

bdp

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

**ARBITRATION PETITION NO. 393 OF 2017
WITH
ARBITRATION PETITION NO. 315 OF 2019**

Sphere International
a proprietorship concern through its
proprietor Mr. Rakesh Jalan, A-wing, 13-B,
Pravasi Industrial Estate, Gate No.1,
Goregaon Mulund Link Road, Goregaon (E),
Mumbai – 400 063.

... Petitioner

Versus

Ecopack India Paper Cup Pvt. Ltd.
a company incorporated under the provisions
of the Companies Act, 1956, having its
registered office at Plot No.41, Village Navlak
Umbare Jadhavwadi Road, Near Talegaon
MIDC Tal. Maval, Pune – 410 507.

... Respondent

.....

Mr. Premlal Krishnan a/w Mr. Sankalp Anantwar and Mr. Dinesh Bhatia i/by M/s. Panindia Legal Services LLP, Advocates for the Petitioner.

Mr. Aseem Naphade a/w Mr. A.P Singh, i/by M/s. S. K. Srivastav and Company, Advocates for the Respondent.

.....

CORAM : R.D. DHANUKA, J.

RESERVED ON : 12th JULY, 2019

PRONOUNCED ON : 7th AUGUST, 2019

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

. Arbitration Petitioner No. 393 of 2017 is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'Arbitration Act') by the petitioner (original respondent in the arbitral proceedings) impugning the interim award dated 10th April 2017 passed by the learned Arbitrator against the petitioner. Arbitration Petition No. 315 of 2019 is filed by the petitioner (original respondent in arbitral proceedings) impugning the arbitral award dated 29th October 2018 allowing the claim for interest on the principle amount of Rs.47,56,388.80/-, which principle amount is subject matter of the Arbitration Petition No. 393 of 2017. By consent of parties, both the arbitration petitions were heard together and are being disposed of by a common order. Some of the relevant facts for the purpose of deciding these two petitions are as under:-

2. The petitioner herein was the original respondent, whereas the respondent was the original claimant in the arbitral proceedings. During the period between 2014-2015, the respondent herein sold/supplied and delivered the paper cups to the petitioner under various invoices. It was the case of the respondent that the payment in respect of 120 invoices amounting to Rs.47,56,389/- remained to be paid by the petitioner to the respondent.

3. It is the case of the respondent that the respondent addressed letters dated 26th May 2015, 12th June 2015 and 7th November 2015 calling upon the petitioner to make payment alleged to be due under

those 120 invoices. The petitioner addressed a letter dated 21st December 2015 to the respondent alleging that a sum of Rs.48,01,544/- was payable by the petitioner to the respondent, however, after adjusting certain dues payable by the respondent to the petitioner, the petitioner was entitled to a sum of Rs.2,76,589/- from the respondent. It was the case of the petitioner that the petitioner is a proprietary concern of Mr. Rakesh Jalan and was formed in the year 2006. The petitioner is engaged in business of importing, manufacturing, distribution and sale of paper cups, molds, trays, cases etc. for Indian Sweets and Bakery. The respondent is a company carrying on business of exporting, manufacturing and sale of paper cups, molds, trays etc.

4. It is the case of the petitioner that on 8th March 2007 the petitioner and the Ecopack SPA, a company based in Italy, entered into a Gentlemen's Agreement wherein both the parties confirmed to work together for distribution in the whole territory of India for the entire range of products of Ecopack's. It is the case of the petitioner that due to the efforts of Mr. Rakesh Jalan and Mr Anand Jalan, the said business grew multifold in India. The petitioner perceived an idea of setting up their own manufacturing unit in India and thus incorporated Ecopack India Paper Cup Pvt. Ltd. i.e. the respondent herein in the year 2010. Mr. Rakesh Jalan and Anand Jalan become the promoters and directors of the respondent.

5. It is the case of the petitioner that Ecopack SPA proposed to contribute an amount of Rs.1,22,22,756/- in equity of the respondent on various understanding. It is the case of the petitioner

that the said Ecopack SPA wanted to take entire control of business of the respondent including but not limited to the business developed by the petitioner from the year 2006 when the respondent expressed its hesitation to the proposition of Ecopack SPA. Ecopack SPA tried to lure the respondent by showing carrot of profit from 10% to 20%. Since November 2013, various new persons were appointed in the management of the respondent-company. It is the case of the petitioner that after acquiring majority shares in the respondent, Ecopack SPA completely took over the control of the respondent from the petitioner. The accounts of the respondent were audited and cleared in the previous Annual General Meeting. Attempts were made to create fictitious liability amounting to Rs.19,33,981/- unto the petitioner, although the same was reflected in the books of respondent as the monies to be recovered from various distributors of respondent.

6. It is the case of the petitioner that in the year 2014-2015, there was an outstanding amount of Rs.47,56,388/- towards supply by respondent in their accounts. i.e. an outstanding amount of Rs.35,95,875/- upto 26th February 2015 and in 2015-2016 it increased to Rs.47,56,388/-. On 25th February 2015, a resignation letter was addressed by Mr. Anand Jalan to respondent thereby resigning from post of Directorship with immediate effect. On 25th February 2015, Mr. Rakesh Jalan also resigned from the post of Directorship of the respondent with effect from 30th March 2015. It is the case of the petitioner that on 26th February 2015 a meeting was held between the representative of the respondent and Mr. Rakesh

Jalan to settle the account between the parties. During the said meeting, the representative of the respondent forwarded a statement and proposed to settle the accounts. Though, the petitioner had acknowledged the said proposal statement but disputed part of the contents thereof. It is the case of the petitioner that the respondent had inflated various deductions in the said account.

7. It is the case of the petitioner that as per the settlement sheet dated 26th February 2015, the liability of Mr. Rakesh Jalan and Mr. Anand Jalan and respondent was limited to the balance amount remaining after adjusting the dues payable between the respondent and the petitioner. According to the petitioner, the respondent owed Rs.9,76,45,183/- and Rs.19,83,810.20/- towards share in profit after correct calculation to the petitioner. Various emails were exchanged between the parties.

8. On 12th May 2015, the petitioner forwarded a debit note to the respondent claiming an amount of Rs.45,24,955/- which was due and liable to be paid towards accounts settlement on 26th February 2015, pending salary, turnover discount and unpaid telephone invoices according to the petitioner. On the other hand, the respondent also demanded various amounts from the petitioner. On 7th November 2015, the respondent invoked arbitration agreement in respect of the alleged dispute arising due to the non-payment of the amount due and liable in respect of the 120 Tax Invoices. It was alleged by the respondent that the petitioner was liable to pay a sum of Rs.98,69,051/- to the respondent and further demanded a sum of Rs.2,00,00,000/- for competing with the business of the respondent.

9. On 21st December 2015, the petitioner through his advocate responded to the said notice dated 16th November 2015 and denied the allegations made therein. The petitioner requested the respondent to transfer back the Rs.10,000/- shares to Mr. Rakesh Jalan and Mr. Anand Jalan. The matter was referred to the Arbitral Tribunal appointed by the Hindustan Chamber of Commerce. It was the case of the petitioner that the petitioner has to recover a sum of Rs.9,96,28,993/- from the respondent, whereas it was alleged by the respondent that they have to recover a sum of Rs.47,57,389/- from the petitioner.

10. The respondent filed statement of claim on 17th February 2016 before the learned Arbitrator *inter-alia* praying for recovery of Rs.57,75,046/- with interest thereon against the petitioner. On 8th July 2016, the petitioner filed a statement of defence denying the various allegations made in the statement of claim. In paragraph (J) of the said statement of defence, the petitioner annexed a table showing the amount allegedly payable by the respondent to the petitioner in the sum of Rs.48,01,544/- and also showing an amount of Rs.45,24,955/- adjustable by the petitioner against the said amount of Rs.48,01,544/- showing the balance amount of Rs.2,76,589/-. The petitioner also filed a counter claim in the said proceedings before the learned Arbitrator *inter-alia* praying for an amount of Rs.9,48,71,604/- with interest thereon. The respondent filed statement of defence to the said counter claim on 1st September 2016. The petitioner filed rejoinder to the said statement of defence filed by the respondent.

