

(2015) 06 BOM CK 0086
In the Bombay High Court
Case No : Arbitration Petition No. 958 of 2012

Diversey India Private Limited

APPELLANT

Vs

Waverley Private Limited

RESPONDENT

Date of Decision : 09-06-2015

Acts Referred:

Arbitration Act, 1940 — Section 30
Arbitration and Conciliation Act, 1996 — Section 3, 34, 7, 7(4) (b), 7(4)(b)
Evidence Act, 1872 — Section 65A, 65B

Citation : (2015) 06 BOM CK 0086

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : M.P.S. Rao, Senior Advocate, Nilesh Khandray and Shivangi Vengurlekar i/by Mallar Law Consulting, for the Appellant; Vishal Talsania and Dhawal Mohan instructed by Thakore Jariwala and Associates, Advocates for the Respondent

Judgement

R.D. Dhanuka, J.—By this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short "the said Arbitration Act"), the petitioner has impugned the arbitral award dated 4th May 2012 made by the learned arbitrator in so far as the learned arbitrator has rejected a part of the claims made by the petitioner. The petitioner was the original claimant whereas, the respondent was the original respondent in the arbitral proceedings. Some of the relevant facts for the purpose of deciding this petition are as under :

2. Prior to June 2005, the respondent was acting as a distributor for the petitioner in certain areas earmarked in Sri Lanka. There was no written agreement between the parties prior to June 2005. On 14th June 2005, the parties entered into an agreement for sale of products manufactured by the petitioner which were to be distributed by the respondent in the earmarked territory in Sri Lanka. On 13th June 2006, the first agreement came to an end.

3. During the period from 14th June 2006 to 31st March 2007, the products of

the petitioner continued to be distributed in the territory of Sri Lanka. No agreement was signed for the said period of 14th June 2006 to 31st March 2007 between the parties.

4. On 1st April 2007, the petitioner and the respondent entered into an agreement. The said agreement was to be operated for a period of two years ending 31st March 2009. Under the said agreement, the petitioner appointed the respondent as its distributor in the Institutional and Industrial Channels of Trade for the purpose of selling or otherwise for the products of the petitioner in the specified territory on the terms and conditions set out therein. Under the said agreement, the respondent was granted 75 days" credit from the date of invoicing for the products purchased from the petitioner and the respondent was to establish Letter of Credit or TT to avail the said credit facility. Under clause 6.3 of the agreement, either party could terminate the said agreement without being required to assign any reason at any time by giving the other party 90 days prior written notice.

5. Clause 6.1 of the said agreement is extracted as under :-

"6.1 Term-The terms of this Agreement commences on the Effective Date and continues in force for a period of two years, unless earlier terminated as provide therein or where it is mutually agreed by both parties to terminate this Agreement if both parties to agree in writing the term of this Agreement may be extended for another one year term on the same terms and conditions unless otherwise mutually agreed upon."

6. Clause 9.1 of the said agreement provided for arbitration which is extracted as under :-

"9.1 Law and Legal Proceedings -This Agreement and the relationship of the parties hereunder : will be governed by and interpreted in accordance with the laws of India without regard to its principles respecting the conflicts of laws. Application of the U N Convention on the International Sale of Goods is hereby rejected Any and all disputes, claims and controversies between the parties arising out of or relating to this Agreement, the alleged breach of this Agreement and the rights and obligations of the parties hereunder shall be resolved exclusively by binding arbitration. Arbitration shall be administered by the International Chamber of Commerce which shall apply its international commercial arbitration rules as modified by this Agreement. The decision of any such arbitrator(s) shall be final and judgment on the award rendered may be entered in any Court having jurisdiction thereof. Such Arbitrator(s) shall have the authority to impose all manner of remedies. Arbitration proceedings shall be conducted in Mumbai, India in the English Language."

7. On 6th April 2008, the respondent by its email addressed to the petitioner, terminated the agreement dated 1st April 2007 however made effective from 1st September 2008. In the said email, the respondent requested the petitioner to make an arrangement to purchase the balance stocks including the

demonstration equipments and the spare parts and informed that the respondent would settle the dues of the petitioner as well. It is the case of the petitioner that the petitioner was unable to appoint another distributor/agent for sale of its products in the specified territory in Sri Lanka.

8. On 27th August 2008, a meeting was held between Mr. Sukrit Ghosh, the then Sales and Marketing Manager of the petitioner and Mr. Gnana Samaratunga, Managing Director of the respondent. The said meeting was also attended by Mr. Nikhil Sawant, Director Healthcare and Hospitality of the petitioner. It is the case of the petitioner that in the said meeting, the parties agreed that the respondent would continue as an agent and/or distributor of the products of the petitioner at least until 20th September 2008. It is the case of the petitioner that the said record of discussion what was transpired on 27th August 2008 was spelt out in the three emails all dated 4th September 2008 that were exchanged between the parties.

9. On 4th September 2008, the respondent sent an email to the petitioner at 10.39 a.m. recording that it was agreed that the respondent would distribute the chemicals of the petitioner and act as a distributor for one more month ending 20th September 2008. In the said email, it was also recorded that it was further agreed that the petitioner would find a new distributor during the said period and would ensure that the stocks and chemicals were taken over from the respondent after due payments during the said period.

10. It is the case of the petitioner that the said email was sent by Mr. Gnana Samaratunga, Managing Director of the respondent from his mobile device. The said email was sent from the email ID -Rashmi. It is the case of the petitioner that the petitioner replied to the said email at 3.20 p.m. which was sent by the respondent. The said email was sent at the same email ID from which the email was received by the petitioner. The petitioner informed the respondent that the petitioner was in process of finalising their business partner which was already in its course. In the said email, the petitioner referred to a meeting held on 29th August 2008. The petitioner informed that as soon as the petitioner would finalise its business partner, the petitioner would immediately inform the respondent on the process of taking over by a new partner which was likely to go beyond 20th as all the official formalities needed to be taken care of.

11. It is the case of the petitioner that the respondent relied upon the said email dated 4th September 2008 at 3.35 p.m. The said email was also sent by the respondent from the same email ID. In the said email, the respondent conveyed that the respondent expected the petitioner to complete the taking over at least by 30th September 2008 and requested the petitioner to confirm the same.

12. It is the case of the petitioner that under the said extended agreement, the petitioner supplied the goods to the respondent for the period from September 2008 upto 25th October 2008 under the cover of invoices drawn in the name of the respondent. During that period, the petitioner raised invoices in the name of

the respondent and all documents of title such as invoice, bills of lading etc. were all duly accepted by the respondent as agent/distributor and also further caused the goods to be sold in the specified areas in Sri Lanka.

