

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION NO.1104 OF 2012

Royal Palms (India) Private Limited,)
A company incorporated under the)
Companies Act, 1956 having its)
Registered Office at Survey No.169,)
C.T.C. No.1627, Aarey Milk Colony,)
Goregaon (East), Mumbai – 400 065) .. Petitioner

Versus

Neeta Jignesh Parikh,)
carrying on business under the)
name and style of M/s.Prashin)
Sales Agency, a Sole Proprietary)
Firm with the office at A-303,)
Kandivali (West) Mumbai – 400 056) .. Respondent

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Mr.Mayur Khandeparkar i/b Ms.Suvarna Joshi for the Petitioner.
Mr.Vishwajeet Sawant with Mr.Siddarth Ranade and Ms.Rutuja Joshi i/b
ALMT Legal for the Respondent.

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CORAM : R.D. DHANUKA, J.
RESERVED ON : 8th APRIL, 2015
PRONOUNCED ON : 6th May, 2015.

JUDGMENT :-

. By this petition filed under section 34 of the Arbitration &
Conciliation Act, 1996 (for short the said “Arbitration Act”), the

petitioner has impugned the arbitral award dated 8th June, 2012 passed by the learned arbitrator, a former Judge of the Supreme Court, allowing some of the claims made by the respondent. Some of the relevant facts for the purpose of deciding this petition are as under :

2. The petitioner was the original respondent, whereas the respondent was the original claimant in the arbitral proceedings.

3. The respondent herein is carrying on business of supply of material such as pipes, pipe fittings, flanges etc. to the developers, builders and contractors. The petitioner is carrying on business of infrastructure and real estate development of residential and commercial properties, tourist complexes and hotels.

4. During the period between November, 2006 to October, 2008, the respondent supplied various kinds of material such as pipes, pipe fittings, flanges, valves etc. to the petitioner. It was the case of the respondent that the first order for supply of material was placed by the petitioner on or around 18th November, 2006 and until about the end of February, 2008. The petitioner used to confirm the quotations of the respondent by issuing purchase orders which were most of time authorized by Mr.Amir Nensey, who is the Director of the petitioner. Initially the material was purchased either by the petitioner making advance payment or on making 50% payment at the time of issuing purchase order and the balance 50% post delivery of the material.

5. It is the case of the respondent that since the respondent became a regular supplier of the petitioner, the petitioner used to place orders some

time on the respondent from March, 2008 onwards on the basis of verbal acceptance by the petitioner of the quotation of the respondent and at times the said Mr.Amir Nensey, who is the Director of the petitioner, used to initial the quotation / invoice in confirmation thereof. The payments were made by the petitioner on post delivery of the material and if no purchase orders had been issued, such payments were reflected in the ledger account of the petitioner with reference to the bill number.

6. It was the case of the respondent that the petitioner went on placing verbal orders in July, 2008 by following the same procedure i.e. confirmation of such orders being placed and executed and thereafter would initial the tax invoices. The present dispute was in respect of the goods supplied by the respondent to the petitioner between July, 2008 and September, 2008 under 8 invoices, which are marked as Exhibits C-11 collectively to C-18 collectively by the learned arbitrator. The amount covered by these 8 invoices was at Rs.61,36,187/- after giving credit of Rs.1.00 lacs paid by the petitioner to the respondent on 1st September, 2008.

7. It was the case of the respondent that during the period between April, 2008 to October, 2008, the petitioner took delivery of the material in value aggregating to Rs.1,49,88,072/- of which the petitioner only paid a sum of Rs.88,51,885/- to the respondent and did not pay the balance sum of Rs.61,36,187/-.

8. It was the case of the respondent that the petitioner failed and neglected to pay the said balance amount though repeatedly called upon

by the respondent to the petitioner. The petitioner issued a statement of account dated 6th January, 2009, acknowledging the balance outstanding payment of Rs.61,36,187/-, which was due and payable by the petitioner to the respondent.

9. The respondent vide letters dated 16th October, 2008, 16th December, 2008, 5th January, 2009, 7th January, 2009, 23rd January, 2009, 3rd March, 2009, 23rd March, 2009, 31st March, 2009, 20th April, 2009 and 2nd June, 2009 called upon the petitioner to pay the outstanding amount without any undue delay. The petitioner however, did not give any response to any of such letters.

10. The respondent by her advocate's notice dated 20th June, 2009 issued under sections 433 and 434 of the Companies Act, 1956, called upon the petitioner to make payment of the outstanding bills along with interest. In response to the said notice, the petitioner vide their advocate's reply dated 7th July, 2009, denied that any sum or money was payable to the respondent by the petitioner and also denied having received any material from the respondent. The respondent vide her advocate's letter dated 20th July, 2009, denied the allegations made by the petitioner in the letter dated 7th July, 2009.

11. Some time in the month of September, 2009, the respondent herein filed a winding up petition against the petitioner in this Court (Company Petition No.802 of 2009). By consent of the parties, by an order dated 2nd August, 2010, disputes and differences between the parties were referred to arbitration of a former Judge of the Supreme Court. The said company petition was disposed of.

