

Devika Mehra Vs. Ameeta Mehra

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Court : Delhi

Decided On : Oct-06-2004

Reported in : 114(2004)DLT811; 2004(77)DRJ651

Judge : Mukul Mudgal, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 4, 9, 12, 12(5), 16(6) and 34; [Hindu Succession Act, 1956](#); Income Tax Act - Sections 40A2

Appeal No. : O.M.P. 134/2004

Appellant : Devika Mehra

Respondent : Ameeta Mehra

Advocate for Def. : P.V. Kapur, Sr. Adv., ; Ketaki Goswami and ; Rattan Singh

Advocate for Pet/Ap. : Soli S. Cooper,; Ramesh Singh,; Amit Kumar and;

Judgement :

Mukul Mudgal, J.

1. This petition under Section 34 of the Arbitration & Conciliation Act, 1996(hereinafter referred to as `the Act') challenges by way of these objections the Award dated 31st December, 2003, passed by the Sole Arbitrator. The arbitrator in question is the maternal grandfather of the petitioner and the respondent who are

sisters and had lost their parents and another sister in an unfortunate accident.

2. The award is challenged by the petitioner on the following grounds:-

A. That the writing dated 21st June, 2003 does not constitute an arbitration agreement.

(i) that the said writing only contemplates avoidance of any future dispute and does not refer to any existing dispute nor it refers to arbitration.

(ii) that in view of the judgment of the Hon'ble Supreme Court in : [1998]1SCR601 and : (2004)1SCC372 @ 17 an agreement for avoidance of a dispute is not an arbitration agreement.

B. That the main objection of the petitioner is that even if the writing dated 21st June, 2003 constitutes an arbitration agreement even then the purported award travels beyond the scope of the said agreement.

(i) that the document dated 21st June, 2003 contemplated division of the estates left behind by the parents and the deceased sister of the parties and does not make any reference to any other assets.

(ii) that the phrase 'estate' having a clear and definite legal connotation can never be interpreted to include 'assets' owned by the parties even prior to the death of the person from whom the said parties inherit.

(iii) Reliance has been placed on the judgment of the Supreme Court in : [1991]188ITR803(SC) to contend that estate means 'property' which a person was entitled to deal with at the time of his/her death.

(iv) that the pre-existing estates of both the petitioner and the respondent prior to the demise of their parents and sister could not possibly be the estate of their late parents and sister and would not fall within the scope of the agreement dated 21st June, 2003.

(v) that the award is based on a misconception recorded by the arbitrator which misinterprets the agreement dated 21st June, 2003 to settle the dispute and

differences between Ameeta, the respondent and Devika, the petitioner in respect of the partition of their various properties and businesses.

(vi) that since the writing of 21st June, 2003 only related to the undivided assets of the parties' late parents and sister's estate, the award is void and unenforceable.

(vii) that the shareholding between the various family companies already stood divided between the parties prior to 21st June, 2003 and could not, therefore, form part of the estate.

C. That the award is tainted by the bias and the misconduct of the arbitrator.

(i) that the arbitrator did not disclose the circumstances likely to give rise to justifiable doubts as to his impartiality.

(ii) that the arbitrator being a Stud partner in a Greentree Stud did not disclose this to the petitioner as required under Section 12 of the Act.

(iii) that the said partnership in Greentree Stud still continues.

(iv) that this was further evident from the fact that certain assets belonging to Usha Stud Farm were wrongly transferred to the said partnership firm, the Greentree Stud.

(v) that these were brought to the notice of the arbitrator, who did not take note of this and did not reveal his personal interest in the said Greentree Stud.

(vi) that the award dated 31st December, 2003 is a case of fabrication, disclosing the mala fides and the misconduct and was sent only under the covering letter of 4th February, 2004 even though on 6th January, 2004 and 9th January, 2004, the petitioner had written to the arbitrator that he was biased and not entitled to make any award and she should be given a copy of the award, if any, made.

(vii) that the award was only sent by a covering letter of 4th February, 2004 demonstrating that it does not bear the date purported to have been put on the award.

D. That in any case the valuation in the award is extremely lopsided and the petitioner has been short changed and the award is, therefore, biased, unfair and unreasonable so as to shock the conscience of the Court.(i) that the division by the arbitrator in fact awards 70% of the disputed property in favor of the respondent and only 30% comes to the petitioner as demonstrated by the chart. In particular the valuation of the horse business is lopsided. In order to suppress the share of the petitioner, the horse business has been undervalued so as to favor the respondent.

3. The submissions of the respondent's senior counsel, Shri P.V. Kapur about the memorandum of agreement dated 21st June, 2003 are as follows:-

(1) that the petitioner's plea regarding challenge to the efficacy and legality of the Agreement dated 21st June, 2003 was never raised before the arbitrator and is merely an afterthought.

(2) that the Memorandum of Agreement dated 21st June, 2003 was not an agreement to prevent future disputes and the objections on this count have been inspired by the position of law laid down by the Hon'ble Supreme Court in K.K. Modi vs K.N. Modi : [1998]1SCR601 .

(3) that an agreement for preventing future disputes is entered into between the parties only when where there are no disputes between them. In the present case, bitter disputes existed between the sisters much prior to the Memorandum of Agreement dated 21st June, 2003 that is why their grandfather, Admiral Nanda was asked to step in as arbitrator.