13. The present dispute was in respect of invoices substantially drawn during the period September 2008 until October 2008. It is the case of the petitioner that some time in the month of January 2009, reconciliation of the accounts between the parties in respect of the goods of the petitioner sold and delivered from the period June, 2005 to 25th October 2008 took place. The said statement of account dated 31st January 2009 showed balance of USD 19.96 which was admitted and acknowledged as payable by the respondent to the petitioner and another statement of account which disclosed that a sum of US\$ 41363.93 was agreed to be payable by the respondent to the petitioner. The said statement of account was duly signed and/or initialed by the parties. It was the case of the petitioner that all statements of accounts were signed and/or initialed by the Managing Director of the respondent.

14. On 17th March 2009, the respondent addressed a letter to the petitioner and made a claim of US\$ 4899495.05 for the period July 2005 to October 2009 on the alleged ground that there was a delay of delivery due to mismanagement of operation in the transaction by the petitioner.

15. On 23rd July 2009, the petitioner addressed a letter to the respondent informing that after considering the liabilities of the petitioner, balance of US\$ 40607.93 was found payable by the respondent to the petitioner.

16. The respondent, by their letter dated 10th August 2009 claimed that a sum of Sri Lankan Rs.4,899,495.05 was found due and payable by the petitioner to the respondent. The petitioner through its advocate's letter dated 14th October 2009 once again demanded payment from the respondent of the sum of US\$ 41332.94 with interest thereon from 31st March 2009.

17. The respondent, by their advocate's letter dated 24th October 2009 addressed to the petitioner stated that the said agreement between the parties was terminated with effect from 31st August 2008 and that the petitioner would make a counter claim for a sum of US\$ 51128.30 on various grounds stated in the said letter.

18. The petitioner through their advocate's letter dated 1st December 2009 reiterated their demand of US\$41332.94. The respondent by their letter dated 9th December 2009 reiterated its counter-claim upon the petitioner. The petitioner, thereafter, invoked clause 9.1 of the agreement which provided for arbitration. The learned arbitrator, who has rendered an award, came to be appointed under the International Chamber of Commerce Rules and Regulations.

19. Before the learned arbitrator, the petitioner filed a statement of claim, inter alia, praying for a sum of USD 41,332.94 with interest @21% p.a. or at such other rate as the learned arbitrator would deem appropriate and for costs.

20. The respondent filed their reply and counter-claim. In the said reply, the respondent raised a plea of jurisdiction of the learned arbitrator to adjudicate upon the claim of the petitioner for USD 41,332.94 on the ground that the said part of the claim was related to the period after 31st August 2008. The respondent also made a counter-claim against the petitioner for the sum of Sri Lankan Rupees Rs.5,224,588.97 (equivalent to USD 47,496.26) towards alleged financial losses caused to the respondent by the petitioner.

21. The learned arbitrator framed four issues including the issue whether the claim of the petitioner would fall within the ambit of arbitration clause. The petitioner had also made an application before the learned arbitrator to adduce the additional affidavit of Mr. Sukrit Ghose after closure of hearing.

22. On 4th May 2012, the learned arbitrator made an award holding that the learned arbitrator had no jurisdiction to hear the claim of the petitioner for the sum of USD 37,505.60 claimed in the invoices listed in Annexure B of the request for arbitration dated 20th July 2010. The learned arbitrator allowed the claim of the petitioner for USD 3,827.34 with simple interest @ 9% p.a. from 14th October 2009 i.e. from the date of demand for payment till the date of the award and simple interest @18% p.a. from the date of the award till the date of payment. The learned arbitrator also held that he had no jurisdiction to hear the counter-claim of the respondent for the sum of Sri Lankan Rupees 5,224,588.97. The learned arbitrator directed both the parties to bear their own costs and expenses of the said arbitration. The respondent did not challenge any part of the award dated 4th May 2012. The petitioner, however, has challenged the said award dated 4th May 2012 in so far as the claim of the petitioner in respect of USD 41332.96 is concerned which was rejected by the learned arbitrator on the ground of jurisdiction in this petition.

23. Mr. Rao, learned senior counsel for the petitioner invited my attention to various clauses of the agreement dated 1st April 2007 and the correspondence exchanged between the parties including three emails all dated 4th September 2008 and also to various portions of the oral evidence led by both the parties to the impugned award rendered by the learned arbitrator. It is submitted by the learned senior counsel for the petitioner that the learned arbitrator has come to an erroneous conclusion that the agreement dated 1st April 2007 came to an end on 31st August 2008 though the parties by exchanging correspondence by emails all dated 4th September 2008 and by their conduct had ex facie extended agreement dated 1st April 2007 on the same terms and conditions.

24. Learned senior counsel for the petitioner submits that by virtue of exchange of the said three emails all dated 4th September 2008 and by virtue of subsequent conduct of the petitioner to supply its products and acceptance of the products unconditionally by the respondent in the month of September 2008, and thereafter, the effective date of the termination of the agreement dated 1st April 2007 was extended. He submits that though the learned arbitrator did not give any finding that the existence and the contents of the said three emails all

dated 4th September 2008 were not proved by the petitioner and on the contrary though has placed reliance on the said three emails has rendered a perverse finding that even if there was an oral agreement, such oral agreement was outside the terms of the agreement dated 1st April 2007 which was contrary to law.

25. Learned senior counsel submits that the learned arbitrator has totally overlooked and decided contrary to Section 3 of the Arbitration and Conciliation Act, 1996 which provided that unless otherwise agreed by the parties, any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address. He submits that the respondent had not only extended the date of termination of the agreement dated 1st April 2007 but extended the said agreement and had also replied to the emails sent by the petitioner. Learned senior counsel submits that the petitioner had proved the existence and the contents of the said three emails exchanged between the parties by examining two witnesses.

26. Learned senior counsel submits that under clause 6.1 of the agreement, the said agreement dated 1st April 2007 could be extended by the parties in writing on the same terms and conditions unless otherwise mutually agreed upon. He submits that the parties had agreed to extend the said agreement by exchanging emails which were in writing, however, not for a period of one year but for a shorter period. The learned arbitrator has overlooked clause 6.1 of the agreement and has decided contrary thereto. It was not the case of the petitioner that there was any oral agreement only between the parties for extension of the agreement dated 1st April 2007. He submits that the decision arrived at in the meeting held on 27th August 2008 was recorded in the emails which were proved by the petitioner before the learned arbitrator. The said agreement dated 1st April 2007 was thus extended in all respects including the arbitration agreement.

27. Learned senior counsel also placed reliance on Section 7(4) (b) of the Arbitration and Conciliation Act, 1996 and submits that the arbitration agreement even if it is recorded by exchange of letters sent by emails, it would amount to an arbitration agreement within the meaning of Section 7 of the said Arbitration Act.

