(2011) 06 DEL CK 0063

Delhi High Court

Case No: O.M.P. No''s. 245 of 2005, 351 and 400 of 2009

O.P. Kapoor and Others		APPELLANT
	Vs	
Raman Kapoor and Another Shri Raman Kapoor Vs Shri O.P. Kapoor		RESPONDENT

Date of Decision: June 8, 2011

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 18, 30, 34, 9
- Civil Procedure Code, 1908 (CPC) - Section 151
- Penal Code, 1860 (IPC) - Section 420, 468, 471

Citation: (2011) 2 ARBLR 517

Hon'ble Judges: Vipin Sanghi, J

Bench: Single Bench

Advocate: Harish Malhotra, Rajender Aggarwal, in O.M.P. 245/2005 and 351/2009, Anil Sapra and Sanjay Bansal, in O.M.P. 400, 428 and 429 of 2009, for the Appellant; Anil Sapra Sanjay Bansal in O.M.P. 245/2005 and 351/2009, Harish Malhotra and Rajender Aggarwal in O.M.P. 400, 428 and 429 of 2009, for the Respondent

Final Decision: Dismissed

Judgement

Vipin Sanghi, J.

O.M.P. No. 245/2005 is a petition u/s 34 of the Arbitration and Conciliation Act (the Act) to assail the interim award dated 01.06.2005 passed by Justice P.K. Bahri (Retd.) in Arbitration Case Nos. 157-160/1999 in relation to the claims raised by the Respondent Sh. Raman Kapoor. The same has been preferred by Sh. O.P. Kapoor, the father of the Respondent/claimant, and his three sons.

2. O.M.P. No. 351/2009 is a petition u/s 34 of the Act to assail the final award dated 23.04.2009 passed by Justice P.K. Bahri (Retd.) in continuation of the aforesaid interim award. This petition too, has been preferred by Sh. O.P. Kapoor and his

three other sons.

3. O.M.P. No. 400/2009 is a petition u/s 34 of the Act preferred by Sh. Raman Kapoor/claimant before the Arbitral Tribunal, wherein he seeks modification of the final award dated 23.04.2009 to a limited extent.

4. O.M.P. Nos. 428/2009 and 429/2009 are two petitions preferred by Sh. Raman Kapoor seeking interim measures consequent to the passing of the aforesaid interim and final award.

5. At the time of arguments, Sh. Raman Kapoor, the Petitioner in O.M.P. No. 400/2009 has not pressed the objections raised by him to the final award dated 23.04.2009, and the same is, accordingly, dismissed.

6. I may note that no interim measure was directed in the aforesaid two petitions u/s 9 of the Act preferred by Sh. Raman Kapoor. These petitions would be disposed of by passing appropriate directions after considering the objections to the interim and final award preferred by Sh. O.P. Kapoor and his three sons.

7. The Respondent in O.M.P. Nos. 245/2005 and 351/2009, Sh. Raman Kapoor filed four civil suits in this Court, namely, C.S.(OS) Nos. 918/1998, 919/1998, 920/1998 and 921/1998. In three suits, he sought dissolution of the partnership firms, namely, M/s. Kapoor Sons and Ors., M/s. Continental Films and M/s. Ropas International and sought rendition of accounts and payment of his share in the three firms. In the fourth suit, he sought partition of property bearing No. B-5/13, Safdarjung Enclave, New Delhi and grant of 1/4th share by metes and bounds, and if it is not possible, sale of the property and payment of 1/4th share of sale proceeds thereof.

8. During the pendency of these suits, the parties agreed that all the disputes be adjudicated through arbitration by Justice P.K. Bahri (Retd.). Vide order dated 01.10.1999, the Court appointed Justice P.K. Bahri (Retd.) as the sole Arbitrator to adjudicate the disputes.

9. I may at this stage itself note that the Petitioners Sh. O.P. Kapoor and Ors. (in O.M.P. Nos. 245/2005 and 351/2009) admit the Respondent Sh. Raman Kapoor to be a partner in M/s. Ropas International and M/s. Continental Films, and do not challenge the interim award and the final award, insofar as they relate to the aforesaid two partnership firms.

10. In relation to the claim of Sh. Raman Kapoor for 1/4th share in house property No. 5B/13, Safdarjung Enclave, New Delhi, the learned Arbitrator rejected the defence of the Petitioners Sh. O.P. Kapoor and his three sons, that Sh. O.P. Kapoor was the real owner of the said property. The learned Arbitrator relied upon the provision in Benami Transaction (Prohibition) Act, 1998. I may also note that, though, at the stage of arguments, Mr. Harish Malhotra, learned senior counsel appearing for the said Petitioners Shri O.P. Kapoor and his three sons, did seek to raise an argument that the property bearing house No. 5B/13, Safdarjung Enclave,

New Delhi was owned by Sh. O.P. Kapoor, as he had purchased the said plot in the name of his mother Smt. Tej Kaur, and built upon it with his own money, after perusing the judgment of the Supreme Court in R. Rajagopal Reddy and Others (deceased by legal representatives) Vs. Padmini Chandrasekharan (deceased by legal representatives), , Mr. Malhotra fairly does not press the claim of Sh. O.P. Kapoor towards the ownership of the said house property. The ostensible owner of the said property was the mother of Sh. O.P. Kapoor, viz. Smt. Tej Kaur. It is also not in dispute that Smt. Tej Kaur made a will dated 29.08.1997 bequeathing the said house in favour of all the four sons of Sh. O.P. Kapoor, viz. Petitioners No. 2 to 4 and the Respondent Sh. Raman Kapoor, bequeathing 1/4th share each in favour of the four sons. Consequently, the award made by the learned Arbitrator insofar as it pertains to house No. 5B/13, Safdarjung Enclave, New Delhi also cannot be successfully challenged, and to that extent the challenge to the awards is repelled.

11. The real dispute between the parties pertains to the partnership firm M/s. Kapoor Sons & Co. While, according to the Respondent/claimant, he was a partner of the said firm and was entitled to seek its dissolution and share in the assets of the said firm, according to the Petitioners, the Respondent Sh. Raman Kapoor had resigned as a partner from the said firm and his account had been settled by transferring the amounts due to him to the other partnership firms, and the firm was dissolved on 31.03.1992 and reconstituted as on 01.04.1992 without Shri Raman Kapoor as a partner. According to the Petitioners, the claimant Sh. Raman Kapoor was not a partner of Kapoor Sons & Co. in the reconstituted firm. The learned Arbitrator has returned the finding that the Respondent Sh. Raman Kapoor continued to remain a partner of the firm M/s. Kapoor Sons & Co. and the resignation attributed to him was not believed by the Arbitral Tribunal. On this basis, the learned Arbitrator has apportioned the share of the Respondent in the partnership firm M/s Kapoor Sons & Co. It is this finding, which is the subject matter of argument before me.

12. I am conscious of the limits of the jurisdiction of this Court in going into, or interfering with the findings of the Arbitral Tribunal, and in particular the findings of fact returned by the tribunal. I am also conscious of the legal position that the power of the Arbitral Tribunal includes the power to determine the admissibility, materiality and weight of any evidence. Therefore, to succeed in its challenge, it would need examination whether the Petitioner has been able to make out a case falling in one of those exceptional categories, which call for court''s interference with the award of the Arbitral Tribunal.

13. I may now set out hereinbelow some of the undisputed background facts, and various findings on disputed factual issues returned by the learned Arbitrator:

(a) Sh. O.P. Kapoor was one of the two sons of one Sh. Mela Ram, resident of Jalandhar City in Punjab. Sh. Mela Ram had four daughters. Sh. Mela Ram''s wife was Smt. Tej Kaur. Sh. Mela Ram had hardly any income to meet the needs of his family.

He had two shops and a residential house of ancestral nature. Admittedly, the two shops were mortgaged. The monies obtained were spent on performing the marriage of the daughters of Sh. Mela Ram. All these events took place prior to Sh. O.P. Kapoor shifted to Delhi.

(b) After the demise of his father, Sh. O.P. Kapoor carried on the business of "kabari" and also had worked as a waiter in Skylark Hotel. He alone first came to Delhi and took up employment. He later brought his family to Delhi and lived in a one room accommodation.

(c) The learned Arbitrator rejected the plea of Sh. Raman Kapoor, the Respondent/claimant that Sh. O.P. Kapoor had utilized the ancestral funds to set up his business, by observing that in case Sh. O.P. Kapoor was so affluent as was sought to be made out by the claimant, the family would not have struggled to make good in Delhi.

