business as well as read estate and investment business of the company. The learned arbitrator held that valuation of the properties should be fair market value arrived at by competent approved valuers appointed by him with the consent of parties concerned. As far as valuation of foods business and real estate and investments business is concerned, it was held that same were complex matters needing advice of experts in the field, viz. approved valuers of repute. The learned arbitrator directed the appointment of two approved valuers of repute i.e. one for the businesses of the company and the other for the real estate and investments of the company and other jointly owned real estate properties.

8. It is the case of the appellants that M/s. Subhash Shah and Associates was appointed by the learned arbitrator with consent of parties. By letter dated 16th February, 2006. The said M/s. Subhash Shah and Associates was requested to determine the fair market value of the properties mentioned in the enclosure to

the letter which included the said agricultural lands.

9. On or about 2nd January, 2006, the respondents filed a petition before the Company Law Board under the provisions of Section 397-398 of the Companies Act, 1956 with respect to the said Weikfield Products Company Private Limited. The respondents also filed a petition before the District Judge, Pune u/s 34 of the Arbitration and Conciliation Act, 1996 for setting aside the said interim award made by the learned arbitrator and also sought removal of the learned arbitrator on various grounds.

10. It is the case of the appellants that while the said arbitration petition was pending before the learned District Judge at Pune, the Chairman of the Company Law Board, held discussions with the family members for settlement of all disputes between them, which culminated in a Consent Order dated 15th December, 2006, of the Hon'ble Company Law Board, which recorded inter alia that the parties had reached an agreement for separation of all family businesses, assets and properties, except the said agricultural lands referred to above. The said order also recorded inter alia that the respondents were not agreeable to the appellants' proposal for transfer of the said property to the other family members and instead, the respondents were willing to pay three times the value of the said lands as recorded in the registered documents to the other family members. The said Order dated 15th December, 2006 also notes inter alia that if the parties were able to settle the disputes with regard to the said agricultural lands standing in the name of Ankush, there would be no pending dispute and that it would enable them to release the Arbitrator. The settlement as recorded in the said Order was fully carried out. An amount of Rs. 29 crores was paid to the respondents. The other lands were divided and distributed as set out therein.

11. It is the case of the appellants that in the course of the CLB proceedings/settlement talks, parties agreed on another valuation report being obtained in regard to the real estate of the family including the said agricultural lands. Accordingly, M/s. Bapat Valuers & Consultants Pvt. Ltd. ("BVCPL") were appointed to carry out such valuation (the name of BVCPL being suggested by the respondents). BVCPL made its report dated 22nd December, 2006. By a letter dated 23rd December, 2006, Mukesh Malhotra recorded to Puneet Malhotra (respondent No. 1) the discussions that had taken place between the parties in regard to BVCPL being appointed as valuers for "jointly owned lands and the lands standing in the name of Ankush" and forwarded the BVCPL valuation report to Puneet (Respondent No. 1). The BVCPL valuation report included the valuation of the agricultural lands standing in the name of Ankush.

12. By an order dated 3rd April, 2007, the learned District Judge-4, Pune dismissed the arbitration application (Civil Miscellaneous Application No. 149/2006) filed by the respondents herein u/s 34 of the Arbitration Act, 1996. The learned District Judge held that it was difficult to accept the contentions of the applicants to the said application that the terms of the reference did not

include separation of business and assets. The learned District Judge recorded that it was conceded by the applicant that except the lands at Wagholi, Lonikand and Bhabadi, all other disputes had been resolved before the learned Company Law Board. The appellants herein had placed on record the consent order passed by the Company Law Board before the Learned District Judge in the said proceedings. The learned District Judge also held that there was no substance in the arguments of the respondents herein that separation of business and assets were never contemplated. It is held by the learned District Judge that there was no substance in the allegations made by the respondents herein and even from the record it was not found that any prejudice was caused to them on the ground of grouping of the parties. As far as issue of bias raised by the applicants to the said proceedings is concerned, the learned District Judge rejected the said plea and refused to remove the learned arbitrator. The learned District Judge rejected the plea raised by the respondents herein about the independence, impartiality and incapacity of the learned arbitrator. The respondents herein did not challenge the said order and judgment dated 3rd April, 2007 passed by the learned District Judge rejecting the said application filed u/s 34 of the Arbitration Act, 1996. The said interim award as well as the said order and judgment rejecting the arbitration application have become final and binding on the parties.

13. By a letter dated 4th May, 2007, the appellants referred to the pending arbitration and informed the learned arbitrator that the only outstanding disputes and differences pertaining to the said agricultural lands and the partnership firm of Weikfield Venture International were required to be resolved by him and requested him to recommence the arbitration proceedings.

14. On 11th May, 2007, the Appellant sent their Statement of Case with regard to the two outstanding matters to the Learned Arbitrator with a copy to the respondents.

15. On receipt of the said Statement of Case, respondents by their letter dated 19th May, 2007, requested the learned arbitrator to first decide the following issues:

(a) Whether the Claimants [i.e. group "A" to "D"] can submit their statement of claim again?

(b) If so, whether it is to be treated as first statement of claim or fresh statement of claim?

(c) If it is to be fresh statement of claim, whether that can be allowed?

(d) If that statement of claim is to be taken on record then to consider next date for filing our statement of defence and further dates of arbitration Meeting and procedure to be followed in arbitration proceeding.

16. By an email dated 23rd May, 2007, the learned arbitrator informed the parties that the issues raised by the respondents on 19th May, 2007 would be considered in the next hearing and in the meantime directed them to file a reply

to the Statement of Case filed by the appellants.

17. By a letter dated 23rd May, 2007, the Appellants informed the learned arbitrator that the Statement of Case submitted by them was merely an addendum to the statement earlier filed and could not be said to be a fresh one.

18. By an email dated 29th May, 2007, the learned arbitrator informed the parties of his decision that the appellants were entitled to supplement their claim in accordance with the provisions of Section 23 of the Arbitration Act and that the Statement of Case filed by them was not a fresh Statement of Case, but merely an addendum to their earlier Statement of Case. By the said email the learned arbitrator directed the respondents to file their reply to the Statement of Case and fixed the next date of hearing on 11th June, 2007. This decision/direction of the learned arbitrator has not been impugned by the respondents.

19. On 4th June, 2007, the respondents filed their reply to the statement of case filed by the appellants and contended that the agricultural lands could not be considered as part of the disputes referred to arbitration, as they were new claims which were not part of the original Statement of Case dated 11th November, 2005 and not part of the interim award. It was also stated that the agricultural lands stood in the name of and belonged to Ankush who had purchased them by taking a "loan" from the family firm (in which all the family groups were partners with equal shares). On that basis, it was also contended that these disputes were not within the scope of the arbitrator's mandate or of the reference.

20. The respondents attended the arbitration meeting held on 11th June, 2007 alongwith their advocate. It is the case of the appellants that the appellants objected to representation by an advocate stating that it had been agreed at the first meeting that no lawyer would represent any party. The learned arbitrator then checked the minutes of the first meeting and however found that the said agreement had not been recorded in the minutes. It is the case of the appellants that the learned arbitrator recalled that he had directed that no lawyer should be engaged at the very first meeting itself. The respondents thereafter made a written application before the learned arbitrator seeking permission to represent the respondents by a lawyer which application was rejected by the learned arbitrator. The decision of the learned arbitrator was recorded in the minutes of the meeting held on 11th June, 2007.

21. The learned arbitrator thereafter heard the submissions of the parties over the next two days, i.e. on 12th June, 2007 and 13th June, 2007. On 21st July, 2007, the learned arbitrator made a final award. In the said final award, the learned arbitrator gave a ruling that there was no merits in the objections raised by the respondents herein that the dispute in respect of the said agricultural lands was not covered by the original statement of case of Groups A to D or that the same could not have been taken up for the arbitration in the current proceedings. The learned arbitrator rendered a finding that these documents

were included in the original statement of case dated 10th November, 2005 submitted by Groups C and D with the concurrence of Groups A and B. The learned arbitrator held that the loans advanced to Ankush by the family firm/the grand parents/grand aunt were not simpliciter loans, but were loans with an understanding as stated by the appellants. The learned arbitrator directed the appellants to pay a sum of Rs. 261 lakhs to the respondents, and a sum of Rs. 114 lakhs to respondent No. 2 being their share in the said lands in the names of the grand-children and directed respondent No. 2 to transfer the said agricultural lands standing in his name to appellant Nos. 1 and 3 as a part of the total separation of assets and properties. The said amounts were worked out on the basis of the higher BVCPL valuation of the agricultural lands. The learned arbitrator also passed directions for the dissolution of the partnership firm Weikfield Ventures International and consequential directions. The arbitrator also repelled the respondent's contention that the said claims were not maintainable.

22. On or about 17th September, 2007, the respondents filed an arbitration application u/s 34 of the said Act, before the learned District Judge, Pune, praying for setting aside the final award of the learned arbitrator on various grounds setout therein.

23. By an order and judgment dated 31st May, 2010, the learned District Judge 1, Pune allowed the said arbitration application (Miscellaneous Application No. 899 of 2007) filed by the respondents herein u/s 34 of the Arbitration Act, 1996 and set aside the final award with a clarification that it would not affect implementation of the interim award dated 31st December, 2005. By the said judgment, the learned District Judge rendered a finding that the said agricultural lands were covered under the mandate of the arbitration proceedings and thus the learned arbitrator was justified in considering the said issue. The learned Judge however held that the arbitration agreement did not indicate that the arbitrator was assigned with the work of distribution of properties of different family members and that by doing so, the learned arbitrator had acted beyond the scope of the arbitration agreement and beyond the scope of the arbitral mandate. As regards the dissolution of the partnership firm of Weikfield Ventures International, the learned District Judge held that the learned arbitrator could not have directed dissolution of the firm when the suit was pending before the District Court "for the same relief" and that only the Court could legally order dissolution (and not an arbitrator). The learned Judge also held that the respondents had been denied fair opportunity to present their case by denial of representation by an advocate and that the award was opposed to public policy.

24. Being aggrieved by the said order and judgment dated 31st May, 2010, the appellants filed this appeal u/s 37 of the Arbitration Act, 1996. The respondents have challenged part of the findings rendered by the learned District Judge by filing cross objections which was also heard by this Court alongwith this appeal filed by the appellants.

25. From the perusal of the impugned order and judgment delivered by the

learned District Judge, it is clear that basically the impugned final award has been set aside by the learned District Judge on the following grounds:-

(a) The division or distribution of the individual properties of the family members of the Malhotra family was outside the scope of the arbitral mandate and was hit by Section 34(2)(a)(iv) read with Section 34(2)(b)(ii) of the Act.

(b) The learned arbitrator ought to have allowed the respondents to represent themselves by an advocate of their choice at the time of hearing the additional claim made by the appellants and by depriving them of such opportunity, the award was hit by Section 34(2)(a)(iii) of the Act.

(c) The learned arbitrator could not have ordered the dissolution of the family partnership firm, Weikfield Ventures International. The award was based on perverse conclusion and the same was totally illegal and was set aside on the ground mentioned in Section 34(2)(a)(iii), (iv) and Section 34(2)(b)(ii) of the Arbitration Act, 1996.

Whether further division or distribution of the individual properties of the family members of the Malhotra family was outside the scope of the arbitral mandate and was hit by Section 34(2)(a)(iv) and Section 34(2)(b)(ii) of the Act:

26. Mr. D'vitre, learned senior counsel for appellant made following submissions on this issue:

i) Arbitration Agreement dated 5th December, 2005 and Undertaking dated 28th October 2005 together constitute the reference to arbitration between the parties including the lady members of the family who signed the said document dated 5th December 2005. Parties were divided in 5 Groups i.e. Group A to Group E. On 10th November 2005, Group C and D i.e., consisting of appellant No. 4 to 6 and appellant Nos. 7 to 10 respectively filed their Statement of Case in concurrence with Group A and B i.e., appellant No. 1 and 2 and appellant No. 3 respectively. It was prayed that the learned arbitrator considered a fair, equitable and amicable division and separation of family businesses and assets as per the proposals set out therein. In paragraph 6(s) proposals and claims relating to certain agricultural lands standing in the name of Ankush Malhotra (Group E) and purchased from family funds provided by the family partnership firm/grand mother/grand aunt for the benefit of the family was made. In paragraph 6(t) and (u) of the Statement of claim, similar proposals and claims with regard to agricultural lands standing in the name of Akshay Malhotra (Group C) and Shikha Malhotra, daughter of Mukesh Malhotra (Group C) were mentioned. In their Statement of Case/Reply dated 14th November 2005 and also reply dated 17th November, 2005 before the learned arbitrator, the respondents did not deny that agricultural lands referred in paragraph 6(s), (t) and (u) were part of the family businesses and assets and that the same had been purchased out of funds lent by various other family members. The only response to the said claim was that Group A had not made any claim and were not parties to the dispute and thus Group C could not raise those disputes relating to agricultural lands.

ii) On the ground of family wedding, the first respondent sought adjournment of hearing before the learned arbitrator and therefore, to avoid any delay in arbitral proceedings, the learned arbitrator made an interim award dated 31st December 2005. In the said interim award, the learned arbitrator held that the businesses, assets and properties be separated as it was not possible for the family to work or stay together. The learned arbitrator accepted the contention of the respondents that for such separation, independent outside valuers shall be appointed to value the family businesses, assets and properties. The learned arbitrator rejected the contention of the appellants that the valuation exercise should be done by the family members themselves and directed that the businesses, investments and real estate owned by the family be valued for the purposes of total separation by two approved valuers of repute to be appointed with his approval and subject to the consent of the parties. M/s. Subhash Shah & Associates, Valuer appointed by the learned arbitrator with consent of parties, was requested to determine the fair market value of the properties mentioned in the enclosure to the letter dated 16th February 2006 which included the agricultural lands. The Valuation Report dated 19th May 2006 submitted by the said Valuer included the valuation of the said agricultural lands. It is submitted that M/s. Haribhakti & Associates were appointed as Valuers for the businesses.

iii) In the proceedings before the Company Law Board (CLB) filed by the respondents u/s 397 and 398 of the Companies Act with respect of M/s. Weikfield Products Company Pvt. Ltd., which culminated in the Consent Order dated 15th December 2006, it was recorded that parties had reached an agreement for separation of all family businesses, assets and properties except the said agricultural land and it was also recorded that the respondents were not agreeable to the appellants' proposal for transfer of the said property to the other family members and instead, were willing to pay three times the value of the said lands as recorded in the registered documents to the other family members. The CLB recorded that that if the parties were able to settle the disputes with regard to the said agricultural lands standing in the name of Ankush, there would be no pending dispute and that it would enable them to release the arbitrator. The said settlement recorded before the CLB has been carried out.

iv) It is submitted that parties agreed on another Valuation report in respect of the real estate of the family including the agricultural lands from M/s. Bapat Valuers & Consultants Pvt. Ltd. It is submitted that name of the said Valuers was suggested by the respondents who submitted its report on 22nd December 2006. Reliance is placed on the letter dated 23rd December 2006 recording these facts addressed by Mr. Mukesh Malhotra to Mr. Puneet Malhotra. The said Valuation Report included the valuation of agricultural land standing in the name of Ankush. Reliance is placed on paragraph 18 of the order dated 3rd April 2007 passed by the learned District Judge dismissing arbitration application filed by the respondents challenging the interim award in which it was recorded that the respondents conceded that the only surviving dispute between the parties related

to the said agricultural lands. It is submitted that this was in respect of the pending dispute regarding agricultural lands before the learned arbitrator and such finding not having been challenged by the respondents, the same has become final and binding.

v) The Statement of Case submitted on 23rd May 2007 was merely an addendum to the statement earlier filed and was not a fresh statement of claim. Even the learned arbitrator on 29th May 2007 took a decision that the appellants were entitled to supplement their claim in accordance with provisions of Section 23 of the Arbitration Act and the Statement of Case filed was not a fresh Statement of Case but was merely an addendum to their earlier Statement of Case. This decision of the arbitrator has not been impugned by the respondents.

vi) In the impugned award, the learned arbitrator held that he has jurisdiction to decide in respect of agricultural lands. The learned District Judge, in application filed by the respondents u/s 34 rejected the contention of the respondents that the agricultural lands were not covered under the mandate of the arbitration agreement and held that arbitration agreement did not indicate that the arbitrator was assigned with the work of distribution of properties of different family members and thus had acted beyond the scope of arbitration agreement and beyond the scope of arbitral mandate. It is submitted that findings regarding distribution being outside the scope of arbitration was rendered by the learned District Judge by re-appreciating the entire material before the learned arbitrator and was by setting aside the said award on merits after differing with the arbitrator on questions of fact and merits, which is not permissible u/s 34 of the Act. The learned District Judge was not deciding any "jurisdictional facts". The learned District Judge was not entitled to arrive at a finding of fact which was different from and/or inconsistent with the findings of the arbitrator on merits. The learned arbitrator has analysed and interpreted the terms of loan agreement entered into between Ankush and Weikfield Ventures International and after considering the unusual terms recorded therein, had rendered a finding that transaction would not be a "loan simpliciter" or an arms-length loan transaction. It is submitted that recordings of findings of facts was within the arbitrator's jurisdiction and the learned District Judge could not have taken a different view by over-stepping the limits of Section 34 by substituting its own interpretation for that of the arbitrator and re-appreciating the entire material.

vii) Findings of the learned District Judge is contradictory. On one hand it has been held that the agricultural land in question was covered by the mandate of the arbitration proceedings and the arbitrator was justified in considering that issue and on the other hand, it is held that it was outside the arbitrator's scope to distribute those properties. It is submitted that the very issue had been raised in the arbitration application challenging interim award and the same was rejected by the learned District Judge in Order dated 3rd April 2007 thereby repelling the challenge on the ground that the arbitrator had no jurisdiction to distribute the businesses, assets and properties of the family. The learned

District Judge therefore, could not have taken a different view than a view already taken by his predecessor by an order dated 3rd April 2007.

viii) Finding of the learned District Judge that property was self acquired property of the respondents was by overruling the finding of the learned arbitrator which exercise was beyond the powers of the learned District Judge u/s 34. Proceedings u/s 34 of the Act was not proceedings by way of first appeal. Mr. D'vitre placed reliance on Section 7(4)(c) of the Arbitration Act in support of his plea that in paragraph 6(s), (t) and (u) of Statement of Case, there was a claim for distribution of said agricultural lands. It was also pleaded that arbitrator had jurisdiction to deal with such claims. The respondents at the first instance had not challenged the jurisdiction of the arbitrator to decide such claim in the written statement. The arbitration agreement thus would exist between the parties in view of Section 7(4)(c). It is submitted that the learned arbitrator had also jurisdiction to make an award regarding dissolution of firm. The learned senior counsel placed reliance upon the Judgment of Supreme Court in case of M/s. V.H. Patel and Company and Others Vs. Hirubhai Himabhai Patel and Others, and particularly paragraph 12 thereof which reads as thus:

12. So far as the power of the arbitrator to dissolve the partnership is concerned, the law is clear that where there is a clause in the Articles of Partnership or agreement or order referring all the matters in difference between the partners to arbitration, arbitrator has power to decide whether or not the partnership shall be dissolved and to award its dissolution. [See: Phoenix v. Pope & Ors., (1974) 1 All E.R. 512]. Power of the arbitrator will primarily depend upon the arbitration clause and the reference made by the court to it. If under the terms of the reference all disputes and difference arising between the parties have been referred to arbitration, the arbitrator will, in general, be able to deal with all matters, including dissolution. There is no principle of law or any provision which bars an arbitrator to examine such a question. Although the learned counsel for the petitioner relied upon a passage of Pollock & Mulla, quoted earlier, that passage is only confined to the inherent powers of the court as to whether dissolution of partnership is just and equitable, but we have demonstrated in the course of our order that it is permissible for the court to refer to arbitration a dispute in relation to dissolution as well on grounds such as destruction of mutual trust and confidence between the partners which is the foundation therefor.

It is submitted that the learned arbitrator had thus jurisdiction to decide the distribution of the said agricultural lands.

27. Mr. S.U. Kamdar, the learned senior counsel appearing for respondents on the other hand makes following submissions on this issue:

(i) The dispute in respect of the agricultural land situated at Wagholi, Lonikand and Bhavadi villages was not the subject matter of reference before the learned arbitrator. This claim was made for the first time in the additional statement of the claim for a declaration that Group A and B had a exclusive right, title and

interest in the said properties and standing in the name of respondent No. 2. The mandate and undertaking of the learned arbitrator was restricted to settle all the disputes and differences that had arisen amongst the parties regarding the business and properties owned by the family. In the Annexure 1 to the original statement of claim of Group C and D, details of seven jointly owned properties were set out. There was no specific details or particulars of three agricultural properties therein. The respondents had challenged the inclusion of disputes relating to these three properties before the learned arbitrator in reply dated 17th November, 2005 to the original statement of group of C and D on the ground that Group A and D were not agitating any claims therein. Neither Group A nor B made any specific prayer or pleadings in relation to those three properties.

(ii) The jurisdiction of the Arbitral Tribunal must be determined by a reference to the arbitration mandate submitted by the parties which was in the form of two arbitration agreements which was in writing which confers jurisdiction to the Arbitral Tribunal to determine specific dispute between the parties mentioned therein. No other documents must be looked at for the purpose of determining the jurisdiction of the Arbitral Tribunal when the reference to the Arbitral Tribunal is by written agreement between the parties. It is submitted that reference to the arbitration did not cover the individual properties of any individual member of the family where such property was standing in his own name. Even if those three properties were included in the original statement of claim, the contents of statement of claim cannot include dispute within the jurisdiction of the Arbitral Tribunal where there is a clear reference of dispute to that Tribunal by a written arbitration agreement. The said original statement of claim is filed only on behalf of Groups C and D albeit with the concurrence of Groups A and B. Groups C and D, in fact, have no claim to the said three properties mentioned in para (6) (s) of the original statement of claim and have not contributed a single farthing towards the purchase consideration of the same by a loan or otherwise.

