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

COMMERCIAL ARBITRATION PETITION NO.349 OF 2020

Aakash Packaging …Petitioner

Versus

Arenel (Private) Limited …Respondent

Mr. Mustafa Doctor, Senior Advocate a/w Ms. Spenta Havewala, Mr. Aashdin Chivalwala, Ms. Aditi Prabhu and Mr. Pratik Dave i/b Desai Desai Carrimjee and Mulla for Petitioner.

Mr. Shrinivas Deshmukh a/w Mr. Sunilkumar Neelambaran, Mr. Jeyhaan Carnac and Mr. Aaron Kevin Fernandes i/b Mulla & Mulla & Craigie Blunt & Caroe for Respondent.

CORAM : R.I. CHAGLA, J.

RESERVED ON : 6th FEBRUARY, 2025.

PRONOUNCED ON : 8th SEPTEMBER, 2025.

JUDGMENT :

1. By the present Commercial Arbitration Petition, the Petitioner has challenged Award dated 2nd December, 2019 ("impugned Award") under Section 34 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act"). The Petitioner was the Respondent in the arbitration and the Respondent was the Claimant.

2. The facts briefly stated are as under:

(i) On 18th October 2012, the Petitioner raised an Invoice No. 35 on the Respondent for a sum of USD 78,101.85 for supply of 18,555.450 Kg of goods.

(ii) The Petitioner raised Proforma Invoice (No. AP/A004/2012-23) on 20th December 2012, for a sum of USD 87,000.50 on the Respondent for additional supplies of goods. It is pertinent to note that the goods under the Proforma Invoice were never dispatched by the Petitioner to the Respondent.

(iii) On 21st January, 2013, material sent under Invoice No.35 was received by the Respondent in Zimbabwe ("**First Shipment**").

(iv) The Petitioner raised Invoice No.53 on 1st February 2013 for the sum of USD 70,996.88 for supply of 17307.762 kgs quantities of goods.

(v) The Respondent's Managing Director (Mr. Joshua Lepar) over a Skype on 11th February, 2013 informed

the Petitioner's authorized representative (Miss Sheetal Bhatia) that goods supplied under the First Shipment were defective.

(vi) The e-mail correspondence between the parties was exchanged on 13th March 2013 in relation to the above, in the course of which the Respondent's representative invited the Petitioner's representative to Zimbabwe to check the material supplied by the Petitioner. At that relevant time, the Petitioner's Manager had to get her passport revalidated and therefore, could not travel.

(vii) On 25th March 2013, the Petitioner obtained a Report from an international laboratory's India Branch, which is known as SGS India in respect of the said goods at the request of the Respondent. This test was done at the request made by the Respondent vide e-mail dated 13th March 2013. It is pertinent to note that the Report concluded that the samples had passed the test and that the samples (retained by the Petitioner and tested by SGS India) complied with the permissible safety limits as

stated in the German code. Further, it complied with the requirements of the relevant EU regulations on materials and articles intended to come in contact with food; and on a sensorial examination on both, odour and taste, the test results were lower than the maximum permissible limits.

(viii) The Respondent itself obtained a report from the same laboratory viz. SGS India in respect of the said goods. It is pertinent to note that the material used for this report was sent directly by the Respondent from Zimbabwe to the laboratory in India. Further, the impugned Award wrongly records at Paragraph 9/Page 49 of the Petition that this report was obtained by the Petitioner. The report concluded that both samples had passed the test and that both samples submitted by the Respondent complied with the permissible safety limits, as stated in the German code; both the samples complied with the requirements of the relevant EU regulations on materials and articles intended to come in contact with the food; and on a sensorial examination on both, odour

and taste, the test results were lower than the maximum permissible limits.

(ix) The goods sent under Invoice No.53 were received by the Respondent in Zimbabwe on 6th June, 2013 ("**Second Shipment**").