(d) Sh. O.P. Kapoor married off his three sisters after the demise of his father. He joined service in Hari Singh & sons, Travel Agents on shifting to Delhi, and thereafter he started his own travel agency in the name of General Travel Agency. The residential plot bearing No. B5/13, Safdarjung Enclave was purchased by Sh. O.P. Kapoor in the year 1996 out of his own funds, benami in the name of his mother Smt. Tej Kaur.

The learned Arbitrator rejected the Respondent/claimants version that the said plot was purchased by Smt. Tej Kaur from her own funds and monies. Smt. Tej Kaur was an illiterate house lady. There was no other earning member in the family, apart from Sh. O.P. Kapoor. In the income tax assessment orders, the properties were shown to have been acquired from the income of Sh. O.P. Kapoor.

(e) The business of travel agency of Sh. O.P. Kapoor flourished and from the income of the same, he not only purchased the residential plot B5/13, Safdarjung Enclave, but also purchased the plot whereon the cinema hall known as "Kamal Cinema" was constructed. The cinema plot was purchased for Rs. 11 lacs.

(f) Sh. O.P. Kapoor constituted a firm, namely, Kapoor Sons & Co. in which name, the said cinema was constructed, and he made his close family members as partners. The assessment of income tax was made treating the said property, namely, Kamal Cinema as belonging to Sh. O.P. Kapoor. The Respondent/claimant was minor at the time when the said properties were purchased and no capital was contributed by any of the partners. Sh. O.P. Kapoor initially did not himself become a partner of the said firm, but he had kept complete control over the same and he alone operated the bank account of the said firm. He made all his minor sons, his brother in law, his four sisters and his mother, his own three daughters as partners in the said firm. The firm continued, but sisters and daughters, on being married, retired from the partnership. So also his mother and brother in law.

(g) As on 01.04.1988, Sh. O.P. Kapoor and his four sons, namely Arun Kapoor, Lalit Kapoor, Raman Kapoor (the Respondent) and Anil Kapoor were the partners of the said firm. The claimant and his three brothers, each had 21% share in this partnership, and Sh. O.P. Kapoor had 16% share as a partner. The partnership deed dated 01.04.1988 was marked as C-1 by the learned Arbitrator. Even according to the Respondent/claimant, the final say in all business matters relating to the said firm had throughout, from its inception, been that of the father Sh. O.P. Kapoor. He further states that he and his three brothers, being obedient son of their father, throughout worked on the directions of their father.

(h) No evidence was produced to show that any of the partners, apart from Sh. O.P. Kapoor, ever contributed any capital in the said partnership firm. The case of the Respondent/claimant that he actively participated in the business at the cost of his studies, which were left by him when he was studying in Class X, was negated by the learned Arbitrator on the basis of the Respondent''s admission in his evidence that he did his graduation. Sh. Raman Kapoor also admits that before his marriage, Sh. O.P. Kapoor set up a firm in the name of Kapoor Jewellers, of which Raman Kapoor was the sole proprietor. His plea that no business was done in Kapoor Jewellers was also not believed, as he admitted that in sales tax returns, some sales were shown to have been effected and license got renewed for some years.

(i) The learned Arbitrator believed the version of Sh. O.P. Kapoor that the business of Kapoor Jewelers was set up as the claimant Sh. Raman Kapoor''s father-in-law was having jewellery business and desired that Sh. Raman Kapoor have his own independent business before he agrees to marry his daughter with the claimant.

(j) The brother in law of Sh. O.P. Kapoor (wife''s brother) had settled in Lima (Peru) long back. Sh. Arun Kapoor, one of the sons of Sh. O.P. Kapoor, also shifted to Lima in 1972, or there about. The version of the Respondent/claimant that Sh. Arun Kapoor shifted in the year 1983 was held to be untrue. Sh. Arun Kapoor flourished in Lima and acquired 28 cinemas. The claimant, Raman Kapoor shifted to Lima. He acquired knowledge of Spanish language while living with his brother Arun Kapoor. Sh. Arun Kapoor bore the expenses of the claimant Raman Kapoor in Lima.

(k) The learned Arbitrator rejected the version of the claimant Raman Kapoor, that he did business so long as he stayed with Arun Kapoor. Admittedly, due to the differences between the wives of the two brothers, Sh. Raman Kapoor shifted with his wife to Bogota. He constituted a firm by the name of Continental DC Commercio, wherein he and his wife became partners. That firm was admittedly set up to import goods from India through M/s. Ropas International. Sh. Raman Kapoor started receiving consignments of goods sent by M/s. Ropas International from 1990 onwards. The claimant, Sh. Raman Kapoor was not making payment of such consignments before taking deliveries. In accordance with the Foreign Exchange Controls and Regulations applicable in India, the exporter M/s. Ropas International had to ensure that foreign exchange covering the price of the exported goods are

received from the foreign buyer.

(l) The learned Arbitrator has returned the finding that the claimant Raman Kapoor did not transmit the sale proceeds in their entirety in favour of M/s. Ropas International. The version of the claimant that the goods exported by M/s. Ropas International were overvalued, has also been rejected by the learned Arbitrator.

(m) The claimant, admittedly, opened a bank account in Miami, USA in the name of his wife and transferred his earnings to that account from which he started receiving monthly interest income of US Dollars 800. Despite repeated directions of the learned Arbitrator, the claimant failed to submit a consolidated statement of account of that bank. The claimant also did not produce the books of accounts of his own firm maintained in Bogota. The claimant did not refute the communication of his father Sh. O.P. Kapoor, wherein Sh. O.P. Kapoor accused the claimant Sh. Raman Kapoor of not paying the price of the goods exported by M/s. Ropas International. In his communication dated 21.12.1992 (CW-1/12), Sh. O.P. Kapoor called upon the claimant to send Rs. 1,20,00,000/- in US dollars/foreign exchange by 31.12.1992. Sh. O.P. Kapoor was angry with the claimant, as the claimant was not sending the due amount of the exports.

(n) The claimant had himself produced a document (Mark Z-12), claimed to be in the handwriting of Shri O.P. Kapoor, which showed that till 31.12.1995 US Dollars 1,69,500/- remained outstanding from the claimant.

(o) Though the claimant initially disputed the genuineness of the price of the goods at which the exports were made by M/s. Ropas International to the claimants" firm in Bogota, when the non-claimants i.e. the Petitioners herein wished to examine the witnesses to prove the bills issued by M/s. Ropas International, the claimant Sh. Raman Kapoor made a statement that the claimant was not in a position to dispute the authenticity of such bills, and consequently the Petitioners herein were not required to examine any witnesses. In fact, the learned Arbitrator holds that there is a strong probability that the price list RW-1/PW-2 was made for the benefit of the claimant, so that the goods could be got released from the customs authorities by paying customs at lower value of goods as per the price list.

14. I may now record the versions of the parties in relation to the partnership firm M/s Kapoor Sons & Co., in relation to which there are serious disputes between the parties.

15. The case of the Petitioners was that the Respondent-claimant had successfully established himself in Bogota and expressed a desire to retire as a partner from the firm M/s Kapoor Sons & Co. This desire was also conveyed by him in his letter dated 15.02.1992 (R-34). It was the Petitioners" case that Smt. Sarla, the mother of the Respondent-claimant left India on 07.02.1992 for Miami, and on 25.02.1992 she came over to Lima and stayed with her son Shri Arun Kapoor till 20.04.1992. The dissolution deed (R-36), two new partnership deeds of the two other firms M/s

Continental Films and M/s. Ropas International (R-37 and R-38) were sent to Mr. Arun Kapoor at Lima. They were signed by him and thereafter Smt. Sarla took them with her to Bogota on 20.04.1992 and handed over the same to the Respondent-claimant. The Respondent-claimant then signed the same, and with a letter dated 24.04.1992 (R-35) (wrongly typed in the impugned award as R-34) sent the same by post to Shri O.P. Kapoor, Petitioner No. 1 at Delhi. These documents were contemporaneously filed with the Income Tax authorities, and also with the Registrar of Firms. These two letters (R-34 and R-35) are on the letter heads of the firm M/s. Continental DC Commercio belonging to the Respondent-claimant.

16. These two letters R-34 and R-35 attributed by the Petitioners to the Respondent read as follows:

R-34 "15 February 1992

Respected Papaji,

Peripana,

We are fine here and hope that you will be in good health. With your kind help and guidance and with the financial help by Arun I have established my business here and doing very good business.