(iii) The mere fact that the original statement of claim of Groups C and D was filed in concurrence with Groups A and B cannot make that original statement of claim by and on behalf of Groups A and B, especially where both Groups A and B have filed their own respective statement of claim.

(iv) There was no discussion in the entire interim award about those three properties. The jurisdictional challenge raised by Group E (respondents herein) to the inclusion of the said three properties by Groups C and D in their original statement of claim is also not decided anywhere. The interim award was restricted, inter alia to the "jointly owned real estate properties". The order passed by Company Law Board and/or observations made therein would not amount to reference on dispute in respect of those three properties to arbitration. The existence of disputes between two parties does not ipso facto mean that those disputes are actually being agitated before same forum. The question as to whether the said three properties were individual or jointly owned

properties was a jurisdictional fact that required determination in order to ascertain whether the Arbitral Tribunal did in fact have the jurisdiction to decide the disputes as to the said three properties.

(v) The learned District Judge having found that the learned arbitrator had incorrectly determined the jurisdictional fact and had incorrectly assumed jurisdiction, held that the learned arbitrator did not have jurisdiction to separate/distribute those properties which it found stood in the name of any individual family members. It is submitted that the Learned District Judge rendered a finding that those three properties were individual properties based on admitted facts. It is submitted that the learned arbitrator had jurisdiction to first determine whether the nature of the said three properties was as independent individual properties or family properties and once it was held that the same formed the independent and individual properties of a family member, he would not have jurisdiction to determine the actual dispute as to the said three properties. This view taken by the learned District Judge is in consonance with the provisions of Section 16 of the Arbitration and Conciliation Act, 1996 wherein it is provided that the learned arbitrator will always have the jurisdiction to determine his own jurisdiction.

(vi) Finding of the learned arbitrator that the said three properties were in fact family properties and not individual properties pertains to this jurisdictional fact and therefore can be the subject of a challenge u/s 16(6) read with section 34.

(vii) The learned District Judge, has while holding that the learned arbitrator had the jurisdiction to decide the jurisdictional fact, held that the learned arbitrator's findings on that jurisdictional fact are totally perverse and baseless and liable to be set aside. There is absolutely no inconsistency in the findings rendered by the learned District Judge in the impugned order.

(viii) It is submitted that it was an admitted fact that the said three properties in three villages standing in the name of respondent No. 2 individually under registered documents viz. Ankush Malhotra. As far as the property at Lonikand is concerned, the same was purchased by respondent No. 2 by taking loans from a partnership firm of Weikfield Ventures International. The said loan had been repaid by respondent No. 2 by taking a fresh loan from Mr. Bahri Malhotra. In respect of the loan taken from the grandfather/granduncle-Satpal Malhotra and Bahri Malhotra-there is no written agreement. The other two properties at Wagholi and Bhavadi villages were not totally financed by the loan obtained from the grandfather/granduncle but also included a portion of consideration paid by respondent No. 2 of his own account.

(ix) The learned senior counsel placed reliance upon the meaning of the word "loan" as per legal dictionary as under:-

"Loan" means a loan whether of money or in kind, and includes any transaction which is, in the opinion of the court, in substance a loan {Advanced law Lexicon at page 2776}.

Sum of money borrowed by one person or organization from another on condition that it is repaid, generally for a specified time and often at an agreed rate of interest. {Advanced law Lexicon at page 2776}.

A "loan" is defined as delivery by one party to and receipt by another party of sum of money upon agreement, express or implied, to repay it with or without interest. {Legal & Commercial Dictionary author Mitra at pg. 539}

A grant of something for temporary use. {Black's Law Lexicon-pg. 954}.

(x) Jurisdiction of arbitrator is determined by terms of reference and not by submission of claim. There cannot be two arbitration agreements i.e. one under two writings entered into between the parties referring certain disputes to arbitration and another u/s 7(4)(c) of the Arbitration and Conciliation Act. Different eventualities of arbitration agreements are provided u/s 7(4)(a) to (c). If one eventuality applies, the other is excluded.

(xi) There was no direction issued by the arbitrator for valuation for properties mentioned in paragraphs (s), (t), (u) of the statement of claim. However, the valuer made valuation also in respect of those three properties. In the interim award, the learned arbitrator had directed joint valuation only of joint properties. What was directed by the learned arbitrator regarding valuation is relevant and not what is ultimately carried out by the valuer. If the dispute regarding these three properties was already made before the learned arbitrator according to the appellant, the dispute would have remained only about distribution of such properties. Filing of fresh statement of claim was thus not necessary. Nature and character of the properties alleged was for the first time in the additional statement of claim and was not subject matter of the original statement of claim. Loan could never be considered as consideration for purchase of those three properties.

(xi) It is submitted that the learned District Judge rightly held that the arbitrator had jurisdiction to ascertain whether it is individual or family property and the reasoning of the arbitrator being perverse were liable to be challenged and set aside u/s 34 of the Act. The finding recorded by the learned arbitrator were contrary to the record, law and were perverse and rightly set aside by the learned District Judge.

(xii) The learned District Judge had taken a view that the properties were individual and self acquired properties based on admitted facts and thus rightly held that the learned arbitrator has no jurisdiction to distribute the individual properties of the respondents. u/s 34 of the Arbitration and Conciliation Act, the court is empowered to go into issue of perversity of the award. Reliance is placed on the judgment of the Supreme Court in case of ONGC Ltd. Vs. Garware Shipping Corpn. Ltd., .

(xiii) The award rendered by the learned arbitrator was contrary to the provisions of Benami Prohibition Act. Reliance is placed on section 3 of the said Act. The

arbitrator proceeded to determine the issue contrary to section 3 of the said Act and thus award is patently illegal. Title of the properties always stood in the name of Ankush Malhotra. It is submitted that Section 4(3)(a) and (b) of the Benami Transactions (Prohibition) Act, 1988 provides that no suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property except in two circumstances viz. (i) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family or (ii) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity. It is submitted that the said three properties purchased by loans from the grandparent/grandaunt would not fall within the exceptions created u/s 4 of the Benami Properties Act, 1988 and consequently the said three properties can never be treated or considered as benami property i.e. being held by a person by or on behalf of another person. In the present case the property held by Respondent No. 2 could never be treated as property of the Malhotra family as doing so would be clearly and patently contrary to the provisions of the Benami Act, 1988. It is submitted that the provisions of Section 4(3)(a) applies only in case of HUF property where the coparcener is holding the property in his individual name for and on behalf of the HUF. It is nobody's case that in the present case it is HUF property. In fact there is no HUF at all. It is submitted that a fiduciary capacity can only be created by person who is in a position to influence over another person. In the case of a family relationship the elderly persons having relationship with younger siblings could be in fiduciary capacity but it can never be vice versa. It is submitted that the case pleaded under Sections 3(a) and 4 for the first time in this Court has no merits whatsoever and is without any basis.

(xiv) Written loan agreement was only in respect of one property. In respect of two other properties, there was no documents of loan transaction admittedly. Even in the income tax return of the respondents, transaction was reflected as a loan transaction. The learned arbitrator rendered a finding that properties were family properties based on oral submission of appellant and affidavit of Ankush Malhotra. There was no cross examination of any of the party. On the issue of benami transaction, the learned senior counsel placed reliance upon the judgment of Pawan Kumar Gupta Vs. Rochiram Nagdeo, and in particular paragraphs 27 to 31 thereof which reads thus:-

27. It is true that respondent adduced evidence to show that Ext. P.11 was preceded by an agreement entered into between Pyarelal and Narain Prasad for the sale of the suit building. The High Court adverted to the said agreement. But even with that agreement the respondent has only succeeded in showing that Pyarelal had enough money and appellant was not having so much of funds to pay the purchase money for Ext. P.11. Perhaps the said circumstance may lead

to an inference that Pyarelal, the father of the appellant, gave money to his son to pay the consideration for buying the property.

28. Section 3(1) of the Benami Act contains the interdict that no person shall enter into any benami transaction. The aforesaid prohibition has been judicially pronounced as prospective only, (vide R. Rajagopal Reddy and Others (deceased by legal representatives) Vs. Padmini Chandrasekharan (deceased by legal representatives), . As the Benami Act was passed on 5.9.1988 it would apply to Ext. P.11 which was executed subsequently. A contention was bolstered up in the High Court on behalf of the tenant that since the sale consideration was provided by Pyarelal the sale deed would be a benami transaction.

29. Section 2(a) of the Benami Act defines benami transaction as "any transaction in which property is transferred to one person for a consideration paid or provided by another person." The word "provided" in the said clause cannot be construed in relation to the source or sources from which the real transferee made up funds for buying the sale consideration. The words "paid or provided" are disjunctively employed in the clause and each has to be tagged with the word "consideration". The correct interpretation would be to read it as "consideration paid or consideration provided". If consideration was paid to the transferor then the word provided has no application as for the said sale. Only if the consideration was not paid in regard to a sale transaction the question of providing the consideration would arise. In some cases of sale transaction ready payment of consideration might not have been effected and the provision would be made for such consideration. The word "provided" in Section 2(a) of Benami Act cannot be understood in a different sense. Any other interpretation is likely to harm the interest of persons involved in genuine transactions, e.g., a purchaser of land might have availed himself of loan facilities from banks to make up purchase money. Could it be said that since the money was provided by the bank it was benami transaction?

30. We are, therefore, not inclined to accept the narrow construction of the word "provided" in Section 2(a) of the Benami Act. So even if appellant had availed himself of the help rendered by his father Pyarelal for making up the sale consideration that would not make the sale deed a benami transaction so as to push it into the forbidden area envisaged in Section 3(1) of the Benami Act.

31. Thus, looking from either angle the contention of the respondent that appellant had no title to the suit property could not stand legal scrutiny. The High Court erred grossly in adopting such a view which is in conflict with law and is in reversal of the concurrent findings of the two fact finding courts.

28. In rejoinder on this issue, Mr. D'vitre submits that question relating to these three properties was raised in November, 2005 itself suggesting distribution of those properties and was always on record earlier. The learned arbitrator did not permit any party to alter the earlier arrangement/basis. Reference to these three properties was already made in the original statement of claim filed on 11th

November, 2005. Properties of Ankush Malhotra was referred in para 6(s). It was mentioned that the said property was purchased from the family fund and was to be valued and surplus was to be distributed. Statement of claim was submitted by Group A to D. Group A and B concurred. Grandparents were forming part of Group A and granduncle was forming part of Group B. No issue of jurisdiction was raised by the respondents in reply to the para 6(s), (t) or (u). There was no denial that those assets were family assets. It is submitted that by interim award, the learned arbitrator had ordered valuation of properties setout in Schedule 2. In statement of claim schedule included those three properties of Ankush Malhotra. M/s. Subhash Shah and Associates, the valuer were required to undertake valuation of the properties referred in enclosure to the letter of appointment dated 16th February, 2006. Respondents did not raise any objection about valuation of these three properties. Even the valuer Mr. Bapat also valued these three properties. The learned arbitrator chose valuation report of Mr. Bapat. No such issue was raised u/s 34 by the respondents. The learned District Judge in the earlier petition filed by the respondents had already rejected the plea of the respondents that the arbitrator had no jurisdiction to distribute the family properties and assets and this finding of the learned District Judge is binding on parties. The finding of the learned District Judge in the second arbitration application challenging the final award on this issue is inconsistent with the finding of the learned District Judge in the first proceedings filed u/s 34. The learned District Judge in the second proceedings could not have taken a different view on this issue than view of the learned District Judge in the first proceedings which had become final.

29. It is submitted that the learned arbitrator had rendered a finding that the claims in respect of these three properties were not new claims but were supplemental to the original claims which findings were not perverse and thus no interference could be made by the learned District Judge u/s 34 of the Act. The learned arbitrator rendered a finding that three properties were part of the original statement of claim which findings were not challenged by the respondents. The arguments of the respondents in the first arbitration application filed u/s 34 that arbitrator had no jurisdiction to decide and distribute the properties of the family members was rejected by the learned District Judge.

30. It is submitted that plea raised across the bar that the learned arbitrator was empowered to decide only the jurisdictional fact has not been raised in the arbitration application filed u/s 34 before the learned District Judge by the respondents and such plea has been raised across the bar for the first time which cannot be permitted. The learned District Judge was not deciding the first appeal but was deciding application u/s 34 of the Arbitration and Conciliation Act.

31. It is submitted that it was not a simpliciter loan transaction. The loan was with the understanding that it was a family property. Income tax return of the Ankush considered by the learned arbitrator discloses that he had no funds. The provisions of the loan agreement clearly indicated that it was not a simpliciter

loan transaction. In case of default in making repayment, the appellant also had share in the property. The parties were entitled to compensation at the market value. This type of clauses were not usual clauses which would indicate any pure loan transaction. The learned arbitrator had interpreted the material and documents produced before him and had rendered a possible interpretation. The learned District Judge could not have drawn any other inference while deciding arbitration application u/s 34. Views of the Arbitral Tribunal could not be substituted by court u/s 34. It was a loan transaction within the members of the family to grand children with understanding and was not a loan transaction between two strangers at arms length. The learned arbitrator had interpreted the documents and had rendered a finding of fact which could not have been re-appreciated by the learned arbitrator u/s 34. The learned arbitrator in equitable manner and based on material on record has ordered the division of the properties amongst the family members. The learned District Judge has substituted views of the arbitrator by interpreting the evidence and has decided on merits by coming to the different conclusion on merits by re-appreciating the facts and evidence which is not permissible u/s 34 of the Act. Even if arbitrator had committed any error, the said error was within his jurisdiction and not outside his jurisdiction. The learned arbitrator could not have shut his eyes on reality.

32. On the plea of benami transaction, Mr. D'vitre, the learned senior counsel placed reliance upon the exception u/s 4(3) (a) and (b) and submits that it includes constructive trust. It is submitted that Ankush Malhotra had held the property in trust for family and on separation, he was liable to return the said property to the family. It is submitted that view taken by the learned arbitrator was possible view and was correct view on jurisdiction and on merits, it could not have interfered with by the learned District Judge. The award is not contrary to the provisions of Benami Prohibition Act.

Whether refusal on the part of the learned arbitrator to permit the respondents to represent themselves by an advocate at the time of hearing of claims culminating in final award was hit by section 34(2)(a)(iii) of the Act or the respondents were deprived of full opportunity to present their case?

33. Mr. D'vitre, the learned senior counsel appearing on behalf of appellants made following submissions on this issue.

(i) It is an undisputed position that (i) the learned arbitrator was an old family friend over 35 years who was well known to the entire family, (ii) at the first arbitration meeting, the parties agreed that they would not lead evidence, oral or written in the present case, (iii) throughout the arbitration till 11th June, 2007, the parties had proceeded without any lawyers.

It was the arbitrator's recollection that the agreement had been recorded in the minutes of the first meeting. However, this was not so. Nonetheless, the facts on record are consistent with a case that at the first meeting, parties had informally

discussed that there would be no representation through lawyers and an informal arrangement to that effect was arrived at. The conduct of the parties viz. in fact not engaging lawyers also lends support to the same.

(ii) The arbitrator's direction at the meeting on 11th June, 2007 that lawyers would not be permitted in the arbitration was based on the above understanding between the parties and to avoid delay in the matter. The arbitrator's direction applied equally to all the parties. The entire arbitration proceedings had been conducted without representation by lawyers until 11th June, 2007, even when the matters relating to the agricultural lands were also before the arbitrator from the initial statement of case of 11th November, 2005. Thus, the arbitrator's direction in effect prevented one of the parties from acting contrary to the understanding. The arbitrator even otherwise gave cogent reasons for his direction viz. to prevent delay. The parties filed extensive written submissions which were duly considered by the arbitrator. The arbitrator's direction thus was justified on the facts.

(iii) Section 18 of the Arbitration Act provides that parties are to be treated with equality, and that each party must be given a full opportunity to present its case. The later sentence must be read in the context of the "equality" requirement dealt with by section 18. It is a fact that the learned arbitrator did not permit any party to be represented by advocates. u/s 19 of the Arbitration Act, the arbitrator is entitled to decide upon the procedure to be adopted in the manner he considers appropriate, unless the parties have agreed. The respondents' case that there was an "agreement" between the parties that advocates should be permitted, is totally incorrect and is negated by the minutes of the meeting dated 11th June, 2007 and the respondents' own version of events as no such "agreement" was ever pleaded or urged by the respondents. A new case cannot now be made out for the first time. In the present case, given the informal nature of the proceedings, the fact that the arbitrator was an old family friend, of over 35 years, that it involved family disputes and the parties themselves throughout the arbitration proceedings (upto 11th June, 2007) never felt the need for being represented by advocates, the arbitrator's decision is based on cogent reasons and is a possible view which did not warrant any interference by this Hon'ble Court.

(iv) The learned senior counsel placed reliance upon the judgment of this court in case of *Skanska Cementation India Ltd. Vs. Bajranglal Agarwal and Others*, and in particular paragraphs 2 and 5 which reads thus:-

2. A few facts may be now noted to enable this Court to dispose of the present petitions. Admittedly the petitioners in both the petitions had placed purchase orders on the respondents. The dispute is regarding the balance unpaid amounts and the interest on the unpaid amounts. The petitioners in support of their contentions that there was no Arbitral clause relied on the purchase order and more specifically Clauses 1, 10 and 11 which may be reproduced as under:

(1) The execution of this order shall be deemed to be an acceptance of the conditions stated herein. The contract shall be deemed to have been made in Bombay, and shall be subject to jurisdiction of Courts in Bombay.

(10) In case of any dispute the decision of the company shall be final and binding on the suppliers.

(11) In acknowledging the order the supplier is required to draw attention of the company specifically to any conditions contained in the order which he finds unacceptable and in the absence of such notification, the conditions contained herein shall exclusively govern this order.

It is, therefore, the contention of the petitioners that when the respondents supplied the goods it amounted to a contract which had come into force and it was governed by the provisions of the terms and conditions of the purchase order. The terms and conditions specifically provided that in case of any dispute, decision of the company shall be final and binding on the supplier. It is further contended that merely because the petitioners have signed some documents before the Arbitral Tribunal would not mean that they have submitted to jurisdiction. All throughout their contention is that the Arbitral Tribunal had no jurisdiction and considering Section 16 of the Arbitration and Conciliation Act, 1996 and considering the judgment of the Apex Court in the very dispute amongst the parties in which it was observed that the dispute regarding jurisdiction would be resolved and decided by the Arbitrator the issue was open for consideration and decision and merely because they participated and raised objections to the jurisdiction of the Arbitral Tribunal would not amount to acquiescence on their part in submitting to the jurisdiction of the tribunal.

On the other hand on behalf of the respondents, it is contended that the issue of jurisdiction was an issue before the Arbitral Tribunal. Considering the terms, the Arbitral Tribunal has come to a finding that there is an Arbitral clause. Once that be the case, it is contended, considering that there was a contract between the parties and the Arbitral Tribunal had decided the dispute this Court should not interfere with the said finding on the issue of jurisdiction. It is then contended that even assuming Clause 11 of the terms and conditions of the purchase order, the respondents had dispatched the goods under the delivery challan. The delivery challan contains clauses of which those relevant for discussion read as under:

Subject to Mumbai jurisdiction and/or if any dispute arises regarding the goods sold under this challan the same have to be referred for decision to Bharat Merchants Chamber or Arbitration under the Rules of the said Chamber Membership No. 600.

Additionally Clause 4 reads as under:

That acceptance of this bill/invoice overrules conditions of the purchase order wherever it clashes with the purchase order.

It is contended that the goods were received by the petitioners under this challan without protest. Moneys for the goods received have been paid from time to time without protest. Apart from that subsequently bills were raised on the petitioners. Clause 5 of the printed conditions reads as under:

If any dispute arises regarding the goods sold under this bill the same shall have to be referred for decision to Bharat Merchants Chamber.

It is, therefore, contended that both in terms of the delivery challan and the bill the Arbitral Tribunal would have jurisdiction. The petitioners if aggrieved by the terms ought to have protested and/or refused to accept delivery when the delivery challan contained specific provision. Having not done so it would not be open to the petitioners to raise the dispute before the Arbitral Tribunal of jurisdiction of the Arbitral Tribunal after having paid the large amounts of moneys under the various delivery challans and bills.

5. The next contention was that the petitioner has sought services of an advocate. That was rejected. The tribunal has dealt with the said application and considering the Rules and the discretion in the tribunal has chosen to reject the application of both the petitioners and the respondents for engaging a lawyer. The exercise of discretion surely cannot be a matter for interference by the Courts u/s 34 by contending that the petitioners were denied an opportunity. The decision to permit engagement of lawyer was within the discretion of the tribunal. Both the parties had sought the opportunity of engaging lawyers. Both have been dealt with equally. The petitioners if they were not conversant with the language could have deputed any person conversant with Hindi to enable them to proceed before the Arbitral Tribunal. It was within the competence of the petitioners to do so. Having not done so and once the tribunal has followed the procedure of the Chamber agreed to by the parties, it cannot be said that the Award atleast on the count should be set aside. There has been no failure to give an opportunity to the petitioners to present their case. The petitioners were in fact represented and had submitted their written say.

Learned senior counsel submits that this judgment delivered by this court was though cited before the learned District Judge, it was not even referred to in the impugned order. It is submitted that the learned arbitrator had rejected the application of both sides for appointment of an advocate. It is submitted that once the learned arbitrator had exercised discretion not to permit any parties to engage lawyers and both parties were treated equally, the learned District Judge could not have interfered with such discretion exercised by learned arbitrator and could not have interfered with arbitration award on that ground.

