Kavita S.J.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION NO. 909 OF 2019

Shriram EPC Ltd., **…Petitioner**

Versus

Parker-Hannifin India Pvt. Ltd., **…Respondent**

Mr. Kevic Setalvad, Senior Counsel a/w Mrs. Rajalakshmy Mohandas, Mr. Amey Kulkarni, Ms. Mukta Chorge & Mr. Nehal Farukh Azam i/b Rajalakshmy Associates for the Petitioner.

Mr. Zubin Behramkamdin, Senior Counsel a/w Vijay Purohit, Faizan Mithaiwala, Pratik Jhaveri, Niyari Bhogayta, Vinit Kamdar i/b P&A Law Officers for the Respondent.

CORAM : R.I. CHAGLA, J.

RESERVED ON : 19TH DECEMBER, 2024.

PRONOUNCED ON : 4th AUGUST, 2025.

JUDGMENT :

1. By this Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"), the Petitioner is impugning (i) Award dated 5th February 2019, passed by the learned Sole Arbitrator ("**impugned Award**"), rejecting the Petitioner's

contention and partly allowing the claim of the Respondent; and (ii) Order dated 3rd September 2016, passed by the learned Sole Arbitrator ("**impugned Order**"), rejecting the application filed by the Petitioner under Section 16 of the Arbitration Act.

2. A brief background of facts is necessary as stated hereunder:

(i) A Purchase Order was issued by the Petitioner on 15th March, 2012 in favour of the Respondent for manufacturing and supply of 480 Hydraulic Drives and 960 Hydraulic Cylinders for a total contract price of INR 6,81,60,000/-. These goods were to be custom made as per the specification of the Petitioner and it is contended by the Respondent that the goods were of specific use only to the Petitioner.

(ii) Thereafter, the Petitioner and the Respondent executed a Supply Agreement dated 26th March, 2012. Under Clause 4.8 of the Supply Agreement, the Petitioner was the Consignee of the goods delivered by the Respondent, as per the Delivery Schedule agreed between

the parties and was liable to make / ensure full payment to the Respondent for the goods. The Respondent was to deliver the goods in different quantities, which was categorized as lots. Under Clause 5.4 of the Supply Agreement, (i) the Petitioner was liable to pay a non-refundable advance payment of INR 68,16,000/- i.e. 10% of the total contract price; and (ii) The Petitioner, prior to the first delivery of the goods, was liable to procure a usance Letter of Credit payable at site from Corporate Ispat Alloys Limited ("**CIAL**"), in favour of the Respondent, which was to cover the remaining 90% of the contract price. It is pertinent to note that as per Clause 22.3.1 of the Supply Agreement, a failure to procure a Letter of Credit amounted to the Petitioner's default under Clause 22.3 and such default entitled the Respondent to terminate the Supply Agreement under Clause 22.4 thereof. Additionally, as per Clause 26.4 of the Supply Agreement, any forbearance or delay on part of either of the party, in enforcing any of its rights under the Supply Agreement would not construe as a waiver of such right to enforce the same.

(iii) A Multi-Party Agreement ("**MPA**") was executed on 2nd August, 2012. The MPA was entered between CIAL, APL ("**Abhijeet Projects Limited**"), the Petitioner and the Respondent but the Agreement was signed only by the Petitioner and the Respondent. The MPA provides a mere clarification to the payment mechanism agreed between the Petitioner and the Respondent. Under Clause A(1) of the MPA, CIAL was to open an irrevocable inland letter of credit in favour of the Respondent, covering 90% of the total contract price. The balance amount was payable by the Petitioner directly. It is pertinent to note that under Clause C of the MPA, it was agreed that all the terms and conditions mentioned in the Supply Agreement shall continue to remain valid and enforceable amongst the parties. As per Clause D of the MPA, in the event of any conflict between the terms of the Supply Agreement and the MPA, the former will prevail i.e. the Supply Agreement. Further, as per the Clause A(2)(iv) of the MPA, the payment mechanism provided thereunder could not be construed to override the specific terms of payments provided under the Supply Agreement.

(iv) The Letter of Credit for the first lot was not provided by CIAL (as per the MPA) but the Petitioner, recognizing its legal obligation to make payment / ensure payment to the Respondent (under the Supply Agreement) delivered a Letter of Credit on 4th August 2012, which was issued by APL in favor of the Respondent. The Letter of Credit was for 90% of the purchase price of the first lot manufactured by the Respondent. The Respondent accepted the Letter of Credit and proceeded to deliver the first lot, which was already manufactured and ready for delivery. It is pertinent to note that, the delivery of the first lot was accepted by the Petitioner without raising any objections.

(v) Several emails were exchanged between the Petitioner and the Respondent from September 2012, wherein the Respondent inquired about the issuance of the Letter of Credit for the second lot, as mandated under the Supply Agreement. The second lot of the goods was ready for delivery, post approval from the Indian Register of Shipping. However, the Petitioner refused to take

delivery of the same.

(vi) A meeting was held between CIAL, APL, Petitioner and the Respondent on 4th October, 2012, wherein the Respondent informed the rest of the attendees that the second lot was ready for delivery and third lot was ready for inspection. The Respondent was also assured at the said meeting that the second Letter of Credit against the 100 sets will be opened by 15th October 2012, and further informed that the delivery for the balance sets will be taken by the end of December 2012.

(vii) The Letter of Credit was not opened by 15th October, 2012. Meanwhile, the inspection for the third lot was complete and it was ready for delivery. By June 2013, manufacturing of the fourth lot and six units of the fifth lot were also complete, however, the Petitioner failed to arrange for inspection of the fourth and the six units of the fifth lot. At no point of time did the Petitioner state that it was not interested in accepting the goods. The Petitioner had also not asked the Respondent to pause the

manufacturing process.

(viii) By Letter dated 22nd August 2013, the Respondent called upon the Petitioner to take delivery of the lots manufactured by the Respondent. However, the Petitioner refused to take delivery of the lots manufactured.

(ix) Ultimately, on 23rd December 2014, the Respondent terminated the Supply Agreement and the MPA ("**Termination Letter**").

(x) The Respondent addressed a notice invoking arbitration dated 16th June, 2015 ("**Arbitration Notice**"). This is by invoking Clause 26.7.3 of the Supply Agreement. Since, the parties failed to reach a consensus on the appointment of arbitrator, the Respondent filed an application under Section 11 of the Arbitration Act, seeking this Court's assistance to appoint a Sole Arbitrator to adjudicate the disputes between the Petitioner and the Respondent.