(x) The Respondent obtained a report from the SGS Germany on 18th June, 2013 wherein it is stated that the packaging had a strong smell of plastic. It is pertinent to note that the Respondent sent to SGS Germany the entire packet of biscuits containing the biscuits, the plastic tray in which the biscuits were placed as also the outer packaging. It is also pertinent to note that it was only the outer packaging and not the plastic tray that was supplied by the Petitioner.

(xi) The Respondent sent a Legal Notice dated 11th July, 2013 to the Petitioner claiming a refund of a sum of USD 165,102.10, claiming that the goods supplied to them were defective, and a further sum of USD 13045.70 towards costs and taxes towards shipment and landing of

material in Zimbabwe.

(xii) The Petitioner responded on 25th July, 2013 to the said legal notice denying the claim made by the Respondent and seeking payment of the balance amount of USD 27,996 that remained unpaid in respect of Invoice No. 53 and an amount of USD 41,079 in respect of Proforma Invoice No. AP/A004/2012-13.

(xiii) Pursuant to an application filed under Section 11 of the Arbitration Act, the learned Arbitrator was appointed vide Order dated 10th November, 2014.

(xiv) The pleadings before the learned Arbitrator were completed between 16th February, 2015 and 27th June, 2018.

(xv) The Respondent made a claim for refund of USD 165,102.10 paid; reimbursement of storage charges, import duties etc. of USD, 62,204.50; costs of USD 44,281.90 incurred in filing Section 11 petition and interest on claims till filing SOC at 12% p.a. of USD 44,281.90.

(xvi) The Petitioner made a counter claim *inter alia* seeking dismissal of the Respondent's claim; payment of USD 27,996 towards Invoice No.53 and USD 41,079 towards Proforma Invoice No.AP/A004/2012-13.

(xvii) During the course of the arbitration, between 23rd December, 2015 and 27th June, 2018, both the parties led the evidence of two witnesses each. The Petitioner led the evidence of Sheetal Bhatia (RW-1) and Bharat Tulsiani (RW-2), whereas the Respondent led the evidence of Joshua Lepar (CW-1) and Pierra Pienaar (CW-2). CW-2 was an expert witness and not a witness of fact.

(xviii) The Respondent's Witness, Joshua Lepar (Managing Director of the Respondent) produced a report dated 4th March, 2016 of CW-2 alongwith his own Additional Affidavit. As per this report, tests were performed by National Measurement Institute Laboratory, Melbourne and Gunn Laboratories in Victoria, Australia. CW2 as an expert concluded that the source of the odour was 2, 6 Dicholoroanisole. It is the

Petitioner's case that Dicholoroanisole does not generally originate in plastic but is really absorbed by plastic should it come into contact with plastic. Further, it is possible that the stain may have come from shipping/transportation of the film, rather than its manufacture.

(xix) On 25th July, 2019 written submissions were filed by both the Petitioner and Respondent.

(xx) The learned Arbitrator passed the impugned award on 2nd December 2019 allowing the claims of the Respondent (except for the Respondent's claim for reimbursement of expenses) on the ground that the disputed consignments were defective and sub-standard and that the Petitioner, by supplying defective and sub-standard packaging material, had breached the contract between the parties. Furthermore, the learned Arbitrator rejected the counter claim of the Petitioner. The learned Arbitrator directed the Petitioner to pay the awarded amounts to the Respondent in accordance with provisions of the FEMA,1999.

3. Mr. Mustafa Doctor learned Senior Counsel appearing for the Petitioner has submitted that although both parties produced test reports from the laboratories with regard to the Respondent's claim that the packaging material supplied by the Petitioner was emitting an odour and was therefore, defective, all reports produced by the parties were rejected by the learned Arbitrator. He has submitted that the learned Arbitrator whilst coming to the conclusion that, "There is no documentary evidence worth considering which would decide this core issue", has made a number of errors, which go to the very root of the matter. He has submitted that the learned Arbitrator mistakenly held that a report which was obtained by the Respondent from SGS India, which is *ex-facie* in the favour of the Petitioner, was obtained by the Petitioner and has wrongly rejected the same, though it was an admitted document and binding on the Respondent who had obtained the same. He has submitted that these errors completely vitiate the impugned Award and will shock the conscience of the Court, apart from the fact that the same results in grave injustice to the Petitioner.