(v) It is submitted that both parties were allowed to file written arguments and such written arguments clearly indicates that the same were drafted by lawyers. It is submitted that refusal to permit respondents to engage lawyer was thus not attracted to the award and then award could not have been set aside on that ground. It is submitted that both parties were treated equally and full

opportunity was given to both parties. The learned senior counsel placed reliance upon sections 19(2) and (3) of the Arbitration Act, 1996 in support of his plea that the parties were free to agree on procedure to be followed by the arbitral tribunal in conducting its proceedings and filing any such agreement, the arbitral tribunal was empowered to conduct the proceedings in the manner it consider appropriate. It is submitted that it is not case of the respondents that the appellants were permitted to engage lawyer and the respondents was not permitted to engage lawyer. Considering the nature of the proceedings, the learned arbitrator did not allow either party to engage a lawyer to represent their case. It is thus submitted that there was no violation of section 18 by the learned arbitrator.

34. Mr. S.U. Kamdar, learned senior counsel appearing on behalf of the respondents on the other hand makes following submissions on this issue:-

(i) At the very first hearing, the respondents made a request to the learned arbitrator to be permitted to be represented by their advocate and even presented their advocate to the tribunal at that hearing. That request was turned down by the Arbitral Tribunal as recorded in the Minutes dated 11 June 2007. The decision as contained in these Minutes refusing the respondents' request for representation by a lawyer was the subject matter of challenge before the District Court, Pune in the Section 34 challenge to the final award. The record in the form of the minutes of the Arbitral Tribunal, records the request by the respondents to be represented by a lawyer as, "when asked by the Hon"ble Arbitrator, why they wanted a lawyer, Group E stated that in their view complicated matters of law were involved and they were not themselves competent to argue their case." The minutes then records a statement of the appellant representative which reads "...Mr. Mukesh Malhotra of Group C stated that while in his opinion, Group E was entitled to such representation by a lawyer,...". The aforesaid statement is followed by the following statement "...if this was to be permitted inspite of the earlier oral understanding, then Group A, B, C & D should also be given suitable time and opportunity to engage and brief their own lawyer to represent then as well." It is submitted that the aforesaid statement records the consent of the appellants to an agreement between the parties, u/s 19(2) of the Act, inter alia, providing for representation to both the parties by their respective advocates.

(ii) It is submitted that once there was an agreement that both parties were entitled to have representation by an advocate, the Arbitral Tribunal had no choice or discretion remaining but to permit such representation, if desired, u/s 19(2) of the Act. The provisions of Section 19(2) of the Act conferring the Arbitral Tribunal the discretion to decide procedure arises only in those cases where there was no agreement as to an aspect of procedure between the parties u/s 19(2) of the Act. The Arbitral Tribunal had already verified, by perusing the minutes of the first meeting, that no agreement preventing representation by lawyers was arrived at between the parties. However, he proceeded to direct that

no representation by lawyers would be permitted for either party on the footing that from his recollection of the first meeting, the parties had in fact agreed to the same. It is submitted that the mere recollection of the learned arbitrator, contrary to the written record of the Minutes, as prepared by him, cannot be the basis on which such a decision is made. Where such an agreement does in fact exist, the Arbitral Tribunal cannot exercise its powers u/s 19(3) of the Act to establish procedure contrary to the agreement between the parties. It is submitted that the decision of the arbitral Tribunal to refuse representation by an advocate in spite of a clear agreement between the parties u/s 19(2) of the Act is totally without jurisdiction and wholly erroneous.

(iii) Assuming without admitting that there is no such agreement, u/s 19(2) of the Act, the learned Arbitrator has therefore exercised his powers u/s 19(3) of the Act to determine the procedure to be followed before the Arbitral Tribunal. It is submitted that the provisions of Section 19(3) must be read along with Section 18 of the said Act. It is submitted that a reading of both these Sections makes it clear and evident that an equal opportunity and an effective representation must be permitted by the Arbitral Tribunal, particularly when a complex question of law arises.

(iv) The learned senior counsel placed reliance on the commentary of the learned author Russell on arbitration, 23rd edition on this issue which reads as under:-

Representation at the hearing: Parties may wish to be represented at the hearing by an advocate. Unless the parties have agreed otherwise, this may be a lawyer or "other person", the refusal of a party's request for representation by an advocate chosen by him, or seeking to limit the level of representation, may give grounds for challenging the award, particularly in complex cases. However, a party cannot insist upon a particular individual if, for example, that person is unsuitable or unavailable. In these circumstances some other individual would have to be chosen. Legal representation may be excluded by the parties' arbitration agreement. It is excluded by the rules of certain trade associations, but is expressly permitted by other institutional rules. Many sets of rules are silent on the point, and the practical effect of this is that the parties may be legally represented if they so wish.

(v) Mr. Kamdar, learned senior counsel placed reliance upon the judgment of this court in case of Faze Three Exports Ltd. Vs. Pankaj Trading Co. and Others, in support of his plea that even u/s 19(3) of the Arbitration Act, 1996, the arbitral tribunal must permit parties to be represented by an advocate where complex question of law arises and effective representation is a must for the redressal of disputes between the parties. It is submitted that in the present case, various complex questions of law has arisen which requires effective representation by an advocate. Paragraphs 9 to 11 of the judgment of this case in case of Faze Three Exports Ltd. reads thus:-

9. The arbitral tribunal appears to have declined the request of the petitioner to

be represented by a legal practitioner on the principal ground that allowing of advocate's presence would result in delay and protraction of the proceedings. The advocates and lawyers delay the proceedings is myth. Sooner the myth is exploded the better it is. May be on stray occasions, a litigant and sometimes even a Judge may feel that a particular proceeding could be disposed of quickly without the assistance of legal practitioners of either side on account of triviality of the dispute or otherwise. But, that is an exception. By and large, advocates and lawyers assist the Courts and Tribunals in limiting the scope of enquiry to the relevant overlooking the irrelevant, separating grain from the chaff and focusing on the real relevant issues. Generalisation that advocates and lawyers delay the proceedings is incorrect. Every Court and Tribunal which is endowed with the duty to act judicially or to determine any issues affecting the rights of the parties in a judicial or quasi judicial enquiry must, in the absence of a statutory provision to the contrary, allow the party before it, if it so wishes to be represented by his authorised representative-including a legal practitioner. Enforcement of Section 30 (which incidentally has not yet been brought into force) of the Advocates Act is not necessary for this purpose. Section 30 of the Advocates Act speaks of the right of Advocates to practise. But, what about the rights of a litigant, who wants to be represented by a person having knowledge of law. Duty to act fairly is inherent in every Court, Tribunal and Authority which has a right and duty to decide upon the rights for the citizens. Giving of a fair opportunity to defend (or to put up his case) to every party is a part of duty to act fairly. Grant of a permission to a party to be represented by a person of his choice, including a legal practitioner, except where statute prohibits it or the Tribunal feels it to be against the public policy (like in some sensitive matter involving security of the State) is a part of the duty of the Tribunal to act fairly.

10. In the present case, the petitioner had specifically made a request to be represented by a legal practitioner. A partner of M/s. Mahimkar and Mahimkar, Solicitors was present at the venue of arbitration but, was not allowed to appear for the petitioner. This is recorded in the letter of the petitioner's Solicitors dated 16th August, 2002. It is thus, clear that fair opportunity of hearing was not given to the petitioner and to present his case which he wanted to do through his legal practitioner. This was done without any authority of law or without any authority in the arbitrators to prevent the representation of the petitioners through a legal practitioner. I am of the considered opinion that even in arbitration proceedings, parties are entitled to be represented by a legal practitioner if they so desire unless they have agreed in writing that none of the parties shall be represented by a lawyer.

11. It is not disputed that Mr. Sunderlal Bagadi was not present in the arbitral meeting on 14th August, 2002. Solicitors of the petitioner by their letter dated 16th August, 2002 have also recorded in writing that Mr. Sunderlal Bagadi was not present but, the remaining two arbitrators stated that his presence was not necessary and they would inform him as to what transpired at the hearing. In para 33 of the petition, the petitioners have stated on oath that only two

arbitrators were present at the arbitral meeting on 14th August, 2002 and they told the petitioner that they would convey him what transpired at the hearing. No affidavit in reply has been filed by the respondents denying this. Even before me, the learned counsel for the respondent did not dispute that the third arbitrator was not present at the arbitral meeting held on 14th August, 2002.

Mr. Kamdar, learned senior counsel placed reliance upon the judgment of Calcutta High Court in case of Nanalal M. Varma and Co. (Gunnies) Private Ltd. Vs. G. Ambalal (Export), on this issue.

Paragraphs 4, 15 and 16 of the judgment of the Calcutta High Court in case of Nanalal M. Varma & CO. (supra) reads thus:-

4. Right to be represented by a lawyer is not expressly recognised by the Indian Constitution with perhaps one exception. It is not a fundamental right under the Constitution of India except under Article 22 of the Constitution in the case of preventive detention where personal liberty is involved. As the Constitution does not recognise the right of a citizen to be represented by a lawyer, except in that particular case, refusal to permit lawyers representing parties in a civil dispute over a contract before the Arbitrators cannot, therefore, be regarded as an infraction of any constitutional provision. It was then argued that the arbitration infringed Article 19(1)(g), Constitution of India. The right there recognised, however, is confined to the right of a citizen to practise a profession which in this case is profession of law. It is not necessarily the same thing for an applicant to claim a right to be defended by a lawyer in a civil dispute over a contract. It is not the applicant's right but the lawyer's right. This arbitration agreement expressly incorporating the rules of the Bengal Chamber of Commerce specifically recognising the right to exclude lawyers except with the permission of the Arbitrators, is not in my opinion a denial of the citizen's right to practise the profession of law. It is left to the Arbitrator to judge each individual case on its merit and to consider whether it is a fit and proper case to permit lawyers to appear. Even were it a denial, I would justify it as a reasonable restriction imposed by the existing law under Sub-clause 6 of Article 19 of the Constitution. Ordinarily in India a person certainly has a right to engage any qualified lawyer to represent his case. But that is a contractual right and not a Constitutional right. It is a matter of contract between the litigant and his lawyer and not a subject of Constitutional provision. It is normally a permissible contract but it is always subject to rules, of those particular Courts and Tribunals before whom the lawyers are licensed to appear and those restrictions are justifiable restrictions on the ground of reasonableness under Sub-clause 6 of Article 19, Constitution of India.

15. The third objection is about the refusal of the Arbitrators to permit the applicants to take the help of lawyers to represent their case before the Arbitrators. Here again the Rule of arbitration of the Bengal Chamber of Commerce is quite specific. By Rule 16 it is expressly declared and provided inter alia:

In any case of a formal hearing, no party shall without the permission of the Court, be entitled to appear by Counsel, Attorney, Advocate or other lawyer adviser.

16. Here again it is clear enough that normally a lawyer will not be allowed to appear or rather a party should not be allowed to appear by Counsel, Attorney, Advocate or other lawyer. If they want to appear, they can only appear with the permission of the Arbitrators. It is for the Arbitrators to permit or refuse. In this case the Arbitrators have refused the applicant's claim to be represented by lawyer. In so refusing, therefore, there cannot be any misconduct because they acted within their powers expressly conferred under the Rules of Arbitration. The parties had agreed in the clause of arbitration set out above, that the arbitration should be according to the Rules of the Bengal Chamber of Commerce. That being so, it is not, for the applicants now to complain that they were not allowed to be represented by lawyers. The discretion lies entirely with the Arbitrators, and I do not find any fact shown on the records of this case which can even remotely suggest that such discretion was not rightly exercised by the Arbitrators. In fact, neither party was represented or allowed to be represented by any lawyer. The questions that were raised before the Arbitrators in this case are very common questions which Arbitrators in commercial arbitrations are deciding everyday in this city.

(vi) Mr. Kamdar, learned senior counsel made an attempt to distinguish the judgment in case of Skanska Cementation India Limited (supra) and submits that rules of the Bharat Chamber of Commerce which was under consideration of this court in the said matter provided that no parties can be represented by an advocate in the chamber arbitration unless the arbitral tribunal permits the parties to do so and thus it was within the sole discretion of the arbitral tribunal to decide whether the parties should be permitted to represent themselves through a lawyer or not. It is submitted that however in this case, both parties had agreed that parties should be allowed to be represented by an advocate and thus the learned arbitrator could not have exercised any discretion to refuse engagement of a lawyer to represent them. The learned senior counsel submits that the facts of this case would be governed by the law laid down by this court in case of Faze Three Exports Ltd. (supra) and not in case of Skanska Cementation India Limited (supra) relied upon by the appellants.

35. In rejoinder, Mr. D'vitre, learned senior counsel submits that in case of Skanska Cementation India Limited (supra), the said judgment does not refer to any rules of Bharat Chamber of Commerce prohibiting any party to engage a lawyer as sought to be canvassed by Mr. Kamdar, learned counsel appearing for respondents. It is submitted that judgment in case of Faze Three Exports Ltd. (supra) relied upon by Mr. Kamdar, does not take into account the prior judgment of this court in Skanska Cementation India Limited (supra). It is submitted that in case of Faze Three Exports Ltd. (supra), this court came to the conclusion that parties were entitled to be represented by a legal practitioner, if they so desire,

unless they agree in writing to the contrary, that they would not be represented by a lawyer. It is submitted that in case of Faze Three Exports Ltd. (supra) it was not a case where one of the party sought to act contrary to the previous understanding between the parties and the consistent previous conduct of the parties which bears out the understanding. Learned senior counsel submits that in any event, the view in the earlier judgment of this court in case of Skanska Cementation India Limited (supra) should be preferred. Learned District Judge failed even to consider the judgment of this case in case of Skanska Cementation India Limited (supra) though relied upon by the appellants and the learned District Judge relied upon only the later judgment of this court in case of Faze Three Exports Ltd. (supra) which did not even consider the previous judgment in case of Skanska Cementation India Limited (supra). As far as judgment of Calcutta High Court of Nanalal M. Varma & CO. (supra) is concerned, Mr. D'vitre, submits that this case is not based on any rules but involves an undertaking between the parties and/or direction of the arbitration regarding procedure in the proceedings before him. The learned senior counsel placed reliance upon para (15) of the said judgment in case of Nanalal M. Varma & CO. (supra) which holds that no party has right to be represented by advocate in arbitration proceedings. The learned senior counsel submits that the learned District Judge was bound by the judgment of this court in case of Skanska Cementation India Limited (supra) and could not have set aside the impugned award on this ground. The learned senior counsel submits that section 18 of the Arbitration Act, relied upon by Mr. Kamdar, the learned senior counsel appearing for the respondents would be of no assistance to the respondents as the learned arbitrator had not permitted any party to engage a lawyer and had treated both parties equally. Learned senior counsel invited my attention to the Minutes of the Meeting at page 485 of the appeal paper book in support of his plea that even Group A to D wanted engagement of an advocate, if arbitrator would have allowed the respondents to engage an advocate. As the learned arbitrator did not permit the respondents to engage an advocate, also did not permit the appellants to engage an advocate, there was thus no agreement arrived at in the said meeting that the advocate shall be engaged by both parties. Learned senior counsel also invited my attention to the written arguments of the respondents filed before the learned District Judge to demonstrate that the understanding of both the parties on this issue about the contents of the minutes of the meeting of the leaned arbitrator was same. It is submitted that the submissions advanced by Mr. Kamdar across the bar that there was an agreement that both parties shall be allowed to represent by an advocate and inspite thereof, the learned arbitrator refused to permit the parties to engage an advocate was contrary to section 19(2) of the Arbitration Act, 1996 is not even pleaded nor argued before the learned District Judge u/s 34 of the Arbitration Act, 1996. It is submitted that in view of family disputes, both parties had accepted to sort out dispute before chosen forum i.e. family friend who was appointed as a sole arbitrator. It is submitted that it is not in dispute that even in the hearing of earlier proceedings, none of the parties were allowed to engage any advocate. It is submitted that the learned District

Judge ought to have considered the background of this case while considering the issue whether discretion exercised by the learned arbitrator to refuse to permit to engage a lawyer was proper or not. The learned arbitrator has refused to permit engagement of lawyer to avoid further delay. No hearing took place for one year before the learned arbitrator in view of the pendency of application filed by the respondents u/s 34 before the learned District Judge impugning interim award. The respondents had requested the learned arbitrator to permit engagement of the lawyer after one year.

36. Mr. D'vitre, the learned senior counsel appearing for the appellants further submit that the learned arbitrator had considered the tax return of Ankush for the relevant years which clearly showed his limited financial resources at the relevant time. It was also considered that the loan was on the basis of the family understanding which was reflected in the terms of loan agreement of 1996. Identical agreements were also executed between the firm and Mr. Akshay, the other grandson and Shikha, the granddaughter. It is submitted that after considering all those material placed for his consideration by the parties, the learned arbitrator rendered various findings and rejected the submissions made by the respondents that Ankush merely received interest free loans of large amount from the elders without any conditions whatsoever. It is submitted that the arbitrator was within his rights to arrive at any fair resolution of the dispute. The learned arbitrator was right in accepting oral submissions of the grandfather/granduncle to adopt 1/6th share formula for separation and such sharing formula was not required to be formally proved before the learned arbitrator by leading evidence. The arbitrator was justified and entitled to accept the 1/6th formula in order to ensure a fair resolution of the disputes considering also the terms of the loan agreement. It is submitted that as no witnesses were examined, the contention of the respondents that they were denied an opportunity to cross examine the witnesses is false. It is submitted that in any event, the findings of the learned arbitrator were not just a possible view of the matter but were wholly correct findings on fact. The District Judge committed a fundamental error by interfering with the award on this ground.

37. On the submission of the respondents that the award was contrary to Benami Transaction (Prohibition) Act, 1988, Mr. D'vitre, learned senior counsel in rejoinder submits that though this issue was raised in petition u/s 34 by the respondents, it did not appear to have been urged before the District Court. There was no reference in the impugned order to any submission in that regard nor there was any reference to the Benami Transaction (Prohibition) Act, 1988 as a result for setting aside the final award dated 21st July, 2007. The respondents cannot be allowed to raise such plea for the first time in the present proceedings. It is submitted that without prejudice to the aforesaid submissions, section 4(3) of the said Benami Transaction (Prohibition) Act, 1988 is wide enough to exclude the present properties from the applicability of the Act, having regard to all the facts and circumstances. Section 4 excludes the application of the Act to the properties setout therein in (a) and (b) viz. held by a coparcener in a Hindu

Undivided Family, for the benefit of the others in the family, as also with regard to properties held by persons standing in a fiduciary capacity. The learned arbitrator has clearly held that the said lands were purchased for the benefit of the entire family and only held in the name of Ankush for convenience. Such an understanding is not hit by the provisions of the Benami Transaction (Prohibition) Act, 1988. The respondents' submission that the nephew (Ankush) was not in a fiduciary position to his grand father/grand uncle or other family members is not accurate. Fiduciary obligations may arise from the relationship of parties per se or from relationships arising from contract. In the present case, qua the agricultural lands, it is clear from the arbitrator's findings that Ankush was in a position of trustee or fiduciary qua the other family members.

38. In so far as issue pertaining to the partnership firm of Weikfield Ventures International is concerned, Mr. Kamdar submits that the Award of the Arbitral Tribunal is totally without jurisdiction and bad in law. The Arbitral Tribunal has taken cognizance of the fact that a suit was pending before the District Court, being suit number 1458/2006. The said suit pertains to challenge of certain sale of the plots purported to have been carried out by the appellant, which belonging to the respondents, without any power of attorney, and by misusing the power of attorney given to them by the respondent through the firm. The plots did not belong to the firm, but the Arbitral Tribunal while purporting to decide the disputes pertaining to the firm has decided the pending suit, pending before the District Court, though such suit was never referred to the Arbitral Tribunal by any of the parties. The aforesaid finding of the Arbitral Tribunal making the suit redundant and ineffective is totally contrary to law and in excess of the jurisdiction conferred on the Arbitral Tribunal. The award pertaining to the said partnership firm is in excess of jurisdiction in as much as it pertains to the properties which are the subject matter of the suit, which admittedly did not belong to the firm and the dispute of the said suit was never referred to the Arbitral Tribunal, which is evident from the reference at page 87 and 89 of the appeal paper book. The contention of the respondent that the Arbitral Tribunal could have done so to effectively to bring an end to all disputes between the parties, though the said suit did not pertain to the assets of the partnership firm is totally baseless and without merits, for the simple reason that the Arbitral Tribunal being a creature of statute is not entitled to travel beyond the mandate given by the parties even if he desires to settle the disputes between the family once they are not referred to him by the parties.

39. In rejoinder on this issue, Mr. D'vitre, the learned senior counsel appearing for the appellants invited my attention to the prayer in the pending suit filed by Punit (Group E) which is reproduced as under:-

(a) The Hon''ble Court will be pleased to declare that the defendants have no authority to deal with the suit properties in any manner whatsoever of the plaintiffs and decree the suit.

(b) The Hon''ble Court be pleased to restrain the defendants or their servants,

agents etc., by an order of permanent injunction from creating any third party interest, changing the nature of the suit property in any manner, whatsoever by virtue of power of attorney.

(c) Hon'ble Court be pleased to grant leave to the plaintiff U/O 2 R 2 of the CPC for challenging the sale transaction entered into by the defendants in respect of the suit property and losses incurred.

(d)...

(e)...

(f)...

40. The learned senior counsel further submits that the findings of the learned District Judge that the dissolution of the partnership firm could be done only by court of law and not by the arbitrator is ex-facie incorrect. Suit was not for relief of dissolution of the partnership and such question was not sub-judice before the learned District Judge. The dissolution of the partnership firm as recorded would in fact automatically result in the respondents obtaining the reliefs that they were seeking in the said suit as above, as in that event inter alia the partners' authority to deal with the properties under the power of attorney would cease. The fact that the award was made during the pendency of the suit was within the powers of the arbitration and is a course sanctioned by the law u/s 8(3) of the Arbitration Act. The learned senior counsel again placed reliance upon the judgment of the Supreme Court in case of M/s. V.H. Patel and Company and Others Vs. Hirubhai Himabhai Patel and Others, in support of his plea that arbitrator has jurisdiction to order dissolution of the firm.