11. On 1st September 2016, the respondent herein filed an application under Section 16 of the Arbitration Act before the Arbitral Tribunal for rejection of counter claim on the ground of jurisdiction. On 1st September 2016, the respondent filed a separate application under Section 31(6) of the Arbitration Act *inter-alia* praying for an interim award of Rs.47,57,389/-. The petitioner opposed the said application filed by the respondent for dismissal of counter claim. On 5th October 2016, the petitioner filed reply to the said application filed by the respondent for interim award. On 5th January, 2019, the Arbitral Tribunal allowed the application filed by the respondent under Section 16 of the Arbitration Act and rejected the counter claim filed by the petitioner on the ground of jurisdiction.

12. On 1st March, 2019, the petitioner herein filed Commercial Arbitration Petition No. 159 of 2017, impugning the said order dated 5th January, 2019 passed by the Arbitral Tribunal accepting the plea of jurisdiction raised by the respondent and rejecting the counter claim on the ground of lack of jurisdiction of the Arbitral Tribunal. On 7th July, 2019, the petitioner filed an application to lead oral evidence before the Arbitral Tribunal. On 10th April, 2019, the Arbitral Tribunal made an interim award against the petitioner under Section 31(6) of the Arbitration Act. On 20th July, 2019, the petitioner filed an affidavit of evidence. On 24th November, 2019, the petitioner withdrew Commercial Arbitration Petition No. 159 of 2017 with liberty to initiate an appropriate proceeding in law. On 15th December, 2019, the petitioner filed Commercial Suit No. 484 of 2018 against the respondent for recovery of various amounts.

13. On 31st January 2018, the respondent filed Arbitration Petition No. 244 of 2018 under Section 29A of the Arbitration Act *inter-alia* praying for extension of time for completion of arbitral proceedings. On 23rd February 2018 this Court disposed off the Arbitration Petition No. 244 of 2018 by appointing a new Arbitrator and directing that the arbitral proceedings shall be proceeded with from the stage left by the erstwhile Arbitral Tribunal. On 25th April 2018, the respondent opposed the application filed by the petitioner for leading oral evidence. The petitioner filed the rejoinder to the said reply dated 25th April 2018, on 3rd May 2018. On 5th June 2018 the Arbitral Tribunal allowed the application filed by the petitioner for leading oral evidence. The petitioner examined the witness who was cross-examined by the respondent's advocate. Both the parties filed the written submissions before the Arbitral Tribunal.

14. The petitioner impugned the said interim award dated 10th April, 2019 by filing Arbitration Petition No. 393 of 2017. By an order dated 13th December, 2019, this Court admitted the said Arbitration Petition No. 393 of 2017. On 21st December, 2019, this Court allowed the Notice of Motion No. 2059 of 2017 filed by the petitioner seeking stay of the impugned award dated 10th April, 2019 in Arbitration Petition No. 393 of 2017 and granted unconditional stay. This Court observed in the said order that the petitioner has already filed the separate suit rejecting the recovery of various amounts, which were subject matter of the counter claim filed by the petitioner on the ground of lack of jurisdiction.

15. This Court also observed that the arbitral award *prima-facie* shows that the said award under Section 31(6) of the Arbitration Act was passed on a solitary paragraph in the written statement and has not considered the entire case/pleadings of the petitioner in the written statement. The petitioner is entitled to explain the alleged admission made in the statement of defence. This Court *prima-facie* observed that the learned Arbitrator ought to have rendered the award after giving an opportunity to both the parties to lead evidence. This Court accordingly granted unconditional stay of the award in favour of the petitioner from enforcement of the interim award dated 10th April, 2019.

16. The respondent herein preferred an appeal against the said order dated 21st December, 2019 passed by this Court, bearing an Appeal No. 101 of 2018. The division bench of this Court dismissed the said Appeal No. 101 of 2018 filed by the respondent. The division bench of this Court observed that the learned Single Judge had rightly observed that the interim arbitral award had merely considered a statement made on behalf of the petitioner herein in paragraph 3(O) of the statement of defence as the admission of liability by the petitioner and it was on that statement, the learned Arbitrator has proceeded to make the impugned interim award.

17. The division bench of this Court also referred to the averments made by the petitioner in paragraph 8 of the reply of the petitioner opposing application filed by the respondent for interim award under Section 31(6) of the Arbitration Act contending that a sum of

Rs.3,21,64,837/- was due and payable by the respondent herein to the petitioner. By adjusting the said amount payable by the respondent to the petitioner, the petitioner is entitled to recover a sum of Rs.2,47,07,448/-. It was also alleged in the said paragraph that the respondent herein is liable to pay an amount of Rs.6,37,44,606/- towards damages. There was however no reference to the said plea raised by the petitioner in the impugned interim award at all.

18. Being aggrieved by the said Judgment of the division bench of this Court dated 14th March 2018 filed by the respondent, the respondent herein filed Special Leave Petition before the Hon'ble Supreme Court. By an order dated 23rd July 2018, the Hon'ble Supreme Court disposed of the said Special Leave Petition No. 16605 of 2018 filed by the respondent herein. The Hon'ble Supreme Court made it clear that the Supreme Court was not interfering with the impugned order. The Supreme Court further requested the learned Single Judge of this Court to dispose of the Arbitration Petition No. 393 of 2017 within a span of four months. It was however made clear in the order that the Supreme Court had not expressed anything on the merits of the case. The learned Single Judge, while adjudicating, shall express his views on the basis of contentions advanced before him.

19. On 23rd March 2018, this Court appointed Mr. Nirman Sharma, a Counsel of this Court as a Sole Arbitrator and directed the Hindustan Chamber of Commerce to transmit the papers and proceedings of Case No.A 149/2015-2016 filed by the respondent to

the learned Arbitrator. The learned Arbitrator accordingly proceeded with the matter from the stage at which the proceedings had reached before the earlier Arbitral Tribunal. The learned Arbitrator gave an opportunity to the parties to lead oral evidence also. By an award dated 29th October 2018, the learned Arbitrator directed the petitioner to pay interest on the principle amount of Rs.47,56,388.80/- upto 16th February 2016, to pay interest *pendente-lite* on the principal amount of Rs.47,56,388.80/- @ 15% p.a. from 17th February 2016 till the date of the said amount and further provided interest @ 15% p.a. on the said principle amount from the date of award till realization. The learned Arbitrator also directed the petitioner to pay costs of Rs.7,21,470/- as sought in the statement of costs set out in the written statement dated 27th September 2018. The petitioner has impugned the said award dated 29th October 2018 in Arbitration Petition No. 315 of 2019.

20. Mr. Premlal Krishnan, learned Counsel for the petitioner invited my attention to the documents annexed to the petitions filed by his clients, various paragraphs of the pleadings filed by both the parties, oral evidence led by his client before the learned Arbitrator in the second arbitral proceedings and various findings rendered by the two Arbitral Tribunal. It is submitted by the learned Counsel that proprietor of the petitioner was one of promoters of the respondent-company till the control of the respondent-company was taken over by Ecopack SPA. Several amounts were recoverable by the petitioner from the respondent. Learned Counsel also strongly placed reliance on various emails exchanged between the parties by which the

petitioner had raised substantial claim against the respondent whereas the respondent had raised claim against the petitioner in respect of Rs.47,56,388 towards supply made by the respondent to the petitioner.

21. It is submitted by the learned Counsel that in the written statement filed by the petitioner before the Arbitral Tribunal, the petitioner had not admitted the claims made by the respondent but had sought adjustment of the amount payable by the petitioner to the respondent as against dues of the respondent against the petitioner. The petitioner had to recover the amount from the respondent. Learned Arbitrator however picked up the averments only from one of the paragraph in the written statement and did not consider the plea of the petitioner for recovery of substantial amount from the respondent raised in various other paragraphs of the written statement and also in the counter claim. The Arbitral Tribunal erroneously rejected the counter claim made by the petitioner on the ground of lack of jurisdiction. The arbitration petition filed by the petitioner impugning the said decision of the Arbitral Tribunal came to be withdrawn by the petitioner with liberty to file appropriate proceedings.

22. It is submitted that the petitioner has already filed a civil suit against the respondent *inter-alia* praying for recovery of large sum. The petitioner has reduced the said sum of Rs.47,57,388/-, which was allegedly payable by the petitioner to the respondent towards supply made by the respondent to the petitioner and claimed the net

amount in the said suit. Similar claim was also made by the petitioner in the counter claim filed before the Arbitral Tribunal. The petitioner has not thus acknowledged the liability of Rs.47,56,388/- as sought to be canvassed by the respondent and accepted by the Arbitral Tribunal while rendering an interim award under Section 31(6) of the Arbitration Act.