4. Mr. Doctor has submitted that the impugned Award contains a number of findings that are ex-facie contrary to the facts

and the record and are also plainly contrary to the rules of natural justice. He has submitted that the learned Arbitrator has wrongfully rejected the SGS India Reports. Further, the learned Arbitrator has rejected the SGS Germany Report. This is by holding that the Reports have no evidentiary value since the authors of the two SGS India Reports have not been examined. He has submitted that this finding in so far as it relates to the SGS India Reports is grossly erroneous and contrary to the admitted facts and the record.

5. Mr. Doctor has submitted that the SGS India Report dated 25th March 2013 was obtained from SGS India by the Petitioner at Respondent's instance and the SGS India Report dated 8th May 2013 was obtained from SGS India by the Respondent.

6. Mr. Doctor has submitted that both the SGS India Reports are in favour of the Petitioner, as in that they do not indicate that there was any odour emanating from the packaging material. He has submitted that during the admission and denial of the documents, the Petitioner admitted both SGS India Reports, both with respect to their existence, as also their contents, but denied the contents of the SGS Germany Report. He has submitted that in these

circumstances, since the SGS India Reports were admitted, the learned Arbitrator proceeded to mark the two SGS India Reports as Exhibit C-16 and C-17 respectively without any qualification. Hence, the requirement of leading the evidence of the author of the report did not arise.

7. Mr. Doctor has submitted that since the SGS Germany Report had been disputed by the Petitioner, the same was marked as Exhibit C-18 with the qualification that the contents of the same would not be binding on the Petitioner.

8. Mr. Doctor has submitted that the SGS India Report dated 8th May 2013, having been obtained by the Respondent was binding upon the Respondent. He has submitted that without prejudice to the above, if the learned Arbitrator had any doubts about the evidentiary value of the SGS India Reports, he ought to have marked the same with the same qualification as was made while marking the SGS Germany Report, so as to put the parties to notice that they needed to prove the contents of the said Reports by leading the evidence of the authors thereof.

9. Mr. Doctor has submitted that had the learned Arbitrator

taken into account, the SGS India Reports, both of which were admitted documents, there would have been no reason for him to have arrived at the finding to the effect that there was no documentary evidence worth considering which would help in deciding the core issue.

10. Mr. Doctor has submitted that without prejudice to the above, even the report of SGS Germany, which was obtained by the Respondent and produced in evidence by them contains a remark to the effect that the odour in question was from the inner plastic tray or a contamination of the food during the production process, neither of which factors can be attributed to the Petitioner.

11. Mr. Doctor has submitted that notwithstanding, the absence of direct evidence in respect of the "core issue" viz. whether the packaging material emitted odour, the learned Arbitrator has relied on hearsay evidence of the Respondent's expert witness in this regard. He has submitted that this is inspite of the expert witness having been called in on or about February 2016 and who admittedly had no personal knowledge of the facts when the goods were delivered in January 2013. The deposition of expert witness (CW-2)

which the learned Arbitrator relied on is *ex-facie* based upon hearsay evidence. CW-2 has deposed to what he was told by the staff members of the Respondent in the year 2016 about the smell in the packaging material, when it received the same in the year 2013. No evidence was led of any staff member to corroborate this evidence, and nonetheless, the learned Arbitrator seems to have on the basis of this evidence which was *ex-facie* in the nature of hearsay, come to the conclusion that there was a smell in the packaging supplied by the Petitioner.

12. Mr. Doctor has submitted that the learned Arbitrator has reversed the burden of proof by holding that "Had any question been put in cross examination to CW1 about the condition of consignment and presence or absence of smell in January 2013 or even to CW-2 with regard to above quoted portion of his report, it would have thrown some light about the presence or absence of smell in January 2013" (Petition/Page 66/Para 50/Award).