28. Mr. Rao, learned senior counsel for the petitioner submits that the impugned award is also contrary to Sections 65A and 65B of the Indian Evidence Act, 1872 and would submit that any information contained in an electronic record such as email shall be admissible in any proceedings, without further proof or production of the original as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible. He submits that though the petitioner had proved the existence and the contents of all the three emails dated 4th September 2008 of which cognizance was taken by the learned arbitrator in the impugned award for different purposes, the learned arbitrator

rendered a perverse finding that there did not exist arbitration agreement beyond 31st August 2008 and that he had no jurisdiction to entertain those claims pertaining to subsequent period.

29. In support of the this submission learned senior counsel placed reliance on the judgment of the Supreme Court in the case of Bharat Petroleum Corporation Ltd. Vs. The Great Eastern Shipping Co. Ltd., AIR 2008 SC 357 : (2007) 4 ARBLR 55 : (2008) 2 CLT 175 : (2007) 12 JT 76 : (2007) 12 SCALE 247 : (2008) 1 SCC 503 : (2007) 11 SCR 117 : (2007) AIRSCW 6945 : (2007) 7 Supreme 628 and would submit that the terms of the contract between the parties can be proved not only by their words but also by their conduct. He submits that since both the parties have not only by exchanging the emails but by their conduct have extended the provision of the agreement dated 1st April 2007 including the arbitration agreement, the dispute between the parties for the transactions from 4th September 2008 onwards could also be referred to arbitration under the said arbitration agreement. Reliance is placed on paragraphs 18 to 25 of the said judgment which read thus : -

"18. Before we proceed to examine the rival stands, we may note, at the outset, that neither the Arbitral Tribunal nor the High Court have gone into the question whether the claim made by the respondent would otherwise fall within the ambit of the arbitration clause in the Charter Party or not. What is in dispute is whether the arbitration agreement between the parties had got extinguished after 31st August, 1998, i.e. the date of expiry of the extended period of the Charter Party. Therefore, we refrain from expressing any opinion on the scope and ambit of the arbitration clause though, prime facie, it appears to be quite widely worded.

19. It is, no doubt, true that the general rule is that an offer is not accepted by mere silence on the part of the offeree, yet it does not mean that an acceptance always has to be given in so many words. Under certain circumstances, offerees silence, coupled with his conduct, which takes the form of a positive act, may constitute an acceptance an agreement sub silentio. Therefore, the terms of a contract between the parties can be proved not only by their words but also by their conduct.

20. In our view, the principle of sub silentio is clearly attracted in the present case. As noted above, after the extended period of Charter Party dated 6th May, 1997 had come to an end on 31st August, 1998 and the bids received pursuant to fresh invitation were pending finalization, vide their letter dated 12th October, 1998, the respondent had informed the appellant that they were agreeable to apply new rates for use of the vessel from 1st July, 1998 provided all the nine vessels are used. However, on 31st October, 1998, the appellant faxed IOCs message informing them of the extension of the existing coastal tanker fleet for the month of October, 1998 at reduced rates, viz. 80% of the Charter Party rates prevailing till 30th August, 1998. On receipt of the said letter, the respondent vide their letter dated 5th November, 1998, protested against the revision of the rates for the vessel not being considered under the new bid and stated in

unequivocal terms that it was not possible for them to accept the proposal of the Oil Co-ordination Committee, communicated to them vide letter dated 12th October, 1998. Yet again while responding to appellants fax dated 31st December, 1998, whereby the respondent was required to sign a provisional charter party by 4th January, 1999, vide their letter dated 4th January, 1999, the respondent, pointed out to the appellant that usual practice is that pending finalization of the new Charter, the existing terms and conditions of the Charter Party continue to apply and, therefore, they were willing to sign the agreement as contemplated by the appellant based on the existing terms and conditions. It was suggested that an agreement may be signed between them for the period from 1st September, 1998 until the matter was finally decided by the appellant under the tender, on the existing terms and conditions with the charter hire being provisionally paid on ad hoc basis at 90% of the rate which was prevailing under the existing Charter Party. As noted hereinabove, there was no response by the appellant to respondents letter dated 4th January, 1999 though it appears that vide their letter of even date, the appellant did suggest to the respondent that as a token of formal agreement the said letter may be jointly signed by the charterers and the vessel owners. Admittedly, no such agreement was signed between the parties. Indubitably, there was no further exchange of correspondence between the parties during the year. Nevertheless, the appellant continued to use the vessel on hire with them under the time charter dated 6th May, 1997. The conduct of the parties, as evidenced in the said correspondence and, in particular appellants silence on respondents letters dated 5th November, 1998 and 4th January, 1999, coupled with the fact that they continued to use the vessel, manifestly goes to show that except for the charter rate, there was no other dispute between the parties. They accepted the stand of the respondent sub silentio and thus, continued to bind themselves by other terms and conditions contained in the Charter Party dated 6th May, 1997, which obviously included the arbitration clause.

21. We may examine the issue from another angle, based on respondents stand that charter party dated 6th May, 1997 continues to be in vogue till the chartered vessel is re-delivered. In this context, it would be appropriate to refer to Clauses 4 and 23 of the Charter Party dated 6th May, 1997. These are in the following terms:

4. Delivery and Redelivery

4.1 The vessel shall continue to be on charter to charterers in direct continuation from 2348 hrs. 22.09.1996 to 30.06.1998. The vessel shall be re-delivered by charterers to owners on dropping last outward pilot at any port on west coast of India at charterers option. Charterers to give owners 15 days notice to probable port of re-delivery.

4.2 Charterers to load last three cargoes clean and re-deliver the vessel in clean condition.

23. Final Voyage Should the vessel be on her voyage towards the port of redelivery at the time of payment of hire is due, payment of hire shall be made for such length of time as Owners and Charterers may agree upon as being estimated time necessary to complete the voyage, less any disbursements made or expected to be made or expenses incurred or expected to be incurred by Charterers for owners account and less the estimated amount of bunker fuel remaining at the termination of the voyage and when the vessel is redelivered any overpayment shall be refunded by the owners or underpayment paid by Charterers.

Notwithstanding the provisions of clause 4 hereof should the vessel be upon voyage at the expiry of the period of this charter, Charterers shall have the use of vessel at the same rate and conditions for such extended time as may be necessary for the completion of the round voyage on which she is engaged and her return to a port of redelivery as provided by the Charter.

22. On a conjoint reading of the said clauses, it is plain that the appellant was under an obligation to re-deliver the vessel as per the procedure contemplated in the afore-noted clauses. Indisputably, the vessel in question had not been re-delivered at least during the relevant period and the appellant continued to use the vessel beyond 31st August, 1998. Having failed to re-deliver the vessel in terms of Clause 4.1 of the Charter Party, the appellant cannot plead that the Charter Party had been fully worked out. It is clear from the pleadings and issue No. 2, framed by the Arbitral Tribunal, that it was respondents consistent stand that since the hired vessel had not been re-delivered at the end of the time charter party, the vessel would be governed by the terms and conditions in the Charter Party dated 6th May, 1997. However, the Arbitral Tribunal answered the said issue against the respondent. It appears to us that even the question in regard to the effect and consequences of non-delivery of the vessel in terms of the Clause 4.1 and 23 would by itself be a dispute arising under the said Charter Party. With respect, the learned Arbitral Tribunal overlooked this aspect of the matter.

