IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: June 23, 2021

\+ O.M.P. (COMM) 71/2019, I.A. 2767/2019

M/S PRAGYA ELECTRONICS PVT.LTD.

..... Petitioner

Through: Mr. Rohit Goel Advocate

versus

M/S COSMO FERRITES LTD. & ANR.

..... Respondents

Through: Mr. Bharat Chugh & Mr. Sujoy Sur, Advocates

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

I.A. 2767/2019

This application has been filed by the petitioner for urging additional grounds. For the reasons stated in the application, the same is allowed.

The application is disposed of.

O.M.P. (COMM) 71/2019

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act', for short) impugning the Award dated April 13, 2016 with the following prayers:

"In view of the above said facts and submissions, it is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to:

a). call for the arbitral record of the arbitration

proceedings from the Respondent no.2 SOLE ARBITRATOR JUSTICE V.P. BHATNAGAR (RETD.) OF THE ARBITRATIONPROCEEDINGS TITLED AS "M/S COSMO FERRITES LTD. VS. M/S PRAGYA ELECTRONICS PVT. LTD.SHRIRAM TRANSPORT FINANCE CO. LTD. VS. GULWANT SINGH & ANR.

b). set aside, reverse and quash the arbitration Award dated 13.4.2014 passed by the Ld. SOLE ARBITRATOR JUSTICE V.P.BHATNAGAR (RETD.) OF THE ARBITRATION PROCEEDINGS TITLED AS "M/S COSMO FERRITES LTD. VS. M/S PRAGYA ELECTRONICS PVT. LTD.SHRIRAM TRANSPORT FINANCE CO. LTD. VS. GULWANT SINGH & ANR.

c). pass any other or further or relief which this Hon'ble Court may deem fit and proper in favour of the petitioner and against the Respondent."

2. The chronology of events leading to the matter being heard/listed before this Court is as follows. The present petition was initially filed before the District Court, Saket in the year 2016, and vide order dated January 03, 2017 the Additional District Judge-5, Saket Courts noting the nature of the dispute involved in the petition is commercial with a value of Rs.5,15,54,292/-, and in view of *The Commercial Courts, Commercial Division & Commercial Appellate Division of High Courts Act, 2*015, the same falls within the jurisdiction of Commercial Courts of this Court, directed the parties to appear before the learned District and Sessions Judge. When the parties appeared before the learned District and Sessions Judge, the petitioner sought adjournment on the ground that a Transfer

Petition, being TP(C) 169/2019, was pending adjudication before this Court as a Section 34 petition filed by the respondent was being proceeded against in this Court. However, since the Section 34 petition filed by the respondent being OMP (COMM) 350/2016 was disposed of on May 25, 2017, the Transfer Petition (TP(C) 169/2016) was disposed of as infructuous vide order December 5, 2017.

3. The petitioner herein, thereafter pressed his application under Order 7 Rules 10 & 10A before the learned District Judge. Vide order dated January 23, 2019 the learned District Judge noting the submission of the counsel for the respondent that *the petitioner has not conducted the matter with due diligence and good faith* and also noting that the question of due diligence not being within the jurisdiction of the said Court placed this matter before the Registrar General of this Court.

4. This matter was thereafter listed before the Registrar (Original) as per the direction of the Registrar General vide order dated January 31, 2019. The Registrar (Original) noting the chronology of the proceedings and the submission of the Counsel for the respondent that the petition is barred by limitation and the registry should at the first instance calculate the delay to which the counsel for the petitioner submitted that the petition being originally filed in District Court and it was not for the Registry to look into the aspect, the Registrar (Original) directed the matter to be placed before the appropriate Bench.

5. The respondent is the manufacturer and the petitioner is the distributor of *Ferrites* and it is the admitted case of the parties that petitioner and respondent entered into a non-exclusive Distributorship Agreement dated April 01, 2005 ('Distributorship Agreement', for short). Subsequently, the parties entered into

annual agreements for the years 2007, 2008 and 2009. In terms of the Distributorship Agreement, the petitioner placed purchase orders on the respondent for supply of goods, which in turn were sold by the petitioner to its customers.

6. The brief facts that led to the invocation of arbitration and the adjudication of disputes by the Arbitrator are as follows. It is respondent/claimant's case that it supplied goods to the petitioner against various purchase orders and raised invoices accordingly. The respondent claimed that the petitioner had failed and neglected to make payments against the invoices for sums aggregating ₹54,14,934/-, which became due and payable. The petitioner thereafter had issued nine cheques, four cheques dated June 30, 2009 and the remaining five dated July 07, 2009 - aggregating ₹33,19,514/- as part payment for goods supplied; however, the said cheques were dishonoured on presentation. Before the Arbitrator, whilst the respondent claimed that the said cheques were issued by petitioner in discharge of its liability, the petitioner had disputed the same. According to the petitioner, the said cheques were issued at the instance of respondent only as a security for any payment that may become due. In addition to the claim for unpaid invoices, the respondent also raised claims for non-supply of 'C' Forms and the consequent liability of sales tax before the Arbitrator.

7. Refuting the claims made in the claim petition before the learned Arbitrator, the petitioner filed its reply and it was averred that the parties were having good business relations for the last 14-15 years, however the petitioner started receiving complaints from its buyers regarding breakage of soft ferrite components. Even though the respondent assured to replace the broken goods with new ones, it failed to do so. Further, it was averred that at

various times through communications it was admitted by the respondent that they had directly contacted the buyers, bypassing the petitioner, which was the exclusive distributor of respondent's products. On the cheques issued by the petitioner, it was stated that the same were provided on the request of the General Manager (Marketing) of the respondent on June 26, 2009 for depicting the same in the books of Accounts for quarterly ending for security purposes as to cover the exposure limit as per Distributorship Agreement and on the assurance that they shall not be presented without consent of the petitioner. The cheques were not returned even after repeated requests of the petitioner, thereby forcing the petitioner to write a letter to its Bank, not to honor the said cheques. On merits also the claims of the claimant/respondent herein were denied.

8. It is noted that after the completion of the pleadings the Arbitrator framed in as much as 23 issues. The Arbitrator found that petitioner had placed purchase orders for the goods in question. Respondent had supplied goods against the aforesaid purchase orders and had raised invoices for the same. The Arbitrator had also taken note of an e-mail dated July 10, 2009 sent by respondent to the petitioner which was placed on record by petitioner. The said e-mail recorded that a total sum of Rs. 54,14,934/- was outstanding against supply of goods made till June 30, 2009. According to the learned Arbitrator, undisputedly, the petitioner had received the said e-mail and the contents of this e-mail had not been denied in contemporaneous correspondence. After considering the evidence and material on record, the learned Arbitrator concluded that a sum of ₹54,14,934/- was recoverable by the respondent/claimant from the petitioner against its outstanding dues. However, the Arbitrator also held

that petitioner was entitled to credit, for sum aggregating ₹13,19,713/-. ₹1,14,279/- on account of commission payable for certain sales made to M/s COILS in the month of June 2009 and a further sum of ₹12,05,434/- as 'turnover discount' on sales from April 2009 to June 2009. The petitioner was also held entitled to credit for ₹4,02,798/- on account of commission payable to the petitioner on sales upto August 28, 2009. After giving credit for the aforesaid sums, the Arbitrator held that a net amount of ₹36,92,423/- was recoverable by the respondent/claimant from the petitioner plus a sum of Rs.1,85,000/- towards the arbitration fee and actual expenses) along with interest @ 12.25% p.a. on Rs.1, 85, 000/-.

