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

% **Pronounced on: 31st July, 2023**

\+ O.M.P. (COMM) 42/2019 & I.A. 1281/2019

SPICEJET LIMITED ..... Petitioner

Through: Mr. Abhinav Vashisht, Sr. Advocate with Mr. Atul Sharma, Mr. Abhinav Sharma, Mr. Gaurav Arora and Ms. Akshita Sachdeva, Advocates

versus

KAL AIRWAYS PVT LTD & ORS. ..... Respondents

Through: Mr. Maninder Singh and Mr. Sathanarayanan, Sr. Advocates with Ms. Nandini Gore, Ms. Sonia Nigam, Mr. Yash Dubey, Mr. Yashwant Gaggar, Mr. Vimal and Ms. Indira, Advocates

O.M.P. (COMM) 43/2019 & I.A. 1286/2019

AJAY SINGH ..... Petitioner

Through: Mr. Abhinav Vashisht, Sr. Advocate with Mr. Atul Sharma, Mr. Abhinav Sharma, Mr. Gaurav Arora and Ms. Akshita Sachdeva, Advocates

versus

KAL AIRWAYS PVT LTD & ORS. ..... Respondents

Through: Mr. Maninder Singh and Mr. Sathanarayanan, Sr. Advocates

with Ms. Nandini Gore, Ms. Sonia Nigam, Mr. Yash Dubey, Mr. Yashwant Gaggar, Mr. Vimal and Ms. Indira, Advocates

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Arbitration Act") has been filed on behalf of SpiceJet Limited, petitioner Company in O.M.P. (COMM) 42/2019 and Ajay Singh, petitioner in O.M.P. (COMM) 43/2019 (hereinafter collectively referred to as "the petitioners") who are aggrieved by the Arbitral Award passed on 20th July 2018, corrected on 20th September 2018, (hereinafter referred to as "the impugned Award"), in the arbitration proceedings between them and Kal Airways Private Limited as well as Kalanithi Maran (hereinafter collectively referred to as "the respondents").

FACTUAL MATRIX

2. The factual background and a brief reiteration of the controversy between the parties that is necessary for the adjudication of the disputes before this Court is delineated hereunder:

a. The respondents were the promoters and majority shareholders, holding 35,04,28,758 equity shares constituting

about 58.46% of the share capital, of the petitioner Company which runs a scheduled airline. During the relevant time period of such shareholding, i.e., from November 2010 to February 2015, the petitioner Company had run into severe financial crisis leading to closing down of its operation and extensive and substantial debts in its name.

b. At this financially critical phase of the petitioner Company, when it was at the verge of shutting down, the respondents issued an Offer Letter dated 13th January 2015 and approached the petitioner, Ajay Singh, who was holding a small shareholding in the petitioner Company to take over the shares held by the respondents for a nominal consideration of Rs. 2/-.

c. Accordingly, the parties executed a Share Sale and Purchase Agreement (hereinafter referred to as "SSPA" or "the Agreement") on 29th January 2015 with the knowledge that the petitioner would be saddled with liabilities to the extent of Rs. 2200,00,00,000/- and also with the consent that the respondents would infuse an additional sum of Rs. 450,00,00,000/- in the petitioner Company for its revival.

d. Disputes arose between the parties pertaining to the Agreement regarding the financial obligation of the parties and for the adjudication and resolution of the same, the respondents invoked the arbitration clause stipulated in the Agreement. Consequently, an Arbitral Tribunal was constituted.

e. The arbitration proceedings were initiated, with filing of the Statement of Claim, and the hearing was concluded by the Arbitral Tribunal and finally, the impugned Award was passed. The following final observations were passed regarding the claims raised and adjudicated during the arbitral proceedings and the Award was granted as under:

> *"In conclusion, we hold as follows:*
>
> *(1) The Claimants are entitled to refund of Rs.308,21,89,461/- from the Respondents.*
>
> *(2) The parties shall explore the possibility of giving effect to and exercise the option as described in detail. In case the efforts do not fortify, the Respondents shall within a period of one month thereafter refund the amount in question i.e., Rs.270,86,99,209/- to the Claimant No.2 (which is arrived at after adjusting the counter claim of Rs.100 Crores which has been allowed).*
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> *(3) Since the amount covered by conclusion (1) was with the Respondents since November 2015, they would have become liable to pay interest on the same. Though, interest at the rate of 18% per annum has been claimed, we are of the view that since Respondent No.1 Company took over a huge liability and also paid interest on the tax amount payable by the Claimants, interest at the rate of 12% on Rs.308,21,89,461/- would be appropriate. The amount has to be accordingly calculated for about 30 months. Additionally, in view of the finding relating to the CRPS claim and the proved position that the Respondents have paid interest / servicing charges of around Rs.29 Crores, the counter claim to that extent is allowed.*

(4) So far as costs are concerned, in view of the factual scenario involved, both parties are directed to bear their respective costs. The Cost of Arbitration (fee of Arbitrators, expenses including travel, hotel expenses etc. of the Arbitrators, venue and Secretarial assistance) shall be borne equally by the parties.

(5) In case the payments, as directed, to be made by the Respondents are not so made within two months from the relevant date, the Claimants shall be entitled to interest @ 18% from the last date of the due date in terms of this Award.

(6) Claims/counter claims other than those dealt with above and specifically granted stand rejected.

(7) The parties have furnished stamp papers of Rs.500/- each with undertaking to pay the deficit, if any, as and when called upon to do so.

(8) The place of Arbitration is declared to be New Delhi."

f. The petitioners are aggrieved of the findings no. 2, 3 and 5, as reproduced above.

3. Therefore, the petitioners are before this Court praying for the following reliefs:

"a) Set aside the Arbitral Award to the extent it allows the refund of Rs. 270,86,99,209/- (Rupees Two Hundred Seventy Crore Eighty-Six Lakh Ninety-Nine Thousand Two Hundred and Nine Only) towards CRPS to the Respondents;

b) Set aside the Arbitral Award to the extent it awards an interest of 12% per annum on the amounts paid towards Warrants by the Respondents;

c) Set aside the Arbitral Award to the extent it awards an interest of 18% per annum to the Respondents on the sums

awarded, if such sums are not paid within the time period stipulated therein; and

d) Pass any other orders this Hon'ble Court may deem fit."

SUBMISSIONS

4. The matter has been argued at length at several dates and this Court has heard both the parties and also considered the contentions made in the pleadings as well as the written submissions. Upon a conjoint consideration of the pleadings, written submissions and the grounds pressed during the course of the arguments, the following submissions of the parties are found relevant for adjudication of the objections to the Award in question.

On behalf of the Petitioners

5. Mr. Abhinav Vashisht, the learned senior counsel appearing on behalf of the petitioners submitted that the impugned Award suffers from patent illegality on the face of record and hence deserves to be set aside.

6. It is submitted that the Arbitral Tribunal erred in awarding the refund of the sum of Rs. 270,86,99,209/- towards amounts paid for Non-Convertible Cumulative Redeemable Preference Shares (hereinafter referred to as "CRPS") despite coming to the finding that the respondents are in breach of their obligation to bring in the entire committed support of Rs. 450,00,00,000/- which amount was to be used towards payment of liabilities including statutory dues and to support the turnaround plan of

the petitioner Company, in terms of the Offer Letter dated 13th January 2015 and the Scheme dated 15th January 2015.

7. The learned senior counsel submitted that in terms of Schedule B of the Agreement, the CRPS is a debt instrument issued at a nominal coupon rate of 6%, repayable at the end of 8 years. The refund was awarded in favour of the respondents without considering that in accordance with the terms of the Agreement, CRPS is essentially a debt instrument, which could have been redeemed only after the expiry of a period of eight years from the date of subscription and is an amount which is not payable *in praesenti.* Moreover, in terms of the Schedule B, the dividend on the CRPS becomes payable only subject to the availability of profits of the Company. Therefore, on the face of the record, the Arbitral Tribunal failed to consider and appreciate that CRPS could have only been redeemed by the respondents after the expiry of a period of 8 years from the date of allotment of such CRPS in accordance with the terms of the SSPA.

8. It is further submitted that the said refund was awarded in favour of the respondents despite the finding that they were in breach of the Agreement having failed to bring in Rs. 100 Crores, i.e., the Tranche-I of the total amount, in terms of Clause 6.3.1. and also, the petitioner Company's claim to the extent of Rs. 129 Crores was allowed on account of such breach. Therefore, now the respondents cannot take undue advantage of their breach.

9. It is submitted that the petitioners have been ready and willing to issue CRPS on the same terms as contained in the Agreement subject to

the respondents fulfilling their obligation of bringing in the sum of Rs. 100 Crores as agreed by way of the Agreement. Moreover, the petitioners also conveyed their willingness to issue CRPS on the same terms subject to fulfilment of obligations by the respondent even during the course of arbitral proceedings.

10. The learned senior counsel submitted that since the amounts under the CRPS were not payable *in praesenti*, there was no question of payment of post award interest on the same and it is pertinent to note that no pre-award interest was granted on those amounts.