(4) that on 30th August, 2001 due to the dispute between the two sisters as to the applicability of half-half division of the properties, a draft of an agreement dated 30th August, 2001 suggested Mr. Rajiv Sawhney, Senior Advocate and Admiral Nanda as Co-arbitrators. This draft agreement was signed by the petitioner, Devika though not by Ameeta, the respondent who did not sign it as she did not wish to accept Mr. Rajiv Sawhney as co-arbitrator. This clearly demonstrates that the disputes existed between the parties prior to 21st June, 2003 and that arbitration was contemplated.

(5) that this is also evident from the Section 9 petition, filed by the petitioner, Devika.

(6) that the case of K.K. Modi (supra) is distinguishable because in that case the disputes had already been settled and the MOU already signed, allocating the various assets to various branches. The Supreme Court in the said decision held that in such a situation any different decision than what was already agreed upon could be suggested.

(7) that the Hon'ble Supreme Court laid down the following three tests for determining whether the agreement between the parties was an arbitration agreement or not:-

- 'a. Existence of disputes as against intention to avoid future disputes;
- b. The tribunal or forum so chosen is intended to act judicially after taking into account relevant evidence before it and the submission made by the parties before it; and
- c. The decision is intended to bind the parties.'

(8) that the above three tests are satisfied because there were disputes existing between the parties much prior to 21st June, 2003 is evident from the documents and correspondence that Devika had named Admiral Nanda to act as arbitrator and not a mere valuer with Mr. Rajiv Sawhney as far back as in 2001 in the draft agreement dated 30th August, 2001 which though not signed by Ameeta is certainly signed by Devika.

(9) that the arbitrator heard both the claims and counter-claims and in fact the respondent Ameeta, get prepared and forwarded two lots to the arbitrator as well as to Devika as per the instructions of the arbitrator and Devika while declining on her part to submit any lots instead put forward her claim with the proposals along with the document 'Way Forward' dated 7th November, 2003. She subsequently clarified her proposal by letters dated 29th November, 2003; 14th December, 2003 and 26th December, 2003.

(10) that in Para 2 of the Award, the Arbitrator clearly examined and discussed at length with each of the two girls and number of meetings by and large informal in nature yet comprehensive were held.

(11) that Ameeta made a proposal making two lots but Devika did not. If Devika had prepared her lots, it would have helped her but she did not given any firm lot, leaving the arbitrator no option but to pronounce his award what according to him would be a division into equal and fair lots.

(12) that the arbitrator has examined the evidence before him including the independent valuations of all the assets, wishes of the late parents, particularly the one contained in the late Major Pradeep Mehra's letter dated 17th October, 2000 where the father of the parties expressed his wish that the 'horse business' was intended to be Ameeta's.

(13) that the arbitrator being the grandfather of the girls knew the family, its assets and its businesses thoroughly and when he was appointed he was acceptable to both the parties.

(14) that no formal pleadings, claims and counter-claims are required as this was a case of family assets partition of which family the arbitrator was an intrinsic part.

(15) that in fact the Memorandum of Agreement dated 21st June, 2003 clearly stated that as the arbitrator and their uncle, Suresh Nanda would be specifically authorized to assist the arbitrator and requested the arbitrator so that a quick decision be taken.

(16) that the decision was fully intended to bind the parties is evident from the fact that the agreement which was signed by both the parties, clearly stipulated that 'We both agree that the decision and directions of our grandfather shall be final and binding on both of us and we shall not have the right to challenge or question the same'.

4. In reply to the plea that the arbitrator was a mere valuer and not an arbitrator, the following pleas are raised on behalf of the respondent Ameeta:-

(a) that as per the Clause 6 of the Memorandum of Agreement, the sisters requested their grandfather to 'resolve all the matters fairly' and this could not be done by a mere valuer.

(b) that the arbitrator was asked to secure fair and equitable division of the estate between the sisters.

(c) that in the letter dated 28th July, 2003, Devika stated that 'in my absence any and all decisions concerning the division of the estate between Ameeta and myself be taken only after my return'. This was also reiterated by Devika in the letter dated 26th September, 2003 where the Arbitrator was requested to wait for the valuation of the horses before dividing any assets. This clearly shows that the arbitrator was not a merely valuer.

(d) that in Clause 3, it was clearly stated that 'the valuation was to facilitate the completion of the distribution of the estate.

(e) that Devika never asserted that the arbitrator was exceeding his jurisdiction. In fact she even asked the arbitrator from time to time to pass interim orders as is evident by the letter dated 28th July, 2003.

(f) that Devika's letter dated 6th January, 2004 clinches the case in favor of the respondent Ameeta and the said letter dated 6th January, 2004 reads as follows:-

'I have to write this letter to formally request you to stop acting as an arbitrator or decision maker between my sister and me with respect to the separation and partition of our interest in the estates of our parents.'The use of the words arbitrator/decision maker in this letter dated 6th January, 2004 falsifies the petitioner's claim that the grandfather was not a mere valuer.

(g) Reliance has been placed on the scope of Section 16(6) and 13(5) of the Act to contend that Devika is precluded from raising this challenge at this stage under Section 34 of the Act as she never raised it before the Arbitrator and the challenge to the decision of the Arbitrator or to the existence or validity of an arbitration agreement or of bias can be raised in the Section 34 petition only if such a challenge is made before the arbitrator itself and in the absence of any such

challenge before the Arbitrator, such an objecting party is deemed to have waived its right to object in terms of Section 4 of the Act.