9. Although, the Arbitrator found that respondent/claimant was entitled to recover the aforesaid amount, it rejected respondent/claimants claim for interest at the rate of 12.25% p.a. on the said awarded sum. This however was challenged by the respondent in Section 34 petition being OMP (COMM) 350/2016 and the coordinate bench set-aside the impugned award to the extent of allowing 12.25% p.a from the date of invoices till the date of the impugned award.

10. It is the case of the petitioner in the present petition and contended by Mr. Rohit Goel that the impugned Award is liable to be set aside as the Award does not bear the signature of the Arbitrator on each and every page and even the Award has been typed in three different fonts on three different types of sheets. In this regard he stated that the impugned Award was in total violation of Chapter XI of the CPC which refer to Judgments and Decrees.

11. Mr. Goel submitted that as per the Distribution Agreement, no conciliation of accounts has been claimed by the

the respondent/claimant and that the cheques were taken on June 29, 2009 in advance with an understanding not to present them for encashment without prior intimation to the petitioner.

12. It is submitted by Mr. Goel that the reasoning mentioned for deciding issue Nos.1, 2 and 14 framed by the Arbitrator being, *(1) Whether the claimant supplied soft ferrites components worth Rs. 54,14,934/- to the respondents and the said amount has become payable ? OPC; (2) Whether the respondents issued 9 cheques totaling Rs. 33,19,514/- in favour of the claimant in discharge of their part liability? OPC; (14) Whether the nine cheques were issued for security purpose in good faith, as alleged ? If so, its effect. OPR,* were never addressed or discussed. It is also submitted that the Arbitrator did not appreciate the fact that the respondent failed to produce complete and authenticated/stamped statement of accounts on record. It is also submitted that the Arbitrator failed to appreciate the difference in the amount of claim, as at one place the respondent had claimed Rs. 40 lacs approx. and on the other hand it claimed Rs. 54,00,000/- in the claim petition, which itself is clear that the respondent has manipulated its record. Further, it is submitted that the learned Arbitrator accepted the account statement at the time of final arguments without giving any opportunity to the petitioner to rebut the contents of the account statement. Moreover, there was never any conciliation of the accounts.

13. It is also submitted that in respect of Issue No.10, being, *Whether the claim petition has been filed, signed and verified by duly authorized persons? If so, its effect? OP Parties.*; no resolution or minutes of meeting, in favour of L.D Sharma, CW-1 was filed on record authorising him to file claim petition and therefore he had no authority to appear and depose in the

arbitration proceedings. According to Mr. Goel, the finding of the Arbitrator that the CW-1 was competent to appear in the arbitration proceedings because CW-1, L.D Sharma was appearing in another matter for respondent is belied.

14. It is also submitted by him that a perusal of the letter dated July 02, 2009 sent by the petitioner to respondent (**Ex. RW-85)** make it clear that the petitioner has sent the same stating that the cheques should not be presented as the same were given for security purpose to be used as cushion/buffer for discussion purpose only and the petitioner through the said letter has asked the respondent to resolve the issues in respect of cross-territory sales, rejection, breakage, commission etc.

15. It is also submitted by him that the Arbitrator has wrongly quoted question nos. 28 and 85 of the cross-examination of the petitioner's witness in respect of issue Nos. l, 2 and 14. The cargo receipts were not proved by the Respondent. The ledger account **Ex.C-110 and C-111** are incomplete and manipulated one and the respondent failed to prove the same as per law.

16. It is submitted by him that the Arbitrator has wrongly interpreted the Clauses 3, 4 and 13 of the annual agreement dated April 13, 2009 and gave contrary findings, passing the impugned award in a pre-conceived manner without application of mind.

17. Further, it is also submitted by him that the Arbitrator did not consider the hand written annual agreement dated April 13, 2009.

18. That apart, it is submitted by Mr. Goel that the respondent never supplied goods vide bill dated December 28, 2015 to the petitioner and that the amicable settlement, as stated by the Arbitrator never happened between the parties, which was to cover up the contents of clause 8 and 7.2 of the Distributorship

Agreement.

19. It is also submitted by Mr. Goel that the Arbitrator has wrongly quoted the questions to the petitioner's witness and have misread the mails. According to him, the Arbitrator has also failed to appreciate that one Rajesh Srivastava did not have any power to terminate the Distributorship Agreement and that the Arbitrator failed to appreciate that there is no reference of termination of distributorship in any of the mails. It is also his submission that Arbitrator has failed to appreciate the notice Order XII Rule 8 CPC issued by the petitioner to the respondent.

20. Further, it is also submitted by him that the Arbitrator wrongly came to the conclusion that the respondent did not send any reply to the email dated July 10, 2009 **(Ex.R-66)** and this in itself is sufficient to show that the Arbitrator acted in a biased manner.

21. On the finding of the Arbitrator that the petitioner has not substantiated its counter-claim, it is stated by Mr. Goel that Ferrites are packed in boxes and the unit of weighing it is in kilograms and it was owing to the same that the petitioner calculated the same in terms of kilograms and a lumpsum figure was given in the counter-claim and the Arbitrator rejected the same without any reason or evidence appraisal.

22. On the stand of the respondent that the petitioner should have claimed insurance for any breakage of materials supplied, it is stated by Mr. Goel that there was no insurance policy to cover breakage of materials.

23. In support of his submissions that the present petition warrants interference by this Court to set-aside the impugned Award, Mr. Goel has relied upon the following judgments:

1. NHAI v. M/s. Progressive MVR (JV), AIR 2018 SC

1270;

2. ***Universal Land and Finance Company v. Pearl Developers Pvt. Ltd., 2018 V AD (Delhi) 679;***
3. ***The Board of Trustee for Theport v. Engineers, 1996 1 SCC 516;***
4. ***Union of India v. M/s. Varindera Construction Ltd., AIR 2018 SC 1270;***
5. ***North Delhi Municipal Corporation v. Ravi Builders, 2018 VII AD (Delhi) 184;***
6. ***Indian Oil Corporation Ltd. v. Institute of GEO Inforomtis Pvt. Ltd., 2018 VIII AD (Delhi) 148;***
7. ***Parveen Gupta v. Star Share and Stock Brokers Ltd., 2018 VII AD (Delhi) 525;***
8. ***Jaiprakash Associates Ltd. through its Director v. Tehri Hydro Development Corporation India Ltd., Civil Appeal No. 1539 of 2019***

24. On the other hand, Mr. Bharat Chugh, learned counsel appearing on behalf of respondent stated that the respondent/claimant's claims were rightly allowed by the Arbitrator and the impugned Award should be sustained. According to him, it is an admitted fact that the petitioner purchased soft ferrites worth Rs.54,14,934/- from the respondnet uptil June 2009 against purchase orders (marked **as Exhibits C-5 to C-10**) for which invoices were also duly raised by the respondent and that the receipt of the materials were duly admitted by the petitioner's witness, RW-1 during cross-examination.