11. It is submitted that the entire amount of Rs. 370 Crores, which was to be brought into the petitioner Company as part of the committed support, was to stay with the airline for a period of 8 years as per the terms of the Agreement and therefore, the Arbitral Tribunal could not have rewritten the terms of the contract by awarding return of Rs. 270 Crores, modifying the nature of the transaction in the Agreement.

12. Relying upon the judgments passed in ***Indian Oil Corporation Limited vs. Shree Ganesh Petroleum Rajgurunagar*, (2022) 4 SCC 463** and ***Union of India vs. Jindal Rail Infrastructure Ltd*., 2022 SCC OnLine Del 1540,** it is submitted on behalf of the petitioners that the Arbitral Tribunal rewrote the terms of the contract between the parties by converting the petitioner Company's offer into an arbitral award. The Hon'ble Supreme Court in ***Shree Ganesh Petroleum Rajgurunagar (Supra)*** observed that:

> *"45. The Court does not sit in appeal over the award made by an Arbitral Tribunal. The Court does not ordinarily*

interfere with interpretation made by the Arbitral Tribunal of a contractual provision, unless such interpretation is patently unreasonable or perverse. Where a contractual provision is ambiguous or is capable of being interpreted in more ways than one, the Court cannot interfere with the arbitral award, only because the Court is of the opinion that another possible interpretation would have been a better one.

46. In Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , this Court held that an award ignoring the terms of a contract would not be in public interest. In the instant case, the award in respect of the lease rent and the lease term is in patent disregard of the terms and conditions of the lease agreement and thus against public policy. Furthermore, in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] the jurisdiction of the Arbitral Tribunal to adjudicate a dispute itself was not in issue. The Court was dealing with the circumstances in which a court could look into the merits of an award.

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49. In Ssangyong Engg. & Construction Co. Ltd. v. NHAI [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , this Court held : (SCC pp. 199-200, para 76)

> *"76. However, when it comes to the public policy of India, argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the agreement continued to be applied till February 2013 — in short, it is not correct to say that the formula under the agreement could not be applied in view of the Ministry's change in the base indices from 1993-1994 to 2004-2005. Further, in order to apply a linking factor, a circular, unilaterally issued by one*

party, cannot possibly bind the other party to the agreement without that other party's consent. Indeed, the circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority award has created a new contract for the parties by applying the said unilateral circular and by substituting a workable formula under the agreement by another formula dehors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment."

50. In PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust [PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, (2021) 18 SCC 716 : 2021 SCC OnLine SC 508] this Court referred to and relied upon Ssangyong Engg. & Construction [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] and held : (PSA Sical Terminals case [PSA

Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, (2021) 18 SCC 716 : 2021 SCC OnLine SC 508] , SCC para 85)

> *"85. As such, as held by this Court in Ssangyong Engg. & Construction [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract has been foisted upon an unwilling party. This Court has further held that a party to the agreement cannot be made liable to perform something for which it has not entered into a contract. In our view, re-writing a contract for the parties would be breach of fundamental principles of justice entitling a court to interfere since such case would be one which shocks the conscience of the Court and as such, would fall in the exceptional category."*

51. In PSA Sical Terminals [PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, (2021) 18 SCC 716 : 2021 SCC OnLine SC 508] this Court clearly held that the role of the arbitrator was to arbitrate within the terms of the contract. He had no power apart from what the parties had given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction.

52. In PSA Sical Terminals [PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, (2021) 18 SCC 716 : 2021 SCC OnLine SC 508] this Court referred to and relied upon the earlier judgment of this Court in Army Welfare Housing Organisation v. Sumangal Services (P) Ltd. [Army Welfare Housing Organisation v. Sumangal Services (P) Ltd., (2004) 9 SCC 619] and held that an Arbitral Tribunal is not a court of law. It cannot exercise its power ex debito justitiae.

53. In Satyanarayana Construction Co. v. Union of India [Satyanarayana Construction Co. v. Union of India, (2011) 15 SCC 101 : (2014) 2 SCC (Civ) 252] , a Bench of this Court of coordinate strength held that once a rate had

been fixed in a contract, it was not open to the arbitrator to rewrite the terms of the contract and award a higher rate. Where an arbitrator had in effect rewritten the contract and awarded a rate, higher than that agreed in the contract, the High Court was held not to commit any error in setting aside the award."

13. The learned senior counsel for the petitioners submitted that the Arbitral Tribunal wrongly awarded interest of 12% on the aforesaid refund amount. It is submitted that Agreement between the parties does not entitle the respondents to claim any interest in case of refund of amount for non-issuance of Warrants and CRPS. Moreover, the interest has been awarded despite the specific finding that the petitioners were not in breach of any of the terms of the Agreement. Referring to Paragraph 25 and 51 of the impugned Award, the learned senior counsel submitted that since there is no breach on the part of the petitioner Company for issuance of Warrants or CRPS as also held by the Arbitral Tribunal, the interest awarded on the refund of Warrants amounting to Rs. 308 Crores is incorrect and ought to be set aside.

14. It is further submitted that the Arbitral Tribunal awarded interest of 12% on refund of Rs. 308 Crores, in total disregard of the proposal made by the petitioners and the fact that Ajay Singh took over the liabilities of Rs. 2200 Crores and ensured that the infused amount of Rs. 350 Crores was utilized towards discharge of liabilities of the Company and release of personal guarantees of the respondent no. 2.

15. It is further submitted that the interest of 12% awarded by the Arbitral Tribunal on the amounts refunded towards Warrants and 18% thereon is not only in violation of Section 28 (3) and Section 34 (2)(b) (ii)

of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Arbitration Act") but also is exorbitant and unreasonable.

16. It is submitted that the Arbitral Tribunal failed to provide any reasons for the grant of interest and the same in itself is a substantial ground for setting aside the impugned Award to this extent. It is submitted on behalf of the petitioner that the arbitral award suffers from patent illegality as it directed the refund of Rs. 270,86,99,209/- towards the amount paid for CRPS despite holding that the respondents are in breach of their obligation to bring committed support of Rs. 450,00,00,000/-. It is further submitted that the amounts paid by petitioner towards CRPS have been directed to be refunded to the respondents without considering the fact that CRPS is a debt instrument which can be redeemed only after the expiry of 8 years from the date of subscription and the amount is not payable *in praesenti*.

17. It is further submitted that interest rate of 12% imposed by arbitral award on the amount of Rs. 308,21,89,461/- towards Warrants and 18% if the sums are not paid within stipulated time are exorbitant, and unreasonable. It is further submitted that such interest rate is in contradiction to the terms of the SSPA which does not provide for any such understanding. Further, this interest rate is in violation of Sections 28(3) and 34(2)(b)(ii) of the Arbitration Act, 1996.

18. It is further submitted that the petitioner company and Ajay Singh are not in breach of their obligations under the SSPA including obtaining discharge of the personal guarantees and mortgages of the respondents, which was a condition precedent for the infusion of 'committed support'

in terms of the Offer. The Arbitral Tribunal despite holding that respondents liable for the breach of their obligations under SSPA awarded refund of the sums towards CRPS in favour of the respondents.

19. The learned senior counsel submitted that the Agreement between the parties explicitly laid out their rights and obligations. The obligation to issue Warrants and CRPS was that of the petitioner Company and not of Ajay Singh. Notwithstanding the fact that there is no breach on the part of the Company, and the fact that there was no allegation of breach on the part of Ajay Singh, the Arbitral Tribunal erred in holding Ajay Singh jointly liable to refund the amounts paid by respondents towards the Warrants and CPRS and interest thereon despite the fact that not a single rupee went to Ajay Singh and the majority of the amount was already utilized by the airline before he became the promoter. It is submitted that the petitioner, who did not benefit from any amounts, cannot be burdened with joint liability to pay the amounts which were used by the petitioner Company to repay the existing liabilities. Further, there was not even a whisper of allegation of breach on the part of the petitioner or any obligation on his part. However, the Arbitral Tribunal erred in holding the petitioners jointly liable, in effect re-writing the terms of the contract, which is impermissible in law and is a ground for setting aside the award.

20. Therefore, in view of the aforesaid objections, it is prayed that the impugned Award be set aside to the extent as stated above.

On behalf of the Respondents

21. Mr. Maninder Singh and Mr. Sathanarayanan, learned senior advocates appearing on behalf of the respondents, *per contra*, vehemently opposed the instant petition, the averments made on behalf of the petitioners and the contentions raised in the pleadings. It is submitted on behalf of respondents that the petitioners are attempting to reagitate the contentions raised before the Arbitral Tribunal which is beyond the scope of the mandate of Section 34 of the Act.

22. It is further submitted on behalf of the respondents that the High Court, while hearing a petition under Section 34 of the Arbitration Act, is not an appellate court and cannot reappraise the evidence or reasons behind the Arbitral Award. The jurisdiction of the Court in Section 34 is limited and it is not open for the court to attempt to probe the process by which Arbitral Tribunal reached its conclusion.

23. The learned senior counsel submitted that the conclusions drawn by the Arbitral Tribunal are completely fair, reasonable and objective except to the extent of Counter-Claim of Rs. 100 crores along with Rs. 29 crores in favour of the petitioners.

