IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL APPEAL (L) NO.36947 OF 2022
IN
COMMERCIAL ARBITRATION PETITION (L) NO.25151 OF 2022
WITH
INTERIM APPLICATION (L) NO.38727 OF 2022

Palmview Investments Overseas Limited)
Portcullis Trustnet (BVI) Ltd.)
Portcullis Trustnet Chambers, P.O.Box 3444)
Road Town, Tortola, British Virgin Islands) ..Appellant

Vs.

1. Ravi Arya, Adult Indian Inhabitant)
Residing at 6, Satlej Terrace, 6 Walkeshwar)
Road, Mumbai 400 006)

2. Nakul Arya, Adult Indian Inhabitant)
Residing at 6, Satlej Terrace, 6 Walkeshwar)
Road, Mumbai 400 006)

3. Sushma Arya, Adult Indian Inhabitant)
Residing at 6, Satlej Terrace, 6 Walkeshwar)
Road, Mumbai 400 006)

4. Varun Arya, Adult Indian Inhabitant)
Residing at 6, Satlej Terrace, 6 Walkeshwar)
Road, Mumbai 400 006)

5. Ravi Arya, HUF)
6, Satlej Terrace, 6 Walkeshwar Road,)
Mumbai 400 006)

6. Arya Iron & Steel Co. Pvt. Ltd.)
Having registered office at)
51-53A Mittal court “A” Wing)
Nariman Point, Mumbai 400 021)

7. Pawan Arya, Adult Indian Inhabitant)
at 51-53A Mittal court “A” Wing)
Nariman Point, Mumbai 400 021)

8. Puneet Arya, Adult Indian Inhabitant)
at 51-53A Mittal court “A” Wing)
Nariman Point, Mumbai 400 021)
9. Poonam Arya, Adult Indian Inhabitant)
at 51-53A Mittal court “A” Wing)
Nariman Point, Mumbai 400 021)

10. Trupti Arya, Adult Indian Inhabitant)
at 51-53A Mittal court "A" Wing)
Nariman Point, Mumbai 400 021)

11. Pawan Arya, HUF)
at 51-53A Mittal court "A" Wing)
Nariman Point, Mumbai 400 021)

12. MP Recycling Pvt Ltd.)
having its registered office at)
43, Ramwadi, Kalbadevi Road,)
Mumbai 400 002)

13. Arya Ship Breaking Co. Pvt Ltd.)
having its registered office at)
43, Ramwadi, Kalbadevi Road,)
Mumbai 400 002) ..Respondents

Mr. Kevic Setalvad, Senior Advocate a/w Mr.. Vijay K Singh, Mr. Vinay J Bhanushali, Mr. Abhiraj Rao, Ms Shreya Arur, Mr. Sanmit Vaze and Mr. Jehan Lalkaka for Appellant / Applicant.
Mr. Haresh Jagtiani, Senior Advocate a/w Mr. Suprabh Jain, Mr. Pushpvijay Kanoji and Ms Jahnavi Vora i/b Mr. Mohd Shariq for Respondent Nos 1 and 2.
Mr. Sharan Jagtiani, Senior Advocate a/w Mr. Priyank Kapadia and Ms Apurva Manwani i/b Mr. Yakshay Chheda for Respondent Nos 3 to 5.
Mr. Sameer Bindra i/b Khaitan & Co for Respondent No 6.
Ms Chandni Dewani i/b Vashi and Vashi for Respondent Nos 7 to 11.

WITH
COMMERCIAL APPEAL (L) NO.37275 OF 2022
IN
COMMERCIAL ARBITRATION PETITION (L) NO.25249 OF 2022
WITH
INTERIM APPLICATION (L) NO.38730 OF 2022

Mr Vijay K Singh a/w Mr Vinay J Bhanushali, Mr Abhiraj Rao,Ms Shreya Arur, Mr SanmitVaze and Mr Jehan Lalkaka for Appellant /Applicant
Mr Sharan Jagtiani, Senior Advocate a/w Mr Priyank Kapadia and Ms Apurva Manwani i/b Mr Yakshay Chheda for Respondent Nos 1 to 3
Mr Haresh Jagtiani, Senior Advocate a/w Mr Suprabh Jain, Mr Pushpvijay Kanoji and Ms Jahnavi Vora i/b Mr Mohd Shariq for Respondent Nos 4 and 5
Ms Chandni Dewani i/b Vashi and Vashi for Respondent Nos 7 to 11

CORAM : K.R. SHRIRAM &
RAJESH S. PATIL JJ
RESERVED ON : 16th MARCH 2023
PRONOUNCED ON : 2nd MAY 2023

JUDGMENT (PER K.R.SHRIRAM J.) :

1 This appeal has been filed under Section 37 of the Arbitration and Conciliation Act 1996 (the Arbitration Act), impugning an order dated 1st November 2022 passed by a Learned Single Judge of this court in an arbitration petition filed under Section 34 of the Arbitration Act. The Learned Single Judge set aside the award dated 16th June 2022 passed by the Arbitral Tribunal in international commercial arbitration proceedings on separate applications filed by respondent nos.1 and 2 and respondent nos.3 and 5 under Section 31(6) read with Section 32 of the Arbitration Act that the person who signed the notice invoking arbitration and signed the statement of claim on behalf of Claimant, i.e., appellant herein had no valid authority to do so, nevertheless granted liberty to cure the defect.

2 The facts in brief are as under:

Respondent no.6-Arya Iron & Steel Co. Pvt. Ltd., is a company registered in Mumbai under the provisions of Companies Act 1956. Appellant and other respondents are shareholders of respondent no.6. Respondent no.6 is, *inter alia,* engaged in the business of manufacturing and selling of iron and steel products.

3 Appellant is a company incorporated under the relevant laws of British Virgin Islands (BVI). Appellant is an investment company. Respondent nos.1 to 5 (RA Group) and 7 to 11 (PA Group) together with respondent nos.12 and 13 are promoters of respondent no.6. It is appellant's

case that in view of a Shareholder's Agreement dated 25th March 2009, appellant holds 49% shares in respondent no.6 and the balance is held by respondent nos.1 to 5 (RA Group) and 7 to 13 (PA Group). Respondent nos.12 and 13 are closely owned and controlled by RA Group and PA Group, i.e., respondent nos.1 to 5 and 7 to 11, respectively.

4 It is appellant's case that it was asked by other respondents to join as shareholder and to infuse funds in respondent no.6. Appellant and respondents entered into a Shareholder's Agreement as well as Share Purchase and Share Subscription Agreement all dated 25th March 2009. Appellant invested about Rs.80 crores in respondent no.6. Appellant was made 49% shareholder and the remaining 51% was with respondent nos.1 to 5 (PA Group) and 7 to 11 (RA Group). It is appellant's case that as per the Shareholders' Agreement, it had nominated one Sunil Jain as nominee director on the board of respondent no.6 and the said Sunil Jain had even attended certain board meetings. Disputes arose between appellant and respondents, i.e., between shareholders of respondent no.6. Consequently, appellant invoked arbitration proceedings on 30th April 2018 in terms of the Shareholders' Agreement dated 25th March 2009. The Arbitral Tribunal comprising of three members, namely, Hon'ble Mr. Justice C. K. Thakker (Retd.) as Presiding Arbitrator, Hon'ble Mr. Justice Deepak Verma (Retd.) and Hon'ble Mr. Justice Mohit Shah (Retd.)was constituted. Later on, Hon'ble Mr. Justice C. K. Thakker (Retd.) resigned and he was substituted by Hon'ble Mr. Justice A. K. Sikri (Retd.).

