

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ARB. A. (COMM.) 11/2017**

Reserved on: 18th January, 2018

Date of decision: 5th April, 2018

BENARA BEARING & PISTONS LTD Appellant

Through: Mr.Ramji Srinivasan, Sr.Adv.
With Mr.Jayant K Mehtra,
Mr.Ayush Agrawal, Mr.Himanshu
Gupta & Mr.Tushar Bhardwaj,
Advs.

versus

MAHLE ENGINE COMPONENTS INDIA PVT LTD

..... Respondent

Through: Mr.Arvind Nigam, Sr. Adv. with
Mr.Sudhir Sharma, Mr.Sanjeev
Kumar Sharma, Mr.Akhil Anand,
Mr.Abhishek Swaroop,
Mr.Anirudh Krishan Gandhi &
Ms.Abhilasha Vig, Mr.Mahboob
Singh Sandhu, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This appeal has been filed by the appellant under Section 37(2)(a) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the order dated 12.01.2017 passed by the Sole Arbitrator holding that there is no concluded Arbitration Agreement between the parties.

2. The main contention of the learned senior counsel for the appellant is that the Arbitrator in the Impugned Order has given “*prima facie*” findings on the non existence of the Arbitration Agreement. He submits that under Section 16 of the Act the Arbitrator is under an obligation to finally determine the issue of existence of the Arbitration Agreement and cannot refuse to proceed with the arbitration only on the basis of *prima facie* conclusion as to the non existence of the Arbitration Agreement between the parties. He submits that as the findings of the Arbitrator are stated to be “*prima facie*” in nature, the Impugned Order is liable to be set aside and parties are to be relegated to the arbitration proceedings.

3. On the other hand, the learned senior counsel for the respondent submits that though the Arbitrator has referred to his findings on the existence of the arbitration agreement as “*prima facie*” in nature, these are in fact, based on appreciation of the correspondence between the parties and is a final determination on this issue. He further submits that the Arbitrator has named such findings as ‘*prima facie*’ only because of the submissions of the appellant that the Arbitrator should examine the question of existence of Arbitration Agreement only on a *prima facie* basis as the existence of the Arbitration Agreement is interconnected with the issue of the existence and binding nature of the Distribution Agreement dated 17.03.2016. He submits that in view of the submissions of the appellant that the Arbitrator must confine his examination of the existence or otherwise of the Arbitration Agreement only on a *prima facie* basis, it cannot now be heard to complain against the same. He in this regard places reliance upon paragraph 42, 44 and 48 of the Impugned Order and these are quoted herein below:-

42. I am also mindful about considering the Claimant's alternative submission (as well as the Respondent's objections to this. Since they submit this was not part of the Request for Arbitration) that even if there was no concluded contract, whether there was nevertheless prima facie an arbitration agreement in the form of a "separate agreement" or in "an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement" within the terms of Section 7(2) and (4) of the IACA.

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44. The Respondent in its submissions did not dispute the Claimant's submission that the standard in which the existence of the arbitration agreement and/or a concluded contract should be examined at this stage should be on a prima facie basis, although neither party in their submissions elaborated on this issue.

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48. The Claimant is dissatisfied with the 26 August 2016 High Court Judgment and is appealing against it. The Claimant's position is that I have the power to hear and decide, on a fresh prima facie basis, the issue of the existence of the arbitration agreement and concluded contract, without being bound by the said Judgment, for the following reasons:

(a) (b) (c).....”

(emphasis supplied)

4. I have considered the submissions made by the counsel for the parties. It is apparent from the above mentioned paragraphs from the Impugned Order that it was the appellant's own case before the Arbitrator that the Arbitrator must decide the issue of existence of the Arbitration Agreement on a *prima facie* basis. It seems that the said submission was made by the appellant being alive to the fact that the said submission is

connected to a great deal with the issue of the existence of the Distribution Agreement between the parties as also, in the alternative, arrangement thereof. It seems that the appellant did not want the decision of the Arbitrator to finally conclude on this issue as this would have prejudiced, in fact, barred the appellant from raising such issue in a regular Civil Suit.

5. Paragraph 2.9 of the reply filed by the appellant to the respondent's application under Section 16 of the Act is also important while considering this issue and is quoted herein below:-

*“2.9 In is stated that on the basis of correspondence, exchange of mails, etc. the Claimant shall endeavor to establish that there is a valid and concluded Contract between the Parties, and **in any event the Claimant shall atleast (without leading evidence in the matter) at this stage seek to atleast establish prima facie existence of a Contract between the Parties, which in the Claimant's submissions is the only requirement at this stage.**”*

(emphasis supplied)

6. The appellant having, therefore, requested the Arbitrator to decide this issue only on a *prima facie* basis, cannot be heard to complain against the same.

7. In any case, it is not the case of the appellant that it wanted to lead any oral evidence on this issue and was denied such opportunity by the Arbitrator. In absence of the same, it was only a question of interpretation of correspondence exchanged between the parties for the arbitrator to arrive at a conclusion as to whether an Arbitration Agreement duly came into existence between the parties or not.

8. The Arbitrator in the Impugned Order has in detail, analyzed the correspondence exchanged between the parties and has concluded that in

his opinion an Arbitration Agreement between the parties did not come into existence. The question in the present appeal, therefore, would have to be whether such finding of the Arbitrator is open to any interference by this Court or not. In my opinion, merely because the Arbitrator calls this finding as a '*prima facie*' finding, would not be sufficient to set aside the Impugned Order. As noted above, it is not the case of the appellant that the appellant wanted to lead oral evidence on this issue and was denied such opportunity by the Arbitrator. Therefore, reliance of the appellant on the judgment of the Supreme Court in *Shin-etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. & Anr*, (2005) 7 SCC 234, is ill-founded.

9. As far as the main issue, which is whether there was an Arbitration Agreement in existence between the parties, it is an admitted case of the appellant that there is no duly signed Arbitration Agreement between the parties. The Arbitration Agreement relied upon by the appellant is signed only by the appellant and not by the respondent and therefore, admittedly the conditions set out in Section 7(4)(a) of the Act are not fulfilled. The learned senior counsel for the appellant, therefore, has taken me through the various correspondence exchanged between the parties to contend that from such correspondence it can be concluded that an Arbitration Agreement between the parties came into existence, though a formal agreement in this regard was not signed by the respondent. He places reliance on Section 7(4)(b) of the Act.