23. It is submitted by the learned Counsel that the Arbitrator Tribunal could not have picked up an isolated sentence from the entire pleading, which pleadings clearly indicated that the claim of the respondent was disputed by the petitioner. The Arbitral Tribunal thus could not have rendered any interim award under Section 31(6) of the Arbitration Act on the ground of alleged acknowledgment of liability of the petitioner towards the respondent.

24. The learned Counsel for the petitioner strongly placed reliance on various observations made by this Court in the order passed by this Court in the order passed in the notice of motion filed by the petitioner in the Arbitration Petition No. 393 of 2017 and the observations made by division bench of this Court in Appeal No. 101 of 2018. It is submitted by the learned Counsel that the Hon'ble Supreme Court has not interfered with the orders passed by this Court in the order dated 23rd July 2018.

25. It is submitted by the learned Counsel that the both the parties have relied upon the settlement sheet before the Arbitral Tribunal and also in the other proceedings. The Arbitral Tribunal thus could not have solely relied upon only on an averment made by the

petitioner in a solitary paragraph of the written statement by ignoring the plea raised in several other paragraphs of the written statement disputing the claims made by the respondent.

26. It is submitted by the learned Counsel for the petitioner that admittedly the petitioner had examined a witness before the learned Arbitrator in the second arbitral reference to prove that the claim of the respondent was seriously disputed by the petitioner. Learned Counsel placed reliance on various portion of the oral evidence led by the petitioner before the learned Arbitrator in the second arbitral reference in the cross-examination of the witness by the learned Counsel for the respondent. He submits that the suit filed by the petitioner for recovery of substantial amount against the respondent is still pending.

27. It is submitted by the learned Counsel that the learned Arbitrator in the second award also did not consider the crucial part of the evidence led by the petitioner and ignored the material evidence produced by the petitioner in the impugned award. The learned Counsel for the petitioner placed reliance on the various paragraphs of the written statement disputing the liability of the petitioner towards the respondent. The petitioner had placed reliance on the settlement proposal dated 26th February 2015. He submits that the liability, if any, of Rs.47,56,388/- in the said paragraph of the written statement was without prejudice to the other averments made by the petitioner in the other part of written statement and the correspondence, disputing the liability of the petitioner.

28. It is submitted by the learned Counsel that since nothing was payable by the petitioner to the respondent, question of awarding any interest by the learned Arbitrator in the second reference would not arise and thus award shows patent illegality.

29. Mr. Aseem Naphade, learned Counsel for the respondent (original claimant), on the other hand submits that there were two separate transactions between the parties. The first transaction was related to sum for sale and supply of goods by respondent to the petitioner covered by Section 55 of the Sale of Goods Act, 1930, whereas the second transaction was relating to take over of the business and management of the respondent. The petitioner did not have any credible defence to the transaction no.1 between the parties. The petitioner has deliberately mixed up the two separate transactions in the written statement and the counter claim filed by the petitioner before the Arbitral Tribunal with a view to confuse the admitted liability of the petitioner towards the respondent under transaction no.1.

30. Learned Counsel for the respondent placed reliance upon the averments made by his client in the application filed under Section 16(2) of the Arbitration Act to raising an issue of jurisdiction in respect of the counter claim filed by the petitioner and also placed reliance on various averments made by his client in the application filed for interim award under Section 31(6) of the Arbitration Act. He submits that the Arbitral Tribunal had rightly rejected the counter claim on the ground of lack of jurisdiction and had rightly accepted the plea of jurisdiction raised by his client under Section 16(2) of the

Arbitration Act. The petitioner has already withdrawn the appeal preferred by the petitioner against the said order passed by the Arbitral Tribunal rejecting the counter claim on the ground of lack of jurisdiction. He submits that civil suit filed by the petitioner for recovery of various amounts against the respondent is pending.

31. Learned Counsel submits that since the petitioner has already withdrawn the appeal filed by the petitioner against the order rejecting the counter claim, the defence raised by the petitioner in the counter claim filed before the Arbitral Tribunal did not survive and cannot be relied upon by the petitioner. Learned Counsel for the respondent placed reliance on the invoices issued by his client upon the petitioner and the letter dated 21st December 2015 from the petitioner through its Advocates to the Advocates representing the respondent and more particularly paragraph (J) and would submit that even in the said letter, the petitioner had clearly acknowledged the liability towards the respondent in the sum of Rs.48,01,544/- and had however pleaded adjustment for Rs.45,24,955/- against the said sum of Rs.,48,01,544/-.

32. Learned Counsel for the respondent placed reliance on the averments made by the petitioner in the written statement and in particular paragraph (g) and would submit that even in the said paragraph the petitioner had clearly admitted the liability of the petitioner towards the respondent arising out of the delivery and sale of the products by the respondent to the petitioner. It is submitted that the petitioner however in paragraph (c) of the written statement had pleaded adjustment based on the settlement alleged to have been arrived at between the parties on 26th February 2015.

33. Learned Counsel for the respondent invited my attention to the particulars of claim in the counter claim preferred by the petitioner before the Arbitral Tribunal and would submit that even in the said counter claim, the petitioner had admitted the liability of Rs.47,57,389/- towards various invoices. He submits that even in the said particulars of claim of the counter claim filed by the petitioner, the petitioner had admittedly given credit of Rs.47,57,389/- towards invoices which would clearly indicate the case of adjustment of the admitted liability towards the claim made by the petitioner. It is submitted that since the petitioner had admitted the liability of Rs.47,57,389/-, the respondent became entitled to an interim award for the said amount on the basis of the admission of the liability on the part of the petitioner.

34. Learned Counsel for the respondent placed reliance on the reply filed by the petitioner to the application filed by the respondent under Section 31(6) of the Arbitration Act and more particularly the averments made in paragraphs 6 and 8 thereof and would submit that even in the said reply to the application under Section 31(6) of the Arbitration Act filed by the respondent, the petitioner had simpliciter claimed adjustment of the amount of admitted liability of the petitioner against the claim of the petitioner.

35. Learned Counsel for the respondent placed reliance on the affidavit of evidence filed by the witness examined by the petitioner and in particular paragraph 28 thereof and would submit that even in the said affidavit of evidence filed by the witness of the petitioner, the petitioner had admitted the liability of Rs.47,57,389/-. He also

placed reliance on the deposition in para 24, 29 and 30 of the said affidavit of evidence. Learned Counsel placed reliance on the finding rendered by the learned Arbitrator in the second arbitral proceedings that there were pleadings filed by the petitioner alleging novation of the contract between the parties. He placed reliance on the cross-examination of the witness of the petitioner and more particularly in reply to the question no. 120. He submits that there was no concluded contract by way of settlement between the parties and thus the claims made by the respondent towards recovery of various amounts under 120 invoices raised by the respondent upon the petitioner prevailed upon the claims made by the petitioner.

36. Learned Counsel for the respondent invited my attention to the statement dated 26th February 2015, which was strongly relied upon by the petitioner and would submit that even in the said statement the petitioner had not stated that the amount payable to the respondent under 120 invoices would not be paid by the petitioner or that the petitioner was not required to pay any amount under those invoices to the respondent. Learned Counsel for the respondent placed reliance on Section 29 of the Indian Contract Act, 1872.

37. Learned Counsel for the respondent placed reliance on Section 93 of the Indian Evidence Act, 1872 and would submit that since the documents relied upon by the respondent were not ambiguous or uncertain or vague, no oral evidence could be laid to prove contrary to the contents of the documents. He submits that no comment can be made by this Court on the issue of novation, since the said plea is

raised by the petitioner in the civil of suit, which is still pending. It is submitted that the admission of liability in the pleadings and documents stand on higher pedestal. He submits that this Court cannot interfere with the findings of facts rendered by the Arbitral Tribunal in view of limited scope of intervention under Section 34 of the Arbitration Act.

38. Learned Counsel for the respondent placed reliance on the following Judgments:-

- i) Judgment of this Court in case of ***Deccan Chronicle Holdings Limited v/s. Tata Capital Financial Services Ltd., 2016 SCC OnLine Bom 5319*** and in particular paragraphs 26, 28 to 31.
- ii) Judgment of Madras High Court in case of ***Gammon India Ltd. v/s. Sankarnarayan Construction (Bangalore) Pvt. Ltd., 2010 (2) MWN (Civil) 528*** and in particular paragraphs 13, 22, 24, 27 to 30.
- iii) Judgment of Supreme Court in case of ***Uttam Singh Duggal & Co. Ltd. v/s. United Bank of India and Ors., (2000) 7 SCC 120*** and in particular paragraphs 12 and 17.
- iv) Judgment of Supreme Court in case of ***Nagindas Ramdas v/s. Dalpatram Ichharam alias Brijram and Ors., (1974) 1 SCC 242*** and in particular paragraph 27.