5 Right from the beginning, there were objections raised by RA Group, i.e, respondent nos.1 to 5 on the constitution of the Arbitral Tribunal or on the impartiality of the Arbitral Tribunal, etc. All these objections were rejected. In fact on the constitution of the Arbitral Tribunal, the Tribunal's order was challenged in the Bombay High Court before a Single Judge, who dismissed the same. The intra court appeal was also dismissed by the Division Bench and the SLP filed also came to be dismissed.

6 Thereafter, pleadings were filed by the parties and the matter proceeded to recording of evidence. Before the evidence was recorded, points of dispute was also framed. Evidence of appellant was being recorded and appellant filed witness affidavit of two persons. Sunil Jain, who was the nominee Director of appellant in respondent no.6, appeared as CW-1 and was cross-examined by all respondents. His testimony was completed and he had been discharged from the proceedings as witness. Second witness was one Gagan Preet Singh as CW-2, whose cross-examination is yet to be concluded. CW-1 had appeared as a fact witness and CW-2, a Chartered Accountant, is produced as an expert witness. After completion of cross-examination of CW-1 and before the cross-examination of CW-2 could commence, an application under Section 31(6) read with Section 32 of the Arbitration Act was filed by respondent nos.1 and 2 on 20th December 2021 (the said application). Reply was filed by appellant. A similar application was filed by respondent no.3 and respondent no.5. It was the case of applicant in the said applications that CW-1 – Sunil Jain, who signed and

verified the statement of claim did not have a valid / requisite authority to invoke arbitration and/or institute the present claim on behalf of appellant and/or to sign and verify the pleadings and to depose on behalf of appellant as the said authority does not emanate from the resolution dated 16th July 2018 on which, Sunil Jain relied upon. The said resolution was not a valid document in the eyes of law. According to applicant of the said application, authorization by the invalid document, namely the resolution in favour of Sunil Jain, goes to the root of the matter. Whether the resolution is a proper and valid resolution under the laws of BVI is a matter of Foreign Law and such aspect in Foreign Law is required to be proved as a question of fact that too by an expert in Foreign Law, as required under Section 45 of the Indian Evidence Act. Appellant having failed to prove that the resolution was a valid resolution under the laws of BVI, the Arbitral Tribunal was asked to pass award / interim award and declare that the claim was presented without authority; that the notice invoking arbitration dated 30th April 2018 was without authority and hence the Arbitral Tribunal should dismiss the claim with cost. Naturally appellant opposed the application and submitted that even if it is found that the authorization of Sunil Jain was not a valid authorization, appellant was ready and willing to rectify the defect. Of course, this was also opposed by respondent nos.1 and 2, and 3 and 5, (the RA Group), in as much as according to these respondents there is no averment at all in the statement of claim that the resolution was validly passed under BVI laws and the resolution produced was impermissible and

cannot be read in evidence as it did not meet with the requirements of Section 44 of the Indian Evidence Act. In order to say that the resolution is valid as per BVI laws, appellant will have to produce an expert, which opportunity appellant has already lost. Moreover, it would be on the assumption that the resolution is valid under BVI laws, which presumption would be improper as there are no pleadings that the resolution is valid under the BVI laws. Therefore, granting such opportunity to appellant would mean showing indulgence to a disentitled party.

7 The Arbitral Tribunal by its award dated 16th June 2022, allowed the application of RA Group by holding that there were no averments that the resolution authorising Sunil Jain was passed as per BVI laws and as no evidence was led to prove that the said resolution was in accordance with the BVI laws, the resolution was invalid. The Tribunal also held that even under the provisions of the Companies Act, 2013, the resolution could not be accepted and, therefore, the resolution was invalid. While holding so, the Arbitral Tribunal observed that even though appellant has not proved the resolution dated 16th July 2018 on the strength of which Sunil Jain had signed and verified the statement of claim is a valid document under law, a further question is required to be decided, i.e., whether non production of valid authorization as irregular and is curable. The Arbitral Tribunal went ahead and decided the question and held that after considering the various submissions made including the judgments cited, the claim should not be dismissed for technical reasons as, whether the claim was signed and

verified by a competent person does not go to the root of the matter. In other words, the Arbitral Tribunal held that the defect was curable. Paragraphs 77 and 78 of the Arbitral Tribunal's order dated 16th June 2016 read as under:

> *"77. The dicta of the aforesaid pronouncements is that such a defect is curable. That apart, as noticed above in the present case, there was no specific denial about the passing of the Resolution by these Applicants / Respondents in their respective defence statements and no specific question was raised by the respondents that the resolution was not valid under the BVI Laws or Indian Laws. Because of this reason, no specific Issue was framed either. Therefore, there was no occasion for the Claimant to lead any evidence on this aspect. This is yet another reason that the Claimant should be given a chance to show that Mr. Sunil Jain is vested with necessary authority to institute the present Arbitration proceedings and has also been authorised to sign and verify the statement of claim and to depose in the matter. Non granting of such an opportunity would cause prejudice to the Claimant and would amount to miscarriage of justice to the Claimant.*
>
> *78. The claimant can do so either by proving that the Resolution dated 16.07.2018 placed on record is a valid Resolution under BVI laws or by filing fresh Resolution, as this irregularity is ratifiable as well. The Tribunal grants two weeks' time to the Claimant to respond as to which option the Claimant would like to exercise so that further directions are issued by the Tribunal in this behalf."*

8 Aggrieved by this liberty granted by the Arbitral Tribunal to rectify the defect, two separate petitions under Section 34 of the Arbitration Act were filed by respondent nos.1, 2, 3 and 5. Both the petitions were heard together and by a common order and judgment pronounced on 1st November 2022, Learned Single Judge of this court held that the impugned orders / interim award would be in contravention of the public policy of India and fundamental Policy of Indian Law. According to the Learned Single Judge, it was impossible for the Arbitral Tribunal to permit

ratification of the resolution /rectifying the defect. It is that order, i.e., impugned in this appeal.

Appellant did not challenge the findings of the Arbitral Tribunal, since, as submitted by Mr. Setalvad, appellant was anyways given a chance to rectify the defect.

Other than Mr. Setalvad, Mr. Sharan Jagtiani and Mr. Haresh Jagtiani, none of the other counsel made any submissions.

9 Mr. Setalvad submitted as under:

(a) The defect in the board resolution is a procedural defect and is curable.

(b) The Arbitral Tribunal has held that there was defect in the board resolution but has also held that such a defect was curable and accordingly gave appellant the opportunity to prove that the board resolution was valid under BVI laws or file a fresh resolution. These directions were passed by considering and keeping with the settled position in law as laid down by the Apex Court and various High Courts including this court.