WHETHER CROSS OBJECTION FILED BY THE RESPONDENTS IS MAINTAINABLE AND IF SO, WHETHER RESPONDENTS HAVE MADE OUT A CASE FOR ENTERTAINING SUCH CROSS EXAMINATION ON MERITS ?

41. Mr. D'vitre, learned senior counsel appearing for the appellants raised preliminary objection about the maintainability of cross objection filed by the respondents challenging certain findings rendered by the learned District Judge in arbitration application filed by the respondents u/s 34 of the Act. Mr. D'vitre made following submissions on this issue:-

(i) Cross objection is not maintainable u/s 37 of the Act. Cross objection is substantive right of appeal and form of exercise of that right is by way of cross objection. Right of filing cross objection also must be provided under the statute and is not inherent right. Appeal would lie where statute permits. Cross objection is not against the order refusing to set aside or setting aside the award. Cross objection does not fall under any of the appealable order provided u/s 37 of the Act. It is submitted that the respondents had succeeded in their arbitration application filed u/s 34 praying for setting aside the impugned award. As the respondents have succeeded in the said application and the impugned award was set aside, no appeal could be filed against such order under any part of Section

37 of the Arbitration and Conciliation Act, 1996. If appeal could not have been filed, cross objection also can't be filed. The learned District Judge has set aside the entire award and thus cross objection would not be maintainable. It is submitted that the provisions of Order 41 Rule 22 of the Code of Civil Procedure, 1908 can't be read in section 37 which provides for a list of appealable order. No appeal is maintainable against any other order not provided u/s 37. The findings rendered by the District Judge are not appealable u/s 37. The learned senior counsel placed reliance upon the judgment of the Supreme Court on this issue in case of Municipal Corporation of Delhi and Others Vs. Intl. Security and Intelligence Agency Ltd., and in particular paragraphs 4 to 11, 13 to 15, 18 to 21, 23 and 24 which read thus:-

4. Disputes arose between the parties and on a petition u/s 8 of the Act filed by the respondents, the Court directed the same to be determined through arbitration by a retired Judge of the High Court. The order of the Court appointing the arbitrator and referring the disputes for determination by him achieved a finality as the appellants did not file any appeal there against and both the parties submitted to the jurisdiction of the arbitrator. On 14.3.1997, the arbitrator gave an award. The award is a non-speaking one. The arbitration agreement between the parties does not require the arbitrator to make a reasoned award. The respondents filed an application u/s 14 of the Act for making the award a rule of the Court. On 26.5.1997, objections were filed by the appellants seeking setting aside of the award. Though the objection petition is styled as one under Sections 30 and 33 (both) of the Act, a perusal of the contents of the objection petition shows that all the objections raised therein fall within the scope of Section 30 of the Act. During the pendency of the hearing on the said objection petition, on 20.1.2000 the appellants filed another objection petition styled as one u/s 33 of the Act wherein for the first time a plea was raised that so far as the respondents company is concerned it was not a party to the contract and therefore appointment of arbitrator at its instance and all the subsequent proceedings upto the date of making of the award were without jurisdiction and nullity and were liable to be adjudged so. By judgment dated 17.1.2001, the Court directed the objection raised on behalf of the appellants to be dismissed and the award to be made a rule of the Court. A decree in terms of the award as upheld by the judgment was later drawn up and dated as 17.1.2001.

5. On 20.2.2001, the respondents moved an application seeking review of the judgment. The judgment and the decree drawn up did not award future interest on the decretal amount to the respondents and the only relief sought for in the review petition was to suitably modify the operative part of the judgment and the decree so as to include therein a direction for payment of interest from the date of decree till realization of the decretal amount. On 25.9.2001, the learned single Judge directed the review petition to be dismissed.

6. On 8.10.2001, the respondents filed an appeal before the Division Bench of

the High Court feeling aggrieved by the judgment and decree dated 17.1.2001. Condonation of delay in filing the appeal by excluding the time lost in prosecuting the review petition was sought for. A perusal of the memo of appeal shows that the only relief sought for in the appeal was for a suitable modification in the decree so as to include therein direction to pay future interest from the date of decree till realization. On 27.10.2001, the appellants too filed an appeal against the judgment and decree dated 17.1.2001 laying challenge to the order of the original court rejecting the objection petition filed by it and directing the award to be made a rule of the Court. The appeal was filed with a delay of 230 days. The appellants sought for condonation of delay in filing the appeal on the ground that it was awaiting the result of review petition and was persuaded to file an appeal because of the respondents having filed an appeal. The cause assigned by the appellants for seeking condonation of delay did not apparently amount to sufficient cause within the meaning of Section 5 of the Limitation Act. When the matter came up for hearing, the appellants submitted that the memo of appeal filed on 27.10.2001, if barred by time and hence not maintainable as an appeal, could still be treated as a cross objection under Order 41 Rule 22 of the CPC which having been filed within the prescribed period of limitation for filing cross objection the same deserved to be heard and decided on merits along with the first appeal filed by the respondents herein.

7. On 12th July, 2002, the first appeal filed by the appellants has been directed to be dismissed by the Division Bench as barred by time consequent upon the dismissal of its application u/s 5 of the Limitation Act. Feeling aggrieved by the judgment dated 12.7.2002, SLP(C) 20508/2002 has been filed by Municipal Corporation of Delhi.

8. Subsequently by an order dated 20th September, 2002, the first appeal filed by the respondents has been directed to be dismissed by the Division Bench as not maintainable on the Division Bench forming an opinion that the order put in issue by the respondents (herein and appellant in the High Court) and the relief sought for in appeal did not fall within the purview of clauses (i) to (vi) of sub-Section(1) of Section 39 of the Act and, therefore, the appeal was not maintainable and was incompetent.

9. On the respondents taking out execution of the decree based on award, the appellants preferred an objection petition u/s 47 of the CPC before the Executing Court submitting that in the absence of any arbitration agreement between the parties, the reference to arbitration, the award and the decree incorporating the award were all invalid and hence the decree was not executable. By order dated 5.3.2002 the Executing Court over ruled the objection. Feeling aggrieved thereby, the appellants preferred an appeal before the High Court which has been dismissed by the High Court as devoid of any merit vide its decision dated 12th July, 2002. SLP(C) No. 20511/2002 impugns the decision dated 12.7.2002 of the High Court.

10. It is not disputed by the learned senior counsel for the parties that so far as

appeal filed by the respondents before the Division Bench is concerned, the same was not maintainable u/s 39 of the Act and has, therefore, been rightly dismissed as not maintainable. Two questions arise for decision in these appeals: firstly, whether in an appeal u/s 39 of the Arbitration Act, 1940, a respondent has a right to file cross objection and, if so, whether the cross objection must be heard and decided on merits though the appeal by reference to which cross objection has been filed is itself dismissed as not maintainable?

11. When the matter came up for hearing before a two-Judge Bench of this Court, reliance was placed on behalf of the respondents on *Superintending Engineer and Others Vs. B. Subba Reddy*, wherein a two-Judge Bench of this Court has held that cross objection in an appeal u/s 39 of the Arbitration Act are not maintainable. On 09.12.2002, the two-Judge Bench entertaining some doubt about the correctness of the view taken in *B. Subba Reddy*'s case deemed it proper for this appeal to be placed for hearing before a three-Judge Bench.

Competence and maintainability of cross objections in an appeal preferred u/s 39 of the Arbitration Act, 1940 ?

13. Sections 39 and 41 of the Act and Rule 22 of Order 41 of the CPC provide as under:

Arbitration Act, 1940

Sec. 39 Appealable orders -

(1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order: -

An order-

- (i) superseding an arbitration;
- (ii) on an award stated in the form of a special case;
- (iii) modifying or correcting an award;
- (iv) filing or refusing to file an arbitration agreement;
- (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;
- (vi) setting aside or refusing to set aside an award;

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

Sec. 41. Procedure and powers of court. Subject to the provisions of this Act and of rules made thereunder.

(a) the provisions of the Code of Civil Procedure, 1908 (5 of 1908), shall apply to all proceedings before the Court, and to all appeals, under this Act; and

(b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court:

Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect of any of such matters.

Order XLI Rule 22 of CPC:

22. Upon hearing respondent may object to decree as if he had preferred separate appeal.-

(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

(2) Form of objection and provisions applicable thereto. Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) Unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent.

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule.

14. Right of appeal is creature of statute. There is no inherent right of appeal. No appeal can be filed, heard or determined on merits unless the statute confers

right on the appellant and power on the Court to do so. Section 39 of the Act confers right to file appeal, in so far as the orders passed under this Act are concerned, only against such of the orders as fall within one or other of the descriptions given in clauses (i) to (vi) of sub-Section (1) of Section 39. The Parliament has taken care to specifically exclude any other appeal being filed, against any order passed under the Act but not covered by clauses (i) to (vi) abovesaid, by inserting the expression "and from no others" in the text of sub-Section (1). Clause (a) of Section 41 extends applicability of all the provisions contained in the Code of Civil Procedure, 1908 to (i) all proceedings before the Court under the Act, and (ii) to all the appeals, under the Act. However, the applicability of such of the provisions of the CPC shall be excluded as may be inconsistent with the provisions of the Act and/or of rules made thereunder. A bare reading of these provisions show that in all the appeals filed u/s 39, the provisions of the Code of Civil Procedure, 1908 would be applicable. This would include the applicability of Order 41 including the right to take any cross objection under Rule 22 thereof to appeals u/s 39 of the Act.

15. Right to prefer cross objection partakes of the right to prefer an appeal. When the impugned decree or order is partly in favour of one party and partly in favour of the other, one party may rest contented by his partial success with a view to giving a quietus to the litigation. However, he may like to exercise his right of appeal if he finds that the other party was not interested in burying the hatchet and proposed to keep the lis alive by pursuing the same before the appellate forum. He too may in such circumstances exercise his right to file appeal by taking cross objection. Thus taking any cross objection to the decree or order impugned is the exercise of right of appeal though such right is exercised in the form of taking cross objection. The substantive right is the right of appeal; the form of cross objection is a matter of procedure.

18. We have, therefore, no doubt in our mind that right to take a cross objection is the exercise of substantive right of appeal conferred by a statute. Available grounds of challenge against the judgment, decree or order impugned remain the same whether it is an appeal or a cross-objection. The difference lies in the form and manner of exercising the right; the terminus a quo (the starting point) of limitation also differs.

19. In *Superintending Engineer & Ors. Vs. B. Subba Reddy* (supra) a two-Judges Bench of this Court observed (vide para 24) "if there is no right of cross-objection given u/s 39 of the Act, it cannot be read into Section 41 of the Act. Filing of cross objection is not procedural in nature. Section 41 of the Act merely prescribes that the procedure of the Code would be applicable to the appeal u/s 39 of the Act. We are, therefore, of the opinion that cross objection by the respondent was not maintainable.". Such observation is not correct and proceeds on certain wrong premises. Firstly, form of cross objection is procedural and is only a manner of exercising right of appeal which is substantive, as we have already stated. Secondly, it is not merely the procedure prescribed by the CPC

which has been made applicable to proceedings under the Arbitration Act by Section 41(a) of the Act; the entire body of the Code of Civil Procedure, 1908 has been made applicable to all proceedings before the Court and to all appeals under the Arbitration Act, 1940. The provision is general and wide in its applicability which cannot be curtailed; the only exception being where the provisions of the Arbitration Act and/or of rules made thereunder may be inconsistent with the provisions of the Code of Civil Procedure, 1909 in which case the applicability of the latter shall stand excluded but only to the extent of inconsistency. We may hasten to add that to the extent of our disagreement with the law laid down in B. Subba Reddy's case, the proposition appears to have been rather widely stated in that case. In fact the question before the Court in B. Subba Reddy's case was whether cross objection seeking the relief of award of interest at a higher rate was maintainable though such an order did not fall within the purview of Section 39(1) of the Act.

20. Once we hold that by taking cross objection what is being exercised is the right of appeal itself, it follows that the subject-matter of cross objection and the relief sought therein must conform to the requirement of Section 39(1). In other words, a cross objection can be preferred if the applicant could have sought for the same relief by filing an appeal in conformity with the provisions of Section 39(1) of the Act. If the subject-matter of the cross objection is to impugn such an order which does not fall within the purview of any of the categories contemplated by clauses (i) to (vi) of sub-Section (1) of Section 39 of the Act, the cross objection shall not be maintainable.

Effect on cross objection if the appeal itself is held not competent or not maintainable?

21. What happens to cross objections if the appeal itself is found to be incompetent or not maintainable? Sub-Rule (4) of Order 22 of the CPC provides for only two situations in which the cross objection may be heard in spite of the original appeal having not been heard on merits. These situations are two: (i) the original appeal being dismissed as withdrawn, (ii) the original appeal being dismissed for default (default in appearance or any other default). Just as the enabling provisions of cross objection contained in sub-Rule (1) of Order 22 of the CPC are applicable to appeals u/s 39 of the Act the disabling provision contained in sub-Rule (4) too would apply to appeals u/s 39 of the Act in view of the generality of the provisions contained in Section 41 of the Act. To put it briefly, if the Appellate Court forms an opinion that the original appeal itself was incompetent or not maintainable as it was filed against an order not falling within one of the clauses (i) to (vi) of sub-Section (1) of Section 39 then the cross objection shall also fall to the ground and cannot be adjudicated upon on merits. It has to be remembered that law of limitation operates with all its rigour and equitable considerations are out of place in applying the law of limitation. The cross-objector ought to have filed appeal within the prescribed period of limitation calculated from the date of the order if he wished to do so. Having

allowed that opportunity to lapse he gets another extended period of limitation commencing from the date of service of the notice of the appeal enabling him putting in issue for consideration of the Appellate Court the same grounds which he could have otherwise done by way of filing an appeal. This extended period of limitation commences from the date of service of the notice of appeal and such notice ought to be in a valid or competent appeal.

23. Illustratively, we may refer to some judicial opinion as to non-maintainability of cross objections consequent upon the non-maintainability of the original appeal. In *Malhati Tea Syndicate Limited Vs. Revenue Officer, Jalpaiguri and Others*, , a Division Bench of Calcutta High Court presided over by P.B. Mukherji, CJ (as His Lordship then was) held the cross objection liable to fail in view of the original appeal itself failing in view of its having been filed in the name of a company which was no longer in existence. In *Dhani Ram Vs. Smt. Sushila Devi*, , R.S. Pathak, CJ (as His Lordship then was) held that though Order 41 Rule 22 speaks of an appeal, it contemplates a valid appeal which ordinarily calls for consideration on its merits. It is such an appeal the pendency of which would entitle the respondent to file a cross objection. An appeal which is barred by time is not a valid appeal and the cross objections too shall have to be rejected. In *Chanchalgauri Ramanlal and Others Vs. Narendrakumar Chandulal and Others*, , a Division Bench presided over by Hon'ble the Chief Justice held that a cross objection filed in a validly instituted appeal against a decree is as good as an appeal and shall have to be disposed of on merits but if an appeal does not lie any cross objection in such an appeal would not call for adjudication on merits. In *Charity Commissioner Vs. Padmavati and Others*, , Chagla, CJ speaking for the Division Bench held that in a time-barred appeal where the delay was refused to be condoned the appeal itself was rendered not maintainable and the cross objection would not survive for consideration. In *A.L.A. Alagappa Chettiar Vs. Chockalingam Chetty & Ors.* (supra), Wallis, C.J. opined that the right of respondent to proceed by way of memorandum of objections is strictly incidental to the filing of the original appeal in time and it is open to a party against whom a memorandum of objections has been filed to set up the bar that the original appeal was filed out of time. We are in respectful agreement with the view of the law taken by several High Courts and noticed hereinabove. The cross objection is available to be heard if the original appeal is available for hearing on merits. A view to the contrary has been taken by a Division Bench of Allahabad High Court in *Shankar Lal and Another Vs. Sarup Lal and Another*, , and *Nanak Bakhsh & Ors. Vs. Wazir Singh & Ors.*, (1909) 4 IC 625 (Punjab Chief Court). Both the decisions are not supported by any convincing reasoning or logic and to say the least do not lay down the correct law, in our opinion.

24. The original appeal filed by the respondents herein was found to be not maintainable as not covered by any of the clauses (i) to (vi) of sub-Section (1) of Section 39 of the Act. It was dismissed as incompetent. The question of the memo of appeal filed in the High Court by the appellants herein being treated as cross objection and being taken up for hearing on merits does not arise.

Independently treated as an original appeal the same was held to be hopelessly barred by time as the delay was not explained satisfactorily. On this aspect we are not persuaded to take a view different from the one taken by the High Court. The appeal filed in the High court by the appellants herein has been rightly held liable to be dismissed as time-barred and is not available to be heard and decided as cross objection in view of the original appeal filed in the High Court by the respondents herein having failed as incompetent.

42. Mr. D'vitre, the learned senior counsel appearing for the appellants placed reliance upon the judgment of this court (R.D. Dhanuka, J.) in case of Masusmi Sa Investment Llc vs. Western Express Highway delivered on 6th November, 2012 in the matter of COMPANY APPEAL (L) NO. 47 OF 2012 IN COMPANY LAW BOARD NO. 57 OF 2012 alongwith other connected matters and in particular paragraphs 41, 44, 51 and 55 in support of his plea that in view of section 5 of the Arbitration and Conciliation Act, 1996, this court can entertain only such proceedings which are specifically provided under Arbitration Act itself and no other proceedings not provided under the Act. Paragraphs 41, 44, 51 and 55 of the said judgment reads thus:-

41. I have heard the learned counsel appearing for the parties at length on the issue of maintainability of the present appeal and have given my anxious consideration to the rival submissions made by the learned counsel.

44. Perusal of the order passed by CLB and the pleadings filed by the parties indicates that the appellant had filed petition u/s 397 and 398 read with 402 of the companies Act, 1956 before CLB on the ground of alleged oppression and mismanagement in the affairs of the first respondent company by the other respondents. In the said proceedings one of the respondent had moved an application u/s 8 of the Arbitration Act, 1996 before CLB u/s 8 of the Arbitration Act, 1996. From the perusal of the order it is clear that CLB while allowing the application filed by the respondent decided the said application exercising powers u/s 8 of the Arbitration Act as judicial authority and did not exercise any jurisdiction u/s 397 and 398 read with section 402 of the Companies Act, 1956. It is clear that by the impugned order CLB has determined the rights of the parties flowing out of the provisions of the Arbitration Act, 1996 and not the provisions of the Companies Act, 1956. In my view, CLB did not adjudicate any disputes between the parties u/s 397 and 398 of the Companies Act, 1956 while referring the parties to Arbitration u/s 8 of the Arbitration Act, 1996. In my view, remedy of appeal if any, thus has to be traced out from within the provisions of the Arbitration Act, 1996 and not under any other provisions of law including Companies Act, 1956. From the perusal of the pleadings including appeal memo in the present proceedings, it is clear that the order passed by CLB is u/s 8 of the Arbitration Act, 1996 and not under the provisions of the Companies Act, 1956. I am of the view that since the Arbitration Act, 1996 is a self contained, complete and exhaustive code in all respects, all the remedies from the orders passed and action taken in Arbitration Act, 1996 must flow from the said statute itself. It

carries negative import and thus only such acts which are mentioned to be done under the said Act are permissible and all other acts or things not mentioned are not permissible.

51. In my view on conjoint reading of Section 5 with Section 37 of the Arbitration Act, 1996, it is clear that judicial authority is barred from intervening in any proceeding which are not otherwise provided in Part I of the Arbitration Act, 1996. In my view, the Arbitration Act, 1996 being a self contained code and the order u/s 8 passed by the judicial authority or by the court is not appealable u/s 37, the present appeal u/s 10F is not maintainable. In my view, there is no merit in the submission of Mr. Dwarkadas, the Learned Senior Counsel that there is no bar u/s 37 from hearing appeal against any other order nor specifically mentioned in Sections 37(1)(a) and (b) and 37(2)(a) and (b). In my opinion, from the expression used "and from no others", it is clear beyond reasonable doubt that appeal is not maintainable against any other order other than what is mentioned in Section 37(1)(a) and (b) and 37(2)(a) and (b). In my view there is clear bar u/s 37 restricting right of appeal only against specified orders set out therein and no other orders. In my view, Section 5 of the Arbitration Act, 1996 leave no room for doubt that judicial authorities and court is restrained from intervening in matters governing domestic arbitration "except where so provided". In my view, an order passed u/s 8 of the Arbitration Act, not having been provided as appealable order u/s 37, recourse to Section 10F of the Companies Act is not permissible.

55. Supreme Court in case of ITI Ltd. vs. Siemens Public Communications Network Ltd. (supra) has considered the revisional jurisdiction of the superior court while interpreting Section 37(3) of the Arbitration Act, 1996. The Supreme Court has held that u/s 37(3) of the Arbitration Act, second appeal is barred from the order passed in appeal u/s 37(1) or 37(2). It is held that the supervisory and revisional jurisdiction of the High Court u/s 115 of the CPC is neither expressly nor impliedly barred either by the provisions of Section 37 or Section 19(1) of the Arbitration Act, 1996. In my view, reliance placed by the Learned Senior Counsel Mr. Dwarkadas appearing for the Appellant on this judgment in support of his proposition that after considering Section 5 of the Arbitration Act, 1996, the Supreme Court still took a view that though the second appeal is not maintainable u/s 37(3), the revision u/s 115 of the CPC is still maintainable, is misplaced. In my view from reading of Section 37(3), it is clear that no second appeal is maintainable against the order passed by the Court u/s 37(1) or 37(2) of the Arbitration Act, 1996. In my view the expression "and from no other orders", used in Section 37(1) of the Arbitration Act, indicates that the court is not authorised to hear appeals other than which are specifically appealable and provided u/s 37(1)(a) and (b) and 37(2)(a) and (b). The Supreme Court was not considering the issue of maintainability of the appeal u/s 37(1) or (2) in case of ITI Ltd. (supra). In my view, the facts before the Supreme Court in case of ITI Ltd. are thus clearly distinguishable in the facts of this case.

