IN THE COURT OF SH. ARUN SUKHIJA,

ADDITIONAL DISTRICT JUDGE – 07, (CENTRAL DISTRICT)

TIS HAZARI COURTS, DELHI.

ARBN. NO. :- 01/2020

UNIQUE CASE ID NO. :- 261/2017

IN THE MATTER OF :-

M/s. Unipack Industries
B-40, G.T. Karnal Road Industrial Area,
Delhi-110033. ….Petitioner

VERSUS

M/s. Birdhi Chand Girdharilal Papers (P) Ltd.,
3798, Chawri Bazar,
Delhi-110006. ….Respondent

PETITION UNDER SECTION 34 OF THE ARBITRATION & CONCILIATION ACT, 1996 AGAINST THE AWARD DATED 20.12.2016 PASSED BY SHRI RAM BHAJ MITTAL IN ARBITRATION CASE NO. 2014-2015/37.

Date of institution of the Petition : 01/04/2017

Date on which Judgment was reserved : 04/06/2020

Date of Judgment : 20/06/2020

::- J U D G M E N T -::

By way of present judgment, this court shall conscientiously adjudicate upon the objections filed on behalf of petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the arbitral award dated 20.12.2016.

CASE OF THE OBJECTOR AS PER PETITION

Succinctly, the objector/ petitioner have averred the following facts in the objections:-

(A) The petitioner is a partnership firm registered under the Partnership Act, 1932. Shri Ajay Gosain is one of the partners of the firm who has signed the petition on behalf of the petitioner.

(B) The respondent is a company registered and incorporated under the Companies Act, 1956 and having its office at the aforesaid address.

(C) The respondent filed Statement of Claim with documents, whereby the respondent claimed an amount of Rs.1,73,903/- from the petitioner on the basis of alleged bill dated 24.11.2014.

(D) The petitioner filed Written Statement/ reply to the Statement of Claim, whereby the petitioner inter-alia took the plea that the respondent failed to give notice under Section 11(6) of the Arbitration & Conciliation Act, 1996 of their intention to go in the Arbitration for settlement of disputes, if any, between the parties. The alleged arbitration clause is not signed by the parties, as is required under Section-7 of the Arbitration & Conciliation Act, 1996. The Statement of Claim is liable to be dismissed straightaway since the respondent has not come to the Court with clean and Claim

Statement is not supported by an affidavit of respondent. The petitioner has already made full payment to the respondent and nothing is due and payable by the petitioner to the respondent. The respondent has not maintained the accounts correctly, whereas, the petitioner's account is duly audited.

(E) As per direction of Ld. Arbitrator, the respondent filed evidence by way of affidavit and thereafter, the petitioner also filed evidence by way of affidavit. The request of the petitioner to allow cross-examination of the respondent's witness was turned down to 09.04.2016 by the Arbitrator.

(F) Thereafter, in order to support the respondent, the Arbitrator on its own vide its Order dated 30.07.2016 directed the parties to submit the copy of Form 2A & 2B. The petitioner not only filed the copy of Form to 2B for the period 01.10.2014 to 31.12.2014, but also filed detailed affidavit dated 17.12.2016 in this regard.

(G) Thereafter, the Ld. Arbitrator, vide Order dated 05.11.2016, closed the case and directed the petitioner to file written arguments. Accordingly, the petitioner filed the written arguments on 17.12.2016.

(H) The Arbitrator made the Award on 20.12.2016. Though, the Award is dated 20.12.2016, but was sent to the petitioner along with covering letter dated 07.01.2017, however, the said letter dated 07.01.2017 was posted to petitioner on 14.01.2017, which was received by the petitioner on 17.01.2017.

(I) Being aggrieved by the Award dated 20.12.2016, the petitioner filed the objections against the Award dated 20.12.2016 inter-alia on the following grounds:-

(1) The Award of the Arbitrator suffers from serious infirmity since the petitioner was denied the opportunity to cross-examine the witness of the respondent. This is nothing but against the law. The purpose of the cross-examination is to check the veracity of the witness and to disprove the averments made by the respondent. The petitioner specifically requested the Ld. Arbitrator on 09.04.2016 to allow cross-examination the respondent's witness but was declined.

(2) The Ld. Arbitrator erred in law by failing to appreciate that the respondent mentioned two alleged bills of same number i.e. 3402 and of the same date i.e. 24.11.2016 for Rs.1,60,722/- and Rs.1,48,513/- for the same material and for same quantity, however, when the petitioner specifically denied the receipt of material mentioned in the alleged bills and also denied the receipt of alleged bills, the respondent came out with the plea that earlier bill was raised for Rs.1,60,722/-, but later on, bill amount was reduced to Rs.1,48,513/- at request of the petitioner, which was again denied by the petitioner. But the Arbitrator failed to even discuss the same in the Award and no finding was given by the Arbitrator. Moreover, had the petitioner been allowed to cross-examine the witness, the false claim of the respondent would have been dismissed.

(3) The Ld. Arbitrator wrongly reached at the conclusion that the alleged Challan no. 524, dated 24.11.2014 is duly signed by the petitioner in token of acceptance of bill, but the fact is that the petitioner categorically denied the receipt of goods and in fact, asked the respondent to prove the same. There is no signature on any of the person the petitioner on the alleged Challan. Therefore, it is not understandable as to what made the Arbitrator reach the conclusion that the alleged Challan is duly signed by the petitioner.

(4) The Ld. Arbitrator erred in law by completely ignoring that the respondent failed to file the original documents to prove the case. Even the original receipt of the alleged Challan was not filed by the respondent before the Arbitrator, whereas, it is mandatory in law. Hence, the Award is in conflict with the public policy of India.

(5) On the one hand, the Arbitrator on his own asked the petitioner to file copy of Form 2B of Sales Tax. The petitioner not only filed the copy of Form 2B for the period 01.10.2014 to 31.12.2014, but also filed detailed Affidavit dated 17.12.2016 in this regard, however, when the Arbitrator did not find the alleged bill no. 3402, dated 24.11.2014, the Arbitrator conveniently ignored the same in the Award.

CASE OF THE RESPONDENT AS PER REPLY

The respondent has filed reply to the objections. Succinctly, the respondent has made the following averments:-

(a) The present application is without any cause of action and is liable to be dismissed. None of the requirements of Section 34 of Arbitration & Conciliation Act, 1996 for setting aside the arbitral award are satisfied in the facts of the present case. There is no ground for setting aside the Award dated 20.12.2016. The Arbitrator has passed a most reasonable Award after hearing both the parties, perusal of their pleadings & documents and after appreciating evidence led by them. There cannot be any re-appreciation of evidence of review of merits of the dispute by this Court in an application under Section 34 of Arbitration & Conciliation Act, 1996.

