

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****ARBITRATION APPEAL NO. 40 OF 2015**

M/s. GILL & COMPANY PVT. LTD.)
Through its authorized Representative)
Mr.Viveck Khanna,)
Age – 33 Years, Occupation – Service,)
Having office address as NTC House,)
N.M.Marg, Ballard Estate,)
Mumbai – 400 001) **..... Appellant**

VERSUS

M/s.PATODIA GINNING FACTORY,)
Maheshkumar Tulsiram Patodiya,)
Age : Adult, Occ : Business,)
R/O Near Swami Narayan Mandir,)
Tamba Kanta, Malegaon, Dist. Nashik) **..... Respondent**

Mr.Sharan Jagtiani, a/w. Ms.Lara Jesani, Mr.Priyank Kapadia, i/b.M.Mulla Associates for the Petitioner/Appellant.

Mr.R.S.Apte, Senior Advocate, a/w. Mr.N.R.Bubna for the Respondent.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 1st APRIL, 2016

PRONOUNCED ON : 20th APRIL, 2016

JUDGMENT :

By this appeal filed under section 37 of the Arbitration and Conciliation Act, 1996, (for short the 'Arbitration Act') the appellant has impugned the judgment dated 30th June, 2015 passed by the District Court, Nashik allowing the arbitration application filed by the respondent herein under section 34 of the Arbitration Act and setting aside the impugned award dated 17th February, 2012. The appellant

herein was the original claimant whereas the respondent herein was the original respondent in the arbitral proceedings. Some of the relevant facts for the purpose of deciding this appeal are as under :-

2. It is the case of the appellant that the appellant and the respondent entered into an agreement being Contract No.AUR-19A dated 23rd September, 2010 for 1200 fully pressed bales of cotton at Rs.36,400/- per candy to be delivered by the respondent during the period between 10th October, 2010 to 25th October,2010. According to the appellant, the said agreement was subject to the bye-laws and rules of the Cotton Association of India which provided for arbitration in accordance with the rules and bye-laws of the said Cotton Association of India. According to the appellant M/s.Radhe Radhe Cotton Company was a broker of the respondent who had confirmed the alleged agreement dated 23rd September, 2010 by way of Sales Confirmation Note dated 23rd September, 2010.

3. It is the case of the appellant that pursuant to the said agreement, the respondent supplied 100 bales of cotton out of the 1200 bales of cotton agreed under the said agreement on 19th October, 2010 and further 100 bales each of cotton on 22nd December, 2010, 22nd December, 2010 and 23rd December, 2010 respectively at the rate and as per the specifications provided in the said agreement. According to the appellant, the respondent supplied a total of 400 bales of cotton out of 1200 bales of cotton agreed under the agreement.

4. On 7th March, 2011 the appellant addressed a letter to the respondent for supplying balance 800 bales of cotton within 7 days of the receipt thereof. The appellant sent a reminder letter dated 26th April, 2011 to the respondent for supplying 800 bales of cotton within 7 days of receipt thereof. It is the case of the

respondent that the respondent did not receive any of these two letters i.e. dated 7th March, 2011 and 26th April, 2011 alleged to have been sent by the appellant to the respondent.

5. On 3rd May, 2011, the appellant addressed a letter to the respondent invoicing back 800 bales of cotton at Rs.50,000/- per candy/Rs.14,060/- per quintal in accordance with the bye-laws and rules of Cotton Association of India and enclosed a debit note for Rs.52,00,640/- on account of alleged failure of the respondent to supply the balance 800 bales of cotton. In the said letter, the appellant conveyed that if the payment as demanded was not made within 5 working days on the date of receipt of the said letter, the appellant shall refer the matter to the Cotton Association of India. In the said letter, the appellant referred to the said alleged Contract No.AUR-19-A.

6. The respondent vide their letter dated 18th May, 2011 replied to the said letter dated 3rd May, 2011 and expressed their shock to read the claim of Rs.52 lacs made by the appellant for which the appellant had proposed to refer dispute to the arbitration. The respondent conveyed that there was no contract with the appellant either agreed orally or in writing bearing Contract No.AUR-19-A dated 23rd September, 2010 through Radhe Radhe & Co. or subject to the rules of the Cotton Association of India. The respondent contended that since there was no contract with the appellant, there was no question of delivery and thus no question of any default on the part of the respondent. The respondent also made it clear that the respondent had only received letter dated 3rd May, 2011 on 10th May, 2011 and the letter dated 9th May, 2011 on 13th May, 2011 from the appellant. The respondent strongly lodged their protest for referring the alleged dispute to arbitration.