- v) Judgment of Supreme Court in case of ***Zonal General Manager v/s. Vinay Heavy Equipments, (2015) 13 SCC 680*** and in particular paragraph 10.
- vi) Judgment of Supreme Court in case of ***Keshavlal Lalubhai Patel and Ors. v/s. Lalbhai Trikumlal Mills Ltd., AIR 1958 SC 512*** and in particular paragraph 9.
- vii) Judgment of Supreme Court in case of ***Babu Ram alias Durga Prasad v/s. Indra Pal Singh (dead) by LRS., AIR (1998) 6 SC 358*** and in particular paragraphs 19 & 20.
- viii) Judgment of this Court in case of ***Central Bank of India v/s. Mahesh Govindlal Vyas, 2002 SCC OnLine Bom 653*** and in particular paragraphs 4 and 8.
- ix) Judgment of Supreme Court in case of ***Chrisomar Corporation v/s. MJR Steels Pvt. Ltd., 2017 SCC OnLine SC 11104*** and in particular paragraphs 37 & 38.
- x) Judgment of Supreme Court in case of ***Gujarat Water Supply and Sewerage Board v/s. Unique Erectors (Gujarat) (P) Ltd., (1989) 1 SCC 532*** and in particular paragraph 9.
- xi) Judgment of Delhi High Court in case of ***Ircon International Ltd. v/s. Arvind Construction Co. ltd, 1999 (50) DRJ*** and in particular page no. 773.

xii) Judgment of Supreme Court in case of ***Sutlej Construction Ltd. v/s. Union Territory of Chandigarh, (2018) 1 SCC 718*** and in particular paragraphs 10 & 11.

xiii) Judgment of Supreme Court in case of ***Associate Builders v/s. Delhi Development Authority, (2015) 3 SCC 49*** and in particular paragraphs 19 and 36.

in support of the aforesaid submission including on the submission of limited powers of courts to interfere with arbitral award under Section 34 of the Arbitration Act.

39. Mr. Premlal Krishnan, learned Counsel for the petitioner in rejoinder invited my attention to the averments made by his client in the reply filed to application under Section 31(6) of the Arbitration Act and more particularly on paragraphs 6 to 8 and would submit that the petitioner had highlighted the business relationship and the transactions between the parties. It was specifically submitted that the claims of the parties are adjusted against each other and balance be drawn and award be passed directing the party against whom an outstanding reflected. The claims made by both parties against each other are interrelated and not severable. It is submitted that the respondent did not lead evidence before the Arbitral Tribunal on any issue even in rebuttal whereas his client had led evidence to show the connection between the two transactions and to explain the alleged admission of liability. The settlement account were produced by the petitioner.

40. Learned Counsel for the petitioner placed reliance on the averments made in the plaint in Commercial Arbitration Petition No. 92 of 2017 filed by his client against respondent in this Court for recovery of Rs.74,95,988/-. He submits that the respondent had also relied upon the same settlement sheet, which was relied upon by the petitioner on the basis of which a separate civil suit has been filed by the respondent against the petitioner. He submits that the respondent admittedly did not file any rejoinder to the statement of defence filed by the petitioner disputing the said settlement sheet or alleging that even after adjusting the amount payable by the petitioner to the respondent, the petitioner was entitled to recover substantial amount from the respondent. The petitioner had only disputed part of the entries in the settlement sheet dated 26th February 2015.

41. It is submitted that since the respondent also had placed reliance upon the settlement sheet, the Arbitral Tribunal on that ground itself could not have rendered a interim award based on alleged acknowledgment of liability.

42. Learned Counsel for the petitioner invited my attention to email dated 25th March 2015 from the respondent to the petitioner recording that out of Rs.42,10,473/- an amount of Rs.35,95,875/- was on hold. The respondent demanded only the differential amount of Rs.6,14,598/- as soon as possible. It is submitted that the respondent had thus admitted the settlement sheet entered into between the parties and had also admitted that an amount of Rs.35,95,875/- was kept on hold against the amount under pending

invoices. It is submitted by the learned Counsel that the petitioner had denied the liability towards the respondent under those invoices. The first Arbitral Tribunal was required to consider the entire written statement and the correspondence and not an isolated paragraph in the written statement.

43. In so far as the award which is subject matter of the Arbitration Petition No. 315 of 2019 is concerned, it is submitted by the learned Counsel that the learned Counsel for the respondent had cross-examined the petitioner's witness on various issues. He strongly placed reliance on the answer of the said witness in cross-examination and more particularly to question nos. 7, 18, 23, 24, 47, 48, 81 and 91.

44. Learned Counsel for the petitioner placed reliance on the following judgments:-

- i) Judgment of this Court in case of ***Pankaj Unit No.1 Housing Development Company Pvt. Ltd. and Ors. v/s. Oshiwara Land Development Company, 2014(3) Mh.L.J.*** and in particular paragraph 14.
- ii) Judgment of this Court in case of ***Western Coalfields Ltd. v/s. Swati Industries, AIR 2003 Bom 369*** and in particular paragraphs 2, 3 and 5.
- iii) Judgment of High Court of Delhi in case of ***Raj Kumar Chawla v/s. Lucas Indian Services, 2006(89) DRJ 560(DB)*** and in particular paragraphs 5 and 8.

iv) Judgment of Supreme Court in case of *Jeevan Diesels and Electrical Limited v/s. Jasbir S. Chadha (HUF) & Anr., (2010) 6 SCC 601* and in particular paragraphs 13 and 14.

in support of his various submission. Learned Counsel for the petitioner distinguished the judgments relied upon by the respondent on the ground that since there was no acknowledgment of liability, the Arbitral Tribunal could not have made an interim award or could not have awarded any interest on the amount directed to be paid under the interim award. It is submitted that since no principle amount was payable by the petitioner, no award for payment of interest could be made by the learned Arbitrator in second arbitral award. The stand of the petitioner was all throughout consistent.

45. Mr. Aseem Naphade, learned Counsel for the respondent in surrejoinder submits that there is no dispute that both the parties had relied upon the settlement sheet in their respective pleadings.

REASONS AND CONCLUSION :-

46. I shall first decide the issue whether the arbitral tribunal could have rendered an interim award under section 31(6) of the Arbitration Act against the petitioner in the facts and circumstances of this case or not.

47. A perusal of the interim award dated 10th April, 2017 passed by the arbitral tribunal indicates that the interim award is made by

the arbitral tribunal based on the alleged admission of liability on the part of the petitioner only in paragraph 4(c) of the statement of defence. This court thus shall refer to some of the averments in the state of defence filed by the petitioner and the correspondence exchanged between the parties to ascertain whether there was any admission of liability on the part of the petitioner in the statement of defence or not which could be considered by the arbitral tribunal for the making an interim monetary award under section 31(6) of the Arbitration Act without recording the evidence on all the issues raised by the petitioner in the statement of defence before the arbitral tribunal or not.

48. It is not in dispute that the said interim award rendered by the arbitral tribunal was final insofar as the principle amount awarded by the first arbitral tribunal in favour of the respondent and against the petitioner is concerned. A perusal of the statement of claim filed in the month of February 2016 by the respondent before the arbitral tribunal indicates that it was the case of the respondent that as per the account maintained by them in the normal course of business, a sum of Rs.47,56,389/- was outstanding and due towards the paper cups sold, supplied and delivered to the petitioner under 120 tax invoices raised by the respondent upon the petitioner.

49. In paragraph (10) of the statement of claim, it was averred by the respondent that the petitioner by its advocate's letter dated 21st December, 2015 replied to the notice dated 21st December, 2015 in response to the notice addressed by the respondent's advocate admitting an amount of Rs.48,01,544/- alleged to be due and

payable to the respondent towards the goods sold and delivered. The respondent accordingly prayed for an amount of Rs.57,75,046/- with interest on sum of Rs.47,56,389/- from the petitioner at the rate of 24% per annum or at such other rate as the arbitral tribunal may deem fit.