(b) Even otherwise, there is no illegality or infirmity in the Award dated 20.12.2016 for the following reasons:-

(1) The petitioner/objector has falsely claimed that the respondent came out with the plea that the earlier bill was raised for Rs.1,60,722/- but later on the bill amount was reduced to Rs.1,48,513/- at the request of petitioner/ objector, only after the petitioner/ objector denied the receipt of the material mentioned in the said bill and denied receipt of the said bill. In fact, a perusal of the claim petition would reveal that the respondent had already clarified the above mentioned fact in para-7 of the Claim Petition and even in the Notice dated 21.09.2015. Thus, the stand of the respondent had always been consistent that initially the amount of invoice no. 3402 was Rs.1,60,722/-, wherein, the rate of goods supplied i.e. C2S Printing Paper Gloss was charged at Rs.1,482/- per kg, as was originally

agreed upon between the petitioner and the respondent. However, the petitioner had avoided making payment by taking false pleas that the rate charged was excessive. Therefore, to avoid any controversy and keeping in view the long business relations, the rate was revised to Rs.1,368/-, which was agreed by the petitioner and the invoice amount was revised to Rs.1,48,513/-. Thus, there are no separate invoices/ bills no. 3402 or two bills are falsely averred by the petitioner and the bill amounting to Rs.1,48,513/- is merely the revised bill. The Arbitrator has considered all aspects of the case and gave his Award after considering evidence and pleas of both the parties.

(2) The petitioner/ objector has falsely disputed the claim of the respondent and has falsely disputed the correctness of the Statement of Account filed by the respondent. The petitioner/ objector has falsely claimed that it has maintained its accounts correctly and as per its Statement of Account, nothing is due or payable by the respondents. The petitioner/ claimant also falsely claimed in the Written Statement as well as the present application/ objections that its accounts are audited, however, no audited statement account has been filed by the petitioner/objector before the Ld. Arbitrator or even before this Court.

(3) Since the petitioner/ objector had not disputed the receipt of goods vide invoice no. 3402, dated 24.11.2014, the Ld. Arbitrator vide Order dated 30.07.2016 directed both the petitioner/ objector and

respondent to submit the copy of Forms 2-A and 2-B filed with the VAT Department for third quarter of 2014-15 ending on 31.12.2014. Accordingly, both the parties filed the aforesaid forms. A perusal of Form 2-B filed by the respondent shows sale of goods to the petitioner/ objector at entry no. 52. There is no corresponding entry with regard to purchase of goods in Form 2-A filed by the petitioner/ objector. Thus, there was a mismatch of entries in Form 2-A & 2-B. As per requirements of VAT Department, in case of mismatch of entry in Forms 2-A & 2-B, a notice with regard to the mismatch is always sent to the person/ entity in whose books the entry is found to be missing and not to the other party. Thus, the VAT Department would have necessarily sent a notice of mismatch of entries to the petitioner/objector and penalty would have been imposed on it. However, the notice of mismatch of entries was concealed by the petitioner/objector. The affidavit dated 17.12.2016 filed by the petitioner/objector is absolutely false.

(4) The respondent sent five E-mails dated 09.03.2015, 02.06.2015, 19.06.2015, 09.07.2015 and 30.07.2015 to the petitioner with regard to the payment of outstanding amount of Rs.1,48,513/-, but no reply was sent by the petitioner. Thereafter, the respondent sent letters dated 03.07.2015 and 13.08.2015 to the petitioner with respect to aforesaid outstanding amount. The respondent has placed on record the postal receipts and speed post tracking report to show that the said letter was served on the petitioner but no reply to the letter

dated 03.07.2015 was sent to the respondent, however, the petitioner has placed on record a false and fabricated reply dated 01.09.2015, the receipt and contents of which are denied by the respondent. The petitioner has not placed on record any proof of service i.e. AD Card of speed post tracking report with respect to the reply dated 01.09.2015. Thereafter, the respondent sent a demand notice invoking the arbitration clause dated 21.09.2015 to the petitioner. The respondent has placed on record the postal receipts and speed post tracking reports showing service of the said notice on the petitioner, however, no reply was sent by the petitioner even to this notice. The non-reply by the petitioner to the repeated e-mails and letters sent by the respondent and duly received by the petitioner amounts to admission of facts stated in the said e-mails/ letters/ notice. The plea taken by the petitioner that the e-mails are not supported by Certificate under Section 65B of the Evidence Act is not tenable in view of Section 19(1) of the Arbitration & Conciliation Act, which provides that the Arbitral Tribunal shall not be bound by the Civil Procedure Code or Indian Evidence Act. Further, all the above-mentioned e-mails, letters and notices sent by the respondent to the petitioner were pleaded in the Claim Petition filed along-with the Claim Petition and not with evidence, as falsely claimed by the petitioner/ objector in its written arguments filed before the Ld. Arbitrator. Moreover, the receipt of the above-

mentioned emails sent by the respondent to the petitioner/objector has not been denied by them in their Written Statement.

(5) The plea taken by the petitioner/objector that the Award dated 20.12.2016 suffers from infirmity as it was not given an opportunity to cross-examine the respondent is also not tenable as the Ld. Arbitrator is empowered to decide the rules of procedure of arbitration by virtue of Section 19 of Arbitration & Conciliation Act. Section 19(3) of the Arbitration & Conciliation Act clearly provides that Arbitral Tribunal may conduct the proceedings in the manner it considers appropriate. Moreover, no opportunity was given even to the respondent to cross-examine the petitioner/ objector and both the parties were treated at parity by the Ld. Arbitrator.

(c) In the parawise reply, most of the contentions have been denied. It has been submitted that the bill dated 24.11.2014 is true & correct and goods were supplied vide the said bill to the petitioner by the respondent.

(d) In reply to the grounds, most of the contentions have been denied. It has been prayed that the Arbitral Award dated 20.12.2016 kindly be satisfied from the petitioner thereby directing him to pay the amount of the Arbitral Award to the respondent in terms of the Arbitral Award dated 20.12.2016.

REJOINDER

The petitioner has filed Rejoinder to the Reply of respondent and controverted the assertion made in the Reply filed by respondent and reiterated the contents of the Petition.

PRINCIPLES OF SETTING ASIDE OF AWARD UNDER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT

On a panoramic appreciation of the earlier existing judicial thought on the issue, as manifested by decisions ranging from ***Renu Sagar Power Company Ltd. v. General Electric Company 1994 Supp. (1) SCC 644*** to ***Associated Builders v. DDA (2015) 3 SCC 49***, the Hon'ble High Court in its decision in ***NHAI v. Hindustan Construction Company Ltd. MANU/DE/2699/2017*** delineated the following propositions:-

(i) The four reasons motivating the legislation of the Act, in 1996, were

(a) to provide for a fair and efficient arbitral procedure,

(b) to provide for the passing of reasoned awards,

(c) to ensure that the arbitrator does not transgress his jurisdiction, and

(d) to minimize supervision, by courts, in the arbitral process.

(ii) The merits of the award are required to be examined only in certain specified circumstances, for examining whether the award is in conflict with the public policy of India.

(iii) An award would be regarded as conflicting with the public policy of India if

(a) it is contrary to the fundamental policy of Indian law, or

(b) it is contrary to the interests of India,

(c) it is contrary to justice or morality,

(d) it is patently illegal, or

(e) it is so perverse, irrational, unfair or unreasonable that it shocks the conscience of the court.

(iv) An award would be liable to be regarded as contrary to the fundamental policy of Indian law, for example, if

(a) it disregards orders passed by superior courts, or the binding effect thereof, or

(b) it is patently violative of statutory provisions, or

(c) it is not in public interest, or

(d) the arbitrator has not adopted a "judicial approach", i.e. has not acted a fair, reasonable and objective approach, or has acted arbitrarily, capriciously or whimsically, or

(e) the arbitrator has failed to draw an inference which, on the face of the facts, ought to have been drawn, or

(f) the arbitrator has drawn an inference, from the facts, which, on the face of it, is unreasonable, or

(g) the principles of natural justice have been violated.

(v) The "patent illegality" had to go to the root of the matter. Trivial illegalities were inconsequential.

