(2010) 04 DEL CK 0267

Delhi High Court

Case No: O.M.P. 379 of 2001

Hindustan Paper Corporation Ltd.		APPELLANT
	Vs	
Delhi Paper Products and Others		RESPONDENT

Date of Decision: April 13, 2010

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11, 11(6), 17, 2(9), 28
- Contract Act, 1872 - Section 73

Hon'ble Judges: Manmohan, J

Bench: Single Bench

Advocate: R.K. Singh, Nikhilesh Krishnan, Mayank Wadhwa, Prabhat Chaurasia Yashish Chandra, Rajesh Kumar, Jaipratap, Vimal Dubey, for Ratan K. Singh and Co, for the Appellant; Jayant K. Mehta, for the Respondent

Judgement

Manmohan, J.

This petition has been filed u/s 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "Act, 1996") seeking partial setting aside of the arbitral Award dated 09.09.2001, passed by Mr. Justice B.D. Aggarwal (Retd.), the Sole Arbitrator.

FACTS:

2. The relevant facts of the present matter is that the petitioner, Hindustan Paper Corporation Limited (hereinafter referred to as ''HPC'') is in the business of manufacturing and selling varieties of papers. For the purpose of selling its paper, HPC appoints stockists throughout the country. HPC entered into one such stockistship agreement and another agreement called supplementary/third party agreement with respondent No. 1, Delhi Paper Products Pvt. Ltd. (hereinafter referred to as ''DPP'') whereby DPP was authorized to purchase papers from the HPC on the terms and conditions mentioned therein. Said agreement was to work as an

umbrella agreement with respect to rights and obligations of the parties to the said agreements.

3. Under the aegis of the said umbrella Stockistship agreement, DPP was regularly buying paper from HPC. For such transactions, DPP used to be entitled to various benefits/incentives in the form of quality discount, quantity discount etc. DPP also used to purchase paper on credit basis on various occasions.

4. During the course of transactions, in the month of Feb-March 1996, DPP purchased paper worth Rs. 79,81,340/- (Rupees Seventy Nine Lakhs Eighty One Thousand Three Hundred Forty only) under 11 invoices. For the paper so purchased during this period, DPP made payments thereof.

5. Thereafter, in the month of June-July 1996, DPP purchased from HPC another batch of paper and against the said supplies in the month of June-July 1996, DPP issued number of cheques for a total amount of Rs. 44,92,782.20 (Rupees Forty Four Lakhs Ninety Two Thousand Seven Hundred Eighty Two only).

6. After issuing aforesaid cheques, DPP asked HPC to abstain from depositing the said cheques on the ground that paper purchased by DPP in the month of Feb-March 1996 was found to be defective and, therefore, in the understanding of DPP, consideration for the papers purchased by them in the month of Feb-March 1996 failed. A request was made by DPP to HPC that it be given credit of the said amount of Rs. 44,92,782.20/- (Rupees Forty Four Lakhs Ninety Two Thousand Seven Hundred Eighty Two only) against the claim arising in their favour because of defective supply made in the month of Feb-March 1996. DPP also asked HPC to refund/adjust the balance of Rs. 34,88,557.80/- (Rupees Thirty Four Lakhs Eighty Eight Thousand Five Hundred Fifty only) being the difference between price of paper supplied in the months of Feb-March 1996 and June-July, 1996. Parties exchanged various correspondences in this regard. There are certain documents on record which indicate that DPP was initially asking for reduction against the supplies made in the months of Feb-March, 1996. By way of its subsequent letters, DPP informed HPC that papers supplied in the months of Feb-March 1996 were totally defective and unusable and not of marketable quality. DPP also asked HPC to take back papers which were lying in the godown of the DPP. DPP also informed HPC that it was incurring warehouse expenses and other charges in retaining such defective papers.

7. On the complaint of DPP, HPC arranged joint inspections on 18.05.1996 and 19.12.1996. Perusal of the said minutes of joint inspection on both the occasions shows that inspecting officials of HPC, acknowledged defects in quality of papers supplied.

8. In the meantime, parties were in dispute on various other grounds including the claim of HPC against DPP that the latter was liable to furnish sales tax form pertaining to supplies made by HPC in the various accounting years. HPC was also

raising its claim against the DPP for local transportation charges. HPC was also claiming interest against the overdue outstanding. For its claims under various heads, HPC was raising various debit notes against DPP.

9. The aforesaid circumstances led to arbitrable disputes between the parties. Under such circumstances, DPP invoked arbitration clause as contained in the abovementioned stockistship agreement. The language of the arbitration clause would be of significance in the present case as the ground of challenge to arbitral award made by the HPC on the ground of non-consideration of counter claim by the Ld. Arbitrator, will have to be decided also by referring to the said arbitration clause. The Arbitration Clause which is Clause 18 of the stockistship agreement is reproduced below:

If there arises any doubts, disputes or difference of opinion by and between the parties hereto in relation to or touching upon this agreement and/or for adjudication or determination of any rights or liabilities of either of the parties or the parties hereto, the same shall be referred to the sole arbitration of the Chairman-cum-Managing Director of the Company or his nominee whose decision shall be final and binding on the parties hereto and all such disputes or differences will include any question relating to interpretation or construction of any provisions hereof.

10. The DPP invoked the said arbitration clause for appointment of a sole arbitrator, however parties could not appoint any arbitrator by mutual consent. In such circumstances, DPP approached this Court for appointment of a sole arbitrator by filing an Arbitration Application No. A.A 255/1998 u/s 11(6) of the Act, 1996.

11. The language of prayer clause also indicates that prayer clause was very widely worded and DPP wanted resolution of all disputes and the differences between the parties by the so appointed sole arbitrator. Said prayer clause is reproduced as under:

9.(b) Take the necessary measure by appointing any independent and impartial person with knowledge of the Law as the sole Arbitrator to decide all the disputes and differences between the parties and accordingly to refer the parties to arbitration by the arbitrator so appointed.

12. Along with aforesaid arbitration application (A.A. 255/1998), DPP also filed one application u/s 9 of the Act, 1996 seeking certain interim relief and said application was numbered as OMP No. 171/98.

13. On 01.09.1998, HPC filed one short interim reply in the form of an affidavit. By way of this interim reply by way of affidavit, HPC denied the case set up by DPP. In paragraph 5 of the said reply, HPC, in fact, raised its own claim of about Rs. 80 Lakhs only against DPP on the ground that DPP had not yet paid the said sum against paper already purchased on credit.

14. In the month of January 1999, DPP filed one affidavit of its Managing Director and relevant paragraphs of the said affidavits are reproduced hereinbelow:

7. That the applicant (DPP) is already on record as being agreeable to all disputes between the parties, including any counter-claims of the Respondent, being referred to the same Retd. Judge of the High Court as an independent arbitrator.

15. Along with the said affidavit, DPP also brought on record one letter dated 16.09.1998 written by the Managing Director of DPP to Senior Manager of Sales of HPC. Relevant paragraph of the said letter is reproduced below:

The underlined disputes need to be referred to arbitration as already sought by us. If you have any claim, demands, disputes with us not covered in our arbitration application before the Hon''ble High Court of Delhi, you may also refer such additional disputes to the same arbitration to be appointed.