10. There is no dispute on the legal proposition that in view of Section 7(4)(b), even in absence of a written document signed by the parties, an Arbitration Agreement can be said to have come into existence, if from the exchange of letters, telex, telegrams or other means of

telecommunications it can be shown that the parties were *ad idem* on the Arbitration Agreement and in that event, mere fact of one party not signing the agreement, cannot absolve him from the liability under the agreement. In the present case, therefore, one would have to examine the correspondence exchanged between the parties to determine whether or not an Arbitration Agreement came into existence between the parties and the parties were *ad idem* on the issue of arbitration.

11. The appellant was appointed as an exclusive distributor for motorcycle pistons, etc. by the respondent and an agreement dated 01.01.2014 was entered into between the parties. The said agreement was amended vide agreement dated 20.03.2015.

12. On 25.08.2015 the appellant sent an email to the respondent expressing its intention to continue with the business relationship. The respondent vide its return email of the same date agreed to explore the revival of the business relationship with the appellant.

13. Vide an email dated 26.08.2015, the respondent stated that the proposed new business opportunities would be a new set-up with different working terms and conditions under a new agreement. The respondent also sent a proposal for commercial viability to the appellant.

14. The appellant being unhappy with the proposal sent by the respondent, vide its email dated 28.08.2015, requested the respondent to have a relook on the same. The respondent, vide its email dated 04.09.2015, sent a revised proposal with revised MRP structure to the appellant.

15. The appellant contends that vide its email dated 11.09.2015 it gave its unconditional acceptance to the proposal sent by the respondent as far

as the MRP structure is concerned. This email is of some relevance and is reproduced herein under:-

“As discussed, we have informed Mr. Bhatia and also asked him to request you to look at margins, etc. as per our discussions in Shanghai. I did receive some information from Mr. Bhatia on 4th September, I am yet to re work on that. But it seems from your email that your offer is non negotiable, I have to accept it the way it is coming and we do accept it the way it is coming.

Please advise next steps to conclude the matter as we also need to start with our planning for sales / purchases accordingly.”

(emphasis supplied)

16. The respondent vide its email dated 11.09.2015, while expressing its happiness on the acceptance of the terms by the appellant, suggested that the parties consult with their respective legal consultants to draft an agreement and in the meantime, the commercial relationship be resumed as it is in common interest of both the parties.

17. By another email dated 14.09.2015, the respondent *inter alia* informed the appellant that the target for the signing of the new agreement would be 1st October. The email further stated that the MRP will be applied as per the revised arrangement as communicated to the appellant on 04.09.2015.

18. By the email dated 15.09.2015, the appellant, while responding to the above email of the respondent, called upon the respondent to exchange the format of the agreement as soon as possible and also stated as under:-

“ We shall try to adjust to most of the issues as mentioned above except the ones which decrease our margins from here on.

Next meeting planned between 21st – 23rd Sep.

- *We also have an issue with currency depreciation in India which needs to be offsetted as per the currency depreciation in China. All our suppliers have done the same and we expect the same to be followed also with Mahle.*
- *We also requested to look into Piston Rings pricing and would like to know the plan to offset the same to help us increase the benefits from the proposed change. This is very important for us to retain lost profits.*
- *We also request Mahle to carry stocks at local level since the products are being billed at CST. This shall help us save on stocks carrying cost / interest cost, etc.*

We hope with all the above changes as per Mahle and as per Benara, it will be more economical to sell the products and compete in the marketplace which shall also support us in our endeavour of having some margins after deduction of costs till we are able to develop alternate means of generation of income from other businesses / product lines.”

(emphasis supplied)

19. Though the counsel for the appellant sought to contend that the email dated 11.09.2015 and 15.09.2015 amount to acceptance of all the commercial terms by the appellant, a bare reading of the above emails leads to a contrary conclusion. These emails were in the form of a counter offer being given by the appellant, which required further discussion between the parties before resulting in a concluded contract between them. This is also evident from the subsequent conduct of the parties.

20. The above discussion had resulted in a Memorandum of Understanding dated 29.09.2015. Some of the terms of this MOU are relevant for the purposes of the present appeal and are reproduced herein

below:-

“WHEREAS

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D. The parties had positive negotiations on board commercial terms and intends to enter into this MOU with the sole objective to enter into a new business model, for distribution of Engine Components products of MAHLE in aftermarket suitable to MAHLE objectives.

E. The Parties intends to enter into a legally binding Distribution Agreement effective from 01st January 2016 as soon as detailed terms and conditions are mutually agreed but not later than 01st January 2016.

NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. OBJECTIVES

As a result of positive negotiations on broad commercial terms, MAHLE and BENARA hereby enter into this MOU aiming to enter into a detailed Distribution Agreement effective from 01st January 2016, provided that all the business requirements of MAHLE are accepted and complied by BENARA.

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4. VALIDITY

This MOU shall stand valid till 31st December 2015 or the execution of the detailed Distribution Agreement between the Parties, whichever is earlier.”

21. A reading of the above MOU would clearly show that the parties were still negotiating on the commercial terms for a proper Distribution Agreement to be signed and to be effective between the parties w.e.f. 01.01.2016. This MOU was therefore, executed as an ad hoc

arrangement, valid only till 31.12.2015. Though the said MOU contains an Arbitration Agreement, admittedly the disputes raised by the appellant before the Arbitrator were not based on the said MOU. The very fact that the MOU was entered into for this limited period with the stipulation that the parties intend to enter into a legally binding Distribution Agreement effective from 01.01.2016 “as soon as detailed terms and conditions are mutually agreed” shows that the prior correspondence exchanged between the parties had still not fructified into a binding contract on all the issues.

22. The appellant placed an order of 2,38,950 units of piston assembly for the period of January, 2016 to March, 2016 vide its email dated 03.11.2015. The counsel for the appellant places reliance on this email to contend that as the order was to be supplied after the expiry of the MOU referred above, it infers that all the terms of the agreement had been mutually agreed between the parties. I am unable to agree with the same as the subsequent email dated 04.12.2015 from the appellant to the respondent and specially the email dated 06.12.2015 from the respondent to the appellant shows that the new business relationship between the parties including the billing price / cost structure for all products with MRP etc., were being discussed between the parties.

23. Relying upon the email dated 16.12.2015 from the respondent to the appellant and the draft agreement annexed thereto, the learned senior counsel for the appellant contended that as the issue of MRP had been duly settled and agreed between the parties, the draft agreement sent by the respondent to the appellant did not mention about the same. This submission cannot be accepted as vide email dated 18.12.2015, the

appellant had given its comments on the draft agreement sent by the respondent and it is not the case of the appellant that it accepted such terms unconditionally and or signed the said agreement at that stage. The subsequent correspondence also belies such submission.