(vi) Additionally, an award could be set aside if

(a) either party was under some incapacity, or

(b) the arbitration agreement is invalid under the law, Or

(c) the applicant/petitioner was not given proper notice of appointment of the arbitrator, or of the arbitral proceedings, or was otherwise unable to present his case, or

(d) the award deals with a dispute not submitted to arbitration, or decides issues outside the scope of the dispute submitted to arbitration, or

(e) the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(f) the arbitral procedure was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(g) the award contravenes the Act, or

(h) the award is contrary to the contract between the parties.

(vii) "Perversity", as a ground for setting aside an arbitral award, has to be examined on the touchstone of the Wednesbury principle of reasonableness.
(A reasoning or decision is ***Wednesbury*** *unreasonable (or irrational) if it is so unreasonable that no* ***reasonable*** *person acting reasonably could have made it (Associated Provincial Picture Houses Ltd v* ***Wednesbury*** *Corporation (1948) 1 KB 223).*
It would include a case in which

(a) the findings, in the award, are based on no evidence, or

(b) the Arbitral Tribunal takes into account something irrelevant to the decision arrived at, or

(c) the Arbitral Tribunal ignores vital evidence in arriving at its decision.

(viii) At the same time,

(a) a decision which is founded on some evidence, which could be relied upon, howsoever compendious, cannot be treated as "perverse",

(b) if the view adopted by the arbitrator is a plausible view, it has to pass muster,

(c) neither quantity, nor quality, of evidence is open to re-assessment in judicial review over the award.

(ix) "Morality" would imply enforceability, of the agreement, given the prevailing mores of the day. "Immorality", however, can constitute a ground for interfering with an arbitral award only if it shocks the judicial conscience.

(x) For examining the above aspects, the pleadings of the parties and materials brought on record would be relevant.

(xi) The court cannot sit in appeal over an arbitration award. Errors of fact cannot be corrected under Section 34. The arbitrator is the last word on facts."

ARGUMENTS OF THE PETITIONER

1. The Award dated 20.12.2016 is patently illegal, against the public policy and violative of principle of Natural Justice. The Award is liable to be set aside inter-alia on the following points:

   A. That the Award suffers from patent illegality since the petitioner was denied the opportunity to cross-examine the Witness of the respondent. The

purpose of the cross-examination is to check the veracity of the Witness and to disprove the averments made by the respondent. The petitioner specifically requested the Arbitrator on 09.04.2016 to allow the petitioner to cross-examine the Witness of the respondent. But the request of the petitioner was declined by the Arbitrator. The Order dated 09.04.2016, inter-alia reads as under:-

"The Defendant wants to cross-examine the Claimant, which is not allowed".

B. That the respondent herein (Claimant before the Arbitrator) raised the alleged plea that the respondent supplied goods (C2S PRINTING PAPER GLOSS) to the petitioner and raised Invoice no.3402 for Rs.1,60,722/- and later on at request of the petitioner, reduced the value of invoice from Rs.1,60,722/- to Rs.1,48,513/- and raised another invoice. In this regard, the petitioner (respondent before the Arbitrator) specifically pointed out in para-7 of Reply on Merits in their Written Statement before the Arbitrator that first of all the petitioner never placed any Order on the respondent for supply of C2S PRINTING PAPER GLOSS, secondly the petitioner never received any such goods from the respondent, thirdly, the petitioner never received Invoice no. 3402 dated 24.11.2014 for Rs.1,60,722/-, fourthly, when the petitioner did not receive alleged Invoice dated 24.11.2014 for Rs.1,60,722/-, the question of requesting the respondent to reduce the price does not and cannot arise and fifthly, the petitioner never received Invoice no.3402 dated 24.11.2014 for Rs.1,48,513/-. The petitioner put the respondent to strict proof of the same. However, the Arbitrator has

completely failed to discuss any of the aforesaid five points in the Award and no finding has been given by the Arbitrator in this regard. Hence, the Award is liable to be set aside.

C. The petitioner also sent reply dated 01.09.2015 through registered post to the respondent to the Legal Notice dated 18.08.2015 of the respondent (filed before the Arbitrator with statement of claim), wherein, the petitioner specifically pointed out as under:

> *"Your another contention that you supplied C2S Printing Paper Gloss to my clients and raised Invoice No.3402 dated 24.11.2014 for Rs.1,60,722/- on my client is totally misconceived and imaginary. In this regard I have to inform you that my clients never placed any Order on you and have not received alleged Invoice No.3402 for Rs.1,60,722/- or for any other amount nor my clients have received C2S Printing Paper Gloss. You are put to strict proof of delivery of goods as well as receipt of alleged Invoice No.3402 for Rs.1,60,722/- or for Rs.1,48,513/-. It seems you are raising bogus and baseless claims against my clients with the only intention to blackmail my clients."*

D. A bare perusal of the Award would reveal that the Arbitrator has failed to discuss anything about the reply dated 01.09.2015 to the Legal Notice. During the course of oral arguments before court, the Ld. counsel for the respondent pointed out that no reply was sent by petitioner to the Legal Notice of respondent, is totally wrong and misconceived. Moreover, the petitioner vide registered post letter dated 05.11.2015 informed the Paper merchant association that the petitioner has already sent reply dated

01.09.2015 to the respondent to their Legal Notice dated 18.08.2015 but surprisingly the Arbitrator did not care to consider in the award.

E. The Learned Arbitrator completely erred in law by ignoring that the respondent failed to file the original documents to prove their case. Even the original receipt of alleged Challan no. 524 dated 24.11.2014 was not filed by the respondent before the Learned Arbitrator. It is mandatory in law to produce the original documents. Surprisingly, the respondent in their reply to Ground (IV) of Petition stated that there is no need to file the original documents before the Arbitrator. Hence, the Award is patently illegal and liable to be set aside.

F. It will not be out of place to mention here that the Arbitrator recorded that alleged Challan no.524 is duly signed by the petitioner. First of all, there was no original of alleged Challan on record, secondly, the Arbitrator failed to point out as to who received the alleged Challan on behalf of the petitioner, thirdly, it is not even pointed out as to on which date the alleged Challan was received, fourthly the respondent failed to prove as to through which transporter the goods were sent to petitioner. Therefore, it is not understandable as to how Arbitrator reached to the Conclusion that alleged Challan no. 524 was signed by the petitioner in token of acceptance of bill.

G. That vide Order dated 30.07.2016, the Arbitrator directed the Parties to submit the copy of 2A and 2B filed with VAT Department for 3rd Quarter of 2014-15 ending on 31.12.2014. Accordingly, the petitioner filed 2A for the period 01.10.2014 to 31.12.2014 and also filed detailed Affidavit before the Arbitrator in this regard. It is pertinent to mention here that on one hand

the Arbitrator vide Order dated 27.08.2016 admitted that the Bill no.3402 dated 24.11.2014 raised by the claimant on the Defendant has not been mentioned anywhere in Form 2A. But surprisingly the Arbitrator did not even whisper a word in the Award about the same nor discussed anything about the affidavit of the petitioner in respect of VAT. The petitioner categorically pointed out in the Affidavit that neither any mismatch notice was received by the petitioner, nor any penalty was imposed by VAT department on petitioner, nor any penalty was paid by the petitioner.