As I have already told you number of time that I am not interested to continue as partner in Kapoor Sons & Co. and I am requesting you once again to please dissolved the partnership and send me the dissolution deed for my signature.

Yesterday I send you the fax, ordering tyre and tubes and cycle parts. Please see that the same are despatched immediately as these are in great demand, please do not worry I will send the payment and will also clear the pending bills shortly, as you know that I am short of funds as I have investment the same in setting up showrooms.

How is chaiji, pay my regards to her and also let me know about her legs, please take care of her. I also understand from Arun that Kamal''s husband is not doing any business, if he feels you can send him to me at Bogota and I will see that he is fully settled here. Ask Kamal and Poonam to drop me a letter as Bela remembers them to much.

I have received one peauget car from Lima and got it cleared from custom. Please send all the containers to Buenaventura instead of Bogota as custom duty is less at duty free port.

Cycle part business is very good because I am the only Importer from India. There is margin of Hundred percent after deducting on the cost. My turnover this year will be 3 to 4 million USD.

My family is very happy and settled here solani is going to the best school in Bogota and every week we go for outing. We have good Indian friends at the Embassy and there is no problem for Indian food. This year we are planning to go to Miami to visit Disney land and after that my wife will visit India to meet her parents. Rest everything is fine here.

Your son

R-35

24 April 1992.

Respected Papa Ji,

Namastey,

I am sending the following documents/ Papers duly signed on all the pages.

1. Dissolution deed dated 31.3.92 and M/S Kapoor sons & Co., duly signed on all the pages.

2. Partnership deed of M/S Continental Films and Ropas International duly signed on all the pages dated 1.4.92.

Rest if O.K. Business is good. Colour tures and tubes are in good demand, Please send one container of tyres which I ordered and faxed to you last week.

As told that I am expending the business and making investment in real estate showrooms and I will try my level best to clear all the export bills and will send some money. I have also requested Sh. Arun Kumar to help me and lend me some money so that pending bills are cleared.

How is chaiji health, is there any improvement in her legs, Please take her care, Pay my paripan to chaiji.

How are Poonam and Kamal, pay my regard to them and love to their childrens. Please see Poonam and Kamal can come to Bogota Bela remember to them very much.

Rest is find, Please take care of your health and if there is anything to be done, Please let me know.

I know cinema is closed and the business is very bad in Delhi, I know you have to pay a lot of money to the suppliers of cycle parts. As I have invested in Property in Bogota so I am unable to help you right now.

With kind regards;

Your son

17. The case of the Petitioners was that the Respondent-claimant willingly and voluntarily retired from the firm M/s. Kapoor Sons & Co. On his visit to India in 1994 and 1997, he confirmed this fact to his close relatives. The Petitioners claimed that the said documents were duly acted upon contemporaneously, and the capital standing in the name of the Respondent-claimant in the said firm M/s Kapoor Sons & Co. was duly transferred in his name in the other two firms, namely M/s Continental Films and M/s Ropas International, wherein he continued to be a partner. The Respondent stopped signing the balance-sheet of the firm M/s Kapoor Sons & Co. for the period after his resignation. Prior to that he was regularly signing the accounts of the said firm year after year. He did not raise the issue, ever, as to why the accounts are not being sent to him for his signatures, as he had voluntarily resigned. Else he would have raised a claim and a dispute contemporaneously, and not after six years of his resignation.

18. On the other hand, the case of the Respondent-claimant was that he had complete faith in his father and brothers, and the affairs of the family were being managed by his father Shri O.P. Kapoor. His sons, including the Respondent-claimant, obediently followed his wishes without demur. He further claimed that he had given a number of blank papers duly signed by him to his father, including blank letter heads of his firm set up in Bogota. He denied that he had ever expressed any wish to leave the firm M/s Kapoor Sons & Co. He denied that the dissolution deed of the said firm, or the partnership deeds of the other two firms, were ever given to him by his mother. He denied ever signing the said documents. He admitted his signatures on the said two letter heads, i.e. Ex. R-34 & Ex. R-35, but pleaded that these letter heads of his firm were blank when he signed the same. He pleaded that he gave a blank cheque book duly signed, and that cheques were filled in by the Petitioners herein for payment to M/s Ropas International. He claimed that he came to know about the forged documents only in the year 1998 when he was not allowed to access the business and account books of the firm M/s Kapoor Sons & Co. by the Petitioners herein. The Respondent claimant had lodged FIR No. 159/1999 registered at Police Station, Kashmere Gate against the Petitioners alleging forgery, inter alia, of the aforesaid two letters by the Petitioners by using the typewriter in the office of the firm M/s Kapoor Sons & Co. and of the dissolution deed in relation to the firm M/s Kapoor Sons & Co. The case of the Respondent-claimant was that in the opinion of the expert from FSL, contained in the report dated 24.09.1999 bearing No. FSL 99/D-0992, the disputed signatures attributed to him on the dissolution deed were not made by him. He further claimed that in the investigation, the disputed documents along with some admitted signatures of the claimant were got examined from an expert of CFSL and the reports (CW-4/1, C-1/8) were given.

19. The Respondent relied on letters dated 21.09.1992, 15.01.1993 and 20.11.1993 i.e., CW-1/12-2, CW-1/13 and CW-1/14 sent by the Petitioners herein, to submit that the Petitioners continued to admit the Respondent-claimant to be a partner in the

said firm even after the alleged resignation and dissolution of the firm M/s Kapoor Sons & Co.

20. He also placed reliance on the letter dated 05.02.1997 (Z-19) of Shri O.P. Kapoor, asking the Respondent-claimant to sign a Memorandum of Association for converting the partnership firm M/s Kapoor Sons & Co. into a private company showing the claimant as one of the shareholders.

21. The learned Arbitrator disregarded the two letters dated 15.02.1992 (R-34) and 24.02.1992 (R-35) relied upon by the Petitioners, which admittedly bore the signatures of the Respondent-claimant. While accepting the case of the Respondent-claimant that these two letters were signed blank along with other documents at the behest of his father, the Arbitrator observed that it is not unusual for a son to give signed blank documents to his father for use in business.

22. The learned Arbitrator rejected the defence of the Petitioners that these two letters dated 15.02.1992 (R-34) and 24.04.1992 (R-35) were typed on the same typewriter as the one, on which another letter of the year 1997 (sent by the Respondent to Sh. Arun Kapoor) was typed. While rejecting this defence, the learned Arbitrator held that there was no evidence on record that the said letter of 1997 was written by the Respondent-claimant to Shri Arun Kapoor.

23. At the behest of the Respondent claimant, the typewriter in the office of the Petitioners was seized. It appears, the case of the Petitioners was that the aforesaid two letters (R-34 and R-35) were sent by the Respondent claimant from Bogota, where they were typed. To support this contention of theirs, one of the Petitioners namely Sh. Anil Kapoor, along with his letter, submitted to the investing authorities, inter alia, a photocopy of a typewritten letter stated to have been written by the Respondent Sh. Raman Kapoor to Sh. Arun Kapoor for comparison purpose. This document was marked by the FSL as TA-9.

24. The discussion found in the impugned interim award on this aspect is material, and the same reads as follows:

34. The two letters dated 15.2.1992 and 24.4.1992 have been strongly relied upon by the Respondents to show that in fact the claimant received the deeds for signing and he himself had sent back such deeds after signing. The claimant has pleaded that these two letters were signed blank along with other documents at the behest of his father. It is not unusual for a son to give signed blank documents to his father for use in business. An effort was made to show that these two letters were typed on a same typewriter on which an other of 1997 was typed. There is no evidence on the record that this letter was written by the claimant to Sh. Arun Kumar. The second opinion of the expert was sought no doubt at the request of the claimant to know whether the said letters had been typed on a typewriter of the Respondents'' office. A typewriter was seized in that connection. It has come out in the statement of Sh. Mohan Lal ACP, AW3 the investigating officer that Sh. Anil had given this letter

of 1997 for comparison purposes. The I.O. had not recorded any statement of the claimant in regard to authenticity of the said letter.

35. Sh. R.S. Chauhan, Inspector, AW2 who had sent the queries for the second report has admittedly not taken any steps to get this letter admitted from the claimant. The learned Counsel for the Respondents has argued that this second report of FSL has been brought on the record by the claimant and so the claimant should be considered to have admitted the authenticity of the said letter. There is no merit in this contention. After all this report was brought on record to show the status of the police case. The police had reported the case as untraced but the M.M. has not agreed with the same and is stated to have issued summons to the Respondents in the case. The witness also deposed that orally he brought this letter to notice of Sh. Raman. There is no reason if that was a fact why it was not recorded in the Police File.