13. Mr. Doctor has submitted that there was no requirement to cross examine either CW-1 or CW-2 in this regard. CW-1's Affidavit did not contain any positive assertion in this regard, as observed by

the learned Arbitrator himself and CW2's evidence in his regard was apparently in the nature of hearsay evidence.

14. Mr. Doctor has submitted that the learned Arbitrator has first rejected the most objective and contemporaneous evidence produced by the parties viz. the Laboratory Reports of SGS India, which tested the samples in question virtually concurrently to them having been supplied. The learned Arbitrator then proceeded to rely upon the evidence of an expert witness (CW-2) produced by the Respondent with respect to matters of fact which were evidently not within his knowledge and thereafter he faulted the Petitioner for not cross-examining CW-2 on hearsay evidence in this regard.

15. Mr. Doctor has submitted that it is pertinent to note that CW-2's Report was rejected by the learned Arbitrator by holding that the Report had no evidentiary value since it was not based on his personal knowledge. However, the learned Arbitrator then surprisingly relies on the Report made by CW-2, on the specious ground that the same is annexed to the Affidavit of Evidence of CW-1.

16. Mr. Doctor has submitted that the learned Arbitrator has dispensed with the most elementary rules of evidence, natural justice

and fair play in the manner that he has conducted the arbitral proceedings. He has submitted that the learned Arbitrator has acted contrary to the provisions of Section 18 of the Arbitration Act in that he has rejected admitted evidence that favoured the Petitioner and has relied on the hearsay evidence which favoured the Respondent. He has submitted that the conduct of the learned Arbitrator can only be termed as arbitrary, contrary to justice and such that would shock the conscience of the Court. He has submitted that the impugned Award is in conflict with public policy of India [Section 34(2)(b)(ii) of the Arbitration Act]. He has submitted that the impugned Award is also in conflict with the most basic notions of justice [explanation 1(iii) of Section 34(2)(b)(ii) of the Arbitration Act].

17. Mr. Doctor has submitted that the settled position in law in so far as a challenge to an Arbitral Award (passed in an international commercial arbitration) under Section 34 of the Arbitration Act is concerned is as follows:

(i) In ***Associate Builders Vs. Delhi Development Authority in (2015) 3 SCC 49***. The Supreme Court has held in Paragraph 36 that an Award can be said to be

against justice only when it shocks the conscience of the Court;

(ii) ***In Ssangyong Engineering & Construction Company Limited Vs. National Highway Authority of India, 2019 SCC online SC 677***, the Supreme Court has in Paragraph 36 upheld the observations in ***Associate Builders (supra)*** by holding that it is only such awards that shock the conscience of the Court, that can be set aside on this ground (i.e. on the grounds of being in conflict with justice)

(iii) In ***Dyna Technology Pvt. Ltd. Vs. Crompton Greaves Limited (2019) 20 SCC 1***, the Supreme Court has held in Paragraph 35 that if the reasoning in an Award is improper, it reveals a flaw in the decision-making process. If the challenge to an Award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Act.

(iv) In ***Delhi Airport Metro Express Private Limited Vs.***

Delhi Metro Rail Corporation Limited, (2022) 1 SCC 131, the Supreme Court has held in Paragraph 31 that if an Award shocks the conscience of the Court, it can be set aside as being in conflict with the most basic notions of justice.

18. Mr. Doctor has submitted that the impugned Award in that it (i) rejects admitted documents, which have previously been marked in evidence without any qualification on the ground that the same has not been proved; (ii) disregards the fact that the only witness of fact (CW-1) produced by the Respondent has not adverted in his Affidavit of Evidence to what the learned Arbitrator refers to as the "core issue" viz. whether the goods supplied by the Petitioner to the Respondent emitted any odour; (iii) relies upon hearsay evidence of CW-2 who was brought in only in his capacity as an expert witness; (iv) relies upon the report made by CW-2, after having rejected the same, on the specious ground that the same was annexed to the Affidavit of Evidence of CW-1; and (v) reserves the burden of proof; is contrary to the most basic notions of justice and would qualify within such matters, both, when viewed singularly and more particularly, when viewed collectively, as shocking the conscience of

the Court.