24. Email dated 03.02.2016 addressed by the respondent to the appellant clearly shows that further meetings were held between the parties and their consultants on the conclusion of the 2016 business model and result thereof was sought to be encapsulated by the respondent in its email dated 03.02.2016. The appellant vide its email dated 09.02.2016 raised various issues including the issues of margin. Some of the relevant portion of the email is reproduced herein below:-

“As and when we talk – which could be anything convenient to you tomorrow in the second half of Indian time, I can call you once you have gone through the contents of email / point discussed with Mr. Franz.

- *Shanghai Visit was fruitful until we realized that the last mail exchanged with you before you closed this issue had very little left for us in margins. We agreed for the concept and are with you to help us be established for some time – till we are able to sustain our business / develop it – so that I can personally sustain with income that is being generated with this business. You had very kindly accepted our request in Shanghai but later on we realized that the margins are not what were discussed with us. We feel left out and have no choice but to plead to the authorities concerned.*
- *We are always committed to Mahle for long term. We are ready to share margins in appropriate manner and don't want that everything should be taken away by us at one go.*

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- *We are also uncomfortable with only a couple of issues in the contract proposed. Please help us in resolving the same.*
- *Piston Rings price issue – with Margins co relation is still unresolved. This shall help us to work more comfortably without any loss to Mahle.*
- *We are willing to share all details for margin that shall be earned by us in the new proposal for billing for 2016.”*

25. A reading of the above email clearly shows that the contention of the learned senior counsel for the appellant, that all commercial terms had been duly accepted and concluded between the parties as far back as 11.09.2015 or 15.09.2015, cannot be accepted. These issues were pending discussions between the parties is also evident from the appellant's own email dated 25.02.2016 as well.

26. Though the draft agreement was being discussed between the parties, it is evident from the email dated 25.02.2016 addressed by the appellant to the respondent that the issue of MRP and margin was still being discussed between the parties as on that date. Even with the email dated 11.03.2016, with which another draft of agreement was sent by the respondent to the appellant, the respondent sought a confirmation in the form of a legal opinion on the issue of MRP from the appellant.

27. The respondent vide its email dated 16.03.2016, while suggesting certain changes in the agreement, informed the appellant that its

representatives are visiting the appellant with duly printed copies of the agreement on a stamp paper for obtaining signatures of the appellant.

28. By another email dated 18.03.2016 the respondent, while seeking confirmation on the signing of the agreement from the appellant, also informed it of the legal opinion received by the respondent which suggested that the MRP was to be affixed by the respondent before invoicing the goods to the appellant. It however, proposed to adopt the MRP / selling structure as per its email dated 03.02.2016.

29. By its email dated 21.03.2016 the appellant informed the respondent that it would be sending signed copy of the agreement to the appellant for its signatures and as far as the issue of MRP is concerned, it would abide by the final confirmation given by it in September, 2015.

30. It is the submission of the appellant that upon sending of the signed copy of the agreement by the appellant, not only did the Arbitration Agreement between the parties come into existence and stood concluded but also the issue of MRP value as well as affixation thereof by the respondent stood accepted by the appellant and a contract in that regard was also concluded. On the other hand, it is the contention of the counsel for the respondent that by email dated 11.03.2016 and 14.03.2016, the revised agreement had been sent by the respondent to the appellant on an understanding that the issue of MRP as well as affixation thereof stood settled. Such settlement was that the respondent would declare and affix the MRP before sending the goods to the appellant. However, the email dated 21.03.2016 from the appellant, clearly suggested that the appellant was not agreeable to such arrangement and sought to refer to its communication of September, 2015, which in any case was a conditional

acceptance and not the one proposed by the respondent in its email dated 03.02.2016. As the parties could not reach the conclusion on the financial terms, the respondent vide its email dated 21.04.2016 terminated its business relationship with the appellant, leading to a dispute between the parties and the reference thereof to the Sole Arbitrator.

31. In the above facts, the primary issue between the parties was as to whether by signing of the agreement by the appellant an Arbitration Agreement can be said to have come into existence between the parties. The learned senior counsel for the petitioner submitted that there was an unqualified acceptance of the commercial terms as well as other terms of the Distribution Agreement between the parties and therefore, a concluded contract between the parties had come into existence. He submits that the parties had agreed to both – MRP value to be affixed and also who will affix the MRP and the issue of “margin” was a mere non issue for the agreement between the parties. In any case, the Arbitration Agreement being distinct and severable from the main agreement, the parties being *ad idem* on the same, the Arbitration Agreement came into existence. He places reliance on the judgment of this Court in ***Lets Engineering & Technology Services Pvt. Ltd. v. Manoj Das*** (2013) 198 DLT 630 and of the Supreme Court in ***Rickmers Verwaltung GmbH v. Indian Oil Corporation Ltd.***, (1999) 1 SCC 1 and ***Govind Rubber Limited v. Louis Dreyfus Commodities Asia Private Limited***, (2015) 13 SCC 477.

32. On the other hand, the learned senior counsel for the respondent submitted that the issue of MRP and its affixation was a fundamental term of the contract. The parties had been in negotiation for arriving at a

settlement of such terms and by the email dated 03.02.2016 the respondent had made it clear to the appellant that the respondent shall import parts from China, carry out custom clearance and discharge the related tax liabilities and also declare and affix MRP label on the goods. By another email dated 14.03.2016 the respondent made it clear to the appellant that it would not consider any change of this fundamental condition and that it would be able to conduct the business only in accordance with its plan. However, the appellant, while forwarding signed copy of the Distribution Agreement did not agree to the above condition and therefore, merely because the appellant signed the draft Distribution Agreement sent by the respondent to the appellant, it cannot be said that a binding Distribution Agreement or even an Arbitration Agreement came into existence between the parties. In this regard he places reliance on the judgment of this Court in *Ralli Estate Pvt. Ltd. v. NDMC* (2006) 126 DLT 703 and *UOI v. M/s Uttam Singh Duggal & co.Pvt. Ltd* AIR 1972 Del 110. He further submits that the claim before the Sole Arbitrator was based on the Distribution Agreement signed by the appellant and sent to the respondent and not on any ad hoc arrangement, therefore, the question before the Sole Arbitrator was whether the Distribution Agreement amounts to a concluded contract containing an Arbitration Agreement between the parties. The Arbitrator having considered the said issue, it was not open for this Court to interfere with the same. The learned senior counsel places reliance on the following judgments in support of his submission:-

- i) *Oberoi Constructions Pvt. Ltd. v. Worli Shivshali Co-op. Hsg. Society Ltd.* [MANU/MH/1045/2008]