(c) The suit filed by a company with defective board resolution or even without any board resolution at all is not fatal. It is procedural in nature and is curable defect. A substantive right should not be allowed to be defeated on account of a procedural irregularity which can be cured at any time, as held in ***United Bank of India Vs. Naresh Kumar***[1]***, Sheth builders Vs. Michael Gabriel***[2]***, Pragya Electronics Pvt Ltd. Vs. Cosmo Ferrites Ltd.***[3]***,***

1. 1996 (6)SCC 660
2. 2020 SCC Online Bom 9042
3. 2021 SCC Online Del 3428

Western India Theaters Ltd. Vs. Ishwarbhai Somabhai Patel[4], Sangat Printers Pvt Ltd. Vs. Wimpy International Ltd.[5], Alcon Electronics Pvt Ltd. Vs. Celem S. A.[6], National Ability SA Vs. Tinna Oil & Chemicals Ltd.[7] and Welding Rods Pvt Ltd. Vs. Indo Borax and Chemicals Ltd.[8]

(d) In *Sheth Builders* (Supra) and *Alcon Electronics* (Supra), there was no board resolution at all when suits were instituted. Yet the court held that such a defect is merely a procedural irregularity which can be cured. Appellant could not be worse-off than in cases where there was no board resolution at all.

(e) In *United Bank of India* (supra) the court has held that in addition to and dehors Order 29 Rule 1 of the Code of Civil Procedure Code (CPC), a company can authorise any person to sign the plaint on its behalf and that would be considered sufficient compliance with Order 6 Rule 14 of the CPC.

Further, in *United Bank of India* (Supra) and *Pragya Electronics* (Supra) nowhere it is mentioned that the signatories were persons falling under Order 29 Rule 1 of the CPC.

(f) The Learned Single Judge by distinguishing the judgments relied upon by appellant on the grounds that none of them involved arbitration proceedings is patently wrong. In *Pragya Electronics* (supra) where *United Bank of India* (supra) and *Sangat Printers* (supra) was followed, was a case invoking arbitration proceedings.

4. AIR 1959 Bom 386 (DB)
5. 2012 SCC Online Del 299
6. 2015 (1) MhLJ 852
7. 2008 (105) DRJ 446
8. 2001 SCC Online Guj 269 (DB)

(g) It is totally irrelevant that the other matters did not involve arbitration proceedings. This is because the law laid down in the judgments cited above is that the defect is procedural in nature and is curable and it would apply equally to arbitration proceedings.

(h) The signing and verification of the statement of claim was a matter of procedure. The same was governed by Indian Law. Matter of procedure should always be governed by law of the country, where the court / tribunal is situated. It is not in the realm of substantive law. This has been the consistent position of Indian Law as held in ***All India Reporter Vs. Ramchandra Dhondo Datar[9], Cement Co. Ltd. Vs. Abdul Hessein Essaji[10], Ganpati Nana Powar Vs. Jivanabai Kom Subanna[11], Netram Dadaram Palliwal Vs. Bhagwan Wallaji Kunbi[12] , and Vatech Global Co. Vs. Unicorn Denmart Ltd.***[13]

(i) It is settled position in law that all matters of procedure such as signing and verification are governed by the domestic law of the country, where the court is situated – *Lex Fori (***Dicey, Morris and Collins on the Conflict of Law[14]**). There is a presumption of proper verification and execution of statement of claim.

(j) As per Section 85 read with Section 57(6) of the Indian Evidence Act, signing and verification of plaint / statement of claim does not require evidence to prove the same as courts will take judicial notice of such

9. 1959 SCC Online Bom 152
10. ILR 1937 Bom 85
11. ILR (1923) 47 Bom 227
12. 1940 SCC Online MP 49
13. 2022 SCC Online DEL 2349
14. 16th Ed., Chapter 4, Pages 121, 131-32

signature / verification as was held in ***Joyce Cecilia Romalia De Souza Vs Carl J M De Souza[15], Zhejiang Medicines & Health Products Import and Export Co. Vs. Devashi Impex[16], National and Grindlays Bank Vs M/s World Science News[17] and Jugraj Singh Vs Jaswant Singh[18]***.

(k) Even if signing / verification of the statement of claim was not procedural law but of substantive law and, therefore, BVI Law's were applicable, then the onus would be on respondents to lead evidence to prove the Foreign Law. The onus of proving Foreign Law as a fact always lies upon the party relying upon it. Absent the Foreign Law being impleaded by the person objecting, the court will apply Indian Law as held in ***Malaysian International Trading Corporation Vs Mega Safe Deposit Vaults[19], Rhodia Limited Vs. Neon Laboratories[20] and Dicey, Morris and Collins on The Conflict of Laws[21]***

(l) The impugned award is not in contravention of public policy of India and fundamental policy of Indian Law.

(m) The Arbitral Tribunal has rightly followed the binding judgments. The order of the Arbitral Tribunal is clearly not contrary to the most basic notions of justice such as would shock the conscience of the court. Notably, the ground of patent illegality is not available in the present case, as appellant is a foreign entity, as per the provisions of Section 34(2-A read with Section 2(1)(f)(ii) of the Arbitration Act and ***Vijay Karia Vs. Prysmian***

15. 2022 SCC Online Bom 421
16. 2016 SCC Online Bom 10041
17. ILR (1976) DEL 559
18. 1970 2 SCC 386 (3J)
19. 2006 SCC Online Bom 92
20. 2004 SCC Online Bom 1125
21. 16th Ed. Chapter 3, Page 103

Cavi E Sistemi SRL[22] and *Ssangyong Engineering and Construction Co. Ltd. Vs. NHAI*[23]

(n) Providing an opportunity to appellant to rectify its board resolution, can hardly be said to be against public policy. On the contrary, the order of Arbitral Tribunal is in keeping with the fundamental policy of Indian Law. If the Arbitral Tribunal had not permitted, then it would have been contrary to public law.

(o) The Arbitral Tribunal's order is not an interim award and not amenable to challenge under Section 34 of the Arbitration Act because the order is not a judicial determination of any of the issues framed by the Arbitral Tribunal. It does not decide any legal rights or liabilities of the parties under the shareholders agreement dated 25th March 2009.

(p) The question of illegality and/or validity of the board resolution was not even an issue since there was no denial in the statement of defence. The order was merely a procedural order passed under Section 19 of the Arbitration Act pursuant to an application under Section 31 read with Section 32 of the Arbitration Act.

(q) As there was no denial qua the passing of the resolution in the respective statements of defence, no specific issue was framed on this aspect and hence there was no occasion for appellant to lead evidence on the point of the validity of the resolution. It is in this background the Arbitral Tribunal provided that appellant should be given an opportunity to show

22. (2020) 11 SCC 1
23. (2019) 15 scc 131

that Sunil Jain possessed the necessary authority to sign the pleadings and depose as witness.

(r) As held in ***Sanshin Chemicals Industry Vs. Oriental Carbons & Chemicals Ltd.***[24], ***Harinarayan G Bajaj Vs. sharedeal Financial Consultants Pvt Ltd.***[25], ***Deepak Mitra Vs. District Judge, Allahabad***[26], ***Punj Lloyd Ltd Vs Oil and Natural Gas Corporation Ltd.***[27] ***and Ranjiv Kumar Vs. Sanjiv Kumar***[28] an Interim award is in the nature of preliminary decree. For an order to be an interim award, it must have finally decided a claim, part of a claim and/ or counter claim which forms subject matter of the arbitral proceedings. The rights and/or liabilities under the contract must have been judicially determined. As that has not been done in this case, an order of this nature passed by the Arbitral Tribunal can hardly be said to be an interim award. The Delhi High Court in ***Future Coupons Pvt. Ltd. Vs. Amazon.com NV Investment Holdings LLC***[29] held that interlocutory orders passed in arbitral proceedings are immune from challenge and party must wait till the final award and only then can he vent his grievances, both against the interlocutory order as well as the final award.