43. In reply of this issue, Mr. Kamdar, learned senior counsel appearing on behalf of the respondents placed reliance upon the Order 41 Rule 22 for Code of Civil Procedure, 1908 and also amendment to the said provisions carried out in 1976. It is submitted that under provisions of Arbitration and Conciliation Act, 1996, there is no express bar from the applicability of the CPC to arbitration proceedings in court. It is submitted that in absence of any such express and/or implied bar, the provisions of Code of Civil Procedure, 1908 are applicable to the arbitration proceedings in court in entirety. Learned senior counsel submits that the impugned award was challenged by the respondents on various grounds. Some of the grounds of challenge were not accepted by the learned District Judge. It is submitted that the refusal on the part of the learned District Judge to set aside the impugned award on some of such grounds which were raised by the respondent would give right to the respondents to challenge that part of the order by filing cross objection. It is submitted that every ground of challenge is a separate and distinct ground for setting aside the impugned award. Mr. Kamdar, the learned senior counsel placed reliance on the judgment of the Supreme Court in case of *S. Nazeer Ahmed Vs. State Bank of Mysore and Others*, and in particular para 7 of the said judgment which reads as under:-

7. The High Court, in our view, was clearly in error in holding that the appellant not having filed a memorandum of cross-objections in terms of Order XLI Rule 22 of the Code, could not challenge the finding of the trial court that the suit was not barred by Order II Rule 2 of the Code. The respondent in an appeal is entitled to support the decree of the trial court even by challenging any of the findings that might have been rendered by the trial court against himself. For supporting the decree passed by the trial court, it is not necessary for a respondent in the appeal, to file a memorandum of cross-objections challenging a particular finding that is rendered by the trial court against him when the ultimate decree itself is in his favour. A memorandum of cross-objections is needed only if the respondent claims any relief which had been negated to him by the trial court and in addition to what he has already been given by the decree under challenge. We have therefore no hesitation in accepting the submission of the learned counsel for the appellant that the High Court was in error in proceeding on the basis that the appellant not having filed a memorandum of cross-objections, was not entitled to canvass the correctness of the finding on the bar of Order II Rule 2 rendered by the trial court.

44. The learned senior counsel distinguished the judgment of the Supreme Court in case of *Municipal Corporation of Delhi and others (supra)* relied upon by Mr. D"vitre, the learned senior counsel appearing for the appellants.

The learned senior counsel also placed reliance upon the judgment of the Supreme Court in case of *Shri Ravinder Kumar Sharma Vs. The State of Assam and Others*, and in particular paragraphs 19 to 23 which reads thus:-

19. In connection with Order 41 Rule 22, CPC after the 1976 Amendment, we may first refer to the judgment of the Calcutta High Court in *Nishambhu Ch. Jana*

Vs. Sm. Sova Guha and Others, . In that case, Mookerjee, J. referred to the 54th report of the Law Commission (at p. 295) (para 41.70) to the effect that Order 41 Rule 22 gave two distinct rights to the respondent in the appeal. The first was the right to uphold the decree of the court of first instance on any of the grounds which that court decided against him. In that case the finding can be questioned by the respondent without filing cross-objections. The Law Commission had accepted the correctness of the Full Bench of Madras High Court in Venkata Rao's case. The Commission had also accepted the view of the Calcutta High Court in Nrisingha Prosad Rakshit vs. The Commissioners of Bhadreswar Municipality that a cross-objection was wholly unnecessary in case the adverse finding was to be attacked. The Commission observed that the words "support the decree..." appeared to be strange and "what is meant is that he may support it by asserting that the ground decided against him should have been decided in his favour. It is desirable to make this clear". That is why the main part of Order 41 Rule 22 was amended to reflect the principle in Venkata Rao's case as accepted in Chandre Prabhuji's case.

20. So far as the Explanation was concerned, the Law Commission stated (page 298) that it was necessary to "empower" the respondent to file cross-objection against the adverse finding. That would mean that a right to file cross-objections was given but it was not obligatory to file cross-objections. That was why the word "may" was used. That meant that the provision for filing cross-objections against a finding was only an enabling provision.

21. These recommendations of the Law Commission are reflected in the Statement of Objections and Reasons for the Amendment. They read as follows:

Rule 22(i.e. as it stood before 1976) gives two distinct rights to the respondent in appeal. The first is the right of upholding the decree of the Court of first instance on any of the grounds on which that court decided against him; and the second right is that of taking any cross-objection to the decree which the respondent might have taken by way of appeal. In the first case, the respondent supports the decree and in the second case, he attacks the decree. The language of the rule, however, requires some modifications because a person cannot support a decree on a ground decided against him. What is meant is that he may support the decree by asserting that the matters decided against him should have been decided in his favour. The rule is being amended to make it clear.

An Explanation is also being added to Rule 22 empowering the respondent to file cross-objection in respect to a finding adverse to him notwithstanding that the ultimate decision is wholly or partly in his favour.

(emphasis supplied)

Mookerjee, J. observed in Nishambhu Jana's case (see p. 689) that "the amended Rule 22 of Order 41 of the Code has not brought any substantial change in the settled principles of law" (i.e. as accepted in Venkata Rao's case) and clarified (p. 691) that.

it would be incorrect to hold that the Explanation now inserted by Act 104 of 1976 has made it obligatory to file cross-objections even when the respondent supports the decree by stating that the findings against him in the court below in respect of any issue ought to have been in his favour.

22. A similar view was expressed by U.N. Bachawat, J. in *Tej Kumar Jain Vs. Purshottam and Another*, that after the 1976 Amendment, it was not obligatory to file cross-objection against an adverse finding. The Explanation merely empowered the respondent to file cross-objections.

23. In our view, the opinion expressed by Mookerjee, J. of the Calcutta High Court on behalf of the Division Bench in *Nishambhu Jena's* case and the view expressed by U.N. Bachawat, J. in *Tej Kumar's* case in the Madhya Pradesh High Court reflect the correct legal position after the 1976 Amendment. We hold that the respondent-defendant in an appeal can, without filing cross-objections attack an adverse finding upon which a decree in part has been passed against the respondent, for the purpose sustaining the decree to the extent the lower court had dismissed the suit against the defendants-respondents. The filing of cross-objection, after the 1976 Amendment is purely optional and not mandatory. In other words, the law as stated in *Venkata Rao's* case by the Madras Full Bench and *Chandre Prabhuji's* case by this Court is merely clarified by the 1976 Amendment and there is no change in the law after the Amendment.

45. Mr. Kamdar, the learned senior counsel placed reliance upon the judgment of the Supreme Court in case of *I.T.I. Ltd. Vs. Siemens Public Communications Network Ltd.*, in support of his plea that the provisions of Code of Civil Procedure, 1908 are applicable to the arbitration proceedings. Paragraph 13 of the said judgment reads thus:-

13. We also do not find much force in the argument of learned counsel for the appellant based on Section 5 of the Act. It is to be noted that it is under this Part, namely, Part I of the Act that Section 37(1) of the Act is found, which provides for an appeal to a civil court. The term "Court" referred to in the said provision is defined u/s 2(e) of the Act. From the said definition, it is clear that the appeal is not to any designated person but to a civil court. In such a situation, the proceedings before such court will have to be controlled by the provisions of the Code, therefore, the remedy by way of a revision u/s 115 of the Code will not amount to a judicial intervention not provided for by Part I of the Act. To put it in other words, when the Act u/s 37 provided for an appeal to the civil court and the application of Code not having been expressly barred, the revisional jurisdiction of the High Court gets attracted. If that be so, the bar u/s 5 will not be attracted because conferment of appellate power on the civil court in Part I of the Act attracts the provisions of the Code also.

46. Mr. D'vitre, the learned counsel appearing for the appellants distinguished the judgment of the Supreme Court in case of *S. Nazeer Ahmed (supra)* and *Ravinder Kumar Sharma (supra)*.

Both the counsel also made submissions on merits of the cross objections.

47. Mr. Kamdar, the learned senior counsel made following submissions:-

(i) The findings of the learned District Judge that the arbitrator had jurisdiction to decide three properties was incorrect.

(ii) The learned arbitrator became functus officio on signing of the award. Once the award was already signed u/s 31(1) of the Act, the said award could not be altered. The said award was published u/s 31(5) in presence of parties and copy thereof was to be furnished to the parties. If there was any error as prescribed u/s 33 of the Act in the impugned award, the same could be corrected only by following procedure prescribed u/s 33(1)(a), (b), (2) or (3). It is submitted that none of the party had requested the Arbitral Tribunal to correct any computation error or clerical or typographical error or any other error of the similar nature occurring in the award. None of the party had applied to the learned arbitrator for interpretation of any part of the award or any specific point. It is submitted that u/s 33(3) of the Act, the learned arbitrator could correct any error of type referred to in clause (a) of Sub-Section (1) on its own initiative within 30 days from the date of the arbitral award. The error corrected by the learned arbitrator was not of the type and/or nature prescribed u/s 33(1)(a). The appellants had not issued any notice to the respondents before pointing out any such alleged error in the impugned award. Even the arbitrator did not issue any notice to the respondents before making correction of any such error. The appellants had admitted before the learned District Judge that the note was prepared and furnished by Mukesh Malhotra suggesting various corrections in the impugned award. It is submitted that the learned arbitrator carried out such corrections as suggested by Mr. Mukesh Malhotra and furnished corrected copy of such award to the respondents. On 19th July, 2010, copy of the impugned award was received only by Mukesh Malhotra admittedly. The corrections carried out in the impugned award by the learned arbitrator are apparent and were exactly in the terms suggested by Mr. Mukesh. Place of the award "Pune" was struck off. The learned arbitrator had put his initial on each page as suggested by Mr. Mukesh. The learned arbitrator had also destroyed the last page. Making and publishing of award was complete under sections 31(4) and 31(5) on the arbitrator signing, putting date on award and place and on furnishing copy thereof to the parties. The learned counsel placed reliance upon section 33(1) to (3) of the Act which reads thus:-

33. Correction and interpretation of award; additional award.

(1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties-

(a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;

(b) if go agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form pan of the arbitral award.

(3) The arbitral tribunal way correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

48. Mr. Kamdar, learned senior counsel placed reliance upon the judgment of the Supreme Court in case of Rikhabdas Vs. Ballabhdas and Others, and in particular paragraphs 6 to 10 thereof on the issue that the learned arbitrator could not make any alterations having become functus officio. Paragraphs 6 to 10 of the said judgment reads thus:-

6. We think that the Division Bench of the High Court was clearly in error. Under s. 16 of the Arbitration Act an award can be remitted to the arbitrators only for reconsideration. When it is remitted for re-writing it on a stamped paper, it is not remitted for reconsideration. Reconsideration by the arbitrators necessarily imports fresh consideration of matters already considered by them. Now they can only consider and give a decision upon matters which are referred to them under the arbitration agreement. It follows that the reconsideration can only be as to the merits of the award. They reconsider nothing when they re-write the award on a stamped paper. We think the matter was correctly put by Mitter, J., in Nani Bala Saha v. Ram Gopal Saha in the following observation:

That cl. (c) means this and nothing more: namely, that where the court finds an error of law in the award itself or in some document actually incorporated thereto on which the arbitrator had based his award, that is to say, finds the statement of some erroneous legal proposition which is the basis of the award, it can remit the award to the arbitrator for reconsideration" and "Want of registration is a defect dehors the award or the decision of the arbitrator, and so in our judgment is not covered by cl. (c) of S. 16(1), Arbitration Act of 1940.

What was said there about a want of registration is clearly equally applicable to a want of stamp.

7. Mr. Pathak appearing for the respondent contended that under s. 14(1) of the Arbitration Act it was clearly the duty of the arbitrator to inform the parties of the amount of stamp duty payable on the award. Section 14 (1) is in these terms:

Section 14(1) When the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award. We are unable to see how this section can provide the

basis for the order made in this case. It only says that the arbitrators shall inform the parties of the fees and charges payable. Even assuming that the word "charges" includes duty payable for the stamp to be affixed to the award, at best, this section would support an order directing the arbitrators to supply this information. It would not justify an order requiring the arbitrators to inscribe the award afresh on a stamped paper and re-submit it to court. As at present advised, we have grave doubts if the fees and charges mentioned in s. 14(1) include the stamp duty payable on the award. Section 17 of the Stamp Act requires that stamping should be at the time of execution. Under s. 14(1) of the Arbitration Act it is only after the signing of the award that is its execution, that the arbitrators are required to supply the information about the fees and charges. It is, of course, no part of the duty of the arbitrators under the Act or otherwise to find the costs of stamp themselves. Therefore it is difficult to appreciate how the word "charges" mentioned in this section includes stamp. But on this question it is not necessary for us to express any final opinion in this case.

8. Mr. Pathak contended that even if the case did not come within s. 16(1)(c) of the Arbitration Act, the order in the present case can be supported under s. 151 of the CPC which preserves the inherent power of a court to make such orders as may be necessary for the ends of justice. It is true that s. 41 of the Arbitration Act makes the provisions of the CPC applicable to proceedings before a court under the Arbitration Act. But it is well known that after making his award the arbitrator is *functus officio*. To cite one authority for this proposition we may quote the observations of Mellish, L.J., in *Mordue v. Palmer* (1870) 6 Ch A 22 at p. 31:

I think the result of the cases at law is that when an arbitrator has signed a document as and for his award, he is *functus officio*, and he cannot of his own authority remedy any mistake.

In the present case, *ex-hypothesis*, the award has already been made and the arbitrator has therefore become *functus officio*. It is that award which requires stamp. Section 151 of the Code cannot give the court power to direct the arbitrator to make a fresh award; that would be against well-established principles of the law of arbitration. It would again be useless to have another copy of the award prepared and stamped for the copy would not be the award and no action in a court can be taken on it. The order cannot therefore be supported by s. 151 of the Code. It is of some interest to read here the following passage from *Russel on Arbitration* (14th Ed.,) p. 325:

The usual practice in preparing an award is to have two copies made of it. One the arbitrator signs, which then becomes then the original award, and this is delivered to the party who takes up the award. The other copy is available for the other parties if they apply for it.

The original award, before it is available for any purpose whatsoever, must be duly stamped, but there is no obligation upon the arbitrator to stamp it, and he

does not usually do so.

We should observe here that the last paragraph in the aforesaid quotation does not appear in the 16th edition of Russel's work. Perhaps this is because in England an award is no more required to be stamped by virtue of s. 35 Sched. 8, of the Finance Act, 1949, which was passed after the 14th edition was published.

9. Lastly, Mr. Pathak tried to support the order under ss. 13(d) and 15(b) and (c) of the Arbitration Act. A bare perusal of the provisions mentioned would show that the order made in this case cannot be based on any of them. Section 13(d) deals with correction of clerical mistakes or accidental slips in the award, neither of which we think an omission to stamp is. Further more, s. 13 is only an enabling section giving certain powers to the arbitrator. The arbitrator cannot be compelled to exercise these powers. Section 15 deals with a court's power to modify or correct an award. In the present case, the Court did not purport to exercise that power.

10. We, therefore, think that the Division Bench was in error in thinking that an order could be made remitting the award to the arbitrator with a direction to re-write it on a stamped paper and resubmit it to court. That is the only point that we decide in this case.

49. Mr. Kamdar then placed reliance upon the judgment of the Supreme Court in case of Juggilal Kamlapat Vs. General Fibre Dealers Ltd. (And Connected Appeal), and in particular paragraphs 5 and 9 thereof on the same issue which paragraphs reads thus:-

5. The main question that has been argued before us is that the first award was set aside on May 25, 1953, the reference was exhausted and the arbitrator had become functus officio and it was therefore not possible without a fresh arbitration agreement to have the same dispute decided again by the arbitrator, irrespective of whether the letter of September 7, 1953, amounted to a second reference or was a mere request for continuation of the proceedings in the original reference, which had proved abortive as the award originally made had been set aside. Reliance in this connection is placed on what are called certain fundamental principles governing all arbitrations. It is urged that once an award is wholly set aside, the arbitrator is functus officio and thereafter he cannot function again to decide the same dispute. This is said to be a fundamental principle of all arbitrations, and reliance is placed on a passage in "Russel on Arbitration" (15th Edn., p. 298), where the effect of setting aside an award is stated thus-"If an award is wholly set aside, the arbitrator is functus officio." Reliance is also placed on Morduse v. Palmer , where it was held-

An arbitrator having signed his award is functus officio and cannot alter the slightest error in it, even though such error has arisen from the mistake of the clerk in copying the draft. The proper course in such a case is to obtain an order to refer the award back to the arbitrator.

Reliance is also placed on *Sutherland and Company v. Hannevig Brothers Limited*. That was a case under the English Arbitration Act of 1889 which provided that an arbitrator could correct in an award any clerical mistake or error from any accidental slip or omission and had thus varied the rule laid down in *Mordue's case*(1). It was however held in that case that the correction made by the arbitrator was not justified under the Arbitration Act. These cases in our opinion have not much bearing on the question before us. It is true that generally speaking, an arbitrator is *functus officio* after he has made the award; but this only means that no power is left in the arbitrator to make any change of substance in the award that he had made (except in certain circumstances which have been provided in the law). What we have to see however are the scheme and the provisions of the Arbitration Act, No. X of 1940 (hereinafter called the Act), which govern the proceedings in arbitration in this case. These provisions are to be found in Chap. II of the Act which deal with "arbitration without intervention of Court."

9. We have already said that generally speaking, the arbitrator becomes *functus officio* after he has given the award; but that does not in our opinion mean that in no circumstances can there be further arbitration proceedings where an award is set aside or that the same arbitrator can never have anything to do with the award with respect to the same dispute. Section 13(d), for example, gives power to the arbitrator to correct in an award any clerical mistake or error arising from any accidental slip or omission. Further s. 16 gives power to the court; to remit the award to the arbitrator for reconsideration. Therefore, when it is said that the arbitrator is generally *functus officio* after he has made the award, it only means that he cannot change that award in any matter of substance himself. But that does not take away the court's power to remit the award for reconsideration under s. 16 or to refuse to supersede the reference even though the award is set aside leaving it to the parties to take such further action under the arbitration agreement for further arbitration if it is possible so to do under the terms of a particular arbitration agreement. We are therefore of opinion that whatever may be the position in the absence of a provision similar to s. 19 of the Act there can be no doubt that s. 19 gives power to the court not to supersede the reference and so leave the arbitration agreement effective even when it sets aside award and thereupon, it will depend upon the terms of the arbitration agreement whether arbitration proceedings can go on with respect to the same dispute or with respect to some other disputes arising under the arbitration agreement. This was the view taken in the *Barangore Jute Factory case*(1). Similar view has been taken in *Rallis India Ltd. v. B.V. Manickam Chetti & Co.* and in *Firm Gulab Rai Girdhari Lal v. Firm, Bansi Lal Hansraj*. We think that this view is correct.

50. Mr. Kamdar also placed reliance upon the judgment of the Supreme Court in case of *Satwant Singh Sodhi Vs. State of Punjab and Others*, and in particular paragraphs 2, 6 and 8 in support of his plea that when award is signed, arbitrator becomes *functus officio*. Paragraphs 2, 6 and 8 of the said judgment reads thus:-

2. In relation to the construction of High Level Bridge over river Ghaggar on Pehawa Road at Devigarh, an agreement was entered into between the appellant and the respondents. The disputes between them arose in respect of certain claims made by the appellant and the matter was referred to arbitration (respondent No. 3) pursuant to an order made by Sub-Judge (1st Class), Patiala. The appellant submitted his claim before the Arbitrator and sought for an interim award in respect of Item No. 1 with a claim for 18% compound interest from 1.2.1981 to 15.3.1992. The Arbitrator, by award made on November 26, 1992, awarded a sum of Rs. 7.45 lacs in respect of Item No. 1 with interest @ 18% compound yearly from 1.2.1981 to 15.3.1992. On January 28, 1994, the Arbitrator made another award inclusive of Item No. 1 and awarded a sum of Rs. 3,75 lacs and interest @ 12% per annum with effect from 1.2.1981 to 15.3.1992 on the amount and also in respect of other claims. The appellant made an application u/s 14 of the Arbitration Act, 1940 (hereinafter referred to as the Act) for making the awards dated November 26, 1992 and January 28, 1994 as the rule of the court. The trial court made the award as the rule of the court holding that the interim award in regard to Item No. 1 should be made the rule of the court and that award having covered Item No. 1 should not be taken note of in the award made on January 28, 1994. Thereby the trial court took the view that interim award made on November 26, 1992 is liable to be made the rule of the court with regard to Item No. 1 and that Item No. 1 of the award made on January 28, 1994 will merge in the same deciding that aspect of the matter against the respondents and in favour of the appellant. The award dated January 28, 1994 was ordered to be made the rule of the court except for Item No. 1 for which interim award has already been granted.

6. The question whether interim award is final to the extent it goes or has effect till the final award is delivered will depend upon the form of the award. If the interim award is intended to have effect only so long as the final award is not delivered it will have the force of the interim award and it will cease to have effect after the final award is made. If, on the other hand, the interim award is intended to finally determine the rights of the parties it will have the force of a complete award and will have effect even after the final award is delivered. The terms of the award dated November 26, 1992 do not indicate that the same is of interim nature.

8. On this aspect of the matter we may refer to some of the decisions on the aspect as to when an award becomes final. In AIR 1951 198 (Nagpur) , after examining the scope of Section 14 of the Act, it was held as follows:

The award becomes valid and final so far as the arbitrators or umpire are concerned the moment it is made and signed by them. The provision for giving notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and the award is for the purpose of limitation under Art. 178 of the Limitation Act, entitling either party to apply to the Court for the filing in Court of the award. No time is fixed

for the giving of such notice by the Arbitrator and it has been held in several cases that it may be done within reasonable time either by the Arbitrator or by his agent. A notice may be given to one party and may not be given to another party for a much longer period. It cannot be said that an award becomes final so far as the first party is concerned and no as against the other entitling the Arbitrators to scrap the award and make a fresh one.