(xi) This Court by an Order dated 9th September, 2015

("**Section 11 Order**"), while categorically acknowledging the existence of the arbitration clause in the Supply Agreement, appointed Hon'ble Mr. Justice S. H. Kapadia (Retired) as the Sole Arbitrator. However, on the demise of Hon'ble Mr. Justice S. H. Kapadia (Retired), Hon'ble Mrs. Justice Sujata Manohar (Retired) was appointed as the Learned Sole Arbitrator. It is pertinent to note that the Section 11 Order shows that no disputes were raised by the Petitioner regarding the reference to Arbitration.

(xii) The Petitioner filed an application under Section 16 of the Arbitration Act, challenging the jurisdiction of the Learned Sole Arbitrator.

(xiii) By the impugned Order dated 3rd September 2016, the learned Sole Arbitrator dismissed the Section 16 Application on merits. The learned Sole Arbitrator, after interpreting the relevant clauses of the Supply Agreement as well as the MPA, concluded that the Supply Agreement is not affected by the MPA and rejected the Petitioner's contention that CIAL and APL are necessary parties to the

arbitration proceedings. Furthermore, the learned Sole Arbitrator relying upon the Section 11 Order, rejected the Petitioner's contention regarding absence of payment of requisite Stamp Duty on the Supply Agreement, as the document was duly admitted by the Petitioner.

(xiv) The learned Sole Arbitrator passed the impugned Award dated 5th February 2019, partly allowing the claims of the Respondent and rejecting the Petitioner's Counter Claim. By the impugned Award, the Petitioner was directed to compensate the Respondent for the manufactured lots along with the purchase of raw material and spare parts, which were custom-designed or fabricated to specification for the supply of 480 units as per the claim of the Respondent.

(xv) The captioned Commercial Arbitration Petition was filed seeking the setting aside of the Section 11 Order and the impugned Award.

3. Mr. Kevic Setalvad, learned Senior Counsel appearing for the Petitioner has submitted that from a reading of the Supply

Agreement and MPA, it is evident that CIAL and APL are necessary parties for adjudication of the disputes raised in the arbitration. Further, from a reading of the LOI, Purchase Order and the Supply Agreement, it would be evident that the obligation of the Petitioner was only in respect of 10% advance amount and not with respect to the balance 90%. The Petitioner has duly complied with its obligation to pay the 10% advance. The liability to open the Letter of Credit in respect of the balance 90% amount vested with CIAL.

4. Mr. Setalvad has submitted that as per the Supply Agreement, the consequence of failure of Petitioner to procure Letter of Credit from CIAL is mentioned in Clause 22.4 of the Supply Agreement. In such event, the Respondent is liable only to pay the liquidated damages and not otherwise. He has referred to the words "*Purchaser **shall procure***" in Clause 5.4.2 of the Supply Agreement and has submitted that this cannot be read to mean that the Purchaser **shall pay** the entire amount in the event CIAL defaults in its obligation. He has submitted that such a reading, would amount to re-writing the Contract.

5. Mr. Setalvad has submitted that the liability of CIAL as

per the Supply Agreement is to open the Letter of Credit in relation to the balance 90% amount and which liability continues in the MPA. He has submitted that the words "*Purchaser shall procure that CIAL shall open the Letter of Credit…*" as used in the Supply Agreement have been omitted in the MPA. He has submitted that the Petitioner's liability to procure the opening of Letter of Credit by CIAL no longer remained. The obligation of CIAL to open the Letter of Credit, remained with CIAL.

6. Mr. Setalvad has referred to Clause C of the MPA and in particular the words *"Terms and conditions mentioned in Contract No. 3 shall continue to remain valid and enforceable* ***inter se among the Parties*** *including* ***the conditions pertaining to resolution of Disputes*** *and that the same shall to the extent that the context may permit, shall also apply to this Agreement*" He has submitted that the parties included CIAL and APL. The phrase "*inter se among the Parties*" in Clause C of the MPA makes it evident that the rights and obligations in Contract No. 3 i.e. Supply Agreement (such as payment of 10% advance by the Petitioner to the Respondent; and payment of 90% by CIAL under Letter of Credit), including the dispute resolution Clause, were incorporated into, and continued to exist under the

MPA – between all four Parties to the MPA. He has submitted that clearly, the arbitration agreement contained in the Supply Agreement was incorporated into the MPA. CIAL and APL, who were parties to the MPA, were necessary parties to the arbitral proceedings.

7. Mr. Setalvad has submitted that the Respondent in their Statement of Claim have *inter alia* claimed for recovery of the balance 90% amount from the Petitioner in addition to warehousing charges and liquidated damages. He has submitted that the liability of the Petitioner was restricted to 10% contract price and the claim of the Respondent was in relation to the balance 90% amount which obligation was contractually vested in CIAL (and was taken over by APL). He has submitted that clearly, CIAL and APL were necessary parties to the arbitration.

8. Mr. Setalvad has placed reliance upon the events that transpired after the execution of the MPA. He has submitted that it would be evident from the sequence of events that the nature of the dispute was so inextricably linked between CIAL, APL, the Petitioner and the Respondent that the dispute could be effectively decided only when all the four parties were made parties to the arbitral

proceedings.

9. Mr. Setalvad has placed reliance upon the Judgment of the Supreme Court in ***Mahanagar Telephone Nigam Ltd. Vs. Canara Bank and Ors.***[1] at Paragraphs 10, 16, 17 and 22. The Supreme Court has *inter alia* held that a third party must be included in the arbitration if there is a direct relation between the party which is a signatory to the arbitration agreement; direct commonality of the subject matter; the composite nature of transaction between the parties. He has placed reliance upon the Judgment of the Supreme Court in ***Cox and Kings Ltd. Vs. SAP India Pvt. Ltd. 2023***[2] ***at*** Paragraphs 166 to 171 and ***Ameet Lalchand Shah Vs. Rishabh Enterprises*** [3] at Paragraphs 24 to 26.

10. Mr. Setalvad has submitted that the fact that CIAL and APL did not actually sign the MPA is of no consequence. He has submitted that if a non-signatory party is involved actively in the performance of a contract and its actions align with those of the signatories, then such a non-signatory party is a 'veritable party' to

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1 *[(2020) 12 SCC 767]*
2 *SCC OnLine 1634*
3 *(2018) 15 SCC 678*

the contract containing the arbitration agreement. He has submitted that the Arbitral Tribunal has the power to decide whether the non-signatory is bound by the arbitration agreement and to implead the non-signatory, if required.

11. Mr. Setalvad has placed reliance upon the Judgment of this Court in ***Cardinal Energy and Infra Structures Private Ltd. Vs. Subramanya Construction and Development Co. Ltd.***[4], wherein this Court had *inter alia* held that the Arbitral Tribunal has the power to decide whether the non-signatory is bound by the arbitration agreement and to implead the non-signatory if answered in the affirmative.