(s) The judgment of the Apex Court in ***Indian Farmers Cooperative Ltd. (IFFCO) Vs. Bhadra Products***[30] has been wrongly relied upon by the Learned Single Judge because the said judgment was totally inapplicable for the facts and circumstances of the case at hand.

24. 2001(3) SCC 341
25. 2003 Mh LJ 598
26. AIR 2000 All 609
27. 2016 SCC Online Bom 3749
28. AIR 2018 Cal 130 (DB)
29. 2022/DHC/005024
30. 2018 (2) SCC 534

(t) Reliance of respondents on ***Maharashtra State Electricity Distribution Company Ltd. (MSEDCL) Vs. Godrej and Boyce Manufacturing Co. Ltd***.[31] is completely misplaced. That was a case where one party to a joint venture invoked arbitration without any authority from the other party to the joint venture.

(u) The Learned Single Judge's finding that the Arbitral Tribunal has exercised jurisdiction in equity by permitting appellant to rectify the board resolution under Section 28(2) of the Arbitration Act, is incorrect. Apart from making a bald statement, the Learned Single Judge has not given any reason or explanation as to how the Arbitral Tribunal has exercised equitable jurisdiction.

(v) Section 28 of the Arbitration Act is not applicable since it provides Rules applicable to substance of dispute. The order passed by the Arbitral Tribunal had no connection with the substance of the dispute. It was merely a procedural order. It gave appellant an opportunity to rectify the defect as was mandated by law. Permitting a party to cure a procedural defect as held in various judgments is the norm. The Arbitral Tribunal has not acted contrary to the law nor had disregarded the law. It has in fact applied the correct principles.

(w) The Arbitral Tribunal has not exercised any equitable jurisdiction. The Arbitral Tribunal has only applied the law when a document is filed by a company without the board resolution or a defective board resolution, it is

31. 2019 SCC Online Bom 3920

a procedural defect which is not fatal and must be permitted to be cured.

10 Mr. Sharan Jagtiani submitted as under:

(a) On maintainability of petition under Section 34 of the Arbitration Act, as held by the Apex Court in *IFFCO* (Supra), a final decision on "any matter" or issue which arises between the parties to arbitration is an interim award, which can be independently and separately challenged under Section 34 of the Arbitration Act. The Apex Court in *IFFCO* (supra) has held that language of Section 31(6) of the Arbitration Act is advisedly wide in nature; that an interim award may be made on "any matter" with respect to which Arbitral Tribunal makes a final award. The expression "matter" is wide in nature and subsumes issues at which the parties are in dispute.

(b) The facts and issues that arise in *MSEDCL* (supra) are almost identical to that of the present matter. Reliance by appellant on *Harinarayan G. Bajaj (Supra), Sanshin Chemical Industry (Supra), Punj Lloyd Ltd.(Supra), Deepak Mitra (Supra), Ranjiv Kumar & Anr. (Supra),* advocating a narrower construction of what constitutes an interim award is misplaced. The nature of orders passed in these judgments cited by appellant are entirely distinct from the impugned order. Similarly appellant's reliance on *Future Coupons Pvt Ltd.(Supra)*, is also misconceived because in *Future Coupons* (Supra) the application before the Arbitral Tribunal was only under Section 33(2)(c) of the Arbitration Act and not for an interim award under Section 31(6) read with Section 2(c) of the Arbitration Act.

(c) The Arbitral Tribunal's findings are in favour of respondents on matters of pleading, matters of evidence and position of Indian Law under the Indian Companies Act, 2013. The Arbitral Tribunal having categorically found in favour of respondents that appellant has not proved the board resolution dated 16th July 2018 on the strength of which, Sunil Jain had signed and verified the statement of claim as a valid document under law, nevertheless, wrongfully allowed appellant to cure the invalidity. The Arbitral Tribunal's reasoning was since the defect is curable and since there was no specific denial of the passing of the board resolution in the respondents' statement of defence and no specific question was raised on this aspect – no issue was framed or in the absence of issue being framed, there was no occasion for appellant to lead evidence in this aspect. For those reasons, appellant should be given an opportunity to show that Sunil Jain is authorized to sign and verify the statement of claim and depose on behalf of appellant, was flawed.

(d) To the extent, the Arbitral Award permits appellant to cure the invalidity of the board resolution, is in conflict with the public policy of India and is liable to be set aside. This is because it negates and reverses the finality of findings in favour of respondents confirming subject matter of the interim award thus giving appellant a clean slate to re-agitate disputed matters of substance arising in the arbitration.

(e) Once it has been held on appreciation of pleadings and evidence led in this regard that Sunil Jain lacks the requisite authority to sign and verify

the statement of claim, the issue stood determined. The Arbitral Tribunal's jurisdiction to consider this issue ends on such determination. The Arbitral Tribunal cannot extend its jurisdiction by permitting appellant to cure the invalidity of Sunil Jain's authority and thereby retain the jurisdiction to once again determine his authority to sign and verify the statement of claim.

(f) If the party is allowed to lead evidence once it has chosen not to do so, no litigation will ever end. Such course of action would also militate against the fundamental policy of Indian Law which tries to attain finality to arbitral awards.

(g) If authority to a person to institute legal proceedings was given at a board meeting held on a particular date and it is established after trial, that the meeting was held, in a manner unknown to law, or that in fact no such meeting was held on the date stated by plaintiff, the court would not allow plaintiff to undo the effect of that finding by once again holding a meeting to issue such authority. Such opportunities erodes the binding finality of awards. There is fundamental and inherent contradiction in the interim award in as much as, on the one hand the Arbitral Tribunal holds that pleadings regarding the validity of the board resolution are required to be made by appellant in the statement of claim itself since appellant would not know what position respondents may take in the statement of claim in this regard. Such pleadings are entirely absent. The Arbitral Tribunal rejects appellant's submission that the lack of specific denial of the board resolution in respondents' statement of defence amounts to admission of its validity.

The Arbitral Tribunal noticed that PA group in the reference has denied the existence and validity of the board resolution and, therefore, appellant was put to notice of its burden to prove the same.

In a departure from this reasoning, however, an opportunity is given by the Arbitral Tribunal to appellant to cure the invalidity of the board resolution is premised on the reasoning that there is no specific denial of the validity of the board resolution by respondents in their statements of defence due to which no specific issue was framed and as such no evidence was led by appellant in this regard. Therefore, by giving an opportunity to cure the defect, the Arbitral Tribunal has given not one but two options, when no such opportunity was sought by appellant.

(h) Appellant never even made an application to the Arbitral Tribunal to allow it to cure the validity for Sunil Jain's authorization to sign and verify the statement of claim. Still an opportunity was given.