25. The submission of Mr. Malhotra, learned senior counsel for the Petitioners, is that the learned Arbitrator has fallen in serious and patent error in recording the aforesaid findings with regard to the dissolution deed and the two letters R-34 and R-35, and there is patent irregularity in the manner in which the learned Arbitrator conducted the proceedings. He points out that the two reports prepared by FSL dated 24.09.1999 & 26.12.2001 had been relied upon, and produced before the learned Arbitrator by the Respondent claimant himself without any reservations or demur. He has tendered in court the list of documents, along with documents, filed by the Respondent claimant before the learned Arbitrator on 01.06.2002 which contains, inter alia, the report of the FSL dated 26.12.2001. Mr. Malhotra submits that before the Arbitral Tribunal the Respondent-claimant did not make any averment, at any stage of the proceedings, and it was not even argued by the Respondent-claimant that the letter of 1997, i.e., TA-9 of the Respondent claimant addressed to Sh. Arun Kumar, which had been used as specimen typewriting for purpose of comparison, could not be used as specimen for the reason that the said document, i.e., TA-9 was disputed by the Respondent-claimant or that the said document, had not been confirmed by the Respondent-claimant to be an admitted document. Mr. Malhotra, by reference to the arbitral record, points out that the claimants had started their arguments before the learned Arbitrator on 16.01.2003 and the arguments stood concluded before the learned Arbitrator on 02.07.2003. The order passed by the learned Arbitrator on 02.07.2003 reads as follows:
July 2, 2003

PRESENT:

Shri Anil Sapra, Counsel for the claimant with the claimant. Shri Harish Malhotra, Counsel for the Respondents with Respondent No. 4.

Arguments completed. Parties to file written submissions within two weeks and exchange copies and no reply to written arguments is to be filed. The date of 5th

July, 2003 is cancelled. In all 37 hearings have taken place. The parties shall deposit the balance of arbitration fee and for two hearings extra for giving award, within two weeks. Award shall be made in due course.

26. Only the written submissions were to be filed before the learned Arbitrator. The award was reserved by the learned Arbitrator and the proceedings stood concluded before him. While the parties were awaiting the award, on 28.01.2004, the Respondent claimant moved an application to seek interim measures, directing the Petitioners herein to pay the arrears as well as all the future charges towards electricity, water, etc. in respect of residential premises bearing No. B-5/13, Safdarjung Enclave, Delhi. The learned Arbitrator issued notice on this application returnable on 04.02.2004.

27. On 04.02.2004, the learned Arbitrator recorded that he had sought certain clarifications from the counsel for the parties. The counsel took time to go through the records before making their comments. The matter was directed to be taken up on 18.02.2004 at 02:30 P.M.

28. The order passed by the learned Arbitrator on 18.02.2004 is relevant, and the same reads as follows:

February 18, 2004

PRESENT:

Sh. Anil Sapra, Counsel for the claimant with claimant

Sh. Harish Malhotra, Counsel for the Respondents with Sh. O.P. Kapoor and Sh. Anil Kapoor.

I have heard counsel for the parties on the clarifications. There is serious dispute between the parties as to certain letters allegedly written by Sh. Raman Kapoor to Sh. O.P. Kapoor. There is another set of two letters allegedly written by Raman Kapoor to Sh. Arun Kapoor, these are typed letters and admittedly bear signatures of Sh. Raman Kapoor. The crucial question which arises for decision is whether all those letters have been typed on same typewriter and whether those letters have been typed on the dates mentioned on those letters or they have been brought into existence as alleged by Mr. Raman Kapoor subsequently after the year 1992. An application was also moved during the proceedings and also later on another application praying that expert opinion be obtained with regard to the age of typing in respect of said letters. For purpose of identifying the exact documents taken into consideration by Sh. S Ahmed expert of FSL in his report dated 26th December, 2001, it has become necessary to call the said witness to prove the said report and also for identifying the documents taken into consideration by him in that report. After the documents are properly identified the concerned expert on the subject of determining age of typing would be asked to give opinion later on. The inspector EOW, Crime Branch, Udyog Sadan who was investigating the case is also to be called

along with all records in order to verify the statement mentioned in the expert''s report that a particular document TA/9 is an admitted document. Let these two witnesses be summoned by the claimant through the court. it is agreed that these witnesses would be allowed to be cross examined by both the counsel. I am told that original document already stand filed with the court of Sh. Gurmeet Singh, Metropolitan Magistrate, Tis Hazari. The Ahalmad of the said court be called with the original records on the date fixed. The next hearing shall take place on 26th April, 2004 at 4:30 P.M. for recording evidence of the said witnesses.

29. The submission of Mr. Malhotra is that without any basis or pleading, the learned Arbitrator proceeded to consider the dispute raised by the Respondent claimant with regard to his issuance of the letter of 1997 (TA-9), for the first time, in the proceedings held before the learned Arbitrator on 18.02.2004, i.e. after conclusion of the final arguments and only when the learned Arbitrator re-opened the proceedings on the basis of the application dated 16.01.2003 filed by the Respondent to seek interim measures. He submits that there was no occasion to call the witness from the FSL to prove the report dated 26.12.2001, as the said report had been produced by the Respondent claimant and not denied by the Petitioners. On the other hand, the Petitioners had sought to challenge the report insofar as it held that the signatures attributed to the Respondent claimant, on the dissolution deed, were not his. He submits that the earlier applications moved by the Respondent on 01.05.2002 and 08.07.2003 did not relate to the authenticity of the document TA-9, and were not premised on an assertion that the said document, namely TA-9, was not an admitted document. Mr. Malhotra submits that the learned Arbitrator fell in serious and patent error in embarking upon an inquiry, which had no basis in pleadings. How and why the learned Arbitrator suddenly, of his own, started the said inquiry is not clear.

30. The next submission of Mr. Malhotra is that before the learned Arbitrator AW-2 Sh. R.S. Chauhan, Inspector, appeared and made a categorical statement to the effect that "I did ask Raman Kapoor about the document (photocopy TA9) and Raman Kapoor stated that it related to another transaction having nothing to do with the issues mentioned in the FIR. I did not ask Raman about the genuineness of the contents of that documents (TA9), as I was only concerned with the typing of that document and not with genuineness or otherwise of the contents of that letter that is why I did not ask Raman Kapoor about the contents of the letter. Raman Kapoor did not give any consent to treat the said document as specimen admitted document rather it was my own decision to treat that document as specimen admitted document. Raman Kapoor did not say anything of his own about the signatures appearing on that document.

(Emphasis supplied)

31. Inspite of the aforesaid statement, the learned Arbitrator disbelieved the statement of the independent witness AW-2 Sh. R.S. Chauhan, merely on the ground

that the fact that Sh. R.S. Chauhan, AW-2 had asked the Respondent Raman Kapoor about the document TA-9, was not recorded in the police file.

32. Even though there was absolutely no averment ever made by the Respondent claimant at any stage, in any proceeding, to the effect that TA-9 was not an admitted document and that the same was wrongly relied upon by the FSL for the purposes of comparison of the typewriting contained in the two letters dated 15.02.1992 (R-34) & 24.04.1992 (R-35) with that contained in the said letter TA-9, the learned Arbitrator ventured into that enquiry and permitted the Respondent to wriggle out of his own relied upon document, which established the fact that the two letters R-34 and R-35 had been sent by the Respondent from Bogota to the Petitioners.

33. Mr. Malhotra has also submitted that the learned Arbitrator has placed blind reliance on the report of FSL dated 24.09.1999 in relation to the dissolution deed dated 31.03.1992. He submits, on the basis of cross examination of CW-4 Harsh Vardhan, Senior Scientific Officer (Documents), FSL, conducted by the Petitioners on 16.12.2000, that the said report is not worthy of reliance, as the witness had accepted the position that he had not taken photographs of the admitted signatures, or specimen signatures, or disputed signatures. Thus, no enlargements were made. The dispute signatures were compared only with the admitted signatures A-91 to A-96, A-108, A-109 and A-109/1 and specimen signatures S-30 to S-34. He had also admitted his omission to mention in his report that he had compared the admitted signatures A-97 to A-107 with the disputed signatures Q-1 to Q-12 and with specimen signatures S-30 to S-34. Mr. Malhotra questions why the comparison with other admitted signatures of the Respondent was not done, and this exercise was limited to A-91 to A-96 alone.

34. Mr. Malhotra submits that the learned Arbitrator has accepted the report of the FSL as the gospel truth without applying his mind to the merit of it, and without examining it critically, or testing its logic.