24. It is further submitted on behalf of the respondent that the respondent fulfilled the obligations under the SSPA including the committed support of Rs. 450 crores reviving the petitioner Company from any sort of financial instability and distress. Further, the infusion of money brought in by the respondents was towards the proposed allotment of Warrants and CRPS to the respondents by the petitioner Company and Ajay Singh which was never done. This understanding was approved by the Ministry of Civil Aviation which granted its approval to the Scheme

of Reconstruction and Revival for Takeover of Ownership, Management and Control of the petitioners.

25. It is submitted on behalf of the respondents that the SSPA was a composite contract envisaging reciprocal obligations of the parties and the performance of the terms of the contract was essential to effectuate the objectives of the SSPA. The compartmentalization of the contract into parts as suggested by the petitioners could not be done as composite contract cannot be read in a disjointed manner and in separate parts. Further, it is submitted that the respondents have performed all the obligations in the contract whereas petitioners failed to adhere to the obligations by failing to discharge the statutory dues and prevent respondent from penal liability.

26. It is further submitted on behalf of respondent that Ajay Singh willfully and without any influence took management of the petitioner company with a win-win situation that the respondent would liquidate the petitioner company with cash inflow in order to revive the petitioner company. Hence, the entire risk bearer of the petitioner company was Respondent No. 2 and not Ajay Singh who had not invested any amount in the petitioner company.

27. It is further submitted on behalf of the respondents that it was not the breach of the SSPA by the respondents that resulted in the non-approval by the Bombay Stock Exchange (hereinafter referred to as "BSE"). It was the responsibility of the petitioner under the SSPA to pursue in-principle application seeking approval of BSE for allotment of Warrants to the respondents. BSE requested the petitioner to submit an

undertaking/ confirmation from the banks so that the Warrants could be issued to the respondents. BSE *vide* letter dated 10th July 2015 informed the petitioner that on account of the petitioner's failure to submit additional requirements and due to lack of response on behalf of the petitioner, the application seeking in-principle approval was closed.

28. It is submitted on behalf of the respondent that respondent No. 2 fulfilled all his obligations i.e., creation of a fixed deposit of Rs. 100 crores and respondent No. 2 provided evidence of the same to the petitioner and issued irrevocable instructions to the Bank. It is further stated that the amended Clause 7.2.1 (b) of the SSPA provided that Rs. 100 crores shall be deposited in the designated account within 2 days of the petitioner issuing written instructions to the Bank for encashment of the fixed deposit. The major contention of the respondent is that such instructions to the Bank were to be issued by the petitioner upon obtaining the consent of Export Development Canada (hereinafter referred to as "EDC") for the repayment of the financial facility availed from the Bank. Even after obtaining consent from EDC, the petitioner did not issue written instructions for encashment of fixed deposit. The respondent alleges that the petitioner chose not to issue written instructions within time knowing that in the present case time was of the essence. Hence, it is due to the non-diligence of the petitioner that the amount of Rs. 100 crores were not received by the petitioner.

29. It is submitted on behalf of the respondents that the contention of the petitioner that amounts can be paid towards the CRPS only after 8 years from the date of allotment of CRPS cannot be sustained. It is

submitted that the learned Tribunal granted sums in favour of respondents entitling the amount with an immediate effect and not at a belated stage.

30. It is further submitted that the interest towards issuance of Warrants awarded by the learned Tribunal is not exorbitant. The respondents in their Statement of Claim demanded for an interest of 18% per annum but only 12% interest was granted by the learned Tribunal and that too without any reasoned order.

31. Hence, the learned senior counsel submitted that the impugned Award, to the extent challenged by the petitioners, is neither patently illegal nor against the fundamental policy of law or the public policy of the Country and therefore, the petition is liable to be dismissed.

ANALYSIS AND FINDINGS

32. Before adjudicating upon the merits of the case, it is essential to recapitulate the idea, purpose, goal and objective of the Arbitration Act as well as Section 34 of the Act to understand the implications the provisions therein have on the powers and jurisdiction of this Court.

Spirit of the Arbitration Act

33. The Arbitration Act was enacted for providing a mechanism to the public to resolve their disputes in a process less rigorous, technical and formal than that of litigation. It has proven to be easier, more accessible, efficient and even cost effective for the parties involved, whether at an individual level or at the level of a business or corporation. The alternative dispute mechanism is not only advantageous for the people involved in disputes but has also been aiding the effective disposal and

release of burden on the Courts of the Country. The parties have a more hands-on involvement in an Arbitration process and play an active role in the adjudication process.

34. The Hon'ble Supreme Court in ***Union of India vs. Varindera Constructions Ltd.*, (2018) 7 SCC 794,** while discussing the object of arbitration held as under:-

> *"**12.** The primary object of the arbitration is to reach a final disposition in a speedy, effective, inexpensive and expeditious manner. In order to regulate the law regarding arbitration, legislature came up with legislation which is known as Arbitration and Conciliation Act, 1996. In order to make arbitration process more effective, the legislature restricted the role of courts in case where matter is subject to the arbitration. Section 5 of the Act specifically restricted the interference of the courts to some extent. In other words, it is only in exceptional circumstances, as provided by this Act, the court is entitled to intervene in the dispute which is the subject-matter of arbitration. Such intervention may be before, at or after the arbitration proceeding, as the case may be. In short, court shall not intervene with the subject-matter of arbitration unless injustice is caused to either of the parties."*

35. Therefore, expeditious and effective disposal of matters are most certainly considered the primary objectives of the enactment of the Arbitration Act. To fulfil the objective of introducing the Arbitration Act, it has been deemed necessary by the legislature as well as the Hon'ble Supreme Court to limit interference by the Courts in the process of arbitration, whether before, during or after the conclusion of the proceedings.

36. The petitioners before this Court have invoked Section 34 of the Arbitration Act to challenge the impugned Award. The relevant portion of the said provision is reproduced hereunder for perusal and consideration:

> *"34. Application for setting aside arbitral award.—*
>
> *(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*
>
> *(2) An arbitral award may be set aside by the Court only if—*
>
> *(a) the party making the application establishes on the basis of the record of the arbitral tribunal that—*
>
> *(i) a party was under some incapacity; or*
>
> *(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or*
>
> *(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*
>
> *(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:*
>
> *Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or*
>
> *(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of*

this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute…"

37. The contents of the provision clearly show that the intention of legislature while enacting the Arbitration Act, as well as while carrying out amendments to the same, was that there should be limited intervention of the Courts in arbitral proceedings, especially after the proceedings have been concluded and an Award thereto has been made by the concerned Arbitral Tribunal. Any claim brought forth a Court of law under Section 34 of the Arbitration Act shall be in accordance with the principle of the provisions laid down under the Arbitration Act as well as interpreted by the Hon'ble Supreme Court.

38. The Law Commission of India in its 246th Report has also elaborated upon the background of introducing Section 34 of the Arbitration Act and laid down as under:

> *"3. The Arbitration and Conciliation Act, 1996 (hereinafter "the Act") is based on the UNCITRAL Model law on International Commercial Arbitration, 1985 and the UNCITRAL Conciliation Rules, 1980. The Act has now been in force for almost two decades, and in this period of time, although arbitration has fast emerged as a frequently chosen alternative to litigation, it has come to be afflicted with various problems including those of high costs and delays, making it no better than either the earlier regime which it was intended to replace; or to litigation, to which it intends to provide an alternative. Delays are inherent in the arbitration process, and costs of arbitration can be tremendous. Even though courts play a pivotal role in giving finality to certain issues which arise before, after and even during an arbitration, there exists a serious threat of arbitration related litigation getting caught up in the huge list of pending cases before the courts. After the award, a challenge under Section 34 makes the award inexecutable and such petitions remain pending for several years. The object of quick alternative disputes resolution frequently stands frustrated.*
>
> *4. There is, therefore, an urgent need to revise certain provisions of the Act to deal with these problems that frequently arise in the arbitral process. The purpose of this Chapter is to lay down the foundation for the changes suggested in the Report of the Commission. The suggested amendments address a variety of issues that plague the present regime of arbitration in India and, therefore, before setting out the amendments, it would be useful to identify the problems that the suggested amendments are intended to remedy and the context in which the said problems arise and hence the context in which their solutions must be seen.*

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> *25. Similarly, the Commission has found that challenges to arbitration awards under Sections 34 and 48 are similarly kept pending for many years. In this context, the Commission proposes the addition of Sections 34(5) and 48(4) which would require that an application under those sections shall be disposed of expeditiously and in any event within a period of one year from the date of service of notice. In the case of applications under Section 48 of the Act, the Commission has further provided a time-limit under Section 48(3), which mirrors the time-limits set out in Section 34(3), and is aimed at ensuring that parties take their remedies under this section seriously and approach a judicial forum expeditiously, and not by way of an afterthought."*

39. With the repeal of Arbitration and Conciliation Act of 1940 by way of Arbitration Act, 1996, the legislature sought to achieve the objective of reducing the supervisory role of courts in arbitration proceedings. The amendment of Section 34 was also to have the Courts readily and expeditiously adjudicate upon any proceedings arising out of arbitration proceedings. The challenge to an Award also must be disposed of as expeditiously possible by the Courts.