16. Thereafter, HPC filed its detailed reply to the aforesaid arbitration application being (A.A. 255/1998) and OMP No. 171/1998. Some of the relevant paragraphs (paragraphs 7(xv) and 7(xxvii)) of the said reply are reproduced hereinbelow as under:

7(xv). As per the practice being followed at the relevant time in case a stockist was invoicing paper more than the agreed target in a particular financial year, then for the subsequent purchases it was extended a discount depending on the excess invoiced. As admitted by the petitioner (DPP) all of the said paper was invoiced on 30.3.96 with the sole view of seeking a discount on the subsequent purchase. As is now evident, the petitioner never had any intention of using or selling the said paper and had all along been planning to invoice the said paper, seek discount and thereafter raise disputes on the quality. It is reiterated that the quality of the paper supplied exactly tallied with the samples first given to the petitioner. It is further submitted that apart from the joint inspection, a few fault samples were also got tested from accredited laboratories results of which clearly falsified the claims of the petitioner. Reference is craved to the relevant correspondence and test reports filed separately by the Respondent. Anything contrary to the above is wrong and denied.

7(xxvii) It is denied that any outstanding amounts were worked out unilaterally by the respondent. It is submitted that the respondent has time and again been requesting the petitioner to come and reconcile the accounts which they have also done from time to time. Bases on these reconciliation, debit and credit notes for rectification purposes, were raised from time to time. Based on these notes a statement of accounts covering a period on 1991 to 1997-98 was prepared and made available to party showing an account of Rs. 85,43,982.54 due and recoverable from the petitioner and its group of companies as on 31.03.98, excluding the penal interest which is further chargeable depending the date of payment of the principal amount by the petitioner. The petitioner was subsequently vide respondent letters dated 01.08.98 and, filed separately, 08.09.98 was requested to confirm the amount

due from them within a period of seven days failing with it be construed that the amount due to the respondent was accepted as correct by the petitioner. So far there has been no response from the petitioner impliedly accepting the said account statement as correct. It is denied that by denying the petitioner to lift paper before he clears the outstanding of over Rs. 85 Lacs, the respondent has terminated the stockistship of the petitioner. It is an admitted case of the petitioner that its stockistship is subsisting till date. It is further denied that any pressure tactics have ever been adopted by the Respondent on the petitioner. In fact, greatest restraint has been exercised and a very lenient approach has been taken towards the petitioner by the Respondent all along, as is evident from the Court record, to be abused by the petitioner in return.

17. In the said reply, HPC sought to deny the submission of DPP that there was a running account between the parties. However, it appears from a perusal of the record of the arbitration proceedings that HPC had amended its counter statement of facts before the Ld. Arbitrator and had pleaded that there was in fact running account between the parties.

18. To complete the narration, it is mentioned that the DPP filed another arbitration application for appointment of a sole arbitrator for getting certain other disputes which had arisen between the parties under the said stockistship agreement. DPP had mentioned in the said second arbitration application No. AA 33/1999 that there were disputes between the parties with regard to the bank guarantee submitted by the DPP to HPC and with respect to the dishonour of cheques issued by DPP to HPC for the supplies made by HPC in the month of June-July, 1996. Along with this arbitration application, one application u/s 9 of the Act was also filed and same was numbered as O.M.P. 33/1999. Said arbitration application and OMP were also replied by HPC. Response of HPC to the said arbitration application No. AA 33/1999 and OMP No. 35/1999 was basically reiteration of HPC''s case as made out in its reply to A.A 255/1998. While filing its reply to the above said arbitration application of the DPP, HPC also prayed to this Court that all disputes between the parties be referred to the arbitrator appointed as per Clause 18 of the stockistship agreement.

19. Considering the pleadings, documents, as well as oral submissions of the parties, this Court vide its order dated 07.09.2000 appointed Justice B.D. Aggarwal (Retd.) as the sole arbitrator. The relevant portion of the said order is reproduced as under:

OMP No. 171/98

Counsel for both the parties state that the parties have agreed to refer the disputes in question for being decided by Justice B.D. Aggarwal (Retd.), presently practicing as Senior Advocate in the Supreme Court in this case and OMP No. 35/99, AA 33/99 and A No. 255/98 and these petitions may be disposed of accordingly.

In view of the said statement, disputes between the parties are referred to Justice B.D. Aggarwal (Retd.) for adjudication in accordance with law. Arbitrator is at liberty to fix his own fee. Interim orders passed in both the OMPs will continue to operate till they are vacated or modified or further orders are passed by the Arbitrator. Parties will appear before the Arbitrator on 9th September, 2000 at 11.30 in Chamber No. 313, Supreme Court Chambers.

20. In terms of the aforesaid order dated 07.09.2000, the Ld. Arbitrator commenced the arbitration proceedings. DPP as a claimant filed its statement of claim and prayed for various reliefs. The prayer clause in the said statement of claim is as under:

7. That the claimants most respectfully reiterate their claims as set out in the aforesaid petitions and, in particular

A) The disputed and unreconciled accounts in the Books of Accounts of the Respondent be settled/resolved and declared.

B) The claimants be permitted to book and take delivery of various grades of paper that are supplied by the Respondent in its usual course of business.

C) The complaints regarding defective/damaged supplies be resolved towards setting/resolution of accounts.

D) The price for the defective/damaged supplies be declared to have failed.

E) The adjustment for the so failed price made by cancellation of the post dated cheques for Rs. 44,92, 782=20 with request for not presenting them, be directed to be recognized by the Respondent.

F) The Post dated cheques be declared, on account of the price having so failed, to have been discharged prior to the dates borne on them on which they are deemed to have been drawn.

G) The presentation of the post dated cheques be struck down as unjustified as/and the cheques cannot be said to have been drawn for the discharge, in whole or in part, or any debt or other liability.

H) The respondent, towards resolution of the defective/damaged supplies referred to by the respondent in its Joint Inspection report dated 18.05.96, without prejudice to the resolution of the other defective/damaged supplies, be required to pay to the claimants a sum of at least Rs. 79,81,340=00 as being due on 30.03.96 less Rs. 44,92,782=20 adjusted on 18.07.96, yielding net at least Rs. 34,88,557=80 as on 30.03.96, due and payable to the claimants.

I) The respondents, towards resolution of the defective/damaged supplied referred to by the Respondent in its Joint Inspection Report dated 18.05.96, be required to pay interest, at a commercial rate of at least 36% on at least Rs. 34,88,557=80 from

30.03.96 until enforcement of the award and on at least Rs. 44,92,782=00 from 30.03.96 till 18.07.96. The same be required also in respect of the other sums adjudicated as due towards resolution of other defective/damaged supplies.

J) The business losses on account of demurrage and warehousing charges, cancellation and delay charges for holding up of supplies and such related defrays and expense pertaining to the defective/damaged supplied as tentatively estimated and sought in letters such as dated 28.07.97 be quantified and the respondent be required to pay the same. The business losses on account of denial of supplies since July, 1996 till recommenced be also be quantified and the respondents be required to pay.

K) The respondent be strictured for not redressing the quality complaints and demand for refund/adjustment and then for not even referring the disputes to arbitration inspite of requests.