23. We are, therefore, of the opinion that though performance of the Charter Party agreement dated 6th May, 1997 may have come to an end on 31st August, 1998 but it was still in existence for some purposes, viz. the effect of vessels non re-delivery as per the prescribed mechanism and its continued use beyond the stipulated time and, thus, the arbitration clause in the said Charter Party operated in respect of these and other allied purposes. Therefore, the factual scenario in the instant case leads to an inescapable conclusion that notwithstanding the expiry of the period fixed in the time charter party dated 6th May, 1997, the said charter party did not get extinguished, inter alia, for the purpose of determination of the disputes arising thereunder and the arbitration clause contained therein could be invoked by the respondent.

24. In view of the foregoing discussion, we do not find any infirmity in the view taken by the High Court that Charter Party dated 6th May, 1997 had not come to

an end by efflux of time and it got extended by the conduct of the parties, warranting interference.

25. Having come to the conclusion that an arbitration agreement existed between the parties, the question which remains to be considered is whether the disputes between the parties should be referred to the same Arbitral Tribunal which had come to the conclusion that in the absence of any arbitration agreement it did not have jurisdiction to entertain and try the claims and counter claims. We feel that it would be proper and expedient to constitute a fresh Arbitral Tribunal. Accordingly, we constitute an Arbitral Tribunal consisting of Justice M. Jagannadha Rao (Presiding Arbitrator), Justice D.P. Wadhwa and Justice S.N. Variava, former Judges of this Court to adjudicate upon the claim/ counter claim by the parties, subject to their consent and such terms and conditions as they may deem fit and proper. It goes without saying that the learned Tribunal shall deal with the matter uninfluenced by any observations in this order on the respective stands of the parties."

30. Learned senior counsel also invited my attention to various portions of the oral evidence of Mr. Sukrit Ghose and Mr. Tanmay Mahajan, the witnesses examined by the petitioner. It is submitted that there was no question put to the witnesses examined by the petitioner that the transactions after 4th September 2008 were carried out on different terms and not on the terms and conditions recorded in the said agreement dated 1st April 2007. He submits that learned arbitrator has not recorded any positive finding that the emails sent by the petitioner were not received by the respondent or were not exchanged between the parties. The petitioner had not even pleaded the oral agreement as erroneously held by the learned arbitrator which shows non-application of mind on the part of the learned arbitrator.

31. Learned senior counsel submits that the learned arbitrator failed to deal with the core issue as to whether the distributor's agreement dated 1st April 2007 was extended by the agreement in writing reflected in those three emails dated 4th September 2008. He submits that in paragraph 13.10 of the impugned award, the learned arbitrator has referred to those three emails exchanged between the parties, however still holds that there was an oral agreement which was not proved. He submits that whether there was any oral agreement or not between the parties was not even the issue raised before the learned arbitrator and/or sent by the learned arbitrator. The learned arbitrator was bound to consider the conduct of the parties post termination of the agreement. The respondent had received bill of lading issued by the petitioner and had received the delivery of the goods during the period between 20th September 2008 to 25th October 2008.

32. Learned senior counsel submits that all supplies effected by the petitioner post 31st August 2008 were also subject matter of reconciliation statement prepared by the parties which were duly signed/initialed by them. The respondent had admitted the reconciliation statement before the learned

arbitrator. The learned arbitrator, however, totally overlooked this crucial and material piece of evidence in the impugned award by holding that the transactions subsequent to 31st August 2008 were not covered by the arbitration agreement. He submits that the respondent had never denied the factum of receipt of bill of lading issued by the petitioner and that the delivery was effected based on such bill of lading. If according to the respondent, it was not concerned with the said transactions at all post 31st August 2008, the respondent ought to have raised an objection against the petitioner sending those goods in the name of the respondent along with the documents. He submits that the learned arbitrator, however, has rendered a perverse finding of fact by overlooking crucial and material part of the evidence of the respondent. The respondent had alleged for the first time in their letter dated 10th August 2009 that the agreement dated 1st April 2007 between the parties was not extended.

33. Mr. Talsania, learned counsel for the respondent, on the other hand, supported the findings rendered by the learned arbitrator and would submit that this Court while exercising power under Section 34 of the Arbitration Act exercises supervisory jurisdiction and not appellate jurisdiction. He submits that even alleged emails relied upon by the petitioner would not extend the agreement dated 1st April 2007. Under clause 6.1 of the agreement, the said agreement could be extended by the parties in writing only for a period of one year, and not for shorter period. He submits that the respondent had already terminated the agreement dated 1st April 2007 by its letter dated 6th April 2008 making it effective from 31st August 2008. He submits that merely because the respondent had made the termination effective by giving a larger notice period, it would not make the termination invalid.

34. Learned counsel for the respondent invited my attention to the notice dated 14th October 2009 which was addressed by the petitioner through their advocate to the respondent and would submit that even in the said notice, it was the case of the petitioner that the said agreement dated 1st April 2007 expired on 31st March 2009 by efflux of time. He submits that it was not the case of the petitioner that the said agreement dated 1st April 2007 was extended after receipt of the termination notice from the respondent by exchanging three emails between the parties. He submits that the stand of the petitioner that the said agreement dated 1st April 2007 was extended by email was inconsistent with their own case in their notice dated 14th October 2009.

35. In so far as the transactions carried out after 4th September 2008 is concerned, it is submitted by the learned counsel that the respondent had agreed to accommodate the petitioner in view of the past business relations between the parties and since the petitioner had agreed to appoint a new distributor/partner for sale of their goods in the territory of Sri Lanka. He submits that the respondent had only collected the bill of lading and other documents since the same were issued in the name of the respondent under the Sri Lankan Law. The respondent was bound to receive such documents standing in their name and to

make payment under those documents to the vendor and/or the principal. The respondent had accordingly handed over those documents to M/s. Jayes Investment (Pvt) Ltd. which was a new distributor appointed by the petitioner which had taken delivery of such goods, had made payment in respect of such goods to the respondent and the respondent in turn had made such payment to the petitioner.

36. Learned counsel submits that merely because the respondent had accommodated the petitioner due to those reasons, it would not amount to withdrawal of the letter of termination for extension of the agreement dated 1st April 2007 including the arbitration agreement. He submits that the learned arbitrator has rightly rendered a finding of fact that substantial part of the agreement made by the petitioner has not been covered by the arbitration agreement. Learned senior counsel for the respondent submits that since some of the goods delivered by the petitioner were found defective by the said M/s. Jayes Investment (Pvt) Ltd., the said party did not release the full consideration to the respondent and thus the respondent in turn could not release the entire payment to the petitioner. The petitioner had thus no locus to make any claim against the respondent in respect of those transactions.