40. It is clear that the speed and efficiency of disposal of disputes between parties are few of the substantial and key purposes of the introduction, development and promotion of resolving disputes by way of alternate mechanisms of dispute resolution. Hence, the objective, goal and purpose of the Act as well as the intention of the legislature have to be given due consideration while adjudicating a petition under Section 34 of the Arbitration Act.

<u>Scope of Powers of Arbitrator & Intervention of Courts</u>

41. The Arbitral Tribunal, that in its wisdom, passes an Award, upon conducting the arbitration proceedings with the participation of parties to the dispute, considering the Statement of Claim and Statement of Defence presented by and on behalf of the parties, the relevant documents placed on record by the parties, is considered a Court for the purposes of adjudicating the dispute before him. An unfettered intervention in the Tribunal's functioning would defeat the spirit and purpose of the Arbitration Act, as discussed in the foregoing paragraphs.

42. An Arbitrator has wide powers while adjudicating arbitration proceedings. There is, undoubtedly, a scrutiny on the Arbitrator and the Awards passed by him, which has been stipulated under the Arbitration Act. However, there is a deemed privilege of limited intervention from the Courts which the Arbitrators have. The same has been reiterated by the Hon'ble Supreme Court time and again. There is, thus, an extent to the accountability put upon an Arbitrator while passing an Award. This is evident from the fact that with the enforcement of the Arbitration Act an Arbitrator needs only to adhere to and fulfil the requirements under Section 31 of the Arbitration Act.

43. In addition to the requirements laid down under the provision, an Arbitrator, although acting in accordance with the requirements of the Arbitration Act, need not act as a formal Court while adjudicating a dispute and pass an Award which is lengthy, detailed or speaking. The Hon'ble Supreme Court has reiterated that an Award which is not speaking shall be set aside by the Court only in exceptional cases.

44. In ***Anand Brothers (P) Ltd. vs. Union of India & Ors.*, (2014) 9 SCC 212,** the Hon'ble Supreme Court on the question of a reasoned or speaking Award observed and held as under:-

> *"**7.** Before we examine whether the expression "finding" appearing in Clause 70 would include reasons in support of the conclusion drawn by the arbitrator, we consider it appropriate to refer to the Constitution Bench decision of this Court in Raipur Development Authority v. Chokhamal Contractors wherein this Court was examining whether an award without giving reasons can be remitted or set aside by the Court in the absence of any stipulation in the arbitral agreement obliging the arbitrator to record his reasons. Answering the question in the negative, this Court held that a nonspeaking award cannot be set aside except in cases where the parties stipulate that the arbitrator shall furnish reasons for his award. This Court held: (SCC pp. 750-51, para 33)*
>
> > *"33 . ... When the parties to the dispute insist upon reasons being given, the arbitrator is, as already observed earlier, under an obligation to give reasons. But there may be many arbitrations in which parties to the dispute may not relish the disclosure of the reasons for the awards. In the circumstances and particularly having regard to the various reasons given by the Indian Law Commission for not recommending to the Government to introduce an amendment in the Act requiring the arbitrators to give reasons for their awards we feel that it may not be appropriate to take the view that all awards which do not contain reasons should either be remitted or set aside."*
>
> *Having said that, this Court declared that the Government and their instrumentalities should-as a matter of policy and public interest-if not as a compulsion of law, ensure that whenever they enter into an agreement for resolution of disputes by way of private arbitrations, the*

requirement of speaking awards is expressly stipulated and ensured. Any laxity in that behalf might lend itself to and, perhaps justify the legitimate criticism, that the Government failed to provide against possible prejudice to public interest.

8. *The following passage is in this regard apposite: (Raipur Development Authority case, SCC pp. 752-53, para 37)*

> *"37. There is, however, one aspect of non-speaking awards in non-statutory arbitrations to which Government and governmental authorities are parties that compel attention. The trappings of a body which discharges judicial functions and is required to act in accordance with law with their concomitant obligations for reasoned decisions, are not attracted to a private adjudication of the nature of arbitration as the latter, as we have noticed earlier, is not supposed to exert the State's sovereign judicial power. But arbitral awards in disputes to which the State and its instrumentalities are parties affect public interest and the matter of the manner in which Government and its instrumentalities allow their interest to be affected by such arbitral adjudications involve larger questions of policy and public interest. Government and its instrumentalities cannot simply allow large financial interests of the State to be prejudicially affected by non-reviewable---except in the limited way allowed by the statute-non-speaking arbitral awards. Indeed, this branch of the system of dispute resolution has, of late, acquired a certain degree of notoriety by the manner in which in many cases the financial interests of Government have come to suffer by awards which have raised eyebrows by doubts as to their rectitude and propriety. It will not be justifiable for Governments or their instrumentalities to enter into arbitration agreements which do not expressly stipulate the rendering of reasoned and speaking awards. Governments and their instrumentalities should, as a matter of policy and public interest-if not as a compulsion of law-ensure that wherever they*

enter into agreements for resolution of disputes by resort to private arbitrations, the requirement of speaking awards is expressly stipulated and ensured. It is for Governments and their instrumentalities to ensure in future this requirement as a matter of policy in the larger public interest. Any lapse in that behalf might lend itself to and perhaps justify, the legitimate criticism that Government failed to provide against possible prejudice to public interest."

9. *Reference may also be made to the Arbitration and Conciliation Act, 1996 which has repealed the Arbitration Act, 1940 and which seeks to achieve the twin objectives of obliging the Arbitral Tribunal to give reasons for its arbitral award and reducing the supervisory role of courts in arbitration proceedings. Section 31(3) of the said Act obliges the Arbitral Tribunal to state the reasons upon which it is based unless the parties have agreed that no reasons be given or the arbitral award is based on consent of the parties. There is, therefore, a paradigm shift in the legal position under the new Act which prescribes a uniform requirement for the arbitrators to give reasons except in the two situations mentioned above. The change in the legal approach towards arbitration as an alternative dispute resolution mechanism is perceptible both in regard to the requirement of giving reasons and the scope of interference by the court with arbitral awards. While in regard to requirement of giving reasons the law has brought in dimensions not found under the old Act, the scope of interference appears to be shrinking in its amplitude, no matter judicial pronouncements at time appear to be heading towards a more expansive approach that may appear to some to be opening up areas for judicial review on newer grounds falling under the caption "public policy" appearing in Section 34 of the Act. We are referring to these developments for it is one of the well-known canons of interpretation of statutes that when an earlier enactment is truly ambiguous in that it is equally open to diverse meanings, the later*

enactment may in certain circumstances serve as the parliamentary exposition of the former.

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14. *It is trite that a finding can be both: a finding of fact or a finding of law. It may even be a finding on a mixed question of law and fact. In the case of a finding on a legal issue the arbitrator may on facts that are proved or admitted explore his options and lay bare the process by which he arrives at any such finding. It is only when the conclusion is supported by reasons on which it is based that one can logically describe the process as tantamount to recording a finding. It is immaterial whether the reasons given in support of the conclusion are sound or erroneous. That is because a conclusion supported by reasons would constitute a "finding" no matter the conclusion or the reasons in support of the same may themselves be erroneous on facts or in law. It may then be an erroneous finding but it would nonetheless be a finding. What is important is that a finding presupposes application of mind. Application of mind is best demonstrated by disclosure of the mind; mind in turn is best disclosed by recording reasons. That is the soul of every adjudicatory process which affects the rights of the parties…."*

45. Therefore, while considering a challenge to an Arbitral Award where private parties are involved, the Court need not examine the validity of the findings or the reasoning behind the findings given by an Arbitrator. The extent to which a Court may exercise supervisory powers in this respect is limited to examining whether the Award and the conclusion drawn therein are supported by findings and not whether the findings themselves are erroneous or sound.

46. It has also been reiterated that, while adjudicating a challenge under Section 34 of the Arbitration Act, the Courts must limit themselves to examining the Award itself and not the facts of the case. A Court shall

not conduct a roving enquiry into the facts and evidence of the matter and neither shall the Court sit in appeal against the Award of the Arbitrator.

47. The powers of Court under Section 34 to set aside award do not include power to modify such an award. Given the limited scope of judicial interference with award under Section 34 on extremely limited grounds not dealing with merits of an award, "limited remedy" under Section 34, is coterminous with "limited right", namely, either to set aside an award or remand matter under circumstances mentioned in Section 34. Section 34 jurisdiction cannot be assimilated with revisional jurisdiction under Section 115 of the CPC. This position has been laid down in the case of ***NHAI v. M. Hakeem,*** **(2021) 9 SCC 1** in the following terms:

> *"**17.** It is important to remember that Section 34 is modelled on the UNCITRAL Model Law on International Commercial Arbitration, 1985, under which no power to modify an award is given to a court hearing a challenge to an award. The relevant portion of the Model Law reads as follows:*
>
> > *"**34. Application for setting aside as exclusive recourse against arbitral award**.—(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paras (2) and (3) of this article.*
> >
> > ***
> >
> > *(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the*

Arbitral Tribunal's opinion will eliminate the grounds for setting aside."