- ii) *Nasir Husain Films (P) Ltd. v. Saregama India Ltd. and Another* (MANU/MH/1570/2008]
- iii) *U.P Rajkiya Nirman Nigam v. Indure Pvt. Ltd.* (1996) 2 SCC 667
- iv) *Zodiac Electricals v. Union of India*, Civil Appeal No. 1957/1984
- v) *IOCL v. Niloufer Siddiqui & others*, Civil Appeal No. 7266/2009
- vi) *Mrs. Aliakutty Paul v. State of Kerela* AIR 1995 Ker 291
- vii) *Pushpa Bai v. Dr. Williams & others* 2001 SCC Online Mad 303

33. Before I consider the above submissions made by the senior counsels for the parties, the summary of facts would not be complete without making a reference to the order dated 26.08.2016 passed by this Court in O.M.P.(I) (COMM.) 153/2016 *Benara Bearings & Pistons Ltd. v. Mahle Engine Components India Pvt. Ltd.* In the said order, this Court, discussing the correspondence exchanged between the parties, held as under:-

“39. It is clearly apparent from the above that the parties were *ad idem* as far as the terms of the Distribution Agreement are concerned but were unable to finalise the commercial terms. The clauses of the proposed Distribution Agreement had been effectively discussed and negotiated between the parties. However, other issues regarding their proposed commercial functioning continued to persist.

40. As indicated above in the Benara’s email of 25.02.2016, Benara had pointed out certain issues - 15 in number - which required to be resolved. Benara had sent an email

requesting that the issues relating to the agreement be kept separate and the other issues be dealt with separately. Again by an email of 02.03.2016, Benara had requested for fixing of a time frame for resolution of the said issues. Benara had again referred to the issues of MRP as well as its Margins in its email dated 07.03.2016. Mahle's response of 14.03.2016 to the aforesaid email is important. Mahle had unequivocally stated that they were not considering the conditions attached - which meant the MRP and Margin issues - as the business plan had been presented to Mahle's Board and the same would not be put in discussion at any level. This clearly indicated that Mahle was proceeding with the finalization of the Distribution Agreement on the basis that Benara was accepting its business plan and had unequivocally stated that Benara's issues with regard to MRP would not be entertained. It is seen that on 18.03.2016, Mahle asked for a confirmation of the signed contract and at the same time also forwarded a legal opinion with regard to fixing of the MRP before invoicing goods to Benara. Mahle further confirmed that Mahle's management had accepted the said opinion. Mahle's e-mails - particularly of 14.03.2016 and 18.03.2016 - made it clear that it was proceeding on the premise that the commercial issues with regard to the MRP and Margins between the parties stood concluded and the commercial model as indicated in the mail of 03.02.2016 would be implemented. Although Benara sent a signed agreement to Mahle alongwith its mail of 21.03.2016, it also asserted that it was standing by its stand of September, 2015 in respect of the issues related to MRP; in other words, it was not accepting Mahle's commercial terms/model. Thus the commercial model on the basis of which the Distribution Agreement was to be worked remained a subject of discord.

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42. It is difficult to accept Mr Nayar's contention that the issues relating to MRP and Margins were completely divorced from the Distribution Agreement that was being negotiated by the parties. The correspondence between the

parties clearly indicates that the parties were ad idem in respect of the terms of the Distribution Agreement, which outlined their business relationship. However, an agreement as to the commercial terms/business model on the basis of which the parties were to conduct their business - which was also simultaneously being negotiated by the parties - remained elusive. The issues with regard to margin, invoicing, fixing of MRP are fundamental to the business arrangement proposed between the parties; clearly, without the consensus in regard to those issues, the question of proceeding forward would not arise. It is in this context, that Mahle had on 14.03.2016 unequivocally stated that the other issues being raised were not being taken into consideration and the business would have to conform to the business plan already approved by its management. The said e-mail must be read in the context of Benara's previous mail requesting that the day to day management issues be resolved separately from the issues related to the Distribution Agreement. The Distribution Agreement between the parties is for distribution of Mahle's products. In absence of the parties being ad idem as to the commercial terms, the Distribution Agreement would be a non starter.

43. It is trite law that a party's signatures are not necessary for a binding contract and the same can be inferred by correspondence between the parties. An agreement can also be oral. In the present case, Mahle's email dated 18.03.2016 which called upon Benara to sign the draft Distribution Agreement is clearly a proposal within the meaning of section 2(a) of the Contract Act and its acceptance would result in a binding contract. This is also Mr Nayar's contention and, to that extent, is merited. However, Mahle's e-mail apart from calling upon Benara to sign the Draft Distribution Agreement also stated that "we propose to adopt the MRP/Selling structure per our mail dtd 3rd Feb"; there is no reason to exclude this part of the e-mail from the scope of Mahle's proposal. In other words, Mahle's proposal as communicated to Benara was to enter into the

Distribution Agreement for distribution of Mahle's products with the MRP/Selling structure as per their mail of 03.02.2016. Whilst, Benara accepted the Distribution Agreement, it did not accept the attendant commercial terms.

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*45. As stated above, signatures on an agreement may not be material in a case where the contract between the parties can be ascertained; however, where the parties reduce their understanding to writing and it is understood that parties are to sign the agreement, it is not always safe to proceed on the basis that their signatures are not necessary. In most cases, affixing signatures on an agreement are meant to signify the party's commitment to the written agreement and its refusal to sign renders the agreement inchoate. Affixing signatures on an agreement cannot be readily inferred as an empty formality. The question as to whether the parties have mutually committed to each other has also to be viewed in the context of the nature of the contract. In a case of sale and purchase of goods, a commitment to supply within a specified period at a stated price and the acceptance of such commitment by the other party – as in the case of **Trimex** (supra) - is sufficient to hold that there is a contract. But, in cases where the agreement is complex or entails defining a continual relationship/association, the number of material terms on which consensus is required for inferring a binding contract is significantly larger. In such cases, signatures on the agreement reduced in writing assume a larger significance. A party may withhold its signatures – as it appears to have happened in this case – unless it is sure the other party has also understood and agreed to perform the agreement in the same manner.*

46. In order to result in a binding contract the offer must be accepted unconditionally. Benara's e-mail of 21.03.2016, cannot be read as an unconditional acceptance of the Mahle's proposal since the proposal to adopt MRP/Selling

structure as per their e-mail of 3rd Feb, 2016 was not accepted by Benara. In this perspective the principal question as to whether there was any meeting of minds between the parties resulting in a binding contract must be answered in the negative.”