7. The appellant thereafter filed arbitration proceedings being Arbitration Case No.47/2011-12 before the Cotton Association of India against the respondent making various claims and forwarded a copy thereof to the respondent along with covering letter dated 9th May, 2011. The respondent filed their written statement on 27th July, 2011 raising various issues including issue of jurisdiction. The respondent also denied the allegation of the appellant that M/s.Radhe Radhe Cotton Company was given any authority to enter into any transaction on behalf of the respondent. The respondent also filed an application on 27th July, 2011 for framing and deciding the preliminary issue of jurisdiction contending that since there was no agreement between the appellant and the respondent nor the respondent ever agreed to submit the dispute to the jurisdiction of the arbitral tribunal, the arbitral tribunal had no jurisdiction to entertain and/or try the dispute filed by the appellant and thus the same was required to be dismissed in limine for want of jurisdiction.

8. The appellant examined four witnesses and filed their affidavit in examination in chief including the said alleged broker Mr.Shyam Tayal. Each of those witnesses were cross examined by the respondent through their learned counsel. The respondent also examined a witness who has filed affidavit in lieu of the examination in chief and was cross examined by the appellant's counsel. On 17th February, 2012, the learned arbitrator made an award directing the respondent to pay sum of Rs.21,89,985/- to the appellant with interest at the rate of 15% per annum from the date of publication of the award till the date of payment and cost of arbitration as Rs.23,000/-.

9. Being aggrieved by the said arbitral award dated 17th February, 2012, the

respondent herein filed an application under section 34 of the Arbitration and Conciliation Act before the District Court Nashik (Arbitration Case No.9 of 2012). By an oral judgment dated 30th June, 2015 the learned Principal District Judge, Nashik allowed the said application filed by the respondent under section 34 of the Arbitration and Conciliation Act, 1996 set aside the impugned award dated 17th February, 2012. The appellant has impugned the said oral judgment dated 30th June, 2015 in this appeal filed under section 37 of the Arbitration and Conciliation Act, 1996.

10. Mr.Jagtiani, learned counsel for the appellant invited my attention to various pleadings, documents and oral evidence led by the parties and also various observations made by the learned arbitrator, various findings recorded by the learned arbitrator and also various observations made by the learned Principal District Judge in the impugned order. He submits that the contract dated 23rd September, 2010 bearing No. AUR-19-A recording various terms and conditions for supply of 1200 bales was a concluded contract. He submits that the said contract specifically provided for arbitration as per rules of Cotton Association of India, Mumbai. It is submitted that the learned arbitrator after considering the pleadings, documents and also the oral evidence led by both parties has recorded the findings of fact that the said contract dated 23rd September, 2010 was a concluded contract which included an arbitration agreement. He submits that these findings of fact recorded by the learned arbitrator could not have been interfered with by the learned Principal District Judge in the application filed by the respondent under section 34 of the Arbitration and Conciliation Act.

11. It is submitted by the learned counsel that the said contract dated 23rd September, 2010 was also confirmed by M/s. Radhe Radhe Cotton Company,

brokers of the respondent. He submits that in the said confirmation note dated 23rd September, 2010, the said broker had referred to various terms and conditions which were referred in the said contract dated 23rd September, 2010. He submits that pursuant to the said contract dated 23rd September, 2010, the respondent had supplied 400 bales of cotton at the rates and specifications agreed in the contract dated 23rd September, 2010. He submits that the said broker was examined as one of the witness by the appellant who confirmed that he was a broker through whom those 400 cotton bales were sold to the respondent by the appellant.

12. Learned counsel also placed reliance on the four tax invoices dated 19th October 2010, 22nd December 2010, 22nd December 2010 and 23rd December 2010 respectively issued by the respondent in respect of sale of those 400 bales of cotton. He submits that the name of the said broker was mentioned in the tax invoices dated 22nd December 2010, 22nd December 2010 and 23rd December 2010 respectively. He submits that the rate per candy mentioned in those three invoices was Rs.36,400/- per candy which also was in accordance with the rate prescribed in the contract dated 23rd September, 2010.