(h) Reliance has been placed on the Supreme Court judgment in Narayan Prasad Lohia Vs Nikunj Kumar Lohia : [2002]1SCR1136 wherein it was held that an award can be set aside only on the ground of challenge under Sections 12,13 and 16 provided such a challenge is first raised before the arbitral tribunal and rejected by it. It was also held that the objectors not having raised any objection before the arbitrator to the composition of the arbitral tribunal as per Section 16, are deemed to have waived their right to object. This position of law laid down by the Supreme Court was followed by the Division Bench of this Court in : 98(2002)DLT659 . This decision was also followed in three other judgments in : [1987]3SCR569 .

5. In reply to the plea that the Award dated 31st December, 2003 deals with all assets of the parties instead of confining itself to the estate of the deceased parents and sister, it is submitted on behalf of the respondent as follows:-

that without prejudice to the submissions made in Para 9 of the note of submissions, this plea could also have been raised before the arbitrator and is thus incapable of being raised in the present Section 34 petition, the respondent's reply on this plea is as under:-

(a) that the words 'estate of our parents and our sister' used in the Memorandum of Agreement dated 21st June, 2003 meant the entire family assets, moveable and immoveable including family owned and controlled companies, that is how the parties have all along understood the said phrase.

(b) that even if it was assumed that the estate of the deceased parents and sister was the subject matter of arbitration, the parties have themselves expanded the scope of arbitration to include all the family's assets.

(c) that the meaning of the word 'estate' has to be understood by the parties at the time when the document was written and the background and surrounding circumstances in which it was written as per the Article 12-116 @ Page 634, 'Chitty on Contracts', 28th Edition.

(d) that there were bitter disputes between the parties after the demise of their parents. Thereafter an agreement was got drafted from Devika's lawyer on 30th August, 2001 which show that the intention at that time was to refer the disputes to the arbitration for dividing and partitioning all family assets including movable and immovable assets including family owned and controlled companies.

(e) that the letter dated 30th August, 2001 further recorded that 'both the sisters have inherited the estate of their parents comprising of movable and immovable assets including agricultural land, residential houses, movable in lockers, shares of private companies, jewellery etc. on equal 50:50 basis and both the parties had agreed to bring about an amicable and peaceful separation and partition of all joint interest so that the sisters have no joint ownership, joint interest, cross holding, profit sharing and it shall be a clear-cut division on an equal basis. This clearly shows that the intention of the sisters was to divide and partition between themselves not only the assets that stood in the name of the deceased parents and sister but the entire assets owned by the family including what the sisters had inherited from the parents. In this case none of them created anything of their own and everything was created by their parents. The real dispute was as to who would receive which asset or business though the parties agreed that the division was to be on 50:50 basis.

(f) that the letter dated 19th May, 2003 is a clear pointer to the fact that the disputes between the sisters was in respect of the entirely family estate and assets.

(g) that the document dated 30th August, 2001 was a lawyer drafted document and the Memorandum of Agreement dated 21st June, 2003 was drafted by the two sisters themselves. The effect of both those documents has to be understood in this light.

(h) that even if it is assumed that in the Memorandum of Agreement, the parties initially intended to confine the scope of arbitration to the estate of the deceased parents and sister, they themselves expanded the scope of arbitration to include all the family's assets as is evident from the fact that when the two lots were get prepared by Ameeta pursuant to the direction of the Arbitrator in his letter dated

28th July, 2003, she included in those lots not only the assets owned by the deceased parents and the sister but also all the assets owned by her and Devika as well as the assets owned by various family companies, e.g., lands, horses etc.

(i) that when Ameeta prepared two lots by her letter dated 9th August, 2003, these two lots were never objected to by Devika by protesting that such lots exceeded the scope of matters referred to the Arbitrator for division. On the contrary she accepted these lots as fair and equitable and later by a letter dated 30th December, 2003 even indicated her option to choose one of the two lots prepared by Ameeta. Even Devika in her proposal attached to the 'Way Forward' document included all the family owned assets including those owned by her and Ameeta as well as the assets owned by various family companies e.g., lands, horses etc.

(j) that by a letter dated 10th October, 2003, Devika speaks of 'two main assets' i.e., the lands which were mainly owned by the family companies and horse breeding stock which too was mainly owned by the family companies.

(k) that Devika in her letter dated 27th December, 2003 in setting out the 'scope of matters' to be bid as per Alternative 1 of the 'Way Forward' included all the family owned assets including those owned by her and Ameeta as well as the assets owned by various family companies.

6. Lastly in answer to the petitioner's plea that the arbitrator could not deal with the assets of the companies since by transmission the shares of the companies already stood divided between the two sisters, it is submitted on behalf of the respondent as follows:-

(a) that there were no assets required to be divided since upon the demise of their parents and sister by operation of the [Hindu Succession Act, 1956](#), everything stood inherited 50:50.

(b) that the letters dated 9th August, 2003 and Devika's proposal along with the 'Way Forward' clearly demonstrated that the assets of the companies were brought forward before the Arbitrator for his decision by both the sisters.

(c) that the division of shares took place after the demise of the parents and the sister was only by way of an interim arrangement pending the final division by the grandfather, a fact admitted in her letter dated 10th October, 2003 by Devika.

(d) Finally the only assets that stood in the names of Ameeta and Devika prior to the parents' and the sisters' demise, constituted a mere 5% of the total assets which are the subject matter of the award.