37. Learned counsel for the respondent submits that Mr. Nikhil Sawant who had alleged to have attended meeting with the Managing Director of the respondent on 29th August 2008 on behalf of the petitioner was not even present in Sri Lanka on 29th August 2008. He submits that the allegation of the petitioner that any such meeting was held on 29th August 2008 in Sri Lanka in which such alleged oral agreement came to be arrived at between the parties for extension of agreement itself was a false and incorrect allegation. He submits that it was thus clear that all the three emails alleged to have been relied upon by the petitioner were also fabricated.

38. In so far as the email ID from which two emails were alleged to have been sent by the respondent to the petitioner is concerned, he submits that the respondent had not authorized Ms. Rashmi, the Sales Coordinator of the respondent to send or receive any email on behalf of the Managing Director. He submits that when the petitioner realized that the allegation of the petitioner that there was a meeting held on 29th August 2008 could not be proved by the petitioner, the petitioner applied for permission to lead additional evidence of Mr. Sukrit Ghose after closure of the hearing before the learned arbitrator. The learned arbitrator was thus justified in rejecting the said application made by the petitioner for leading further evidence in the matter at the belated stage.

39. In so far as the reconciliation statement relied upon by the petitioner is concerned, learned counsel for the respondent submits that the said statement would not prove any extension of agreement between the parties and thus the learned arbitrator rightly did not consider the said reconciliation statement relevant.

40. Learned counsel for the respondent placed reliance on the judgment of the Supreme Court in the case of Ravindra Kumar Gupta and Company Vs. Union of India (UOI), AIR 2010 SC 972 : (2009) 14 JT 591 : (2009) 14 SCALE 303 : (2010) 1 SCC 409 : (2009) 1 SCR 142 : (2009) 10 UJ 5090 and in particular paragraph 8 thereof, judgment of this Court in the case of Ropa Plastics Private Ltd. Vs. IPN Packaging Private Ltd., (2013) 4 ABR 1071 : (2014) 2 ALLMR 309 : (2013) 3 ARBLR 313 : (2013) 4 BomCR 497 : (2014) 3 MhLj 150 and in particular paragraphs 16 and 21 and the unreported judgment delivered by this Court on 21st January 2014 in the case of M/s. Bhavani Cotex Vs. M/s. C.A. Galiakotwala and Co. Pvt. Ltd. passed in Arbitration Petition No. 314 of 2013 and in particular paragraphs 13 and 14 thereof in support of the submission that the scope of Section 34 of the Arbitration Act is very limited, the Court cannot re-appreciate the evidence considered by the arbitral tribunal and cannot interfere with the finding of fact rendered by the arbitral tribunal unless the same is perverse. Paragraph 8 of the said judgment in the case of Ravindra Kumar Gupta and Company Vs. Union of India (supra) reads thus :-

"11. We are of the considered opinion that the High Court committed a serious error in re-appreciating the evidence led by the parties before the arbitrator. This evidence was duly scrutinized and evaluated by the arbitrator. With regard to claim No. 5, the arbitrator has given elaborate reasons. Therefore, finding recorded by the arbitrator cannot said to be either perverse or based on no evidence. A firm finding has been recorded that under claim No. 5 there was default and delay on the part of Union of India with respect to:

- (i) The payment of RARs final bill.
- (ii) Delay in appointing agency for ATT.
- (iii) Delay in giving decision.
- (iv) Increase in height of Tent plinth (given late).

This conclusion has been erroneously substituted by the High Court with its own opinion on appreciation of the evidence.

Such a course was not permissible to the High Court while examining objections to the award under Section 30 of the Arbitration Act, 1940."

41. Mr. Rao, learned senior counsel for the petitioner in the rejoinder submits that the learned arbitrator rejected the application made by the petitioner for leading additional evidence without rendering any reasons and ought to have allowed the said evidence which was proposed to be led for the purpose of clarifying that there was a typing error in the emails sent by the petitioner about the date of the meeting held at Sri Lanka between the representatives of the petitioner and the Managing Director of the respondent. He submits that in any event, even if the arbitrator would have proceeded on the premise that there was no such meeting held on 29th August 2008 as referred in the said emails and also in the pleadings filed by the petitioner, the fact remains that the discussions

held between the parties were recorded in the emails exchanged between the parties which were proved by the petitioner before the learned arbitrator.

42. Learned senior counsel submits that once the petitioner had proved the existence and the contents of the said three emails which recorded extension of the agreement dated 1st April 2007 which was including the arbitration agreement, the claim of the petitioner could not have been rejected by the learned arbitrator overlooking the agreement arrived at between the parties by exchanging the emails on such frivolous grounds. He submits that the respondent had not denied that during the period between 20th September 2008 and 25th October 2008, the petitioner had sent 22 consignments along with the documents which were all received by the respondent. The respondent had never raised any protest against the petitioner for sending any such consignment and the documents in the name of the respondent.

43. Learned senior counsel submits that the respondent had acted upon the extended agreement and thus could not be allowed to raise a plea that there was no agreement between the parties post 31st August 2008 and/or that there existed no arbitration agreement. The parties had finalized the account in the meeting held on 5th February 2009 by preparing reconciliation statement which was duly signed/ initialed by the parties. The three figures mentioned in the said reconciliation statement would clearly indicate that the same was pertaining to different periods including the extended periods. Learned senior counsel submits that the respondent did not examine Ms. Rashmi who was admittedly working with the respondent and held responsible post. He submits that the respondent never referred to the alleged transactions between the respondent and M/s. Jayes Investment (Pvt) Ltd. in any of the correspondence exchanged between the parties. Learned senior counsel distinguished the judgments relied upon by the learned counsel for the respondent on the ground that in this case, the petitioner does not seek before this Court re-appreciation of the evidence but since the findings rendered by the learned arbitrator are *ex facie* perverse and disclosed patent illegality, this Court has ample powers to set aside such award.

REASONS AND CONCLUSIONS:-

44. It is not in dispute that the parties had entered into an agreement on 1st April 2007 which was to be operated for a period of two years ending 31st March 2009 on various terms and conditions recorded therein. The said agreement, however, was terminated by the respondent by their notice dated 6th April 2008, however, made effective from 1st September 2008. It was the case of the petitioner that on 27th August 2008, there was a meeting held between Mr. Sukrit Ghose, the then Sales and Marketing Manager of the petitioner, Mr. Nikhil Sawant, Director Healthcare and Hospitality of the petitioner and Mr. Gnana Samaratunga, Managing Director of the respondent in Sri Lanka. According to the petitioner, the respondent in the said meeting had agreed that the respondent would continue as an agent and/or distributor of the products of the petitioner at least until 20th September 2008. According to the petitioner, all

such discussions which were held in the said meeting were recorded in the three emails all dated 4th September 2008 exchanged between the parties.