35. The next submission of Mr. Malhotra is that in the face of the undisputed findings returned by the learned Arbitrator, as set out in para 13 above, it is unthinkable, and would constitute highly inconsistent conduct on the part of the Petitioners, that the Petitioner No. 1 would want to oust the Respondent claimant from a share in the partnership business M/s Kapoor Sons & Co., and that too on the basis of forged and fabricated documents. He submits that the Petitioner No. 1 throughout his life acted selflessly and in the interest of not only his children, but even his other relations. He provided in every possible way for all his children, including the Respondent. Where was the question of his trying to clandestinely deny anything to the Respondent who is an equal son with the other children? Moreover, if the Petitioner No. 1 was in complete control of all businesses and all the wealth, and all the children, including the Respondent were under his sway at all times, there was no need to resort to any forgery, even if Petitioner No. 1 desired that the Respondent resign from Kapoor Sons & Co. He would have directed the

Respondent to resign and the Respondent would have obeyed his instructions. He submits that, in fact, the Respondent was a dishonest person. He was a failure in whatever he did and wherever he went. He could not run the jewellery business in Delhi. He went to Lima and despite the other son doing flourishing business, the Respondent did not achieve anything while staying in Lima. He then went to Bogota and started importing various items from India through M/s Ropas International, but did not bother to make payment for the supplies received. He then parked his earnings in USA in an account with his wife and despite repeated directions, failed to disclose particulars thereof to the Arbitral Tribunal. He then returned to India, and six years after resigning from Kapoor Sons & Co., has again started staking his claim in the said firm as a partner.

36. He submits that the arbitral award is unconscionable. He relies on the judgment of the Supreme Court in the case of ONGC Limited v. Saw Pipes Limited (2003) 5 SCC 704. Mr. Malhotra submits that practicably each and every allegation of the Respondent claimant was disbelieved by the learned Arbitrator. For instance the Respondent-claimant had claimed:

(i) Sh. O.P. Kapoor had utilized the ancestral funds to set up his business;

(ii) Residential plot bearing No. B5/13, Safdarjung Enclave was purchased by Smt. Tej Kaur;

(iii) All the partners (who were major at that time) pooled their resources for acquiring the plot and for building the cinema;

(iv) The plot on which Kamal Cinema was constructed was purchased with the funds provided by his grandmother;

(v) That he/Respondent actively participated in the business at the cost of his studies, which were left by him when he was studying in Class X;

(vi) The goods exported by M/s. Ropas International were overvalued; and

(vii) The claimant had sent much more amount than the actual price of goods and the Petitioners had inflated the prices in the invoices prepared for the purpose of getting more foreign exchange for getting more incentive from the Government.

All the aforesaid statements of the Respondent were found to be false by the Arbitrator. He further submits that the Respondent conveniently denied each & every document which went against his case on the ground that either the said document was signed in blank, or was forged and fabricated by the Petitioners. He refers to the following instances in this regard:

(i) Claimant/Respondent alleged that letters of 15.02.1992 (R-34) and 24.04.1992 (R-35) were typed fraudulently on blank letter heads which he had signed and given to his father.

(ii) The Respondent alleged that Petitioners have also forged signatures of the claimant for opening some bank accounts.

(iii) The Respondent also alleged that Petitioner has forged and fabricated dissolution deed and form V.

37. He submits that there was no question or occasion to take blank signed letter heads of the Petitioner on the letter head of the firm M/s Continental DC Commercio, as the said firm had no business dealing in India whatsoever.

38. He submits that, on the other hand, the learned Arbitrator accepted the following averments of the Petitioners to be true and genuine.

(i) The residential plot bearing No. B5/13, Safdarjung Enclave was purchased by Sh. O.P. Kapoor in the year 1996 out of his own funds benami in the name of his mother Smt. Tej Kaur.

(ii) The business of travel agency of Sh. O.P. Kapoor flourished and from the income of the same, he not only purchased the residential plot B5/13, Safdarjung Enclave, but also purchased the plot whereon the cinema hall known as Kamal Cinema was constructed. The cinema plot was purchased for ` 11 lacs.

(iii) Sh Arun Kapoor, one of the sons of Sh. O.P. Kapoor, shifted to Lima in 1972 or there about.

(iv) The claimant Raman Kapoor did not transmit the sale proceeds in their entirety in favour of M/s. Ropas International.

(v) The price of the goods at which the exports were made by M/s. Ropas International to the claimants'' firm in Bogota were genuine.

39. Mr. Malhotra submits that the Respondent was totally discredited. In the aforesaid circumstances, the learned Arbitrator, inspite of being the final Arbiter of facts, could not have disregarded the aforesaid factual background while concluding that the Respondent claimant had continued to remain partner in the firm M/s Kapoor Sons & Co. He submits that the learned Arbitrator has disregarded the two letters, i.e., R-34 and R-35 on the specious plea of the Respondent that he had signed the blank letterheads of his firm in Bogota and given the same to the Petitioners, which were misused by the Petitioners. He submits that it was for the Respondent to establish the said plea. There was no evidence led by the Respondent to establish the said claim. The Arbitrator has proceeded on mere assumption and conjuncture that the Respondent would have signed blank letterheads and given the same to the Petitioners. The said story of the Respondent was even more unbelievable, in the light of his discredited position. He submits that after the financial year ending on 31.03.1992, the Respondent, not once, singed the accounts and balance sheet of the said partnership firm, even though earlier he was regularly signing these documents and reports. This, according to him, was only on account

of the fact that, to his knowledge, he ceased to be a partner in the said firm w.e.f. 01.04.1992. He further submits that this contemporarious conduct of the Petitioners was also ignored by the learned Arbitrator.

40. He submits that in relation to the income tax assessment of the firm M/s Kapoor Sons & Co., for the assessment year 1993-94, i.e., year ending on 31.03.1993, the firm had shown only four partners namely: Sh. Arun Kumar, Sh. Lalit Kapoor, Sh. Navin Kapoor, Sh. O.P. Kapoor. He refers to the income tax return dated 23.10.1993, filed before the learned Arbitrator in this regard. The name of the Respondent claimant was not shown as one of the partners of the firm.

41. In contrast, in the income tax returns of the firm M/s Kapoor Sons & Co., for the financial year ending on 31.03.1992, the name of the Respondent claimant was shown as one of the partners. This return was filed on or before 28.10.1992.

42. On 15.06.1992, the partnership firm forwarded the dissolution deed dated 31.03.1992 of the firm M/s Kapoor Sons & Co., and the new partnership deed dated 01.04.1992 to the Manager, Oriental Bank of Commerce. In this letter it was explicitly stated "Sh. Raman Kapoor has retired from the partnership and now only under noted four partners are in the firm: Sh. Arun Kumar, Sh. Lalit Kapoor, Sh. Anil Kapoor, Sh. O.P. Kapoor."

43. So far as the finding with regard to the signatures of the Respondent on the dissolution deed is concerned, Mr. Malhotra submits that it was the case of the Petitioners that the Respondent claimant was in the habit of making different signatures at different times. He submits that the learned Arbitrator in para 36 of the award takes note of this submission of the Petitioners and even notes the various documents placed on record which, admittedly, bore the signatures of the Respondent claimant, which were different. He submits that some of these admitted signatures were never sent for purpose of comparison with the Respondent''s signatures on the dissolution deed.

44. Mr. Malhotra submits that the learned Arbitrator adopted double standards. Even though, in relation to the document TA-9 there was no averment made by the Respondent with regard to its authenticity, etc., the learned Arbitrator took the initiative himself to somehow dismiss the Petitioners reliance placed on the said document and the second report of the FSL dated 26.12.2001, whereas, on the other hand, despite it being pointed out that various admitted signatures of the Respondent were not examined for comparison purposes while preparing the first report dated 24.09.1999, the learned Arbitrator brushed aside the said submission by observing that the Petitioners were aware of the opinion of the expert of FSL to the effect that the disputed signatures (on the dissolution deed dated 31.03.1992) are not made by the Respondent and, therefore, the Petitioners could have got the opinion from any other expert in respect of any other admitted signatures which, according to them, were similar to the disputed signatures on the dissolution deed.

In the absence of any different opinion, the learned Arbitrator held that it is not possible to ignore the expert opinion of FSL.