50. A perusal of the statement of defence filed by the petitioner on 8th July, 2016 before the arbitral tribunal indicates that it was the case of the petitioner that the respondent had suppressed relevant facts and concealed true nature of transaction and relationship between the parties. The petitioner highlighted the relationship between the parties que the company known as Ecopack India Paper Cups Pvt. Ltd. and Ecopack SPA. The petitioner also disclosed that the proprietor of the petitioner alongwith one of his family member was in management and control of the respondent company prior to 2010. These persons thereafter came out of the management of the respondent as the same was taken over by the Ecopack SPA.

51. In paragraph 3(j) of the statement of defence, it was averred by the petitioner that there was an understanding and proposal made by the Ecopack SPA that the respondent was to be created, controlled and managed by the representative of the petitioner and the investments were to be made by Ecopack SPA in return for which the representatives of the petitioner were to receive respective remuneration, further supplemented with profit sharing percentage.

52. In paragraph 3(k) of the said statement of defence, it was the case of the petitioner that after creating the majority shares in the

respondent, Ecopack SPA completely took over the respondent from the petitioner. It was the case of the petitioner that in the annual general meeting, attempts were made to create an amount of Rs. 19,33,981/- unto the respondent, although the same was reflected in the books of the respondent as the monies to be recovered from various distributors of the respondent.

53. In paragraph 3(o), it was averred by the petitioner that during the year 2014-15 there was an outstanding amount of Rs.47,56,388/- towards supply by the respondent in their accounts. At that time, there was also amount receivable to the petitioner towards their salary, turnover discount, reimbursement of expenses etc. A meeting was held between Ms. Annalisa Ferri (Director of the respondent) and Mr. Rakesh Jalan (Director of the respondent who is proprietor of the petitioner) on 26th February, 2015 to settle the accounts between the parties and to take the business forward with peace of mind. The petitioner placed reliance on the statement allegedly forwarded by the said Ms. Annalisa Ferri to propose to settle the accounts in accordance with the said statement.

54. It is averred by the petitioner in the said paragraph that the contents of the said statement were disputed by the petitioner. In the statement of defence, the petitioner had also annexed a copy of the said account settlement sheet dated 26th February, 2015. The petitioner also objected to various entries in the said statement of account. It was averred by the petitioner in paragraph (5) of the said statement of defence that item nos. 1 to 10 were required to be added back to the profit of the respondent to correctly compute the

share in profit to the representatives of the petitioner. In paragraph (q) of the statement of defence, it was the case of the petitioner that if what is stated in the statement of defence in paragraph (p) are added, the correct calculation of profit share can be arrived at.

55. In the statement of defence, the petitioner also placed reliance on several e-mails exchanged between the parties in terms of settlement/understanding. In paragraph (r) of the statement of defence, the petitioner averred that the correct depiction of amount payable by the petitioner against the receivable pending were set out in the said paragraph. According to the said chart set out in paragraph (r) of the statement of defence, after giving credit of Rs.47,57,389/- according to the petitioner, a sum of Rs.17,51,376.20 was payable by the respondent to the petitioner. It was further averred that the petitioner was also entitled to make a separate claim by way of counter claim before the arbitral tribunal.

56. In paragraph 4(c) of the statement of defence, it was specifically averred by the petitioner that under the settlement sheet dated 26th February, 2015, the outstanding dues from each other were to be adjusted and only the balance was payable.

57. In paragraph 4(g) of the statement of defence, the petitioner denied the contents of the letter dated 16th November, 2015 addressed by the respondent through its advocates and relied upon a letter dated 21st December, 2015 in the same paragraph. It was further averred by the petitioner that the petitioner had never denied the delivery and sale of the products from the respondent or their

liability of payment for the same. However, it is further averred in the same paragraph that the said payment was to be effected by way of adjusting dues of the respondent towards the petitioner. It is further averred that the summary of the amount payable by the respondent to the petitioner was provided to the respondent through letter dated 21st December, 2015.

58. In paragraph 4(i) of the statement of defence, the petitioner had specifically denied that it was liable to pay any amount with interest as alleged or that the respondent herein was entitled to recover any amount with interest as per particulars of claim. The petitioner denied the said particulars of claim made by the respondent as erroneous, fraudulent and misrepresented. The petitioner reiterated that it was not liable to pay or receive any amount that was beyond the balance after adjusting the accounts of respondent and the petitioner. In paragraph 4(j), the petitioner averred that the respondent was not entitled for the benefits for the reasons recorded in the earlier statement in the said statement of defence.

59. It is not in dispute that the petitioner had filed a separate counter claim before the arbitral tribunal on 8th July, 2016 in the said proceedings before the arbitral tribunal against the respondent herein *inter alia* praying for an amount of Rs.9,48,71,604/- with interest at the rate of 18% per annum on Rs.3,21,64,837/- from 22nd December, 2015 till payment and/or realization. In the said counter claim filed by the petitioner, the petitioner had summarized the

transaction arrived at between the parties and had referred to the same settlement sheet dated 26th February, 2015. The respondent herein had filed reply to the said counter claim and had opposed the said claim. The respondent did not dispute that the proprietor of the petitioner alongwith one of his family member was in the management of the respondent prior to 2010. It was the case of the respondent in the said written statement to the counter claim that the proprietor of the petitioner was misappropriating the funds and monies of the respondent by showing Ms.Smita Jalan, wife of Mr.Rakesh Jalan as employee of the respondent company and were paying her salary on a regular basis.

60. The respondent admitted the meeting held between the director of the respondent and the proprietor of the petitioner alongwith another director on 26th February, 2015 and that the accounts were drawn up in the said meeting on the basis of the information allegedly provided by the proprietor of the petitioner and his family members. The respondent however alleged that it was agreed between the parties that Mr.Rakesh Jalan was liable to pay to the respondent a sum of Rs.19,33,981/-.

61. The respondent however raised an issue of maintainability of the said counter claim filed by the petitioner before the arbitral tribunal. The arbitral tribunal rejected the said counter claim on the ground that the same was without jurisdiction. The appeal filed by the petitioner under section 37 of the Arbitration Act against the said order dated 5th January, 2017 came to be withdrawn by the

petitioner with liberty to file appropriate proceedings in law on 24th November, 2017.

62. It is not in dispute that the petitioner has thereafter filed a separate suit against the respondent. The respondent also has filed a separate suit on 15th December, 2017 against the petitioner bearing Commercial Suit No. 484 of 2018. It is not in dispute that in the said commercial suit filed by the respondent against the petitioner, the respondent has also relied upon the same settlement sheet dated 26th February, 2015. The suit filed by the petitioner as well as filed by the respondent are pending. In the said suit filed by the respondent, the respondent had filed a notice of motion bearing Notice of Motion (L) No. 58 of 2018. This court passed an order on 19th March, 2019 in the said suit and referred to the said settlement sheet dated 26th February, 2015 relied upon by the respondent. This court dismissed the notice of motion filed by the respondent and issued various directions to the parties to complete the procedure for commencement of the trial.

63. It is not in dispute that on 7th July, 2017, the petitioner had filed an application before the arbitral tribunal showing its inclination to lead evidence in the said arbitral proceedings in respect of the various issues and on the new development by the respondent filing a suit bearing no.92 of 2017. The respondent had relied upon certain documents which were concerned with the subject matter of the dispute. It is clear that though such application was made by the petitioner for seeking permission to lead evidence, the respondent opposed such application filed by the petitioner to lead such oral evidence.

64. A perusal of the record further indicates that the sole proprietor of the petitioner thereafter had filed affidavit in lieu of examination in chief dated 20th July, 2017 before the arbitral tribunal. The learned arbitrator in the second arbitration proceedings recorded that the affidavit of evidence was already tendered by the petitioner before the erstwhile arbitral tribunal. The learned arbitrator in the second arbitral proceedings permitted the petitioner to lead oral evidence.

65. On 18th June, 2018, the petitioner filed additional affidavit of examination in chief before the arbitral tribunal. The sole proprietor of the petitioner was cross examined by the respondent's counsel before the learned arbitrator in the second arbitral proceedings. The learned arbitrator in the second arbitral proceedings however awarded only the claim for interest made by the respondent on the ground that insofar as the principle amount is concerned, the same was already the subject matter of the award in the first arbitral proceedings in respect of which the arbitration petition filed by the petitioner herein was already pending and thus the said issue could not be re-opened in the second arbitral proceedings.