(i) The Arbitral Tribunal has exercised jurisdiction in equity (*Ex Aequo Etbono/ Amiable Compositeur*) which is not permitted under Section 28 of the Arbitration Act. This was not a case where the Arbitral Tribunal exercised power in law available to it on a matter of mere procedure. It was entirely a matter of substance decided in accordance with substantive law. The opportunity to cure the defect in the board resolution by the options in paragraph 77 of the award are demonstrably an exercise of power in equity. The Arbitral Tribunal holds that if it does not grant appellant an opportunity to cure the invalidity of Sunil Jain's authority, it would cause prejudice to

appellant and that would amount to miscarriage of justice to appellant. This is a clear exercise of equitable jurisdiction under Section 28(2) of the Arbitration Act, where it was not available to the Arbitral Tribunal. The observations in ***Interocean Shipping India Pvt Ltd. Vs. ONGC***[32] are apposite even to the present case. None of the judgments relied upon by appellant even remotely apply.

(j) In the circumstances, the appeal has to be dismissed.

11 Mr. Haresh Jagtiani, in addition to adopting the submissions of Mr. Sharan Jagtiani, submitted as under:

(a) The Arbitral Tribunal having held that the resolution based on which Sunil Jain signed the pleadings was illegal on the basis of the substantive law applicable in India, which is the applicable law governing the arbitration, could not have given the liberty to cure the defect.

(b) Sunil Jain was the only fact witness deposing on behalf of appellant and the resolution relied upon by him having been held as not proved, the resolution becomes inadmissible in evidence and no part of the award can be based upon an inadmissible document under the Indian Evidence Act 1872. The issue is purely one of substance and not procedure which is incapable of being cured in the manner in which it is sought to be by the Arbitral Tribunal.

(c) The resolution has been passed by appellant which is a BVI registered company whose sole director is Execorp, a corporate entity whose place of

32. 2022 SCC Online Bom 1699

registration is unknown. Applying the test of Indian Law, such a company like appellant will not be recognized as a legal entity given that Section 149 of the Companies Act 2013 only permits a natural person to be a director and not another artificial entity. This also has been held by the Arbitral Tribunal against appellant and by this yardstick as well the resolution has been declared to be invalid. It is on a pure question of substance that this finding has been arrived at.

(d) Paragraphs 77 and 78 of the award are at odds with the rest of the findings in the award. The liberty given in paragraph 78 to file a fresh resolution can only be explained or justified on principles of equity and good conscience. Section 28 (2) of the Arbitration Act does not permit this unless parties have agreed under the contract that the Arbitral Tribunal can fall back on equity.

(e) The Arbitral Tribunal is a creature of contract between two parties intending to resolve their dispute by arbitrators of their choice and Section 28(2) of the Arbitration Act proscribes the Arbitral Tribunal from exercising equitable jurisdiction except, if expressly agreed by contract of parties referring the resolution of their dispute to arbitration.

(f) Since the parties had not agreed to the Arbitral Tribunal applying principles of equity, the Arbitral Tribunal could not have given the opportunity to appellant to cure the defect.

12 Though elaborate submissions were made, the issues at hand are :-

(a) Whether petition filed by respondent nos.1 to 4 under Section 34 of

the Arbitration Act was maintainable ?

(b) Whether, (i) Arbitral Tribunal having found in favour of respondents in holding that Sunil Jain was neither a Secretary nor a Director nor other principal officer of appellant and the board resolution dated 16th July 2018, on the strength of which Sunil Jain has signed and verified the statement of claim, is not a valid document under law, could the Arbitral Tribunal say that the defect was curable or ratifiable? and (ii) for the reasons mentioned in paragraph 77 of the award, appellant should be given a chance to show that Sunil Jain is vested with necessary authority to institute the present arbitration proceedings and also has been authorised to sign and verify the statement of claim and to depose in the matter or in the alternative file a fresh resolution ?

(c) Whether Section 28 of the Arbitration Act would be applicable in as much as, granting an opportunity to rectify the defect is an exercise of powers under Section 28(2) of the Arbitration Act which parties have not expressly authorised the Arbitral Tribunal to do so.

Our answers are as under:

Issue (a):-

13 On the issue of the maintainability of petition under Section 34 of the Arbitration Act, we would hold that the petition was maintainable. The Apex Court in *IFFCO* (supra) has held that the words “any matter” used in Section 31(6) of the Arbitration Act is very wide in nature and that an interim award may be made on “any matter” with respect to which the

Arbitral Tribunal may make a final Arbitral Award. The expression "matter" is wide in nature and subsumes issues at which the parties herein are in dispute. Paragraph 8 of *IFFCO* reads as under:

> *"8. The language of Section 31(6) is advisedly wide in nature. A reading of the said sub-section makes it clear that the jurisdiction to make an interim arbitral award is left to the good sense of the arbitral tribunal, and that it extends to "any matter" with respect to which it may make a final arbitral award. The expression "matter" is wide in nature, and subsumes issues at which the parties are in dispute. It is clear, therefore, that any point of dispute between the parties which has to be answered by the arbitral tribunal can be the subject matter of an interim arbitral award. However, it is important to add a note of caution. In an appropriate case, the issue of more than one award may be necessitated on the facts of that case. However, by dealing with the matter in a piecemeal fashion, what must be borne in mind is that the resolution of the dispute as a whole will be delayed and parties will be put to additional expense. The arbitral tribunal should, therefore, consider whether there is any real advantage in delivering interim awards or in proceeding with the matter as a whole and delivering one final award, bearing in mind the avoidance of delay and additional expense. Ultimately, a fair means for resolution of all disputes should be uppermost in the mind of the arbitral tribunal."*

The Supreme Court was considering whether a decision on limitation is an interim award which can be independently and separately challenged under Section 34 of the Arbitration Act. Paragraph 30 of *IFFCO* (supra) reads as under:

> *"30. In our view, therefore, it is clear that the award dated 23 rd July, 2015 is an interim award, which being an arbitral award, can be challenged separately and independently under Section 34 of the Arbitration Act. We are of the view that such an award, which does not relate to the arbitral tribunal's own jurisdiction under Section 16, does not have to follow the drill of Section 16(5) and (6) of the Act. Having said this, we are of the view that Parliament may consider amending Section 34 of the Act so as to consolidate all interim awards together with the final arbitral award, so that one challenge under Section 34 can be made after delivery of the final arbitral award. Piecemeal challenges like piecemeal awards lead to unnecessary delay and additional expense."*

14 The facts and issues which arose in *MSEDCL* (Supra) are almost similar to that of the present matter. In *MSEDCL* (supra), the respondent in the arbitration challenged the claimant's authority to file a claim on behalf a joint venture. The respondent filed a formal application for issuance of an interim award under Section 31(6) of the Arbitration Act dismissing the claim. The tribunal rejected this application. The Learned Single Judge of this court allowed the petition filed by *MSEDCL* under Section 34 of the Arbitration Act and dismissed the claim. The Court held that the claimant's JV partner- Electropath had not authorized the filing of the claim. The Learned Single Judge found that Electropath did not give any express authority in favour of the claimant to refer the dispute to arbitration arising out of the business relating to the joint venture, and the claimant could not legally represent Electropath as lead member of the said joint venture in absence of any express authority on behalf of the Electropath. Significantly, the court held that the arbitrator ought to have held that the statement of claim filed by the claimant in its individual capacity was not maintainable and ought to have allowed the said application filed by the Respondents under section 31(6) of the Arbitration Act and ought to have dismissed the claims made by the claimant. Consequently, this Court allowed the petition under Section 34 of the Arbitration Act and allowed the application filed by *MSEDCL* under Section 31(6) of the Arbitration Act and ordered dismissal of the claim.