12. Mr. Setalvad has also placed reliance upon the Judgment of the Delhi High Court in ***KKH Finvest Private Ltd. Vs. Jonas Haggard and Ors.***[5] at Paragraphs 72, 80, 81, 87, 89 to 91, wherein the Delhi High Court has held that if a non-signatory party is involved actively in the performance of a contract and its actions align with those of the signatories, then such a non-signatory party is a 'veritable party' to the contract containing the arbitration

4 *Order dated 27.03.2024 in CARBP(L) 2603.2024*

5 *Judg.dtd.21.10.2024 in ARBP 38/2024 & IA700/2024*

agreement and such party can be impleaded in the arbitration.

13. Mr. Setalvad has submitted that Clause C of the MPA states that the terms and conditions of Contract No. 3 i.e. Supply Agreement including the dispute resolution clause shall also apply to the MPA. He has submitted that on a combined reading of the Supply Agreement and the MPA, it would be evident that the arbitration clause in the Supply Agreement has been incorporated in the MPA. He has placed reliance upon Section 7(5) of the Arbitration Act which *inter alia* states that where there is an incorporation of the terms and conditions of a document, every term of such document will apply to the contract. If a document so incorporated contains a provision for settlement of disputes by arbitration, the said arbitration clause will also apply to the contract.

14. Mr. Setalvad has placed reliance upon the Judgment of the Supreme Court in ***Shinhan Bank Vs. Carol Info Services***[6] at Paragraphs 15 to 19, wherein the Supreme Court placed reliance upon the decision of ***M.R.Engineers and Contractors Private Limited Vs. Som Datt Builders Limited***[7] and held that where there is an

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6 *[2023 SCC OnLine SC 303]*

7 *[(2009) 7 SCC 696]*

incorporation of the terms and conditions of a document in a contract, every term of such document including the arbitration clause will apply to the contract.

15. Mr. Setalvad has submitted that the learned Arbitrator had even framed the following issues:

> "*2. Whether the Supply Agreement and the Multi Party Agreement are interlinked?";*
>
> *"5. Whether it was the sole responsibility of CIAL to open the Letter of Credit in favour of the Claimant?"*

16. Mr. Setalvad has submitted that there appears to be no finding on the aforesaid issues.

17. Mr. Setalvad has submitted that the Respondent was to procure the Letter of Credit from CIAL and which has been confirmed by CW-1 Mr. Ashutosh Kulkarni of the Respondent. He has placed reliance upon Q/A 26 and 27 in this context. He has submitted that the aforesaid facts and circumstances, make it evident that CIAL and APL were necessary parties in the arbitration.

18. Mr. Setalvad has submitted that by directing the Petitioner to make payments to the extent of the balance 90% of the amount to the Respondent, the learned Arbitrator has effectively re-written the contract. He has submitted that the impugned Award is patently illegal and is against the fundamental policy of Indian law. He has placed reliance upon the Judgment of the Supreme Court in ***Ssangyong Engg. & Construction Co. Ltd.Vs. National Highway Authority of India***[8] at Paragraph 69.

19. Mr. Setalvad has submitted that it is *ex facie* clear from a reading of the LOI, the Purchase Order and the Supply Agreement that the obligation of the Petitioner to make payments towards the contract price was restricted to 10% and the obligation to pay the remaining 90% vested with CIAL since the very beginning. He has submitted that the obligation of the Petitioner i.e. the Purchaser, to open the Letter of Credit or to make payment under the Letter of Credit. The obligation of the Petitioner was only to "**procure**" the Letter of Credit from CIAL. The failure to "procure" the Letter of Credit was a Purchaser default – which only invited the imposition of liquidated damages under Section 74 of the Contract Act.

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8 *(2019) 15 SCC 131*

20. Mr. Setalvad has submitted that it is the case of the Respondent that under Section 55(2) of the Sale of Goods Act where, under a contract of sale, the price is payable on a certain day, then irrespective of delivery, where the buyer neglects or refuses to pay the price, the seller may sue him for the price of goods although the property in the goods had not passed to the purchaser. He has submitted that it is the further contention of the Respondent that as the Petitioner/Purchaser did not procure the opening of the LC from CIAL, the liability to pay for the goods manufactured by the Respondent would be of the Petitioner. He has submitted that such contention of the Respondent is erroneous as it was always the obligation of CIAL (and/or APL), and not the Petitioner, to open the Letter of Credit.

21. Mr. Setalvad has submitted that the Statement of Claim states that the present claim is for "recovery of amounts". He has placed reliance upon the particulars of claim in Paragraph 42 of the Statement of Claim. He has submitted that the amounts claimed are towards price of the 2nd, 3rd and 4th lots of goods and remaining 6th units/sets.

22. Mr. Setalvad has submitted that the impugned Award, however, proceeds on the basis that the claim of the Respondent is a comprehensive claim for damages. He has placed reliance on Paragraphs 47 and 48 of the impugned Award in this context.

23. Mr. Setalvad has submitted that there is a discrepancy in the Statement of Claim and the impugned Award. The Statement of Claim proceeds on the basis that claim was for recovery of price. The award on the other hand proceeds on the basis that this claim is a claim for damages. He has submitted that the impugned Award thus suffers from perversity as well as patent illegalities and deserves to be set aside.

24. Mr. Setalvad has relied upon the Judgment of this Court in ***Alkem Laboratories Limited Vs. Issar Pharmaceuticals Pvt. Ltd.*** [9] at Paragraphs 3 to 12, 31 to 36. He has submitted that in the said case the learned Arbitrator had observed that the claim was one of damages, however the Arbitrator had, in awarding the claim of the Claimant awarded the amount as price. It was *inter alia* held by this Court that in a claim for damages, there must be actual loss which is *sine qua non* for such claim and the learned Arbitrator acted contrary

9 *Order dtd.05.02.2024 in IA 377/2024 in CARBP 389/2023*

to the settled law in not considering whether there was proof of actual loss in granting claim for damages.

25. Mr. Setalvad has submitted that without prejudice to the aforementioned submissions on a reading of Clause 22.3 and 22.4 of the Supply Agreement, it is clear that all types of purchaser defaults including "*a breach of any of the Terms by the Purchaser*" is covered therein. He has submitted that the Claimant in any event cannot recover in all, an amount more than what is specified in Clause 22.4.

26. Mr. Setalvad has submitted that the learned Arbitrator therefore erred in holding that Clause 22.3.4 has to be read *ejusdum generis* the preceding sub-clauses as covering breaches of the kind contemplated in sub-clauses 22.3.1 to 22.3.3. He has submitted that the learned Arbitrator has held that Clause 22.3.4 cannot cover failure of the purchaser to take delivery altogether or total failure to pay for the price of the goods or total repudiation of the contract. Such interpretation would render Clause 22.3.4 *otiose*. He has referred to the relevant portion of Paragraph 47 of the impugned Award in this context.