13. It is submitted by the learned counsel for the petitioner that since there was a reference to the arbitration agreement in the contract dated 23rd September, 2010 which was recorded in the letter addressed by the appellant to the respondent, the said contract was not required to be signed and since the same was in writing, the arbitration agreement recorded in the said contract stood incorporated as forming part of the said contract as contemplated under section 7(5) of the Arbitration Act. He submits that in any event since the respondent had supplied 400 bales of cotton on the terms and conditions mentioned in the said contract dated 23rd September, 2010, the arbitration agreement recorded in the said contract formed part of the

said contract and was binding on both the parties. He submits that the learned arbitrator has thus exclusive jurisdiction to entertain, try and dispose of the claims made by the appellant.

14. It is submitted that the learned Principal District Judge thus could not have interfered with such finding of fact in the impugned order and judgment while dealing with the application under section 34 of the Arbitration Act. In support of this submission, learned counsel for the appellant placed reliance on the judgment of this court in case of ***Louis Dreyfus Commodities Asia Pte Ltd. vs. Govind Rubber Ltd., 2013(3) Bom.C.R. 174*** and in particular paragraphs 8 and 21. Learned counsel also placed reliance on the judgment of Supreme Court in case of ***M.R.Engineers and Contractors Private Limited vs.Som Datt Builders Limited, (2009) 7 SCC 696*** and in particular paragraphs 15 to 19 and 21 and would submit that the doctrine of incorporation under section 7(5) of the Arbitration Act would apply to the said contract dated 23rd September, 2010.

15. In support of his submission the Principal District Judge could not have interfered with the finding of fact, the arbitrator being the ultimate master of quantity and quality of evidence, the learned counsel for the appellant placed reliance on the judgment of Supreme Court in case of ***Associate Builders vs. Delhi Development Authority (2015)3 SCC 49*** and in particular paragraphs 33, 52 and 56. He however clarified that it was not the case of the appellant that the writing executed by the alleged broker on 23rd September, 2010 was a contract incorporating an arbitration agreement under section 7(5) of the Arbitration Act but it was the case of the appellant that the said writing was a confirmation of the contract dated 23rd September, 2010 which was sent by the appellant to the respondent bearing Contract No.AUR-19-A.

16. Learned counsel for the appellant invited my attention to part of the cross examination of the broker and would submit that the said broker had admitted that he was representing the respondent in the said transaction. He also placed reliance on the affidavit in lieu of examination in chief of the respondent in support of his submission that even the respondent had admitted that atleast 300 bales of cotton were supplied to the appellant through the said broker.

17. Mr.Apte learned senior counsel for the respondent on the other hand invited my attention to the alleged contract dated 23rd September, 2010 which was on the letterhead of the appellant and would submit that the said alleged contract was never signed by the respondent. He led emphasis on the sentence 'please return to us the enclosed duplicate duly signed by you' mentioned in the said document dated 23rd September, 2010 and would submit that admittedly the respondent never returned the duplicate of the said alleged letter duly signed by the respondent. He submits that the said alleged contract thus never came in existence and thus the question of there being any arbitration agreement between the parties as canvassed by the appellant did not arise.

18. It is submitted by the learned senior counsel that the alleged letter dated 23rd September, 2010 addressed by M/s.Radhe-Radhe Cotton Company to the appellant was never received by the respondent nor the said letter was alleged to have been addressed by the said broker on behalf of the respondent. He submits that the respondent had never authorized the said broker to issue any such confirmation note to the appellant. The appellant had never referred to such alleged confirmation note of the broker in any of the correspondence including the letter dated 3rd May, 2011 which was received by the respondent. He submits that the

earlier two letters annexed to the statement of claim were never received by the respondent. The respondent had received only two letters being dated 3rd May, 2011 and 9th May, 2011 which were duly replied by the respondent vide letter dated 18th May, 2011. The respondent had categorically disputed the existence of any contract bearing AUR-19-A and had also disputed the existence of the alleged arbitration agreement.