12. The respondent filed a statement of claim on 4th January, 2011 before the learned arbitrator *inter-alia* praying for a sum of Rs.61,36,187/- with interest at contractual rate of 30% p.a. from the date of delivery of the material upto the date of filing of statement of claim and also future interest at the rate of 18% p.a. till payment. The said claim was resisted by the petitioner by filing written statement. It was the case of the petitioner in arbitral petition that the petitioner had not placed any orders upon the respondent nor it received any goods from the respondent and thus nothing was due and payable by the petitioner to the respondent. It was the case of the petitioner that during the period November, 2006 onwards, the respondent had supplied certain goods to the petitioner totaling value at Rs.88,51,885/- which amounts were duly paid by the petitioner to the respondent by cheque. In paragraph 7 of the written statement, it was averred by the petitioner herein that the documents marked as Exhibits C-1 to C-7, C-9 and C-10 and C-12 were all forged and fabricated documents. It was alleged that the erstwhile accountant of the petitioner Ms.Neha Dutta in conjunction with the respondent had fabricated the accounts to show excess sums of money payable to the respondent. The petitioner had lodged police complaint against the respondent and Ms.Neha Dutta vide their letter dated 3rd August, 2010. The petitioner also filed private complaint before the Metropolitan Magistrate against the respondent. The respondent denied the allegations made by the petitioner by filing rejoinder on 2nd March, 2011.

13. The learned arbitrator framed 11 issues. The petitioner examined Mr.Dilawar Nensey, son of Mr.Amir Nensey, chairman of the petitioner, who was cross-examined by learned counsel for the respondent. The

respondent examined herself as a witness and also filed her affidavit of evidence, who was also cross-examined by the petitioner's counsel. By an award dated 8th June, 2012, the learned arbitrator held that the petitioner was liable to pay to the respondent a sum of Rs.61,36,187/- due under Exhibits C-11 collectively to C-18 collectively and also interest at the rate of 12% p.a. from the date of the delivery of the goods as reflected in the delivery challans annexed to Exhibits C-11 collectively to C-18 collectively till the date of award and interest at the rate of 10% p.a. from the date of award till payment. The learned arbitrator also awarded arbitration cost in favour of the respondent quantified at Rs.3.00 lacs. This award of the learned arbitrator has been impugned by the petitioner in this petition under section 34 of the Arbitration Act on various grounds.

14. Mr.Khandeparkar, learned counsel for the petitioner submits that the impugned award does not disclose any nexus between the material on record and the conclusions. It is submitted that the findings rendered by the learned arbitrator are perverse and the award is liable to be set aside also on the ground that the same is a non-speaking award on various issues. He submits that the respondent had failed to prove before the learned arbitrator that she had supplied the materials during the period July, 2008 to October, 2008 based upon the alleged oral purchase order issued by the petitioner. The respondent had not examined any transporter who had allegedly supplied the materials during the said period based upon the oral purchase orders.

15. Learned counsel for the petitioner submits that the petitioner had already made payment for all the supplies already effected by the

respondent to the petitioner and no amount was due and payable by the petitioner to the respondent. The petitioner had not placed any verbal purchase orders as alleged by the respondent and the respondent had not supplied any goods / materials pursuant to the said alleged oral purchase orders which were allegedly the transactions under Exhibits C-11 collectively to C-18 collectively. He submits that all the alleged and disputed invoices produced by the respondent before the learned arbitrator were forged and fabricated in conjunction with the accountant of the petitioner Ms.Neha Dutta. The account of the petitioner was fabricated to show excess sum of money payable to the respondent. He submits that criminal complaint filed against the respondent as well as Ms.Neha Dutta is pending.

16. Learned counsel for the petitioner submits that the learned arbitrator has not considered the relevant portion of the evidence led by the petitioner. He submits that one of the invoice relied upon by the respondent was alleged to have been issued by M/s.Pushti Ceramic, a third party and not by the respondent. He submits that the said third party was not even a party to the arbitration proceedings. The respondent had made a claim also based on such alleged invoice issued by the said third party which in any event could not be the subject matter of the claim. Such third party was not a party to the arbitration agreement.

17. It is submitted by learned counsel for the petitioner that the respondent in her cross-examination had admitted that the said invoice issued by M/s.Pushti Ceramic was issued by her sister concern. The learned arbitrator while allowing the claim, has allowed the claim also based on the invoice issued by a third party.

18. He submits that there was no seal and signature of the General Manager and Purchaser Manager of the petitioner on the document annexed and marked as Exhibit C-14. Learned counsel invited my attention to some of the portions of the cross-examination of the respondent and also part of the evidence led by the petitioner. He submits that the respondent did not examine the delivery boy, who had alleged to have delivered the goods and invoices at the premises of the petitioner.

19. He submits that even though according to the alleged quotation, 50% payment was required to be made by the petitioner in advance and balance 50% was to be made on delivery, the petitioner had never made any such payment either in advance or against the delivery since neither any purchase order was placed by the petitioner nor any delivered was effected by the respondent. He submits that the quotations as well as the alleged delivery challans were thus fabricated by the respondent. Even the stamp of the petitioner was fabricated by the respondent.

20. Learned counsel submits that the petitioner has disputed the alleged initials of the Chairman of the petitioner on Exhibit C-17. He submits that the initials on three delivery challans relied upon by the respondent of the Chairman are different and shows fabrication.