27. Mr. Setalvad has submitted that the learned Arbitrator

has erred in placing reliance on the Judgment of the Supreme Court in ***SAIL Vs. Gupta Brothers***[10]. He has submitted that the observations of the Supreme Court in this case pertained to the interpretation of Clause 7.2 of the Full Requirement Supply Scheme which is different from Clause 22 of the Supply Agreement.

28. Mr. Setalvad has submitted that having claimed liquidated damages, the Respondent is not legally entitled to make any other claim and all its claims in respect of the alleged goods, alleged ware housing charges and alleged purchase of import of raw materials, cannot be claimed. He has submitted that where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated.

29. Mr. Setalvad has placed reliance upon the Judgment of the Supreme Court in ***Kailash Nath Vs. Delhi Development Authority***[11] at Paragraph 43.1, wherein the Supreme Court has *inter alia* held that where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a

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10 *[(2009) 10 SC 63]*
11 *(2015) 4 SCC 136*

breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. He has submitted that in other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated.

30. Mr. Setalvad has submitted that the impugned Award violates and infringes the fundamental policy of the Indian law as enshrined under Section 74 of the Indian Contract Act.

31. Mr. Setalvad has submitted that the goods pertaining to the alleged imported raw materials had not been manufactured at all. Besides this, there is no consequential direction or order for delivery of such alleged raw materials to the Petitioner on such awarded payment.

32. Mr. Setalvad has submitted that even assuming without admitting that such goods were imported by the Respondent, any such raw materials are all standard products and components having alternate usage and means of economic disposal, which cannot be claimed to have been tailor made specifically for the purpose of

supply of goods under dispute and therefore the Petitioner cannot be fastened with such liability. He has submitted that the Respondent regularly manufactures, markets and makes such goods.

33. Mr. Setalvad has submitted that the Arbitral Tribunal has erroneously held in Paragraph 37 of the impugned Award that "*37. ….the goods were specialized and non-standard and were specially manufactured to be used for the solar project*". He has submitted that there was no evidence in this regard.

34. Mr. Setalvad has submitted that the Supply Agreement is inadequately stamped and therefore ought to have been impounded by the learned Arbitrator. An unstamped document cannot be admitted in evidence or be acted upon, in view of the provisions of Section 35 of the Indian Stamp Act, 1989.

35. Mr. Setalvad has placed reliance upon the Judgment in ***Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act 1899***[12] *at* Paragraph 184, the Supreme Court has *inter alia* held that by enacting Section 16 of the Arbitration Act, the Parliament has

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12 *2023 SCC OnLine 1666)*

permitted an Agreement to arbitrate to be preliminarily enforced even if it is only an Agreement. The legitimate concerns of the revenue in the realization of Stamp Duty are not defeated because the Arbitral Tribunal has the jurisdiction to act in pursuance of the provisions of the Stamp Act.

36. Mr. Setalvad has accordingly submitted that the impugned Award alongwith the Section 11 Order be set aside.

37. Mr. Zubin Behramkamdin, the learned Counsel appearing for the Respondent has submitted that the Supply Agreement and the MPA are not interlinked, and that the Supply Agreement was not novated by the MPA. He has submitted that the MPA was entered into as a mere clarification to the payment mechanism agreed upon by the Petitioner and the Respondent. In fact, the MPA only clarifies certain mechanisms for opening of the Letter of Credit, without changing the Petitioner's liability under the Supply Agreement. He has referred to recital (f) of the MPA, wherein the Petitioner and the Respondent have accepted the payment mechanism, pertaining to the Letter of Credit, under the Supply Agreement.

38. Mr. Behramkamdin has submitted that as per Clause C of

the MPA, the existing terms and conditions agreed between the parties in their respective contracts were to remain valid and enforceable, including the conditions pertaining to the resolution of disputes. Therefore, as per Clause C of the MPA, the dispute resolution clause in the Supply Agreement, i.e. Clause 26.7.3, remained intact and the invocation of the arbitration clause by the Respondent under the Supply Agreement was legal, valid, and in consonance with the terms of the MPA.

39. Mr. Behramkamdin has submitted that as per Clause D of the MPA, on any conflict between the terms of the existing contracts between the parties and the MPA, the terms of the existing contract between the parties shall prevail over the MPA.

40. Mr. Behramkamdin has submitted that Clause D of the MPA clearly shows that the Supply Agreement was the principal Agreement, whose terms and conditions were overarching and primary. He has submitted that if the Petitioner's contention is to be accepted that under the MPA, the obligation to procure the Letter of Credit shifted from the Petitioner to CIAL or APL then there would be a conflict between the Supply Agreement and the MPA, and

consequently the terms of the Supply Agreement would prevail.

41. Mr. Behramkamdin has submitted that on a review of the facts of the present dispute, it is evident that the dispute between the Petitioner and the Respondent emanates from the failure of the Petitioner to procure the Letter of Credit from CIAL, under Clause 5.4.2 of the Supply Agreement. He has placed reliance upon Clause 5.4.2 of the Supply Agreement. He has submitted that a review of the said Clause, clearly demonstrates that the Petitioner was obligated to procure that CIAL shall open prior to the first delivery a usance Letter of Credit in favour of the Respondent. He has submitted that therefore, it is clear that the liability of procuring the Letter of Credit is only on the Petitioner, failing which, the Petitioner would be in breach of the terms of the Supply Agreement. He has submitted that such failure to procure the Letter of Credit, resulted in Petitioner's default as per Clause 22.3.1 of the Supply Agreement. This entitled the Respondent to terminate the Supply Agreement under Clause 22.4 of the Supply Agreement. He has submitted that since the breach of the Petitioner emanates out of the Supply Agreement, the Respondent was fully entitled to invoke arbitration under the Supply Agreement.

42. Mr. Behramkamin has placed reliance upon the Judgment of the Supreme Court in ***Lata Constructions v. Dr. Rameshchandra Ramniklal Shah***[13] at Paragraph 10, wherein it has held that an essential requirement of a novation under Section 62 of the Contract Act, 1872, is that there should be a complete substitution of a new contract in place of the old, in such a way that the original contract need not be performed. The said decision has been affirmed by the Supreme Court of India in ***H.R. Basavaraj Vs. Canara Bank***,[14] at Paragraphs 18 and 19, wherein the Supreme Court has rejected the Appellant's contention of novation of contract, observing that a mere deposit of an amount by a third party towards liquidation of an outstanding amount cannot *ipso facto* lead to the novation of the contract. He has submitted that on a conjoint reading of Clauses C and Clause D of the MPA, it is quite clear that the MPA does not novate the Supply Agreement. As under the MPA, the rights and obligations of the parties under the existing contracts are specifically kept alive even after entering the MPA and these rights have not been rescinded.