(e) that in the award made by the arbitrator, Ameeta's 1/3rd in Vasant Vihar house valued at about Rs.2.80 crores had been given to Devika and Devika's 46.4 acres land at Pataudi also valued at Rs.2.80 crores had been given to Ameeta and other than that out of the 4 mares that were in Devika's name, 2 had been given to Ameeta with an obligation on Ameeta to maintain at her cost Devika's two mares and their foals for life. That the grandfather apportioned the estate after taking into account the nature of cross-holdings in the shareholding structures of the various family owned companies so as to avoid to embroil the sisters in litigation for a long time. That the division was made equitable after taking into account the rival claims made by the sisters and is based on the premise that the horse business and lands could not be separated and that only by the manner which the award was made could a clean break between the parties be arrived at.

7. In response to the plea of the alleged bias of the Arbitrator, it is submitted by the learned counsel for the respondent that this plea not having been raised before the Arbitrator at any time and cannot be raised at this stage of Section 34 objections.

(a) In reply to the partnership of Admiral Nanda of Green Tree Stud and Agricultural Farm which he was duty bound to disclose, it is submitted that the original Green Stud was set up by Admiral Nanda and Ameeta in 1980, when Ameeta was a minor of 16 years of age in a registered firm which was subsequently dissolved and after dissolution, it is the sole proprietary firm of Ameeta. This status of sole proprietary firm is evident from (a) Income Tax return for the assessment year 2002-03 which have been filed by Devika with the petition under Section 34, which recorded the sole proprietary nature of Green Tree; (b) disclosure under Section 40(A)2(b) of the Income Tax Act as per the Income Tax return of Usha Stud and Agricultural Farm for the assessment year 2000-2001

signed by the parents of the parties which also record the sole proprietary nature of the Gree Tree; (c) Income Tax return of Veena Mehra for the year 2000-01 signed by her which also disclosed the sole proprietary nature of Green Tree; (d) Income Tax returns of Ameeta for the year 2000-2001 which also recorded sole proprietary nature of Green Tree; and (e) Certificate dated 7th April, 2004 issued by Syndicate Bank, Vasant Vihar stating that the account No.1040 has not been operated since 1st April, 1999 .

(b) Since Green Tree ceased to be a partnership firm of Admiral Nanda and Ameeta, there was nothing to show on 21st June, 2003 or at any time thereafter that such a firm subsisted or operated.

(c) In any event while dividing the assets of green tree stud which were two horses, were duly valued and were made the subject matter of the award after taking into account the value of the horses of Ameeta in Green Tree Stud. Thus no benefit if any accrued to the Arbitrator in the division of its assets.

(d) In any event Devika knew about the composition of the Green Tree Stud and of the fact that the arbitrator was no longer a partner with Ameeta for the following reasons :

(i) Mr. D.V. Taneja, the statutory auditor of the family companies and the family members including Green Tree Stud has always been Devika's own representative since the demise of the parents of the parties and has been collecting documents and information on her behalf;

(ii) Devika had been involved in the partition and division of the assets for three years and had been compiling information of all family assets by writing to the Stud Book Authority of India and collecting information on horse stock, and therefore it is inconceivable that before and/or during arbitration, she was unaware of the status of Green Tree Stud.

(e) The close relationship of maternal grand father of the parties has been emphasized, whose love and affection for both the parties was equal and he has acted more as a grand father than an Arbitrator. Both the deceased parents had

reposed full confidence in them as they appointed him as executor of their respective Wills to protect the interests of their children.

(f) Admiral Nanda did not volunteer to be an Arbitrator. Both the sisters chose him for being the Arbitrator and Memorandum of Agreement appointing him as a sole arbitrator was entered into.

(g) The procedure adopted by the arbitrator was fair and equitable and as soon as he entered the reference, he called upon both the sisters to independently to make two equal lots of assets by letter dated 28th July, 2003. This requisition was complied by the respondent/Ameeta though Devika did not respond and by a letter dated 26th September, 2003, showed her lack of knowledge of value of the assets and asked the Arbitrator to value assets on her behalf. The Arbitrator sought the aid of professional valuers but also sought Devika's valuation of each item, by his letter dated 30th September, 2003. Devika declined to give her lots once again due to lack of knowledge of the value of the assets and wanted a professional, unbiased valuation. The Arbitrator had thereafter engaged services of competent and reputed valuers after having the names approved from both the sisters, to value the horses and the lands.

(h) The award has been made on the basis of the aforesaid valuation after hearing the parties on their claims. However, Devika put forth a way forward proposal with two alternatives first for bidding and second for choosing anyone of the lots as prepared by Ameeta by letter dated 9th August, 2004 though agreeing that the said lots submitted by Ameeta were fair and equitable. Due to the lack of consensus between the parties regarding the scope of bidding and other issues concerning alternative 1 as evident from Ameeta's letter dated 26th November, 2003 and Devika's letter dated 29th November, 2003 and the complete failure of the parties to finalize the terms of bidding process at pre-bid meeting on 26th December, 2003, the arbitrator by letter dated 27th December, 2003 informed both the parties that he was going ahead with publishing the award based on the valuations obtained from independent valuers. The award was prepared by the end of October, 2003 but was delivered on 31st December, 2003 and the operative part thereof was communicated to Devika on the same day.