19. Learned senior counsel invited my attention to the cross examination of the said alleged broker and would submit that the said broker had admitted in his cross examination that he had not taken signature of the respondent on any of the contract. He submits that though the respondent had raised an issue of jurisdiction based on there being no contract between the parties including alleged arbitration agreement before the learned arbitrator, the learned arbitrator did not deal with this issue in detail in the impugned award. He submits that the learned Principal District Judge dealt with the submission made by both the parties and has rightly come to the conclusion that there was no contract entered into between the parties including arbitration agreement.

20. It is submitted by the learned senior counsel for the respondent that since the alleged arbitration agreement was recorded in the letter dated 23rd September, 2010 addressed by the petitioner which was admittedly not signed by the respondent, there was no arbitration agreement entered into between the parties. He submits that section 7(5) of the Arbitration Act therefore would not be attracted to the facts of this case. He submits that under section 7(4) of the Arbitration Act an arbitration agreement is in writing if it is contended in the documents signed by the parties. He submits that since no such document was signed by the respondent admittedly nor the same was ever acted upon, the learned District Judge was right

in holding that there was no arbitration agreement between the parties. He submits that unilateral writing addressed by the petitioner would not fall under section 7(5) of the Arbitration Act.

21. Learned senior counsel distinguished the judgment of this court in case of ***Louis Dreyfus Commodities Asia Pte Ltd.*** (supra) relied upon by the learned counsel for the petitioner on the ground that this court in the said judgment had relied upon various correspondence exchanged between the parties in which there was a reference to the arbitration agreement which was not in dispute whereas in this case there is no such correspondence exchanged between the parties recording arbitration agreement in the correspondence.

22. It is submitted by the learned senior counsel that 400 bales of cotton were not supplied by the respondent under the said alleged writing dated 23rd September, 2010. He submits that the said M/s.Radhe Radhe Cotton Company had no authority to write any letter dated 23rd September,2010 to the petitioner on behalf of the respondent. He placed reliance on the oral evidence of the broker and would submit that even in his evidence admittedly, he could not prove any authority alleged to have been given by the respondent to enter into any contract with the petitioner.

23. Insofar as submission of the learned counsel for the petitioner that the petitioner had paid to the respondent the rate as per alleged agreement dated 23rd September, 2010 is concerned, it is submitted by the learned senior counsel that the petitioner did not make any allegation in any of the pleading about the rates in respect of 400 bales of cotton alleged to have been paid in accordance with the rates mentioned in the alleged contract dated 23rd September, 2010. He submits

that the learned arbitrator without any pleadings or evidence on record, came to the erroneous conclusion that the rate paid by the petitioner to the respondent in respect of 400 bales of cotton was in accordance with the alleged contract dated 23rd September, 2010. He submits that the learned District Judge accordingly has rightly set aside the impugned award and thus this court cannot interfere with the said order and judgment rendered by the learned District Judge.

24. Mr.Jagtiani, learned counsel for the petitioner in rejoinder would submit that the learned arbitrator has rendered a finding that the contract was a concluded contract based on the evidence led by the parties. He submits that this court cannot interfere with the finding of fact rendered by the learned arbitrator. In support of this submission, learned counsel placed reliance on the judgment of Supreme Court in case of *Associate Builders* (supra) and would submit that the court has no power to interfere with the findings of fact rendered by the learned arbitrator unless the same are perverse. It is submitted by the learned counsel for the petitioner that since the contract dated 23rd September, 2010 entered into between the parties was in writing, the signature of the parties on the said contract was not necessary. He submits that in any event the said contract dated 23rd September, 2010 was duly confirmed by the broker M/s.Radhe Radhe Cotton Company and the said contract was acted upon by the parties.

REASONS AND CONCLUSIONS

25. It is not in dispute that the writing dated 23rd September, 2010 which was addressed by the petitioner to the respondent was admittedly not signed by the respondent as well as by the broker. A perusal of the said writing indicates that the petitioner had requested the respondent to return the duplicate thereof duly signed

by them to the petitioner. The respondent however did not sign any such writing or returned the same to the petitioner. It is not the case of the petitioner that there was any other writing entered into between the parties (and/or correspondence) in which the parties had recorded the arbitration agreement in terms of section 7(4) (a) and (b). It is also not the case of the petitioner that in the statement of claim the petitioner had alleged existence of an arbitration agreement and the same was not denied by the respondent in the written statement.