21. Learned counsel for the petitioner submits that the learned arbitrator attempted to compare the signature of the Chairman of the petitioner with the disputed signature and/or initials and has erroneously rendered a finding that the signature was identical. He submits that the learned arbitrator on his own could not have done such exercise of

comparing the alleged admitted signature with the dispute signature. He submits that in view of the dispute raised by the petitioner regarding forgery and fabrication of the documents, the learned arbitrator could not have compared the admitted signature with the disputed signature. There was no positive evidence led by the respondent to prove the signature of the Chairman of the petitioner on the disputed documents. In support of this submission, learned counsel for the petitioner placed reliance on the judgment of the Supreme Court in the case of **Thiruvengada Pillai vs. Navaneethammal & Anr.** reported in **AIR 2008 SC 1541** and more particularly paragraph 15 which reads thus :-

“15. While there is no doubt that court can compare the disputed handwriting/signature/finger impression with the admitted handwriting/signature/finger impression, such comparison by court without the assistance of any expert, has always been considered to be hazardous and risky. When it is said that there is no bar to a court to compare the disputed finger impression with the admitted finger impression, it goes without saying that it can record an opinion or finding on such comparison, only after an analysis of the characteristics of the admitted finger impression and after verifying whether the same characteristics are found in the disputed finger impression. The comparison of the two thumb impressions cannot be casual or by a mere glance. Further, a finding in the judgment that there appeared to be no marked differences between the admitted thumb impression and disputed thumb impression, without anything more, cannot be accepted as a valid finding that the disputed signature is of the person who has put the admitted thumb impression. Where the Court finds that the disputed finger impression and admitted thumb impression are clear and where the court is in a position to identify the characteristics of finger prints, the court may record a finding on comparison, even in the absence of an expert's opinion. But where the disputed thumb impression is smudgy, vague or very light, the court should not hazard a guess by a casual perusal. The decision in Muralilal (supra) and Lalit Popli (supra) should not be construed as laying a proposition that the court is bound to compare the disputed and admitted finger impressions and record a finding thereon, irrespective of the condition of the disputed finger impression. When there is a positive denial by the person who is said to have affixed his finger impression and where the finger impression in the disputed document is vague or smudgy or not clear, making it difficult for comparison, the court should hesitate to venture a decision based on its own comparison of the disputed and admitted finger impressions. Further even in cases where the court is constrained to take up such comparison, it should make a

thorough study, if necessary with the assistance of counsel, to ascertain the characteristics, similarities and dissimilarities. Necessarily, the judgment should contain the reasons for any conclusion based on comparison of the thumb impression, if it chooses to record a finding thereon. The court should avoid reaching conclusions based on a mere casual or routine glance or perusal.”

22. The learned counsel for the petitioner submits that the learned arbitrator could not have drawn any adverse inference against the petitioner. The petitioner had not relied upon the security register and thus no adverse inference could have been drawn by the learned arbitrator against the petitioner for not producing such security register. He submits that the petitioner had explained that the security register was gutted and/or destroyed in a fire. The respondent had not led any positive evidence on this issue. He submits that since the burden was on the respondent which the respondent had failed to prove, the onus did not shift on the petitioner. There was thus no question of drawing any adverse inference against the petitioner. In support of this submission, learned counsel placed reliance on the judgment of the Supreme Court in the case of **Srichand K. Khetwani vs. The state of Maharashtra**, reported in **AIR 1967 SC 450** and in particular paragraph 9, which reads as under :-

“Further, an adverse inference against the prosecution can be drawn only if it withholds certain evidence and not merely on account of its failure to obtain certain evidence. When no such evidence has been obtained., it cannot be said what that evidence would have been and therefore no question of presuming that the evidence would have been against the prosecution under s. 114, illustration (g) of the Evidence Act can arise.”

23. Learned counsel for the petitioner placed reliance on the judgment of the Supreme Court in the case of **Union of India vs. Ibrahim Uddin**, reported in **2013 AIR SCW 2752** and more particularly paragraphs 16, 20 and 23 and would submit that since the respondent had failed to discharge her burden, no adverse inference could be drawn against the petitioner.

The relevant paragraphs read thus :-

“16. Thus, in view of the above, the law on the issue can be summarised to the effect that, issue of drawing adverse inference is required to be decided by the court taking into consideration the pleadings of the parties and by deciding whether any document/evidence, withheld, has any relevance at all or omission of its production would directly establish the case of the other side. The court cannot loose sight of the fact that burden of proof is on the party which makes a factual averment. The court has to consider further as to whether the other side could file interrogatories or apply for inspection and production of the documents etc. as is required under Order XI CPC. Conduct and diligence of the other party is also of paramount importance. Presumption or adverse inference for non-production of evidence is always optional and a relevant factor to be considered in the background of facts involved in the case. Existence of some other circumstances may justify non-production of such documents on some reasonable grounds. In case one party has asked the court to direct the other side to produce the document and other side failed to comply with the court’s order, the court may be justified in drawing the adverse inference. All the pros and cons must be examined before the adverse inference is drawn. Such presumption is permissible, if other larger evidence is shown to the contrary.