There is thus a fundamental difference between the making, signing and delivery of a judgment and making and signing and giving notice of an award. In the former case all three must be simultaneous acts and parts of the same transaction. In the latter case the first two may be simultaneous and the notice of the award can be postponed. That award does not become invalid because notice of the making of it has not been given. An Arbitrator is entitled to file an award in Court u/s 14, sub-s. (2). If he does so, the Court is bound to give notice to the parties of the filing of the award.

51. Mr. Kamdar submitted that by carrying out corrections by the learned arbitrator in the impugned award as suggested by Mukesh and without any prior notice to the respondents, arbitrator has committed serious misconduct. No equal opportunity was rendered by the learned arbitrator to the respondents as required u/s 18 of the Act. The award is thus in violation of principles of natural justice. It is submitted that the learned arbitrator was totally biased as is apparent from his conduct. The learned arbitrator was in contact with the appellants. Note prepared by Mukesh was found attached to the copy of the award furnished to the respondents by the private secretary of the learned arbitrator. The learned arbitrator could not have delegated his powers to a party before him. The learned senior counsel distinguished the judgment of Oudh High Court in case of AIR 1935 349 (Oudh) which was relied upon by the learned District Judge. It is submitted that facts of that case are clearly distinguishable. Para 12 of the judgment of the Oudh High Court in case of Nihal Chand (supra) reads thus:-

12. Judicial misconduct.--As regards the ground of judicial misconduct, the only facts which have been made out are that Babu Lachhman Das, who works with Lala Makund Lal as his junior, wrote some portion of the award at the dictation of Lala Makund Lal, that Lala Nihal Chand remained all along at Ferozepore during the time that the award was under preparation, that he had an inkling into the award being in his favour before it had been delivered and that he filled in his handwriting a black space in the copy of the award which was sent to the plaintiff" with a quotation from the agreement in Urdu. There is nothing to show that the arbitrator did not exercise his own judgment on the matters referred to him. The writing of a part of the award by Lachhman Das at the dictation of the arbitrator was an act of a ministerial character which could be delegated to a third party: Buta Vs. Municipal Committee of Lahore, In the absence of any evidence showing that the arbitrator in any way took the defendant into his confidence, no misconduct can be attributed to him by reason of the contents of

the award having leaked out before it was pronounced. Any help given by the defendant in the preparation of the copy of the award sent to the plaintiff cannot also affect the award itself. We are therefore of opinion that these circumstances relied on by the learned Subordinate Judge, though raising some suspicion against the arbitrator are not sufficient to establish a charge of misconduct. (The rest of this judgment is not material for the purposes of this report.)

52. Mr. D'vitre, the learned senior counsel appearing on behalf of the appellants made following submissions on merits of the cross objections:-

(i) There was no ground raised by the respondents in their application filed u/s 34 before the learned District Judge that arbitrator had become functus officio. No such ground thus could be raised by the respondents in their cross appeal and/or cross objections. The only ground raised by the respondents in this regard in paragraph (n) was that the learned arbitrator was biased and had joined hands with the opponents. The respondents had also raised grounds of malafide, collusion, impartiality and independence on the part of the learned arbitrator. Even in the written arguments filed by the respondents before the learned District Judge, no such ground of functus officio was raised by the respondents. Though there was reference to section 33 of the Arbitration and Conciliation Act, 1996 in the written argument, such reference was not in context of arbitrator having become functus officio. The issue of functus officio has been raised for the first time as a new ground in the cross objections in paragraphs (c) and (d) which cannot be permitted for the first time. The submissions considered by the learned District Judge made by the parties also does not refer to any such alleged submissions on arbitrator became functus officio. If the appeal could not lie on that ground, the cross objections also would not be maintainable on such ground. In the alternative, it is submitted that even if such objection could have been raised by the respondents, not having raised, such objections is deemed to have been waived by the respondents. It is submitted that Mr. Sodhi who was admittedly an employee of Weikfield was appointed by consent of all parties. This position has been admitted by the respondents themselves in para (n) of the arbitration application filed u/s 34 before the learned District Judge. It is submitted that on 16th July, 2007, the learned arbitrator had indicated of his visit to Pune between 24th to 26th July 2007 and proposed to pronounce the award on 25th July, 2007. It is submitted that vide e-mail dated 18th/19th July, 2007, the learned arbitrator however cancelled his visit to Pune and sent the impugned award by courier to Mr. Sodhi. Mr. Sodhi received the said award on 20th July, 2007 who showed that award to Mukesh. Mukesh made some suggestions by preparing a note which suggestions were in the nature of the minor corrections and not of any substantial nature on 21st July, 2007. Mr. Sodhi went to Delhi and returned on 21st July, 2007 itself with corrections in date and initial on each page of award on 27th July, 2007. The arbitrator signed final award and corrected the date and put his initial on every page. Place of the award mentioned at Pune was deleted which was non-sequitur and insignificant. u/s 20(2) of the Act this place of arbitration was to be mentioned for the purpose

of showing that the arbitration proceedings was held at Pune which was not in dispute. The date was changed by the learned arbitrator from 25th July to 21st July as the learned arbitrator had cancelled his personal visit of Pune which was proposed to be on 25th July. It is submitted that all these corrections were in respect of clerical mistake and neither there was any substance of change nor was there any change in the body of the award. All these corrections were inconsequential and insignificant. There is distinction between the change of substance and clerical mistake. The learned counsel also placed reliance upon the note prepared by the learned arbitrator which was placed on record before the learned District Judge which note was also referred in the written arguments of the appellants before the learned District Judge. The said note was addressed by the learned arbitrator to Mr. Sodhi, the registrar appointed by the parties pointing out ministerial/clerical mistake.

53. Mr. D'vitre, the learned senior counsel also submits that section 33(3) of the Act empowers the learned arbitrator to correct any clerical mistake even suo motu within 30 days as per section 33(1)(a) i.e. clerical typographical and/or similar nature without any notice to the parties. It is submitted that the arbitrator thus does not become functus officio on the date of signing award in view of power given to him under sections 33(1), (2) and (3). It is submitted that though the arbitrator cannot make any change of substance, this power u/s 33(3) continue for a limited purposes for correcting any error described in section 33(1)(a). The learned senior counsel also placed reliance upon the commentary of Shri Dr. Justice B.P. Saraf (as His Lordship then was) and Shri Justice S.M. Jhunjhunwala, former judges of this Court on Arbitration and Conciliation Act, 1996 (2012 Edition) and in particular note (10) on section 33 which reads thus:-

10. Whether arbitral tribunal becomes functus officio after making an award.

Under the provisions of Act of 1940, on making and publishing of an award, the arbitrator became functus officio. However, under the provisions of the Act, since the arbitral tribunal can of its own motion or on the application of any party to the arbitral agreement, correct any computation, clerical or typographical errors or any other errors of similar nature, occurring in the arbitral award within a period of 30 days from receipt of signed copy of the arbitral award, unless any other period has been agreed between the parties, the arbitral tribunal does not become functus officio even after making of an arbitral award. In any event, the arbitral tribunal would become functus officio if no written request is received on any of the points mentioned in this section within 30 days of the receipt of the arbitral award; in the alternative, if a written request is received within time, the arbitral tribunal has given its interpretation or made the additional award.

54. Mr. D'vitre distinguishes the judgment of the Supreme Court reported in Juggilal Kamlatpat Vs. General Fibre Dealers Ltd. (And Connected Appeal), relied upon by Mr. Kamdar. Mr. D'vitre also placed reliance upon para 5 of the said judgment in support of his plea. Even in that judgment, it has been held that

there is no power left in the arbitrator to make change of substance except in the circumstances provided in law. It is submitted that in the said judgment, the Supreme Court had considered section 13(d) of the Arbitration Act, 1940. The learned senior counsel submits that there was no miscarriage of justice by such corrections of clerical mistake in the impugned award. The learned senior counsel submits that on these facts, no bias could be imputed against the learned arbitrator by the respondents. It is submitted that the learned arbitrator admittedly did not show the award to any party. If Mr. Sodhi had shown that award to one of the party, no bias could be imputed against the learned arbitrator. There was no interaction shown between the learned arbitrator and the appellants by the respondents in application filed u/s 34 or even in the cross objections. The allegations of bias made by the respondents against the learned arbitrator was all throughout rejected by the learned District Judge. The learned arbitrator was in Delhi when his registrar opened the award and showed the same to Mr. Mukesh Malhotra. Whether Mr. Sodhi had shown that note prepared by Mr. Mukesh to the arbitrator or not is not placed on record. Even according to the respondents as pleaded, the learned arbitrator had informed the respondents that he was making some changes in the award. The note relied upon by the respondents does not suggest any change in substance of the impugned award. There could be no misconduct imputed against the arbitrator even if a copy of the award was shown to one of the party. It was not case of the respondents that the learned arbitrator had directed Mr. Sodhi to first show the said award to Mukesh. It is submitted that even if any change would have been made as suggested by Mukesh the award would be still valid. The learned senior counsel distinguished the judgment of the Supreme Court reported in *Satwant Singh Sodhi Vs. State of Punjab and Others*, . It is submitted that in the facts of that case, the different amount was awarded by the learned arbitrator by making two separate award. The learned arbitrator had redetermined on the matter which he had already pronounced. The Supreme Court thus ignored the award pronounced by arbitrator after he become functus officio and upheld the first award.

55. In so far as judgment of the Supreme Court in case of *Rikhabdass* (supra) relied upon by Mr. Kamdar is concerned, Mr. D'vitre submits that in that matter the Supreme Court held that the Court could not remit the matter to the arbitrator for stamping, for giving legal efficacy to the award and upheld the said award. The Supreme Court therefore set aside the order of High Court remitting the award for stamping and allowing the parties to cure the defects.

56. In the alternate, Mr. D'vitre, the learned senior counsel submits that the learned arbitrator could have corrected such clerical mistakes in better manner. However, in view of the fact that no change of substance was carried out, no prejudice of any nature whatsoever was caused to any of the parties and the award thus could not be set aside on such hyper technical plea raised by the respondents.

57. On issue of jurisdiction, Mr. D'vitre submitted that the learned arbitrator had

jurisdiction to decide those issues in respect of three properties. The respondents had never raised these issues earlier. The learned arbitrator had rendered interim award earlier, itself would indicate that the learned arbitrator had not become functus officio and was empowered to make final award. The findings of the learned District Judge on the issue of jurisdiction is totally contradictory and perverse.

REASONS AND CONCLUSIONS:

58. For the purpose of deciding whether the learned District Judge was right in his findings on the issue in respect of the agricultural properties or not, it will be necessary to refer to the agreements entered into between the parties for referring the disputes to arbitration and the pleadings filed by the parties before the learned arbitrator.

59. On perusal of the undertaking and mandate dated 28th October, 2005 duly signed by the parties, it is clear that the parties agreed to appoint arbitrator who was former Law Secretary to the Government of India and was practicing as senior advocate in Supreme Court of India to settle all disputes or differences arising amongst the parties regarding business run and properties owned by the family. The parties also agreed to present all the relevant papers to the learned arbitrator regarding the disputes required to be arbitrated by 10th November, 2005. By separate writing dated 5th December, 2005 signed by other family members, it was agreed by them to abide by and give full effect to the terms and conditions regarding arbitration of all disputes and differences relating to the family business (including real estate business) contained in the undertaking dated 20th October, 2005 by male members of the family. On 10.11.2005 Mukesh Malhotra (Appellant No. 4) and Ashiwini Malhotra (Appellant No. 7), in concurrence with S.P. Malhotra (Appellant No. 1) and Bahri Malhotra (Appellant No. 3) filed proposal (Statement of Case) for family settlement of Malhotra family before the learned arbitrator. It was stated in the said statement that the disputes and differences had arisen between Group C and D on one hand and Group E (respondents) on the other hand and requested the learned arbitrator to consider fair, equitable and amicable distribution and settlement of the family businesses and assets. In the said statement, the appellants made various proposals in respect of various properties. In Para 6(s) it was stated that the agricultural lands standing in the name of Ankush Malhotra (respondent No. 2) were purchased out of funds provided by other family members shall be valued by Government Valuer to be appointed by the learned arbitrator and based on such valuation, surplus be calculated and be allocated equally to Mr. Ankush Malhotra, Vidur Malhotra, Miss. Siya Malhotra and either Mr. S.P. Malhotra or Mr. B.R. Malhotra or Smt. Kanwal M. Malhotra. Similarly in Para 6(t), similar relief was sought in respect of the agricultural land standing in the name of Ankshay Malhotra. In paragraph 6(u), similar relief was sought in respect of the agricultural lands standing in the name of Ms. Shikha Malhotra, daughter of Mukesh Malhotra. The said statement was also duly signed by Mr. S.P. Malhotra

and Bahri Malhotra.

60. On 17.11.2005, Mr. and Mrs. Punit Malhotra, Ankush Malhotra and Vidur Malhotra filed reply to the statement of case of Group C and D. In the said reply, it was categorically stated that the learned arbitrator had been appointed to settle all the disputes and differences arising amongst signatories to his appointment. In so far as reply in respect of the averments made in paragraph 6(s), (t) and (u) of the claim filed by the appellants it was stated by the respondents that since the dispute sought to be resolved as stated by Mukesh Malhotra was only between that Group and Group C and grand parents forming part of Group A and B were not party to the said dispute could not insist any change in its status in ownership of the lands owned by Ankush of Group C. In respect of the properties mentioned in para 6(t) and 6(u), it is submitted that, the same was not the matter for the learned arbitrator to decide because the dispute sought to be resolved as stated by Mukesh was only between Group B and Group C. On perusal of the said written statement filed by the respondents, it is clear that only objection raised in the written statement in respect of the said agricultural properties referred to in paragraphs 6(s)(t) and (u) by the appellants and by which the appellants had sought distribution of the said properties on the plea that the said properties were purchased out of the funds provided by the family members, was that the said reliefs could not be insisted by Mukesh Group. No issue of jurisdiction was raised by the respondents in the said reply. In the said written statement, it was pleaded by the respondents themselves that the learned arbitrator had been appointed to settle all disputes and differences arising amongst the signatories to the appointment and requested him to resolve the disputes and differences on record by making written arbitration award that would be final and binding on all the parties. In view of such objection raised by the respondents that the grand parents were not parties to the said statement of claim, on 21.11.2005 Mr. S.P. Malhotra and Mr. Bahri Malhotra forming part of Group A and B filed separate Statement of Case. It was made clear that in view of the statement filed by Punit Malhotra Group raising several points and issues pertaining directly to Group A and B, grand parents filed individual statement with a request to the learned arbitrator to take due cognizance thereof in the arbitration deliberation. In the said statement, it was stated that there were many issues on which Group A and B had strong difference of opinion with group E. The Group A and B denied the statement of Punit Malhotra. Group A and B confirmed that there was written concurrence on their part to various statements made by Group C and D. Group A also rejected the contention of Punit Malhotra Group that Group A and B were not parties to that dispute and arbitration and could not express and/or lay down their contentions, conditions and claims. By the said individual statement, Mr. S.P. Malhotra and Mr. Bahri Malhotra requested the learned arbitrator to take due cognizance of the said statements in his deliberation. Though the respondents filed separate reply to these individual statements made by S.P. Malhotra and Bahri Malhotra, no objection regarding jurisdiction of the learned arbitrator in

respect of these agricultural properties was raised by the respondents. On the contrary, it was pleaded that the arbitrator was appointed to resolve all the disputes and differences between the parties.

61. It is not in dispute that the respondents had applied for adjournment of the proceedings before the learned arbitrator in view of the wedding in their family. Accordingly the learned arbitrator rendered interim award in respect of the separation of business of the company, family business etc. The learned arbitrator directed appointment of two private valuers subject to the consent of the parties, one for the business of the company and other for the real estate and investment of the company and other jointly owned real estate properties. The respondents had impugned the said interim award by filing arbitration Application No. 149 of 2006 in the court of the learned District Judge Pune. By order and judgment dated 3rd April, 2007, the learned District Judge, Pune rejected the said arbitration application. The learned District Judge rejected the plea of bias raised by the respondents against the learned arbitrator. In so far as the issue of jurisdiction raised by the respondents in the said arbitration application is concerned the learned District Judge held that looking to the widest possible term, "on settlement of disputes or differences arising amongst them regarding businesses run and properties owned by the family" raised in the mandate dated 28th October, 2005, it was difficult to accept the contention of the applicants that the terms of reference did not include separation of businesses and assets. The learned District Judge in the said order also referred to the order passed by the company Law Board in the proceedings filed by the respondents. The learned District Judge recorded that it was brought to his notice that except the lands at Wagholi, Lonikand and Bhabadi (subject matter of the present dispute), all other disputes had been resolved before the Company Law Board. It is not in dispute that the said order passed by the learned District Judge rejecting the arbitration application filed by the respondents impugning the interim award was not challenged by the respondents.

62. On perusal of the order passed by Company Law Board on 15th December, 2006 in proceedings filed by Punit and others against M/s. Weikfield Products Company India Pvt. Ltd. and others, it is clear that the issue in respect of agricultural properties was also discussed in the said proceedings. It was contended by the appellants herein that these properties were purchased by the grand parents out of their own funds but registered in the name of Ankush Malhotra and thus, he should either transfer the half of the properties in area to the grand parents or pay to the grand parents half of the present value of those three properties. Respondents did not agree to that suggestion but made counter suggestion that they were willing to pay three times of the value recorded in the registered document. The Company Law Board made suggestions to the parties to consider the proposal made by parties. In para 5 of the said order, the Company Law Board observed that if the parties could agree on the terms to settle the disputes in regard to the three properties in the name of Ankush, there would be no other dispute pending amongst the parties and which would enable

them to release the arbitrator and would also enable the petitioners group to withdraw the suit (arbitration) filed by them.

63. On perusal of the further statement filed by the appellants read with email dated 29th May, 2007 sent by the learned arbitrator, it is clear that the learned arbitrator had communicated its decision that the application/statement filed by the appellants was not fresh statement of case as alleged by Punit Malhotra but was merely addendum to their earlier statement of case and there was no infirmity involved in the matter. On perusal of the record it is clear that this decision of the learned arbitrator holding that further statement filed by the appellants was merely addendum to their earlier statement of case has not been impugned by the respondents in the subsequent arbitration application filed impugning the final award rendered by the learned arbitrator. On perusal of the impugned award it is clear that on the issue of jurisdiction raised by the respondents regarding these three properties the learned arbitrator has rendered finding that he had jurisdiction to adjudicate upon in respect of those properties and rejected the objection raised by the respondents by holding that all these matters were covered within the four corners of the arbitration agreement dated 28th October, 2005. In their arbitration application filed u/s 34 before the learned District Judge Pune, it was pleaded that properties owned by Ankush were not subject matter of the arbitration agreement and were not included in the interim award dated 31st December, 2005. There was no fresh consent or notice u/s 33 by any of the parties regarding inclusion of those three properties to the arbitration. It was pleaded that the arbitral award thus dealt with the dispute not contemplated or not falling within the terms of settlement to arbitration and contains decision on the matters beyond the scope of submission to arbitration. On this issue the learned District Judge in the impugned order and judgment rendered a finding that on considering the wording of the mandate, although resolution of dispute pertains to properties owned by the family, it indirectly includes dispute pertains to the properties owned by the members of the family, however, it is open for the family members to plead that it was not the family property. The learned District Judge recorded that there was reference about the dispute with respect to the landed properties of three villages even in previous proceedings challenging the interim award. The learned District Judge also referred to the consent order passed by the Company Law Board in Company petition No. 2 of 2006. The learned District Judge also referred to various suggestions given by the Company Law Board for amicable settlement to the parties in respect of the said agricultural properties. The learned District Judge interpreted the said order passed by Company Law Board and observed that the suggestions for amicable settlement with respect to immovable properties given by the Company Law Board were not agreed by the parties and were kept aside and had observed that it would be decided by the arbitrator. The learned District Judge also referred to observations made by the learned District Judge in the earlier arbitration application filed by the respondent u/s 34 challenging the interim award on this issue. In Para 59 of the impugned order, the learned

District Judge recorded a finding that the mandate of the arbitration agreement as well as in the two previous proceedings, one before the company Law Board and the another before that Court, the parties had virtually agreed to the said dispute being considered by the Arbitrator and rejected the contention about jurisdiction raised by the respondents in the said arbitration application, having no force.

64. On perusal of the record, it is clear that the parties had agreed on another valuation in respect of the real estate of the family including agricultural lands from M/s. Bapat Valuers and Consultants Pvt. Ltd. Mukesh in his letter dated 23rd December, 2006 had recorded this fact which was not disputed by the respondents. The said valuation report included valuation of agricultural land standing in the name of Ankush. In my view, on perusal of the agreement entered into between the parties and on perusal of the written statement filed by the respondents, it is clear that both the parties were ad idem that learned arbitrator was appointed to adjudicate upon all the disputes and differences between the parties including distribution in respect of those properties which were found to be family properties by the learned arbitrator though was standing in the name of individual members of the family.

65. The respondents did not challenge the order passed by the learned arbitrator that the statement of case filed by the appellants was merely addendum to their earlier statement of case and was not a new statement of case. In any event, in view of section 23 of the Arbitration & Conciliation Act, 1996, the arbitral tribunal is empowered to permit the parties to supplement his claim during the course of arbitration proceedings. It is not in dispute that the learned arbitrator had permitted the respondents to file their additional written statements. It is not in dispute that the earlier award rendered by the learned arbitrator was interim award. It is not the case of the respondents that on rendering the said interim award by the learned arbitrator, he had become functions officio. On the contrary the record indicates that the learned arbitrator made interim award in view of the adjournment application made by the respondents on their personal grounds. Perusal of the order passed by the Company Law Board, the order passed by the learned District Judge, rejecting the earlier arbitration application and impugned order passed by the learned District Judge, I am of the view that the learned arbitrator had jurisdiction to decide the dispute in respect of these agricultural lands. The learned District Judge was thus right in his finding that the learned Arbitrator had jurisdiction to adjudicate upon these disputes.