L) The Bank Guarantees be declared to have been discharged without having been invoked and therefore without any liability for payment to be made thereon. Even otherwise, the invocation be declared to be bad in law as the price sought to be encashed thereby had failed. The respondent be required to surrender the original Bank Guarantees to the Claimants and withdraw its demands/claims from the Bank and be perpetually injuncted from claiming on the said Bank Guarantees. No New Bank Guarantees be sought if no credit is asked for beyond what is available as part of the Respondent''s own cash discount policy.

M) The respondents be required to pay heavy penal costs over and above the cost and expenses incurred by the Claimant.

N) Any other and further directions/orders as may be called for towards full and final resolution of all disputes between the parties and as may be just and expedient in the circumstances.

21. HPC filed its counter statement of facts/written statement and also raised counter claim. Amendments were also made by HPC and as per the amended counter claim, HPC claimed Rs. 1,84,86,983.54/- (Rupees One Crore Eighty Four Lakhs Eighty Six Thousand Nine Hundred Eighty Three only), which finds mention in paragraph 34 of the amended counter statement of facts/counter claim. Breakup of the counter claims of HPC is as follows:

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a) Price of paper supplied          Rs. 76,03,534.36
b) Local Transportation charges     Rs.    50,682.18
c) Sales Tax liability              Rs. 22,72,808/-
d) Interest for delayed payment
up to 31.3.97 @ 28% p.a.            Rs.  8,89,766/-
c) Interest on price of paper @
28% p.a. from 1.4.97 to 6.11.2000 Rs. 76,70,193/-
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Total Rs. 1,84,86,983.54

22. DPP filed its rejoinder as well as reply to such claims and challenged its maintainability, on the ground that claim amount of the HPC was beyond the scope of order dated 07.09.2000 passed by this Court.

23. Before the Ld. Arbitrator, HPC also filed one application u/s 17 of the Act, 1996 with a prayer that DPP be directed to secure its counter claim. DPP filed its reply to the said application of HPC and raised a preliminary plea of maintainability of the counter claim. Submission of DPP was that the jurisdiction of the Ld. Arbitrator be confined to the disputes raised by DPP in its arbitration applications and OMPs and, therefore, HPC cannot be allowed to enlarge the scope of arbitration. A detailed written submission was also filed by DPP on the said application. Said application of HPC u/s 17 of the Act, 1996 was disposed of vide order dated 11.04.2001 by the Ld. Arbitrator and relevant portion of the said order is extracted hereinbelow:

I have heard learned Counsel for both the parties at length in regard to the Application.

On a bare perusal of the claim and the counter claim it appears that the allegations and assertions made in the counter claim will have a direct bearing on the grant of some reliefs claimed by the claimants (DPP). It cannot thus be said that the counter claim is totally de hors the subject matter of dispute referred for Arbitration by the Hon''ble Delhi High Court. It cannot therefore, be said that the Counter Claim is not maintainable. I accordingly find no force in the preliminary objection of the Counsel for the claimants to the maintainability of the counter claim.

As far as issuing a direction to the claimant No. 1 to furnish security in the sum of Rs. 1,72,34,950.14 by way of Bank Guarantee, is concerned, I don''t find any good ground having been made out by the Respondent (HPC) for issue of such a direction, at this stage, prior to any adjunctions on merits of the counter claims so made.

Accordingly, the Application filed by the respondent stand rejected.

24. HPC filed its detailed evidence by way of affidavits. Various affidavits were filed by HPC in support of its case, however, it appears that DPP did not choose to file evidence by way of affidavits.

25. Ld. Arbitrator passed his award on 09.09.2001 and the same is under challenge by HPC before this Court. However, HPC is not challenging impugned award with respect to issue Nos. 4, 5 and 6 as framed by the Ld. Arbitrator. It is the submission of HPC that the findings of the Ld. Arbitrator on the said issues No. 4, 5 and 6 are severable from rest of the award.

26. Though in the said petition, HPC has challenged impugned award on various grounds, however, during the course of final arguments, HPC confined its challenge

to impugned award on following two grounds:

(i) Non consideration of claims/counter claim of the HPC in the arbitration proceeding.

(ii) Non-observance of principles of Section 73 of the Indian Contract Act, 1872 and other provisions of law by the Ld. Arbitrator.

GROUND I: NON CONSIDERATION OF CLAIMS/COUNTER CLAIM OF HPC IN THE ARBITRATION PROCEEDING AND CONSEQUENCES THEREOF.

PETITIONER''s ARGUMENTS:

27. Mr. Ratan K. Singh, learned Counsel for the petitioner-applicant HPC submits that the impugned award is liable to be set aside in its entirety as Ld. Arbitrator committed jurisdictional error by not considering and adjudicating upon the merits of counter claim of HPC.

28. It has been argued by Mr. Singh that once the parties have provided arbitration as the mode of settlement/resolution of the disputes/differences under a contract, it should relate to all disputes/differences arising out of or in relation to such contract. Argument advanced is that arbitration agreement between the parties is the source of power and authority of arbitrator. It has been argued that wordings of the arbitration clause in such circumstances is of paramount importance. Mr. Singh, while referring to the arbitration clause (Clause 18 of the stockistship agreement) has urged that arbitration clause between the parties is very widely worded. It was argued that "any doubts or any disputes/differences by and between the parties in relation to or arising out of the agreement, or adjudication of any rights and liabilities of either of the parties" were required to be resolved by process of arbitration. Mr. Singh argued that the said arbitration clause is positively worded and does not exclude adjudication/resolution of any claim/counter claim of either of the parties.

29. Further argument of the Ld. Counsel for HPC is that the order dated 07.09.2000 passed by this Court while appointing sole arbitrator had again not excluded adjudication of claims/counter claims/defence of the HPC from the scope of the arbitration. His argument is that the said order came to be passed prior to the judgment of Supreme Court in the matter of S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, His arguments is that prior to S.B.P. & Co. (supra), law as settled by various judgments including the Konkan Railways case reported in Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., was that orders passed u/s 11(6) of the Act, 1996 used to be treated as an administrative order and while passing orders under the said provisions courts used to simply refer the parties to arbitration and courts used to not formulate the disputes for adjudication by the arbitrators. Mr. Singh submits that the Hon''ble Supreme Court while passing its judgment in S.B.P. & Co.''s (supra) declared that orders passed u/s 11(6) are in the

nature of judicial orders, however, said judgment in express terms holds that the said judgment will only have prospective effect. Based on the said submissions, argument of Ld. Counsel for petitioner is that this Court while passing the aforesaid order dated 07.09.2000 only referred parties to arbitration and therefore parties were entitled to raise all their respective claims/counter claims against each other and Ld. Arbitrator was entitled to entertain and adjudicate claim/counter claim of both the parties.

30. Ld. Counsel for HPC further submits that order dated 07.09.2000 is very widely worded and required and mandated adjudication of all the disputes between the parties to be resolved by the appointed arbitrator. His argument is that even the plain reading of the said order dated 07.09.2000 requires the Ld. Arbitrator to adjudicate all the disputes between the parties. Argument raised is that one has to see the intention behind such order. Mr. Singh argued that the idea was to settle all the disputes between the parties and not to confine the same to any particular issue, claim or dispute of one party. In such circumstances, non consideration of the claims of one of the parties would not only amount to violation of the terms of the arbitration agreement between the parties but also to the order passed by this Court. Mr. Singh submits that by not considering the claims of one of the parties, Ld. Arbitrator has gone against the contract (arbitration agreement) between the parties.