66. It is not in dispute that the petitioner had filed affidavit in lieu of examination-in-chief before the arbitral tribunal in the first arbitral proceedings dated 20th July, 2019. The respondent had opposed the application filed by the petitioner for leading oral evidence. It is not in dispute that the said affidavit in lieu of examination-in-chief along with additional affidavit dated 18th June 2018 which was filed by the witness examined by the petitioner was

taken on record before the learned arbitrator in the second arbitral proceedings. The said witness was also cross-examined by the respondent's counsel at length.

67. A perusal of the said affidavit in lieu of examination-in-chief clearly indicates that the witness had deposed about the business relationship between the petitioner and the respondent and also Ecopack SPA. The said witness also strongly placed reliance on the Settlement Sheet dated 26th February 2015. The said witness also explained the alleged admission on the part of the petitioner to pay outstanding amount of Rs.45,56,388/- and deposed that the petitioner was entitled to recover various amounts from the respondent after adjusting the said amount payable to the respondent. The said witness also deposed that various amounts were wrongly debited to the account of the respondent.

68. In the additional affidavit in lieu of examination-in-chief dated 18th June 2018 filed by the said witness before the learned arbitrator in the second arbitral proceedings, the said witness placed reliance on the averments made in the Commercial Suit No.484 of 2018 filed before the arbitral tribunal after withdrawing the Arbitration Petition No.159 of 2017 filed by the petitioner before this Court under Section 37 of the Arbitration Act impugning the order passed by the arbitral tribunal accepting the plea of jurisdiction raised by the respondent under Section 16 of the Arbitration Act in so as the counter claim filed by the petitioner before the arbitral tribunal in the first arbitral proceedings is concerned.

69. A perusal of the cross-examination of Mr.Rakesh Jalan, Proprietor of the petitioner herein clearly indicates that the said witness in his cross-examination deposed that after the respondent company was incorporated as per the agreement, the respondent herein will manufacture the goods and sales would be done by the petitioner. In reply to question no.21, when the witness was asked whether he could explain why the amounts under the said invoices were not paid by the petitioner to the respondent, the witness deposed that this was paid against the agreement signed between the petitioner and the respondent on 26th February 2015. In reply to question no.23, when the witness was asked whether there was any formal agreement in writing between the petitioner and the respondent which had novated and/or modified the terms set out in the invoices of the respondent herein at Sr. No.6 of the compilation of documents, the said witness answered in affirmative and deposed that the agreement at Exhibit RWW 1/6 i.e. Settlement Sheet had modified the terms of the invoices.

70. In reply to question no.24, when the witness was asked whether he had referred to the fact in the statement of defence that no sums of money were payable by the petitioner to the respondent by virtue of the said settlement sheet, the witness answered in affirmative and pointed out that such averments is at paragraph 4(c) of the Statement of Defence. In reply to question no.47, when the witness was asked as to what exactly did the petitioner mean by “So we once again request you to please issue credit notes for the above amount so that we can clear the balance payment,” the witness

deposed that it was in response to the letter dated 26th May 2015 from the respondent asking for a payment of Rs.47,56,388/-. The witness deposed that he had explained in that regard that the total receivable amount on that day i.e. 3rd June 2015 comes to Rs.45,42,343/- so he was ready to pay the difference amount after adjusting the same.

71. In reply to question no.48, when the witness was asked whether it would be correct to say that he was not denying his liability to the tune of Rs.47,57,389/- towards the respondent-company but only contending that he was entitled to a set off against the sums payable to the petitioner towards the particulars set out in the table, the witness deposed that he repeats what he had said in paragraph 28 of the affidavit of evidence. A perusal of paragraph 28 of the affidavit of evidence clearly indicates that according to the said paragraph, it was the case of the petitioner that the respondent was liable to pay various amounts to the petitioner. In reply to question no.81, when the witness was asked whether he could explain why the figure of Rs.47,56,388.80 which is the principal outstanding claimed by the respondent in the arbitral proceedings, the witness deposed that it reflects part of the amount i.e. Rs.35,95,875/- which was outstanding as on 26th February 2015. The balance amount pertains to the bills raised by the respondent upon the petitioner after 26th February 2015 approximately till May 2015.

72. The respondent did not, however, enter the witness box though the case of the respondent was put to the witness examined by the petitioner. Learned arbitrator in the second arbitral

proceedings did not refer to the oral evidence led by the petitioner at all on the ground that the dispute in respect of interim award was pending before this Court in the arbitral petition filed by the petitioner. It is not in dispute that both the parties had relied upon the Settlement Sheet dated 26th February 2015 in their separate suits filed in this Court against each other. The witness examined by the petitioner specifically referred to the said Settlement Sheet not only in the written statement filed by the petitioner before the arbitral tribunal in the first arbitral proceedings but also in the correspondence exchanged between the parties.

73. The petitioner also placed on record the said Settlement Sheet in the oral evidence led by him on which there was elaborate cross-examination by the respondent's counsel. In my view, even if there is admission or acknowledgment of liability in any part of the pleadings or documents under Order XII Rule 6 of Code of Civil Procedure, 1908, such admission can be explained at the stage of leading oral evidence. However, in the facts of this case, the arbitral tribunal chose to make an interim award solely based on an isolated settlement made in paragraph 4(c) of the Statement of Defence filed by the petitioner and totally overlooked the other averments made in the said Statement of Defence and also the correspondence exchanged between the parties clearly stating that after adjusting the said amount payable to the respondent under those invoices, the petitioner had yet to recover various amounts from the respondent.

74. The petitioner had specifically denied the claim made by the respondent in various paragraphs of the Statement of Defence. In

my view, in the facts and circumstances of this case, even at that stage, the petitioner had produced sufficient documents on record and had raised various disputes about the alleged liability of the petitioner towards the respondent under those invoices by filing detailed Statement of Defence. By ignoring such vital evidence and the pleading of the petitioner, the arbitral tribunal in the first arbitral proceedings could not have made an interim award based on the alleged admission of liability of the petitioner. The arbitral tribunal ought to have considered the entire pleadings filed by the petitioner and the documents and only after giving an opportunity to lead oral evidence to both the parties, could have decided the entitlement of both the parties in the facts of this case. The award shows patent illegality on the face of the award and thus deserves to be quashed and set aside.

75. In so far as the arbitral award which is the subject matter of the Arbitration Petition No.315 of 2019 filed by the petitioner is concerned, the learned arbitrator in the said arbitral award has only awarded interest to the respondent on the principal amount @ 15% p.a. from 17th February 2016 till the date of award and cost of Rs.7,21,470/- and ignored the oral and documentary evidence led by the petitioner in toto. In my view, since the arbitral award dated 10th April, 2019 made by the arbitral tribunal directing the petitioner to pay the principal amount based on the alleged admission of liability itself shows patent illegality, the arbitral award dated 29th October 2018 awarding interest thereon by the learned arbitrator in the second arbitral proceedings is also vitiated on that ground and deserves to be set aside.

76. This Court by an order dated 21st December, 2019 passed in Notice of Motion No.2059 of 2017 in Arbitration Petition No.393 of 2017 had granted unconditional stay of the arbitral award dated 10th April, 2019 by recording prima facie finding that the arbitral tribunal had rendered an arbitral award under Section 31(6) of the Arbitration Act based on a solitary paragraph in the written statement. The petitioner is entitled to explain the alleged admission made in the Statement of Defence. This Court took a prima facie view that the arbitral tribunal ought to have rendered the final award after giving an opportunity to both the parties to lead evidence. Division Bench of this Court by an order dated 14th March 2018 in Appeal No.101 of 2018 filed by the respondent herein against the said order dated 21st December, 2019 while dismissing the said appeal observed that there was no reference to various contentions raised by the petitioner in the pleadings. Division Bench of this Court thus did not interfere with the order passed by the learned Single Judge granting unconditional stay of the impugned award. The Hon'ble Supreme Court by an order dated 23rd July, 2018 while disposing of the special leave petition clarified that while not interfering with the impugned order passed by the Division Bench of this Court, the Hon'ble Supreme Court directed the learned Single Judge to dispose the Arbitration Petition No.393 of 2017 within a span of four months. The Hon'ble Supreme Court clarified that it had not expressed anything on the merits of the case. The learned Single Judge while adjudicating shall express his views on the basis of the contentions advanced before him. I am thus deciding the matter

based on the contentions advanced by the learned counsel and the evidence produced.