25. It is also stated by him that as per Clause 7 of the Distributorship Agreement, the credit exposure limit of the petitioner was to the tune of Rs. 30 lakhs and the petitioner had to

its name dues to the tune of Rs. 54 lakhs. No payment of the outstanding dues were made even after various requests vide communications dated June 17, 2009, June 21, 2009 and June 24, 2009. Thereafter, it was towards the discharge of the part liability of the petitioner that it issued 9 cheques dated June 30, 2009 and July 7, 2009, for a total amount of Rs. 33,19,514/-. It is stated by Mr. Chugh that the cheques were issued towards the discharge of crystallized liability of the petitioner. The cheques dated June 30, 2009 and July 7, 2009 were dishonoured on July, 2009 and July 14, 2009 respectively and according to him the learned Arbitrator has rightly construed that the petitioner by not disputing/replying the respondent's communication dated July 10, 2009, wherein the respondent claimed the exact outstanding liability after the dishonour of cheques, to be an admission on its part.

26. It is submitted by Mr. Chugh, when the communication of the petitioner dated July 02, 2009 intimating desire to discontinue as the distributor of the respondent was made, the respondent was constrained to terminate the Distributorship Agreement in accordance with Clause 8 of the said agreement on August 28, 2009. On the objection of the petitioner that Rajesh Srivastava was not eligible to terminate the Distributorship Agreement on behalf of the respondent, it is stated by Mr. Chugh that he was the agreed SPOC as per Article 1 of the Annual Agreement dated April 13, 2009.

27. It is stated by Mr. Chugh that the Arbitrator has rightly deducted, by reading the Annual Agreement with e-mail dated July 10, 2009, from the total liability of the petitioner, a) Cosmo's sales to M/s Coil for June, 2009 (Rs. 12.74 lacs approx.), b) TDS on those sales (Rs. 1,27,401), c) Deduction of Rs. 4,02,798/- which was due to the Petitioner on account of the commission on

sales to Coil Electronics up to August 28, 2009. In fact, the commission of Rs. 4,02,798/- due and payable to the petitioner, was also conceded by the respondent by way of an affidavit filed by CW-1, L.D. Sharma, which was undisputed by the petitioner. It is also submitted by Mr. Chugh that the competency of the CW-1 as the Authorized Representative was also dealt with by the Arbitrator by relying upon various judgments.

28. It is also stated by Mr. Chugh relying upon paragraph 49 of the impugned Award that the termination of the Distributorship Agreement was valid in law and on facts.

29. On the learned Arbitrator disallowing the counter-claim of the petitioner, it is stated by Mr. Chugh that no break-up whatsoever was provided by the petitioner for its claim of Rs. 2.5 crores under various heads and the Arbitrator rightly disallowed the same as the same were not substantiated and no evidence was lead to prove the same.

30. On the claim of the petitioner that defective goods were supplied by the respondent, it is stated by Mr. Chugh that no particulars were provided by the petitioner, despite opportunity, as can be seen from the answers to Q.107 by RW-l, Sharad Gupta, and Q.12 by RW-2, Satish Sharma. Moreover, the goods being insured, there is no evidence that any claim whatsoever towards breakage was ever claimed by the petitioner. He stated that all these aspects were rightly considered by the Arbitrator.

31. It is submitted by Mr. Chugh, the claim of the petitioner that respondent dealt directly with the clients of the petitioner bypassing the Distributorship Agreement is fallacious. In support of his submission he has relied upon Clauses 3.1 to 3.5 of the Distributorship Agreement to state that the respondent was allowed to deal with the petitioner's customers barring customers

who were introduced to the respondent by the petitioner (Article 4 of the Annual Agreement), for which it had to pay 10% commission, which claim has already been granted to the Petitioner by the Ld. Arbitrator.

32. Further, it is submitted by Mr. Chugh by relying upon the minutes of the meeting that all the issues between the parties were addressed, settled, and finally resolved in a meeting on April 13, 2009. He stated, even the Annual Agreement was executed wherein certain amounts payable to the petitioner in connection with TOD and commission were factored in by the Arbitrator, as depicted in paragraph 31 of the impugned Award.

33. On the jurisdiction of this Court in interfering with the findings rendered by the learned Arbitrator in a petition under Section 34 of the Act, Mr. Chugh has relied upon the following judgments:

1. ***Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49;***
2. ***Swan Gold Mining Ltd v. Hindustan Copper Ltd., (2015) 5 SCC 739;***
3. ***Sudarshan Trading Co. v. Govt. of Kerala, AIR 1989 SC 890;***
4. ***MMTC v. Vedanta, 2019 SCC Online SC 220.***

34. Having heard the learned counsel for the parties and perused the record, at the outset, I intend to deal with the submission of Mr. Rohit Goel that the award passed by the learned Arbitrator is liable to be set aside as it is in violation of Chapter XI of the CPC which deals with Judgments / Decrees; it does not bear signatures on each and every page and the award is typed in three different fonts on three different types of sheets.

35. In this regard, I may state that reference as made to

Chapter XI is an error. It appears reference was intended to Part I of the CPC wherein Section 33 refers to a *Judgment* and a *Decree*. Mr. Goel has not qualified his submission as to how the Award is in violation of that provision. In so far as his contention that the learned Arbitrator has not signed each and every page of the Award, he has not pointed out any provision which contemplates so. Even the plea of Mr. Goel that the award is typed in three different fonts shall not make the award invalid. Again he has not submitted any rule / law in support of his submission. This plea of Mr. Goel is rejected.

36. In so far as the submission of Mr. Goel, on the competency of authorized representative of the respondent namely Laxmi Dutt Sharma (L.D Sharma) (CW1) to sign, verify and file the claim petition in the absence of any resolution or minutes in his favour is concerned, I may refer to the reasons given by the learned Arbitrator to determine the competency of L.D. Sharma to maintain the claim petition, the same being as under:

> 1. He has the power of attorney dated November 6, 2007, Ex.C-4 in his favour.
>
> 2. The contents of power of attorney are wide enough and it authorized him to maintain a claim petition.
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> 3. The power of attorney (Ex.C-4) was executed by Ambrish Jaipuria, who was Executive Director of the respondent company in 2004 or 2005.
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> 4. The power of attorney contains a note that Board of Directors had authorized Ambrish Jaipuria to execute the said power of attorney.
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> 5. He was prosecuting legal matters on behalf of the respondent company.