34. The above order was carried in appeal by the appellant by way of FAO (OS) (COMM) 66/2016 and was dismissed by the Division Bench of this Court vide its order dated 01.03.2017 reported in **2017 SCC OnLine DEL 7226**. In the said order the Division Bench again examined the emails exchanged between the parties and held as under:-

“15. It will be seen from the e-mail dated 18.03.2016 that Mahle was insisting that the MRP be affixed by them before invoicing the goods to the appellant and they propose to adopt the MRP/selling structure as per their earlier e-mail dated the 3rd of February. On the other hand, the e-mail of 21.03.2016, while it indicates that the appellant had signed the distribution agreement, also makes it clear that the appellant was sticking to its stand on the MRP as per its final confirmation in September, 2015. By virtue of the e-mail dated 21.03.2016, the appellant also requested Mahle to sign the distribution agreement before commencement of business for the year. It is an admitted position that Mahle never signed the distribution agreement. It is also clear that Mahle withdrew from the negotiations with regard to the distribution arrangement by virtue of its subsequent letter dated 21.04.2016. Furthermore, there was no consensus with regard to the issue of MRP. We are of the view that without the business model and the issue of MRP having been sorted out, the distribution agreement, even if it had been signed by Mahle, would be unworkable. We agree with the learned Single Judge who found that although the parties could be regarded as being ad idem insofar as the terms of the distribution agreement were concerned, they were certainly not ad idem with

regard to the commercial terms. We also entirely agree with the observation of the learned Single Judge that the commercial model on the basis of which the distribution agreement was to be worked remained a subject of discord. We also agree with the finding that the issues relating to MRP and margins were not divorced from and, in fact, were intertwined and interlaced with the distribution agreement that was being proposed by the parties. We fully endorse the following observations of the learned Single Judge on this aspect of the matter.

“42. It is difficult to accept Mr Nayar's contention that the issues relating to MRP and Margins were completely divorced from the Distribution Agreement that was being negotiated by the parties. The correspondence between the parties clearly indicates that the parties were ad idem in respect of the terms of the Distribution Agreement, which outlined their business relationship. However, an agreement as to the commercial terms/business model on the basis of which the parties were to conduct their business - which was also simultaneously being negotiated by the parties - remained elusive. The issues with regard to margin, invoicing, fixing of MRP are fundamental to the business arrangement proposed between the parties; clearly, without the consensus in regard to those issues, the question of proceeding forward would not arise. It is in this context, that Mahle had on 14.03.2016 unequivocally stated that the other issues being raised were not being taken into consideration and the business would have to conform to the business plan already approved by its management. The said e-mail must be read in the context of Benara's previous mail requesting that the day to day management issues be resolved separately from the issues related to the Distribution Agreement. The Distribution Agreement between the parties is for distribution of Mahle's products.

In absence of the parties being ad idem as to the commercial terms, the Distribution Agreement would be a non starter.”

16. We may also point out that if the e-mail dated 18.03.2016 is a proposal, then the e-mail dated 21.03.2016 could have been regarded as an acceptance of the proposal only if it had not been clarified by the appellant that they would stick to the stand of MRP as per their final confirmation in September, 2015. The e-mail dated 21.03.2016 would, therefore, not operate as an acceptance but as a counter-proposal which was never accepted by Mahle and negotiations were finally dropped by Mahless letter of 21.04.2016.

17. A point had been raised by the learned counsel for the appellant that Mahle had by its conduct indicated that the distribution agreement dated 17.03.2016 had culminated into a binding contract. However, we are in complete agreement with the observation of the learned Single Judge that the fact that Mahle supplied its products to the appellant while the distribution agreement and the commercial terms were being negotiated, did not mean that the appellant was appointed as an exclusive distributor of Mahle products or that the proposed distribution agreement dated 17.03.2016 had matured into a binding contract.”

35. The appellant challenged the above order by way of SLP (C) 9925/2017, which was dismissed by the Supreme Court vide its order dated 10.04.2017, however, clarifying as under:-

“It is however essential for us to clarify, that the factual determination arrived at by the High Court, while passing the impugned order under Section 9 of the Arbitration and Conciliation Act, 1996, shall be treated as a provisional finding, limited to the determination rendered by the High Court, in the application filed under Section 9 of the Act.”

36. I have narrated the above orders and the findings of this Court only because the learned senior counsels for the parties have also made submissions as to whether the Arbitrator could have relied upon the orders of this Court in passing his Impugned Order and was bound by the same or not. In my view, as the Supreme Court had in its order dated 10.04.2017 clarified that the observations made by this Court while disposing of the application under Section 9 of the Act would be treated as only a provisional finding, the Arbitrator was not bound by the findings of this Court in the above mentioned orders and had to reach his own conclusion. Therefore, a question would arise and has been contended by the learned senior counsels for the parties, with both having a divergent stand, as to whether the Arbitrator, in passing the Impugned Order relied solely on the findings of this Court.

37. In my opinion, the Arbitrator has given his own findings after fully deliberating on the correspondence exchanged between the parties and though he has made reference to the orders passed by this Court, it is not as if the Impugned Order is passed solely thereon. I would therefore, now quote the relevant findings of the Arbitrator on this issue:-

“40. I agree with the Claimant’s submission that, under Articles 6(3) and 6(9) of the ICC Rules read with Section 16(1) of the IACA, the Tribunal’s consideration and decision in relation to the Respondent’s Jurisdictional Objection at this Stage ought to be limited to the question of existence of an arbitration agreement between the Parties by which the parties agreed to submit disputes between them to ICC arbitration and the scope of such an arbitration agreement.

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42. I am also mindful about considering the Claimant's alternative submission (as well as the Respondent's objections to this, since they submit this was not part of the Request for Arbitration) that even if there was no concluded contract, whether there was nevertheless prima facie an arbitration agreement in the form of a "separate agreement or in "an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement within the terms of Section 7(2) and (4) of the IACA.

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55. Therefore, in this Award, I have taken the approach that in case the 26 August 2016 High Court Judgment turns out to be not binding on this arbitration for any reasons (including but not limited to those stated in paragraphs 53 and 54 above, or in case any relevant parts of the 26 August 2016 High Court Judgment are revised on appeal), I have a duty nevertheless to consider the arguments raised by the parties as regards the Jurisdictional Objections and record my decisions thereon in this award, pursuant to my duty under the "kompetenz-kompetenz" principle to do so under Section 16(1) of IACA as well as Articles 6(3) and 6(9) of the ICC Rules.

56. I also add that even if the 26 August 2016 High Court Judgment is not binding on me for any reason (such as those stated in paragraphs 53 to 55 above) there are certain parts of that Judgment, which I shall refer to below which are relevant and of persuasive value on the issues the Parties have placed before me.