H. Had the Arbitrator allowed the petitioner to cross examine the witness of the respondent, the following questions besides other questions would have been asked:-

a. When the petitioner placed the order on the respondent for supply of C2S PRINTING PAPER GLOSS?

b. Through which transporter the alleged goods were sent?

c. Who received the alleged Challan on behalf of petitioner?

d. On what date alleged Challan was received?

e. By what mode the alleged bill for Rs.1,60,722/- was sent to petitioner?

f. When the petitioner made request to the respondent to reduce the price of alleged bill?

g. By what mode alleged bill for Rs.1,48,513/- was sent to petitioner?

h. On what basis the respondent is saying that VAT department issued mismatch notice to petitioner?

i. When the VAT department imposed alleged penalty on petitioner?

j. Etc., etc.

I. That none of the points of the written arguments filed by the petitioner was discussed by the Arbitrator in the Award.

2. That in support of the case, the petitioner relies upon the following judgments:-

A. ***2020 (266) DLT 612 [SUKHBIR SINGH v/s HINDUSTAN PETROLEUM CORPORATION LTD.]***. *In this case, the Petitioner challenged the Award under Section 34 on the only ground that the Arbitrator refused to allow cross-examination of the Respondent's Witness. The Court held that it is a valid ground for challenge and set aside the Award.* ***The relevant paras of this Judgment are 12, 19, 20, 21, 22, 25 and 51.***

B. ***2019 (15) SCC 131 [SSANGYONG ENGINEERING & CONSTRUCTION COMPANY LIMITED Vs. NHAI]***. *In this case, the Hon'ble Supreme Court reached the conclusion that the Award is patently illegal, against the Public Policy and violative of Principle of Natural Justice and set aside the Award.* ***The relevant paragraphs are 12, 19, 20, 22, 23, 24, 30, 53, 74 and 77.***

C. ***2020 SCC ONLINE SC 466 [PATEL ENGINEERING LIMITED Vs. NORTH EASTERN ELECTRIC POWER CORPORATION LIMITED]***. *In this case, initially the Petition under Section 34 was dismissed. Thereafter in Appeal under Section 37, the Division Bench set aside the Award as well as Judgment of Single Judge under section 34. Finally, the Hon'ble Supreme Court upheld the decision of Division Bench under Section 37 and maintained that the Award has rightly been set aside. The* ***relevant paras are 4, 16, 17, 18, 21, 22, 25 and 27.***

D. ***AIR 2015 SC 180 [ANVAR P.V. Vs. P.K.BASHEER]***. *In this case, it is held that Section 65B of the Evidence Act is applicable to any proceedings which involves electronic records.* ***The relevant para is 14***.

3. That the judgments cited by the Ld. counsel for the respondent i.e. ***AIR 1956 CALCUTTA 361*** and ***State Trading Corporation Vs. Toepfer International Asia*** are not applicable. In view of ***Sukhbir Singh*** judgment (supra) of Hon'ble Delhi High Court, Calcutta judgment has no bearing. Similarly, in view of the two recent judgments passed by Hon'ble Supreme Court i.e. (1) ***SSANGYONG (supra)*** & (2) ***PATEL ENGG. (supra)*** and one judgment passed by Hon'ble Delhi High Court i.e. ***Toepfer (supra)*** are not applicable and moreover, it is delivered prior to amendment made in 2015 in the Arbitration Act.

ARGUMENTS OF THE RESPONDENT

1. Section 1 of Indian Evidence Act and Section 19 of Arbitration & Conciliation Act provides that Indian Evidence Act is not applicable to arbitration proceedings. Arbitrator is free to decide his own procedure.
2. Both parties filed their affidavits of evidence and written arguments before the Arbitrator. The claimant also filed its set of documents, which included signed bills and Challans i.e disputed bill with its Challan and some previous bills and Challans, which were already accepted and paid by the petitioner herein. The claimant also filed demand letters dated 03.07.15, 18.08.15 and 21.09.15 along-with postal receipts and tracking reports

showing service. Some emails were also filed. The petitioner herein never responded or replied to these correspondences.

3. The petitioner herein in its written statement before Arbitrator admitted business dealings and only disputed sale with respect to Bill no.3402.
4. The Arbitrator, after going through the documents and after comparing the signatures on admitted bills and Challans with disputed bill and Challan, came to the conclusion that sale and delivery of goods has been made through bill no.3402, which is finding of fact given by Arbitrator, based on evidence on record.
5. The existence of Arbitration Agreement between the parties is not disputed in the grounds taken under Section 34 Arbitration & Conciliation Act. More so, even during the course of oral arguments, the petitioner herein did not dispute the existence of Arbitration Agreement. Further, order dated 30.07.16 under Section 16 Arbitration & Conciliation Act has not been challenged. It is settled law that grounds not taken under Section 34 Arbitration & Conciliation Act cannot be urged to set aside the Award.
6. No allegation of bias or partiality has been raised before the Arbitrator as provided under Section 13 of the Act.
7. The Grounds no. (II), (III), (VI) and (VII) of the Objections, relate to Sale of Goods vide bill no. 3402 which are questions of fact and the same has been decided by the Arbitrator by comparing signatures as mentioned above.
8. With regard to Ground no.(IV) of the Objections, it is clarified that the original documents were brought by the respondent along-with the affidavit

of Evidence which fact is evident from the affidavit itself. More so, Indian Evidence Act is not applicable to Arbitration proceedings and in view of Section 19(iv) Arbitration & Conciliation Act, the Arbitrator can decide admissibility, relevance and weight of any evidence. The petitioner herein never raised such objection before the Arbitrator, therefore, he waived his right to object to the same, at this stage, as provided in Section 4 of the Act.

9. Ground (V) of the Objections is regarding Section 11(6) of the Act and is not applicable to the facts of the present case.
10. Ground (I) of the Objections, is not the ground to challenge of the Award. Right to cross examination is not granted as a matter of right in arbitration proceedings in view of Section 19 of the Act. The petitioner herein never filed any application before the Arbitrator disclosing the grounds or points on which he wanted to cross examine the witness. The oral request was without any reason assigned to it and was made just for the sake of it. The Arbitrator acted impartially and did not give the right to cross examination to both parties. Decline of oral request for cross examination was never protested or objected to by the Petitioner herein. In fact, the said objection was not even urged by the petitioner herein in oral final arguments or written arguments filed before the Arbitrator *(written arguments filed by Petitioner herein before the Arbitrator be kindly perused).* There is no procedure of cross examination agreed between the parties or in the rules of Paper Merchants Association, Delhi, which govern the present Arbitration. The Arbitrator and other Tribunals/Judicial Fora are promoted and encouraged to expedite the process of justice and are not bound by rules of

evidence or C.P.C. Since the petitioner herein has not filed any protest or objection to the non-grant of right to cross examine and continued to participate of arbitration proceedings, therefore, he has waived his right to object to the same in view of Section 4 of the Act. Cross examination is granted when examination in chief is conducted. However, in the present case, Arbitrator has adopted the procedure for filing of affidavits simplicitor. In view of Section 24 (1) of the Act, the Arbitrator has been given liberty to decide to have oral presentation of evidence or to have case decided on the basis of documents and material on record. The Arbitrator adopted the procedure for deciding the case on the basis of documents, affidavits of evidence and material on record, which procedure has not been challenged or objected to by either party. The judgment of Sukhbir Singh being relied upon by the petitioner herein is distinguishable and not applicable to the facts of the present case. In the said case, the Objector therein filed an application specifically mentioning the points/ grounds/ facts on which he intends to cross examine the witness. Further, in the said case, a Lab report was relied upon which was a report of an expert and according to Section 26 (2) of the Act, expert witness can be cross examined. Further, that case did not pertain to institutional arbitration i.e governed by any institutional rules and regulations. However, the present case was governed by institutional arbitration rules i.e rules of Paper Merchants Association, as also mentioned in all the invoices and also admitted during the course of oral arguments by the petitioner herein.