45. The question that arose before the learned arbitrator was whether by these three emails exchanged between the parties, the agreement dated 1st April 2007 was extended including the arbitration clause. The respondent had denied the said three emails all dated 4th September 2008. The respondent also disputed the authority of Ms.Rashmi from whose email ID the two emails out of three emails were alleged to have been sent by the respondent. The respondent had also made a counter-claim against the petitioner before the learned arbitrator.

46. It was not the case of the petitioner that there was any oral agreement entered into between the parties. It was the case of the petitioner that what had transpired in the said meeting dated 27th August 2008 between the parties which meeting was held prior to termination of the agreement dated 1st April 2007 coming into effect from 1st September 2008, the parties had recorded such agreement by the said emails. It was also the case of the petitioner that either the said termination letter thus did not come into effect at all or in any event, the date of termination stood postponed in view of extension of the agreement by exchange of three emails.

47. In the light of these rival submissions made before the learned arbitrator by both the parties, I will now deal with the impugned award and rival submissions on this issue.

48. A perusal of the impugned award indicates that the learned arbitrator had framed four issues for determination, in addition to the issue as to whether there was a valid termination of the agreement. The learned arbitrator had also framed an issue as to whether the claimant's claim falls within the ambit of the arbitration clause.

49. In so far as the issue of validity of termination of the agreement is concerned, it is held by the learned arbitrator that the respondent had complied with the requirements in Section 6.3 of the agreement to give 90 days' prior written notice to effectively terminate the agreement and thus the said termination by the respondent was valid and the agreement was terminated with effect from 1st September 2008. It is also held by the learned arbitrator that the oral agreement did not have the effect of reviving the agreement and extending the same to September 2008 and beyond.

50. However, in paragraph 13.9 of the impugned award, the learned arbitrator held that even if there was an oral agreement as alleged by the claimant, such an oral agreement was outside the terms of the agreement dated 1st April 2007. The learned arbitrator placed reliance on Section 6.1 of the agreement and held that his view is fortified by the wording used by the parties to refer to the oral agreement as nowhere in Exhibits ID-2 and ID-3 (emails) the parties did state that the agreement had been extended to September 2008 and beyond. The learned arbitrator accordingly took a view that the claim of the petitioner save for

the sum of USD 3,827.34 was not within the ambit of the arbitration clause and he had no jurisdiction to decide the claim of the petitioner save for the sum of USD 3,827.34.

51. A perusal of the award clearly indicates that the learned arbitrator though did not render any finding that the said three emails all dated 4th September 2008 exchanged between the parties were fabricated or did not exist and on the contrary referred to the said emails in paragraph 13.10 of the agreement, the learned arbitrator held that even if there was an oral agreement as alleged by the claimant, such an oral agreement was outside the terms of the agreement dated 1st April 2007. In my view the award shows ex facie contradictions and patent illegality on the face of the award. Once the learned arbitrator had not rejected those three emails all dated 4th September 2008 and had referred to the said emails in the impugned award for rejecting the claim of the petitioner, the learned arbitrator could not have taken a view that even if there was an oral agreement, such agreement was outside the terms of the agreement dated 1st April 2007. Since the agreement was arrived at by exchange of emails, in my view, there could not have been any oral agreement between the parties. In this case, discussions arrived at between the parties in the meeting held on 27th August 2008 were recorded by exchange of emails. A perusal of Section 6.1 of the agreement also makes it clear that the parties in writing could extend the said agreement dated 1st April 2007 for another one year on the same terms and conditions unless and until mutually agreed upon. In this case, the parties agreed that the said agreement dated 1st April 2007 would be continued till 20th September 2008 and even beyond. In my view, the said three emails clearly extended the agreement dated 1st April 2007 prior to the letter of termination having come into effect.

52. I am not inclined to accept the submission of the learned counsel for the respondent that even if those three emails were exchanged, the same were not in accordance with Section 6.1 of the agreement on the ground that the extension if at all could only be for one year and not for smaller period. A plain reading of Section 6.1 clearly indicates that the parties could mutually agree upon the extension even for a period of less than one year.

53. In my view, the finding of the learned arbitrator that in view of the respondent having given 90 days" prior written notice as per clause 6.3 of the agreement, the agreement is validly terminated with effect from 1st September 2008 is totally perverse and discloses patent illegality. In my view, since the parties had already agreed to extend the period of the agreement dated 1st April 2007, the said letter of termination did not come into effect and was given a go-bye.

54. It is not in dispute that post 31st August 2008, 22 consignments were sent by the petitioner in the name of the respondent which were accepted by the respondent. It was only the case of the respondent that the respondent had, at the request of the petitioner, accepted those documents and had forwarded the

same to M/s. Jayes Investment (Pvt) Ltd. who took delivery of those goods and had made payment to the respondent and in turn the respondent had made payment to the petitioner. It was the case of the respondent before the learned arbitrator that since some of the goods delivered by the petitioner were found defective by M/s. Jayes Investment (Pvt) Ltd., the said M/s. Jayes Investment (Pvt) Ltd. who was a distributor appointed by the petitioner did not make payment of the entire amount under some of the invoices and thus the respondent could not make balance payment to the petitioner. The case of the respondent was that since the bill of lading were issued in the name of the respondent under Sri Lankan Law and that the respondent was bound to accept those documents and the respondent only could make payment under those documents.

55. A perusal of the record makes it clear that the respondent never made any such allegations in any of the correspondence exchanged between the parties. Be that as it may, since the respondent admitted that the consignments were sent by the petitioner and bill of lading were issued in the name of the respondent, the respondent had to accept those documents, it is clear that both the parties had acted upon all such transactions having taken place after 31st August 2008. The respondent did not examine M/s. Jayes Investment (Pvt) Ltd. in support of their case before the learned arbitrator. The respondent also did not examine Ms. Rashmi from whose email ID, the said two emails were sent to the petitioner. Since the respondent had accepted the documents issued by the petitioner post 31st August 2008 and had acted upon such transactions, it is clear that the agreement dated 1st April 2007 was duly extended by the parties as recorded in the said emails. I am thus not inclined to accept the submission of the learned counsel for the respondent that any of such emails were fabricated or were of no consequence.