57. Therefore, irrespective of the effect of the 26 August 2016 High Court Judgment, I will set out in the following part of this Award my decisions on the issues placed by the Parties before me – both as regards the issue of the existence of "concluded contract between the Parties" (within which the purported arbitration agreement is housed) and the Claimant's alternative submission of a "separate arbitration agreement" or an arbitration agreement arising from the Parties exchange of correspondence.

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61. *The absence of a concluded contract and a consensus ad idem for a concluded contract coming into being is prima facie apparent from the undisputed existence of the chain of events and documents referred above. This prima facie factual background was also recognized in the 26 August 2016 Judgment of the Delhi High Court (at paragraph 4 to 10; 18 to 41 thereof) in coming to its decision that there was no concluded contract between the Parties.*

62. *I should add here that not only did the parties not become ad idem on an important material business term (i.e. on the MRP issue); certain essential requirements under the Indian Contracts Act 1872 (the “Contracts Act”) for the formation of a contract, which are elaborated in paragraphs 85 to 88 below were not satisfied.*

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67. *In view, it is clear on a prima facie basis (i.e. on the face of the events and undisputed documentation and evidence listed in paragraph 60), that during this interim period in the first quarter of 2016, they were at that time still negotiating both the “business terms” (including the MRP requirements) as well as the finalization of a “new distribution agreement”. It is patently clear that there was no contract in the form of a “distribution agreement” entered into between the Parties as yet, even whilst they were conducting the Interim Period Activities with each other.*

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71. *In my view, it is clear from the documents placed before me that the Parties were in discussions in late March and in April 2016 because they were still genuinely trying to work out the possibility of agreement and closure of the on-going ad hoc transactions. There was the hope that perhaps the MRP and margins issues could be resolved and an agreement reached on*

these issues leaving open a possibility of still entering into a new distribution agreement if and when they could work out the commercial issues. The events do not show that the Parties had become ad idem on the main point of difference between them – i.e. on the MRP issue or that the Respondent had subsequently accepted the Claimant’s counter-proposal of 21 March 2016. The fact remains and it is patently clear that the Parties did not in any case come to any agreement on the MRP or margins issues that the Respondent did not sign the NDA and there was no concluded contract between them. In those circumstances, it is also artificial and contrived to consider that there was a concluded agreement, when the Respondent’s email of 21 April 2016 stated:

“During this period, we were unable to create a positive business case which could meet the requirements of both....Now, we are convinced that there is no such business plan that exists and accordingly, we would like to inform you that with immediate effect we withdraw ourselves from the exercise.”

72. This is certainly not the kind of scenario which even suggests anything near to a concluded contract on a prima facie basis. The “bottom line” on this issue is that the end result is that the Respondent (rightly or wrongly) considered that the Parties were not ad idem on commercial issues and did not proceed with the NDA; and on the face of it, there remained “no concluded contract”.

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77. However, in my view, these submissions by the Claimant ignore the undisputed backdrop and discussions on the formation of the NDA as summarized in paragraph 60 above. This was particularly so since the Respondent had repeatedly stated in their emails of February and March 2016 and at meetings that the Respondent’s management was firm on the MRP issue as part of its new proposed business model. The importance of the MRP issue is clear from the Claimant’s own email of 7 March 2016 stating it was looking forward to quickly resolving the MRP and margins

issues, as well as from the Respondent's emails of 3 February 2016 and 14 March 2016 quoted in paragraph 60 above.

78. The MRP issue had an important bearing on the Parties selling price structure and margins of each Party, as discussed at meetings and in correspondence. Furthermore, it was a question of compliance with the law and regulations of India which according to the Respondent's Advisors entailed the importer of the products (i.e. the Respondent) to affix MRP on the imported products; and if the Parties had agreed on the Claimant affixing the MRP, this would have resulted in a transgression of legal requirements, thereby rendering the object of the alleged agreement unlawful under Section 23 of the Contracts Act. The Claimant had not represented otherwise nor produced any legal opinions as to whether it was permissible for the Claimant to affix the MRP instead. The Respondent sent a copy of the NDA to the Claimant on 16 March 2016 on the understanding the Claimant would accept or had accepted the Respondent's position on MRP (i.e. that the Respondent would affix the MRP).

79. The qualification from the Claimant at this late stage of negotiation, on 21 March 2016, occurred even after the Respondent again re-iterated its position on the MRP issue, by sending the Written Opinion and re-iterating its stand expressed in its emails of 3 February 2016, which it confirmed in its email of 14 March 2016 it would not put in discussion "at any level."

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82. In my view, it is trite that Section 4 of the Contracts Act which is cited by the Claimant has to be applied appropriately in the context of each case. Trimex was a very different case from the present case. The differences in Trimex will be elaborated further below in this Award. From the chain of events summarized at paragraph 60 above, it is obvious (on the face of the evidence and documents produced by the parties, including those by the Claimant especially its own email of 21 March 2016) that the MRP issue was an important fundamental and material part of the

dealings between the Parties pursuant to the Respondent's new model for distributing its goods in India. It is artificial and contrived to consider otherwise; or that the abovementioned general provision in Clause 3.2 of the NDA disposed of this issue in the NDA and it could be sorted out later as merely a procedural matter given the importance placed in it by both Parties (not only by the Respondent but by the Claimant as well). The Claimant was very well aware of this even though there were no (inadvertent or otherwise) express clause in the NDA on this considering that it was important enough for the Respondent to re-iterate it in its email of 18 March 2016 and for the Claimant to also do so in its email of 21 March 2016.

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86. On a basic legal and contractual level, there was no formation of a contract. Ultimately there was no "acceptance" of a "proposal" under the Contracts Act. As provided by Section 7 of the Contracts Act, in order to convert a proposal into a promise the acceptance must be absolute and unqualified and be expressed in some usual and reasonable manner. A condition or qualified by which a material difference is imposed becomes a counter-proposal, which in order to be deemed as a concluded contract must be accepted by the other party under Section 2(a), (b), (h) and 7 of the Contracts Act.

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88. By the qualification in the email on 21 March 2016, the Claimant had even prior to completing their own signing of the NDA (which occurred on 22 March 2016) and prior to the Respondent receiving the NDA, communicated a condition or qualification, in legal effect a counter-offer or counter-proposal, which made a material difference to the contract between the Parties, i.e. as to who is to affix the MRP label. The Respondent did not accept such a counter-offer, consistently with their prior communications to the Claimant that this was an important non-negotiable issue. It is

undisputed that the Respondent then decided not to sign and proceed with the NDA.