19. Mr. Doctor has submitted that the impugned Award ought to be set aside under Section 34(2)(b)(ii) as being in conflict with the public policy of India.

20. Mr. Shrinivas Deshmukh, learned Counsel appearing for the Respondent has submitted that the two grounds of challenge to the Award passed made by the Petitioner are non-consideration of admitted documents and consideration of hearsay evidence. The challenge to the Award on these two grounds is not maintainable as both the grounds fall under perversity which is covered by ground of patent illegality. He has placed reliance upon the Judgment of the Supreme Court in ***Ssangyong Engineering & Construction Co. Ltd. (supra)*** at Paragraph 41. He has submitted that the ground of patent illegality is not available to challenge the present Award, which is a domestic Award passed in international, commercial arbitration. He has placed reliance upon Section 34 (2A) of 1996 of the Arbitration Act in this context.

21. Mr. Deshmukh has submitted that without prejudice to the above submission, these challenges are not maintainable in law

and they are devoid of any merit.

22. Mr. Deshmukh has submitted that for the first time, before this Court, the Petitioner has come up with a plea that the two SGS India Reports were admitted documents and ought to have been considered by the learned Arbitrator. He submitted that this is not the case of the Petitioner before the Tribunal as can be seen from the written submissions of the Petitioner before the Tribunal more particularly Paragraph 9.34 at Page 714 of the compilation.

23. Mr. Deshmukh has submitted that the Petitioner cannot raise a plea which was not raised before the learned Arbitrator, for the first time before this Court in a Section 34 Petition. He has placed reliance upon the Judgment of this Court in ***Dhiren Lalit Shah Vs. Sandeep & Company***[1].

24. Mr. Deshmukh has submitted that the contents of the SGS India Reports had never been admitted by the Respondent. The Respondent had disputed the findings of the Report. This is evident from the Statement of Claim at Paragraph 4(q) read with 4(o) and (p). He has submitted that the Respondent has relied upon the Report

1 *(2015) SCC Online Bom 5792*

from SGS Germany and sought to lead SGS Germany in evidence of CW-1 in Paragraphs 22 and 23.

25. Mr. Deshmukh has submitted that in the minutes of meeting dated 14th October 2015, the learned Arbitrator has recorded the admission of the Reports by the Petitioner. This is not an admission of the Respondent.

26. Mr. Deshmukh has submitted that the Petitioner, being aware that these reports are not admitted by the Respondent, has put its case to CW-1 that SGS India Report dated 25th March, 2013 was accepted by the Respondent. He has referred to Question 151 and 173 at Pages 464 & 468 of the CoD (Compilation of documents) in this context. He has submitted that had the Report been admitted by the Respondent, the Petitioner would not have put this case to the witness.

27. Mr. Deshmukh has submitted that it is settled law that mere marking of a document in evidence does not prove the contents of the document. In this context, he has placed reliance upon the Judgment of the Supreme Court in ***LIC Vs. Ram Pal Singh Bisen***[2], at

2 *(2010) 4 SCC 491*

Paragraphs 25 and 31 and Judgment of this Court in ***Hiren P. Doshi Vs. State of Maharashtra***[3] at Paragraph 12.

28. Mr. Deshmukh has submitted that it is well settled that evidence of the contents of a document is hearsay evidence, unless the writer thereof is examined. In this context he has placed reliance upon the Judgment of his Court in ***Om Prakash Berlia Vs. Unit Trust of India***[4] at Paragraph 10.

29. Mr. Deshmukh has submitted that the learned Arbitrator has rightly held in Paragraph 41 of the impugned Award that the two Reports of SGS India, though marked in evidence have no evidentiary value, since the author of the Reports have also not been examined.