(i) The letter dated 1st January, 2004, is ante-dated to 30th December, 2003 wrongly purporting to choose alternative 2 and asking for the first right to choose one of the two lots prepared by Ameeta way back on 9th August, 2003. The ante-dating of this letter is evident from pages 69-78 and in particular DTDC's supporting letter dated 2nd August and 13th August, 2004. Having loss of confidence and fear of lack of impartiality against the arbitrator was never mooted during the entire arbitration proceedings and it is only the eventual award which has inspired the allegation of bias. The Arbitrator's generosity is evident from the fact that (a) he has contributed 4 acres of his land for the initial start up of the business which is still continuing; (b) he transferred his shares of Usha Stud Farm to his daughter and son-in-law when the worth was far higher; and (c) non-charging of arbitrator's fee and bearing of the entire expenses for getting the valuation done without asking for any contribution from the parties.

8. The arbitrator's award impugned in this petition raising objections under Section 34 of the Arbitration Act cannot be considered in isolation merely by reference to the agreement dated 21st June 2003 but has to be construed in the context of the family relationship, the events and correspondence preceding the said agreement and thereafter and the conduct of the parties before during and after the arbitration proceedings.

9. In so far as the plea of bias is concerned, Mr. Kapur had strenuously urged that this plea of bias not having been urged before the Arbitrator at any time cannot be raised at this stage under Section 34 objections before this Court. The letters of petitioner dated 6th January, 2004 and 9th January, 2004 raising the allegations of the bias before the arbitrator are said to be attempts at creating evidence for alleging bias on the ground that these were only raised subsequent to the coming to know the contents of the award by the arbitrator on 31st December, 2003. In my view while there may be some merit in this plea of the respondent I have nevertheless gone into the allegation of bias which is primarily inspired by the ownership of the Admiral Nanda of the Greentree Stud, an agricultural farm which according to the petitioner he was duty-bound to disclose.

10. In my view the plea of bias is not sustainable for the following reasons:-

(a) that the Greentree Stud Farm was set up in the year 1980 as a registered firm which was subsequently dissolved. This was evident from the income-tax returns of the assessment year 2002-2003 filed along with the objections petition which recorded that the partnership was a sole proprietary concern.

(b) that the disclosure under Section 40(A)2(b) of the Income-Tax Act as per the income-tax returns of the Usha Stud and Agricultural Farms for the assessment year 2000-2001 signed by the parents of the parties as well as income-tax returns of Veena Mehra, the mother for the year 2000-2001 signed by her which also showed that the Greentree Stud was a sole proprietary company. Similarly the income-tax return filed by the respondent for the year 2000-2001 also showed that the Greentree Stud was a sole proprietary concern of the respondent Ameeta Mehra.

(c) similarly a certificate dated 7th April, 2004 by the Syndicate Bank, Vasant Vihar Branch, New Delhi stated that the account No.1040 had not been operated since 1st April, 1999.

The aforesaid contemporaneous documents demonstrate that while the arbitrator due to close relationship with the parties was initially a partner with the respondent when she was the minor of 16 years in the registered firm, but thereafter the firm has functioned as the sole proprietary concern of the respondent. This clearly shows that the partnership even though existing in 1980 had become dormant and had been taken over by the Ameeta, the respondent as the sole proprietary concern. Thus the non-disclosure of such an interest arising from an event of 1980 cannot taint the conduct of the arbitrator and thus challenge to the award based on bias cannot be sustained. Even otherwise due to the close relationship of the parties with the arbitrator it is not possible to believe that the petitioner was unaware of the past relationship of the arbitrator with Green Tree Stud. If she still chose to appoint her as an arbitrator, thus not having raised any protest of bias till 6th January 2004 after the pronouncement of the award the plea of bias can not be sustained at the present juncture after the award. It is also not necessary to consider the plea raised by the respondent that the petitioner's letter was backdated. The respondents' plea is that the letter dated 1st January 2004 is ante

dated by the petitioner which cannot also be gone into under Section 34 objections as it amounts to entering into an arena of fact finding. The petitioner has not been able to show that any real protest was made about bias prior to 6th January, 2004 by her barring passing reference to denial of accounts by the respondent to the petitioner. Furthermore DV Taneja, the statutory auditor of the family companies and the family had been representing Devika and it is highly unlikely that the petitioner was not aware of the arbitrator's association with Green Tree Stud. The manner in which the arbitration was conducted, and the fact that the petitioner was given a time bound first option to choose the lots prepared by the respondent belies the plea that the arbitrator was biased. Significantly the petitioner had herself noted that the lots prepared by the respondent were fair. Thus the plea of bias raised against the arbitrator has no substance and is thus rejected.

11. It would be necessary to keep the circumstances preceding the award and the close relationship of the parties with the arbitrator in mind before considering the challenge to the scope of the award. One cannot lose sight of the fact that the maternal grandfather of the two disputing sisters was the arbitrator and the arbitration award sought to resolve a dispute between two sisters who were the remaining survivors of a ill fated family. Before considering the scope and effect of the agreement dated 21st June 2003, it will be necessary to consider the history of the dispute which shows that on 30th August 2001 a draft agreement signed by the petitioner, Devika Mehra, was handed over to Ameeta Mehra, the respondent. The said agreement reads as follows:

'THIS AGREEMENT is signed on this 30th day of August 2001 between Ameeta Mehra and Ms. Devika Mehra, both daughters of late Major Pradeep K. Mehra and late Veena Mehra and residents of D7/6 Vasant Vihar, New Delhi.

WHEREAS the parties hereto are sisters and are sole beneficiaries of the estates of their parents Major Pradeep K. Mehra and Mrs. Veena Mehra, and sister, Radhika.

AND WHEREAS both sisters have inherited the estates of the parents comprising of movable and immovable assets including agricultural land, residential houses, movable in lockers, shares of private companies, jewelry etc. on an equal 50:50

basis.