15 Both these judgments, i.e. *IFFCO* (supra) and *MSEDCL* (supra) relied on by Respondents is subsequent in time *vis-à-vis* the judgments cited by appellant.

16 Advocating a narrower construction of what constitutes an interim award appellant relied on various judgments, i.e., *Harinarayan G. Bajaj* (supra), *Sanshin Chemical Industry* (supra), *Punj Llyod Ltd.* (supra) *Deepak Mitra* (supra), *Ranjiv Kumar* (supra), to submit that an 'interim award' is limited to orders which finally decide any part of the claim or counterclaim between the parties or an order which results in dismissal of the reference. The nature of orders passed in the judgments cited by appellant are entirely distinct from the Order dated 16th June 2022.

17 Appellant's reliance on the judgment of *Free Coupons Pvt Ltd.* (supra) on this aspect is not correct. In that case the order of the Arbitral Tribunal was challenged, and the Hon'ble Delhi High Court did not entertain the challenge under Section 34 of the Arbitration Act.

The main distinction that appellant misses is that in *Future Coupons Pvt Ltd.* (supra) the application before the Arbitral Tribunal was only under Section 32(2)(c) of the Arbitration Act and not for an Interim Award under Section 31(6) read with Section 2(c) of the Arbitration Act. In that case, the question was whether order of Competition Commission of India dated 17th December 2022 and order of the National Company Law Tribunal admitting an application against Future FRL would prevent the arbitration from proceeding. It was on the basis of these two other orders in two completely

different proceedings and their alleged effect on the arbitration that the petitioner filed its application under Section 32(2)(c) of the Arbitration Act seeking a determination that the continuation of the arbitration proceedings has become unnecessary or impossible. It is in this context that the findings of the Delhi High Court came to be rendered by holding that had the application been allowed and the arbitration reference terminated, perhaps a remedy would have been available under Article 227 of the Constitution of India but that since the application was dismissed by the Arbitral Tribunal, no remedy would lie against the interlocutory order of the Tribunal under Section 34 of the Arbitration Act. Section 31(6) of the Arbitration Act and the very concept of an Interim Award being under challenge did not arise in that case.

18 In our view, *IFFCO* (supra) and *MSEDCL* (supra) are authorities for the proposition that an order or decision is an interim award if it finally decides an issue or 'matter' between the parties on which the tribunal can make a final award, including an order determining whether the claimant is authorised to file the claim. As such, the Impugned Order dated 16 June 2022 is an Interim Award within the meaning of Section 2(1)(c) read with Section 31(6) of the Arbitration Act.

<u>Issue (b) and Issue (c)</u>

19 The issue as to whether the Arbitral Tribunal could have given an opportunity to cure the irregularity or whether there was a bar under Section 28(2) of the Arbitration Act have to be considered together and can

be answered thus:

It is appellant's case that the lack of authority or defective authority of Sunil Jain is a procedural defect and is curable; it was a case, where the Arbitral Tribunal exercised powers in law available to it on a matter of mere procedure; it was not a matter of substance decided in accordance with substantive law. In our view, the Arbitral Tribunal did not decide any matter of substance in accordance with substantive law. Having said that, the Arbitral Tribunal, as laid down in ***Nahar Industrial Enterprises Ltd Vs. Hongkong and Shanghai Banking Corporation***[33] by the Apex Court, can travel beyond the CPC and the only fetter that is put on its powers is to observe the principles of natural justice. Paragraph 98(n) of *Nahar Industrial Enterprises Ltd.* (Supra) reads as under:

> *"98(n) It is not bound by the procedure laid down under the Code. It may however be noticed in this regard that just because the Tribunal is not bound by the Code, it does not mean that it would not have jurisdiction to exercise beyond the Code of Civil Procedure. Rather, the Tribunal can travel beyond the Code of Civil Procedure and the only fetter that is put on its powers is to observe the principles of natural justice."*
>
> *(emphasis supplied)*

20 As held by the Apex Court in ***Srei Infrastructure Finance Ltd. Vs. Tuff Drilling (P) Ltd.***[34] Section 19 cannot be read to mean that the arbitral tribunal is incapacitated in drawing sustenance from any provisions laid down under the CPC. Just because the Arbitral Tribunal is not bound by the CPC, it does not mean that it would not have jurisdiction to exercise powers of a court as contained in the CPC.

33. (2009) 8 SCC 646
34. (2018) 11 SCC 470

Section 19 of the Arbitration Act, for ease of reference, reads as under:

> "Determination of rules of procedure.—
> (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).
>
> (2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.
>
> (3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate. The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

Paragraph 26 of *Srei Infrastructure Finance Ltd.*(supra) reads:

> *26. There cannot be a dispute that the power exercised by the arbitral tribunal is a quasi-judicial. In view of the provisions of the 1996 Act, which confers various statutory powers and obligations on the arbitral tribunal, we do not find any such distinction between the statutory tribunal constituted under the statutory provisions or Constitution in so far as the power of procedural review is concerned. We have already noticed that Section 19 provides that arbitral tribunal shall not be bound by the rules of procedure as contained in Civil Procedure Code. Section 19 cannot be read to mean that arbitral tribunal is incapacitated in drawing sustenance from any provisions of Code of Civil Procedure. This was clearly laid down in Nahar Industrial Enterprises Limited Vs. Hong Kong and Shanghai Banking Corporation, (2009) 8 SCC 646. In Paragraph 98(n), following was stated:-*
>
> *"(n) It is not bound by the procedure laid down under the Code. It may however be noticed in this regard that just because the Tribunal is not bound by the Code, it does not mean that it would not have jurisdiction to exercise powers of a court as contained in the Code. "Rather, the Tribunal can travel beyond the Code of Civil Procedure and the only fetter that is put on its powers is to observe the principles of natural justice."*
>
> *(emphasis supplied)*

21 In ***Oil & Natural Gas Corporation Ltd. Vs. Interocean Shipping (India) Pvt Ltd.***[35] learned single Judge of this court held that though the Arbitral Tribunal is not bound by the Evidence Act and Civil Procedure Code, the

35. 2017 Scc Online Bom 1032

principles thereof will still apply. Paragraph 48 of *Oil Natural Gas Corporation Ltd*. (Supra) reads as under:

> *"48. This Court has already held in catena of the decisions that though under Section 19 of the Arbitration and Conciliation Act, 1996, the arbitral tribunal was not bound by the Code of Civil Procedure, 1908, Indian Evidence Act, 1872, the arbitral tribunal is still bound by the principles of Indian Evidence Act, Code of Civil Procedure, 1908 and also the principles of natural justice. In my view, the impugned award on this issue shows clear perversity and patent illegality."*