56. A perusal of the email dated 4th September 2008 which was sent by the respondent to the petitioner at 10.39 a.m. read with other emails clearly indicates that the respondent had agreed to distribute the chemicals and act as a distributor of the petitioner for one more month ending 20th September 2008. I am not inclined to accept the submission made by the learned counsel for the respondent that the respondent accepted those bill of lading and other documents only because the same were in the name of the respondent under Sri Lankan laws and to accommodate the petitioner in view of the long business relations between them. The respondent even did not make any attempt to prove before the learned arbitrator that the respondent had any point of time opposed the petitioner sending 22 consignments in the name of the respondent and had issued large number of documents in the name of the respondent though according to the respondent, the respondent was not at all concerned with such transactions in any manner whatsoever. It is also the matter of record that the learned arbitrator did not render any such finding that the respondent had opposed and protested against the petitioner sending large number of documents and goods in the name of the respondent at any point of time.

57. Under Section 7(4)(b) of Arbitration Act, an exchange of letters, telex, telegrams or other means of communication which provide a record of the arbitration agreement also amount to an arbitration agreement in writing. In my view, since the parties had recorded the agreement by way of exchange of emails, all the terms and conditions of the said agreement dated 1st April 2007 including the arbitration agreement stood extended. The said three emails thus satisfied the ingredients of Section 7(4)(b) of the Arbitration Act for the purpose of constituting of an arbitration agreement.

58. A perusal of the impugned award indicates that the learned arbitrator has construed part of the claim i.e. USD 3,827.34 with interest thereon within his jurisdiction and has held that the balance claim was not within the ambit of the arbitration clause. In my view, once the agreement dated 1st April 2007 stood extended in toto, the arbitration agreement recorded therein also stood extended. Any dispute between the parties thus for the transactions post 31st August 2008 could be adjudicated upon only in the arbitration proceedings under the arbitration agreement arrived at between the parties under the said agreement dated 1st April 2007.

59. Supreme Court in the case of Bharat Petroleum Corporation Ltd. (supra) has considered a situation where the parties had not entered into any fresh agreement for extension of charter party in writing, however, by their conduct, the party continued to use the vessel on hire under the earlier time charter. After considering those facts, the Supreme Court held that the petitioner had accepted the stand of the respondent sub silentio and thus, continued to bind themselves by other terms and conditions contained in the Charter Party, which obviously included the arbitration clause. Supreme Court held that though performance of the Charter Party Agreement may have come to an end, but it was still in existence for some purposes, i.e. the effect of vessels for non re-delivery as per the prescribed mechanism and its continuous use beyond the stipulated time and thus, the arbitration clause in the said Charter Party operated in respect of these and other allied purposes. The Supreme Court held that the said charter party did not get extinguished, inter alia, for the purpose of determination of the disputes arising thereunder and the arbitration clause contained therein could be invoked by the respondent therein. In my view, in this case also, the parties have not only exchanged the emails thereby the respondent agreed to act as distributor of the petitioner for further period and acted upon those transactions. In my view, the judgment of the Supreme Court would squarely apply to the facts of this case. I am respectfully bound by the said judgment.

60. Supreme Court in the case of Trimex International FZE Ltd. Dubai Vs. Vedanta Aluminium Ltd., India, (2010) 1 JT 474 : (2010) 1 SCALE 574 : (2010) 3 SCC 1 : (2010) 2 SCR 820 : (2010) 2 UJ 655 : (2010) AIRSCW 909 : (2010) 1 Supreme 302 has held that the existence of an arbitration agreement can be inferred from a document signed by the parties, or an exchange of letters, telex, telegrams or other means of telecommunication, which provide a record of the

agreement. It is held that in the absence of signed agreement between the parties, it would be possible to infer from various documents duly approved and signed by the parties in the form of exchange of e-mails, letter, telex, telegrams and other means of tele-communication. Paragraphs 55 to 60 of the said judgment which are relevant for the purpose of deciding this matter read thus :-

"55. This Court in *Dresser Rand S.A* (supra) rejected the contention that the acceptance of a modification to the General Conditions would not constitute the conclusion of the contract itself. On the other hand, in the present case, after the suggested modifications had crystallized over several emails. Further in para 32 in *Dresser Rand S.A* (supra) this Court held that "parties agreeing upon the terms subject to which a contract will be governed, when made, is not the same as entering into the contract itself" whereas in the case on hand, the moment the commercial offer was accepted by the respondent, the contract came into existence. Though in para 44 of the *Dresser Rand S.A* (supra), it is recorded that neither the Letter of Intent nor the General Conditions contained any arbitration agreement, in the case on hand, the arbitration agreement is found in clause 6 of the Commercial Offer. In view of the same, reliance placed by the respondent on *Dresser Rand S.A* (supra) is wholly misplaced and cannot be applied to the case on hand where the parties have arrived at a concluded contract.

56. Mr. Venugopal pointed out that the Charter Party Agreements are governed as per international shipping practices. The normal procedure is that the brokers from both sides first agree on the vital terms over phone/telex (these terms relate to Freight, Type of Ship, Lay Can (Period of shipping), Demurrage Rate, Cranes, etc.) At this stage, no agreement is formally signed but the terms are binding on both the parties, as per the Contract of Affreightment (CoA), which in the present case was entered into on the next day, i.e. 17.10.2007. Certain minor modifications could go on from either side on mutual agreement but in the absence of any further modification, the originally agreed terms of the CoA are binding on both the parties. Till the agreement is actually signed by both the parties, the term draft is used. This does not mean that the terms are not binding as between the Petitioner and the Ship-owners. Further, according to him, the existence of the Charter Party, various international shipping practices etc. which are to be pleaded in detail before the Arbitral Tribunal once it is constituted and not before this Court since this means extensive quoting of shipping laws and decided cases which cannot be done in the present arbitration petition. The above submissions cannot be under estimated.

57. Both in the counter affidavit as well as at the time of arguments Mr. C.A. Sundaram, learned senior counsel for the respondent has pointed out various differences between the version of the respondent and the petitioner. However, a close scrutiny of the same shows that there were only minor differences that would not affect the intention of the parties. It is essential that the intention of the parties be considered in order to conclude whether parties were ad idem as far as adopting arbitration as a method of dispute resolution was concerned. In

those circumstances, the stand of the respondent that in the absence of signed contract, the arbitration clause cannot be relied upon is liable to be rejected.

58 *Smita Conductors Ltd. Vs. Euro Alloys Ltd.*, (2001) 3 ARBLR 275 : (2001) 7 JT 358 : (2001) 6 SCALE 128 : (2001) 7 SCC 328 : (2002) 1 UJ 13 was a case where a contract containing an arbitration clause was between the parties but no agreement was signed between the parties. The Bombay High Court held that the arbitration clause in the agreement was binding. Finally, this Court upholding the judgment of the Bombay High Court held that the arbitration clause in the agreement that was exchanged between the parties was binding.