AND WHEREAS in order to maintain good relations between themselves and to avoid in future any dispute and/or litigation, the sisters have agreed to separate and partition their interests on the understanding that each shall receive an equal 50% share in all family assets including movable and immovable assets including family owned and controlled companies.

AND WHEREAS with the object of achieving and an amicable and peaceful separation of their interests the Parties have agreed to the terms as follows:

NOW thereforeE THIS AGREEMENT WITNESSETH AS FOLLOWS:

1.Both parties confirm that as sisters, they are equal beneficiaries and holders/owners of all family assets including movable and immovable properties shares in companies, assets in bank lockers and or/in what ever form including all assets inherited on the death of their parents and sister.

2.Both parties have agreed to bring about an amicable and peaceful separation and partition of all joint interests so that the sisters have no joint ownership, joint interest, cross holding, profit sharing, and it shall be a clear cut division on an equal 50-50 basis;

3.The separation and partition of all interests shall be duty effected and completed by 31st March 2002.

4.Each sister shall act accordingly and shall keep each other and the executor of the will Admiral S.M. Nanda fully informed of all matters, dealings and transactions pending the separation and division of their interest.

5.It is hereby agreed that in the event of any dispute of whatsoever nature arising between the two sisters with respect to the title of any assets, the division and distribution of the estates, giving effect to the understanding as recorded in this Agreement shall be resolved by reference to arbitration. The parties hereby appoint Mr. S.M. Nanda and Mr. Rajiv Sawhney as the Arbitrators, and agree that their decisions shall be final and binding on the parties and each Party agrees and

undertakes to comply with and implement every decision of the Arbitrators. In the event of a vacancy arising the remaining Arbitrators shall fill the same by appointment of an independent Arbitrator unless the Parties hereto mutually agree to the name of an Arbitrator to fill the vacancy within seven days of the vacancy arising.

6.Until the division takes place all keys of lockers, the Will and the originals of the Share certificates of companies etc shall be deposited with Admiral S.M. Nanda.'

12. The above draft agreement clearly discloses that the apart from referring to the estate of the parents it also referred to separation and partition of their interest so as to have 50 per cent share in all family assets `including movable and immovable assets of the family owned companies of by the family. This agreement referred to the appointment of Mr. S.M. Nanda and Rajiv Sawhney, as the arbitrators. Even though this draft agreement was not signed by Ameeta Mehra, the respondent on the ground that she did not agree to the arbitration by Mr. Rajiv Sawhney, but nevertheless it was signed by the petitioner and furnishes a vital backdrop to the present proceedings. This draft agreement also shows that not only the estate but the entire movable and immovable were to be divided 50 per cent to each sister including the family owned companies. The draft agreement also referred to the arbitrator, Brig. S.M. Nanda as an arbitrator and, therefore, to confine his role by virtue of the agreement dated 21st June 2003 to that of the valuer is not possible.

13. Another vital document which confirms the offer made by the respondent on 9th August 2003 in response to the letter dated 28th July 2003 of the arbitrator asking them to have two lots of the property of estate and mark them as lot A and B. Both the parties were asked to make the lots but the response was only given by Ameeta Mehra who prepared the lots. Significantly the way forward proposal of 7th November 2003 signed by both the petitioner and the respondent is crucial and reads as follows:

'WAY FORWARD'

Admiral Nanda had prepared an award for distribution of assets under the terms of the Agreement signed by Ameeta and Devika Mehra on 21st June, 2003 authorising Admiral Nanda to make an award.

There was a difference of opinion in the valuation of the Gurgaon real estate and the horse breeding business.

The valuation of the Gurgaon land has since been done by Admiral Nanda, through a reputed International real-estate company.

The valuation of the horses has also been done by Admiral Nanda through an authorised valuer.

Following this both DM and AM have agreed on the following way forward and deadline dates:

ALT 1

A bidding process is initiated between AM and DM for the horses. The highest bidder will win. Land in Pataudi and Jhundsarai, Gurgaon, Bijwasan, and Bhora Kalan will be as per proposal (attached). If this alt is accepted the bidding will take place on 28th Dec.

ALT 2

AM has prepared 2 lots and given DM the option to select either lot. DM agrees that the lots are fair and equitable.

DM has asked for time until next week, i.e. 14 Nov 03 to give her decision as to which of the two aforesaid alternatives is acceptable.

The entire process must be completed before end of Dec 2003, failing which Adm Nanda shall give his award which would be acceptable to both as final and binding

Other movable and immovable assets will be divided 50:50.

Accepted on 7 Nov 2003.

Ameeta Mehra Devika Mehra

PROPOSAL ATTACHED TO MEMO DATED 07 NOV 03

Everything to be divided 50/50 as follows

Horses to be bid for by AM and DM starting at a reserve price of Rs.13 Cr

Pataudi/Jhunsarai to be divided 1 each and whoever gets the horses will get the second land on lease

VV and Rangpuri will be divided 1 each

LF to be sold and proceeds divided 50/50

Bijwasan to be divide 50/50

Gurgaon to be released from common pool, sold and the profits divided 50/50

All transfers after 2001 to be reversed

Everything else to be divided 50/50

sd/-

Devika Mehra

7th Nov 03'

14. The said letter clearly shows that Devika Mehra had noted the lots have been prepared and noted further that the lots were fair. This also showed that the division was not confined to the estate of the parents but comprised all the other properties and in any event whatever was the effect of the original agreement dated 21st June 2003 subsequent correspondence and conduct of the parties show that the arbitration was not confined to the estate of the deceased parents but included all assets of both sisters. In this letter she refers to the arbitrator giving his award and refers to the valuation by expert of the real estate and stud farm business. No objection had also been raised by Devika to the valuation of the