6. In view of the Judgments in the case of ***United Bank of India v. Naresh Kumar (1996) 6 SCC Page 660***; ***MTNL v. Sushma Sharma, 2010 SCC Online Delhi 4290***; ***M/s. Sangat Printers Pvt. Ltd. v. M/s. Simpy International Ltd. (2012) SCC Online Delhi 299***; ***Seritec Electronic Pvt. Ltd. v. Computer Peripherals Solutions (2014) SCC Online Delhi 810***; L.D. Sharma has the competency.

37. I find, Mr. Goel has not made any submission to contradict the conclusion of the learned Arbitrator on this issue. He has not contradicted the contents of the power of attorney dated November 6, 2007, that they are not wide enough to confer power on L.D. Sharma to file the claim petition. He has also not contradicted the competency of Ambrish Jaipuria who as per the note in the Power of Attorney was authorized by the Board of Directors. It is also not disputed that L.D. Sharma was representing the respondent company in other court proceedings. That apart, learned Arbitrator has rightly relied upon the Judgment of the Supreme Court in the case of ***United Bank of India (supra)*** wherein in Para 10, the Supreme Court has *inter alia* held that on a reading of Order VI Rule 14 together with Order XXIX Rule 1 CPC, it would appear that even in the absence of any formal letter of authority or power of attorney having been executed a person referred to in Rule 1 of Order XXIX by virtue of the office which he holds, can sign and verify the pleadings on behalf of the corporation. Additionally, *de hors* Order XXIX Rule 1 of CPC, a company is a juristic entity, it can duly authorise any person to sign the plaint or the written statement on its behalf, which would be regarded as compliance with the provisions of Order VI Rule 14 CPC. That apart,

Supreme Court in para 13 has also held that there is a presumption of valid institution of a Suit once the same is prosecuted for a number of years. The relevant paragraphs read as under:

> *"11. The courts below could have held that Sh. L.K. Rohatgi must have been empowered to sign the plaint on behalf of the appellant. In the alternative it would have been legitimate to hold that the manner in which the suit was conducted showed that the appellant bank must have ratified the action of Sh. L.K. Rohatgi in signing the plaint. If, for any reason whatsoever, the courts below were still unable to come to this conclusion, then either of the appellate courts ought to have exercised their jurisdiction under Order 41 Rule 27(1)(b) of the CPC and should have directed a proper power of attorney to be produced or they could have ordered Sh. L.K. Rohatgi or any other competent person to be examined as a witness in order to prove ratification or the authority of Sh. L.K. Rohatgi to sign the plaint. Such a power should be exercised by a court in order to ensure that injustice in not done by rejection of a genuine claim.*
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> *12. The Courts below having come to a conclusion that money had been taken by respondent No. 1 and that respondent No. 2 and husband of respondent No. 3 had stood as guarantors and that the claim of the appellant was justified it will be a travesty of justice if the appellant is to be non suited for a technical reason which does not go to the root of the matter. The suit did not suffer from any jurisdictional infirmity and the only defect which was alleged on behalf of the respondents was one which was curable.*
>
> *13. The court had to be satisfied that Sh. L.K. Rohatgi could sign the plaint on behalf of the appellant. The suit had been filed in the name of the appellant company; full amount of court fee had been paid by the appellant bank;*

documentary as well as oral evidence had been led on behalf of the appellant and the trial of the suit before the Sub Judge, Ambala, had continued for about two years, it is difficult, in these circumstances, even to presume that the suit had been filed and tried without the appellant having authorised the institution of the same. The only reasonable conclusion which we can come to is that Sh. L.K. Rohatgi must have been authorised to sign the plaint and, in any case, it must be held that the appellant had ratified the action of Sh. L.K. Rohatgi in signing the plaint and thereafter it continued with the suit"

(Emphasis Supplied.)

38. I find that the law laid down by the Supreme Court is satisfied in this case as the litigation between the parties had, commenced in the year 2010, when Arb. Pet. No. 201/2010 was filed by the respondent company and the parties are in litigation since then and on the date of the Award six years had already elapsed.

39. In fact, I find that in ***MTNL (supra)***, this Court on the basis that the suit was being prosecuted for two years held the same is a validly instituted suit.

40. It is reiterated that learned Arbitrator is justified in his conclusion on the competency of L.D. Sharma to file the claim petition on behalf of the respondent Company. Hence, this plea of Mr. Goel is rejected.

41. It was also the submission of Mr. Goel that learned Arbitrator on the claim of the respondent for Rs.54,00,000/- on which three issues were framed, i.e., issue nos. 1, 2 and 14, while awarding the amount of Rs.36,92,423/- has not discussed or addressed the said issues. According to him, in the absence of a complete, authenticated and duly stamped statement of account on record, the learned Arbitrator could not have granted the

amount. In fact, Mr. Goel has laid stress on the fact that respondent was not clear on the claim amount inasmuch as at one place it claimed Rs.40,00,000/- whereas in the claim petition, it is Rs.54,00,000/-, which according to him shows manipulation of record. Even the account statement submitted at the time of final arguments was accepted by the learned Arbitrator without giving an opportunity to the petitioner to rebut.

42. In this regard, I may state that the above three issues framed by the learned Arbitrator arose from the stand of the respondent that it had supplied soft ferrites components worth Rs.54,14,934/- which amount has not been paid by the petitioner herein.

43. It is also the case of the respondent that when the petitioner was informed that no supply would be made in future unless the previous dues were cleared, petitioner issued 9 cheques aggregating Rs.33,19,514/- towards discharge of their part liability. The said cheques on presentation were dishonoured and returned with a note *"payments stopped by the drawer"*.

44. The case of the petitioner before the learned Arbitrator was that it did not take delivery of goods to the tune of Rs.54,14,934/- and as such the said amount is not payable. It was also the stand of the petitioner that they started receiving complaints from the buyers regarding the breakage of soft ferrites components. Such complaints were brought to the notice of the respondent who assured that they would replace the breakage, but failed to do so.

45. As regards issuance of 9 cheques, petitioner's case was that Rajesh Srivastava, General Manager (Marketing) of the respondent visited the petitioner on June 29, 2009 and requested that the cheques were required as there was quarter ending and

the cheques had to be shown in the books of accounts. According to the petitioner, Rajesh Srivastava assured that the cheques would be kept for security purposes so as to cover the exposure limit. In other words, cheques were not issued towards part payment of the outstanding amount.