66. It is clear that in the interim award the learned Arbitrator had made order for appointment of the valuer even in respect of the agricultural lands. The respondents did not dispute that the name of M/s. Bapat Valuers and Consultants Pvt. Ltd. was suggested by the respondents themselves who had submitted valuation report in respect of the properties including agricultural lands. The appointment of the valuer for the purposes of valuation of agricultural lands and the parties having acted upon the said decision of the learned arbitrator to

appoint valuer would also indicate that the learned arbitrator had jurisdiction to decide the dispute in respect of those agricultural lands.

67. In my view, Mr. D'Vitre the learned senior counsel appearing for the appellants is right in placing reliance upon section 7(4)(c) of the Arbitration & Conciliation Act, 1996 in support of his plea that though there was reference in respect of these three properties in para 6(s)(t) and (u) of the statement of claim, with prayer to adjudicate upon these properties and to declare the same as family properties and for distribution thereof amongst the family members, no issue of jurisdiction was raised by the respondents in their earlier written statement. Perusal of the earlier written statement clearly indicates that the only objection raised by the respondent was that such proposal/claim could not be made by Mukesh group as the said statement of claim was not filed by the grand parents. On the respondents having raised such objection, Satpal and Bahri Malhotra had filed separate statement of claim by confirming their concurrence already granted in filing statement of Claim by Mukesh and group.

68. In my view, u/s 7(4)(c) if the arbitration agreement is pleaded in the statement of claim and is not denied by the respondents, it would satisfy the conditions of arbitration agreement in terms of section 7(4)(c) of the Arbitration and Conciliation Act, 1996. There is no substance in this submission made by Mr. Kamdar, the learned Senior Counsel for the respondents that the appellant cannot seek reliance on section 7(4)(c) of the Act in support of the plea that the arbitration agreement existed between the parties, in view of the fact that the agreement to refer the particular disputes to arbitration already existed between the parties. In my view, the arbitration agreement to refer the disputes in respect of these three properties already existed. This however, does not preclude the party from placing reliance upon section 7(4)(c) as and by way of alternate submission. On perusal of the earlier written statement filed by the respondents, it is clear that it was respondent's own case that the learned arbitrator had jurisdiction to adjudicate upon all the disputes and differences between the parties which were already on record.

69. On perusal of the impugned order passed by the learned District Judge, it is clear that on the one hand, the learned Judge rendered finding that considering the wording of the mandate that it includes disputes pertaining to properties owned by the members of the family and on the other hand has rendered contradictory finding that the terms of the arbitration agreement did not indicate that the learned arbitrator was assigned with the work of distribution of properties of different family members and the same was beyond the scope of arbitration agreement. The learned District Judge observed that direction about transfer and execution of deed of conveyance about the landed property was beyond the scope of arbitration mandate. In my view the learned District Judge once having come to the conclusion on interpretation of the arbitration agreement between the parties that it included mandate for resolution of disputes pertaining to the properties owned by the members of the family, could

not have rendered the contradictory finding that the direction of the learned arbitrator to transfer and execute documents about the landed property was beyond the scope of arbitral mandate or that the said agreement did not indicate any work of assignment of distribution of the properties of different family members. In my view once the learned arbitrator had jurisdiction to decide the dispute pertaining to the properties owned by the members of the family and for separation thereof, it would include direction to distribute the said properties including direction to execute the requisite documents to transfer and to implement the direction to execute the requisite documents to effectuate the transfer thereof. The impugned order passed by the learned District Judge shows patent contradiction and illegality on the face of the order. In my view, the learned District Judge in the impugned order could not have taken a view different than the view taken by his predecessor in the earlier order dismissing the arbitration application impugning the impugned award which was filed by the respondents on this issue.

70. In my view the learned District Judge having come to the conclusion that the learned arbitrator had jurisdiction to decide the dispute in respect of the properties held by individual members of the family and the learned arbitrator having rendered a finding of fact based on interpretation of the agreements and other evidence that such properties were family properties, the learned District Judge in my view could not have arrived at different conclusion by re-appreciating the material produced by the parties before the learned arbitrator. The learned District Judge was not deciding the first appeal and could not have come to a different conclusion on re-appreciation of facts while deciding the arbitration application u/s 34 of the Arbitration & Conciliation Act, 1996. The impugned order passed by the learned District Judge setting aside the impugned award by re-appreciating the evidence and by rendering different findings of fact u/s 34 of the Arbitration & Conciliation Act, is impermissible and deserves to be set aside.

71. I am not inclined to accept the submission made by Mr. Kamdar the learned senior counsel for the respondents that there is no contradiction in the findings rendered by the learned District Judge. I am not inclined to accept the submission of Mr. Kamdar that the learned Arbitrator was only empowered to decide the jurisdictional fact and not to decide the dispute in respect of distribution of three properties. Both the parties had already agreed in the said two writings that the arbitrator had to decide the disputes also in respect of the family properties though held in the name of individual family members. In my view whether those three properties were self acquired or jointly owned properties cannot be termed as jurisdictional fact as sought to be canvassed by Mr. Kamdar, learned senior counsel for the respondents. Even learned District Judge in the impugned order has rejected the submission of the respondents that learned arbitrator had no jurisdiction to decide the dispute in respect of the individual properties on interpretation of the agreement entered into between the parties. On perusal of the arbitration application filed by the respondents, it is

clear that there is no plea raised by the respondents that the learned arbitrator had decided jurisdictional fact while deciding the question as to whether those three properties were individually purchased or jointly owned. In my view, this plea not having been raised in the petition filed u/s 34, cannot be allowed to be raised for the first time across the bar. Even in the cross objection filed by the respondents no such plea has been raised by the respondents regarding bifurcation of the jurisdiction of the learned arbitrator regarding jurisdictional fact or distribution of properties.

72. There is no dispute that once the plea of jurisdiction was raised before the learned arbitrator by the respondents u/s 16, the order of the learned arbitrator rejecting such plea can be challenged u/s 34 of the Arbitration & Conciliation Act, 1996 while challenging the final award.

73. On Perusal of the cross objection filed by the respondents, it is clear that the respondents did not raise any plea about the view of the learned District Judge that the properties were self acquired properties and were not family properties were based on admitted facts. On perusal of the impugned order passed by the learned District Judge, it nowhere indicates that the said findings of fact recorded by the District Judge is based on any admitted facts. In any view of the matter, no such findings of fact can be recorded by the learned District Judge for the first time while deciding the application u/s 34 of the Arbitration & Conciliation Act, 1996. In my view, since the respondents did not raise any such plea in arbitration application and in cross objection, respondents cannot be allowed to raise that plea for the first time across the bar.

74. The learned District Judge in the impugned order has rendered a new finding that on the material produced on record it could not be said that the properties were family properties and that infact same were self-acquired/separate properties of the Ankush subject to rights of the lenders to recover loan amount with interest provided by them for purchase of the said property by him. While coming to this conclusion, the learned District Judge came to the conclusion that the agreement of repayment of loan which compelled the purchaser to sell the property purchased and to retain certain percentage of sale proceeds and to pay remaining to the opponents, could not be said to be legally enforceable agreement. The learned District Judge also observed that the condition that if the loan was not repaid by the appellants herein, that they were entitled to get 85% of the surplus amount from the sale proceeds on sale of the landed property seems to be quite unreasonable as the land so purchased by applicant Ankush would go back to the subsequent purchaser, and he would be entitled to retain 15% of the sale proceeds only and the remaining would go to the opponents/lenders towards recovery of loan given by them. In my view, such findings rendered by the learned District Judge about the validity of the loan agreement nor perverse could be the reason that neither there was any plea in the arbitration application filed by the respondents challenging the validity or unreasonableness of any of the provisions of the loan agreement, no such issue

can be decided by the learned District Judge while deciding application u/s 34 of the Arbitration & Conciliation Act, 1996. The learned District Judge in my view has exceeded his jurisdiction by rendering such finding on the validity or reasonableness of the provisions of the loan agreement while deciding application u/s 34 of the Arbitration Act, 1996.

75. The learned District Judge though referred to various findings rendered by the learned arbitrator and the documentary evidence considered for coming to the conclusion that the properties were family properties and not self acquired properties in the impugned award, the learned District Judge has reversed those findings by recording new finding that all those observations made by the learned arbitrator were based on assumptions that the landed properties of three villages were in fact joint family properties. This part of the finding of the learned District Judge is beyond his powers u/s 34 of the Arbitration Act, 1996. In my view on the basis of the documents produced by the parties and on interpretation of the loan agreement, the learned arbitrator had rendered finding of fact that such properties were family properties and not self acquired properties of the individual members of the family. The learned arbitrator had also considered income tax returns of Ankush, bank statements of the grand parents and other family members and the agreements between Weikfield Products Company India Pvt. Ltd. Ankush and Akshay showing the nature of understanding on which the loans were advanced. The learned arbitrator rendered a finding that the tax returns of Ankush clearly showed the meager nature of his financial resources at the relevant time and that he had received loans from the elders and the firm, which were used for purchase of the lands under dispute. The learned arbitrator also observed that loan agreement showed the intention of the parties and the terms and conditions on which the loans were granted. In respect of other two properties, the learned arbitrator applied 1/6th formula based on the oral understanding between the parties. The learned arbitrator also considered affidavit dated 13th June, 2007 filed by Akshay. In my view, Mr. D'vitre the learned senior counsel appearing for the appellant is right in his submission that finding of the learned arbitrator was based on interpretation of the terms of the loan agreement and other documents on record demonstrates that it was not simpliciter loan transaction and the transaction was not at the arms length, as the loan agreement provided for compensation and share in the property and such finding could not be substituted by the learned District Judge. In my view the learned arbitrator while rendering such finding has considered the documents on record and on interpretation of the terms of the agreement which interpretation in my view is a possible interpretation. The learned District Judge thus could not have substituted the possible interpretation of the learned arbitrator with any other interpretation. Even if there was any error in recording such finding, it was within the jurisdiction of the learned arbitrator and not outside his jurisdiction. Thus no interference could be made by the learned District Judge with such finding of fact rendered by the learned arbitrator.

76. As far as the issue raised by Kr. Kamdar that the impugned award was hit by

the provisions of the Benami Transactions (Prohibition) Act, 1988 (for short "Benami Act") is concerned, on perusal of the impugned order passed by the learned District Judge, it is clear that no such submission appears to have been made by the respondents before the learned District Judge. On perusal of the cross objection filed by the respondents on this issue, it is clear that no ground has been raised by the respondents that any such plea was though raised by the respondents before the learned District Judge, the same was not considered in the impugned order passed by the learned District Judge. In my view, Mr. D"Vitre is right in his submission that on perusal of the order passed by the learned District Judge, there appears to be no such argument having advanced by the respondents appears to be correct. In any event, the only ground raised in the cross objection on this issue is that the learned District Judge failed to appreciate that the award passed by the learned arbitrator was directly hit by the provisions of section 3 of the said Act. As far as argument of Mr. Kamdar that the award is hit by the provisions of Benami Act and the learned arbitrator could not have treated the property held by respondent No. 2 as the property of Malhotra family in the teeth of section 4(3)(a) of the said Act is concerned, in my view, Mr. D"Vitre, the learned senior counsel appearing for respondent is right in his submission that though the properties were standing in the name of individual members of the family, the same was with the understanding and also on the terms and conditions of the agreement. The learned arbitrator was right in rendering a finding on interpretation of the agreement and considering the documents that the said properties were family properties and the same were held in trust by the individual members. It was not in dispute that such individual members of the family had no independent source of income so as to buy those properties at the relevant time and were members of the same family. In my view thus there is no substance in the submission of Mr. Kamdar that the award of the learned arbitrator was in the teeth of provisions of Benami Act. As far as the judgment of the Supreme Court in the case of Pavankumar (supra), relied upon by Mr. Kamdar on this issue is concerned, the Supreme Court has considered the definition u/s 2(a) of the Benami Act. The Supreme Court took a view that even if the party had availed himself of the help rendered by his father for making up the sale consideration that would not make the sale deed a benami transaction. After considering the evidence recorded by the parties, the Supreme Court took that conclusion. However, in the facts of this case, none of the parties had led any oral evidence. The learned arbitrator interpreted the documentary evidence produced on record and rendered finding that it was not simpliciter loan transaction but was a transaction with the understanding that in case of default in repayment, the other parties would be entitled to compensation and share in the property. In my view the judgment of the Supreme Court in the case of Pavankumar is clearly distinguishable with the facts of this case and is of no assistance to the respondents.

77. As far as the submission of Mr. Kamdar that the award in respect of dissolution of partnership firm M/s. Weikfield Ventures International by the

learned arbitrator is totally without jurisdiction and bad in law is concerned, it is not in dispute that the dispute in respect of Weikfield Ventures International which was family partnership was referred to arbitration of the learned arbitrator. Various properties were held in the name of the said firm. The learned arbitrator rendered a finding that the said firm was run by the family and the disputes or differences pertaining thereof were squarely covered by the term of arbitration agreement dated 25th October, 2005. The learned arbitrator after referring to section 8(3) of the Arbitration and Conciliation Act, 1996 held that the dissolution of the said firm as prayed for by Group A and D would not cause any prejudice to any parties and would as a consequence, also result in all the disputes and differences between the parties being resolved, which was the intent of that arbitration before him. The learned arbitrator accordingly held that the dissolution of the said firm would render all the agreements and special power of attorney null and void and would remove the very cause of action of the suit filed by Puneet Malhotra and also satisfy his desire who did not wish to permit Mukesh or Ashwini or the firm to continue sales of the plots standing in his name and allow him to independently carry out the sales of all the plots standing in his name at Malhotra Forest Valley without any interference from Mukesh or Groups A to D. The learned arbitrator accordingly directed that the said firm be dissolved and appropriate steps be taken for that purpose forthwith.

78. On perusal of the copy of the plaint produced for perusal of this court by the appellants indicates that there was no dissolution of partnership firm sought by Puneet Malhotra in the said suit. The issue of dissolution of partnership was not subjudice before the learned District Judge in the said suit filed by Puneet. On perusal of section 8(3) of the Arbitration Act, it is clear that even if the application is pending before the Judicial authority, the arbitration may be commenced or continued and the arbitration award can be made. There was no bar in the learned arbitrator making the award on that issue. In the case of V.H. Patel and Others (supra), the Supreme Court has held that under the terms of reference of disputes and differences arising between the parties referred to arbitration, the arbitrator will, in general, be able to deal with all matters including dissolution. In my view, as the said firm was carrying on family business and the dispute in respect of the family business was admittedly having been referred to arbitrator, the learned arbitrator rightly exercised his jurisdiction to dissolve the said firm and the same was not beyond his jurisdiction. The judgment of the Supreme Court in the case of V.H. Patel would squarely apply to the facts of this case. In my view there is no substance in the submission of Mr. Kamdar on this issue that the learned arbitrator acted beyond his jurisdiction to pass the order for dissolution of the said firm.

79. The next issue which arises for consideration of this court is whether the refusal on the part of the learned arbitrator to permit the respondents to represent themselves by advocate was in violation of section 34(2)(a)(iii) of the Arbitration & Conciliation Act or that the respondents were deprived of the full opportunity to present their case. It is not in dispute that the learned arbitrator

was old family friend from 35 years and was well known to the entire family. In the first arbitration meeting itself, all parties had agreed that they will not lead any evidence oral or written in the present case. It is also not in dispute that through out arbitration till 11th June, 2007, the parties had proceeded without any advocate. Both the parties were allowed to file written arguments, perusal of which it indicates that the same were obviously drawn by advocates. In view of the pendency of arbitration application filed by the respondents impugning interim award, no arbitration hearing took place for one year. The learned arbitrator with an intention to avoid any further delay exercised his discretion not to allow any party to engage advocate to represent them. The matter relating to agricultural land was already pending before the learned arbitrator even prior to 11th June, 2007. The matter was adjourned in view of the request made by the respondents.

80. u/s 18 of the Arbitration & Conciliation Act, 1996, it is provided that the parties shall be treated with equality and each party shall be given full opportunity to present his case. The record would indicate that the learned arbitrator did not allow either party to engage any advocate to represent them before him. If the learned arbitrator would have allowed the appellants to engage an advocate to represent them and would have rejected the application of the respondents to engage advocate, section 18 of the Act would have attracted in that situation. In my view, refusing to permit a party to engage an advocate in the arbitration proceedings by the arbitrator would not violate section 18 of the Arbitration & Conciliation Act, 1996. There was no violation of any equal treatment being given to both the parties by the learned arbitrator. Both the parties were given full opportunity to present their respective case including filing of written arguments. The learned arbitrator being family friend for 35 years and the dispute being family dispute and to avoid any further delay in the matter, in my view the learned arbitrator was right in exercising his discretion not to allow any of the parties to engage an advocate.

81. On perusal of section 19(2) and (3) of the Arbitration & Conciliation Act, it is clear that on failing in the agreement between the parties on the procedure to be followed by the arbitral tribunal in conducting the proceedings, the arbitral tribunal is empowered to conduct the proceedings in the manner it considers appropriate. As far as submission of Mr. Kamdar, the learned senior counsel that in the meeting held on 11th June, 2007, there was an agreement arrived at between the parties that both the parties were entitled to have representation by advocate, the learned arbitrator had no choice or discretion but to permit such representation if desired, u/s 19(2) of the Act is concerned, reference to the minutes of the said meeting of 11th June, 2007, the application made in writing by the respondent on 11th June, 2007, the written arguments filed by the respondents before the learned arbitrator would be relevant. On perusal of the minutes of the said meeting, indicates that the learned arbitrator exercised powers vested in him and gave a ruling that no lawyers need be engaged for the hearing and hearing should be conducted by the parties themselves as conducted

earlier. The learned arbitrator recorded that such ruling was given with a view to prevent protraction of the proceedings by lawyers in the family matter. After giving that oral ruling, the respondents filed an application at 1.00 p.m. On perusal of the said application and the written arguments filed by the respondents, it is submitted by the respondents themselves that Mukesh had stated that if the respondents herein were allowed to engage lawyer, then the appellants also be allowed. On perusal of these documents, it is clear that there was no agreement arrived at between the parties to permit the engagement of the advocates to represent them before the learned arbitrator as contemplated u/s 19(2) of the Arbitration Act. I am not inclined to accept the submission of Mr. Kamdar that there was agreement entered into between the parties for engagement of advocate or that the arbitrator could not have exercised his discretion regarding conduct of the proceedings in the manner he considers appropriate u/s 19(3) of the Act. In my view as there was no agreement to engage an advocate between the parties as contemplated u/s 19(2), the learned arbitrator was fully justified in exercising his discretion to conduct the proceedings in the manner he considers appropriate and by refusing to permit either parties to engage advocate. In my view there is no denial of equal opportunity or violation of principles of natural justice by refusing to engage an advocate to both the parties. In my view, once the learned arbitrator has exercised that discretion, considering the facts of that case, the learned District Judge could not have interfered with such discretion exercised by the learned arbitrator by exercising powers u/s 19(3) of the Arbitration Act. The impugned order passed by the District Judge setting aside the impugned award on this ground is thus perverse and untenable in law.

82. In the case of Skanska Cementation India Ltd. (supra) delivered by this court on 13th December, 2002 this court while considering the arbitration rules of Bharat Chamber of Commerce held that the arbitral tribunal had dealt with the application of the petitioner considering the rules and had exercised its discretion while choosing to reject the application of both, petitioner and respondents for engaging the lawyer and such exercise of discretion, surely could not be a subject matter of section 34 by contending that the petitioners were denied opportunity. It is held that the decision to permit engagement of lawyer was within the discretion of the tribunal. Both the parties had sought opportunity to engage lawyers. Both the parties had been dealt with equally. I am unable to accept the submission of Mr. Kamdar that this court in the said judgment had considered the provisions providing bar from allowing any party to engage an advocate to represent their case before the learned arbitrator. On perusal of the said judgment carefully, I do not find any such prohibition in the rules of Bharat Chamber of Commerce prohibiting any party from engaging any advocate considered in the said judgment. Though this issue was urged by the petitioner before the learned District Judge, on perusal of the impugned order passed by the learned District Judge, it is clear that neither this judgment was referred by the learned Judge nor was followed in the impugned order.

83. As far as judgment of this court in the case of Faze Three Exports Ltd. (supra) relied upon by Mr. Kamdar the learned counsel for the respondent is concerned, on perusal of the said judgment, it is clear that the earlier judgment of this court rendered in the case of Skanska (supra), holding that in the absence of any agreement between the parties, to permit engagement of advocate to represent before the learned arbitrator, the learned arbitrator had discretion to refuse parties to engage advocate and once having exercised such discretion, the court u/s 34 could not have interfered with such discretion of the learned arbitrator was not brought to the notice of this court while deciding the said matter in the case of Faze Three (supra). On perusal of the said judgment in the case of Faze Three (supra), it is clear that this court did not consider the effect of section 19 of the Arbitration and Conciliation Act, 1996. In my view, the judgment in the case of Faze Three relied upon by Mr. Kamdar would be thus of no assistance to the respondents.

84. As far as the judgment in the case of Nanalal M. Varma and Co. (supra) relied upon by Mr. Kamdar is concerned, on perusal of para 15 of the said judgment it clearly indicates that Rule 16 of the Bengal Chamber of Commerce had specifically provided that in case of formal hearing, no party shall without the permission of the Court be entitled to appear by counsel, attorney, advocate or other lawyer adviser. Considering that provisions, it is held that the learned arbitrator in refusing the permission would not have committed any misconduct as they acted within their powers expressly conferred under the rules of arbitration. Even in the said judgment, the Calcutta High Court held that ordinarily in India, person certainly has a right to engage any qualified lawyer to represent his case but that is contractual right and not constitutional right. In my view the judgment of the Calcutta High Court thus relied upon by Mr. Kamdar is of no assistance to the respondents.