31. While Mr. Singh has submitted that in order to understand the real intention and spirit behind the order dated 07.09.2000 of this Court, background in which said order was passed attains significance Mr. Singh invited attention of this Court to interim reply dated 01.09.1998 filed by the HPC to arbitration application numbered A.A. 255/1998 and also invited my attention to, inter alia, paragraph 5 of the said interim reply. While referring to the said paragraph 5, Mr. Singh submitted that said interim reply came to be filed on receiving notice in the said A.A. 225/98 and OMP No. 171/1998. He submitted that in paragraph 5 of the said reply, HPC had categorically raised its claim of over Rs. 80 Lakhs only against appropriate paper lifted/raised by the DPP on credit.

32. Mr. Singh invited attention of this Court also to various paragraphs of the detailed reply of HPC to the aforesaid arbitration application and OMP''s. Special mention was made to paragraph XXVII to XXXVI which are on internal page 12, 13 and 14 of the detailed reply of HPC to A.A. 255/1998. Mr. Singh submitted that in the said paragraphs HPC has categorically mentioned that HPC had time and again requested DPP to come and reconcile the account which was in fact done from time to time by DPP. HPC further submitted that based on these reconciliations, debit and credit notes were raised from time to time by HPC. Not only that, HPC had made available detailed report of account covering Jun-July 1996 and shown outstanding of Rs. 85,53,982.45/- due and recoverable from DPP and its group as on 31.03.1998 excluding penal interest which was further chargeable. It was also mentioned in the

said paragraph that HPC in various letters including letter dated 01.08.1998 and 08.09.1998, had asked the DPP to confirm the amount due (reference was also made to paragraph (iv) of the said reply whereby HPC had not only objected the claim raised by the DPP but also raised its counter claim of Rs. 85 Lakhs only under various heads.) Reference was invited to other prayers of HPC in this regard.

33. Mr. Singh submitted that for understanding the pending disputes between the parties, reference to certain paragraphs of the arbitration application A.A. 255/1998 filed by DPP is also very important. He submitted that various paragraphs of said application No. A.A. 255/1998 filed by DPP, mentioned the existing disputes and differences between the parties and in this regard reference was made to paragraph 24 of said arbitration application. It was argued in the said paragraph that HPC was asking DPP to arrange and furnish sales tax forms for concluded transactions between the parties. Attention of this Court was also invited to paragraph (XXXIV) of the said Arbitration Application No. 255/1998. Mr. Singh argued that DPP itself had categorically mentioned in the said paragraph that HPC had raised various debit notes under various heads. Reference was further invited to paragraph XXXV in which DPP submitted that HPC was asking DPP to clear the outstanding, else HPC would terminate stockistship agreement. By referring to aforesaid paragraphs, argument advanced is that parties were already in disputes and DPP was fully aware of all such pending disputes between the parties.

34. Mr. Singh thereafter referred to affidavit dated 21.01.1999 of the Managing Director of the DPP company. While referring to paragraph of the said document it was argued that in fact Managing Director of DPP himself had stated that reason for non-supply of paper to DPP was the pending claims of HPC against DPP. Attention of this Court was also drawn to paragraph 7 of the said affidavit, wherein, it was mentioned that DPP was already on record "as being agreeable to all the disputes between the parties including any counter claim of the respondent (HPC) being referred to same retired judge of the Hon''ble High Court as an independent arbitrator." Based on the said paragraph of the said affidavit, it was argued that DPP itself had agreed to get all the counter claims of the applicant resolved in the same arbitration proceedings and therefore now DPP was estopped from raising any plea contrary to the said statement made by DPP.

35. Attention of this Court is further invited to another letter dated 16.09.1998 written by Managing Director of the DPP to HPC. It was stated by DPP in the said letter that if HPC had "any claim, demand, disputes with HPC not covered in the arbitration application of the HPC, which was pending before this Court, HPC may refer all such additional disputes to the same arbitrator.

36. Mr. Singh, therefore, argued that in the aforesaid background HPC consented to get the disputes of both the parties resolved by Ld. Arbitrator Sh. Justice (Retd.) B.D. Aggarwal (arbitrator designated under the arbitration clause), and not by Chairman-cum-Managing Director of the HPC or any of his nominee. He further

submitted that disputes between the parties before this Court was not only the assertion/claims of the DPP but also the claims and assertion of HPC.

37. Therefore based on the above, argument of Mr. Singh is that finding of the Ld. Arbitrator that only the claims of DPP and not the claims of HPC were sent for his adjudication, is factually and legally incorrect and award is liable to be set aside on said grounds. Mr. Singh while referring to the judgment in Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others, argues that a party to an arbitration proceeding is entitled to refer even such claim/counter claim which arose after the order of reference. Mr. Singh also invited attention of this Court to the judgment in the case of Escorts Limited Vs. Knorr Bremse-AG, passed by a learned Single Judge of this Court. In paragraph 9 of this judgment it was held that counter claim can be filed while filing reply to claim of a party and when such counter claim is filed it becomes the subject matter of the disputes between the parties in the arbitration proceedings and therefore can''t be refused. In paragraph 10 of the said judgment, it was held that arbitration is resorted to by the parties to reduce delay and avoid multiplicity of proceeding and litigation between the parties and in such circumstances if an arbitrator refuses to entertain the counter claim and ask the party to file fresh suit and start fresh suit de novo and constitute new arbitral tribunal, this will result in multiplicity of proceeding resulting in failure of procedure. Mr. Singh argued that there are plethora of judgments wherein it is held that arbitral agreements and orders of reference are always interpreted in favour of arbitration.

38. Mr. Singh has further referred to Benford Ltd. v. Lopean SL (No. 2), [2004] 2 Lloyd''s Rep. 618. In the facts of this case, one of the issues raised was whether counter claim of respondent can be arbitrated upon in same arbitration proceeding. Facts in short of case was that party to the said proceeding entered into a distributorship agreement under which a Spanish company was appointed as sole distributor with respect to number of different regions within Spain of the claimant''s products sold to Spain. Disputes arose between the parties with regard to the extent of territory for the purpose of the said distributorship agreement. Case of the Spanish company was that their territory of operation was extended as a result of oral agreement, which agreement was denied by the other side on various grounds. There were other disputes between the parties with respect to territories, namely whether the claimant in the said case was entitled to deprive the Spanish company of one of the regions, namely Cordoba. Disputes between the parties led to termination of the distributorship agreement. Action was brought by the parties on the ground that they sold and delivered to defendant a number of trucks which were ordered by the defendants in their capacity as distributor under the umbrella agreement and based on the said submissions various claims raised by the claimant. The defendant in the said case raised its own claims on various grounds including loss of profits, wasted expenses, overhead expenses etc. In such circumstances, question revolved around as to whether counter claim raised and

the defenses which were advanced, constituted what the courts now call "transaction set off" on the one hand or "independent set off" on the other. It was reiterated in said judgment that "transaction set off" operates as a defense, whereas "independent set off" works as striking a balance where 2 claims are looked at independently. It was held that transaction set off act is a defense to the claim of the other side. In the said judgment, reference was made to Aectra Refining and Marketing Inc. v. Exmar N.V. [1995] 1 Lloyd''s Rep. 191, wherein, it was held that aforesaid phrases, namely "transaction set off" and "independent set off" were coined by Lord Justice Hopkins which phrase/concept basically reiterates the settled law on the subject. In the said judgment, reference was made to LEON Corporation v. Atlantic Lines and Navigation Co. Inc. (The Leon) reported as [1985] 2 Lloyd''s Rep. 470, at page 474 to quote the following paragraph of the said judgment:

Equitable principles derived from a sense of what justice and fairness demands. It does not mean equitable set off has been reduced to an exercise of set off. Since the merging of equity and law, equitable set off gives right to legal defense. This defense does not vary according to length of the Lord Chancellors or arbitrators the defense has to be granted or refused by the application of legal principle.