20. Admission is the best piece of substantive evidence that an opposite party can rely upon, though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous. Admission may in certain circumstances, operate as an estoppel. The question which is needed to be considered is what weight is to be attached to an admission and for that purpose it is necessary to find out as to whether it is clear, unambiguous and a relevant piece of evidence, and further it is proved in accordance with the provisions of the Evidence Act. It would be appropriate that an opportunity is given to the person under cross-examination to tender his explanation and clear the point on the question of admission. (Vide: [Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi & Ors., AIR 1960 SC 100](#); [Basant Singh v. Janki Singh & Ors., AIR 1967 SC 341](#); [Sita Ram Bhau Patil v. Ramchandra Nago Patil, AIR 1977 SC 1712](#); [Sushil Kumar v. Rakesh Kumar, AIR 2004 SC 230](#); [United Indian Insurance Co Ltd. v. Samir Chandra Choudhary., \(2005\) 5 SCC 784](#); [Charanjit lal Mehra & Ors v. Kamal Saroj Mahajan & Anr., AIR 2005 SC 2765](#); and [Udham Singh v. Ram Singh & Anr., \(2007\) 15 SCC 529.](#))

23. In view of the above, the law on the admissions can be summarised to the effect that admission made by a party though not conclusive, is a decisive factor in a case unless the other party successfully withdraws the same or proves it to be erroneous. Even if the admission is not conclusive it may operate as an estoppel. Law requires that an opportunity be given to the person who has made admission under cross-examination to tender his explanation and clarify the point on the question of admission. Failure of a party to prove its defence does not amount to admission, nor it can reverse or discharge the burden of proof of the plaintiff.”

24. Learned counsel also placed reliance on the judgment of this Court in the case of ***Zee Entertainment Enterprises Ltd. vs. Klassic Studios & Films Pvt. Ltd.***, reported in **2013(7) Bom.C.R. 357** and more particularly paragraphs 20 and 22 and would submit that since the learned arbitrator has not considered the oral evidence led by the petitioner and also has not considered the relevant material produced by the petitioner, the impugned award deserves to be set aside on this ground alone. Paragraphs 20 and 22 of the said judgment read thus :-

“20. In my view, the award does not deal with the material and crucial evidence forming part of the cross examination of the witness of the respondent which records the admission on the part of the respondent having received debit notes and contents thereof and also having admitted the receipt of the payment stated in the said documents. In view of the fact that the learned arbitrator was considering the debits and credits claimed by both parties, the petitioner who was claiming adjustment/set off by way of debit notes from the amount payable to the respondent was entitled to prove its claim for adjustment/set off even by cross examination of the witness examined by the respondent. Once, the respondent witness has admitted the correctness of the claims made by the petitioner, it was in my view not necessary for the petitioner to examine any other witness to prove its claim once again. In my view, the learned arbitrator has thus proceeded on erroneous basis and has not kmv ARBP556.12 considered the material and crucial evidence in the impugned award and has not dealt with the written submissions at all. The learned arbitrator has not proceeded with the matter in the correct direction in the impugned award on this issue. In my view the reliance thus placed by the respondent on the judgment of Supreme Court in case of Iswar Bhai C. Patel (supra), Vidhyadhar (supra) is misplaced. In my view facts of the said case before the Supreme Court are clearly distinguishable in the facts of this case. This court thus in such circumstances can interfere with award under Section 34 of the Act.

22. In my view, since the witness examined by the respondent had admitted kmv ARBP556.12 the liability of the respondent and also having admitted the receipt of payment from the petitioner through the Association to directors, artists and technicals, the petitioner was not bound to examine any other witness independently to prove such claims/adjustments once again, once having it proved by cross examination of the witness of the respondent. In my view, the learned arbitrator has disallowed this claim contrary to law and the award thus shows a manifest error of law. The learned arbitrator has not considered any part of the oral evidence led by the petitioner or cross examination of the witness examined by the respondent as well as detailed written submissions filed by the petitioner in

the impugned award at all. The impugned award is in violation of principles of natural justice and this part of the award is thus deserves to be set aside.”

25. Mr.Khandeparkar, learned counsel for the petitioner also placed reliance on an unreported judgment of this court delivered on 10th February, 2015, in the case of ***Seemaben @ Shamuben Shakar Patel vs. Motibhai K. Patel*** in *Arbitration Petition No.1409 of 2013* and would submit that since the learned arbitrator has not considered the relevant evidence and has drawn adverse inference contrary to law, the award deserves to be set aside. Reliance is placed on paragraphs 53 and 54 which read as under :-

“53. It is submitted that the petitioner examined Jethabhai Patel, who had occupied the said gala and had produced large number of documents to show that he was carrying on business in the said gala and the same was not divided in three parts. Respondent no.1 had not produced any documents showing division of the said gala in three parts or he could not produce permission from the Bombay Municipal Corporation for division of such gala in three parts. The learned arbitrator however, without any evidence on record, rendered the finding that the said gala no.206 was divided into three parts and was already distributed among the parties in accordance with the provisions of the deed of dissolution.

54. It is submitted by the learned counsel that though there was no monetary claim referred to the learned arbitrator, he has awarded monetary claim and has exceeded his jurisdiction by allowing such claim not referred to him. That part of the award is also liable to be set-aside on this ground.”

26. Learned counsel submits that the learned arbitrator could not have marked the documents produced in cross-examination for the first time as exhibits. The impugned award is thus in violation of the principles of natural justice and of Evidence Act.

27. Learned counsel appearing for the petitioner submits that the view of the learned arbitrator is not a plausible view. No qualitative finding as

regards the documents has been rendered by the learned arbitrator. He submits that the rate of interest awarded at 12% p.a. is also on higher side.

28. Mr.Sawant, learned counsel for the respondent on the other hand submits that the learned arbitrator has rendered a finding of fact after considering the pleadings, documents and oral evidence which findings are not perverse and thus no interference is permissible under section 34 of the Arbitration act.