46. I may, at this stage, reproduce the relevant paragraphs of the award wherein the learned Arbitrator held that the amount of Rs.54,14,934/- is recoverable by the respondent from the petitioner:

> *26. The claimant's case is that the respondents sold soft ferrites (material) in the month of June 2009-10 against the purchase orders Exh. C-5 to C-10. RW-1 Sharad Gupta, during his cross-examination, has admitted while replying to Questions 28 and 85, these purchase orders having been placed by the respondents on the claimant. The supplies of the material against the above purchase orders were made and invoices Ex. C-11 to C-69 raised. RW-1 Sharad Gupta was confronted with these invoices during cross examination at Question 40 when it was put to him that the invoices in question were in response to the purchase orders placed by the respondents. His answer was evasive. He stated that it was difficult to confirm or deny the above suggestion, although he admitted while answering Questions 48 and 86 that the materials against the invoices were received. The claimant has also placed on record the cargo receipts of the transport courier at Exh. C-70 to C-79. A copy of the ledger account of respondents maintained by the claimant for the financial year 2009-10 has also been placed on record at Exh. C-110 and C-111 from pages 158 to 173.*
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> *27. The respondents have resorted to a bare denial of the outstanding arnount pertaining to the above supplies in their pleadings and also the counter-claim lodged by them. This is not sufficient to effectively rebut the formidable evidence adverted to above. It is also*

noteworthy that the respondents have not produced their own documents in regard to the above purchases. It is difficult to believe that they do not maintain such documents/accounts at all. If so, an adverse presumption does arise in the matter. This brings me to the e-mail dated 10.07.2009 at Exh. R-66 (Pages 139 to 140) sent by the claimant to the respondents. This document has been placed on the record by the respondents themselves and in para-1 thereof it has been stated that the total outstanding amount against the supplies till 30.06.2009 from claimant to the respondents comes to Rs. 54,14,934/-. The other contents of this e-mail are also important for deciding the disputes between the parties and will be taken up later on at the appropriate place. It would suffice to mention at this stage that the respondents sent no reply to the said e-mail and, therefore, in particular, did not challenge the correctness of the outstanding amount stated in para-1 thereof.

28. It is also not disputed that Rajesh Srivastava, General manager (Marketing) of the claimant visited the respondents on 30.06.2009 and collected the 9 cheques, the details of which has been given in para 4 of this Award. The claimant maintained that these cheques had been issued towards the discharge of the outstanding liability and that the amounts of the said cheques had been calculated against the invoices raised and even cash discount of 2.25% on cheques had been deducted. In this connection, the answer given to Question 72 by CW-1 Lakshmi Dutta Sharma may be referred to. it appears that the claimant had become quite insistent and demanded the payment repeatedly as on 30.06.2009 and continued to press for it but without any success. The claimant went ahead and presented the cheques to the bank for encashment but the respondents had stopped the payment through instructions in writing. This ultimately resulted in issuance of legal notice at Exh. C-127 under provisions of Section 138 of the Negotiable Instruments Act and some other court cases

which, strictly speaking, are not relevant as far as the present arbitration proceedings are concerned.

29. It has been denied by the respondents that the aforesaid cheques were issued towards the discharge of the outstanding dues although the factum of the issuance of the cheques in question has not been denied. The explanation given by the respondents in the matter is that the cheques were issued towards security, on the representation made by Rajesh Srivastava that the same were required to be shown in the Quarter Ending Accounts, cushion and as a buffer. The respondents have examined RW-2 Satish Sharma and RW-3 Sunil Kumar Gupta in support of their version. There is no need for me to go into the correctness of these pleas. This Tribunal is not concerned about the cheques having been not honoured because the same had been stopped for payment by the respondents on 03.07.2009 by their letter Exh. R-60 at page 132. What matters is the issuance of these cheques which is not denied and further as to how the exact amount was worked out. RW-1 Sharad Gupta was hard put to explain how the cheque amounts were calculated. The statement made by him in the cross-examination lead to the conclusion that his explanation on this vital point is not satisfactory. It, undoubtedly, strengthens the case of the claimant that these cheques were issued against the pending liability. The e-mail dated 29.06.2009 from RW-1 Sharad Gupta to the claimant at Exh. C-113 reinforces the above conclusion. The respondents therein have requested for about 15-18 more days to make the payment without challenging the accuracy of the outstanding amount. Here some of the relevant points urged by Shri Rohit Goel, Ld. Counsel for the respondents may be noticed. He has pointed out to the different amounts claimed as outstanding dues by the claimant and has urged that the same show confused accounting which is unreliable and not worthy of being acted upon and, therefore, liable to be rejected. I find no such confusion in the evidence adduced by the claimant and mentioned above. I further

find that the claimant has allowed credit on several amounts which were found payable to the respondents in terms of Clauses 3 and 4 of the Annual Agreement for the year 2009-10 at Exh. R-3/R-7. Moreover, in response to my order dated 28.12.2015, the claimant has filed an affidavit admitting that a commission on sales upto 28.08.2009, the date on which Distributorship was terminated, came to Rs. 4,02,798/- in terms of Clauses 3 and 4 ibid.

47. From the above, it is seen that the learned Arbitrator had relied upon **Ex.C-5 to C-10**, which are purchase orders, the receipt of which has been admitted by RW-1 Sharad Gupta, in his answers to question Nos. 28 & 85. He also relied on invoices exhibited as **C-11 to C-29** which have been confirmed by Sharad Gupta in answer to question no. 40. The witness in reply to question Nos. 48 and 86 stated that materials against the invoices have been received. The learned Arbitrator has also relied on receipt of the transport courier **Ex.C-70 to C-79** and ledger account of the petitioner maintained by the respondent for the financial year 2009-2010 (**Ex.C-110 and C-111**). The learned Arbitrator has held that the petitioner has not produced its own documents in regard to the purchases. He also referred to a letter dated July 10, 2009 of the respondent, as filed by the petitioner wherein it is stated that outstanding amount against the supplies till June 30, 2009 from the respondent to the petitioner was for Rs.54,14,934/-. It is his finding that no reply was sent by the petitioner to the respondent to the said letter.

48. On the stand of the petitioner that cheques were issued towards security, learned Arbitrator had relied on the e-mail dated September 26, 2009 from RW-1 Sharad Gupta wherein he requested for 15-18 days more to make the payment without

challenging the accuracy of the amount. On the difference in the amount claimed by the respondent, learned Arbitrator held that there is no confusion in the evidence adduced by the respondent as referred to above.

49. The submissions of Mr. Goel are primarily the following:

1. The respondent has not filed proper and complete account statement showing customers of the petitioner. Despite calling upon the learned Arbitrator to direct the respondent to file the statement of accounts and giving the details of the customers, the respondent only showed a figure.

2. The petitioner always asked the respondent to reconcile the accounts, but the respondent was only concerned about their payments and never cared about the stock and its replacement.

3. The petitioner through the letter dated July 2, 2009 to the respondent stated that the cheques should not be presented as the same were given for security purposes pending discussions and the said letter was also issued in respect of cross territorial sales / rejection / breakage and commission etc.