77. This Court in the order dated 19th March, 2019 in the Notice of Motion No.58 of 2017 in Commercial Suit No.92 of 2017 filed by the respondent against the petitioner for recovery of various amounts referred to Settlement Sheet dated 26th February 2015 relied upon by both the parties and rejected the said notice of motion. Mr.Naphade, learned counsel for the respondent does not dispute before this Court that his client has also relied upon the Settlement Sheet in the suit filed by his client before this Court and asked various questions in the cross-examination in respect of the said Settlement Sheet to the witness examined by the petitioner.

78. Both the parties have relied upon number of judgments in support of their rival contentions whether the arbitral tribunal could have passed an interim award under Section 31(6) of the Arbitration Act based on the alleged admission of the petitioner in the Statement of Defence filed by the petitioner before the arbitral tribunal or not.

79. This Court in the case of ***Pankaj Unit No.1 Housing Development Company Pvt. Ltd. & Anr. (supra)*** has construed Order XII Rule 6 of the Code of Civil Procedure, 1908 and has held that a decree on admission is not a matter of right, but rather a matter of discretion of a Court which discretion must be exercised in accordance with known judicial canons. This Court adverted to the judgment of the Delhi High Court in the case of ***Vijay Gupta Vs.Ashok Kumar Gupta, AIR 2007 Delhi 166*** in which it was held

that where the defendant has raised objection which will go to the very root of the case, it would not be appropriate to exercise the discretion under Order XII Rule 6 of the Code of Civil Procedure, 1908.

80. It is further held by the Delhi High Court that the cases which involve questions to be decided upon regular trial and the alleged admissions are not clear and specific, it may not be appropriate to take recourse to these provisions. In the facts of this case also, in my view, there was no clear admission of liability by the petitioner in favour of the respondent in the entire Statement of Defence read with correspondence exchanged between the parties. The petitioner had claimed amount from the respondent after adjusting the amount payable to the respondent by the petitioner based on the Settlement Sheet partly relied upon by the petitioner. In view of these disputed facts in the Statement of Defence raised by the petitioner, the powers of the Court under Order XII Rule 6 of the Code of Civil Procedure, 1908 being discretionary could not have been exercised by the arbitral tribunal in the casual manner and that also without giving an opportunity to both the parties to lead oral evidence and to the petitioner to explain the alleged admission in any part of the pleadings or documents exchanged between the parties. The principle laid down by this Court in the case of ***Pankaj Unit No.1 Housing Development Company Pvt. Ltd. & Anr. (supra)*** applies to the facts of this case. I am respectfully bound by the said judgment.

81. In so far as the judgment of this Court in the case of ***Westerm Goldfields Limited (supra)*** relied upon by the learned counsel for

the petitioner is concerned, it is held by this Court that in the matter of judgment on admission, general rule is that the pleadings are to be read as a whole; admissions in pleadings cannot be dissected. The Court is vested with jurisdiction to pass a decree on admission on the strength of the principle laid down under Section 58 of the Evidence Act that admitted facts need not be proved and as such admissions can be considered as substantive evidence on which a decree can be passed. It is held by this Court in the said judgment that as the admission made by the defendant was qualified, it is to be read as a whole while considering whether a decree can be passed against the defendant on such admission. In the facts of that case also, this Court is of the view that as the alleged admission of the petitioner was qualified, and it was specifically pleaded that the said amount has been appropriated against another claim under contract between the parties, the arbitral tribunal could not have proceeded to pass the interim award by exercising the discretionary powers. This Court had adverted to the judgment of the Supreme Court in the case of ***Dudhnath Pandey Vs. Sureshchandra Bhattasalli, AIR 1986 SC 1509*** in the said judgment. In my view, the facts before this Court in the case of ***Westerm Coldfields Limited (supra)*** are identical to the facts of this case. The principle laid down by the Supreme Court applies to the facts of this case. I am respectfully bound by the said judgment.

82. Delhi High in the case of ***Raj Kumar Chawla (supra)*** has adverted to the judgment of the Hon'ble Supreme Court in the case of ***Balraj Taneja & Anr. Vs. Sunil Madan & Anr., AIR 1999 SC***

3381 and in the case of *Dudhnath Pandey (supra)* and has held that in spite of admission of a fact having been made by a party to the suit, the Court may still require the plaintiff to prove the fact which has been admitted by the defendant. Delhi High Court considered the correspondence exchanged between the parties, issue of settlement and has set aside the judgment and decree of the trial Court and remanded the case back to the Delhi High Court for a fresh decision. Principles laid down by the Supreme Court referred in the said judgment of Delhi High Court is applicable to the facts of this case. I am in agreement with the views expressed by the Delhi High Court in the case of *Raj Kumar Chawla (supra)*.

83. The Hon'ble Supreme Court in the case of *Jeevan Diesels and Electrical Limited (supra)* has adverted to various judgments holding that party is not entitled to apply for orders based on the alleged admission unless there is a clear admission that the money is due and recoverable in the action in which the admission is made. It is held by the Hon'ble Supreme Court that the admission must be clear and unambiguous before a Court can act under order XII, Rule 6 of the Code of Civil Procedure, 1908. The principles laid down by the Supreme Court in the case of *Jeevan Diesels and Electrical Limited (supra)* would apply to the facts of this case. I am respectfully bound by the said judgment.

84. In so far as the judgment of this Court in the case of *Deccan Chronicle Holdings Limited (supra)* relied upon by Mr.Naphade, learned counsel for the respondent is concerned, there is no dispute

about the proposition of law laid down by this Court in the said judgment. This Court in the said judgment has held that if the learned arbitrator comes to the conclusion that the respondent in the arbitration proceedings has admitted and acknowledged their liability to the petitioners which admission and acknowledgment of the liability is clear and unambiguous, the principles of Order XII Rule 6 of the Code of Civil Procedure, 1908 can be applied by the learned arbitrator for making an interim award under section 31(6) of the Arbitration Act. In that case, the petitioners had not disputed the contents of the documents of the petitioners themselves and having not explained the admission and acknowledgement of their liability inspite of an opportunity having been given by the learned arbitrator. With these facts at hand, learned arbitrator made an interim award against the petitioners in the sum of Rs.100 crores.

85. This Court in the said judgment referred to the judgment of the Hon'ble Supreme Court in the case of ***Himani Alloys Limited vs. Tata Steel Limited, (2011) 15 SCC 273***, in which it was held by the Supreme Court that a judgment can be on an "admission" contained in the minutes of the meeting but the admission should be categorical. It should be a conscious and deliberate act of the party making it, showing an intention to be bound by it. It is held that Order XII Rule 6 being an enabling provision, it is neither mandatory nor peremptory but discretionary. The Hon'ble Supreme Court in the said judgment had considered a situation where both the parties had referred to different figures in the entries made in their record which were tentative and were subject to the verification.

86. In this case also, both the parties have referred to settlement sheet. The witness examined by the petitioners in his cross-examination had deposed that invoices were novated by the Settlement Sheet dated 26th February 2015. The judgment of this Court in the case of ***Deccan Chronicle Holdings Limited (supra)*** is clearly distinguishable in the facts of this case.

87. In so far as the judgment of Madras High Court in the case of ***Gammon India Ltd. (supra)*** relied upon by Mr.Naphade, learned counsel for the respondent is concerned, Madras High Court in the facts of that case rendered a finding that what was stated by the petitioner was actually more than a mere admission. The petitioner had not only admitted their liability to the respondent to the extent of the particular amount, but also gone to the extent of adjusting the same towards the amount claimed by them against the respondent. Madras High Court pointed out that a Court cannot act blindly upon the admission of a fact. An admission, entitling a plaintiff to a decree/award, should be positive, unequivocal and clear. The facts before the Madras High Court are totally different and are clearly distinguishable in the facts of this case.

88. In so far as the judgment of the Supreme Court in the case of ***Uttam Singh Duggal & Co. Ltd. (supra)*** relied upon by Mr.Naphade, learned counsel for the respondent is concerned, the Hon'ble Supreme Court has held that where other party had made a plain admission entitling the former to succeed, it should apply and also wherever there is a clear admission of facts in the face of which,

it is impossible for the party making such admission to succeed. The provisions of Order XII Rule 6 of Code of Civil Procedure, 1908 would apply in that situation. There is no dispute about propositions of law laid down by the Supreme Court in the said judgment. However, in the facts of this case, on perusal of statement of defence filed by the petitioner and the correspondence exchanged between the parties and in view of both the parties having relied upon the Settlement Sheet, the said judgment of the Hon'ble Supreme Court in the case of *Uttam Singh Duggal & Co. Ltd. (supra)* would not assist the case of the respondent and is clearly distinguishable in the facts of this case.