30. Mr. Deshmukh has submitted that the Petitioner has contended that the learned Arbitrator has considered the Report of CW2 about what was told to him by the staff members of the Respondent in the year 2016, about the smell in the packaging material when it was received in the year 2013. He has submitted that the learned Arbitrator has considered what CW-2 personally smelled when he visited the warehouse in 2016. He has relied upon

3 *2016(1) Mh.L.J. 571*
4 *AIR 1983 Bom 1*

Paragraph 43 to 47 of the impugned Award in this context.

31. Mr. Deshmukh has also placed reliance upon Paragraphs 48 to 50 of the impugned Award, where the learned Arbitrator observed, while considering the submission of the Petitioner that there is contradiction in the evidence of CW-1 and CW-2 regarding when the smell in the consignment was noticed by the claimant for the first time.

32. Mr. Deshmukh has submitted that the learned Arbitrator has not considered any hearsay evidence to come to a finding that the consignment had odour. He has submitted that the Petitioner is seeking re-appreciation of evidence by this Court, which is not permissible as per proviso to Section 34(2A) of the Arbitration Act.

33. Mr. Deshmukh has accordingly submitted that the above Commercial Arbitration be dismissed with costs.

34. Having considered the submissions, I am of the view that the learned Arbitrator has by placing reliance upon the Report of Respondent's Expert Witness (CW-2), relied upon hearsay evidence as the deposition of CW-2 is *ex-facie* based upon hearsay evidence. CW-2

has deposed to what he was told by staff members of the Respondent in the year 2016 about the smell in the packaging material when they received the same in the year 2013. Further, no evidence was led of any of the staff members to corroborate this evidence. Nonetheless, the learned Arbitrator seems to have on the basis of the evidence of CW2, come to the conclusion that there was a smell in the packaging supplied by the Petitioner.

35. Further, it is pertinent to note that the learned Arbitrator had rejected the SGS Reports although the SGS India Report dated 8th May 2013 was obtained from SGS India by the Respondent itself. In Paragraph 9 of the impugned Award the learned Arbitrator has incorrectly found that both the SGS India Reports i.e. one dated 25th March 2013 obtained by the Petitioner at the Respondent's instance and the other dated 8th May, 2013 obtained from SGS India by the Respondent, were obtained by the Petitioner. The SGS India Reports were in favor of the Petitioner, as they did not indicate that there was any odour emanating from the packaging material.

36. The learned Arbitrator has himself found in Paragraph 9 of the impugned Award that both the SGS India Reports were

produced by the Respondent in its compilation of documents. In fact, during the admission and denial of documents, the Petitioner had admitted both the SGS India Reports as to their existence as well as contents. The SGS India Reports having been admitted were marked by the learned Arbitrator as Exhibit-C16 and C17 without any qualification. The SGS Germany Report which was produced by the Respondent had been denied by the Petitioner with regard to its contents and accordingly the learned Arbitrator marked the SGS Germany Report as Exhibit-C18 with the qualification that the contents of the same would not be binding on the Petitioner. The learned Arbitrator has, in spite of the SGS India Report having been obtained by the Respondent and the existence and contents having been admitted by the Petitioner and thus binding upon the parties has held that "There is no documentary evidence worth considering which would decide this core issue." The core issue being whether the packaging material emitted odour.

37. The learned Arbitrator ought to have considered that the laboratory reports of SGS India were the most objective and contemporaneous evidence produced by both the parties as they tested the samples virtually concurrently to them having been

supplied. The SGS India Report dated 25th March, 2013 had been prepared pursuant to the test done at the request made by the Respondent vide e-mail dated 13th March, 2013 and which concluded that the samples had passed the test as it had complied with the permissible safety limits. Further, the SGS India Report dated 8th May, 2013 obtained by the Respondent had also concluded that the samples had passed the test as both the samples submitted by the Respondent complied with the permissible safety limits. On sensorial examination of both samples, odour and taste, the test results were lower than the maximum permissible limits. Thus, the learned Arbitrator by holding that the SGS India Reports have no evidentiary value, has arrived at a grossly erroneous finding which is contrary to the admitted facts and record and which shocks the conscience of the Court.