18. *Redfern and Hunter on International Arbitration (6th Edn.), states that the Model Law does not permit modification of an award by the reviewing court (at p. 570) as follows:*

> *"10.06. The purpose of challenging an award before a national court at the seat of arbitration is to have that court declare all, or part, of the award null and void. If an award is set aside or annulled by the relevant court, it will usually be treated as invalid, and accordingly unenforceable, not only by the courts of the seat of arbitration, but also by national courts elsewhere. This is because, under both the New York Convention and the Model Law, a competent court may refuse to grant recognition and enforcement of an award that has been set aside by a court of the seat of arbitration. It is important to note that, following complete annulment, the claimant can recommence proceedings because the award simply does not exist—that is, the status quo ante is restored. The reviewing court cannot alter the terms of an award nor can it decide the dispute based on its own vision of the merits. Unless the reviewing court has a power to remit the fault to the original tribunal, any new submission of the dispute to arbitration after annulment has to be undertaken by commencement of a new arbitration with a new Arbitral Tribunal."*

19. *The statutory scheme under Section 34 of the Arbitration Act, 1996 is in keeping with the Uncitral Model Law and the legislative policy of minimal judicial interference in arbitral awards.*

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23. *It is settled law that a Section 34 proceeding does not contain any challenge on the merits of the award. This has been decided in MMTC Ltd. v. Vedanta Ltd. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293] , as follows : (SCC p. 167, para 14)*

> *"14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."*

24. *Likewise, in Ssangyong Engg. & Construction Co. Ltd. v. NHAI [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , this Court under the caption "Section 34(2)(a) does not entail a challenge to an arbitral award on merits" referred to this Court's judgment in Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("the New York Convention") and various other authorities to conclude that there could be no challenge on merits under the grounds mentioned in Section 34 — (see paras 34 to 48). This Court also held, in Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd. [Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd., (2018) 3 SCC 133 : (2018) 2 SCC (Civ) 65] (at p. 170), that the court*

hearing a Section 34 petition does not sit in appeal (see para 51).”

48. In ***UHL Power Co. Ltd. vs. State of Himachal Pradesh***, **(2022) 4 SCC 116**, the Hon’ble Supreme Court reiterated the narrow scope under Section 34 of the Arbitration Act and held as under:-

> *“**16.** As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. In MMTC Ltd. v. Vedanta Ltd. 5, the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act have been explained in the following words: (SCC pp. 166-67, para 11)*
>
> > *“11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.”*

17. *A similar view, as stated above, has been taken by this Court in K. Sugumar v. Hindustan Petroleum Corpn. Ltd. 7, wherein it has been observed as follows: (SCC p. 540, para 2)*

> *"2. The contours of the power of the Court under Section 34 of the Act are too well established to require any reiteration. Even a bare reading of Section 34 of the Act indicates the highly constricted power of the civil court to interfere with an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator."*

49. In ***Delhi Airport Metro Express Pvt Ltd vs. Delhi Metro Rail Corporation,*** **(2022) 1 SCC 131**, the Hon'ble Supreme Court to this aspect held as under:-

> *"**28.** This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by Courts while examining the validity of the arbitral awards. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well established principles for interference to the facts of each case that come up before the courts. There is a disturbing tendency of Courts of setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other*

grounds available for annulment of the award. This approach will lead to corrosion of the object of the 1996 Act and the endevours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorizing them as perverse or patently illegal without appreciating the contours of the said expressions."

50. Further, in ***State of Jharkhand vs. HSS Integrated DSN*, (2019) 9 SCC 798,** the Hon'ble Supreme Court held that even when there are more than one plausible views and the Arbitrator, in his wisdom, adopts one of them, having given reasons for his findings, the Courts shall not interfere with such an Award. It was observed as under:-

*"**6.1**. In Progressive-MVR3, after considering the catena of decisions of this Court on the scope and ambit of the proceedings under Section 34 of the Arbitration Act, this Court has observed and held that even when the view taken by the arbitrator is a plausible view, and/or when two views are possible, a particular view taken by the Arbitral Tribunal which is also reasonable should not be interfered with in a proceeding under Section 34 of the Arbitration Act.*

***6.2**. In Datar Switchgear Ltd., this Court has observed and held that the Arbitral Tribunal is the master of evidence and the findings of fact which are arrived at by the arbitrators on the basis of the evidence on record are not to be scrutinised as if the Court was sitting in appeal. In para 51 of the judgment, it is observed and held as under: (SCC pp. 169-70)*

> *"51. ..... The proposition of law that the Arbitral Tribunal is the master of evidence and the findings of fact which are arrived at by the arbitrators on the basis of evidence on record are not to be scrutinised as if the Court was sitting in appeal now stands settled by*

> *a catena of judgments pronounced by this Court without any exception thereto."*

51. Hence, the law which has been settled by the Hon'ble Supreme Court is that the scope of interference with an Arbitral Award under Section 34 of the Arbitration Act is fairly limited and narrow. The Courts cannot sit in an appeal while adjudicating a challenge to an Award which is passed by an Arbitrator, who is the master of evidence, after due consideration of facts, circumstances, evidence and material before him. Therefore, it is clear that this Court shall also limit itself to the Award in question and not re-appreciate evidence and all material before the Arbitrator.

Consideration of the Impugned Award

52. This Court has duly considered the facts and circumstances of the instant case, judicial pronouncements relied on by the parties, pleadings presented, and arguments advanced by the learned counsel of the parties. After carefully analyzing the materials relied on by the parties, this Court has framed the following issue for its consideration: -

> *Whether the impugned award in question dated 20th July 2018 suffers from patent illegality and/or is in conflict with the public policy or fundamental policy of Indian law and thus is liable to be set aside under the provisions of Section 34 of the Arbitration and Conciliation Act, 1996, warranting interference of this Court.*

53. As discussed above, there are limited grounds upon which a challenge under Section 34 of the Arbitration Act can be raised.

Therefore, while adjudicating the challenge to the impugned Award dated 20th July 2018, this Court needs to be satisfied that the petitioners had rightly and successfully invoked the limited grounds so available.

54. On a bare reading of the invoked provision Section 34 of the Arbitration Act as quoted above, it has become evident the words used therein are that "*An arbitral award may be set aside by the Court only if*", which signifies the intent of limiting the scope of interference by Courts in an Arbitral Award, passed after thorough procedure, involvement of parties, and appreciation of facts, evidence and law, "only" in the event of the circumstances delineated in the provision being met. The limited grounds which may invite the intervention and action thereupon by the Courts are explicitly laid down under the provision. What is to be seen by a Court exercising jurisdiction under Section 34 of the Arbitration Act is that an Award passed by an Arbitral Tribunal may only be set aside if it is patently illegal, against the public policy of India and fundamental policy of law, based on no evidence and delineates no reason for passing the Award.

55. The grounds taken by the petitioners while assailing the Arbitral Award is that the impugned Arbitral Award is *ex-facie* erroneous and suffers from patent illegality and by extension is contrary to public policy of India. The law regarding patent illegality, public policy of India and fundamental policy remains no more *res integra* and has been categorically dealt with, elaborated upon and clarified by the Hon'ble Supreme Court by way of extensive judicial pronouncements and observations therein. The implications and bearing of the principles laid

down by extensive deliberation by the Courts of the Country shall also effect the adjudication in the instant matter, hence, the sum and substance of the principles is reiterated in order to test the impugned Award in its entirety under the provisions of the Arbitration Act.

Patent Illegality

56. While adjudicating a challenge under Section 34, it is to be borne in the mind of the Court that only an illegality which goes to the root of the matter and is apparent on the face of the record shall be considered a patent illegality and would lead to an intervention by this Court.

57. The Hon'ble Supreme Court in the landmark case of ***Patel Engg. Ltd. v. North Eastern Electric Power Corpn. Ltd.,*** **(2020) 7 SCC 167** construed the ambit of patent illegality as a ground for setting aside the Arbitral Award under Section 34 of the Arbitration Act. The court observed as under:

> *"**19**. Pursuant to the recommendations of the Law Commission, the 1996 Act was amended by Act 3 of 2016, which came into force w.e.f. 23-10-2015. The ground of "patent illegality" for setting aside a domestic award has been given statutory force in Section 34(2-A) of the 1996 Act. The ground of "patent illegality" cannot be invoked in international commercial arbitrations seated in India. Even in the case of a foreign award under the New York Convention, the ground of "patent illegality" cannot be raised as a ground to resist enforcement, since this ground is absent in Section 48 of the 1996 Act. The newly inserted sub-section (2-A) in Section 34, reads as follows:*

> *'34. (2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:*
>
> *Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.'"*

58. This Court has looked into the discussion of patent illegality ground in the case of ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI,* (2019) 15 SCC 131**, wherein the Hon'ble Supreme Court relied upon the decision of ***Associate Builders v. Delhi Development Authority,* (2015) 3 SCC 49**, wherein, it was held that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes a contract in a manner which no fair-minded or reasonable person would take i.e., if the view taken by the arbitrator is not even a plausible view to take. While discussing the fundamentals of patent illegality, the Hon'ble Supreme Court, taking in view the judgments passed in ***Ssangyong Engg. & Construction Co. Ltd. (Supra)*** as well as ***Associate Builders (Supra),*** in ***State of Chhattisgarh v. Sal Udyog (P) Ltd.*, (2022) 2 SCC 275** held as under:-