43. Mr. Behramkamdin has submitted that mere acceptance

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13 *(2000) 1 SCC 586*
14 *(2010) 12 SCC 458*

of the Letter of Credit issued by APL would not amount to waiver of the agreed terms of payment under the Supply Agreement. He has submitted that as per Clause 26.4 of the Supply Agreement, any delay or failure by either of the parties to enforce its right under the Supply Agreement would not be construed as a waiver of such right. Thus, the issuance of Letter of Credit by APL does not affect the Petitioner's obligation to procure Letter of Credit under Clause 5.4.2 of the Supply Agreement.

44. Mr. Behramkandin has submitted that without prejudice to the above, accepting the Letter of Credit issued by APL, in contrast to the terms of the Supply Agreement, was the prerogative of the Respondent. However, acceptance of the Letter of Credit issued by APL in good faith, albeit in contrast to the terms of the Supply Agreement, would not automatically alter the agreed terms of the Supply Agreement. Furthermore, it is the Respondent's choice to either waive or enforce its right under the Supply Agreement, and consequently, waiver of a violation of the Supply Agreement, does not act as an estoppel against the Respondent to enforce its rights under the Supply Agreement.

45. Mr. Behramkamdin has submitted that CIAL and APL are not necessary parties to the arbitration proceedings. He has submitted that since the claims of the Respondent in the arbitral proceedings before the learned Sole Arbitrator, arise from the Supply Agreement, which was executed between the Petitioner and the Respondent, there exists no privity of contract between CIAL and/or APL and the Respondent.

46. Mr. Behramkamdin has submitted that the Petitioner has failed to raise a plea for joinder of CIAL and APL at the time of appointment of the learned Sole Arbitrator under Section 11 of the Arbitration Act. The Petitioner has also failed to raise the plea for joinder of CIAL and APL before the learned Arbitrator. The plea of the Petitioner was to simply terminate the arbitration proceedings i.e. an obvious attempt to evade arbitration at all costs.

47. Mr. Behramkamdin has submitted that the Judgment relied upon by the Petitioner viz. ***Cardinal Energy and Infra Structure Private Limited (Supra)*** is inapplicable in the present case. In that case there was impleadment of a non-signatory sought before the learned Arbitrator. However, in the present case the Petitioner has

only sought to challenge the jurisdiction of the learned Sole Arbitrator, instead of filing a formal application for joining CIAL and APL as necessary parties to the arbitration. He has submitted that the learned Arbitrator has considered the plea raised by the Petitioner in connection with the joinder of CIAL and APL to the arbitration on merits and has dismissed this plea in the impugned Order. The learned Arbitrator has reviewed and interpreted the relevant clauses of the Supply Agreement and the MPA and on the conjoint reading of the relevant provisions thereunder, concluded that the Supply Agreement is not affected or novated in any way by the MPA.

48. Mr. Behramkamdin has submitted that Clause C of the MPA does not incorporate Clause 26.7.3 of the Supply Agreement by reference. He has submitted that on a review of the Section 16 Application, it is evident that the Petitioner has failed to raise this contention before the learned Arbitrator. He has submitted that the Petitioner cannot raise this contention at this belated stage of Section 34 of the Arbitration Act, without specifically pleading it or arguing it before the learned Arbitrator in the Section 16 Application. He has submitted that it is a settled legal position that, a plea which was not raised before the Arbitrator cannot be subsequently raised at the time

of setting aside of the arbitral award. He has placed reliance upon the Judgment of the Supreme Court in ***Union of India Vs. Susaka Private Limited and Others***[15] at Paragraph Nos. 19 to 27 and Judgment of this Court in ***Tema India Ltd. Vs. Seok-am-atech Co. Ltd.***,[16] at Paragraph No. 32. He has submitted that it is clearly laid down in these Judgments that in the absence of any specific pleading of incorporation by reference before the learned Arbitrator, this Court cannot entertain the plea of incorporation by reference.

49. Mr. Behramkamdin has submitted that assuming without admitting that Clause C of the MPA, does in fact, incorporate Clause 26.7.3 of the Supply Agreement by reference, however, in absence of the signatures of CIAL and APL on the MPA, Clause C of the MPA could not be acted upon by either of the parties or be considered as a valid arbitration agreement. He has referred to Section 7 of the Arbitration Act which specifies that the arbitration agreement must be in writing and an arbitration agreement is said to be in writing if it is signed by the parties. He has submitted that the arbitration agreement allegedly incorporated in the MPA cannot be considered as a valid arbitration agreement, under Section 7 of the Arbitration

15 *(2018) 2 SCC 182*

16 *2024 SCC OnLine Bom 1072*

Act.

50. Mr. Behramkamdin has submitted that contention of the Petitioner on plea of incorporation by reference and novation, by way of exchange of letters/correspondence, cannot be raised at the stage of the setting aside of the Impugned Award and impugned Order, as it was not raised before at the referral stage of Section 11 of the Arbitration Act, as is evident from Section 11 Order. He has submitted that this plea was never raised before the learned Arbitrator, as is evident from Section 16 Application and other pleadings filed before the learned Arbitrator.

51. Mr. Behramkamdin has submitted that the Emails dated 15th October 2012, addressed by the APL to the Respondent and Emails dated 28th November 2012, addressed by the Petitioner to the Respondent, demonstrates that the obligation of the Petitioner to procure the Letter of Credit in favour of the Respondent under the Supply Agreement, was never shifted, even by the correspondence exchanged between the parties or by the MPA.

52. Mr. Behramkamdin has submitted that the learned Arbitrator has rightly awarded the claims pertaining to the price of

goods. He has submitted that the time of delivery of goods was of the essence and in absence of any communication from the Petitioner to the Respondent for not manufacturing further lots, after the delivery of the first lot, the Respondent was bound to perform its obligations under the Supply Agreement. He has submitted that the Respondent had thus manufactured many of the lots of goods. Further, the materials and goods manufactured by the Respondent were of specialized nature and the Respondent could not sell the goods in the market and mitigate any part of the loss.

53. Mr. Behramkamdin has submitted that as per Section 55 of the Sale of Goods Act, 1930, a Seller is entitled to sue a Buyer, in the instance when the goods have been passed to the Buyer and the Buyer neglects or refuses to pay for the goods as per the agreed terms of the contract. In fact, even if the goods have not been passed to the buyer, the seller is still entitled to maintain its claim against the buyer. He has relied upon the Judgment of this Court in ***Vithaldas Vishram Vs. Jagjivan Gordhandas***[17] at Paragraphs 10 and 11. He has submitted that the Respondent was always entitled to be compensated for the costs incurred by the Respondent to

17 *1938 SC OnLine Bom 139*

manufacture the lots, alongwith the costs incurred towards the procurement of the raw materials. He has relied upon illustration (c) of Section 65 of the Indian Contract Act, 1872 and has submitted that the Respondent was always entitled to claim the compensation for the goods manufactured by the Respondent and the raw materials procured by the Respondent, despite terminating the Supply Agreement and the MPA.