38. Insofar as the SGS Germany Report obtained by the Respondent, the finding arrived at was that “smell of plastic, significant deviation” and on taste “strongly perceptible off-flavour, significant deviation objectionable”. The report noted that “possibly benzaldehyde from the inner white plastic tray (odour) or a contamination of the food during the production process (off-flavour

appears to be stronger than the smell)". This finding is in relation to the inner white plastic tray which had not been supplied by the Petitioner but was procured directly by the Respondent. Further, the contamination of the food as noted in the Report was during the production process and also the responsibility of the Respondent. Thus, even the report of SGS Germany obtained by the Respondent and produced in evidence by them containing the aforementioned findings cannot be attributed to the Petitioner.

39. The submission on behalf of the Petitioner that the learned Arbitrator has reversed the burden of proof by holding that "had any question been put in cross examination to CW-1 about the condition of consignment and presence of or absence of smell in January 2013 or even to CW-2 with regard to above quoted portion of his report, it would have thrown some light about the presence or absence of smell in January 2013". (Petition's/Page 66/Para 50/Award) merits acceptance. The learned Arbitrator ought to have appreciated that there was no requirement to cross examine either CW-1 or CW-2 in view of CW-1's Affidavit not containing any positive assertion and CW-2's evidence being in the nature of hearsay evidence.

40. The learned Arbitrator by rejecting the most objective and contemporaneous evidence produced by the parties i.e. the SGS India Reports which had tested the samples concurrently to them having been supplied, and relying on the expert evidence (CW-2) produced by the Respondent which was evidently not within the knowledge of CW-2 and thereafter faulting the Petitioner for not cross-examining the CW-2 on hearsay evidence, shocks the conscience of this Court.

41. I do not find merit in the contention on behalf of the Respondent that the Petitioner has raised the plea that the two SGS India Reports were admitted documents and for the first time in the Section 34 Petition i.e. not raised before the learned Arbitrator, and hence cannot be considered. It is apparent from the finding of the learned Arbitrator that the Petitioner had relied upon the two SGS India Reports which according to the Petitioner was of best evidentiary value in view of SGS India having tested the samples in question concurrently to them having been supplied. Thus, the evidentiary value of the SGS India Reports was clearly raised by the Petitioner. The fact of these Reports being admitted documents is in support of the plea of the Petitioner raised before the Arbitrator viz.

that the SGS India Reports ought to have been taken into consideration by the learned Arbitrator as being of best evidentiary value. Thus, the Judgments relied upon by the Respondent in support of their contention that the Petitioner cannot raise a plea, not raised before the Arbitrator, for the first time before this Court in Section 34 Petition, is inapplicable in the circumstances of this case.

42. The Respondent has also contended that it is settled law that mere marking of document in evidence does not prove the contents of the document. The Respondent has relied upon Judgments of the Supreme Court and this Court in support of his contention. The Petitioner as aforementioned has not merely relied upon the marking of the SGS India Reports in evidence as proving their contents, but has gone on to establish that the SGS India Reports were of best evidentiary value considering that SGS India had tested the samples in question, concurrently to them having been supplied. The Reports of SGS India having found that the samples had passed the test, was required to be taken into consideration by the learned Arbitrator. Instead, the learned Arbitrator has relied upon, the Expert's Evidence which in my considered view is hearsay evidence i.e. evidence of CW-2 of what he had been told by the staff

members of the Respondent in the year 2016 about the smell in the packaging material, when they received the same in the year 2013.

43. Further, the contention of the Respondent that evidence of the contents of the document, to be hearsay evidence is to be accepted only if the writer thereof is examined is inapplicable in the present case. It is evident from the face of the Report of CW-2 that CW-2 has referred to the information given by the staff members of the Respondent in the year 2016 about the smell in the packaging material when they received the same in 2013. Thus, compared to the two Reports of SGS India which tested the samples in question concurrently to them having been supplied, the Report of CW-2 had no evidentiary value as it is ex-facie in nature of hearsay evidence. Thus, the learned Arbitrator by failing to consider the Reports of SGS India, and placing reliance upon the Report of the Expert (CW-2) which is based on hearsay evidence, has acted in an arbitrary manner, contrary to justice, which shocks the conscience of this Court.