29. Learned counsel submits that prior to the period of disputed transactions, there were admittedly dealings between the petitioner and the respondent during the period between 2000 and 2008. The purchase order used to be signed by the Chairman of the petitioner. The invoices were signed by the respondent. The delivery challans were issued. The documents annexed as Exhibits C-1 to C-10 were pertaining to the earlier period when the aforesaid practice was followed by the parties. He submits that the witness examined by the petitioner himself had admitted before the learned arbitrator that on many occasions, verbal orders werer placed by the petitioner and were accepted by the respondent. The petitioner had approved the quotations and used to place the purchase orders in respect of those disputed transactions.

30. He submits that the invoices were signed by the Chairman. The delivery challans issued by the respondent were acknowledged and duly stamped by the petitioner. The petitioner had accepted the material sold, delivered and supplied by the respondent and had utilized the same. He submits that even on the rear side of the delivery challan, there was stamp

of the petitioner affixed. In support of this submission, learned counsel invited my attention to one of the said challan. He also placed reliance on a copy of the invoices which were counter signed by the Chairman of the petitioner and were furnished to the respondent. The respondent had called upon the petitioner to produce the original of such invoices which the petitioner had deliberately failed to produce.

31. Learned counsel for the respondent submits that since the petitioner had alleged forgery and fabrication against the respondent in respect of some of the documents, the onus was on the petitioner to prove such allegations and not the respondent. The original of the invoices issued by the respondent and received by the petitioner were retained by the petitioner and not produced. Though the witness examined by the petitioner had taken time to look into the documents twice during the course of cross-examination, the petitioner did not produce the original. On the third date of evidence, the petitioner came out with a false allegations that such documents were gutted in fire and were not available.

32. Learned counsel invited my attention to some part of the cross-examination of the witness examined by the petitioner as also of the respondent. He submits that though the respondent had called upon the petitioner to produce the security register, the witness of the petitioner did not produce the same. He invited my attention to the cross-examination of the witness of the petitioner, in which the witness has admitted the instances of oral orders placed by the petitioner. He submits that the allegations that there was a fire in the building in which the office of the

petitioner was situated and the documents of the petitioner were gutted into fire was alleged for the first time during the course of cross-examination.

33. Learned counsel for the respondent submits that to adjudicate upon the issue whether the goods were delivered by the respondent to the petitioner or not, the learned arbitrator looked into the documents produced by both the parties and rightly rendered a finding of fact that the disputed transactions had taken place and invoices contained the signature of the Chairman of the petitioner.

34. Learned counsel submits that the credibility of the witness examined by the petitioner was at the stake . He submits that though the petitioner had alleged that the Chairman of the petitioner had not signed and/or initials on the invoices relied upon by the respondent, the petitioner had not examined the Chairman of the petitioner. The son of the Chairman of the petitioner who was examined as witness of the petitioner was deliberately not identifying the signature or initials of his own father even on the admitted documents. The learned arbitrator was not barred from comparing the admitted signature with the disputed signature under section 73 of the Evidence Act. The learned arbitrator has thus recorded the findings of fact on the issue of delivery of goods, initials of the Chairman of the petitioner and that the documents were received by the petitioner and in acknowledgement thereof, stamp of the petitioner company was affixed thereon.

35. Learned counsel for the respondent submits that the evidence of the respondent was not shaken in the cross-examination and was thus

rightly believed by the learned arbitrator. He submits that the learned arbitrator has not relied upon the material which was not on record of the arbitral proceedings but relied upon the evidence on record. The petitioner had failed to prove the allegations of forgery and fabrication. Since the petitioner failed to prove the allegations of forgery and fabrication, the learned arbitrator has rightly accepted the case of the respondent that the transactions had taken place and the goods and materials were supplied by the respondent to the petitioner under various documents. He submits that the learned arbitrator has rightly made the observations in the impugned award on demeanor of witness examined by the petitioner.

36. Learned counsel for the respondent submits that the learned arbitrator has rightly rendered a finding of fact that the documents relied upon by the respondent were not fabricated. Since the petitioner did not produce the security register though was called upon by the respondent, the learned arbitrator rightly drew an adverse inference against the petitioner. The respondent had called upon the petitioner to produce the originals of invoices / quotations, the petitioner failed to produce the same. In their reply, the petitioner had not pleaded that the documents were not available in view of the same having alleged to have been gutted in fire. He submits that since the petitioner had withheld the best evidence available with the petitioner, the learned arbitral tribunal was justified in drawing an adverse inference against the petitioner.

37. Insofar as the marking of the documents by the learned arbitrator in the cross-examination is concerned, learned counsel for the respondent

submits that one document was shown to the witness examined by the petitioner to confront the said witness in the cross-examination. The said witness identified the said document. The petitioner did not raise any objection when the said document was tendered by the respondent and was marked as exhibit by the learned arbitrator. The petitioner thus could not be allowed to raise any objection about marking of such document at the later stage i.e. either at the stage of hearing of the arbitral proceedings after closure of evidence or at this stage in this petition.

38. He submits that since the petitioner had not issued the purchase order in writing insofar as these disputed transactions is concerned, the respondent could not have produced the originals of such purchase orders. It was the case of the respondent that the petitioner had placed orders verbally and the Chairman of the petitioner used to sign the invoices issued by the respondent in token of the acceptance of the purchase order placed orally.

39. Insofar as the submission of learned counsel for the petitioner that even according to the terms and conditions of the quotations, the payments were not made by the petitioner is concerned, he submits that the respondent had explained the practice of placing orders by the petitioner and the payments made by the petitioner to the respondent in respect of such purchase orders by leading oral evidence. There was no cross-examination of the witness examined by the respondent on this issue. The practice of placing orders and the mode and manner of payment by the petitioner to the respondent was established by the respondent in the arbitral proceedings. He submits that this Court has to

consider the totality of the findings rendered by the learned arbitrator and not any particular isolated observation made in the impugned award.