45. On the other hand, the submission of Mr. Sapra, learned senior counsel for the Respondent claimant, is that the learned Arbitrator has taken into account various letters/documents authored by the Petitioner No. 1 wherein he admitted the factum of the Respondent being a partner in the firm M/s Kapoor Sons & Co., or which show that the Respondent was a partner in the said firm. These letters are all of the period after the date of the dissolution deed dated 31.03.1992. He further submits that M/s Kapoor Sons & Co. was the only firm, of the three firms, which had valuable assets. The other two firms M/s Continental Films and M/s Ropas International were not having any assets. There was no reason for the Respondent to retire/resign from M/s Kapoor Sons & Co. and to continue as a partner in M/s Continental Films & M/s Ropas International. He further submits that even though it is claimed that US$ 8,60,000/- & US$ 3,40,000/- are due from the Respondent, no counter-claim for the said amounts was raised by the Petitioners before the learned Arbitrator. He submits that the cheque of US$ 3.40 Lakhs stated to have been issued by the Respondent was not even deposited by the Petitioners, simply because there was no outstanding due owned by the Respondent to the Petitioners.

46. Mr. Sapra submits that the arbitral tribunal is the final authority on issues of fact, and this Court cannot go into the merits to appreciate the evidence and re-determine the findings of fact. The finding of the arbitral tribunal that the Respondent/claimant continued to remain a partner of the firm Kapoor & Sons has been arrived at after rejecting the Petitioners reliance placed on Ex. R-34 and R-35, and also by placing reliance upon the various letters issued by the Petitioners post 31.03.1992, which tend to show that the Respondent continued to remain a partner of the said firm. The finding is also based upon the report of the handwriting expert, wherein he has opined that the signatures on the dissolution deed dated 31.03.1992 of Kapoor Sons & Co., which were attributed to the Respondent/claimant were, infact, not his.

47. There can be no quarrel with the proposition that the arbitral tribunal is the final authority to determine issues of fact and its findings cannot be overturned or substituted by a Court with its own while examining the award in proceedings u/s 34 of the Act. However, the Court can examine whether the mechanism/process adopted by the learned arbitral tribunal while arriving at its findings is legal and fair. Therefore, the Court will examine whether the tribunal has ignored relevant material on record, or whether it has considered wholly irrelevant material in arriving at its findings. The Court will also inquire whether the finding has been arrived at after giving adequate, fair and equal opportunity to the parties or not. The Court would also consider whether the finding is such that no reasonable person could arrive at, or is such as to shock the conscience of the Court.

48. In State of Rajasthan Vs. Puri Construction Co. Ltd. and Another, the Supreme Court, inter alia, observed:

In recent times, error in law and fact in basing an award has not been given the wide immunity as enjoyed earlier, by expanding the import and implication of "legal misconduct" of an arbitrator so that award by the arbitrator does not perpetrate gross miscarriage of justice and the same is not reduced to mockery of a fair decision of the lis between the parties to arbitration. Precisely for the aforesaid reasons, the erroneous application of law constituting the very basis of the award and improper and incorrect findings of fact, which without closer and intrinsic scrutiny, are demonstrable on the face of the materials on record, have been held, very rightly, as legal misconduct rendering the award as invalid. It is necessary, however, to put a note of caution that in the anxiety to render justice to the party to arbitration, the court should not reappraise the evidences intrinsically with a close scrutiny for finding out that the conclusion drawn from some facts, by the arbitrator is, according to the understanding of the court, erroneous. Such exercise of power which can be exercised by an appellate court with power to reverse the finding of fact, is alien to the scope and ambit of challenge of an award under the Arbitration Act. Where the error of finding of facts having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible viewpoints, the interference with award based on erroneous finding of fact is permissible. Similarly, if an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator. In ultimate analysis, it is a question of delicate balancing between the permissible limit of error of law and fact and patently erroneous finding easily demonstrable from the materials on record and application of principle of law forming the basis of the award which is patently erroneous.

49. In Seth Mohanlal Hiralal Vs. State of M.P., a case under the Arbitration Ac, 1940, the Supreme Court referred to the view in K.P. Poulose Vs. State of Kerala and Another, wherein it had been held that misconduct u/s 30(a) has no connotation of moral lapse. It comprises legal misconduct which is complete if the arbitrator, on the face of the award, arrives at an inconsistent conclusion even on his own finding or arrives at a decision by ignoring the very material documents which throw abundant light on the controversy to help a just and fair decision.

50. In M.D., Army Welfare Housing Organisation Vs. Sumangal Services Pvt. Ltd., , the Supreme Court held that the Court cannot sit in appeal over the award of the arbitrator, but can certainly interfere when the award suffers from non-application of mind or when a relevant fact is ignored or an irrelevant fact not germane for deciding the dispute is taken into consideration.

51. In M/s. Arosan Enterprises Ltd. Vs. Union of India and Another, , wherein it has been held that where the error of finding of fact, having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible viewpoints, the interference with award based on erroneous finding of fact is permissible. Similarly, if an award is based by applying a principle of law, which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such an award is liable to be set aside by holding that there has been legal misconduct on the part of the arbitrator.

52. I am afraid the findings returned by the learned arbitrator in relation to Ex. R-34 and R-35 cannot be sustained, as, in my view, there is patent illegality in the manner in which the learned arbitrator has proceeded to deal with the said documents in the impugned award. The patent illegality is discernible on a mere reading of the award, the orders passed by the arbitral tribunal and the documents placed on record before the arbitral tribunal.

53. In relation to these documents, namely, Ex. R-34 and R-35, the Respondent/claimant had admitted his signatures. He had also admitted that these two letters were issued on the letterhead of his firm set up in Bagota under the name and style of M/s. Continental DC Commercio. His explanation was that he had given blank signed letterheads to his father, namely, Petitioner No. 1, on which the Petitioners had created these documents, subsequently by using the typewriter lying in the office of Kapoor Sons & Co. He had lodged FIR bearing No. 159/99 at police station Kashmere Gate alleging, inter alia, forgery of the aforesaid two letters by the Petitioners. At his behest, the typewriter in the office of Kapoor & Sons was seized.

54. To counter the aforesaid allegations of the Respondent, one of the Petitioners, namely, Sh. Arun Kapoor had submitted before the investigating officer, a letter stated to have been issued in 1997 by the Respondent/claimant from Bagota. It was the case of the Petitioners that the letters Ex. R-34 and R-35 had been typed out on the same letterhead with the same type style as the letter issued by the Respondent/claimant in the year 1997 from Bagota.

55. The investigating officer had got the letters Ex. R-34 and R-35 examined by FSL, and for comparison purposes, the letter of 1997, (attributed to the Respondent as having been issued from his office in Bagota), which was marked as TA-9 was also submitted to the FSL. The two letters, Ex. R-34 (letter dated 15.02.1992) was marked as TQ-13 by the FSL, and Ex. R-35 (letter dated 24.04.1992) was marked as TQ-13/1 by the FSL. Upon comparison of Ex. R-34/TQ-13, and Ex. R-35/TQ-13/1 with TA-9, the FSL returned a finding on 26.12.2001, "that the sample typewriting marked TA-9 tally with the questioned typewritings marked TQ-13 and TQ-13/1 in size, design, relative location of the corresponding characters/words and also super impose over each other."

56. Pertinently, the report of the FSL dated 26.12.2001 was produced before the arbitral tribunal by the Respondent/claimant himself, without any protest, demur or reservations, on 01.06.2002. When the said report was produced, it was not the Respondent/claimants contention that the specimen document TA-9 was not an admitted document, or that the said document had been treated by FSL as a specimen/admitted document unilaterally, without the Respondent/claimants being confronted with.

57. Despite my repeated query, the learned senior counsel for the Respondent has not been able to point out even a single averment made by the Respondent/claimant from the entire arbitral record, to the aforesaid effect, which may have been made before the matter was fully heard and award reserved by the arbitral tribunal.

58. It is pertinent to note that the Respondent had himself moved the application alongwith supporting affidavit dated 01.05.2002 before the arbitral tribunal, wherein, in relation to the said two letters, i.e. Ex. R-34 and R-35, it was claimed that the Respondent had signed blank letterheads in the year 1994 and sent the same to the Petitioners and that sometime in the year 1998, after the disputes arose between the parties, the Petitioners had created the forged documents by using the same. In this application, it was stated that the original of these letters are lying deposited in the case FIR No. 159/99, Kashmere Gate, Delhi. The Respondent desired the arbitral tribunal to get the age of the print on the said letters investigated by the CFSL to prove that the said letters were not typed in the year 1992, and that they were typed in or about 1998. The prayer made in this application was as follows:

a) the age of printing on said letters dated 15th February, 1992 and 24th April, 1992 lying deposited in the case/FIR No. 159/1999, Kashmere Gate, Delhi, be ordered to be verified by Central Forensic Scientific Laboratory, in order to determine the age and period of the said printing.