2 valuers being unfair. This also demonstrated that the award was to be given by 31st December 2003. By the said letter Devika had written that her proposal about the bidding proposal as per alternative (1) suggested by her in her way forward dated 7th November 2003. The agreement dated 21st June 2003 reads as follows:

'Memo of Agreement

AGREEMENT BETWEEN AMEETA MEHRA AND DEVIKA MEHRA REGARDING DIVISION OF THE ESTATE OF THEIR PARENTS MAJOR P.K. MEHRA AND MRS. VEENA MEHRA AND SISTER RADHIKA MEHRA.

Being the only surviving legal heirs of our parents and our sister, and with the object of upholding the family name and to maintain peaceful, happy and an cordial relationship between ourselves and to give effect to the wishes of our late parents, we confirm that we have agreed as follows:-

1.The entire estate of our parents and our sister comprising of movable and immovable properties shall be divided between us on a 50:50 basis.

2.For the purpose of securing the fair and equitable division of the estate between us we hereby appoint our Grandfather Admiral S.M. Nanda to take all divisions in that respect to bring about the division of the estate between us. He will be fully entitled to take the advice of our uncle Mr. Suresh Nanda.

3.Each of us agrees to extend full cooperation and assistance to our grandfather and uncle in establishing the fair values of assets. We both agree and undertake to promptly provide full information as is available with respect to all matters and to facilitate the completion of the distribution of the estate.

4.As they are aware of everything, we request that a quick decision be taken-preferably not later than 31st July 2003.

5.We both agree that the decision and directions of our Grandfather shall be final and binding on both of us and we shall not have the right to challenge on question the same. This power is personal to our grand father and uncle (Suresh) and not for anyone else.

We both have full confidence that our Grandfather will resolve all matters fairly. We, therefore, request our Grandfather to accept this appointment.

Signed on this 21st day of June 2003 at New Delhi.

Sd/- sd/-

(AMEETA MEHRA) (DEVIKA MEHRA)

Witnesses:

1.ALOK SHARMA sd/-

2.SHWETA RAZDAN sd/-

15. A bare reading of the agreement dated 21st June 2003 may lend some substance to the plea of the petitioner because this only refers to the estate of the deceased parents and deceased sister Radhika Mehra. However, if the surrounding circumstances and the preceding correspondence and even events subsequent agreement dated 21st June 2003 as also subsequent correspondence between the parties, and their conduct is taken into account, it is clear that the word estate was not used in the agreement dated 21st June 2003 in the restricted manner suggested by the petitioner but meant the entire family assets and the family owned companies. There is further substance in the plea of the respondent that even if initially on 21st June 2003 agreement was construed to be confined to the estate as suggested by the petitioner, nevertheless the parties by their subsequent conduct and correspondence have expanded its scope. The plea that the arbitrator was a mere valuer is contradicted by the letter dated 6th January 2004 written by the petitioner. This letter while making allegations of bias against the arbitrator refers to his role in the partnership in stud farm.. The significant words are that it was stated by the petitioner ' I am thereforee cancelling all authorities given to you to act as decision maker or arbitrator or take any decision relating to my interests in the estate of my parents.' The following paragraph in the said letter reiterate the state of mind of the petitioner:

' Just yesterday I came to know for the first time that you are a partner with my sister in a firm called Greentree Stud, where she transferred 3 mares from Usha Stud after my parents' death in 2001. The people in the office were unable or unwilling to show me any documents. I visited the Ministry of Agriculture, and obtained from them a copy of the partnership deed between you and my sister. No doubt this partnership was made during the lifetime of my parents, but on their death it was agreed that all companies and firms would be put in the joint names of my sister and myself, then why wasn't my name substituted for years in this partnership? And why was I not informed about this partnership?

Baradaddy, there are far too many question marks in the way you have conducted affairs, and I cannot any, longer ignore your biased attitude in favor of my sister, I am thereforee cancelling all authorities given to you to act as decision maker or arbitrator, or take any decisions relating to my interests in the estates of my parents. I do not authorize you to take any decision, and please, please don't compel me to challenge your actions in court, which I will if you do not withdraw immediately.'

16.The aforesaid letter clearly shows that Brig. Nanda was treated by the petitioner as an arbitrator and not as a mere valuer and the way the word 'estate' was used it was based on the premise that all companies and firms of the family were referred to by Devika. Thus the petitioner in this view of the matter cannot rely upon the meaning of 'estate' as per the decision of the Supreme Court in P. Leelavathamma vs CEO : [1991]188ITR803(SC) This letter has been termed by the respondents to have been only written after the award was announced by the arbitrator and a belated back dated attempt on the part of the petitioner to allege bias after coming to know of the terms of the award. on 31st December 2003. I am not dealing with the plea raised on behalf of the respondent that this ground not having been urged before the arbitrator and, thereforee, the petitioner Devika is precluded from raising this ground for the reason that this being a family dispute resolved by the grand father and the decision not having been found acceptable by one of the sisters, I considered it essential to have a broad look at the contents of the award within the scope of Section 34 of the Act to ensure that the award did not suffer from any infirmity and was not legally amenable to challenge under

Section 34 of the Act.