40. Learned counsel for the respondent distinguished the judgment of the Supreme Court in the case of *Thiruvengada Pillai vs. Navaneethammal & Anr.* (supra) on the ground that the trial Court in that matter had made an attempt to compare the disputed thumb impression of the witness with another thumb impression of the same witness. In that context the Supreme Court held that the Court should avoid reaching conclusions based on a mere casual or routine glance, or perusal. He submits that in this case, the signature of the Chairman of the petitioner was compared by the learned arbitrator on the disputed invoices with his admitted signature on the other invoices. Since the witness examined by the petitioner, who was the son of the Chairman of the petitioner did not identify the signature of his own father on the admitted document, the learned arbitrator was not barred from comparing the signature on the disputed documents of the witness with the admitted signature. He submits that the judgment of the Supreme Court in the case of *Thiruvengada Pillai vs. Navaneethammal & Anr.* (supra) is thus distinguishable in the facts and circumstances of this case.

41. Insofar as the judgment of this Court in the case of *Zee Entertainment Enterprises Ltd. vs. Klassic Studios & Films Pvt. Ltd.* (supra) is concerned, the said judgment is distinguishable on the ground that the witness examined by the respondent in that case had admitted the liability of the respondent. He submits that in the said judgment this Court held that the said case was not a case of reappraisal of evidence but was the case of non-consideration of the material and crucial

evidence. He submits that it is not the case of the petitioner that any of the documents produced by the petitioner were not considered by the learned arbitrator. The said judgment of this Court thus is clearly distinguishable in the facts of this case.

42. Learned counsel for the respondent distinguished the judgment of the Supreme Court in the case of *Union of India vs. Ibrahim Uddin* (supra). He distinguished the said judgment on the ground that since the petitioner had alleged forgery and fabrication, the onus was on the petitioner to prove which the petitioner had failed to discharge. He submits that in the said judgment the Supreme Court held that the Court cannot loose sight of the fact that the burden of proof is on the party which makes a factual averment. It is also held by the Supreme Court in the said judgment that in case one party has asked the Court to direct the other party to produce the document and other the party failed to comply with the Court's order, the Court may be justified in drawing the adverse inference. Learned counsel distinguished the judgment of the Supreme Court in the case of *Srichand K. Khetwani vs. The state of Maharashtra*, (supra) also on the similar ground.

43. Mr.Sawant, learned counsel for the respondent distinguished the judgment of this Court in the case of *Seemaben @ Shamuben Shakar Patel vs. Motibhai K. Patel* (supra) on the ground that the facts of that case are totally different and/or clearly distinguishable with the facts of this case.

44. Learned counsel for the respondent placed reliance on the judgment of this Court delivered on 8th January, 2015 in the case of

Ashwin Crane & Construction & Anr. vs. L & T Finance Ltd. in Arbitration Petition No.1018 of 2011 and in particular paragraphs 30 and 47 in support of the submission that the scope of section 34 of the Arbitration Act is very limited. It is submitted that the petitioner has not made out any ground for interference with the impugned award under section 34 of the Arbitration Act.

45. Learned counsel for the respondent placed reliance on the judgment of this Court in the case of *Union of India vs. M/s.India Proofing & General Industries, Kanpur*, reported in 2000(3) ALL MR 23 and in particular paragraph 7 and would submit that re-appraisal of evidence is not permissible under section 34 of the Arbitration Act.

46. Mr.Khandeparkar, learned counsel for the petitioner in re-joinder submits that the respondent had not produced any notice to produce any document on record of the arbitral proceedings. He submits that the said finding recorded by the learned arbitrator is factually incorrect. He submits that admittedly in respect of the earlier transaction, the petitioner had paid 50% in advance, whereas for the disputed transactions, no such payment was made by the petitioner to the respondent and thus it would clearly indicate that such documents were fabricated and no transaction had taken place.

47. Insofar as the adverse inference drawn by the learned arbitrator for not producing the security register by the petitioner is concerned, he submits that there was no pleading of the respondent to draw any adverse inference against the petitioner on this ground. Only during the course of cross-examination of the witness examined by the petitioner, the

respondent at that stage had called upon the witness to produce the security register. The learned arbitrator thus could not have drawn any adverse inference against the petitioner for not producing the security register, which was not available. He submitted that the learned arbitrator since has over looked the material evidence produced by the petitioner and has ignored the document, which is fatal to adjudication of the dispute on merits, this Court has ample power to interfere with such findings of fact which has been rendered overlooking the material and the relevant documents.

REASONS AND CONCLUSIONS :-

48. It is not in dispute that prior to the date of alleged 8 transactions during the period between July 2008 and September 2008, for last several years, there were several transactions of supply of various kinds of materials by the respondent to the petitioner had taken place. There is no dispute between the parties in respect of the transactions having been taken place prior to July 2008. The present dispute was only in respect of the transactions under 8 invoices which are marked as Exhibits C-11 to C-18 collectively by the learned arbitrator. The claim made by the respondent for Rs.61,36,187/- was arising out of the said 8 invoices after giving credit of Rs.1.00 lacs paid by the petitioner to the respondent on 1st September 2008.