26. Under section 7(5) of the Arbitration Act, if there is a reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract. In my view if the arbitration agreement is referred in the same document which is considered as a contract between the parties, the provisions of section 7(5) of the Arbitration and Conciliation Act, 1996 would not apply. There must be two separate documents i.e. one containing arbitration agreement and another document which is in writing and duly signed and there is reference to the earlier document containing arbitration agreement.

27. If the arbitration agreement is contained in the same document, it will fall under section 7(4) (a) of the Arbitration Act and not under section 7(5) of the Arbitration Act and would be an arbitration agreement if it is signed by both parties or is acted upon. In my view there is thus substance in the submission of the learned senior counsel for the respondent that the said writing dated 23rd September, 2010 which was addressed by the petitioner to the respondent which was admittedly not signed by the respondent would not fall under section 7(5) of the Arbitration Act. Though the petitioner could not prove before the learned arbitrator that the said writing dated 23rd September, 2010 was acted upon by the

parties, the learned arbitrator rendered a perverse finding that the said contract dated 23rd September, 2010 was a concluded contract.

28. In my view even an oral agreement also can be proved as a concluded agreement by leading an evidence. The arbitration agreement in an oral agreement though such oral agreement is concluded however would not fall under section 7(4) of the Arbitration Act.

29. It is not the case of the petitioner admittedly that the so called confirmation letter dated 23rd September, 2010 from M/s.Radhe Radhe Cotton Company was a concluded contract or that the said writing recorded any arbitration agreement. Admittedly, even on the said alleged writing dated 23rd September, 2010 addressed by M/s.Radhe Radhe Cotton Company, there was no signature of the respondent nor it indicated that the same was addressed on behalf of the respondent or that the same was based on any authority given by the respondent to the said broker to address any such writing on their behalf to the petitioner. In my view the said alleged writing addressed by the broker thus cannot be construed as an arbitration agreement or any contract between the appellant and the respondent recording any arbitration agreement.

30. The petitioner could not submit any proof before the learned arbitrator or before the learned District Judge or before this court to show that the letters dated 7th March, 2011 and 26th April, 2011 were served upon the respondent. In my view there is thus substance in the submission of the learned senior counsel for the respondent that the respondent immediately upon receipt of the letter dated 3rd May, 2011 alleging the existence of a contract and alleged arbitration agreement denied such allegations made by the petitioner.

31. A perusal of the cross-examination of the first witness of the appellant i.e. Mr.Vivek Khanna indicates that he admitted that the office copy of the contract dated 23rd September, 2010 produced by him was not signed by the respondent. He also deposed that it was orally confirmed by the appellant that delivery would be given as per contract dated 23rd September, 2010. The witness admitted that when he acquainted himself from the record and noticed about the lack of signature on the contract, he alleged to have persuaded through Aurangabad Office to get the contract stamped and signed. The said deposition was based on the statement made by the broker as well as the officers of their branch office. He also admitted that the invoices dated 19th October, 2010 , 22nd December, 2010 and 23rd December, 2010 did not bear any reference to any contract.

32. In his cross-examination, he could not produce any acknowledgement from the respondent to the letter dated 7th March, 2011 alleged to have been addressed by the petitioner to the respondent. He deposed that the respondent had refused to acknowledge the said letter. The witness was alleged to have been given this information by Mr.Ravindra Dehankar. Similarly the witness also could not produce any acknowledgment of the letter dated 22nd April, 2011. In his re-examination, the said witness admitted that there was oral contract between the appellant and the respondent for purchasing alleged 1200 bales of cotton.

33. It is thus clear that the witness examined by the appellant also admitted that there was an oral contract between the parties for purchasing 1200 bales of raw cotton. The second witness examined by the appellant in his cross-examination when asked as to from which record he got the information regarding alleged contract between the parties, he deposed that he knew only on the basis of confirmation note sent by the broker. He deposed that the respondent had

confirmed telephonically and not in writing.