> *"**14.** The law on interference in matters of awards under the 1996 Act has been circumscribed with the object of minimising interference by courts in arbitration matters. One of the grounds on which an award may be set aside is "patent illegality". What would constitute "patent illegality" has been elaborated in Associate Builders v. DDA, where "patent*

illegality" that broadly falls under the head of "Public Policy", has been divided into three sub-heads in the following words: (SCC p. 81, para 42)

> *"42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three sub-heads:*
>
> *42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:*
>
> > *'**28.** Rules applicable to substance of dispute.-(]) Where the place of arbitration is situated in India,-*
> >
> > *(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;'*
>
> *42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality - for example if an arbitrator gives no reasons for an award in contravention of Section 31 (3) of the Act, such award will be liable to be set aside.*
>
> *42.3. (c) Equally, the third sub-head of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:*
>
> > *'**28. Rules applicable to substance of dispute.-(1)-(2)** * * **
> >
> > *(3) 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.'*

15. *In Ssangyong Engg. & Construction Co. Ltd. v. NHAI, speaking for the Bench, R.F. Nariman, J. has spelt out the contours of the limited scope of judicial interference in reviewing the arbitral awards under the 1996 Act and observed thus: (SCC pp. 169-71, paras 34-41)*

> *"34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco expansion has been done away with. In short, Western Geco, as explained in paras 28 and 29 of Associate Builders, would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders.*
>
> *35. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paras 36 to 39 of Associate Builders , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.*

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders, or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders8. Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco, as understood in Associate Builders8, and paras 28 and 29 in particular, is now done away with.

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of Associate Builders, namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders, however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section

31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders, namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders8, while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse."

16. *In Delhi Airport Metro Express (P) Ltd. referring to the facets of patent illegality, this Court has held as under: (SCC p. 150, para 29)*

"29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of

> *law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality".”*

59. The abovementioned precedents have settled the position of a challenge to an Arbitral Award. The facets under Section 34 of the Arbitration Act, specifically under Sub-section 2, provide the limited purview of such a challenge.

60. In order to succeed in a challenge against an Award under Section 34 the petitioners must show that there is a patent illegality in the impugned Award which goes to the root of the matter and is not an

illegality of trivial nature. In absence of the same the impugned Award cannot be held to be against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged illegal.

61. To argue that the impugned Award before this Court is liable to be set aside in the instant petition, the learned counsel for the petitioners submitted that the findings of the learned Arbitral Tribunal were patently illegal. As stipulated by the aforementioned precedents, the words are not to be construed in their plain meaning, but the essence to be appreciated while adjudicating a challenge under Section 34 of the Arbitration Act is that the illegalities or deficiencies are such that they are apparent on the face of record and/or shock the conscience of the Court and can in no manner be sustained.

62. The petitioners in the instant case have pressed the objection to the impugned Award on the ground of patent illegality and the same shall be tested keeping in view the well-established principles of law settled by the provision itself and by the Hon'ble Supreme Court.

Fundamental Policy of Law

63. As has been laid down under the provision and its expansive interpretation by the Courts of the Country time and again, it is for the Court exercising powers under Section 34 of the Arbitration Act to test whether the arbitral award under challenge is contrary to the fundamental policy of law.

64. The Hon'ble Supreme Court in ***ONGC Ltd. vs. Western Geco International*, (2014) 9 SCC 263,** deliberated and elaborated upon the concept of fundamental policy of Indian law and the implications of its contravention under Section 34 of the Arbitration Act. The relevant portion of the judgment is reproduced hereunder:

> *"**35**. What then would constitute the 'Fundamental policy of Indian Law' is the question. The decision in Saw Pipes Ltd. (supra) does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "Fundamental Policy of Indian Law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the Fundamental Policy of Indian law. The first and foremost is the principle that in every determination whether by a Court or other authority that affects the rights of a citizen or leads to any civil consequences, the Court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the Court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of Judicial approach in judicial and quasi-judicial determination lies in the fact so long as the Court, Tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bonafide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of*

a Court, Tribunal or Authority vulnerable to challenge.

***36**. In Ridge v. Baldwin [1963 2 All ER 66], the House of Lords was considering the question whether a Watch Committee in exercising its authority under Section 191 of the Municipal Corporations Act, 1882 was required to act judicially. The majority decision was that it had to act judicially and since the order of dismissal was passed without furnishing to the appellant a specific charge, it was a nullity. Dealing with the appellant's contention that the Watch Committee had to act judicially, Lord Reid relied upon the following observations made by Atkin L.J. in [1924] 1 KB at pp. 206,207: "Wherever anybody of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."*

***37**. The view taken by Lord Reid was relied upon by a Constitution Bench of this Court in A.C. Companies Ltd vs. P.N. Sharma and Anr. (AIR 1965 SC 1595) where Gajendragadkar, C.J. speaking for the Court observed:*

> *"In other words, according to Lord Reid's judgment, the necessity to follow judicial procedure and observe the principles of natural justice, flows from the nature of the decision which the watch committee had been authorised to reach under S.191(4). It would thus be seen that the area where the principles of natural justice have to be followed and judicial approach has to be adopted, has become wider and consequently, the horizon of writ jurisdiction has been extended in a corresponding measure. In dealing with questions as to whether any impugned orders could be revised under A. 226 of our Constitution, the test prescribed by Lord Reid in this judgment may afford considerable assistance."*

38. *Equally important and indeed fundamental to the policy of Indian law is the principle that a Court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated 'audi alteram partem' rule one of the facets of the principles of natural justice is that the Court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the Court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian Law.*

39. *No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a Court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury's principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a Court of law often in writ jurisdiction of the Superior courts but no less in statutory processes where ever the same are available.*

40. *It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in*

> *miscarriage of justice, the adjudication even when made by an arbitral tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."*

65. Thus, the limited yet expansive interpretation stipulates that while adjudicating a challenge under Section 34 of the Arbitration Act the Court may examine the impugned award on the following aspects:

a. Whether a judicial approach has been adopted by the Arbitrator while passing the Award.

b. Whether the principles of natural justice have been observed.

c. Whether the Arbitrator has reached a conclusion which no reasonable person would reach at.

66. Therefore, the petitioners, in the instant case, to successfully establish their case shall also convince this Court of the said principles and show that the impugned Award has been passed by the Tribunal without application of mind and a judicial approach, without observing the principles of natural justice and the conclusion drawn is one which no reasonable person could draw in the facts and circumstances of the case.

Public Policy of India

67. The contravention of public policy of India is also an indispensable consideration while adjudging an arbitral award and a challenge thereto. The Hon'ble Supreme Court in ***BCCI vs. Cricket Association & Ors.***

(2015) 3 SCC 251, on the question of public policy, passed extensive observations and held as under:-

> *"**90.** The validity of Rule 6.2.4 as amended can be examined also from the standpoint of its being opposed to "public policy". But for doing so we need to first examine what is meant by "public policy" as it is understood in legal parlance. The expression has been used in Section 23 of the Contract Act, 1872 and in Section 34 of the Arbitration and Conciliation Act, 1996 and host of other statutes but has not been given any precise definition primarily because the expression represents a dynamic concept and is, therefore, incapable of any straitjacket definition, meaning or explanation. That has not, however, deterred jurists and courts from explaining the expression from very early times.*
>
> ***91.** Mathew, J. speaking for the Court in Murlidhar Aggarwal v. State of U.P. 27 referred to Winfield's definition in Public Policy in English Common Law 42 Harvard Law Review 76 to declare that: (SCC p. 482, para 31)*
>
> > *"31. Public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation. Public policy would be almost useless if it were to remain in fixed moulds for all time."*
>
> ***92.** The Court then grappled with the problem of ascertaining public policy if the same is variable and depends on the welfare of the community and observed: (Murlidhar Aggarwal case, SCC pp. 482-83, para 32)*
>
> > *"32. If it is variable, if it depends on the welfare of the community at any given time, how are the courts to ascertain it? The Judges are more to be trusted as interpreters of the law than as expounders of public policy. However, there is no alternative under our system but to vest this power with Judges. The*

difficulty of discovering what public policy is at any given moment certainly does not absolve the Judges from the duty of doing so. In conducting an enquiry, as already stated, Judges are not hidebound by precedent. The Judges must look beyond the narrow field of past precedents, though this still leaves open the question, in which direction they must cast their gaze. The Judges are to base their decisions on the opinions of men of the world, as distinguished from opinions based on legal learning. In other words, the Judges will have to look beyond the jurisprudence and that in so doing, they must consult not their own personal standards or predilections but those of the dominant opinion at a given moment, or what has been termed customary morality. The Judges must consider the social consequences of the rule propounded, especially in the light of the factual evidence available as to its probable results. Of course, it is not to be expected that men of the world are to be subpoenaed as expert witnesses in the trial of every action raising a question of public policy. It is not open to the Judges to make a sort of referendum or hear evidence or conduct an inquiry as to the prevailing moral concept. Such an extended extra-judicial enquiry is wholly outside the tradition of courts where the tendency is to 'trust the Judge to be a typical representative of his day and generation'. Our law relies, on the implied insight of the Judge on such matters. It is the Judges themselves, assisted by the Bar, who here represent the highest common factor of public sentiment and intelligence. No doubt, there is no assurance that Judges will interpret the mores of their day more wisely and truly than other men. But this is beside the point. The point is rather that this power must be lodged somewhere and under our Constitution and laws, it has been lodged in the Judges and if they have to fulfil their function as Judges, it could hardly be lodged elsewhere."*

***93**. In Central Inland Water Transport Corpn. this Court was also considering the import of the expression "public policy" in the context of the service conditions of an employee empowering the employer to terminate his service at his sweet will upon service of three months' notice or payment of salary in lieu thereof. Explaining the dynamic nature of the concept of public policy this Court observed: (SCC pp. 217-18, para 92)*

> *"92. . . . Public policy, however, is not the policy of a particular Government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well recognised head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy ....*
> *It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying*

the fundamental rights and the directive principles enshrined in our Constitution."