49. It is not in dispute that the respondent had examined herself as a witness to prove her claims whereas the petitioner had examined Mr. Dilawar Nensey, son of Mr.Amir Nensey who was chairman of the

petitioner as a witness. The learned arbitrator framed 11 points for determination and had answered the same in the impugned award.

50. In so far as the submission of the learned counsel for the petitioner that invoices and some of the documents relied upon by the petitioner were forged and fabricated is concerned, though the petitioner had made such allegations against the respondent, the petitioner did not examine Mr. Amir Nensey, chairman of the petitioner whose signatures/initials were alleged to have been forged by the respondent. A perusal of the record indicates that the said witness examined by the petitioner deliberately did not identify the signature or initials of his own father on the admitted documents. In my view, the onus to prove that the documents were forged and fabricated was on the petitioner who had made such allegations and not on the respondent. Be that as it may, the respondent had independently proved the existence and contents of all such documents which were marked as exhibits by the learned arbitrator. The learned arbitrator considered the entire evidence on record and noticed that the witness examined by the petitioner was shown the signature of the chairman of the petitioner on the documents. He deposed that it resembles the signature of his father but he was not sure about it.

51. The learned arbitrator accordingly held that the chairman of the petitioner would have been the best person to tell the truth to the tribunal but was not examined although he was available. No reasons whatsoever had been given by the petitioner as to why the allegations had been made of the documents alleged to have been forged and fabricated by the petitioner. The learned arbitrator compared the

signatures of the chairman of the petitioner on the admitted documents with the disputed documents and rendered finding of fact that initially on the disputed document and the text invoices were identified and the chairman of the petitioner had accepted the fact of delivery of the material/goods supplied and delivered by the respondent. The learned arbitrator has rendered a positive finding that he was unable to hold that those documents were forged by the respondent and on such forged documents or that the respondent had affixed the duplicate rubber stamp of the petitioner.

52. In my view, the learned arbitrator has considered the documentary as well as oral evidence led by both the parties and has rightly rendered finding that none of the documents relied upon by the respondent was forged and fabricated. The learned arbitrator has held that since the best person who could be examined on such allegations was not examined though available, he has rightly considered positive evidence led by the respondent and rendered finding of fact. In my view, such finding of fact which is based on evidence and is rendered after appreciation of the documents and pleadings cannot be re-appreciated by this Court unless the same are found perverse. I am not inclined to accept the submission of the learned counsel for the petitioner that there was no nexus between the material on record and conclusions drawn by the learned arbitrator or that any part of the impugned award was a non-speaking award. The petitioner also could not demonstrate before this Court as to which relevant part of the evidence led by the petitioner was not considered by the learned arbitrator.

53. In so far as the submission of the learned counsel for the petitioner that the delivery boy or transporter was not examined by the respondent and thus the learned arbitrator ought to have drawn adverse inference against the respondent is concerned, in my view, there is no substance in this submission of the learned counsel for the petitioner. The respondent herself was examined as a witness who proved her case by leading documentary as well as oral evidence. The respondent had called upon the petitioner to produce the security register which would have been a crucial document to falsify the case of the petitioner that the goods/invoices were not delivered to the petitioner. On number of occasions, the witness examined by the petitioner had taken time to produce security register but subsequently came out with an excuse that all the records had already been destroyed in fire in the premises of the petitioner. It is not in dispute that the allegation of there being a fire in the premises of the petitioner was not made by the petitioner in any of the pleadings but it was alleged for the first time in the cross-examination of the witness of the petitioner.

54. Since the petitioner has suppressed and withheld the best evidence before the learned arbitrator, in my view, the learned arbitrator has rightly drawn adverse inference against the petitioner. The judgment of the Supreme Court in the case of *Srichand K. Khetwani vs. The state of Maharashtra (supra)* is thus of no assistance to the petitioner. In my view, onus to prove that the documents relied upon by the respondent were forged and fabricated was not on the respondent but was on the petitioner. There is thus no substance in the submission of the learned counsel for the petitioner that the respondent had failed to discharge her burden and thus, the learned arbitrator could not have

drawn any inference against the petitioner. The judgment of the Supreme Court in the case of *Union of India vs. Ibrahim Uddin (supra)* is of no assistance to the petitioner.

55. In so far as the submission of the learned counsel that there was no seal and signature of the General Manager of the petitioner on the documents annexed and marked as Exhibit C-14 is concerned, the learned arbitrator has admitted the said documents and has considered the same after dealing with the oral evidence led by both the parties and no infirmity can be found with the marking of the documents during the course of the proceedings.

56. In so far as the submission of the learned counsel for the petitioner that even though according to the quotations, 50% payment was required to be made by the petitioner in advance and balance 50% was to be made against the delivery and since no payment was made, it would indicate that the quotations were fabricated is concerned, a perusal of the record indicates that the respondent in her deposition had explained the practice of placing orders by the petitioner in detail and the payment made by the petitioner to the respondent in respect of such purchase orders. There was no cross-examination of the witness examined by the respondent on this issue. The respondent had established that in view of long business relation between the petitioner and the respondent, the petitioner had not issued purchase orders in writing in so far as those disputed transactions are concerned. The respondent, therefore, could not have produced originals of such purchase orders. The respondent had proved by leading documentary as well as oral evidence that the petitioner had placed orders verbally and

the chairman of the petitioner used to sign the invoices issued by the respondent in token of the acceptance of the purchase order placed orally. In view of the long business relation, the respondent had not insisted for advance purchase orders before supply of any material. The learned arbitrator had rendered finding of fact that on these issues which are not perverse hence no interference is thus permissible under Section 34 of the Arbitration Act with such findings of fact.