89. In so far as the judgment of Supreme Court in the case of *Nagindas Ramdas (supra)* relied upon by Mr.Naphade, learned counsel for the respondent is concerned, it is held by the Hon'ble Supreme Court that admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. It is held that on the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong. Supreme Court in the said judgment held that since in that case, there was a clear admission in the compromise, incorporated in the decree, of the fundamental facts that could constitute a ground for eviction under Section 12(3)(a) of the Bombay Rent Act, 1947, the Executing Court was not competent to go behind the decree and question its validity. The Hon'ble Supreme

Court was considering the powers and duties of the Executing Court and the issue whether the Executing Court could go behind the decree or not. The facts before the Hon'ble Supreme Court were totally different and are clearly distinguishable in the facts of this case.

90. In so far as the judgment of the Supreme Court in the case of ***Zonal General Manager, Ircon International Limited (supra)*** relied upon by Mr.Naphade, learned counsel for the respondent is concerned, in the facts of that case, it is held that concession, however, the admission itself, taken alone, was not conditional. The appellant had admitted an unconditional contractual liability on its part to pay the contractual claim of the respondent. The facts before this Court however, are totally different. The judgment of the Supreme Court in the case of ***Zonal General Manager, Ircon International Limited (supra)*** is clearly distinguishable in the facts of this case and would not assist the case of the respondent.

91. In so far as the judgment of the Supreme Court in the case of ***Keshavlal Lallubhai Patel & Ors. (supra)*** relied upon by Mr.Naphade, learned counsel for the respondent is concerned, it is held by the Honb'le Supreme Court that vague and uncertain terms of contract are void under Section 29 of the Indian Contract Act. The said judgment would not even remotely apply to the facts of this case.

92. In so far as the judgment of the Supreme Court in the case of ***Babu Ram alias Durga Prasad (supra)*** relied upon by Mr.Naphade,

learned counsel for the respondent is concerned, it is held by the Hon'ble Supreme Court that unless there is a detailed plea and also evidence that before execution of the sale-deed, there was novation and parties expressly agreed to give a go-bye to the agreement or reconveyance, no inference could be drawn that the agreement of reconveyance contained in the agreement of sale which preceded the sale-deed was given a go-bye. In the facts of this case, both the parties have admittedly relied upon the sale-deed in the proceedings and also on the oral evidence led by the petitioner. On the contrary, a specific question was asked in the cross-examination to the witness examined by the petitioner whether the invoices relied upon by the respondent were novated by any document. The witness examined by the petitioner pointed out the Settlement Sheet to prove that the invoices were novated by the said Settlement Sheet.

93. In so far as the judgment of the this Court in the case of ***Central Bank of India (supra)*** relied upon by Mr.Naphade, learned counsel for the respondent is concerned, this Court held that there was neither any pleading nor proof to the effect that the earlier agreement must have been cancelled by a novatio. In the facts of this case, both the parties have relied upon the Settlement Sheet. The witness examined by the petitioner in his evidence including cross-examination has proved that the invoices were novated by the Settlement Sheet. The judgment of the this Court in the case of ***Central Bank of India (supra)*** is clearly distinguishable in the facts of this case and would not assist the case of the respondent.

94. In so far as the judgment of the Hon'ble Supreme Court in the case of ***Chrisomar Corporation (supra)*** relied upon by Mr.Naphade, learned counsel for the respondent is concerned, the Hon'ble Supreme Court in the facts of that case had held that there was no new contract which came into being. The original terms continued to be part of the modified contract except to the extent that they were inconsistent with the modifications made. The judgment of this Court in the case of ***Chrisomar Corporation (supra)*** is clearly distinguishable in the facts of this case and would assist the case of the respondent.

95. In so far as the judgment of Supreme Court in the case of ***Gujrat Water Supply & Sewerage Board (supra)*** relied upon by Mr.Naphade, learned counsel for the respondent is concerned, it is held by the Hon'ble Supreme Court while dealing with an arbitral award under Section 30 read with Section 33 of the Arbitration Act, 1940 that an award of an arbitrator should be read reasonably as a whole to find out the implication and the meaning thereof. The reasons should not only be intelligible but should also deal either expressly or impliedly with the substantial points that have been raised. The Court however, does not sit in appeal over the award and review the reasons. In my view, this judgment of the Supreme Court would not apply to the fact of this case. In this case, the award is rendered under the provisions of the Arbitration and Conciliation Act, 1996 and has been impugned under Section 34 of the Arbitration Act on the ground that the arbitral tribunal could not have passed any interim award under Section 31(8) of the

Arbitration Act merely on the basis of the solitary averment made in the statement of defence and without considering the entire pleadings.

96. In so far as the judgment of Delhi High Court in the case of *Ircon International Limited (supra)* relied upon by Mr.Naphade, learned counsel for the respondent is concerned, it is held by the Delhi High Court that under Section 31(3) of the Arbitration and Conciliation Act, 1996, the arbitrator is not expected to write judgment like a Court of law but has only to state as to how, he has come to the finding arrived at by him. No particular form is required for giving reasons. The arbitrator is not expected to record at great length the communications exchanged or submissions made by the parties nor he is expected to analyse the law and the authorities. In my view, this judgment of the Delhi High Court would even remotely apply to the facts of this case. A question arises for consideration of this Court in this matter is whether the arbitral tribunal could have rendered an interim award based on the alleged admission of liability relying upon a solitary paragraph of Statement of Defence when the petitioner had specifically disputed the claim made by the respondent in several paragraphs of the Statement of Defence and in the correspondence. Since the interim award under Section 31(6) rendered by the learned arbitrator in this case has effect of final award, the learned arbitrator was bound to record reasons after considering the entire pleadings and documents on record till such stage. In this case, the learned arbitrator ought to have given an opportunity to lead oral evidence before rendering any interim award of this nature.

97. In so far as the judgment of Supreme Court in the case of ***Sutlej Construction Limited (supra)*** relied upon by Mr.Naphade, learned counsel for the respondent is concerned, it is held by the Supreme Court that since a view taken by the learned arbitrator is a plausible view, the Court shall not substitute such view of the learned arbitrator. In the facts of this case, in my view, in no circumstances the arbitral tribunal could have rendered an interim award under Section 31(6) of the Arbitration Act ignoring the pleadings and documents on record before the arbitral tribunal and more particularly the statement of defence disputing the liability by the petitioner to the respondent. The award shows patent illegality and deserves to be quashed and set aside. The view of the learned arbitrator is impossible view and thus can be interfered with by this Court.

98. In so far as the judgment of Supreme Court in the case of ***Associate Builders (supra)*** relied upon by Mr.Naphade, learned counsel for the respondent is concerned, it has been held by the Hon'ble Supreme Court that for setting aside the arbitral award, illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Unless the award shows unfair and unreasonable, that it shocks the conscience of the Court, the award cannot be set aside. In the facts of this case, the arbitral award did not consider the entire statement of defence and the correspondence exchanged between the parties and without giving an opportunity to the petitioner to

explain the alleged admission and to lead oral evidence, the arbitral tribunal in the first arbitral proceedings has rendered an interim award only based on a solitary averment made in paragraph 4(c) of the statement of defence ignoring the other documentary evidence and the pleadings on record.

99. In my view, the interim award under Section 31(6) of the Arbitration Act can be made by the arbitral tribunal only if the alleged admission or acknowledgement of the liability on the part of the respondent before the arbitral tribunal is clear, unambiguous and definite and does not require any evidence to prove such admission at the stage of trial. If there are serious disputed questions raised by the respondent in the arbitral proceedings about the claim made by the claimant which requires detailed evidence at the stage of trial, the arbitral tribunal can not exercise its discretion under Order XII Rule 6 of the Code of Civil Procedure, 1908 and to make any interim award.

100. In the facts of this case, the petitioner was ultimately granted liberty to lead oral evidence in the second arbitral proceedings. In the oral and documentary evidence led by the petitioner in the second arbitral proceedings, the petitioner had proved beyond reasonable doubt that invoices were novated by the Settlement Sheet. In my view, both the arbitral awards show patent illegality and thus deserve to be quashed and set aside.

101. I therefore pass the following order :-

- i. The arbitral awards dated 10th April, 2017 and 29th October, 2018 are set aside.
- ii. Arbitration Petition Nos.393 of 2017 and 315 of 2019 are allowed.
- iii. There shall be no order as to costs.

(R.D. DHANUKA, J.)