11. The respondent herein relies upon the following judgments:-

a. Kailash Nath Agarwal Vs. M/s. Aaron Exports- Paras 3, 4, 15, 18, 19, 22 and 25.
b. Scholar Publishing House Pvt. Ltd. Vs. M/s. Khanna Traders -Paras 5, 6, 9, 10.
c. State Trading Corporation Vs. M/s. Toepfer International Asia – Paras 6, 7, 9, 11, 12, 14, 17.
d. Trimex International Vs. Vedanta Aluminium Ltd.- Paras 15, 16, 19. Para 19 is most relevant.
e. D.L Miller Vs. Daluram Goganmull- Air 1956 Cal 361- Paras 11, 12, 13, 14, 15, 18, 20.
f. Union of India Vs. Delhi High Court Bar Association- Page 12 – Matter was relating to DRT and Court held that right to cross examination is not an absolute right.
g. Patel Engineering Vs. North Eastern Electric Power- Paras 19, 22.

FINDINGS AND CONCLUSIONS OF THE COURT

The Ld. Counsel for the petitioner has raised the first argument that the petitioner was not even allowed to cross-examine the witness of the claimant/respondent and the same amounts to violation of the principles of natural justice and the Arbitration Award is liable to be set-aside on this ground alone.

Paras No. 12, 19, 20, 21, 22, 25 and 29 of the latest Judgment of our own High Court as relied upon by the Petitioner passed in Sukhbir Singh V/S Hindustan Petroleum Corporation Ltd**,** 2020 (266) DLT 612 are reproduced herein for apt understanding:-

"12. The only ground of challenge argued by Mr. Sanat Kumar, learned Senior Counsel for the petitioner, is that the arbitrator's failure to permit cross-examination of the respondent's witness renders the impugned award liable to be set aside for violation of the principles of natural justice.

II. Principles of Natural Justice

21. In considering the question raised in the context of a petition under Section 34 of the Act, it must be noted at the outset that the Supreme Court has, time and again, emphasised adherence to the principles of natural justice as a part of the fundamental policy of Indian law. In ONGC Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263, the Court held inter alia as follows:—

> "38.Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law."

22. Referring to Western Geco (supra) and Associate Builders v. Delhi Development Authority (2015) 3 SCC 49, the Court reiterated these principles in Ssangyong Engineering &

Construction Co. Ltd. v. National Highways Authority of India 2019 (3) ArbLR 152 (SC) : 2019 SCC OnLine SC 677. In paragraph 35 of Ssangyong (supra), the analysis in Western Geco has been reaffirmed, at least to the extent that it applies to arguments of natural justice:—

"…However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra)."

25. It is undisputed that an affidavit of evidence was filed on behalf of the respondent on 01.10.2013 and the next hearing was only held on 04.04.2014, when the request for cross-examination was made to the arbitrator. Although some hearings had been scheduled in the interregnum, it is evident from the material on record that no hearings were in fact held. Considering that all the dates of hearing between 01.10.2013 and 04.04.2014 were cancelled in advance of hearing, I find that the petitioner's request to the arbitrator was made at the appropriate stage.

29. In the judgment of this Court in Degremont (supra), relying upon Section 18 of the Act, an arbitral award was set aside on the ground of 'procedural infirmities'. Mr.Sanat Kumar relied upon the following extracts of the said judgment:—

"30. The reply by Respondent No. 1 to the counter claims of the Petitioner was over 300 pages. It was but necessary for the Tribunal to have permitted the Petitioner to file a rejoinder to the said reply. Moreover, considering that a large number of documents had been filed by both the parties and the claim was for a sum of over Rs. 3.5 crores involving disputed questions of fact, it was necessary for the Tribunal to have devised a procedure consistent with Section 18 of the Act to ensure that full opportunity was given to both the parties to support their

> respective claims and counter claims. **It was also necessary, in the facts and circumstances of the present case, to permit the parties to file affidavits by way of examination in chief and also in a time-bound manner complete the cross-examination of witnesses.** On the other hand, the Tribunal appears to have adopted summary procedure of going by the written submissions of both the parties. While a Tribunal is not bound by the strict rules of evidence and the rules of procedure that govern the proceedings before a civil court, **it must ensure that adequate opportunity is given to the parties before it to present their respective cases and establish the veracity of the documents relied upon by them.** As far as the present case is concerned, it was not correct for the Tribunal to have adopted a summary procedure of going only by the written submissions of the parties. The Tribunal also does not appear to have referred to the numerous documents filed by the parties in the impugned Award.
>
> 31. This Court holds that the procedure adopted by the Tribunal in the present case was far from satisfactory and was not consistent with the requirement of Section 18 of the Act. This is another ground on which the impugned Award is unsustainable in law and is hereby set aside."

This Petitioner had set-up his defence in the reply dated 01.09.2015. The reply dated 01.09.2015 was sent by the Petitioner/ defendant to the Legal Notice dated 18.08.2015 of the Respondent/claimant. The reply dated 01.09.2015 sent through registered post inter-alia mentions that:-

> "Your another contention that you supplied C2S Printing Paper Gloss to my clients and raised Invoice No.3402 dated 24.11.2014 for Rs.1,60,722/- on my client is totally misconceived and imaginary. In this regard I have to inform you that my clients never placed any Order on you and have not received alleged Invoice No.3402 for Rs.1,60,722/- or for any other amount nor my clients

> have received C2S Printing Paper Gloss. You are put to strict proof of delivery of goods as well as receipt of alleged Invoice No.3402 for Rs.1,60,722/- or for Rs.1,48,513/-. It seems you are raising bogus and baseless claims against my clients with the only intention to blackmail my clients."

The aforesaid reply reveals that the Petitioner/defendant since beginning has maintained the stand that the Petitioner has not received the goods under the Invoice No.3402. In fact, the Petitioner, at first instance, raised the defence that there was no transaction either of Rs.1,60,722/- or Rs.1,48,513 under Invoice No.3402. The Respondent has disputed the said reply dated 01.09.2015 and it is submitted in the rejoinder filed before the Ld. Arbitrator that the said reply and postal receipt is forged and fabricated. The Ld. Arbitrator has nowhere come to the conclusion that the said reply dated 01.09.2015 and the original postal receipt is a forged and fabricated document. In fact the Ld. Arbitrator has nowhere adjudicated and discussed the said reply in his Award.

Furthermore, the perusal of the Arbitration record reveals that the original reply dated 05.11.2015 has been received by the Paper Merchant Association in reference to their letter dated 19.10.2015 sent to the petitioner (which was alleged to be received by the petitioner on 26.10.2015). In the said letter, there is reference of reply dated 01.09.2015 and it is submitted by them that the said reply is self-explanatory. In said letter, it was also mentioned that the petitioner had neither placed any order nor they received any goods from the respondent qua the invoice in question.