34. The alleged broker Mr. Shyam Tayal who was the owner of Radhe Radhe Cotton Company and was also examined as one of the witness by the appellant in his cross examination when he was asked whether he had obtained any confirmation of the impugned transaction between the appellant and the respondent, he deposed that in the cotton trade normal confirmation was taken on telephone and all transactions were confirmed telephonically. The said witness when was asked that if he was issuing broker note in writing, why did he not seek confirmation in writing from the respondent in respect of the contract, he deposed that generally they did not do that. The said witness admitted that the said alleged contract was not signed by the respondent. He however deposed that Mr. Mahesh Patodia was not available there at that time and Mr. Krishna Patodia promised to send it back after obtaining the signature of Mr. Mahesh Patodia.

35. When the witness was asked as to when he left the said contract in the factory of the respondent, he deposed that he did not recollect exact date but it was within 5 to 7 days of contract dated 23rd September, 2010. He did not visit the the respondent to find out as to why the contract was not signed and returned but he spoke on the phone for signing of contract. The witness admitted that when he visited the respondent again in the month of October 2010, he did not request the respondent to sign the contract because he had visited the respondent for follow up of the delivery. He admitted that it was his duty to obtain the signature on the contract from the seller. He did not take any steps to get the written contract since period of delivery had already started and thereafter there was no need to request for a written contract.

36. In reply to question no.22, when he was asked whether he had any documentary evidence to show that 400 bales pertain to the impugned transaction, he deposed that the rates were as per contract and there was no other contract between the parties other than the said contract of 1200 bales. He admitted that it was possible to have different contracts between the parties of the same rate. He also admitted that he did not have knowledge of the transaction entered into between the appellant and the respondent for a period other than year 2010-11.

37. The witness no.4 i.e. Shyamsundar Kantilal Tiwari, who was examined by the appellant in his cross-examination could not produce any written contract between the appellant and the respondent duly signed. The witness admitted that there was no reference to any contract in the invoices dated 19th October, 2010, 22nd December, 2010 and 23rd December, 2010.

38. The respondent examined its sole proprietor Mr.Mahesh Tulshiram Patodia. In his examination in chief, the witness deposed that there was no document signed by him which would show existence of any agreement for supply of 1200 bales of cotton. He deposed that he did not sell any cotton through the broker Shyam Tayal except 300 bales of cotton delivered on 22nd and 23rd December, 2010. The said broker did not send him any agreement, nor called him, nor met him any time regarding any outstanding delivery as alleged or otherwise. In his cross-examination when he was asked whether for supply of 400 bales of cotton whether he had entered into any contract, the witness deposed in the negative. He also deposed that the said 400 bales of cotton was delivered without any contract. When the witness was shown a copy of the alleged contract dated 23rd September, 2010 and invoices dated 22nd December, 2010 and 23rd December, 2010 and was asked whether the rate mentioned in the contract and in the invoices were one and

the same, the witness deposed that the rate was not one and the same. The witness disclosed different rates in respect of 400 bales of cotton. In reply to question no.27, when the witness was put a suggestion that he had entered into an oral agreement for delivery of 1200 bales of cotton and not 400 bales of cotton with the appellant, the witness denied the said suggestion.

39. A perusal of the oral evidence led by the appellant and the respondent clearly indicates that the appellant could not establish the existence of any signed contract between the parties. The alleged broker, who was examined by the appellant admitted in his cross-examination that the said writing dated 23rd September, 2010 was not signed by the respondent. The said alleged broker though had claimed to have visited the factory of the respondent, did not obtain any signature of the respondent on the said alleged writing dated 23rd September, 2010. The said alleged broker also could not prove that the confirmation letter dated 3rd September, 2010 which was alleged to have been signed by the said broker was counter signed by the respondent or that he was authorized to address any such letter on behalf of the respondent.

40. The Assistant Manager (Export) Mr.Vijay Ashok Khanna, who was examined by the appellant as one of the witness, in his cross-examination admitted that the said contract dated 23rd September, 2010 was not signed by the respondent.

The cross-examination of the respondent also clearly indicates that the suggestion was put to the witness of the respondent that there was oral contract between the parties for supply of 1200 bales of cotton and not 400 bales of cotton. This suggestion put to the witness itself indicates that there was an oral contract between the parties and not any alleged writing dated 23rd September, 2010. A

perusal of the alleged writing dated 23rd September, 2010 clearly indicates that the same is not signed by the respondent nor the duplicate thereof is returned by the respondent to the appellant.