The fact that the two lots were prepared by Ameeta which include not only the estate of the parents, all the family assets and the family owned companies clearly show that the estate was never understood by both the parties to have a restrictive meaning but referred to the arbitration encompassing the entire properties owned or inherited by both the sisters. The contents of the two lots which included all the assets of the sisters showed that both sisters understood the scope of the arbitration proceedings to include all their assets. Reliance was placed upon the judgment of the Hon'ble Supreme Court by the petitioner in K.K. Modi vs K.N. Modi : [1998]1SCR601 to contend that the arbitrator was merely a valuer and not an arbitrator. This plea, in my view, cannot be sustained in light of the correspondence already noticed and the findings arrived that the 21st June, 2003 agreement certainly constituted an arbitration agreement and the subsequent conduct of and correspondence exchanged between the parties clearly demonstrated that it encompassed the entire property owned prior or after the parents' demise by the sisters. Similarly the decision of the Supreme Court in Mallikarjun vs Gulbarga : (2004)1SCC372 regarding what constitute an arbitration agreement cannot be relied upon by the petitioner as the said judgment states that a participant in arbitration proceedings who consciously submits to the jurisdiction of the arbitrator cannot raise objection at the stage of the execution of the award. In so far as reliance upon K.K. Modi's case(supra) is concerned, the following tests were laid down:-

'17. Among the attributes which must be present for an agreement to be considered as an arbitration agreement are:

(1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement.

(2) That the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration.

(3) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal.

(4) that the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides.

(5) that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,

(6) the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.'

It is evident that the above tests stand fully satisfied in the present case as the correspondence and the documents and the conduct of the parties discussed in this judgment clearly shows that the arbitrator's decision was binding, was based upon consent of his grand daughters, determined substantive rights in a just and reasonable manner and the award was meant to be binding and enforceable in respect of an existing dispute. Both the parties were given opportunity to put forth their point of view. Thus I am satisfied that in view of the findings recorded in the foregoing paragraphs of the judgment, there was a dispute in existence between the parties. The parties appointed their grandfather to act as an arbitrator and to act fairly which clearly showed that he was under a duty to act judicially and since I find that the award to be sustainable, I am satisfied that the arbitrator acted fairly and had given adequate opportunities to both the parties to present their case. The correspondence between the parties and the arbitration agreement clearly demonstrated that both the parties agreed that the decision should bind them. In fact it was clearly stated that the decision and directions of the grandfather were held to be final and binding and both the sisters stated that they shall not have any right to challenge or question the award. Thus I am satisfied that the tests laid down in the aforesaid judgment of K.K. Modi (supra) laying down the tests to determine whether an arbitration agreement existed between the parties were fully satisfied.

18. So far as the plea relating to division of the assets of the company and the plea that the arbitrator could not deal with it as it already had been divided between the two sisters is concerned, I am of the view that both sisters had agreed to division of all the assets as revealed from the above noted correspondence and, therefore, this plea is not open to be raised by the petitioner. In any event in my view this plea is not capable of being raised under Section 34 of the Act.

19. In so far as valuation is concerned in a family property, the grand father had taken the help of two expert valuers so as to arrive at a valuation of the property and its consequent division in the ratio of half and half. The assets are family owned companies and the grand father had some role to play in the starting of the Usha Stud Farm Company by donating 4 acres of land by way of the family holding. When this division is based on the valuation by the independent valuers it is not open to this court under Section 34 of the Act to sift the evidence and to sit in appeal over every factor comprising the valuation. Furthermore, the petitioner herself had by appending her signatures to Way Forward acknowledged that the two experts had valued the horse business and the estates.

20. The scope of interference with the arbitrator's award is well settled by the following judgments:-

(a) DDA Vs Sahdev Brothers : 97(2002)DLT902 when while relying on Sudarsan Trading : [1989]1SCR665 the Division Bench of this Court held that the Court cannot substitute its own evaluation of the conclusion of law for that of the arbitrator and even a possible if not correct view cannot be interfered with by the Court.

(b) Briendra Nath Vs Mayank : AIR 1994 SC2562 where it was held that even if the shares under the award were unequal, the award could not be challenged.

(c) Gian Chand Totu Vs Subhash Chand Kathuria judgment, passed in FAO(OS).No.1/2004 dated 16th February, 2004 where a Division Bench of this Court held that interference with awards on grounds of public policy is possible only if the award is not only patently illegal, but the illegality must go to the root of

the matter.

In my view none of the tests laid down by the above judgments justify interference with the impugned award.

21. During the course of hearing one of the pleas which the petitioner had raised was that out of farm land allotted to her share in Rangpuri and valued at Rs.5.50 crores had a flawed title. The valuation of the property at Rangpuri land which was allotted to the respondent was said to be depressed because of the agreement to sell with one of the senior advocates of the Delhi High Court which had the potential of a prolonged litigation for the recipient. Mr. Kapur on behalf of the respondent made an offer by which he was prepared to pay according to the valuation in respect of the said property to Devika to acquire the Rangpuri property for the respondent so as to allay her grievance on this score and in such an event a risk, if any, would be of the respondent. The learned counsel for the respondent was asked whether he stands by such an offer and stated that he stands by such an offer in case this court upholds the award.

22. Accordingly I am of the view that there is no merit in the objections raised under Section 34 of the Act by the petitioner and the award dated 31st December 2003 deserves to be sustained. However the offer made by the learned counsel for the respondent in respect of the Rangpuri property shall be responded to by the petitioner within a week from today failing which it will be free to the respondents to withdraw such an offer.