57. In so far as the submission of the learned counsel for the petitioner that the learned arbitrator could not have marked some of the documents as exhibits during the course of the cross-examination is concerned, a perusal of the record indicates that one document was shown to the witness examined by the petitioner to confront the said witness in the cross-examination. The said witness identified the said document. The learned arbitrator, therefore, rightly marked the said documents as exhibits. The petitioner never raised any objection about marking of such document at that stage when the said document was tendered by the respondent. In my view, the petitioner could have raised the objection, if any, when the said document was tendered and not at the stage of oral arguments or at the stage of hearing this petition under Section 34 of the Arbitration Act. In my view, there is thus no substance in the submission of the learned counsel for the petitioner.

58. In so far as the judgment of the Supreme court in the case of *Thiruvengada Pillai vs. Navaneethammal & Anr.* (supra) relied upon by the learned counsel for the petitioner on the issue that the learned arbitrator could not have compared the signature of the chairman of

the petitioner is concerned, a perusal of the said judgment indicates that the Civil Court in that matter had compared two thumb impressions of the same witnesses and in that context, the Supreme Court held that the Court should avoid reaching conclusions based on the mere casual or routine glance, or perusal. However, in the facts of this case, since the witness examined by the petitioner, who was the son of the chairman of the petitioner did not identify the signature of his own father on the admitted documents, the learned arbitrator was not barred from comparing the signature of the witness on the admitted documents with the disputed documents. Since the petitioner had not come out with clean hands and had deliberately did not identify the signature, in the facts of this case, the learned arbitrator was justified in comparing the signature of the chairman of the petitioner on the admitted documents with the signature of the disputed documents. Be that as it may, the impugned award is not based only on the comparing signatures of the chairman of the petitioner on the admitted documents with the disputed documents.

59. In so far as the judgment of this Court in the case of *Zee Entertainment Enterprises Ltd. vs. Klassic Studios & Films Pvt. Ltd.* (supra) relied upon by the petitioner is concerned, a perusal of the said judgment clearly indicates that the witness examined in that case had admitted the liability of the respondent and thus this Court held that the said case was not a case of reappraisal of evidence but was the case of non-consideration of the material and crucial evidence. However, in this case, the learned arbitrator, in my view, has dealt with all the documents and oral evidence led by both the parties and has rightly awarded the

claim in favour of the respondent. The judgment of this Court in the case *Zee Entertainment Enterprises Ltd. vs. Klassic Studios & Films Pvt. Ltd.* (supra) does not assist the case of the petitioner.

60. In so far as the judgment of the Supreme Court in the case of *Union of India vs. Ibrahim Uddin* (supra) relied upon by the petitioner is concerned, in the said judgment, the Supreme Court held that the Court cannot lose sight of the fact that the burden of proof is on the party which makes a factual averment. It is also held by the Supreme Court in the said judgment that in case one party has asked the Court to direct the other side to produce the document and other side failed to comply with the Court's order, the Court may be justified in drawing the adverse inference. The said judgment does not assist the case of the petitioner but assist the case of the respondent. In this case, the onus to prove that the documents were forged and fabricated was on the petitioner and not on the respondent. Be that as it may, the respondent in this case had proved the existence and the contents of each of the documents. The judgment of the Supreme Court in the case of *Srichand K. Khetwani vs. The state of Maharashtra*, (supra) relied upon by the petitioner also does not assist the case of the petitioner on the similar ground.

61. In so far as the judgment of this Court in the case of *Seemaben @ Shamuben Shakar Patel vs. Motibhai K. Patel* (supra) relied upon by the petitioner is concerned, in my view, the facts of that case were totally different. In that matter, the learned arbitrator had ignored the material and crucial evidence in the impugned award and had drawn adverse inference against the petitioner. The said judgment of this Court does not assist the case of the petitioner.

62. In so far the submission of the petitioner that one of the invoice produced by the respondent was of a third party who was not party to the arbitration agreement is concerned, the petitioner did not raise the issue of jurisdiction before the learned arbitrator. The respondent had proved that the said party was a sister concern of the respondent. Be that as it may, it was not the case of the petitioner that even that party had also made a separate claim against the petitioner. There is thus no merits in this submission of the petitioner.

63. In my view, the learned counsel for the respondent has rightly placed reliance on the judgments of this Court in the cases of *Ashwin Crane & Construction & Anr. vs. L & T Finance Ltd.(supra)* and *Union of India vs. M/s.India Proofing & General Industries, Kanpur (supra)* in support of his submission that scope of Section 34 of the Arbitration Act is very limited and the Court has no power to re-appreciate the evidence and to interfere with such findings of facts unless the same are perverse under Section 34 of the Arbitration Act. I am respectfully bound by the said judgments in respect of the aforesaid two judgments relied upon by the petitioner which applies to the facts of this case.

64. A perusal of the award clearly indicates that the learned arbitrator has rendered detailed reasons and has dealt with each and every submissions made by the parties and has also dealt with the pleadings and evidence of both the parties and rendered various findings of facts and has rightly awarded the claim made by the respondent. The petition is totally devoid of merits.

65. I, therefore, pass the following order :-

- a) Arbitration Petition No.1104 of 2012 is dismissed.
- b) There shall be no order as to costs.

(R.D. DHANUKA, J.)