22 In *United Bank of India (supra)* the Apex Court has held that letter of authority of an individual, who had signed the pleadings on behalf of the company can be cured by the company subsequently. The court held that where suits are instituted or defended on behalf of a public corporation, public interest should not be permitted to be defeated on a mere technicality. Though appellant is not a public corporation, a litigant's interest should not be permitted to be defeated on a mere technicality. Procedural defects which do not go to the root of the matter should not be permitted to defeat a just cause. There is sufficient power in the Courts, under the Code of Civil Procedure, to ensure that injustice is not done to any party who has a just case. As far as possible a substantive right should not be allowed to be defeated on account of a procedural irregularity which is curable. The court also held that in the absence of a person expressly authorised to sign the pleadings on behalf of the company, for example by the Board of Directors passing a resolution to that effect or by a power of attorney being executed in favour of any individual, the company can ratify the said action of it's officer in signing the pleadings. Such ratification can

be express or implied. Paragraphs 8, 9, 10, 11 and 13 of *United Bank of India* (supra) read as under:

> *8. In this appeal, therefore, the only question which arises for consideration is whether the plaint was duly signed and verified by a competent person.*
>
> *9. In cases like the present where suits are instituted or defended on behalf of a public corporation, public interest should not be permitted to be defeated on a mere technicality. Procedural defects which do not go to the root of the matter should not be permitted to defeat a just cause. There is sufficient power in the Courts, under the Code of Civil Procedure, to ensure that injustice is not done to any party who has a just case. As far as possible a substantive right should not be allowed to be defeated on account of a procedural irregularity which is curable.*
>
> *10. It cannot be disputed that a company like the appellant can sue and be sued in its own name. Under Order 6 Rule 14 of the Code of Civil Procedure a pleading is required to be signed by the party and its pleader, if any. As a company is a juristic entity it is obvious that some person has to sign the pleadings on behalf of the company. Order 29 Rule 1 of the Code of Civil Procedure, therefore, provides that in a suit by against a corporation the Secretary or any Director or other Principal officer of the corporation who is able to depose to the facts of the case might sign and verify on behalf of the company. Reading Order 6 Rule 14 together with Order 29 Rule 1 of the Code of Civil Procedure it would appear that even in the absence of any formal letter of authority or power of attorney having been executed a person referred to in Rule 1 of Order 29 can, by virtue of the office which he holds, sign and verify the pleadings on behalf of the corporation. In addition thereto and de hors Order 29 Rule 1 of the Code of Civil Procedure, as a company is a juristic entity, it can duly authorise any person to sign the plaint or the written statement on its behalf and this would be regarded as sufficient compliance with the provisions of Order 6 Rule 14 of the Code of Civil Procedure. A person may be expressly authorised to sign the pleadings on behalf of the company, for example by the Board of Directors passing a resolution to that effect or by a power of attorney being executed in favour of any individual. In absence thereof and in cases where pleadings have been signed by one of it's officers a Corporation can ratify the said action of it's officer in signing the pleadings. Such ratification can be express or implied. The Court can, on the basis of the evidence on record, and after taking all the circumstances of the case, specially with regard to the conduct of the trial, come to the conclusion that the corporation had ratified the act of signing of the pleading by it's officer.*
>
> *11. The courts below could have held that Sh. L.K. Rohatgi must have been empowered to sign the plaint on behalf of the appellant. In the alternative it would have been legitimate to hold that the manner in which the suit was conducted showed that the appellant bank must have ratified the action of Sh. L.K. Rohatgi in signing the plaint. If, for any reason whatsoever, the courts below were still unable to come to*

> *this conclusion, then either of the appellate courts ought to have exercised their jurisdiction under Order 41 Rule 27 (1) (b) of the Code of Civil Procedure and should have directed a proper power of attorney to be produced or they could have ordered Sh. L.K. Rohatgi or any other competent person to be examined as a witness in order to prove ratification or the authority of Sh. L.K. Rohatgi to sign the plaint. Such a power should be exercised by a court in order to ensure that injustice is not done by rejection of a genuine claim.*
>
> *12. *********************
>
> *13. The court had to be satisfied that Sh. L.K. Rohatgi could sign the plaint on behalf of the appellant. The suit had been filed in the name of the appellant company; full amount of court fee had been paid by the appellant bank; documentary as well as oral evidence had been led on behalf of the appellant and the trial of the suit before the Sub Judge, Ambala, had continued for about two years. It is difficult, in these circumstances, even to presume that the suit had been filed and tried without the appellant having authorised the institution of the same. The only reasonable conclusion which we can come to is that Sh. L.K. Rohatgi must have been authorised to sign the plaint and, in any case, it must be held that the appellant had ratified the action of Sh. L.K. Rohatgi in signing the plaint and thereafter it continued with the suit.*

23 In the impugned order, the Learned Single Judge has accepted that this is the position in law but states that none of the cases relied upon by appellant apply to the arbitral proceedings. According to the Learned Single Judge, the cases relied upon by appellant either arose out of the order passed by the Civil Court, which unlike an Arbitral Tribunal is a Court of plenary jurisdiction or in respect of filing of winding up petition. According to the Learned Single Judge, the Arbitral Tribunal unlike a Court of plenary jurisdiction is a creature of contract governed by the agreement between the parties and cannot act in equity, in the absence of an express authorisation by the parties. As we will observe later Section 28 of the Arbitration Act is not applicable.

In fact, as noted earlier, the Apex Court in *Srei Infrastructure Finance Ltd.* (supra) relying on *Nahar Industrial Enterprises* (supra) has held that Section 19 cannot be read to mean that the arbitral tribunal is incapacitated in drawing sustenance from any provisions laid down under the CPC. Just because the Arbitral Tribunal is not bound by the code, it does not mean that it would not have jurisdiction to exercise powers of a court as contained in the CPC. Rather, the Arbitral Tribunal can travel beyond CPC and the only fetter that is put on its powers is to observe the principles of natural justice. The Apex Court in *Jugraj Singh* (supra) has held that once it is ratified, the ratification is thrown back to the date of the act done and the agent is put in the same position as if he had authority to do the act at the time the act was done by him. Therefore, in our view, the decision of the Arbitral Tribunal to permit appellant to cure the defect is perfectly justified.

24 Section 28 of the Arbitration Act deals with the question, which law or rules the Arbitral Tribunal shall apply to the substance of the dispute. The expression "substance of the dispute" could have reference only to the merits of the case. We draw support for this view from ***Justice R.S. Bachawat's Law of Arbitration and Conciliation***[36] (Bachawat), where it reads as under:

> *"UNCITRAL Report on Adoption of Model Law*
>
> *Paragraph (1) [Corresponding to Ss. 19(1) and (2)]*
>
> *Two suggestions of divergent significance were made with respect to paragraph (1). One suggestion was to make clear in the Model Law that the freedom of the parties to agree on the procedure should be a*

36. Sixth Edition Volume-I (Sections 1-34) – Pg. 1407/1506

continuing one throughout the arbitral proceedings. The other suggestion was to permit the parties to determine rules of procedure after the arbitrators had accepted their duties to the extent the arbitrators agreed (Para 171].

Neither suggestion was adopted. Although the provision as it now stood implied that the parties had a continuing right to change the procedure, the arbitrators could not in fact be forced to accept changes in the procedure because they could resign if they did not wish to carry out new procedures agreed to by the parties. It was noted that the time-frame allowed for changing the procedures to be followed could be settled between the parties and the arbitrators [Para 172]
Paragraph (2) [Corresponding to Ss. 19(3) and (4)]

An observation was made that, since in some legal systems a question of admissibility, relevance, materiality and weight of evidence would be considered to be a matter of substantive law, the question arose as to the relationship between the second sentence of paragraph (2) and Art. 28. [Para 173].