Reply to Para no.7 on merits of the Written Statement, filed by the petitioner/Defendant before the Ld. Arbitrator, clearly reveals that after denying

the contents of para no.7 of the Statement of Claim, it is categorically stated by the petitioner/defendant that petitioner/defendant has never placed any order on the claimant/respondent for supply of alleged goods mentioned in alleged invoice no. 3402, dated 24.11.2014 for Rs.1,60,722/-. It is also averred that therefore, the question of supply of goods does not and cannot arise. It is further stated by the petitioner/defendant that he has not received Invoice no. 3402 for Rs.1,60,722/- or Invoice no. 3402 for Rs.1,48,513/-. The categorical stand of the petitioner/defendant before the Ld. Arbitrator was that he has not done any transaction on which the claim of the respondent/claimant was based. The entire case of the claimant/respondent is based upon the invoice no. 3402, dated 24.11.2014 for Rs.1,48,513/- and recovery of the amount is also based upon the said Invoice.

The Order dated 13.01.2016 passed by the Ld. Arbitrator reveals that the matter was fixed for evidence of the claimant/respondent and on that day, an application under Order 6 Rule 17 CPC was filed by the claimant/respondent. The matter was thereafter taken up on 20.02.2016. On 20.02.2016, the petitioner/defendant has filed reply to the application under Order 6 Rule 17 CPC. The Ld. Arbitrator has recorded that the claimant/respondent has not filed evidence by way of affidavit and in case, the evidence by way of affidavit was not filed by the claimant/respondent on the next date, then the claim of the claimant/respondent will be dismissed. The Ld. Arbitrator has also fixed the matter for adjudication on the application under Order 6 Rule 17 CPC for 09.04.2016.

On 09.04.2016, the Ld. Arbitrator has allowed the application under Order 6 Rule 17 CPC filed by the respondent/claimant in accordance with the said Order. The natural corollary will be that once an application under Order 6 Rule 17 CPC was allowed by the Ld. Arbitrator, the Ld. Arbitrator was required to call upon the petitioner/defendant to file the amended Written Statement. The Ld. Arbitrator has not called upon the petitioner/defendant to file the amended Written Statement. The petitioner/defendant has also not raised their grievance as far as giving the opportunity by the Ld. Arbitrator to them to file the amended Written Statement, therefore, this aspect is not further considered in this Judgment.

Furthermore, on 09.04.2016, the evidence by way of affidavit was filed by the claimant/respondent and Ld. Arbitrator denied the opportunity by simply saying that the defendant wants to cross-examine the claimant, which was not allowed. The Ld. Arbitrator has not assigned reasons for not affording opportunity to the petitioner/defendant to cross-examine the claimant's witness. In terms of Section 24 of the Arbitration and Conciliation Act, the Ld. Arbitrator was required to give the reasoning for not affording the opportunity for oral hearing to cross-examine the witness, but the Ld. Arbitrator has failed to assign any reason, whatsoever, for not affording the opportunity to cross-examine and simply by one stroke, disallowing the submission of the petitioner/defendant.

The ld. counsel for claimant/respondent submits that in terms of Section 19 of the Arbitration and Conciliation Act, the Ld. Arbitrator is not bound to follow the Indian Evidence Act and as per Section 1 of the Indian Evidence Act, the Indian Evidence Act is not applicable to the Arbitral proceedings. It is further submitted that the Arbitrator is free to decide his own procedure.

Section 19(2) of the Arbitration and Conciliation Act provides that parties are free to agree on the procedure to be followed by the Arbitral Tribunal in conducting its proceedings. The perusal of the Arbitration record, nowhere, reveals that the Ld. Arbitrator had made any endeavor to ask the parties to agree on a particular procedure to be followed by the Arbitrator in conducting its proceedings. The Claimant has approached the Ld. Arbitrator and the claimant has never mooted any procedure to be followed by the Ld. Arbitrator. There was no exchange of procedure between the parties which was required to be followed by the Ld. Arbitrator to conduct the Arbitration proceedings. There is no order of Ld. Arbitrator which provides that a particular procedure was mooted by one party and other party has not given his consent on the said procedure. Section 19(3) of Act will apply only in a case, where there is no agreement between the parties.

The provisions of Section 19(2) and 19(3) have not at all been followed in the present case. No doubt, the Ld. Arbitrator has the power to decide the procedure but only in a case where the parties have failed to arrive any agreement with respect to the procedure to be adopted by the Ld. Arbitrator to conduct the Arbitration proceedings. However, in the present case, the parties have not exchanged even the procedure which was required to be followed by the Ld. Arbitrator. None of the order of Ld. Arbitrator reveals that the Ld. Arbitrator would follow the procedure X or procedure Y in order to conduct the Arbitration proceedings. The Ld. Arbitrator has also not even suggested the procedure to be followed by him to adjudicate the case. It is well known that Arbitration proceedings are Additional Dispute Resolution forum and it is adjudicatory body and not merely a conciliatory body. Otherwise also, the Ld. Arbitrator was

required to follow the procedure, which was fair, rationale, reasonable and not arbitrary and whimsical.

The petitioner/defendant had already raised their defence before the Ld. Arbitrator by way of pleading and documents and in view of the facts and circumstances of the case, the Ld. Arbitrator ought to have given reasoning and finding for denial of the right of cross-examination to the petitioner/defendant to cross-examine the witness of the claimant/respondent, but the Ld. Arbitrator has not given or assigned any reason at all and the Order dated 09.04.2016, whereby, the right to cross-examine the claimant's witness was closed simply in one stroke holding that the right to cross-examine is declined. In terms of the judgment of ***Sukhbir Singh Vs. Hindustan Petroleum Corporation Ltd. 2020 (266) DLT 612***, the Ld. Arbitrator was required to give oral hearing for cross-examination and in case, the Ld. Arbitrator does not want to allow oral hearing for cross-examination, then, the Ld. Arbitrator was required to give reasoning. In terms of the said dictum, the Ld. Arbitrator has failed to assign any reason, whatsoever.

The Ld. Counsel for the claimant/respondent has argued that even the claimant/respondent was not given any opportunity to cross examine the witness of the Petitioner/Defendant and the Ld. Arbitrator has given equal treatment to both the parties. The said Argument of the Ld. Counsel for the claimant/respondent is totally misplaced and sans merit. The Ld. Counsel for the claimant/respondent has failed to point from entire order sheets of the Ld. Arbitrator that as to when the claimant/respondent had asked for the cross examination of the witness of Petitioner/Defendant. When the claimant/respondent has not asked for the same where was the question for allowing or disallowing the

same. Furthermore, the perusal of the entire order sheets reveals the Respondent/ claimant had never asked for cross examination of the witness of the Petitioner/Defendant and it is only the Petitioner/Defendant who had asked for cross examination of the respondent/claimant's witness.

The Ld. Counsel for claimant/respondent has also relied upon regulations of the Paper Merchant Association (Regd.) Delhi and submits that the said rules nowhere allow the parties to have a right to cross-examine the opposite party and in view thereof, the petitioner/defendant was not having any right to cross-examine the claimant/respondent's witness as a matter of right. Firstly, the Ld. Arbitrator has not assigned any reason for declining the cross-examination, as mandated by the aforesaid Judgment of Hon'ble High Court. The Ld. Arbitrator had nowhere held that since there was contrary Regulation of Paper Merchant Association (Regd.) Delhi, therefore, he is declining the Petitioner/ Defendant to cross-examine the Respondent/Claimant's witness. Secondly, this Court has perused the Regulation 30, which provides rules for arbitration cases of the Paper Merchant Association (Regd.) Delhi. The said regulation, nowhere, expressly bars any party to cross-examine the witness of other party. Per Contra, the Clause-10 of the Regulation 30 of the Paper Merchant Association (Regd.) Delhi provides that Arbitrator/Arbitrators shall decide the dispute in accordance with the Arbitration and Conciliation Act and amendments made therein from time to time by the Central Government.