94. *We may also refer to the decision of this Court in ONGC Ltd. v. Saw Pipes Ltd., wherein this Court was considering the meaning and import of the expression "public policy of India" as a ground for setting aside an arbitral award. Speaking for the Court M.B. Shah, J. held that the expression "public policy of India" appearing in the Act aforementioned must be given a liberal meaning for otherwise resolution of disputes by resort to arbitration proceedings will get frustrated because patently illegal awards would remain immune to court's interference. This Court declared that what was against public good and public interest cannot be held to be consistent with public policy. The following passage aptly summed up the approach to be adopted in the matter: (Saw Pipes Ltd. case, SCC pp. 727-28, para 31)*

> *"31. Therefore, in our view, the phrase 'public policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar case it is required to be held that the award could be set aside if it is patently illegal. The result would be-award could be set aside if it is contrary to:*
>
> *(a) fundamental policy of Indian law; or*
>
> *(b) the interest of India; or*

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

***96.** To sum up: public policy is not a static concept. It varies with times and from generation to generation. But what is in public good and public interest cannot be opposed to public policy and vice versa. Fundamental Policy of Law would also constitute a facet of public policy. This would imply that all those principles of law that ensure justice, fair play and bring transparency and objectivity and promote probity in the discharge of public functions would also constitute public policy. Conversely, any deviation, abrogation, frustration or negation of the salutary principles of justice, fairness, good conscience, equity and objectivity will be opposed to public policy. It follows that any rule, contract or arrangement that actually defeats or tends to defeat the high ideals of fairness and objectivity in the discharge of public functions no matter by a private non-governmental body will be opposed to public policy. …."*

68. Further, in the landmark judgment passed by the Hon'ble Supreme Court in ***Ssangyong Engg. and Construction Co. Ltd (Supra),*** it was held as under:

*"**34.** What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paragraphs 18 and 27 of*

Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the "Renusagar" understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra).

35. *It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paragraphs 36 to 39 of Associate Builders (supra), as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.*

36. *Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with."*

69. A conjoint reading of the precedents reproduced makes it clear that the concept of public policy is not static but is dynamic. The dynamism is such that all what may be considered against the public good may be considered to be in contravention of the public policy.

Application of the principles to test validity of Arbitral Award

70. Keeping in view the entirety of the principles settled under law and interpreted by the Hon'ble Supreme Court the impugned Award and the observations of the Arbitral Tribunal therein shall be considered. The Arbitral Tribunal while considering the disputes between the parties had framed the following broad issues for consideration, as mentioned in the impugned award:

> *"POINTS FOR DETERMINATION*
> *1. Whether any of the parties is in breach of SSPA dated 29.01.2015:*
> *2. If answer to Issue No.1 is in the affirmative, what is the quantum of damages the party in question is entitled to?*
> *3. Whether the Respondents are liable to pay interest on the aforesaid amounts, and if yes, at what rate?*
> *4. Whether the SSPA dated 29.01.2015 stood frustrated on account of impossibility entitling the Claimants to restitution and if so, what are the consequences including maintainability of the Claim therefor?*
> *5. Whether the parties are entitled to the reliefs as prayed for in their respective pleadings, including costs?*
> *6. Whether the SSPA dated 29.01.2015 constitutes the 'entire agreement' between the parties and, therefore, the claims arising wherefrom are within the jurisdiction of this Hon'ble Arbitral Tribunal?"*

71. After the conclusion of hearing in the arbitral proceedings, the Arbitral Tribunal passed the Award on the issues framed. While deciding the issue of the breach of the Agreement and the damages accruing therefrom the Arbitral Tribunal observed as under:

> *"23. On a careful consideration of the rival stands, the facts situation which emerges is that the application for in-principle approval was made at a point of time when the Claimants were in management and control. The question whether there was any inaction on the part of either the Claimants or the Respondents loses significance once the basis for rejection is considered. The reasons indicated for rejection do not dwell upon any inaction and on the other hand focused on the breaches which warranted rejection. The undisputed position is that issuance of warrants was subject to approval of BSE. According to the Claimants, the concept of impossibility loses significance if the Respondents are found to be not participated or diligent in pursuing the application. Even if it is accepted that they took some belated steps, it was more to cover up their lapses than providing any input of significance. Because of their willful default and negligence, the Claimants suffered huge losses. As noted above, it has been highlighted that the Respondents themselves in their letter dated 07.01.2016 to SEBI have accepted that for non-issuance of approval, the Respondents would be in breach of its obligations. At the cost of repetition, it may be stated that the accepted position is that issuance of warrants was conditional on the issuance of approval by the BSE. Even if it is accepted as contended by the Claimants that it was the obligations of the Respondents to obtain approval of the authorities i.e. in consequential since the approval was refused by the concerned authority who may have been responsible for inaction is of no consequence as that would have no effect on the decision of the authority on the grounds / basis / reason for refusal of approval. Undisputedly, the Company could not have issued the warrants only after getting the approval.*

24. In this context, the directions of the High Court to BSE assume importance. The denial of approval is linked to certain undisputed findings, none of which relate to steps to be taken by the Applicant.

25. The inevitable conclusion is that the non issuance of warrants by the Respondents cannot be treated as a breach by them and consequentially of the SSPA. Therefore, it is not of any consequence as to what the Respondents projected in the letter dated 07.01.2016 to SEBI. Further, the factual scenario highlighted by the Claimants (some of which have been disputed by the Respondents) to show lack of diligence on the part of the Respondents in seeking in-principle approval would not change the foundation of the conclusions / findings by BSE, more particularly, the finding that granting in-principle approval would result in breach of ICDR Regulations.

26. Nevertheless, the alternative plea of Claimants premised on Section 65 of the Contract Act is on terra firma (though contractual arrangements stricto sensa cannot be termed as void). It would be relevant to note that in its proposal dated 20.11.2015, the Respondents had suggested that the consideration for warrants would be returned by the Company. Though by Annexure C-41 dated 20.11.2015, the Respondents had suggested that the consideration for warrants would be returned by the Company, the Claimants did not agree to the same. The amount involved is Rs.308,21,89,461/-. This amount is to be refunded to the Claimants."

72. While awarding the amount of Rs. 308,21,89,461/- the Arbitral Tribunal observed that the non-issuance of Warrants by the petitioners could not be treated as a breach of the Agreement by them. However, it also stated that issuance of Warrants was conditional on the issuance of approval by the BSE. The Arbitral Tribunal considered the objections of both the parties and extensively recorded the facts, circumstances and the

material on record before giving the aforesaid observations. The Arbitral Tribunal was of the view that upon consideration of failure of issuance of Warrants, there remained no reason to look into the inaction, if any, on the part of either of the parties. It was further observed that there was a rejection *qua* the approval by the concerned and competent authority which was not and could not have been effectuated by the inaction as alleged by the respondent herein against the petitioner even if the argument of obligations on the part of the petitioner herein was to be considered.

73. The Arbitral Tribunal very categorically dealt with the fact that the failure to obtain in-principle approval by the petitioner Company and Ajay Singh would not amount to a breach of the Agreement even though the issuance of Warrants was pursued by the petitioners. Tribunal provided reasons for the same observing that the issuance of Warrants as part of obligations were conditional upon the approval by the BSE but the same could not be granted by the BSE as granting in-principle approval would have resulted in breach of ICDR Regulations. However, the Tribunal also observed that the parties were to act in accordance with Section 65 of the Contract Act, which the petitioners failed to, and accordingly, the petitioners were to pay back and refund the consideration of Warrants to the respondent.

74. Based on these observations the Arbitral Tribunal awarded the sum of refund in the favour of the respondents herein. Thereafter, the Arbitral Tribunal went on to settle the dispute *qua* the issue of CRPS as well as the obligation of the parties to bring in the respective amounts as per the

Agreement between them. The other claim raised by the respondents herein, decided by the Arbitral Tribunal and challenged by the petitioners pertains to the refund of the amount of Rs.370,86,99,000/- paid by the respondents towards subscription of Tranche-1 and Tranche-2 CRPS Shares.