39. In the facts of the said case (Benford Ltd. v. Lopean SL), therefore, issue posed by the court upon itself was whether it was a case of ''transactional set off''. While answering the said question, Mr. Justice Morosion observed that test is to see whether claims on the one hand and defense and counter claim on the other are having connection and nexus or not. It was held that what is required to be seen is the relationship between the claim and counter claim. Mr. Singh, while referring to the said judgment argued that where claim and counter claim of parties are arising out of one umbrella agreement, in such circumstances, there is no difficulty in holding that all such claims and counter claims would be subject matter of one arbitration proceedings. In the facts of said case it was observed that it would be unjust to allow the claimant to claim the price of good sold and delivered without taking defense of the defendant''s counter claim for breach of the agency agreement. If that is right than the defendants are entitled to rely upon their counter claim as a set off. In the said judgment, counter claims of the defendant were held to be adjudicated by the same arbitrator.

40. Ld. Counsel of HPC has also referred to Union of India (UOI) Vs. Jain Associates and Another, Paragraph 8 of the said judgment was referred to by learned Counsel, wherein, it was held by the Hon''ble Supreme Court that the non-consideration of counter claim also amounted to non-application of mind by the arbitrator. Mr. Singh also referred to the judgment in the case of Narmada Constructions Vs. Western Coalfields Ltd., . On the basis of the said judgment, argument was that Section 2(9) of the Act, 1996 which defines the claims also includes counter claims within the definition of the claims. Section 2(9) of the Act is reproduced below-

Section 2(9): Where this Part, other than Clause (a) of Sub-section (2) of Section 32, refers to a claim, it shall also apply to a counter-claim, and where it refers to a defence, it shall also apply to a defence to that counterclaim.

41. In paragraph 15 of the said judgment, Hon''ble judges also referred to the Western Coalfields Limited Vs. Narbada Constructions, and paragraph 10 of the said judgment was quoted. It was finally held in aforesaid judgment that ''claim'' includes ''counter claim'' and even if claims are referred to arbitrator without any specific reference to counter claim, counter claim would also be required to arbitrated upon. Ld. Counsel also argued that if counter claim is not considered by an arbitrator, the award be treated as an unreasoned award and such award does not conform to the requirements of Section 31 of the Act, 1996. His submissions is that in various judgments including the judgment reported as Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., , Court was pleased to hold that if an award is an unreasoned award and does not confirm to Section 31 of the Act, such award is liable to be set aside.

42. Mr. Singh also argued that non-consideration of counter claim amounts to violation of Section 28 of the Act, 1996. Mr. Singh further submitted that non-consideration of counter claim offends public policy of India and for this reason also award is liable to be set aside.

43. It was argued that since counter claim was not adjudicated upon by the Ld. Arbitrator and therefore, in view of the relationship between the claim and counter claims, which are so inter-twined, entire award is liable to be set aside.

RESPONDENTS'' ARGUMENTS:

44. Mr. Jayant K. Mehta, learned Counsel for DPP, has rebutted the submissions of HPC on all counts. With regard to submission of HPC that award is liable to be set aside as the Ld. Arbitrator has not considered the counterclaim, Mr. Mehta''s first submission is that Section 34 of the Act, 1996 does not permit setting aside arbitral award on the ground of non-consideration of a claim/counter claim by the arbitrator. Mr. Mehta argues that no doubt Section 2(9) of the Act,1996 provides that the phrase ''claim'' includes ''counterclaim'' yet this provision of the Act, 1996 does not indicate that merely because arbitrator has failed to adjudicate upon the counterclaim, the entire award including the well reasoned and sustainable findings on other issues would be invalid.

45. Mr. Mehta further argues that claims/counterclaims raised by HPC by way of its replies in proceedings u/s 11 of the Act, 1996 were not the subject matter of HPCs counter-claim before Ld. Arbitrator. In other words, the two were distinct.

46. Mr. Mehta also argued that counterclaims of HPC before the Ld. Arbitrator were raised on the basis that there was a running account between the parties whereas HPC has pleaded before this Court in aforesaid proceedings that parties were not

maintaining running account. Therefore, argument of Mr. Mehta is that HPC could not aprobate and reprobate. In support of his argument that there was no running account between the parties, Mr. Mehta has referred to some of the clauses of the stockistship agreement and also of the reply of HPC to Arbitration Application No. A.A. 255/1998. Mr. Mehta has further submitted that there is variance between claims made by HPC in its reply to A.A. 255/1998 and those made before Ld. Arbitrator. In support of this submission, Mr. Mehta has referred to certain paragraphs of HPC''s reply and counter claims raised before Ld. Arbitrator.

47. It has also been argued on behalf of DPP that counter claims of HPC were in fact considered by the Ld. Arbitrator and partly allowed. And in this regard internal page 33 of the impugned award had also been referred to. Mr. Mehta has lastly submitted that counter claims raised by HPC were beyond the terms of the reference. The claims as made by HPC before Ld. Arbitrator were never raised before this Court and vice versa.

FINDINGS:

48. Jurisdiction of arbitrators to decide the claims/counter claims of parties is primarily determined by the wordings of the arbitration agreement. If arbitration agreement requires adjudication of claims/counter claims, arbitrators in such circumstances would be well within their power to adjudicate claims and counter claims of both the parties. In fact, in such circumstances, arbitrators are duty bound to adjudicate claims/counterclaims of both the parties. In almost all pre-dispute arbitration agreements, parties necessarily agree to get resolved all disputes/claims by way of arbitration in the event of any disputes arising between them.

49. There can be few situations where claim/counter-claims of one of the parties to arbitration agreement may not fall within the jurisdiction of the arbitrators. One such instance could be when before commencement of arbitration proceedings, parties by consent agree to restrict the role of arbitrators for adjudication of claims of only one party and not the claim/counter-claim of other party. This is based on the concept of autonomy of contracting parties, meaning thereby if parties could agree to have adjudication of their respective claims and counterclaims by an arbitrator, the parties can surely alter the terms of arbitration by mutual consent. Another situation when counter-claims may not be entertained by an arbitrator, despite the fact that there is an arbitration clause, is when a court while appointing an arbitrator limits the scope of jurisdiction of the arbitrator and refers claims of only one of the parties to arbitration. Yet, another exception can be when claims/counter-claims are totally beyond the scope of main/underlying contract, that means, if claims raised have no co-relation with the subject matter of the main contract, which contract contains the arbitration clause.