59. The Respondent moved yet another application dated 08.07.2003 (i.e. after the conclusion of the final arguments and reservation of the award by the learned arbitrator) in which, once again, he referred to his earlier application of 01.05.2002 "in order to determine the age and period" of Ex. R-34 and R-35. It was stated in this application as follows:

4. That the final arguments in the matter have now been heard by the Hon''ble Tribunal. It is submitted that if the Hon''ble Tribunal has any doubt regarding the forgery and fabrication of the letters dated 15th February, 1992 and 24th April, 1992 the same may be ordered to be verified by Central Forensic Scientific Laboratory, or any other Govt. Approved Agency in order to determine the age and period of the said letter. It is the contention of Claimant that the said letters have been fabricated on blank signed letter-heads, much later than 1992 and around the time when

disputes arose between parties and the AGE OF THE TYPING on the said letters would prove this fact.

It is therefore most respectfully prayed before this Hon''ble Tribunal that the application u/s 151 CPC dated 1st May, 2002 may be accordingly decided and appropriate orders be accordingly passed.

60. What is important to note is that both these applications were filed by the Respondent after the preparation of the report by the FSL dated 26.12.2001 to the effect that Ex. R-34 and R-35 (TQ-13 and TQ-13/1 respectively) had the same typewriting as in TA-9 (the letter stated to have been issued by the Respondent/claimant in the year 1997). Despite that being the position, in neither of these two applications, the Respondent/claimant claimed that TA-9 was not an admitted document, or that it was a forged document, or that the said document could not be used as a specimen for comparison purposes, for any reason whatsoever. It is, therefore, abundantly clear that before the learned arbitrator, there was absolutely no pleading or, even otherwise, any case set up by the Respondent, to contend that TA-9 was not an admitted document, or that it could not be used as a specimen for the purposes of comparison of the typewriting style etc. with Ex. R-34 and R-35.

61. The Respondent/claimant, for the purpose of discrediting the report of the FSL dated 26.12.2001, places reliance on the order passed by the learned Metropolitan Magistrate on 18.05.2002, whereby the final/closure report filed by the police was rejected by the learned Magistrate. However, a perusal of the order dated 18.05.2002 passed by the learned Magistrate shows that the same came to be passed only on the basis of the final report that the signatures on the dissolution deed dated 31.03.1992 was not found to be that of the complainant/Respondent herein, and on the ground that he was not in India at the time of execution of the said document. There is absolutely no mention in the order dated 18.05.2002 of the report of FSL dated 26.12.2001, which is the report in question.

62. The order of the learned Magistrate dated 18.05.2002 read as follows:

Final report is submitted by the police is not acceptable. From the final report it reveals that the signatures on the partner-ship deed is not that of the complainant and he was not in India at that time. Further by getting the signatures of the complainant the accused have been benefitted in the partner-ship deed as their share was increased as a result of retiring of the complainant out of the partnership.

I take cognizance of the offence u/s 420/468/471 and 120-B IPC.

Issue summons to the accused persons for 18.09.02.

63. Therefore, there is no merit in the Respondents submission that the learned Magistrate had disbelieved the report of the FSL dated 26.12.2001 while rejecting the final report vide order dated 18.05.2002 passed by the learned Magistrate.

64. It is pertinent to note that for the first time, the Respondent/claimant disputed the letter TA-9 in his written synopsis filed before the learned arbitrator as late as 15.07.2003, i.e. after the close of the arguments before the learned arbitrator on 02.07.2003. The question that arises for consideration is whether a party can make absolutely new factual averments in his written synopsis, filed nearly two weeks after the close of the final arguments, even though the said averments could and ought to have been made at the first available opportunity, i.e. soon after 26.12.2001. The purpose of filing a written synopsis is to put in writing, in a summarized form, the arguments advanced before the adjudicator. The purpose is not to slip in a fresh factual averment which has never before been contended or raised during the proceedings. It also needs consideration whether a party who has himself filed a document without any demur or reservation, and without claiming that the same is illegal or illegally procured, can seek to resile therefrom in his written synopsis filed, as aforesaid, nearly two weeks after the close of the final arguments and reservation of the award.

65. In my view, the answer to the aforesaid question has to be an emphatic "No". Otherwise, there would be no sanctity in legal proceedings before an arbitrator. The arbitral tribunal did not have any pleading before it to embark on an enquiry (and that too suo moto - as the Respondent never asked for reopening of the proceedings to agitate the aforesaid issue) on the issue whether TA-9 was an admitted document or not, and whether the same could, or could not, have been relied upon by FSL for comparison with Ex. R-34 and R-35. Moreover, it would be highly unfair to the opposite party to be suddenly confronted with an absolutely new case of the first party, to deal with which, it has had no opportunity, on the basis of something said for the first time in a written synopsis filed after the close of the arbitral hearing and reservation of the award. If the arbitrator permits such a course of action to be adopted, it would clearly be in violation of the principles of natural justice, i.e. the rule of audi alteram partem.

66. Unfortunately, that is what has happened in the present case. After the filing of the written synopsis by the Respondent/claimant on 15.07.2003, the learned arbitrator, of his own accord, sought to reopen the proceedings on the ground of seeking clarification from the parties. This clarification did not pertain to the case of the parties set out in their pleadings and to the evidence led before the arbitrator. This clarification pertained to the brand new case set up by the Respondent/claimant before the arbitrator, for the first time, in the written synopsis dated 15.07.2003 to the effect that TA-9 was a forged and fabricated letter.

67. The learned arbitrator, in my view, gravely erred in going into the issue whether TA-9 was an admitted document or not, and whether it was validly used for comparison purposes with Ex. R-34 and R-35. The reference by the learned arbitrator in his order dated 18.02.2004 to the two applications moved during the proceedings by the Respondent, praying for expert opinion with regard to age of

typing of Ex. R-34 and R-35 is also misplaced, as even in these applications, it was not the Respondents case that the specimen letter TA-9 used by FSL for comparison purposes had not been written by the Respondent. Pertinently, there is no finding returned by the arbitral tribunal with regard to the age of Ex. R-34 and R-35, and that is not the basis on which the arbitral tribunal has rejected the Petitioners reliance on these documents. If such a course of action is permitted to be adopted, a party would, after the close of the arguments start raising as an afterthought new factual pleas with a view to get out of the weakness in his case. This would not only place the opposite party in a disadvantageous position but could also lead to a never ending exercise as one party would try to better the other with one plea after another as an afterthought.

68. The patent illegality in the impugned award does not stop with the reopening of the proceedings to inquire into the authenticity of the specimen letter TA-9. Shri R.S. Chauhan AW-2, the Inspector who was an independent witness had clearly stated that he had asked the Respondent Raman Kapoor about the documents TA-9, and Raman Kapoor had stated that it related to another transaction having nothing to do with the issues mentioned in the FIR. If the aforesaid statement of AW-2, Sh. R.S. Chauhan is to be believed, it would constitute an admission on the part of the Respondent, as the Respondent had claimed that the said document TA-9 pertained to another transaction - meaning thereby that there was another transaction in relation to which the document TA-9 was written. Pertinently, according to this witness, the Respondent did not deny the document TA-9 as not being genuine or being forged. Despite this being the position, the learned Arbitrator has rejected the report of the FSL dated 26.012.2011 on the premise that the Investigating Officer had not mentioned the factum of his having shown the document TA-9 to the Respondent, Raman Kapoor in the case diary. In my view, the aforesaid reasoning is, with due respect, flawed and the same cannot be said to be a mere question of appreciation of evidence. The error is patent and more fundamental, as the learned arbitrator has ignored the independent witnesses testimony on a specious ground.

69. I also find merit in the submission of learned Counsel for the Petitioners that the learned Arbitrator has adopted different yardsticks/double standards while dealing with the parties. The Petitioners in their counter statement filed before the learned Arbitrator has specifically pleaded that the Respondent-claimant was in the habit of signing differently and changing his signatures. Reference may be made to para 25 at page 418 of the arbitral record. In their written submissions dated 01.07.2008 (served on the Respondent on 19.08.2003), the Petitioners had stated that signatures of the Respondent at pages No. 481, 577, 578, 582, 583, 584, 585, 586, 587, 588, 589, 590 & 592 in Volume II, had not been sent for comparison with his signatures on the dissolution deed when the FSL made its report dated 24.09.1999.