54. Mr. Behramkamdin has submitted that the learned Arbitrator has correctly interpreted Clause 22.3 of the Supply Agreement which deals at length with the various defaults committed by the Petitioner, to hold that the damages claimed by the Respondent, which are not covered by Clause 22.4 of the Supply Agreement, can be awarded as unliquidated damages.

55. Mr. Behramkamdin has submitted that the learned Arbitrator has correctly rejected the submission of the Petitioner that Clause 22.4 of the Supply Agreement covers every conceivable kind of breach and held that the limit provided by the quantum of liquidated damages clause will not apply to the present case. The learned Arbitrator has held that there is no impediment or obstacle

upon the parties to a contract to make provision for liquidated damages for specific breaches only, leaving the other types of breaches to be dealt with as unliquidated damages. He has placed reliance upon the Judgment of the Supreme Court in ***Steel Authority of India Limited Vs. Gupta Brother Steel Tubes Limited*** [18] at Paragraph 24 in this context.

56. Mr. Behramkamdin has submitted that from a perusal of the impugned Award, the learned Arbitrator has refused to award any liquidated damages, under Clause 22.4 of the Supply Agreement to the Petitioner and has awarded only the costs incurred by the Respondent for the manufacturing of the second lot, third lot, fourth lot, and five units of the fifth lot and for procuring the raw materials.

57. Mr. Behramkamdin has submitted that Clause 22.4 of the Supply Agreement, ought to be read narrowly and applied only to instances where the Petitioner would have failed to open a Letter of Credit, and the Respondent would not have manufactured any goods. He has submitted that in the present scenario, the goods have already been manufactured by the Respondent, based on the assurances

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18 *(2009) 10 SCC 63*

given by the Petitioner and APL that the Letter of Credit will be opened. He has submitted that a wide interpretation of Clause 22.3.4, to cover every breach of the terms and conditions of the Supply Agreement, would nullify the purpose of the preceding clauses.

58. Mr. Behramkamdin has distinguished the Judgment of this Court relied upon by Mr. Setalvad viz. ***Alkem Laboratories (supra)***. He has submitted that in the said decision, the claimant was wrongly awarded the full price of goods, despite the fact that the balance goods were not even manufactured by the claimant. However, in the present case, it is undisputed that the Respondent had already manufactured second lot, third lot, fourth lot, and five units of the fifth lot, and the learned Arbitrator has awarded only the costs incurred by the Respondent for manufacturing the custom made goods of the second lot, third lot, fourth lot, and five units of the fifth lot and for procuring the raw materials.

59. Mr. Behramkamdin has submitted that the contention of the Petitioner that the arbitration clause under the Supply Agreement cannot be acted upon as the Supply Agreement which contains the

arbitration clause is unstamped and therefore, under the provisions of the Maharashtra Stamp Act, 1958 and the Indian Stamp Act, 1899, is inadmissible in evidence. This contention was raised by the Petitioner in its application under Section 16 of the Arbitration Act, and has been adequately dealt with by the learned Arbitrator. This contention had been rejected by the learned Arbitrator by rightly relying on the Section 11 Order, wherein this Court had recorded that *"There is no dispute that the arbitration agreement exists between the parties. Shri Justice S. H. Kapadia, former Chief Justice of India is appointed as the sole arbitrator."* Thus, the Section 11 order upholds the validity of the arbitration clause contained in the Supply Agreement.

60. Mr. Behramkamdin has submitted that in view of this Court confirming the validity of the arbitration clause contained in the Supply Agreement, the learned Sole Arbitrator was bound by the Section 11 Order. It is a settled law, that the matters under Section 11 of the Arbitration Act are incapable of being re-opened before the Arbitral Tibunal. He has submitted that the Petitioner cannot now challenge the arbitration clause contained in the Supply Agreement in any manner.

61. Mr. Behramkamdin has relied upon the Three-Judge Bench Judgment of the Supreme Court in ***N.N. Global Mercantile (P) Ltd. Vs. Indo Unique Flame Ltd.***[19] which upholds the validity of an unstamped arbitration agreement and directs the Courts to refer the parties to arbitration, despite the fact that the arbitration agreements are unstamped/insufficiently stamped.

62. Mr. Behramkamdin has submitted that in view of the Petitioner having admitted the Supply Agreement and raised claims on the Supply Agreement, the Respondent is not liable to prove the admitted Supply Agreement. He has submitted that Section 58 of the Indian Evidence Act, 1872 has been considered by the Supreme Court in ***Nagindas Ramdas Vs. Dalpatram Ichharam***,[20] at Paragraph 27. It has been held that admissions made by the parties in the pleadings, before the hearing of a case are admissible and are fully binding on the parties and constitute as a waiver of proof. The Supreme Court in ***Javer Chand Vs. Pukhraj Surana***,[21] at Paragraph 4 and 5 affirming the above position of law, categorically held that the question with respect to the admissibility of document, on the ground

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19 *2023 SCC OnLine SC 1666*

20 *(1974) 1 SCC 242*

21 *1961 SCC OnLine SC 22*

that it has not been stamped, or that it has been improperly stamped, has to be decided when such a document is tendered in evidence and once the document is admitted in evidence, the parties cannot object to such admittance.

63. Mr. Behramkamdin has submitted that the learned Arbitrator has passed a reasoned award after considering and dealing with the contentions raised by both, the Petitioner and the Respondent. It is settled law that if the interpretation of the learned Arbitrator is a possible view, the Courts will not interfere with an arbitral award under Section 34 of the Arbitration Act.

64. Mr. Behramkamdin has submitted that the impugned Award and the impugned Order cannot be interfered with by the Court, as the learned Arbitrator has adequately dealt with all the pleas and contentions raised by the parties, as is evident from the impugned Award and the impugned Order.

65. Mr. Behramkamdin has submitted that the findings of the Arbitrator are neither patently illegal or perverse. He has submitted that an erroneous finding or application of the law or contravention of substantive law of India is not a ground for setting aside the

award. Every error of law or erroneous application of the law does not amount to patent illegality and the Court cannot re-appreciate the evidence. He has submitted that the Petitioner has miserably failed in showing that the Award is vitiated on any of the grounds set out in Section 34 of the Arbitration Act and thus the Petition should be dismissed with heavy costs.