50. Undoubtedly, the arbitrators derive their authority and power from the arbitration agreement executed between the parties, but unless scope and width of

power and jurisdiction of arbitrator gets limited/restricted expressly under the circumstances like the ones mentioned in the preceding paragraphs, arbitrators are required to adjudicate claims/counterclaims of both the parties. One should not forget that the intent of all arbitrations is to achieve finality.

51. Applying the aforesaid principles, I find that in the present case, the claims/counter-claims raised by HPC are not falling under any of the abovementioned exceptions. I may quote ''Russel On Arbitration'' (22nd edn.) para 6-092 in which the author states:

Counterclaims. In the absence of special circumstances requiring that matters should be dealt with separately, where there is a counterclaim which is sought to be used as a set-off or excess, the award need not deal separately with the two issues of claim and counterclaim, but it must explain how the result is arrived at.

52. Consideration/non-consideration of counterclaims relates to the jurisdiction of an arbitrator and if in a given case arbitrator does not exercise his jurisdiction by not considering counterclaims, in such circumstances, arbitrator commits jurisdictional error. Section 34(2)(iv) of the Act, 1996 sets out a ground for challenge to an award if an arbitrator passes an award with respect to disputes not referred to him. Going by same analogy, an award will also be liable to set aside if an arbitrator does not decide counterclaims which are otherwise required to be adjudicated by him.

53. A defendant/counterclaimant in a particular proceeding may defend himself by taking various pleas/defenses available to him. A defendant in an arbitration proceeding can set up a case of payment, adjustment, set-off and counterclaim. All these pleas raised by a defendant are liable to be adjudicated upon as a defense to the claim of claimant unless such pleas are totally beyond the scope of main contract between the parties.

54. For my aforesaid observations, I also find support from the judgment in the case of Benford Ltd. v. Loppean reported in 2004 (2) LR 618. In the said judgment, it was observed that when a defense and counterclaims constitutes a "transactional set-off", such transactional set-off operates as a defense and extinguishes the claim of claimant. By the phrase ''transaction set-off'' what is meant is that when a claim of set-off arises under an umbrella agreement, such claims of set-off are termed as transactional set-off. In my view, it would be unjust if in a proceeding, claim of a party is considered and allowed without taking into consideration the defence/counterclaims of other party, especially when counterclaims are having close commercial relationship with claim of claimant.

55. In fact, the Supreme Court in the case of M/s. V.H. Patel and Company and Others Vs. Hirubhai Himabhai Patel and Others, wherein it has held as under:

9. We asked the parties to appreciate the matter in the proper perspective to produce the partnership deed and the partnership deed dated 21-4-1986 is

produced before us. Clause 5 provides that "the partnership is commenced on and from the 2nd day of April, 1986 and shall continue for a term of period until the parties hereinbefore mentioned mutually agree to dissolve". Clause 11 thereto provides that

all disputes and questions in connection with the partnership or with this deed existing between the parties shall be referred to arbitration under the provisions of the Indian Arbitration Act, 1940, or any statutory modification or re-enactment thereof for the time being in force.

In the suit filed before the Court it is no doubt true that one party, Respondent 1, was seeking to establish that he had not retired from the partnership and, therefore, there is justification in the criticism levelled by the learned Counsel for the petitioner that the prayer for dissolution of the firm is inconsistent with such a claim. But that is not the end of the matter. Even if he had not retired pursuant to the terms of the agreement entered into between the parties, it is certainly permissible for him when disputes had arisen between the parties to ask for dissolution of the partnership and when that was not possible by mutual consent a dispute could certainly arise thereto and such a dispute could have been referred to arbitration as provided in clause 11 of the partnership deed. If that was permissible, such a contention could be raised in the suit filed by the parties. Merely because the disputes between the parties have been referred to arbitration, he is not prevented from raising such a question nor is the arbitrator prevented from deciding such a matter. Therefore, agreeing with the view expressed by the High Court, we reject the contention raised on behalf of the petitioner that it was not permissible for the arbitrator to enter upon the question of dissolution of the partnership. Though the disputes between the parties originated on the basis whether one or the other partner had not retired from partnership or as to the rights arising in relation to trademarks or otherwise, still when there is no mutual trust between the parties and the relationship became so strained that it is impossible to carry on the business as partners, it was certainly open to them to claim dissolution and such a question could be adjudicated. The scope of reference cannot be understood on the actual wording used in the course of the order made by this Court or the memorandum concerned filed before this Court, but it should be looked from the angle as to what was the spirit behind the reference to the arbitration. The idea was to settle all the disputes between the parties and not to confine the same to any one or the other issue arising thereunder. In that view of the matter, the contention addressed to the contrary is untenable.
(emphasis supplied)

56. It has also been the policy of the government in this country to promote and support arbitration as an alternative disputes resolution mechanism and there have been series of judgments which lay down that interpretation of arbitration clause/agreement should favour arbitration. Such interpretation discourages

multiplicity of proceeding and saves costs and time.

57. While referring to facts of the present case, I find that HPC had raised its claim against DPP at the first available opportunity while filing its interim reply to A.A. 255/1998. HPC was consistent in its approach that DPP was liable to pay huge amount of money to HPC under various heads as mentioned in its reply. Therefore, denial of existence of running account does not come in the way of various claims of HPC under various heads. Arbitral record also shows that HPC had amended its counterclaims before the arbitrator and had stated that they in fact used to maintain running account with respect to transactions with DPP and its third parties. In any case, claims/counterclaims raised by HPC before this Court in aforesaid proceeding or before arbitrator are arising out of the stockistship agreements. In any event, Ld. Arbitrator has not refused to entertain counter claims of HPC on ground that it was not maintaining a running account. In fact it would have been in the interest of both the parties if claims/counterclaims of both the parties had been decided in same arbitration proceeding and it would have saved time and cost of both the parties.

58. Mr. Mehta has argued that counterclaims of the HPC were in fact considered and partly allowed and therefore it can''t be said that counterclaims were not entertained by Ld. Arbitrator. I have thoroughly examined the findings of the arbitration proceedings in this regard and I am of the view that Ld. Arbitrator has considered only such claims of HPC which claims arose in favour of HPC in relation to supplies made by HPC in the month of Jun-July 1996. In fact, Ld. Arbitrator has himself mentioned in this award that he is not considering other claims/counterclaims of HPC on the ground that in his opinion counterclaims were not having any nexus with claims raised by DPP in its petition u/s 11 of the Act, 1996 and the related OMP. Therefore, this Court does not agree with Mr. Mehta that all the counterclaims of HPC were considered.

59. I also refer to affidavit dated 21.01.1999 of the Managing Director of DPP. In said affidavit, Managing Director of DPP had categorically agreed to adjudication of counter claims of HPC also in the same arbitration proceedings. Alongwith said affidavit, letter dated 16.09.1998 was also filed before this Court wherein the Managing Director of DPP had mentioned that DPP was ready to get adjudicated all the claims of HPC in the same arbitration proceedings even if such counterclaims were not covered under the arbitration petition of DPP.