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97. Thus, in the present case, it is clear that the affixing of Parties' signatures on the NDA was not an "empty formality" and the Respondent's refusal to sign rendered the agreement inchoate. As the Delhi High Court held in the 26 August 2016 High Court Judgment at [45]:

"As stated above, signatures on any agreement may not be material in a case where the contract between the parties can be ascertained; however, where the parties reduce their understanding to writing and it is understood that parties are to sign the agreement, it is not always safe to proceed on the basis that their signatures are not necessary. In most cases, affixing signatures on an agreement are meant to signify the party's commitment to the written agreement and its refusal to sign renders the agreement inchoate. Affixing signatures on an agreement cannot be readily inferred as an empty formality... "

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104. I have mentioned above there was no concluded contract (under Sections 2 and 7 of the Contracts Act) in a "defined legal relationship" (under Section 7(1) of the IACA) between the Parties. However, with respect to the specific provisions of Sections 16(1) (a) and (b) of IACA I have just referred to I would like to add that even if I have to look for the existence of the "arbitration agreement" separately from the question of a concluded commercial contract, the same tests (i.e. for ingredients of the Contracts Act to be satisfied and of a defined legal relationship" under the IACA) apply equally and lead to the conclusion that there was prima facie still no agreed separate "arbitration agreement" agreed between the Parties:

(a) In the same way that there has to be an offer, acceptance, and consideration for the formation of a commercial

contract, there have to be the same ingredients for the formation of an "arbitration agreement".

(b) In the present case, in the NDA which the Respondent emailed to the Claimant on 16 March 2016 and in the two engrossed copies of the NDA sent to the Claimant, the Respondent had proposed to amend the place of arbitration in Clause 15 from Germany to New Delhi. On this aspect, the Claimant contends that this exchange of correspondence shows that the Parties were ad idem as far the method of dispute resolution between them was concerned, even if the Respondent eventually refused to sign the NDA.

(c) However, the Claimant emailed to the Respondent with what was in effect a counter-offer on a material and fundamental aspect of the proposed contract, which was not acceptable and not accepted by the Respondent (as I have mentioned in paragraphs 85 to 88 above).

(d) Essentially, there eventually being no business or commercial "agreement" between the Parties, it can also be said that the whole "consideration" for the purported "arbitration agreement" fell away, leaving no valid and concluded "arbitration agreement".

(e) Therefore, it is clear on basic contractual principles there was prima facie and in effect no "arbitration agreement" which satisfies, the elements of a contract to start with.

(f) Further, it is necessary to look at intent of Clause 15. The proposed scope of the "arbitration agreement" is with respect to "any and all disputes, differences, claims or questions arising out of or in connection with or in relation to the interpretation of any of the clause of this Agreement" [emphasis added]. Thus, upon the agreement not coming into existence by the matters aforesaid, then there is in effect nothing further for the purported "arbitration agreement" to apply to, and no "defined legal relationship under Section 7(1) of the IACA in relation to the purported "arbitration agreement", i.e. not an "arbitration agreement" within the definition in the IACA."

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119. My decisions on this issue are as follows:

(a) Firstly, I have to bear in mind that the Claimant's Request for Arbitration is founded not in a separate arbitration agreement contained in prior correspondence, but in "in the form an arbitration clause of a contract" under section 7(2) of the IACA. The Claimant has itself submitted in its Request for Arbitration and submitted strenuously in its submissions that the arbitration agreement in question is in Clause 15 of the NDA. As I have decided above, on a prima facie basis there is no concluded contract, and hence the invalidity and ineffectiveness of that clause to form any jurisdictional basis for this arbitration.

(b) My above-mentioned findings in paragraphs 104 to 109 above - the lack of contractual consensus ad idem between the Parties, the unaccepted counter-offer and lack of consideration for the formation of an arbitration agreement separate from the contract - also apply to the Claimant's alternative contention of an arbitration agreement in the form of a "separate agreement" or in "an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement" within the terms of the last part of Section 7(2) and Section 7(4) of the IACA.

(c) As I have mentioned above, just because the Parties agreed on the wording of the arbitration clause in their correspondence does not mean they intend to arbitrate in the absence of the contract, in a vacuum, without any substantive contract being concluded between the Parties.

(d) Since no contract or "defined legal relationship" within the meaning of Section 7(1) of the IACA came into existence during the process of and as a result of all the above mentioned correspondence between the Parties, there was eventually no subject matter of the arbitration agreement, and hence no "arbitrable" matter between the Parties."

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129. In view of all my aforesaid findings, my conclusions are as follows:

a. There was no concluded contract between the Parties in the NDA. Hence there does not exist an "arbitration agreement" between the Parties in Clause 15 of the NDA.

b. Neither is there any arbitration agreement in a separate agreement or contained in an exchange of correspondence between the Parties as regards the claims submitted to this Arbitration.

c. The Claimant's Claims in the Request for Arbitration are all purported to fall under the NOA and a "concluded contract" between the Parties. In view of the above conclusions, the Arbitrator appointed in this Arbitration therefore does not have any jurisdiction to hear and consider the Claimant's Claims submitted to this Arbitration."

38. I have quoted the above findings of the Sole Arbitrator in detail only to highlight that the Arbitrator has arrived at his findings on non-existence of the Arbitration Agreement after duly scrutinizing all the correspondence exchanged between the parties during their negotiation and leading to the signing of the Distribution Agreement by the appellant and the email dated 21.04.2016 from the respondent terminating its business relationship with the appellant. The above findings also clearly show that the Arbitrator has not relied on the findings of this Court in its decision dated 26.08.2016, but has reached its conclusion independent of the same. Though I see no reason to disagree with the findings of the Arbitrator, I would briefly state the following only to supplement the same.

39. As noted above, the negotiations for the new business relationship upon the expiry of the earlier Distribution Agreement, started between the parties with the email dated 26.08.2015 from the respondent to the

appellant. Alongwith email dated 26.08.2015 the respondent had sent to the appellant a “Pricing Proposal”. The appellant had some reservation regarding the margins in the said proposal and by way of its email dated 28.08.2015 requested the respondent to re-consider the same.

40. The respondent sent a revised proposal under cover of its email dated 04.09.2015 to the appellant. The appellant responded to the above email by its own email dated 11.09.2015 wherein it *inter alia* mentioned that it was to work on the proposal sent by the respondent. This certainly cannot be read as an unconditional acceptance of the proposal sent by the respondent.