66. Having considered the submissions, the Petitioner has apart from challenging the impugned Award, challenged the Section 11 Order on the ground that CIAL and APL were necessary parties to the arbitration. This is in context of the Petitioner's contention that as per the Supply Agreement, the obligation of the Petitioner was only in respect of payment of 10% advance amount and not in respect of payment of balance 90% which vested with CIAL as the liability to open the Letter of Credit was that of CIAL. Having perused the provisions of the Supply Agreement and the MPA, this contention on behalf of the Petitioner cannot be accepted. Clause C of the MPA provides that the existing terms and conditions agreed between the parties in the respective contracts were to remain valid and enforceable, including the conditions pertaining to the resolutions of dispute. Further, as per Clause D of the MPA any

conflict between the terms of the existing contracts between the parties of the MPA, the terms of the existing contract viz. Supply Agreement between the parties shall prevail over the MPA. The Supply Agreement was thus considered by the parties in the MPA to be the principal Agreement and its terms and conditions would thus override the terms and conditions of the MPA in the event of there being a conflict.

67. I find much merit in the submission on behalf of the Respondent that if the Petitioner's contention is to be accepted that under the MPA, the obligation to procure the Letter of Credit shifted from the Petitioner to CIAL or APL then there would be a conflict between the Supply Agreement and the MPA, and consequently the terms of the Supply Agreement would prevail. It is the obligation of the Petitioner under Clause 5.4.2 of the Supply Agreement to procure the Letter of Credit from CIAL. Thus, there is no merit in the contention that the liability to open the Letter of Credit in respect of balance 90% amount vested with CIAL.

68. In the circumstances of the present case, the Petitioner having failed to procure the Letter of Credit either from CIAL or from

APL, would be in breach of the terms of the Supply Agreement. This resulted in a default on the part of the Petitioner as per Clause 22.3.1 of the Supply Agreement, entitling the Respondent to terminate the Supply Agreement under Clause 22.4 thereof. The Respondent has thus rightly invoked the arbitration clause in the Supply Agreement.

69. I do not find any merit in the contention on behalf of the Petitioner that the nature of dispute was inextricably linked between CIAL, APL, Petitioner and the Respondent and that the dispute could be effectively decided only when all four parties were made parties to the arbitral proceedings. The MPA has admittedly not been signed by either CIAL or APL. The Judgment of this Court relied upon by the Petitioner viz. ***Cardinal Energy and Infra Structure Private Limited (Supra)*** in support of their submission that the arbitral tribunal is equipped with the power to implead non-signatories to the arbitral proceedings is clearly distinguishable on facts. In that case, the impleadment of a non-signatory was sought, whereas in the present case, the Petitioner has not filed a formal application for joining CIAL and APL as necessary parties to the arbitration before the learned Arbitrator. The Petitioner instead choose to challenge the jurisdiction of the learned Arbitrator.

70. The learned Arbitrator has in fact considered the plea raised by the Petitioner in connection with the joinder of CIAL and APL to the arbitration on merits and has dismissed this plea in the impugned Order. This upon considering the relevant clauses of the Supply Agreement and the MPA and concluding that the Supply Agreement is not affected or novated in any way by the MPA. This finding is in accordance with the settled law as laid down by the Supreme Court in ***Lata Constructions Vs. Dr. Rameshchandra Ramniklal Shah (supra)*** relied upon by the Respondent, wherein the Supreme Court has held that an essential requirement of a novation under Section 62 of the Contract Act, 1872, is that there should be a complete substitution of a new contract in place of the old, in such a way that the original contract need not be performed. This has been followed by the Supreme Court in ***H.R. Basavaraj Vs. Canara Bank (supra)*** which is also relied upon by the Respondent. Thus, the finding of the learned Arbitrator being in consonance with the settled law and reading of the clause C and clause D of the MPA, does not call for interference.

71. The Judgments in ***Mahanagar Telephone Nigam Ltd. Vs Canara Bank (supra); Cox and Kings Ltd. Vs. SAP India Pvt. Ltd.***

(supra) and Ameet Lalchand Shah Vs. Rishabh Enterprises (supra) relied upon by the Petitioner in support of its contention that a third party must be included in the arbitration if there is a direct relation between the party which is a signatory to the arbitration agreement; direct commonality of the subject matter; the composite nature of transaction between the parties are inapplicable in the present case. Further, the Judgment relied upon by the Petitioner in ***KKH Finvest Private Ltd. Vs. Jonas Haggard and Ors.(supra),*** where it was held that if a non-signatory party is involved actively in the performance of a contract and its actions align with those of the signatories, then such a non-signatory party is a 'veritable party' to the contract containing the arbitration agreement and such party can be impleaded in the arbitration is also inapplicable in the circumstances of present case. In that case, the proceedings were initiated under Section 11 of the Arbitration Act, where the Petitioner sought to invoke the Group of Companies Doctrine to implead non-signatories to a dispute pertaining to a shareholder agreement. In the present case, no such plea for impleadment of CIAL and APL, on the basis of Group of Companies Doctrine, has been raised by the Petitioner at the time of appointment of learned Arbitrator under Section 11 of the Arbitration Act, as is evident from the Section 11 Order. This has

also not been raised by the Petitioner under the Section 16 Application. The Petitioner cannot now, at the stage of the setting aside of the impugned Award and impugned Order, be allowed to rely on the Group of Companies Doctrine to demonstrate that APL and CIAL were necessary parties to the arbitration proceedings.

72. I further find that the Petitioner has not raised the plea of incorporation by reference before the learned Arbitral Tribunal as is now sought to be raised at the stage of the setting aside of the impugned Award and impugned Order. Thus, the Petitioner cannot now raise this contention without having specifically pleaded or argued it before the learned Arbitrator in the Section 16 Application. The Judgments relied upon by the Respondent viz. ***Union of India Vs. Susaka Private Limited (supra);*** and ***Tema India Ltd. Vs. Seok-am-Tech Co. Ltd. (supra)*** are apposite. Thus, the plea of incorporation by reference raised by the Petitioner cannot be considered at this stage.

73. I find no merit in the submission on behalf of the Petitioner that the learned Arbitrator has re-written the contract by directing the Petitioner to make payment to the extent of balance amount of 90% to the Respondent. The learned Arbitrator has

correctly held that the liability for procuring the Letter of Credit in respect of the balance 90% amount payable to the Respondent is that of the Petitioner as per Clause 5.4.2 of the Supply Agreement. The learned Arbitrator has further correctly construed the said Clause of the Supply Agreement in directing the Petitioner to make payment to the extent of balance 90% amount to the Respondent. It is settled law that if the interpretation of the Arbitrator is a possible view then in such a case as in the present case the Court will not interfere with an Arbitral Award under Section 34 of the Arbitration Act. The Judgment of the Supreme Court in ***Ssangyong Engg. & Construction Co. Ltd. (supra)*** and ***Delhi Metro Express (P) Ltd. Vs. DMRC***[22] at Paragraphs 27 to 31, 41 to 43 & 49 are apposite.