50. Suffice to state the above submissions of Mr. Goel do not contradict the purchase orders **Ex.C-5 to C-10.** RW-1, Sharad Gupta of the petitioner was cross-examined; apart from answers to question Nos. 28 & 85, I find that the answers to the following questions are of relevance:

> *"Q.22. Were invoices raised by the claimant on the respondent company for goods supplied?*
> *Ans. Invoices used to be sent alongwith the goods.*

Q.43. Did you keep the record of purchase orders placed by you and the invoices received from the claimant?
Ans. Such record ordinarily is maintained. However, the above record is five years old.

Q.44. Can you produce all the purchase orders placed by you against the Invoices sent to you by the Claimant pertaining to the present dispute?
Ans. I will have to check my record for this purpose.

Q.49. I put it to you that the above goods were delivered to you on 9.06.2009, 25.06.2009, 01.07.2009 and 02.07.2009.
Ans. I cannot answer this question without looking at the relevant documents.

Q.50 do you maintain record showing the date of receipt of the goods?
Ans. Yes. However, / will have to check record.

Q:51. Is it correct that the above goods were sent to you by Road Transport?
Ans. it is correct.

Q.52 Have you made payment against the goods received by you as regards the invoices admitted by you?
Ans. i will have to checkup from the record as to the payment made invoice-wise.

Q.53. When was the last payment made by to the Claimant against the goods?
Ans. i do not remember.

Q.57. On which date the claimant supplied the goods to you last of all?
Ans.I do not remember.

Q.81. Please see question 57 and the answer thereto and give a specific answer now.
Ans. 3rd July 2009.

Q.82. Please persue question 43 and answer thereto and give a specific answer now.

Ans. The record of purchase order and the invoices was maintained.

Q.83. Please peruse question 44 and answer thereto and give a specific answer now
Ans. There are some invoices in which "Email" is written against the purchase order. In such cases, I am hot in a position to produce the corresponding purchase order. In other cases, I can do so.

Q.88 Please peruse question 52 and the answer given by you thereto and give a, specific answer now.
Ans. The representative of the claimant used to come to my office to collect the cheques i used to issue the cheques for the amounts they stated. Therefore, I cannot say even now whether the payments have been made invoice wise or not.

Q.89. Please peruse question 53 and the give a specific answer.
Ans. i did not keep any register showing when the last payment was made, i cannot state the date of the last cheque issued in favour of the claimant in this case. The payments to the claimant were invariably made through cheques.

Q. 90. Can you give the date on which the last cheque issued by you was cleared by the bank and the amount thereof?
Ans. No."

51. The above answers show that the witness had not denied the purchase orders; invoices and cargo receipts. He could not say whether the payment against the invoices was made. Learned Arbitrator was right in relying upon **Ex.R-66**, which is a communication of the respondent so filed by the petitioners. This communication is in response to the letter of the petitioner of the same date, i.e., July 9, 2009. The letter Ex.R-66, reads as under:

"From: RAJESH SHREEVASTAVA [rajesh@cosmoferrites.com]
Sent:' Friday, July 10,2009 10:05 AM

To: 'sharad'
Cc: 'Ambrish Jaipurla'; 'ArjunYadav'; 'SK Miital'

Subject; RE; CHEQUE TO BE PRESENTED TO. BANKERS ON l0Jul

Dear Mr Sharad,

1. Total Outstanding against supplies till 30Jun09 from CFR to Pragya Rs. 54,14934

2. This Includes the Cheque Dishonored/Payment Stopped by Pragya of Rs.1255110 dated 30 Jun 09 (CD amount Rs 28239 to be added for recovery

3. The Total Sales Done to Pragya from April 09 to Jun09 is Rs 241.096Lacs

4. The TOD'(At 5% of sales) is Rs 1205434

5. The Sales to Coil for month of Jun 09 is Rs 12.74Lacs - Effective Commission to Pragya (Rs127401) after TDS is Rs 114279

6. Hence the Net Effective Payment to be Done by Pragya is (Rs.4095221 as,on date to CFR after deducting the Commissions and TODs. Refer attachment summary for details

7. Cheques in Hand, dated 07 July to be presented to Bankers on 11 Jun 09 for Payment is Rs 20.9'2Lacs against supplies of 24Jun from CFR to Pragya.

You may refer to the attachments for details.
Kindly release payments as per details above to clear the accounts till date with CFR to enable us to confirm for a meeting-today.'

Regards
Rajesh "

52. It clearly reads that an amount of Rs.54,14,934/- is payable and after adjustment of TOD, commission, the amount payable by the petitioner is Rs.40,95,221/-. This also answers the plea of Mr. Goel that different amounts were claimed by the respondent.

53. It may also be stated that the petitioner in the said letter had only made a claim for commission and TOD and not for compensation for the breakage stock. It is a matter of record that the learned Arbitrator has given the benefit of TOD / commission in favour of the petitioner, which part of the award has not been challenged by the respondent.

54. The plea of Mr. Goel that the account statement was not properly stamped and authenticated and the same could not have been accepted by the learned Arbitrator is concerned, the said plea is not appealing. The statement of account is not the only evidence to depict the amount recoverable. If the amount of invoices exhibited as **C-11 to C-69** are added together, the goods supplied by the petitioner can be to the tune of Rs.54,14,934/-. The said exhibits have not been contested by the petitioner before the learned Arbitrator or even before this Court. Learned Arbitrator is justified in holding that the said amount is recoverable towards outstanding dues and after adjustment of certain amounts in favour of the petitioner, granted a sum of Rs.36,92,423/- to the respondent herein.

55. In so far as the challenge of the petitioner to the rejection of its counter-claim of Rs.2,50,00,000/- is concerned, the same was claimed by the petitioner on the following reasoning:

(i) Non-payment of commission @ 10%;

(ii) Non-payment of TOD (Turn Over Discount);

(iii) Quality defects;

(iv) Loss sustained due to breakage;

(v) Dealing directly with customers of the Respondents" resulting in cross territory sales;

(vi) Loss due to illegal, termination of the Distributorship Agreement;

and

(vii) Failure to left the stock lying with the Respondents.

56. I may state here that the commission and TOD has been held to be payable to the petitioner and the amounts of Rs.12,05,434/- and Rs.1,14,276/- as TOD and commission have been adjusted against the amount of Rs.54,14,934/- payable to the respondent.