85. On perusal of the arbitration application filed by the respondents challenging the impugned final award, it is clear that the ground raised in the said application by the respondent was not that inspite of the agreement between the parties to engage advocate or to be represented by their lawyer before the learned arbitrator, the learned arbitrator acted contrary to that agreement. The only ground raised is that the order refusing the respondents to present their case through their advocate was against the principles of natural justice. In my view, the respondents cannot be thus permitted to raise this issue about the alleged agreement between the parties for the first time across the bar in this appeal.

86. The next question that arises for consideration of this court is whether cross objections filed by the respondents is maintainable or not and if so, whether the respondents have made out a case for entertaining such cross objections on merits.

87. It is not in dispute that the arbitration application filed by the respondents u/s 34 of the Act impugning the final award was allowed and the said impugned award came to be set aside in toto. It is also not in dispute that this appeal filed

by the appellants herein is maintainable u/s 37(1)(b) of the Arbitration Act. Arbitration Appeal No. 12 of 2010 filed by the appellants has been admitted. Notice in respect of the admission of the said appeal was issued to the respondents. There was some delay in filing cross objections by the respondents. After hearing both sides, by a separate order, this court has allowed the civil application for condonation of delay in filing cross objections keeping the issue of maintainability of the cross objections open.

88. On reading of section 37(1)(a) and (b), it is clear that no appeal can be filed by the respondents in whose application u/s 34, the arbitral award has been set aside. Question however that arises for consideration of this court is whether if the aggrieved party files an appeal challenging an order setting aside the arbitral award, if there are any adverse findings recorded by the learned Judge in the impugned order against the respondents while setting aside the arbitral award, whether respondents can challenge such findings by filing cross objections in the appeal filed by the aggrieved party challenging the said order.

89. On perusal of cross objections filed by the respondents, it is clear that the respondents have impugned some of the adverse findings which were recorded by the learned District Judge in the impugned order while allowing arbitration application filed by the respondents u/s 34.

Reference to Order 41 Rule 22 sub-rule (1) w.e.f. 1st February, 1977 would be necessary which reads thus:-

22. Upon hearing, respondent may object to decree as if he had preferred separate appeal.-(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the court below in respect of any issue ought to have been In his favour; and may also take any cross objection] to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one months from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow:

Explanation: A respondent aggrieved by a finding of the court in the judgment on which the decree appealed against is based may, under this rule, file cross objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or In part, in favour of that respondent.

On perusal of the said explanation, it is clear that even if the decision is wholly or in part in favour of the respondents but if the respondents is aggrieved by the findings of the court in the judgment on which the decree is appealed against is heard, the respondents may file cross objections in respect of the decree in so far as it is based on that findings.

90. In my view, the provisions of the Code of Civil Procedure, 1908 would apply to the arbitration proceedings filed in court to the extent, it is not inconsistent with any of the provisions of the Arbitration and Conciliation Act, 1996. There is no bar under the provisions of the Arbitration and Conciliation Act from applicability of the provisions of the Code of Civil Procedure, 1908 to the arbitration proceedings filed in court. Section 19 of the Arbitration Act provides that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908. The said provision does not apply to the proceedings filed in court including arbitration application filed u/s 34 or even appeal u/s 37 of the Arbitration and Conciliation Act, 1996. I am thus not inclined to accept the submission of Mr. D'vitre, the learned senior counsel appearing for the appellants that right of filing cross objections also must be provided u/s 37 of the Act and not having provided, cross objections would not be maintainable. In my view, section 37 of the Arbitration and Conciliation Act, 1996 has to be read with the provisions of the Code of Civil Procedure, 1908 and in this case in particular Order 41 Rule 22 thereof. If arbitration appeal filed by the appellants in this court itself would not have been maintainable, cross objections filed by the respondents also in that event would not be maintainable. On perusal of Order 41 Rule 22 Sub Rule 4, it is clear that if original appeal is withdrawn or is dismissed for default, in such an event, cross objections filed by the respondents would nevertheless be heard and determined after such notice to the other parties as the court thinks fit.

91. As far as submission of Mr. Kamdar that every ground of challenge to the impugned award raised in the arbitration application filed u/s 34 is a separate and distinct ground of challenge and if the learned Judge would have refused to set aside the award on a particular ground though finally set aside the impugned award on other grounds, the respondents would be entitled to file a separate appeal u/s 37(1)(a) or (b) for impugning the order refusing to set aside award on that particular ground is devoid of merits. This submission of Mr. Kamdar in my view is contrary to section 37(1)(b). It is not in dispute that on application of the respondents, the learned District Judge had set aside the impugned award on some of the grounds raised by the respondents in application u/s 34 of the Act. No such eventuality is provided u/s 37(1)(b) permitting the respondents to challenge the order setting aside an award on the ground that the award was not set aside on all the grounds raised by the respondents. However, the respondents are not precluded from challenging the adverse findings recorded in such order by filing cross objections under Order 41 Rule 22 of the CPC in arbitration appeal filed by the opponent impugning such order setting aside arbitral award.

92. In my view, in absence of any express and/or implied bar under the provisions of the Arbitration Act 1996, provisions of Code of Civil Procedure, 1908 are applicable to the arbitration proceedings in court to the extent any of such provisions are not inconsistent with the provisions of the Arbitration and Conciliation Act, 1996. In my view, there is no bar under the provisions of Arbitration and Conciliation Act, 1996 for maintainability of cross objections.

Supreme Court in case of S. Nazeer Ahmed (supra) and Ravinder Kumar Sharma (supra) has held that for supporting the decree passed by the trial court, it is not necessary for the respondent in the appeal, to file a memorandum of cross objections challenging a particular finding that is rendered by the trial court against him when the ultimate decree itself is in his favour. It has been held that memorandum of cross objections is needed only if the respondent claims any relief which had been negated to him by the trial court and in addition to what he has already been given by the decree under challenge.

93. In my view, it is open to the respondents even if he has not filed any cross objections with respect to the portion of the impugned order which has gone against him while opposing the appeal filed by the opponent against such order a contention which if, the learned judge would have accepted would have necessitated of the setting aside of the entire award but that order so far as it was against him would stand. The respondents can without filing cross objections canvass the correctness of the findings against him in order to support the judgment that has been passed against the appellants. In my view, Mr. D'vitre, the learned senior counsel appearing for the appellants is not right in his submissions that the respondents could not have challenge any findings by way of cross objection as the application of respondents for setting aside the impugned award was allowed. This argument of Mr. D'vitre is devoid of any merit in view of explanation inserted in Order 41 Rule 22 sub rule 1 w.e.f. 1st February, 1977.

94. In support of his plea that cross objections filed by the respondents is not maintainable in view of such remedy not having been provided u/s 37 of the Arbitration Act, Mr. D'vitre, learned senior counsel strongly place reliance upon the judgment of the Supreme Court in case of Municipal Corporation of Delhi and others (supra). On perusal of the said judgment, it is clear that the Supreme Court was considering Sections 39 and 41 of the Arbitration Act, 1940 and also Order 41 Rule 22 of the Code of Civil Procedure, 1908. In the said matter against the order of the Trial Judge refusing to set aside the arbitration award and passing an order that the award be made rule of the Court, the respondents filed an appeal u/s 39 of the Arbitration Act, 1940 seeking suitable modification in the decree so as to include therein direction to pay future interest from the date of decree till realization. Though the applicant whose application u/s 30 read with section 33 impugning the award filed an appeal against the same judgment and decree, there was gross delay in filing the said appeal. The Division Bench rejected the said appeal filed by the applicant consequently upon the dismissal of condonation application filed u/s 5 of the Limitation Act. It was submission of the applicant that Memo of Appeal filed by the applicant if was barred by time though maintainable, the same could be treated as cross objections under Order 41 Rule 22 of the CPC in appeal filed by the respondents which having was filed within the prescribed period of limitation and the same shall be heard on merits alongwith appeal filed by the respondents. Against the Order of the Division Bench dismissing the appeal filed by the original applicant, the applicants filed

SLP in Supreme Court. In that context, it is held by the Supreme Court that the original appeal filed by the respondents itself was found to be not maintainable as not covered by any of clause (i) to (vi) of sub section 1 of section 39 of the Arbitration Act, 1940 which was dismissed as incompetent, the question of memo of appeal filed by the applicant being treated as cross objections and being taken up for hearing on merits did not arise. On perusal of the said judgment, it is clear that there was no issue before the Supreme Court as to whether respondents could challenge adverse findings of fact by filing cross objections in case appeal u/s 39 of the Arbitration Act, 1940 was maintainable under any of the clause (i) to (vi) of sub section 1 of Section 39 of the Arbitration Act, 1940. No reliance was placed on explanation inserted in sub rule 1 of Order 41 Rule 22 of the Code of Civil Procedure, 1908. In my view the facts before the Supreme Court in case of Municipal Corporation of Delhi and others (supra) are clearly distinguishable with the facts of this case. Reliance thus placed by Mr. D'vitre on the judgment of Supreme Court in case of Municipal Corporation of Delhi and others (supra) is of no assistance to the appellants.

95. As far as judgment of this court in case of Masusmi Sa Investment Llc (supra) in Company Appeal (L) NO. 47 of 2012 with connected matters is concerned, the issue before this court in the said matter was whether an order passed by the Company Law Board allowing the application filed by the respondents u/s 8 of the Arbitration and Conciliation Act, 1996 was appealable and whether an appeal filed u/s 10(F) of the Companies Act, 1956 challenging the said order was maintainable. Considering the provisions of sections 5, 8 and 37 of the Arbitration and Conciliation Act, this court took a view that order passed u/s 8 of the Act was not one of the appealable order u/s 37 of the Arbitration and Conciliation Act, 1996 and thus appeal was not maintainable. There was no issue of maintainability of cross objection filed under Order 41 Rule 22 raised in the said matter.

96. In my view filing of cross objection for impugning certain adverse findings in the impugned order, even if no such cross objection is specifically mentioned u/s 37 of the Arbitration Act or any of the provisions of the Arbitration Act, 1996 is maintainable. In my view, the judgment of this court (R.D. Dhanuka, J.) in Company Appeal NO. 47 of 2012 in case of Masusmi Sa Investment Llc (supra) is of no assistance to the appellants.

97. Mr. Kamdar, the learned senior counsel placed reliance upon the judgment of the Supreme Court in case of ITI Ltd. (supra) in which it has been held by the Supreme Court that the proceedings before the court will have to be controlled by the Code of Civil Procedure. It has been held that bar u/s 5 will not be attracted because conferment of appellate power on the civil court in Part I of the Act attracts the provisions of the Code also. In my view as there is no bar from applicability of CPC to arbitration proceedings in court, the provisions of Order 41 Rule 22 can be invoked by the respondents on the satisfying the conditions mentioned therein.

98. Next question that arises for consideration of this court is whether the respondents have made out a case for interference with the findings rendered by the learned District Judge against the respondents in this cross objections filed by the respondents.

99. On merits of cross objections Mr. Kamdar canvassed two submissions which are recorded in paragraph 48 of the aforesaid judgment. As far as submission of Mr. Kamdar that findings of the learned District Judge that arbitrator had jurisdiction to decide regarding three properties was incorrect has no merits. Even the respondents in their written statement had repeatedly asserted that the arbitrator had jurisdiction to decide all the disputes and differences between the parties. The learned District Judge on interpretation of the agreement and mandate had rightly taken a view that the learned arbitrator had jurisdiction to decide the dispute also in respect of individual properties of the family members. I am thus not inclined to accept that the said findings of the learned District Judge was faulty and/or warrants any interference in this cross objections.

100. Mr. Kamdar, the learned senior counsel appearing for the respondents laid emphasis more on the issue that the learned arbitrator had become functus officio on signing the award u/s 31(1) of the Arbitration and Conciliation Act, 1996 and could not have made any alterations in the impugned award. According to Mr. Kamdar, if there was any error as prescribed u/s 33(1) of the Act, in the impugned award, the same could be corrected only by following procedure prescribed u/s 33(1)(a), (b) or section 33(2) or (3). It is submitted by Mr. Kamdar that no notice was given by either party to each other or to the arbitrator for making any correction of any error prescribed u/s 33(1)(a). It is submitted that the learned arbitrator had committed gross misconduct by carrying out corrections in the impugned award, by showing the impugned award to Mukesh first, by making corrections of substantial nature in the impugned award as suggested by Mukesh in a note admittedly prepared by him which note was found alongwith copy of the award served upon the respondents by the Registrar of the learned arbitrator. Mr. Kamdar vehemently urged that the learned arbitrator struck off the place of award, had destroyed the last page of the award, had initialed each and every page which was impermissible without following proper procedure according to the learned senior counsel.

101. On perusal of the record, it is clear that Mr. Sodhi who was admittedly employee of the firm Weikfield was appointed by consent of all parties as Registrar of the learned arbitrator. On 16th July, 2007, the learned arbitrator had indicated of his visit to Pune between 24th to 26th July 2007 and proposed to pronounce the award on 25th July, 2007. The learned arbitrator had already put the date of 25th July, 2007 in the award and sent the said award by courier to Mr. Sodhi at Pune. It appears that Mr. Sodhi had shown that award to Mukesh. It is not in dispute that Mukesh had prepared a note suggesting few minor corrections to Mr. Sodhi. Mr. Sodhi went to Delhi and returned on 21st July, 2007 itself with corrections in date and initial on each page of award. The arbitrator

signed final award and corrected the date and put his initial on every page. Place of the award mentioned at Pune was deleted. The learned arbitrator changed the date from 25th July to 21st July as he had cancelled his personal visit to Pune which was proposed on 25th July. On perusal of the record, it is also clear that it was case of the respondents themselves that they were in contact with the learned arbitrator who had informed the respondents that the learned arbitrator was in process of correcting few mistakes in the impugned award. It is not the case of the respondents that the learned arbitrator had directed Mr. Sodhi first to show the impugned award to Mukesh or to consult him for making any corrections.

102. Question that arises for consideration of this court is whether arbitrator become functus officio on the date when copy of the award was first signed by the learned arbitrator by putting the date of 25th July 2007 and Mr. Sodhi showing a copy thereof to Mukesh. Question also arises whether learned arbitrator has carried out corrections in the award contrary to section 33 and has committed misconduct or was biased.

103. u/s 31 of the Arbitration Act, an award is made when it is signed by the arbitrator. Section 31 provides for the form and contents of the arbitral award. Section 31(4) provides that the arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place. Section 31(5) of the Act provides that after the arbitral award is made, a signed copy shall be delivered to each party. It is not in dispute that the respondents were also served with the signed copy of the award by the learned arbitrator through his registrar/secretary. It is not in dispute that the arbitration proceedings were held at Pune.

104. u/s 33(1)(a), a party may with notice to the other party within 30 days from the receipt of the arbitral award unless another period of time has been agreed upon by the parties, request the arbitrator to correct any computation error, any clerical or typographical or any other error of the similar nature occurring in the nature. If any such application is made by a party with notice to the other party, the learned arbitrator can make such corrections prescribed u/s 33(1)(a). On similar request, the learned arbitrator may also give an interpretation of specific point or part of award within the same time prescribed u/s 33(2). Section 33(3) categorically provides that arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award. Section 33(4) empowers the arbitrator to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award. Section 33(7) provided that Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.

105. While deciding these issues reference to section 32 of the Arbitration and Conciliation Act, also would be useful. On perusal of section 32 of the Act, it is

clear that the arbitral proceedings are terminated by the final arbitral award or by an order of the arbitral tribunal passing order for termination of proceedings on the claimants withdrawing his claim, parties agree on the termination of the proceedings, or if the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible. Section 32(3) provides that subject to section 33 and subsection (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings. On conjoint reading of sections 32, 33 and section 34(4) of the Arbitration Act, it is clear that the mandate of the arbitral tribunal is not terminated if any application for correction is made u/s 33(1)(a) by the parties till an order thereon is passed by the learned arbitrator within the time prescribed or if arbitrator exercises suo motu powers for correction till such period expires or if any request is made by parties for additional award till such additional award is made within the time prescribed u/s 33(5) and extension if any u/s 33(6). If court passes an order u/s 34(4) by adjourning the proceedings, on a request made by the party in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award, arbitration proceedings revive for such limited purpose. In my view, the arbitral tribunal thus does not become functus officio after making an award for such time prescribed u/s 33 for correcting any computation error clerical or typographical error or any other error of the similar nature occurring in the award or giving interpretation part of a specific point or part of award as requested by the parties, making an additional award on request of the parties. In my view, the learned arbitrator is put back in office for resuming the arbitral proceedings so as to eliminate the grounds for setting aside the arbitral award by virtue of an order that may be passed by court u/s 33(4) of the Act. In my view, the arbitrator however while making any corrections u/s 33(1)(a) or by exercising suo-motu u/s 33(3) cannot make any change in matter of substance in the impugned award.

106. I shall now consider whether corrections carried out by the learned arbitrator in the impugned award would amount to any change of substance in the contents of the impugned award or the same was mere irregularity.

107. On perusal of the note prepared by Mukesh and the corrections alleged by the respondents, it appears that the learned arbitrator had initialled each and every page of the award. The arbitrator had changed the date of the award in view of the cancellation of his proposed visit to Pune on 25th July, 2007. The learned arbitrator had deleted the place of declaration of award at Pune. It is not the allegations of the respondents that the learned arbitrator had made any other corrections which would affect the merits of the case. In my view, even if the learned arbitrator would not have initialled each page of the award, or even if the place i.e. Pune was deleted or not mentioned in the award would not make the award illegal. Change of date from 25th July to 21st July 2007 was obviously made in view of the cancellation of the proposed visit to Pune by the learned

arbitrator which in my view would not affect the merits of the matter.

108. None of these corrections carried out by the learned arbitrator would be of any substance in nature and were absolutely clerical which could be carried out by the learned arbitrator on his own initiative by exercising powers u/s 33(3) of the Act. On perusal of section 33(3) of the Arbitration Act, it is clear that the learned arbitrator could carry out such corrections prescribed u/s 33(1)(a) within 30 days from the date of the award even without giving any notice to the parties before carrying out any such corrections. In my view, the learned arbitrator had not become functus officio. It is true that the learned arbitrator could have followed proper procedure or would have acted in better way before carrying out such corrections which were of clerical in nature as provided u/s 33(1)(a) of the Arbitration Act. In my view, no malafide or bias can be imputed by the respondents against the arbitrator on the basis of such corrections of clerical nature carried out by the learned arbitrator in the impugned award. None of the allegations of the bias were accepted by any of the learned District Judge while deciding application filed u/s 34 of the Arbitration Act by the respondents. In my view, award in respect of which no fault can be found could not have been set aside by the learned District Judge. I am not inclined to accept the submission of Mr. Kamdar, the learned senior counsel appearing for the respondents that on this ground also the award ought to have been set aside by the learned District Judge. In my view, the view expressed by the former Judges of this Court in their treaties on Arbitration and Conciliation Act, 1996, on this issue relied upon by Mr. D"vitre are correct.

109. As far as judgment of the Supreme Court in case of Rikhabdass (supra) relied upon by Mr. Kamdar is concerned, Supreme Court has set aside the order passed by the lower court remitting to the arbitrator with a direction to rewrite it on a stamp paper and re-submit it to the court and took a view that the said exercise was not permissible u/s 151 of the Code of Civil Procedure. Supreme Court held that the learned arbitrator had become functus officio and could not be directed by the court to make a fresh award. On consideration of the powers of the arbitrator u/s 33 read with section 32 and 34(4), I am of the view that the learned arbitrator did not become functus officio till within the time prescribed. The learned arbitrator would have made corrections on compliance with the conditions mentioned therein. The judgment of the Supreme Court thus relied upon in case of Rikhabdass (supra) would be of no assistance to the respondents.

110. Similar judgment of the Supreme Court in case of Juggilal (supra) relied upon by the respondents would be of no assistance to the respondents. On the contrary on perusal of the judgment of the Supreme Court in the said case, it is clear that the Supreme Court had categorically held that the arbitrator is functus officio after he has made the award but that would only mean that no power is left in the arbitrator to make any change in award in any matter of substance himself. On perusal of the arbitration application filed by the respondents impugning the final award, it is clear that no such ground has been raised by the

respondents in the said application that the learned arbitrator had become functus officio and could not have made any corrections in the impugned award. In my view, Mr. D'vitre is right in his submission that if no such ground was raised by the respondents in arbitration application filed u/s 34, no such ground can be permitted to be raised for the first time in cross objections.

111. As far as judgment of the Supreme Court in case of Satwant Singh Sodhi (supra) relied upon by Mr. Kamdar is concerned, the learned arbitrator had made two awards in respect of the one of the claims and in that context, Supreme Court held that the learned arbitrator had become functus officio and could not have made another award in respect of the same claim. In my view, the facts before the Supreme Court in case of Satwant Singh Sodhi (supra) are clearly distinguishable with the facts of this case.

112. In my view thus there is no substance in the cross objections filed by the respondents and thus no interference is warranted with the impugned findings of the learned District Judge in this cross objections and the same thus deserves to be dismissed. I, therefore, pass the following order:-

(1) Arbitration Appeal No. 12 of 2010 is allowed. Impugned order dated 31st May, 2010 passed by the learned District Judge-1 Pune is set aside.

(2) Miscellaneous Application No. 899 of 2007 filed by the respondents is dismissed.

(3) Cross objections (L) No. 728 of 2013 is dismissed.

(4) There shall be no order as to costs.

Mr. C.S. Kamdar, the learned counsel for the respondents at this stage applies for stay of operation of this order for the period of eight weeks from today. Operation of Order and Judgment delivered today is stayed for the period of eight weeks from today.