It was understood that the objective of paragraph (2) was to recognize a discretion of the arbitral tribunal which would not be affected by the choice of law applicable to the substance of the dispute (Para 174).

The Commission adopted paragraph (2) [Para 175]

UNCITRAL Model Law

Section 28 (except clause (a) of sub-section 1) corresponds to Article 28 of the UNCITRAL Model Law.

****

Analytical Commentary on UNCITRAL Draft Model Law

Article 28. Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Commentary

1. Article 28 deals with the question which law or rules the arbitral tribunal shall apply to the substance of the dispute. This question, which should be distinguished from the issue of the law applicable to the arbitral procedure or the arbitration agreement is often dealt with in conventions and national laws devoted to private international law or conflict of laws. However, it is sometimes covered by national laws on arbitration and often by arbitration conventions and arbitration rules."

(emphasis supplied)

During the hearing we had suggested to the counsel to also consider the UNCITRAL reports.

25 The issue at hand was not substance of the dispute. The substance of the dispute is the dispute and differences between the parties on account of shareholding in respondent no.6, which according to appellant was misused by PA group that gave them future dominance over respondent no.6. Even if, for a moment we stretch to hold that the Arbitral Tribunal has exercised jurisdiction in equity by allowing appellant to cure the irregularity, still it will not be hit by the provisions of Section 28(2) of the Arbitration Act because Section 28 of the Arbitration Act deals with the question which law or rules the Arbitral Tribunal shall apply to the substance of the dispute, would mean the merits of the case. The object of Sections 19(3) and 19(4) of the Arbitration Act is to recognize the discretion of the Arbitral Tribunal on matters that do not relate to the substance of the dispute, whereas, Section 28 of the Arbitration Act deals with substance of the dispute in contradistinction to the law applicable to the procedure.

Pages 1570/1571 in Bachawat says:

According to Article 28(3), the parties may authorize the arbitral tribunal to decide the dispute ex aequo et bono or as amiables compositeurs. This type of arbitration is currently not known or used in

> *all legal systems and there exists no uniform understanding as regards the precise scope of the power of the arbitral tribunal. When parties anticipate an uncertainty in this respect, they may wish to provide a clarification in the arbitration agreement by a more specific authorization to the arbitral tribunal. Paragraph (4) makes clear that in all cases, i.e., including an arbitration ex aequo et bono, the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of trade applicable to the transaction [Para 36]*

This also indicates that Section 28 applies only to the substance of the dispute, that is, the transaction that is under dispute and not procedural issues as in the case at hand.

Section 28(2) provides the arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so. If the arbitrators are appointed as *amiable compositerus*, they are exempt from the obligations of hearing the parties and their respective proofs, or establish default against them and decide according to the rule of law. These are clauses used in transactions where the parties are contracting for a long relationship, in which the maintenance of commercial trust between the parties is reasonably assured. These are clauses where the arbitrator is freed from any duty to respect the rule of law when deciding upon the merits of the dispute. The Arbitrator can ignore technicalities and strict constructions and need not conform in the ordinary legal procedures when conducting the reference.

In the case at hand the arbitral tribunal has not ignored the technical objections raised by RA Group. It has infact conformed to the law laid down by the Apex Court and various High Courts and has respected the rule of

law while deciding the objection raised by the RA Group.

Therefore, to say the Arbitral Tribunal by holding that appellant should be able to correct on irregularity, cannot be stated to have acted as "*amiable compositeurs*" or "*ex aequo et bono*". The Arbitral Tribunal has acted according to law and applied principles of natural justice.

26 The Arbitral Tribunal in our view, had not acted contrary to the law or disregarded the law but has applied the correct position in law. The Arbitral Tribunal has applied the principles of Order 29 Rule 4 read with Order 6 Rule 14 of the CPC and as noted earlier, there was no fetter in the Arbitral Tribunal in doing so. The Arbitral Tribunal has acted in accordance with the fundamental policy and Indian Law and granted appellant its right to cure the defect. At the cost of repetition, the Arbitral Tribunal, as held in catena of judgments, has held that when a proceeding is filed by company with defective board resolution or even without any board resolution at all, is not fatal and must be permitted to be cured. Procedural defect which do not go to the root of the matter should not be permitted to defeat a just cause. There is sufficient power in the Arbitral Tribunal to ensure that injustice is not done to any party who has a just case. As far as possible a substantive right should not be allowed to be defeated on account of a procedural irregularity which is curable. If we take away that power then no arbitrator will have power to ensure injustice is not done. This is the law and it is this law which had been applied by the Arbitral Tribunal.

The Claim has been filed by a company incorporated in BVI, which holds 49% shares in Respondent No. 6 together with RA Group and PA Group. Appellant has participated in the arbitral proceedings since 2018. The relationship between the parties goes as far back as 25th March 2009 when the share purchase agreement was entered into. It is in these circumstances, it is difficult even to presume that the claim has been filed and arbitral proceedings pursued without appellant having authorised the institution of the same. The only reasonable conclusion which we can come to is Sunil Jain must have been authorised to institute arbitration and sign the Claim Statement, etc. but did not have a valid document to prove that. We cannot say Sunil Jain was an impostor, as alleged by Mr. Haresh Jagtiani repeatedly during his submissions. In his cross examination by Counsel for Respondent No. 6, Sunil Jain has deposed that he has attended many meetings of Respondent No. 6 after his appointment as Director of Respondent No. 6 in January 2010. The substance of the dispute is for the control of Respondent No. 6 between Appellant and the RA Group / PA Group. Despite that RA Group has raised such objections.

Infact Mr. Haresh Jagtiani himself has admitted while cross examining Sunil Jain that Sunil Jain was the nominee Director of Appellant in Respondent No. 6. Question no. 113 and Question no. 114 and answers thereto read as under:

> *"Q.113. Please confirm that you were present at most of the board meetings of respondent no.1 company and have participated in the deliberations in your capacity as a nominee director of the claimant.*
> *Ans. I have attended many Board Meetings of Respondent No.1*

company.

Q.114. In your capacity as a Nominee Director by the Claimant, you must have been given instructions as to the interest of the Claimant that you were expected to protect an further. Is that correct ?
Ans. As per SHA, that is correct."

27 In the circumstances, the Learned Single Judge was not correct in interfering with the award under Section 34 of the Arbitration Act.

We set aside the impugned order and judgment of the Learned Single Judge and restore the award of the Arbitral Tribunal.

28 The appeal is allowed on the above terms and costs to be cost in the arbitral proceedings. Consequently, interim application (l) no.38727 of 2022 also stands disposed.

29 The Arbitral Tribunal shall endeavour to fix the date for proceeding with the arbitral proceedings at its earliest convenience.

30 Our findings above will squarely apply to Commercial Appeal (L) No.37275 of 2022, which was also filed impugning the same order and judgment dated 1st November 2022. Consequently, Commercial Appeal (L) No.37275 of 2022 and interim application (l) No.38730 of 2022 also stand disposed.

31 Mr. Sharan Jagtiani prays for stay of the judgment. Stay refused.

(RAJESH S PATIL, J.) (K.R. SHRIRAM, J.)

Meera Jadhav