57. So, the counter-claim, to the extent of these two heads are concerned, was payable in favour of the petitioner.

58. Now coming to the other reasons for making the counter-claim, the same are quality defects; loss sustained during breakage; loss due to illegal termination of distribution agreement and failure to lift stock lying with the petitioner. Additionally, the petitioner has also premised its counter-claim on the basis of cross-territorial sales and direct sale in respect of customers of the petitioner. In support of this submission, reliance was placed on e-mail, exhibited as **Ex.R-12** onwards. On the rejected material reliance was placed by the petitioners on the photographs taken of the material in the petitioners' godown. Before I come to these reasons, I intend to deal with the issue whether respondent was justified in terminating the Distributorship Agreement. This issue was decided by the learned Arbitrator by stating as under:

> *"49……*
>
> *The above letter is admittedly sent by General Manager (Marketing) of the Claimant, Rajesh Shrivastava. Both parties had agred, vide Article 1 of the Annual Agreement (2009-10) at Exh.C-3/R-7 that "Mr. Rajesh Shrivastava will be the SPOC and will be the decision maker for all." It is, clear from the facts narrated above that the parties continued to negotiate an amicable settlement with each other despite the Respondents*

expressing their inability to continue Dealership. To terminate the Dealership on 28.08.2009 with retrospective effect on the ground of mutual agreement (Clause 8.2), does not appear to be in order. All the same, the stipulation incorporated in Clause 8.1, reproduced above, clothes the Claimant with the right to terminate the Agreement at any time at its discretion without assigning any reasons therefore. It has also to be born in mind that the Respondents had stopped placing any orders of purchase of the material from the Claimant after the issuance of the e-mail Exh. R-60 on 02.07.2009 and continued to default in making payment without any justification therefor. In other words, the Respondents unilaterally stopped working as distributors of the Claimant from 02.07.2009 itself. Still, the parties continued efforts for their relationship to subsist which was finally brought to an end vide leter Exh. R-91/C-118 because in the above circumstances, the Claimant had no choice except to terminate the Dealership. It could be done under the wide powers it had under Clause 8.1 of the Distributorship Agreement dated 01.04.2005 at ***Exh.C-2/R-6.*** *I, therefore, hold that the Distributorship stands validly terminated w.e.f 28.08.2009."*

59. Mr. Goel has not made any submission on the above conclusion of the learned Arbitrator. In any case clause 8.1 of the Distributorship Agreement also reads as under:

> "*The Company reserves the right to terminate the agreement at any time at its discretion without assigning any reason therefor."*

60. It is clear that it contemplates termination of a contract without assigning any reason. In other words, it is a determinable contract. The above shows there was a justifiable reason for the respondent to terminate the Agreement in as such as that no payment of invoices worth Rs. 54,14,934/- was forthcoming from the petitioner. That apart, the petitioner in its e-mail dated July 2, 2009 **(Exh. R-60)** had expressed itself that

it is not possible to continue to associate itself with the respondent. The respondent terminated the contract vide communication dated August 28, 2009. I also find justification in the learned Arbitrator concluding in the following manner in Paras 49 and 50 of the award:

> *"49. It was in the above background that the Claimant issued letter dated 28.08.2009 Exh. R-91 (Pajge 179). It has also been exhibited by the Claimant at Exh. C-118. The contents of this letter sent through Registered Post may be reproduced per verbatim:*
>
> > *This is with reference to your e-mail dated July 02, 2009.*
> >
> > *We wish to inform you that we have accepted your request for termination of Dealership and your distributorship has been terminated w.e.f. July 2, 2009*
> >
> > *Further, we request you to clear the outstanding dues and issue pending C forms at the earliest to settle the accounts.*
>
> *The above letter is admittedly sent by General Manager (Marketing) of the Claimant, Rajesh Shrivastava. Both parties had agred, vide Article 1 of the Annual Agreement (2009-10) at Exh.C-3/R-7 that; "Mr. Rajesh Shrivastava will be the SPOC and will be the decision maker for all." It is, clear from the facts narrated above that the parties continued to negotiate an amicable settlement with each other despite the Respondents expressing their inability to continue with the Dealership. To terminate the Dealership on 28.08.2009 with retrospective effect on the ground of*

mutual agreement (Clause 8.2), does not appear to be in order. All the same, the stipulation incorporated in Clause 8.1, reproduced above, clothes the Claimant with, the' right to terminate the Agreement at any time at its discretion without assigning any reasons therefor. It has also to be born in mind that the Respondents had stopped placing any orders of purchase of the material from the Claimant after the issuance of the e-mail Exh. R-60 on 02.07.2009 and continued to default in making payment without any justification therefor. In other words, the Respondents unilaterally stopped working as distributors of the Claimant from 02.07.2009 itself. Still, the parties continued efforts for their relationship to subsist which was finally brought to an end vide leter Exh. R-91/C-118 because in the above circumstances, the Claimant had no choice except to terminate the Dealership. It could be done under the wide powers it had under Clause 8.1 of the Distributorship Agreement dated 01.04.2005 at Exh. C-2/R-6. I therefore, hold that the Distributorship stands validiy terminated w.e.f. 28.08.2009.

50. Two judgments cited by the Ld. Counsel for the Respondents pertaining to the determination of Distributorship may be noticed. The basic authority is Indian Oil Corporation Ltd. Vs Amritsar Gas Service and Others. (1991) 1 SCC 533. It has been held in that case that Distributorship being revocable in terms of the Agreement, the award granting relief which is restoration even on the basis of a finding that breach of Agreement was committed by the Corporation, was in

contravention of Section 14 (1) (c) of the Specific Relief Act and, therefore, could not be allowed. The above law has been followed by the Delhi high Court in its judgment dated 15.02.2016 in OMR No. 478/2015. The above law has no applicability to the facts of the present case for the simple reason that no relief in the nature of restoration of the Dealership has been sought in the proceedings before this Tribunal. Issue No. 15 is decided accordingly in favour of the Claimant.

61. Therefore, it must be held that there was justification for the termination of Distributorship Agreement by the respondent.

62. Now coming to the reasons for making the counter-claim being, quality defects; loss sustained during breakage; and failure to lift stock lying with the petitioner etc. It is a fact that in the counter-claim, the petitioner did not give the break-up of its claim for Rs.2,50,00,000/-. The justification in that regard by the petitioner and also contended by Mr. Goel is that the ferrites are packed in a box and their medium of weighing is in Kgs. So, the petitioner calculated the total stock in Kgs. and made a consolidated claim.

63. This claim of the petitioner was the subject matter of issue No. 20. I may also state here that it was in support of the above claim, the petitioner had filed three applications before the learned Arbitrator. The nature of applications being:

(i) That respondent / petitioner to take / remove the stock / goods and the rejection / breakage of the goods lying with the petitioners / respondents;

(ii) For appointment of Local Commissioner to assess the total stock of the goods and the rejection /

breakage of the goods lying with the petitioner.

(iii) To place on record the clarification.