Furthermore, the provision of Section 19(1) of the Arbitration & Conciliation Act, whereby, it provides that Arbitral Tribunal shall not be bound by the CPC or the Indian Evidence Act, does not imply that the fundamental

principles of natural justice are required to be violated or the Arbitrator is not required to follow the fundamental and basic principles and notions of the Evidence Act. In the present case, on account of the defense raised by the petitioner/defendant, the petitioner/defendant ought to have been given the right of cross-examination to check the veracity of the evidence and documents, as relied by the claimant/respondent. It is well settled law that the procedure adopted must be rational and it should not be arbitrary or whimsical. The fundamental policy of Indian Law is to elicit the truth. In the present case, in my considered opinion, the cross-examination of claimant's witness was necessary. The petitioner/defendant had asked for the cross-examination of claimant's witness, but the same was denied by the Ld. Arbitrator. The judgments as relied upon by the claimant/respondent in this respect are totally distinguishable on the facts and circumstances of the present case. The judgments as relied upon by the ld. counsel for petitioner/defendant and specifically of the Hon'ble Delhi High Court passed in ***Sukhbir Singh Vs. Hindustan Petroleum Corporation Ltd. 2020 (266) DLT 612*** is squarely and directly applicable to the facts and circumstances of the present case.

In addition to above, the perusal of the impugned award reveals that the same runs in total 3 pages and out of 3 pages, more than one and half pages relate to the facts and history of the case. The findings of the Ld. Arbitrator qua liability of the petitioner/defendant are as follows:-

> *"Now I will take up the case of Bill no. 3402 dated 24.11.2014 for Rs. 1,48,513/-. The defendant has denied that he has not received the goods against this bill. I have examined Challan no. 524 dated 24.11.2014, which is duly signed by the defendant in token of*

acceptance of the above bill. I am therefore satisfied that the goods against bill no. 3402 dated 24.11.2014 has been delivered to the defendant. I therefore announce the award in favour of the claimant and against the defendant.

Principal amount *Rs. 1,48,513/-*
(interest allowed @ 12% p.a.) *Rs. 12,695/-*

Instead of 24% p.a. as claimed by the claimant

Total *Rs. 1,61,208/-*
(Rs. One Lakh Sixty One Thousand Two Hundred and Eight only)

Future interest @ 12% p.a. is also allowed on the above awarded amount till the payment is received by the claimant."

The ld. counsel for claimant/respondent submits that the Ld. Arbitrator has clearly written in his Award that he has gone through the papers filed by the claimant and defendant and it is also written that he has also gone through the Written Statement, evidence by way of affidavit filed by the defendant, Rejoinder and evidence by way of affidavit filed by the claimant thoroughly. It is submitted by the Ld. counsel for claimant/respondent that the Ld. Arbitrator has given his Award after perusing the entire file.

In terms of Section 31(3) of the Arbitration and Conciliation Act, the arbitral Award shall state reasons, upon which it is based unless the parties have agreed that no reason need to be given or the Award is based upon the compromise/settlement between the parties. The Award was not based upon the compromise between the parties. There was no agreement between the parties that the Ld. Arbitrator was not required to give reasons, therefore, it was incumbent upon the Ld. Arbitrator to back his award by reasons.

No doubt, the Ld. Arbitrator has written that he has perused the records, however, the only reason, on which he has awarded the aforesaid amount in favour of claimant/respondent that he had examined Challan no. 524, dated 24.11.2014, which is duly signed by the defendant in token of acceptance of the above bill. The Ld. Counsel for respondent/claimant has tried to fill the said reasoning by submitting that the Ld. Arbitrator has compared the earlier Challan and the disputed Challan and after comparing the signatures on those Challans, the Ld. Arbitrator came to conclusion that the signatures belong to the defendant.

In my considered view, the reason and the procedure adopted by the Ld. Arbitrator for giving the Award in favour of the claimant/respondent shocks the judicial conscience. The Ld. Arbitrator has nowhere concluded that he has compared the signature of earlier Challan with the disputed Challan. The Ld. Arbitrator has only held that he had examined Challan no. 524, dated 24.11.2014, which is duly signed by the defendant in token of acceptance of the above bill. The petitioner/defendant, at no point of time in the entire pleading and evidence, had admitted that the said Challan bears their signature. The Ld. Arbitrator has not assigned any reason, whatsoever, as to why he had arrived at such a conclusion and what was the evidence, which was available with him for arriving at such a conclusion. Furthermore, the perusal of the order-sheets of the Ld. Arbitrator clearly reveals that at no point of time, the original Challan no.524, dated 24.11.2014 or earlier Challan were produced for his inspection. Even on the date of filing of the evidence by way of affidavit by the Respondent/Claimant, the Ld. Arbitrator has nowhere recorded that the original documents including challans were produced by the Respondent/Claimant for his inspection.

Even, if the Ld. Arbitrator exercises the power under Section 73 of the Indian Evidence Act, still the Ld. Arbitrator was required to see the original documents before arriving at the conclusion that the signatures on both the Challans are of the defendant. The procedure adopted by the Ld. Arbitrator for arriving at the conclusion is based upon no reason at all.

The perusal of the order dated 30.07.2016 reveals that the Ld. Arbitrator has given the directions to both the parties to produce respective Form 2A and Form 2B filed by them of third quarter of the year 2014 filed with D-Vat Department.

The perusal of the Order dated 27.08.2016 of the Ld. Arbitrator reveals that the petitioner/Defendant has filed Form/Annexure 2A, which is summary of the purchase made by the defendant for the 3rd quarter from 1.10.2014 to 31.12.2014. The Ld. Arbitrator has noted in the said order that the Bill no.3402, dated 24.11.2014 raised by the claimant on the defendant has not been mentioned anywhere in the Annexure 2A. The claimant attended the proceedings late and submitted Form/Annexure 2B. The claimant/respondent has shown the entries of Invoice no. 3402, dated 24.11.2014 for a sum of Rs.1,48,513/- in its Return filed with D-Vat Department. The Ld. Arbitrator has come to the conclusion that it has to be verified from the D-Vat Department, whether the mismatch is in the hand of purchaser or seller.

The petitioner/defendant has filed the detailed affidavit and it was clearly mentioned in the said detailed affidavit that no Mismatch Notice has been received by the petitioner/defendant from the D-Vat Department. It is also mentioned by the Petitioner/defendant that no penalty was levied by the D-VAT Department.

Despite specific Order dated 27.08.2016, no endeavour has been made either by the claimant/respondent or even by the Ld. Arbitrator to adhere to the said Order dated 27.08.2016 for verification from the D-Vat Department. The Order dated 27.08.2016 has not been followed at all and the same remained un-complied with.