74. The finding of the learned Arbitrator on damages is also in consonance with the relevant Clauses of the Supply Agreement. As per the Supply Agreement, the time of delivery of goods was of the essence and that the Respondent was bound to perform its obligations under the Supply Agreement in the absence of any communication from the Petitioner to the Respondent for not manufacturing further lots after delivery of the first lot. Further, the

22 *(2022) 1 SCC 131*

materials and goods manufactured under the Supply Agreement by the Respondent were of specialized nature and the Respondent could not sell the goods in the market and mitigate any part of the loss.

75. It is provided in Section 55 of the Sale of Goods Act, 1930 that a seller is entitled to sue a buyer, in the instance when the goods have been passed to the buyer and the buyer neglects or refuses to pay for the goods as per the agreed terms of the contract. It has been held by this Court in ***Vithaldas Vishram Vs. Jagjivan Gordhanas (Supra)*** at Paragraph Nos. 10 and 11 that even if the goods have not been passed to the buyer, the seller is still entitled to maintain its claim against the buyer. The Respondent in the present case was entitled to be compensated for the costs incurred by the Respondent to manufacture the lots, along with the costs incurred towards the procurement of the raw materials. This is further borne out from illustration (c) of Section 65 of the Indian Contract Act, 1872. This would be despite the Respondent terminating the Supply Agreement and the MPA.

76. In my considered view, the learned Arbitrator has correctly interpreted Clause 22.3 of the Supply Agreement to hold

that damages claimed by the Respondent which are not covered by Clause 22.4 of the Supply Agreement, can be awarded as unliquidated damages. The learned Arbitrator has correctly rejected the submission of the Petitioner that Clause 22.4 covers every conceivable kind of breach. Further, the submission on behalf of the Respondent that Clause 22.4 of the Supply Agreement ought to be read narrowly and applied only to instances where the Petitioner would have failed to open a Letter of Credit, and the Respondent would not have manufactured any goods merits acceptance. A wide interpretation of Clause 22.3.4, to cover every breach of the terms and conditions of the Supply Agreement, would nullify the purpose of the preceding clauses. Thus, the liquidated damages which have been capped at 5% of the total contract price under Clause 22.4 of the Supply Agreement does not prohibit the learned Arbitrator from awarding the costs incurred by the Respondent in manufacturing the goods and for procuring the raw materials which were custom designed.

77. The contention on behalf of the Petitioner that the Respondent had claimed for price of the 2nd, 3rd and 4th lots of goods and remaining 6 units/sets, inspite of which the impugned Award

proceeded on the basis that the claim of the Respondent is a comprehensive claim for damages and thus rendering it perverse as well as patently illegal requiring it to be set aside is misconceived. The claim of the Respondent in the Particulars of Claim does not prohibit the learned Arbitrator from awarding costs incurred by the Respondent in manufacturing the goods and for procuring raw materials which were in custom-designed. The Judgment relied upon by the Petitioner viz. ***Alkem Laboratories (supra)*** in support of their contention that the learned Arbitrator has wrongly awarded un-liquidated damages, when in fact the Respondent's claim was for price of goods is distinguishable on facts. In that case the Claimant was wrongly awarded the full price of goods, despite the fact that the balance goods were not even manufactured by the claimant. However, in the present case, it is undisputed that the Respondent had already manufactured the second lot, third lot, fourth lot, and five units of the fifth lot, and accordingly, the learned Arbitrator has awarded only the costs incurred by the Respondent for manufacturing these goods and for procuring the raw materials.

78. I further find no merit in the contention on behalf of the Petitioner that the learned Arbitrator could not award the claims of

the Respondent by allowing the Respondent to retain the goods. This argument is misconceived in that the Petitioner had refused to take delivery of the goods which were manufactured at the relevant time and even thereafter the Petitioner had refused to take the goods.

79. The contention of the Petitioner is that the arbitration agreement cannot be acted upon as the Supply Agreement contains the arbitration clause which is unstamped and for which reliance is placed on the provisions of the Maharashtra Stamp Act, 1958 and the Indian Stamp Act, 1899, for contending that it is inadmissible in evidence has overlooked the Judgment of the Supreme Court in ***N.N. Global Mercantile (P) Ltd. (supra).*** The Supreme Court has upheld the validity of an unstamped arbitration agreement and directs the Courts to refer the parties to arbitration, despite the fact that the arbitration agreements are unstamped/insufficiently stamped.

80. Further, in the Section 11 order this Court has upheld the validity of the arbitration clause contained in the Supply Agreement. There is a categorical finding that "*There is no dispute that the arbitration agreement exists between the parties. Shri Justice S. H. Kapadia, former Chief Justice of India is appointed as the sole*

arbitrator." Having confirmed the validity of the arbitration clause contained in the Supply Agreement, the learned Arbitrator was bound by the Section 11 Order. It has been held in ***S.B.P. & Co. Vs. Patel Engineering*** [23] at Paragraph 20 that matters under Section 11 of the Arbitration Act are incapable of being re-opened before the Arbitral Tribunal. Thus, it is not open for the Petitioner to challenge the arbitration clause contained in the Supply Agreement.

81. The Petitioner has also admitted the Supply Agreement and raised claims on the Supply Agreement before the learned Arbitrator as has been observed by the learned Arbitrator in the impugned Order as well as in the impugned Award. Admissions in pleadings are fully binding on the parties and constitute as a waiver of proof. This has been held by the Supreme Court in ***Nagindas Ramdas Vs. Dalpatram Ichharam (supra)*** relied upon by the Respondent. This is also as per Section 58 of the Indian Evidence Act, 1872. Further, as per section 36 of the Indian Stamp Act, 1899, once an instrument is admitted in evidence, its admissibility cannot later be contested for insufficient stamping, except under Section 61 of the Indian Stamp Act, 1899. It has been held by the Supreme

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23 *(2005) 8 SCC 618*

Court in ***Javer Chand Vs. Pukhraj Surana***,[24] at Paragraphs 4 and 5 that the question with regard to the admissibility of document, on the ground that it has not been stamped, or that it has been improperly stamped, has to be decided when such a document is tendered in evidence and once the document is admitted in evidence, the parties cannot object to such admittance.

82. I thus find no valid ground of challenge raised by the Petitioner under Section 34 of the Arbitration Act for setting aside of the impugned Award and the impugned Section 11 Order. The learned Arbitrator has interpreted the clauses in the Supply Agreement and the MPA, which interpretation of the arbitrator is a possible view, and it is settled law that in such a case the Court will not interfere with an arbitral award under Section 34 of the Arbitration Act.

83. In view thereof, the captioned Commercial Arbitration Petition is dismissed. There shall be no orders as to costs.

[R.I. CHAGLA, J.]

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24 *1961 SCC OnLine SC 22*