41. A perusal of the impugned award rendered by the learned arbitrator clearly indicates that the learned arbitrator has not dealt with the various admission in the deposition of the witness examined by the appellant and also did not consider the cross-examination of the witness examined by the respondent on the issue whether any contract in writing duly signed between the parties existed. A perusal of the said award indicates that the learned arbitrator has recorded a finding of fact on the issue of jurisdiction without any reasons. The learned arbitrator has decided the issue of jurisdiction very casually overlooking the correspondence and oral evidence led by the parties.

42. A perusal of the impugned judgment dated 30th June, 2015 delivered by the Principal District Judge, Nashik indicates that the learned judge has passed a reasoned judgment after considering the documentary and oral evidence led by the parties. The learned Principal District Judge also considered section 7 of the Arbitration and Conciliation Act, 1996 and has rendered a finding that there was no valid agreement between the parties which issue was though raised by the respondent was not examined by the learned arbitrator. It is held that the learned arbitrator did not consider material aspect which was going into the root of the matter. The learned Principal District Judge has held that the alleged contract produced by the appellant was not immediately signed by the respondent herein. In my view the learned Principal District Judge was right in interfering with the impugned award rendered by the learned arbitrator and has rightly held that the arbitral proceedings before the learned arbitrator were totally without jurisdiction.

43. Insofar as judgment of Supreme Court in case of ***Associate Builders*** (supra) relied upon by the learned counsel for the appellant is concerned, it is held by the Supreme Court that when a court is applying the 'public policy' test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. It is held that the arbitrator is ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. It is held by the Supreme Court that an award can be said to be against justice only when it shocks the conscience of the court. If the award is in contravention with the Arbitration Act itself, it would be regarded as patent illegality. It is held that the contravention of the substantive law of India would result in the death knell of an arbitral award. In my view, the learned arbitrator has exceeded his jurisdiction and has rendered an award though there was no arbitration agreement entered into between the parties. The impugned award thus was in contravention of the substantive law of India and showed patent illegality. The impugned award in my view thus has been rightly set aside by the learned Principal District Judge.

44. Insofar as judgment of Supreme Court in case of ***M.R.Engineers and Contractors Private Limited*** (supra) relied upon by the learned counsel for the appellant is concerned, in my view since the provisions of section 7(5) of the Arbitration and Conciliation Act, 1996 did not apply to the alleged contract but section 7(4) of the Act would apply, the judgment of Supreme Court in case of ***M.R.Engineers and Contractors Private Limited*** (supra) does not apply to the facts of this case and would not assist the case of the appellant.

45. Insofar as judgment of this court in case of ***Louis Dreyfus Commodities Asia Pte Ltd.*** (supra) relied upon by the learned counsel for the appellant is

concerned, the contract which contained arbitration clause in that matter was duly acted upon. The contract was followed by purchase orders. This court has also considered the correspondence exchanged between the parties in which clearly indicated the existence of arbitration agreement. In this case there is no correspondence on record which would indicate the existence of any arbitration agreement between the parties. In my view the facts in case of ***Louis Dreyfus Commodities Asia Pte Ltd.*** (supra) are totally different and are clearly distinguishable with the facts of this case. The said judgment in my view thus would not assist the case of the appellant.

46. Though the appellant placed reliance on several letters in the arbitral proceedings, except two letters, all other letters though were disputed by the respondent, the appellant could not prove the existence and delivery of those letters. No reliance thus could be placed on those disputed documents by the appellant. The broker did not produce any authority letter from the respondent to address any confirmation letter dated 23rd September, 2010. It is not the case of the appellant that the said alleged writing addressed by the alleged broker constituted any contract between the appellant and the respondent. In my view there is thus no substance in the submissions made by the learned counsel for the appellant. No interference is thus warranted with the order passed by the learned Principal District Judge on 30th June, 2015. The appeal is devoid of merits.

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

- (a) Arbitration Appeal No. 40 of 2015 is dismissed.
- (b) No order as to costs.

[R.D. DHANUKA, J.]