59. In *P.V.K. Distillery Ltd. Vs. Mahendra Ram*, AIR 2009 SC 2205 : (2009) 121 FLR 381 : (2009) 3 JT 169 : (2009) 4 SCALE 453 : (2009) 5 SCC 705 : (2009) 2 SCC(L&S) 134 : (2009) 3 SCR 896 : (2009) 3 SLR 324 : (2009) 2 UJ 1013, this Court held that from the provisions made under Section 7 of the Arbitration and Conciliation Act, 1996 that the existence of an arbitration agreement can be inferred from a document signed by the parties, or an exchange of letters, telex, telegrams or other means of telecommunication, which provide a record of the agreement.

60. It is clear that in the absence of signed agreement between the parties, it would be possible to infer from various documents duly approved and signed by the parties in the form of exchange of e-mails, letter, telex, telegrams and other means of tele-communication.

In my view, the judgment of the Supreme Court in the case of *Trimex International FZE Limited, Dubai* (supra) also would squarely apply to the facts of this case. I am respectfully bound by the said judgment.

61. The petitioner had proved the existence and contents of the said three emails before the learned arbitrator. The arbitration agreement between the parties thus existed and the entire claims made by the petitioner were arbitrable. The finding of the learned arbitrator that the claims made by the petitioner were not within the ambit of the arbitration clause is thus patently illegal. The learned arbitrator, in my view, has refused to exercise his jurisdiction though he had jurisdiction under the said agreement and the impugned award is contrary to the terms of the agreement and is in conflict with the public policy.

62. A perusal of the record indicates that even reconciliation statement prepared by the parties which was duly signed/initialed by them had taken cognizance of and had dealt with the transactions having taken place post 31st August 2008. The said reconciliation statement was in three parts which also would indicate that the said agreement dated 1st April 2007 was duly extended. The learned arbitrator has totally overlooked the said crucial documents in the impugned award and has rendered a perverse finding.

63. In so far as the submission of the learned counsel for the respondent that merely because the respondent had issued a notice for termination by giving

larger notice period, the termination would not become invalid is concerned, since the parties had agreed for extension of the contract before the termination coming into effect, the said notice of termination for a period of more than three months would be of no significance. In my view, there is thus no substance in the submission of the learned counsel for the respondent.

64. In so far as the submission of the learned counsel for the respondent that the case of the petitioner that the agreement dated 1st April 2007 expired on 31st August 2008 by efflux of time and the said stand was inconsistent with the plea raised in the arbitral proceedings is concerned, a perusal of the record indicates that the respondent did not raise any such plea before the learned arbitrator. Be that as it may, the respondent did not accept the said stand of the petitioner that the agreement stood expired on 31st August 2008 by efflux of time. In any event, the learned arbitrator has to take into consideration the entire pleadings and documents including the oral evidence, if any, and not a statement made in the notice in isolation.

65. In so far as the submission of the learned counsel for the respondent that merely because the respondent had accommodated the petitioner for the reasons disclosed before the learned arbitrator and it would not amount to withdrawal of the letter of termination is concerned, the parties in this case have given a go-bye to the said letter of termination by extending the period of agreement dated 1st April 2007 and thereafter, have taken steps for implementation of the said agreement. There is thus no substance in this submission of the learned counsel for the respondent.

66. The respondent has placed heavy reliance on the date of meeting mentioned in one of the emails and in the pleadings that the said Mr. Nikhil Sawant who had alleged to have attended the meeting with the Managing Director of the respondent on 29th August 2008 on behalf of the petitioner was not even present in Sri Lanka on 29th August 2008. A perusal of the record indicates that the learned arbitrator has not rendered any finding that the emails exchanged between the parties were fabricated. In my view, in the emails, the parties have recorded their agreement for extension of the contract and thus even if there was any typing error about the date of the meeting, the agreement dated 1st April 2007 stood extended by virtue of such emails irrespective of the incorrect date mentioned therein. In my view, the respondent wanted to take undue advantage of the said typing error in one of the emails.

67. The petitioner had made an application to correct the said error before the learned arbitrator belatedly, which was vehemently opposed by the respondent and in view of such opposition, the learned arbitrator refused to permit the petitioner to correct the said inadvertent error. Be that as it may, the fact remains that the agreement dated 1st April 2007 stood extended by exchange of emails which were not found as unproved by the learned arbitrator in the impugned award. Once the existence and contents of the said three emails were proved by the petitioner and the same were also relied upon by the learned

arbitrator in the impugned award, such inadvertent error about the date of meeting was of no significance. The respondent did not challenge any part of the findings of the learned arbitrator by filing a separate petition.

68. In so far as the submission of the learned counsel for the respondent that Ms.Rashmi from whose email ID the two emails out of three emails dated 4th September 2008 were alleged to have been sent was only a Sales Coordinator of the respondent and was not authorised to send or receive any such email is concerned, the respondent did not examine the said Ms.Rashmi to prove such allegation. In any event, the learned arbitrator not having given any such positive finding, the respondent cannot be allowed to make such submission before this Court about fabrication of the said three emails for the first time.

69. In so far as the submission of the learned counsel for the respondent that reconciliation statement would not prove any extension of agreement or that the said reconciliation statement was irrelevant for that purpose is concerned, the conduct of the parties post 31st August 2008 would clearly indicate that both the parties had accepted that the said agreement dated 1st April 2007 was extended and was acted upon. There is thus no merit in this submission of the learned counsel for the respondent.

70. In so far as the judgment of the Supreme Court in the case of Ravindra Kumar Gupta and Company (supra), the judgments of this Court in the cases of Ropa Plastics Pvt. Ltd. (supra) and M/s. Bhavani Cotex (supra) relied upon by the learned counsel for the respondent in support of their submission that this Court cannot re-appreciate the evidence and cannot interfere with the finding of the fact unless the same is perverse is concerned, there is no dispute about the preposition of law laid down by the Supreme Court and this Court in the aforesaid three judgments. In this case, the petitioner, however, has not urged that this Court shall re-appreciate the evidence considered by the learned arbitrator but has demonstrated before this Court that the finding rendered by the learned arbitrator while refusing to exercise jurisdiction on the ground that the claims made by the petitioner were not within the ambit of the arbitration agreement is patently illegal and perverse. The judgments relied upon by the learned counsel for the respondent thus do not assist the case of the respondent.

71. In my view, since the findings rendered by the learned arbitrator are perverse and show patent illegality, this Court has ample power under Section 34 of the Arbitration Act to interfere with such finding of fact. In my view, there is thus no merit in this submission of the learned counsel for the respondent.

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

The impugned award dated 4th May 2012 in so far as the issue of jurisdiction rendered in paragraph 17.1 (i) of the impugned award holding that the arbitral tribunal has no jurisdiction to hear the claimant's claim for the sum of USD 37,505.60 claimed in the invoices listed in Annexure B of the request for Arbitration dated 20th July 2010 is set aside. Rest of the award is upheld. No

order as to costs.

At the request of the learned counsel appearing for the respondent, operation of the order passed today is stayed for a period of two weeks from today.