44. The settled position of law as regards challenge to an Award (passed in an international commercial arbitration) under Section 34 of the Arbitration Act has been laid down by the Supreme

Court in the Judgments which have been relied upon by the Petitioner viz. ***Associate Builders (supra) ; Ssangyong Engineering & Construction Company Limited (supra); Dyna Technology Pvt. Ltd. (supra) and Delhi Airport Metro Express Private Limited (supra).*** These Judgments hold that if an award shocks the conscience of the Court, it can be set aside as being in conflict with the most basic notions of justice, as per Explanation 1(iii) to Section 34(2)(b)(ii) of the Arbitration Act, as it is in conflict with the public policy of India.

45. The contention of the Respondent that the grounds of challenge of the Petitioner on non-consideration of admitted documents and consideration of hearsay evidence are not maintainable as they fall under perversity which is covered by ground of patent illegality and not available to a challenge as the present award is a domestic award passed in international commercial arbitration, is misconceived. The grounds of challenge to the impugned Award include the impugned Award being in conflict with the public policy of India, as it is in conflict with the most basic notions of justice and shocks the conscience of the Court. This ground can certainly be raised to challenge the impugned Award which is a domestic award passed in International Commercial

Arbitration. Thus, this ground of challenge in the present Commercial Arbitration Petition under Section 34(2)(b)(ii) is maintainable.

46. The Respondent has also sought to contend that the Petitioner is seeking re-appreciation of evidence by this Court which is not permissible as per the provision to Section 34(2) of the Arbitration Act. This contention is also, in my view, misconceived. The Petitioner is not seeking a re-appreciation of evidence by this Court, but is in fact contending that the learned Arbitrator has failed to consider the evidence viz. the SGS India Reports by holding that they are of no documentary evidence worth considering, which would decide a core issue of whether packaging material emitted odour. This finding of the learned Arbitrator itself is flawed in view of the laboratory reports of SGS India which tested the samples in question virtually concurrently to them having been supplied.

47. The learned Arbitrator although observing that neither in the Statement of Claim nor in the evidence of the Respondent's only witness of fact (CW-1) has it been stated that CW-1 noticed any smell on the material date i.e. in January 2013 has nonetheless gone on to hold that "...it is not possible to conclude on the basis of this omission

that there was no smell as alleged." The learned Arbitrator has based his finding on the hearsay evidence of CW-2 who was brought in only in his capacity as an expert witness. This after first rejecting the report made by CW-2 and thereafter relying upon the same only on the specious ground that the same is annexed to the Affidavit of Evidence of CW-1. In view of these findings, the impugned Award has shocked the conscience of Court and accordingly is in conflict with public policy of India and is required to be set aside under Section 34(2)(b)(ii) of the Arbitration Act.

48. In view thereof, the Commercial Arbitration Petition is allowed by setting aside the impugned Award dated 2nd December, 2019 passed by the learned Arbitrator.

49. The Commercial Arbitration Petition No. 349 or 2020 is accordingly disposed of. There shall be no orders as to costs.

[R.I. CHAGLA, J.]

50. Upon this Judgment being pronounced, the learned Counsel appearing for the Respondent has referred to the Order

dated 7th April 2021, by which this Court had stayed the execution and implementation of the impugned Award on the condition that the Petitioner deposits in this Court, the sum of USD 165,000 (or it's Rupee equivalent) within a period of four weeks from the date of said order. He has submitted that pursuant to the said order, the Petitioner has deposited the amount.

51. The learned Counsel for the Respondent has accordingly applied for stay on the withdrawal of the deposit by the Petitioner in view of the impugned Award being set aside.

52. Having considered the application for stay, the Petitioner is permitted to withdraw the deposited amount after a period of four weeks from today.

[R.I. CHAGLA, J.]