60. In the aforesaid background and with consent of learned Counsel of both the parties, this Court vide its order dated 07.09.2000 referred the parties to arbitration so that both the parties could get adjudicated all their claims/counterclaims from the same arbitrator. It can''t be lost sight of the fact that under the stockistship agreement, CMD of HPC or his nominee had to act as an arbitrator; however considering the facts that DPP was agreeable to get all the disputes including the counterclaims of HPC adjudicated by same arbitrator, HPC might not have insisted

upon appointment of its own CMD or his nominee as the arbitrator.

61. So far as the argument of Mr. Mehta that there has been variance in amount of claims raised by HPC in its reply to Arbitration Application No. A.A. 255/1998 and counterclaims raised before the Ld. Arbitrator, I am of the view that HPC was entitled to claim any amount as counterclaims before arbitration if its claims were arising out of the stockistship agreements and merit of the counter claims were to be decided by the Ld. Arbitrator.

62. Judgments cited by learned Counsel of respondents are distinguishable on their own facts. Said judgments were passed in the circumstances when counterclaim were pertaining to entirely different transactions or were not referred to arbitrator by court concerned.

63. For the aforesaid reasons, I am of the view that Ld. Arbitrator committed jurisdictional error by not entertaining the entire counter claims of the HPC and impugned award is liable to set aside to this extent. I hereby make it clear that I am not inclined to interfere with the award on other aspects, for the reasons mentioned hereafter. Accordingly, the counterclaims of HPC, which have not been adjudicated upon by Ld. Arbitrator are required to be adjudicated upon.

64. I may mention that the counter claim filed by the petitioner before the Ld. Arbitrator was for a total amount of Rs. 1,84,86,983.54. The break up of this amount is as follows:

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(i) Price of paper supplied       : Rs. 76,03,534.36
(ii) Local Transportation charges : Rs.    50,682.18
(iii) Sales Tax liability         : Rs. 22,72,808.00
(iv) Interest for delayed payment : Rs.  8,89,766.00
upto 31.3.1997 @ 28% p.a.
(v) Interest for delayed payment  :  Rs. 76,70,193.00
Upto 31.3.1997 @ 28% p.a.
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Admittedly, the claim of the price of the paper supplied included the supplies of Rs. 44,92,782.00 against the supplies made in June-July 1996. Ld. Arbitrator has already allowed this part of the claim and adjusted the amount of Rs. 44,92,782.00 from the total claim of the respondents and awarded the residual amount of Rs. 34,88,557.80 to the respondents. That being so, the amount of Rs. 44,92,782.00 has already been received by the petitioner from out of its counter claim of Rs. 76,03,534.36 and now only the unadjudicated counter claim under the head ''price of paper supplied'' amounting to Rs. 31,10,752.36 needs to be referred to the arbitrator along with the remaining claims under serial Nos. (ii) to (v) above.

65. The reference of aforementioned counter claim is without prejudice to all the contentions and defences available to the respondents as per law and the Ld. Arbitrator shall adjudicate the counter claims uninfluenced by this order.

66. I am informed by the Ld. Counsel for the parties that Ld. Arbitrator who has passed the impugned award, has expired. Therefore, in such circumstance, with the consent of the Ld. Counsel for parties who have given their consent after taking necessary instructions from their client, Mr. Justice (Retd.) P.K. Bahri is hereby appointed to decide the unadjudicated counter claims of HPC. Ld. Arbitrator will be free to fix his fees subject to a ceiling limit of Rs. 2 lacs only to be shared equally by both the parties. Learned Arbitrator is requested to dispose of the matter expeditiously preferably within a period of ten months from today.

GROUND II: NON-OBSERVANCE OF PRINCIPLES OF SECTION 73 OF THE INDIAN CONTRACT ACT, 1872 AND OTHER PROVISIONS OF LAW BY THE LD. ARBITRATOR.

PETITIONER''S ARGUMENTS:

67. With regard to supplies of paper made in the month of Feb-Mar 1996 DPP had raised issue of defects in quality of paper supplied. Argument of learned Counsel of HPC is that during the joint inspections, officers of HPC had merely collected the samples and had narrated the complaints of DPP. It was argued that after the first inspection report samples collected were tested in the laboratory of HPC at Cachar Paper Mill at Assam and it was informed to DPP that papers were of marketable quality. Mr. Singh also argued that Mr. Dhar, who had carried out inspection had filed an affidavit before the Ld. Arbitrator in support of his plea that during the course of inspections only samples were collected and complaints of the representatives of DPP were recorded. Learned Counsel for HPC also submits that even going by the joint test report dated 18.05.1996 and 12.09.1996, it cannot be said that papers supplied were of no value. Mr. Singh also argued that if DPP would have taken reasonable steps to mitigate losses, loss if at all suffered by DPP would have been minimized. His argument is that principles of Section 73 of Indian Contract Act, 1872 have not been applied by the Ld. Arbitrator, while determining the damages awarded in favour of the DPP. He submitted that mitigation of loss is one of the fundamental facets of Section 73 of Indian Contract Act, 1872. He also referred to following judgments in support of his arguments that non-observance of the principle of Section 73 of Indian Contract Act, 1872 renders an award bad in law and such award is liable to be set aside. The referred judgments are as follows:
(i.) M/s. Sikkim Subba Associates Vs. State of Sikkim,

(ii.) Haryana Telecom Ltd. v. UOI 2006 (3) RAJ 225 (Para 27 & 28);

(iii.) Bharat Sanchar Nigam Ltd. Vs. BWL Ltd.,

(iv.) Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.,

(v.) Hindustan Zinc Ltd. v. Friends Coal Carbonisation 2006 (2) RAJ 1 (Para 12);

(vi.) ONGC Ltd. Vs. Garware Shipping Corpn. Ltd.,

68. He also argued that papers purchased from Lucknow depot were not the subject matter of reports dated 18.05.1996 and 12.09.96, therefore, Ld. Arbitrator went wrong in observing that said papers were also part of inspection report. Mr. Singh also argued that award is liable to be set aside as there is no application of mind by Ld. Arbitrator.

RESPONDENTS'' ARGUMENTS:

69. Mr. Mehta submitted that argument of HPC that Ld. Arbitrator has failed to apply principles of awarding damages u/s 73 of Indian Contract Act, 1972 and more particularly the principle of mitigation of damages, is devoid of any merit. Mr. Mehta submits that Ld. Arbitrator proceeded on consideration of two joint inspection reports duly acknowledged by officers of HPC. Contents of both the joint inspection reports are referred to by Mr. Mehta. It has been argued that perusal of said two reports show that the papers supplied by HPC to DPP were of no commercial value and were useless.

70. Mr. Mehta argued that Ld. Arbitrator duly considered the two test reports and concluded that said reports clearly established that material supplied by HPC to DPP were damaged/unusable and of no marketable value. Submission of Mr. Mehta is that finding of Ld. Arbitrator are premised on appreciation of the inspection reports admittedly signed by representatives of HPC.