41. The respondent vide its email dated 14.09.2015 *inter alia* reiterated that the MRP will be applied as per the revised proposal sent by it on 04.09.2015. One important condition in this email was that the respondent would also check the possibility of applying MRP in China. Therefore, by this email there were two separate issues raised, one with respect to the price i.e. MRP and the second with respect to the affixation of the MRP.

42. The appellant responded to the above email vide its email dated 14/15.09.2015. As far as the issue of MRP is concerned, a vague reply was given that the appellant would try to adjust to most of the issues except the once which decrease its margin. The same, therefore, cannot be said to be an un-conditional acceptance of the offer/proposal given by the respondent.

43. Section 7 of the Indian Contract Act, 1872 states that in order to convert a proposal into a promise the acceptance must be absolute and

unqualified. In the present case, the email dated 14/15.09.2015 cannot be read as an unqualified acceptance on the issue of MRP by the appellant.

44. A reading of the above correspondence as also the later correspondence exchanged between the parties would also show that the issue of MRP was not an ancillary issue but was a major condition of the contract and in fact, the same was extensively discussed between the parties, including obtaining legal opinion thereon. The subsequent correspondence also shows that the parties could not arrive at an agreement on this important condition of the contract. In fact, it was because of this reason that the parties in the interim, while negotiating for final terms of the agreement, executed a Memorandum of Understanding dated 29.09.2015.

45. As far as subsequent correspondence is concerned, the email dated 03.02.2016 from the respondent to the appellant suggested that the respondent would be importing the goods from China as also declaring and affixing the MRP labels. This was reiterated by the respondent in its email dated 08.02.2016. The appellant, vide its email dated 09.02.2016 again complained about the margin left for the appellant.

46. By its email dated 24.02.2016 the appellant undertook to get a legal opinion on whether the appellant can be supplied the goods by the respondent without affixing the MRP. By another email dated 07.03.2016 the appellant again requested the respondent to resolve the MRP issue and also the issue of margin.

47. The respondent vide its email dated 11.03.2016, while sending the revised draft of the Distribution Agreement again requested the appellant

to send the legal opinion on the issue of supply being made by the respondent without affixing the MRP.

48. The appellant, vide its email dated 15.03.2016 suggested to the respondent that the Distribution Agreement can be executed while the other issues are still under discussion. The respondent, however, vide its email dated 18.03.2016, while sending the draft agreement for signature, also informed the appellant that it has received legal opinion suggesting that the MRP has to be affixed by the respondent before invoicing the goods to the appellant. The respondent, therefore, proposed to adopt the MRP / selling structure as per its email dated 03.02.2016 referred above. The same can therefore be construed as an offer by the respondent to the appellant which was also conditional on the appellant agreeing to the MRP/selling structure as proposed by the respondent in its email dated 03.02.2016.

49. The appellant vide its email dated 21.03.2016 informed the respondent that it had sent the signed copies of the Distribution Agreement to the respondent. As far as the MRP issue is concerned, the appellant stated that it would “stick to the stand of MRP as per our final confirmation in September, 2015”. This certainly cannot again be read as an unconditional acceptance of the proposal / offer given by the respondent to the appellant.

50. As noted above, while the parties were discussing the terms of the Distribution Agreement, they were also discussing the financial arrangement including the issue of MRP affixation on the product. Discussion on both the issues was going hand in hand and cannot be divorced from each other. The learned senior counsel for the appellant

has submitted that affixation of MRP was not a condition of the contract, however, as noted above, from the correspondence exchanged between the parties it can be safely concluded that this was certainly a major condition being discussed between the parties and was a major stumbling block to the execution of the Distribution Agreement.

51. Learned senior counsel for the appellant, in the alternative sought to contend that the appellant had given an unconditional acceptance on this issue vide its email dated 21.03.2016. I am unable to agree with the same. The email dated 21.03.2016 refers to the confirmation in September, 2015. As noted above, even the acceptance in September, 2015 was conditional in nature. In any case, the question of affixation of MRP had been given importance thereafter and from the email dated 21.03.2016 it is impossible to come to a conclusion that the appellant had given its unconditional acceptance on the affixation of MRP on the goods by the respondent.

52. Learned senior counsel for the appellant has relied upon the judgment of *Govind Rubber Limited (Supra)* to contend that an agreement even if not signed by the parties can be spelled out from the correspondence exchanged between the parties. Further in order to constitute an Arbitration Agreement, it need not be signed by all the parties if the record of agreement is provided by exchange of letters, telex, telegram or other means of telecommunication. While there cannot be any dispute on the above proposition of law, as noted above, from the correspondence exchanged between the parties it cannot be said that the parties had arrived at a consensus ad idem on the commercial relationship between the parties.

53. In *Lets Engineering (Supra)*, this Court after scrutinizing the correspondence exchanged between the parties there in, had concluded that the parties were *ad idem* with regard to all the Clauses in the Marketing Agreement, including the Arbitration Agreement. Noticeably, the Court in that judgment was exercising its powers under Section 11 of the Act.

54. In *Rickmers Verwaltung GmbH (Supra)* also the Supreme Court has held as under:-

“Unless from the correspondence, it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through correspondence.”

55. In *UP Rajkiya Nirman Nigam Ltd. v. Indure Pvt. Ltd. And Others*, (1996) 2 SCC 667, the Supreme Court had reiterated that where the contract is in a number of parts, it is essential for the validity of the contract that the contracting parties should either have assented or taken to have assented to the same thing in the same sense or as it is sometimes put, there should be consensus *ad idem*. In absence of any consensus *ad idem* on the material terms of the contract to be entered into between the parties, no concluded contract can be said to have emerged between the parties. Once the original contract itself was not a concluded contract, there existed no Arbitration Agreement between the parties. The present would be a similar position on facts. Once it is held that the Distribution Agreement itself did not come into existence on mere signing of the same by the appellant due to the conditional nature of acceptance given by it, clearly the Arbitration Agreement contained in such Distribution

Agreement cannot be said to have come into existence. There cannot be an Arbitration Agreement in the vacuum. Though severable from the main agreement, it has to have a foundation in some defined legal relationship between the parties. The defined legal relationship would require a consensus on the terms thereof between the parties. In the absence of such consensus on the legal relationship, no Arbitration Agreement can be said to have come into existence between the parties. To put it differently, it cannot be said that the parties agreed to have their dispute in relation to an agreement, settled through arbitration and would be bound by the same even though such agreement never came into existence as the parties could never reach consensus *ad idem* on terms thereof.

56. In view of the above, I find no merit in the appeal and the same is accordingly dismissed with cost quantified at Rs. 50,000/-.

NAVIN CHAWLA, J

APRIL 05, 2018/rv

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