70. According to me, the learned arbitrator could not have acted, and that too on his own, to embark on an enquiry on the basis of statements made in the written

submissions of the parties for the first time. However, if the aforesaid approach of the learned arbitrator were to be approved for the sake of argument, then the same should have been adopted without discrimination in relation to both the parties.

71. Despite the said dispute being raised by the Petitioners, the learned Arbitrator did not send the aforesaid documents for purposes of comparison with the signatures found on the dissolution deed dated 31.03.1992. It was held that the Petitioners knew about the opinion already given by the expert of FSL to the effect that the disputed signatures (on the dissolution deed dated 31.03.1992) were not made by the Respondent-claimant. The Arbitrator held that the Petitioners herein could have got an opinion from any other expert in respect of any other admitted signatures which, according to them, are similar to the disputed signatures. In the absence of any expert opinion, the Arbitrator held that it was not possible to ignore the expert opinion of FSL. However, on the other hand, even though there was no pleading made by the Respondent herein in relation to the specimen document TA-9, the learned Arbitrator of his own took the initiative to reopen the proceedings and record evidence to return a finding that TA-9 was not an admitted document.

72. Therefore, when it came to the case of the Petitioners, even though there was some averment made in the counter statement and greater elaboration in the written submissions (in relation to non-comparison of the dissolution deed dated 31.03.2002 with admitted documents of the Respondent), the learned arbitrator rejected the Petitioners submission by observing that the Petitioners should have taken steps on their own, while in the case of the Respondent the learned arbitrator took upon himself, on his own, even though there was not an iota of pleading made earlier, to reopen the proceedings and record further evidence of witnesses from the FSL. Pertinently, the Respondent did not seek the reopening of the proceedings and did not move any application before the arbitral tribunal to lead any further evidence.

73. In my view the aforesaid conduct of the learned Arbitrator is clearly in breach of his obligation to treat the parties equally and to provide them with equal and full opportunity to present their case, as mandated by Section 18 of the Act. In the light of the aforesaid discussion, there is a patent illegality and legal misconduct committed by the learned Arbitrator in rejecting the Petitioner''s case founded upon Ex.R-34 and R-35. The finding returned by the learned Arbitrator in relation to Ex.R-34 and R-35, therefore, is patently flawed as it has been arrived at on the basis of a fundamentally flawed approach of the learned Arbitrator.

74. From the impugned award, it also appears that the learned Arbitrator has ignored the contemporaneous conduct of the parties, namely that on 15.06.1992, the Petitioners informed their bank of the fact that the Respondent was no longer a partner in the firm Kapoor Sons & Co.; that the last time the Respondent was shown as a partner of Kapoor Sons & Co. in the income tax returns was for the year ending 31.03.1992; that the said fact was mentioned in the income tax return filed for the

previous year 1992-93, when he was not shown as a partner, and that the Respondent was never required to sign the balance sheet and accounts of the firm Kapoor Sons & Co. for the period after 31.03.1992.

75. The learned Arbitrator, in para 31 of the award has posed a question as to why the Respondent wished to continue as a partner in the other firms, namely, Ropas International and Continental Films when those firms did not have any significant assets, and desired to resign from the firm Kapoor Sons & Co. which owned a very valuable immovable property. In my view that was a question which should have been put to the parties. If the Respondent indeed resigned from the firm Kapoor Sons & Co., the said resignation could not be undone, merely because such conduct may appear to be strange to an Arbitrator. There could be various reasons for such conduct of the Respondent. From the correspondence placed on record, it appears the Respondent was heavily indebted to the Petitioners in relation to the export business undertaken by the other firms, particularly Ropas International, while he was in Bogota. It could well be that to square of his liabilities in those firms, and towards other partners, the Respondent traded of his share in the partnership firm Kapoor Sons & Co. However, these are issues which should have been examined by the Arbitrator, and it is not for this Court to derive any conclusions in these proceedings. The aforesaid possible explanation has been noted by me only by way of an illustration to show that the mere absence of an apparent reason for the Respondent to resign from the firm Kapoor Sons & Co. cannot lead to the inference that he, in fact, did not so resign.

76. I also find merit in the submission of Mr. Malhotra that the impugned award appears to be unconscionable. I have recorded in paras 35 to 42 hereinabove the submissions of Mr. Malhotra, which appeal to me. I cannot help but think that the normal course of human conduct; particularly, the personality of Petitioner No. 1 which emerges from the struggle of his life as noticed in the award itself, coupled with various circumstances pointed out by Mr. Malhotra, negate the story that Ex. R-34 & R-35 were forged and fabricated, and that the dissolution deed dated 31.03.1992 was also forged and fabricated insofar as the signatures of the Respondent thereon are concerned.

77. Courts have repeatedly commented on the weightage to be placed on the reports of handwriting experts. It has been held that the science of reading handwriting is not a perfect science. Reference may be made in this regard to the following judgments:

(i) Smt. Bhagwan Kaur Vs. Shri Maharaj Krishan Sharma and Others, , wherein it has been held:

The evidence of a handwriting expert, unlike that of a fingerprint expert, is generally of a frail character and its fallibilities have been quite often noticed. The courts should, therefore, be vary to give too much weight to the evidence of handwriting

expert. In Sri Sri Sri Kishore Chandra Singh Deo Vs. Babu Ganesh Prasad Bhagat and Others, , this Court observed that conclusions based upon mere comparison of handwriting must at best be indecisive and yield to the positive evidence in the case.

(ii) In State of Maharashtra Vs. Sukhdeo Singh and another Vs. State of Maharashtra Through C.B.I. Vs. Sukhdev Singh alias Sukha and others,

it has been held:

But the court cannot afford to overlook the fact that the science of identification of handwriting is an imperfect and frail one as compared to the science of identification of finger-prints; courts have, therefore, been wary in placing implicit reliance on such opinion evidence and have looked for corroboration but that is not to say that it is a rule of prudence of general application regardless of the circumstances of the case and the quality of expert evidence. No hard and fast rule can be laid down in this behalf but the Court has to decide in each case on its own merits what weight it should attach to the opinion of the expert.

78. I find merit in the Petitioners" submission that the learned Arbitrator has not critically examined the report of the FSL dated 24.09.1999 to assess its quality. As to why various documents which contained the admitted signatures of the Respondent, and which were produced before the FSL were not used for comparison has not been explained by CW-4 Harsh Wardhan in his cross-examination. To this extent the reliance placed by the learned Arbitrator on the said report of FSL appears to be without application of mind. On the other hand, the report of FSL dated 26.12.2001, filed by the Respondent and relied upon by the Petitioners, is a report which is based on empirical and scientific basis. The said report is worthy of much greater reliance than the handwriting report pertaining to the dissolution deed dated 31.03.1992.

79. A perusal of these letters, i.e. Ex. R-34 and R-35 ex facie shows that the Respondent-claimant had expressed his intention not to continue as a partner in Kapoor Sons and Co. and he had requested the Petitioners to send him the dissolution deed for his signature. It is also evident that the Respondent had indeed signed a dissolution deed dated 31.03.1992 in relation to M/s Kapoor Sons & Co. and sent the same to the Petitioners.

80. No doubt there are various documents relied upon by the Respondent, and considered by the Tribunal which do suggest that the Petitioners were indeed talking about a share of the Respondent in the partnership firm Kapoor Sons & Co. even after 31.03.1992. However, the learned Arbitrator has, on account of the aforesaid patent error in rejecting R-34 and R-35, failed to examine and balance the evidence on the two sides.

81. For all the aforesaid reasons, I partially allow O.M.P. Nos. 245/2005 and 351/2009 and set aside the interim award dated 01.06.2005 passed by Mr. Justice P.K. Bahri

(Retd.) in Arbitration Case Nos. 157-160/1999 insofar as it pertains to the firm Kapoor Sons & Co. Since the final award dated 23.04.2009 made by the Arbitral Tribunal is founded upon the said interim award, the same is set aside insofar as it depends on the findings and award of the Arbitral Tribunal pertaining to Kapoor Sons & Co. I have already noticed hereinabove in para 5 that Shri Raman Kapoor has not pressed his objections to the final award dated 23.04.2009 and, accordingly, O.M.P. No. 400/2009 is dismissed.

82. O.M.P. Nos. 428/2009 and 429/2009 have been filed, premised on the impugned award pertaining to M/s Kapoor Sons & Co. Since the awards have been set aside pertaining to the said firm, these petitions are dismissed. No order as to Costs.