71. Mr. Mehta submits that it is well settled law that factual findings of an arbitrator which are based on appreciation of evidence cannot be upset u/s 34 of the Act, 1996 as this provision does not permit of any such exercise. In support of his arguments, learned Counsel of DPP has relied upon following judgments:

(i) McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others,

(ii) Bhagawati Oxygen Ltd. Vs. Hindustan Copper Ltd.,

(iii) Wee Aar Constructive Builders Vs. Delhi Jal Board and Another, and

(iv) India Tourism and Development Corporation Ltd. Vs. Sh. T.P. Sharma,

72. On the issue of mitigation of losses, Mr. Mehta has argued that it has been wrongly argued on behalf of HPC that DPP was required to mitigate losses and has failed to do so. He submits that this plea is de hors the provisions of Section 34 of the Act, 1996. He further submits that this plea of HPC overlooks the documents whereby DPP was repeatedly asking HPC to take back defective paper and even sought intimation about HPC''s warehouse where defective papers could be sent by DPP, whereas, HPC failed to respond to any such request and in fact by its letter dated 14.08.1996 rejected the said request of the DPP. Having acted thus, the HPC cannot be permitted to argue that DPP failed to mitigate the loss owing to defective supplies.

73. Accordingly, Mr. Mehta argued that objection of HPC regarding non-observance of principles of Section 73 of Indian Contract Act, 1872 are without any merit.

FINDINGS:

74. In the facts of the case factum of supply of paper worth Rs. 79,81,340/- covered under 11 invoices for the month of Feb-March 1996 is not in dispute. It is also not in dispute that DPP and its third parties also purchased paper worth approximately Rupees 44,92,782.20 in the month of June-July 1996. For the papers purchased in the month of Feb-March 1996, entire invoice value was paid to HPC. For the supplies made in the month of Jun-July 1996, cheques were issued in favour of HPC. There has not been any allegation of any defects in paper supplied in the month of Jun-July 1996.

75. As far as supplies of paper made in the month of Feb-Mar 1996 are concerned, I do not agree with the argument of HPC that papers supplied were not defective and were of marketable value. I also do not agree that principles of Section 73 of the Contract, Act were not applied by the Ld. Arbitrator.

76. This Court is of the view that finding of facts given by an arbitrator are not liable to be interfered with unless findings are perverse and are unconsciousable.

77. This Court is of the view that it would be appropriate to first outline the circumstances in which a court can interfere with an arbitral award passed under the Act, 1996. The Supreme Court in Delhi Development Authority v. R.S. Sharma and Co., New Delhi reported in (2008) 13 SCC 80 after referring to a catena of judgments including Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., has held that an arbitral award is open to interference by a court u/s 34(2) of the Act, 1996 if it is:

(i) contrary to substantive provisions of law; or

(ii) contrary to the provisions of the Arbitration and Conciliation Act, 1996; or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or

(v) prejudicial to the rights of the parties.

78. The Supreme Court has further held in the aforesaid judgment that an award can be set aside if it is contrary to:

(vi) fundamental policy of Indian Law; or

(vii) interest of India; or

(viii) justice or morality.

79. In fact, the Supreme Court in McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, has succinctly summed up the scope of interference by this Court by stating "the 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc...."

80. Present case is not a case of no evidence. Learned Arbitrator has considered all materials brought before him and has arrived at the finding that papers supplied in Feb-Mar 1996 were defective and totally unusable. Learned Arbitrator has referred to various letters of DPP whereby requests were made to HPC to take back the paper supplied, however, HPC never took any step in this regard. Learned Arbitrator also referred to joint inspection reports dated 18.05.1996 and 19.12.1996 which reports were duly acknowledged by officers of HPC. So far as test report dated 03.06.1996 is concerned, I don''t find anything wrong with award with respect to observations made about the said report dated 03.06.1996. Said report was prepared unilaterally and behind the back of Respondent. In any case, such report gets nullified by subsequent joint inspection report dated 19.12.1996. This report of 19.12.1996 reiterates the finding recorded in first report dated 10.05.1996. Therefore, learned Arbitrator was fully justified in not believing the unilateral report of 3.06.96.

81. So far as paper brought from Lucknow is concerned, I have gone through the various correspondences in this regard. I found that even with regard to paper brought from Lucknow, respondents were making identical complaints of defects in quality of paper. Respondents were repeatedly writing to HPC in this regard. Respondent had also said in this regard that said papers were lying in a godown at Lucknow and same were sold to respondents by misrepresentation of facts. There were various other claims raised by respondent under the heads of godown charges, etc. which claims have been rejected by learned Arbitrator.

82. In my view, Ld. Arbitrator took a holistic view and after having considered the relevant aspects in totality awarded only the total price of paper supplied in the month of Feb-March 1996. I have no reason to interfere with such reasoned and detailed findings of arbitrator.

83. However, I am inclined to reduce the rate of interest. Mr. Mehta submits that because of withholding of payments by petitioner, respondent has become a sick company. He further states that for delayed payments by respondent to petitioner, petitioner has recovered interest at the rate of 28% per annum.

84. Mr. Singh denies the aforesaid contention and states that respondent had never raised any of these issues either before the Ld. Arbitrator or in the pleadings filed before this Court.

85. I may mention that the Supreme Court in Rajendra Construction Company Vs. Maharashtra Housing and Area Development Authority and Others, Rajasthan State Road Transport Corpn. Vs. Indag Rubber Ltd., has reduced the rate of interest. In fact, in Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy and Another, the Supreme Court has held as under:

11. ...here also we may add that we do not wish to interfere with the award except to say that after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%.

86. However, keeping in view the aforesaid judgments as well as current rate of interest and the fact that no rate of interest was stipulated in the contract with regard to payments withheld by petitioner-objector, I reduce the rate of interest from 18% per annum to 9% per annum on the amount awarded in the Award for the entire period, that means, pre-reference, pendente lite and post award. It is further clarified that respondent would be entitled to simple interest at the rate of 9% per annum on the awarded sum from the date of award till the date of payment.

87. I also do not want to interfere with the finding of Ld. Arbitrator whereby he held that post dated cheques for total sum of Rs. 44, 92,782.20/- issued by the respondent in favour of HPC in respect of paper supplied in the month of Jun-July 1996 and which payments were stopped on 18.07.1996 by respondent, got discharged prior to dates borne on such cheques.

88. I also uphold the findings of arbitrator whereby arbitrator declared that bank guarantee for a sum of Rs. 20 lakhs only furnished by DPP/its third parties in favour of HPC got discharged without any liability of payment to be made thereon.

89. So far as claims of HPC for sales tax liability and local transportation charges with respect to transactions of sale of papers worth Rs. 44,92,782.20/- in Jun-July 1996 is concerned, HPC would be entitled to such payment in terms of para (d) of operative portion of award. Respondents will be liable to pay simple interest at the rate of 9% per annum for the period starting from one month of the passing of award by the Ld. Arbitrator till the date of payment.

90. However, keeping in view the fact that some of the unadjudicated claims of the petitioner-corporation have been referred for consideration to an Arbitrator, I am of the opinion that the impugned Arbitral Award as modified by me shall not be executed by either of the parties till the new Arbitrator publishes his Award.

91. For the aforesaid reasons, I partly allow present petition in favour of petitioners while leaving the parties to bear their own costs.