The Ld. Arbitrator in his Award has nowhere commented, discussed and adjudicated the detailed affidavit filed by the petitioner/defendant, whereby, the Petitioner/defendant had categorically stated that they have not received any mismatch notice from the D-Vat Department and no penalty was also levied by the D-Vat Department. It is fundamental policy of India that the justice is not to be done but it also appears to be done. The Ld. Arbitrator has arrived the finding of the signature of the defendant only by looking the photocopy of the document without calling or adjudicating upon the original document. Furthermore, the perusal of the file reveals that there is no stamp on the said challan which has been relied upon by the claimant/respondent and even the name is not written on the said challan. The defendant is the partnership firm and in terms of Section 22 of the Partnership Act, 1932, in order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm-name, or in any other manner expressing or implying an intention to bind the firm. There is no pleading of the claimant or evidence that signature on the challan bears the signatures of which of the partners of the defendant firm and there is also no pleading or evidence that it was received by the employee of the defendant firm. The Photocopy of challan reveals some initials of signature without any stamp and it does not reveal whose signature it bears. The Ld. Arbitrator has vaguely without any evidence and that too on the

photocopy of the document came to conclusion that it bears the signatures of defendant. The pleadings or the evidence filed by the defendant/Petitioner, nowhere, matches with the signature of the photocopy of the challan.

Furthermore, the entire burden was upon the claimant/respondent to prove the entitlement of the aforesaid amount but the claimant/respondent have not taken any effort to even comply the order dated 27.08.2016, whereby, the Ld. Arbitrator has clearly opined that it was required to be verified from the D-Vat Department that mismatch notice has been given to the petitioner/defendant or the claimant/respondent. In my considered view, the aforesaid reasons based upon the naked comparison and without being compared with the original documents and without pleading and evidence, as discussed hereinabove, are totally against the fundamental policy of Indian Law. The aforesaid award on the face of it appears to be based upon no reasons.

The ld. Counsel for claimant/respondent submits that various emails and notices were delivered to the petitioner/defendant and the same were not at all replied by the petitioner/defendant and in view of Judgment of the Hon'ble High Court the adverse inference is to be taken against the petitioner/defendant and there is presumption that there was liability of the Petitioner/defendant.

First of all, the said aspect, has not been commented, discussed and adjudicated upon by the Ld. Arbitrator in the entire award. Secondly, the Ld. Arbitrator has not come to the conclusion that he has relied upon the said documents for coming to the conclusion that the petitioner/defendant is liable to pay the disputed amount of the invoice. Furthermore, the Ld. Arbitrator has

nowhere come to the conclusion that the reply dated 01.09.2015 given by the Petitioner/defendant and the original postal receipt is a forged and fabricated document. In fact, the Ld. Arbitrator has nowhere adjudicated and discussed the said Reply in his Award. At the cost of repetition, the perusal of the Arbitration Record reveals that the original Reply dated 05.11.2015 has been received by the Paper Merchant Association in reference to their letter dated 19.10.2015 sent to the petitioner (which was alleged to be received by the petitioner on 26.10.2015). In the said letter, there is reference of Reply dated 01.09.2015 and it is submitted by them that the said reply is self-explanatory. In said letter, it was also mentioned that the petitioner had neither placed any Order nor they received any goods from the respondent qua the invoice in question.

The only reason, which is given by the Ld. Arbitrator for arriving at the conclusion of the liability of the petitioner/respondent, is the satisfaction about the signature of the defendant on the Challan, but there is no reflection of reasons how he was satisfied. The reasons in this respect are totally missing. There is no other reason, which has been assigned in the entire Award except a bald statement in the Award that he has perused the record. Even after perusing the records, he has not relied upon the notices, email for arriving/concluding that the petitioner/defendant is liable to pay.

There is another aspect, as per the case of the Respondent/Claimant, the respondent had always been consistent that initially the amount of invoice no. 3402 was Rs.1,60,722/-, wherein, the rate of goods supplied i.e. C2S Printing Paper Gloss was charged at Rs.1,482/- per kg, as was originally agreed upon between the petitioner and the respondent. It is further submitted that the

petitioner had avoided making payment by taking false pleas that the rate charged was excessive, therefore, to avoid any controversy and keeping in view the long business relations, the rate was revised to Rs.1,368/-, which was agreed by the petitioner and the invoice amount was revised to Rs.1,48,513/-. The Respondent/Claimant further pleaded that thus, there were no separate invoices/ bills no. 3402 or two bills as falsely averred by the petitioner and the bill amounting to Rs.1,48,513/- is merely the revised bill.

The Respondent/Claimant has himself has produced both the invoices and therefore, the said plea of the Respondent/claimant is totally vague and bereft of particulars. The Respondent/Claimant has failed to point out when the Petitioner/defendant has refused to make the payment of the first invoice No.3402 of Rs.1,60,722/- which was alleged to be supplied at the rate of Rs.1482/- per kg. The question of revision arises only when the same was refused for payment. As per the respondent/claimant the agreement was arrived between the parties and thereafter Invoice No.3402 of Rs.1,60,722/- was prepared. It is interesting to note that both the invoices i.e. Invoice No.3402 of Rs.1,60,722/- and Invoice No.3402 of Rs.1,48,513/- were of the same date. It is not the case of the Respondent/Claimant that the payment was required to be made by the Petitioner/defendant on the delivery of the goods. Moreover, the statement of account of the Respondent/Claimant itself shows that payments of the earlier Bills/Invoices were not made on the delivery of the invoices. If the payment was not made on the delivery of goods then on which date the Petitioner/defendant had refused to make the payment. There is no pleading or evidence of the respondent/ claimant to such effect and the pleading and evidence of respondent/claimant is

vague and bereft of particulars. The reason being that both the invoices i.e. Invoice No.3402 of Rs.1,60,722/- and Invoice No.3402 of Rs.1,48,513/- were of the same date.

The Statement of Account of the Respondent/Claimant reveals that there is no entry of the first Invoice No.3402 of Rs.1,60,722/- and there is no reference against the second entry that the same was revised on account of change in the agreed price between the parties. If there was any discount/revised rates agreed between the parties then the same ought to have been reflected at-least in the Statement of account in Respondent/Claimant and more-so, in the Statement of account of the Respondent/claimant as relied upon, there was credit entry of a discount of Rs.5,208/- towards some earlier bill/invoice. However, there is no entry of the first Invoice No.3402 of Rs.1,60,722/- and therefore, there is no entry of discount or revised bill which has been shown in the statement of account by the Respondent /Claimant. The Ld. Arbitrator has not at all commented, discussed or adjudicated upon the said aspect and in my considered view the findings of the Ld. Arbitrator is basically based upon no reasoning and non-application of judicial mind.

The Judgments, as relied upon by the ld. counsel for petitioner/defendant, are squarely and directly applicable to the facts and circumstances of the present case and the Judgments, as relied upon the Ld. Counsel for respondent/claimant, are distinguishable on facts and circumstances of the present case. In my considered view, the aforesaid Award is against the violation of principles of natural justice, fundamental policy of India and shocks the judicial conscience. Furthermore, the same appears to be also patently illegal.

RELIEF:

Accordingly, in view of the discussions, as adumbrated above, I hereby pass the following

::- FINAL ORDER -::

a. The Petition /Application/Objection under Section 34 of the Arbitration and Conciliation Act is hereby allowed. The impugned Award dated 20.12.2016 is hereby set-aside.

b. The parties are left free to pursue their remedies in accordance with law.

c. No order as to costs in the present petition. The parties shall bear their own respective costs.

File be consigned to Record Room after due compliance.

Announced through video conferencing on this 20th day of June, 2020.

ARUN SUKHIJA
Digitally signed by ARUN SUKHIJA
Date: 2020.06.20 16:09:28 +05'30'

(ARUN SUKHIJA)
ADJ-07 (Central)
Tis Hazari Courts, Delhi