64. The three applications were rejected by the learned Arbitrator. The learned Arbitrator who also rejected the claim for Rs.2,50,00,000/- has in Paras 55 to 57 stated as under:

> "*55. In other words, the Respondents stood cautioned that they have to stand on their own legs on the above points. Moreover, the requisite evidence, documentary in particular, could not be with anyone else except the Respondents themselves. If any customer of the Respondents had returned the stock due to defect in quality, breakage or for any other reason, necessary evidence to prove it had to be with them and it was incumbent for them to produce it during the arbitral proceedings, I have carefully gone through the e-mails pointed out to me by the Ld. Counsel for the Respondents in this behalf and have no hesitation in returning the finding that the contents of those documents are incomplete and inconclusive. In reply to Question No. 97. CW-1 Lakshmi Dutt Sharma has stated on oath that the goods found defective were replaced. The perusal of e-mail dated 19.02.2007 Exh. R-10 (pages 55-56) and Exh. R-12 (pages 58 to 61) show that the Respondents adverted to the defects pertaining to the quality of component 710 due to the reasons of saturation and variation in AL. Such e-mails demonstrate that the Claimant attended to the quality defects when pointed out and, in any case do not lead to the conclusion that the Respondents suffered any loss on that account and if so, how much ? The Respondents did have numerous grievances to resolve which the parties had a meeting on 13.04.2009. On that date, the decisions arrived at were recorded in the minutes (hand written) at Exn. R-7 (pages 47-48). I have discussed in detail the circumstances and the fact of these hand-written minutes .having been changed to some extent with the consent of the parties who on that very date, entered into an Annual Agreement (2009-10). Article 6 of the said Annual Agreement provides that the Claimant will give corrective action alongwith Form 8-D once the quality problem is reported by the Respondents. Article 14 prescribes a time limit of 9*

months of delivery during which Respondents were required to confirm any quality related problem against the supplies done by the Claimant and further that no claim of rejection will be accepted after the aforesaid period of 9 months. Whereas specific cases of some parties were taken up and referred to in the Agreement dated 13.04.2009 (See Articles 3 & 4), no particular case OT quality defect, breakage or accumulation of stock finds mention therein. The Ld. Counsel for the Claimant would, therefore, contend that the factum of no such complaint finding mention in the Agreement means that there was no such complaints as on 13.04.2009.

56. The claim regarding breakage Is also inadmissible for the reason that the whole transaction between the parties comes to a close as soon as the material is delivered to the Respondents. And then, the breakage during transit by road was duly Insured. There is no evidence of any breakage during that transit and If the breakage takes place later on while delivering the material to the customers of the Respondents, the claimant cannot be held accountable in the matter.

57. For the reasons given above, It Is decided that the Respondents are not entitled to recovery any amount against the 3 Items mentioned above and further that relief (c) also cannot be allowed."

65. The above conclusion reveals that CW-1, L.D. Sharma, has stated during his cross-examination that the goods found defective were replaced and in terms of **Ex.R-10 and R-12**, the defect in quality was of component T-10 due to reasons of saturation and variation in AL. That apart, there is a finding of fact that no loss was suffered by the petitioner. There is also a finding of fact that in the agreement dated April 13, 2009, no goods of quality defect / breakage or accumulation of stock was mentioned, which shows there was no complaint in that regard on April 13, 2009. Mr. Goel has not made any submission nor

has drawn my attention to any correspondence between petitioner and its customers to show they have returned the damaged below quality stock. Further no document has been placed by way of statement of accounts to show that amount claimed was the loss suffered by the petitioner. Further, nothing has been brought on record nor shown that the petitioner had to pay the amount claimed as damages to its customers.

66. That apart, I find the learned Arbitrator has also held that the insurance was against breakage during transit and no such claim was made. Any breakage beyond transit could not have been recovered through insurance or from the respondent. This position is not contested by Mr. Goel. Hence, the rejection of this claim of the petitioner by the learned Arbitrator cannot be faulted.

67. Coming to the Judgments as relied upon by Mr. Goel in support of his submissions are concerned, in ***National Highway Authority of India (supra)***, the Supreme Court has held that the learned Arbitrator did not decide the cases with the correct application of the formula and further that the claim for price adjustment in respect of bitumen laid by the contractors was not correct and the award being contrary to the contractual terms, the learned Arbitrator having taken a particular view, which is a plausible view, keeping in mind the parameters of judicial review by the Court in exercise of powers under Section 34 of the Act, the award cannot be interfered. Suffice to state, no such submission was made by Mr. Goel. It is not the case of Mr. Goel that the award given by the learned Arbitrator is contrary to the terms of the agreement. In the absence of such a plea, in the facts of this case and the conclusion arrived at by the learned Arbitrator, the award cannot be interfered with. To that extent,

the judgment applies on all fours. He also relied upon the Judgment in the case of ***UOI v. Varindera Construction Limited (supra)***, wherein it was held by the Supreme Court that it is only in exceptional circumstances as provided in the Arbitration and Conciliation Act, 1996, that the Court is entitled to intervene in the dispute, which was the subject matter of the arbitration, when injustice is caused to either of the parties. In view of my discussion above, no injustice has been caused to the petitioner to lay a challenge against the arbitration award.

68. I have also perused the judgments and considered the issues dilated in the cases of ***NDMC (supra), Parveen Gupta (supra)***, ***IOC (supra***) and ***Jai Prakash Associates (supra),*** relied upon by Mr. Goel. These judgments are clearly distinguishable on facts and the reliance placed by Mr. Goel is misplaced in view of my discussion above.

69. In so far as reliance by Mr. Goel on the judgment in ***Universal Land and Finance Company Ltd. (supra)*** is concerned**,** in view of my above conclusion since the award is not in conflict with the public policy the judgment has no applicability. Similarly, the reliance placed on the Judgment in the case of ***Board of Trustees for the Port of Calcutta (supra)***, to contend that the learned Arbitrator is required to make award in accordance with the general law of the land subject to the agreement, provided, the agreement is valid and legal, is concerned, no such submission was made by Mr. Goel that the award is contrary to the general law and contrary to the contract, i.e., the distribution agreement and yearly agreement executed between the parties. Rather, I find Mr. Chugh is justified in relying upon the Judgment of the Supreme Court in the case of ***Associate Builders (supra)***, wherein the Supreme Court has

held as under:

> ***"31.*** *The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:*
>
> *(i) a finding is based on no evidence, or*
>
> *(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or*
>
> *(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.*
>
> ***32.*** *A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312] , it was held: (SCC p. 317, para 7)*
>
> *"7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."*
>
> *In Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429] , it was held: (SCC p. 14, para 10)*
>
> *"10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."*

33. *It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:"General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong".It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)*

"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as

put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

70. The Supreme Court has followed the test of judicial review as laid down in ***Associate Builders (supra)*** in plethora of judgments and the recent one being ***Anglo American Metallurgical Coal Pty. Ltd v. MMTC Ltd., 2021 (3) SCC 308.***

71. In view of my above discussion, I do not see any merit in the petition and the same is dismissed. No costs.

V. KAMESWAR RAO, J

JUNE 23, 2021*/jg*