75. The respondents herein, the claimants before the Arbitral Tribunal, contended that under Clause 3.3 of the Agreement, it was agreed by both the parties that the petitioner would issue Tranche-1 CRPS to respondent on the receipt of Rs. 320,86,99,209/-. The respondent Company was to be issued 2,00,293 CRPS and Mr. Kalanathi Maran was to be issued 30,08,406 CRPS of the face value of Rs. 1000/-. Further, it was also agreed under Clause 3.4 of the Agreement that the petitioner would issue Tranche-2 CRPS to the respondent no.2 upon the receipt of Rs. 50,00,00,000/-. However, such CRPS were never issued by the petitioners and hence, the respondents were entitled to the refund of the same.

76. On the other hand, the petitioner contended that the issuance of CRPS was subject to the terms and conditions specified in Clauses 4 and 5 of the Agreement. As per Schedule B of the Agreement, CRPS is essentially a debt instrument and this debt is repayable at a coupon rate of 6% at the end of 8th year. The CRPS was to be issued in two tranches on second and third closing. It is also contended by the petitioner that the issuance of Tranche-1 shares was contingent upon the receipt of Rs. 320 crores by the second closing date i.e., 24th February 2015 but the same was never achieved as only Rs. 220 crores were brought by the claimants/ respondents by the second closing date. It is further contended that the

third closing date was to take place on 1st June 2015 as agreed between the parties and an amount of Rs. 50 crores were to be remitted by the third closing date. The sum of Rs. 50 crores were received on 3rd June 2015. The major contention of the petitioner is that the third closing date would not be achieved since the second closing date was never achieved due to non-receipt of Rs. 100 crores.

77. The relevant paragraphs of the impugned Arbitral Award highlighting the observations of the Arbitral Tribunal to this effect have been reproduced below:

> *"31. The stand of the Respondents that issuance of CRPS was not a sequential step under the SSPA is legally untenable. Reference is made to Clause 4.1.4 of the SSPA in this regard. The relevance and effect of Clause 10.3 of the SSPA has been lost sight of by the Respondents. Under the said Clause, the Claimants unconditionally guaranteed to SpiceJet that in case of failure to pay the balance warrant payment, the Tranche-1 CRPS amount or the Tranche-2 CRPS amount, SpiceJet may sell the collaterals and apply to proceeds towards payment of such amounts. Further under Clause 7.2.3 of the SSPA and Clause 4.1 of the Escrow Account SpiceJet was required to issue a notice to the Escrow Agent, for release of certain collaterals provided by the Claimants, only after receiving payments towards balance warrant payment and Tranche-1 CRPS amount.*
>
> *Schedule H to the SSPA as amended vide letter dated 23.02.2015 clearly shows that the fixed deposit of Rs.1 00 Crores to be made by Claimant No.2 was towards Tranche-1 CRPS amount. It is not in dispute that SpiceJet vide letter dated 25.02.2015 released the collaterals in terms of Clause 7.2.3 of the SSPA and Clause 4.1 of the Escrow Agreement. Therefore, the only conclusion that can be drawn is SpiceJet*

issued notice for release of collaterals only upon being satisfied that it had received full payment towards the balance warrant payment and Tranche-1 CRPS amount. The contrary stand presently taken by the SpiceJet that allotment of CRPS to the Claimants could not be done due to nonpayment of Rs.1 00 Crores by Claimant No.2.

32. The stand of the Respondents qua the claim relating to CRPS is essentially as follows:

Issuance of CRPS was subject to the terms and conditions specified in Clauses 3 and 4 of the SSPA. As per Schedule B of the SSPA, CRPS is essentially a debt instrument wherein the debt is repayable at a coupon rate of 6% at the end of the 8th year.

The CRPS was to be issued in two tranches on second and third closing.

The second closing date was originally 15.02.2015 which was extended to 23.02.2015 vide amendment letter dated 17.02.2015. Vide amendment letter dated 23.02.2015, the second closing date was to take place on 24.02.2015 or within two days after the date on which EDC consent had been obtained for repayment of the financing facility provided by CUB to the Company of Rs.100 Crores or on such other date as agreed between the parties, subject to the achievement of the first closing (transfer of 58.46% shares) and the satisfaction of the conditions precedent under Clause 5.3.5 (d) i.e. resignation of Mr Maran and his Directors from the Board of the Company and Clause 6.3. Therefore, issuance of Tranche-1 CRPS was contingent upon the receipt of RS.320 Crores being the Tranche-1 CRPS amount, by the Company by the second closing date as amended from time to time.

The second closing was never achieved as on 24.02.2015 only RS.220 Crores approx. were brought in by

the Claimants for Tranche-1 CRPS amount.

The third closing was to take place on 01.06.2015 or such other date as may be agreed upon between the parties. On the third closing date, the Seller No.2 was to remit the Tranche-2 CRPS amount of RS.50 Crores into the Designated Account No.1 for subscribing to 5,00,000 CRPS shares. Though the sum of RS.50 Crores, as noted above, was received on 03.06.2015, the third closing would not be achieved since the second closing was never achieved as Tranche-1 CRPS could not be issued on account of non-receipt of RS.100 Crores. Additionally, the fixed deposit of RS.100 Crores had been attached on 31.03.20151 01.04.2015. The basis for the third amendment of the SSPA was that SpiceJet had obtained a financing facility from Export Development Canada (EDC) for acquisition of certain aircraft. The Company had also availed another financing facility of City Union Bank (CUB). However, the CUB facility was subordinated to the facility granted by EDC i.e. EDC facility had priority of payment over the loan advanced by CUB (first charge was with EDC). This position was confirmed by CW-3, Mr J. Dorai. The CUB loan facility could not be closed until consent of EDC was obtained for the same. The loan advanced by CUB was partly secured by way of personal guarantee and mortgage of a property of Claimant No.2. As per the offer letter dated 13.01.2015, the release of all guarantees and mortgages was the pre-requisite for the Claimants to infuse committed support. Though all guarantees and mortgages of the Claimants were released, yet the committed support was not fulfilled by the Claimants. When the position became clear that the personal guarantee and mortgage of Claimant No. 2 could only be released if an alternate security was provided to CUB, the following scheme for release of the mortgage and for remittance of the balance committed support of Rs.100 Crores was devised:

(1) Claimant No.2 was to substitute his personal guarantee

and mortgage with a fixed deposit of RS.100 Crores and lien mark the same towards the facility granted by CUB to SpiceJet. This was achieved.

(2) SpiceJet was to procure the release of the previous security i.e. the personal guarantee and mortgage of Claimant No.2. This was achieved.

(3) SpiceJet was to procure NOC from EDC for the fixed deposit of Rs.100 Crores to be remitted to the Designated Account No.2 and forward the same to CUB. This was achieved.

33. However, the following were not achieved:

(1) Upon the personal guarantee and mortgage being released, the Claimant No. 2 was to bring in the remaining committed support of RS.100 Crores by issuing irrevocable instructions to CUB to release the fixed deposit of RS.100 Crores into the Designated Account No. 2 towards Tranche-1 CRPS, upon the receipt of the EDC consent from SpiceJet, which sums as per the amended Schedule H was to be utilized by SpiceJet for repayment and closure of CUB facility.

(2) Upon the creation of the EDC consent from SpiceJet, CUB was to release the fixed deposit of RS.1 00 Crores into the Designated Account No.2 as per Schedule H.

38. Significantly the Claimant No. 2 had consented to adjust the sums due for principal and interest of the fixed deposit towards the satisfaction of the credit facility allowed to the Company on maturity of the fixed deposit. Strangely in complete disregard of the instruction, despite the attachment of the fixed deposit by the ED on 01.04.2015, the Bank credited the interest on the fixed deposit into the account of Claimant No.2 stated to be on the basis of oral instructions of Claimant No.2. Even after the release of the attachment on 02.02.2017 Claimant No. 2 did not instruct City Union Bank

to release the amount of fixed deposit into the Designated Account No.2 as clearly obligated under the SSPA. The Claimant No.2, as CW-2, stated that there was no obligation to do so.

42. The Claimants are taking contradictory stands on the question whether issuance of CRPS was sequential to and was independent of the issuance of warrants. Presently, the Claimants have stated that issuance of CRPS was not a sequential step under the SSPA in relation to Clause 4.1.4 of the SSPA, the Claimants have clearly stated in their letter dated 18.02.2016 addressed to BSE that though they had subscribed to the preferential shares of the Company, but are yet to receive the share certificates due to pending warrant matter.

43. It has also been stated that the alternative plea of refund of Rs.370 Crores purportedly paid by them for issuance of CRPS along with interest @ 18% per annum, cannot be accepted or granted as CRPS is essentially a debt instrument bearing a nominal coupon rate of 6% redeemable at the end of 8th year i.e. 2023.

44. The Claimants were to bring in a committed support of Rs.450 Crores and have also undertaken to provide collateral for a sum of Rs.400 Crores in the form of equity shares of SUN - DTH Private Limited and post dated cheques until the same amount is infused into the Company. Infusion of the said committed support was contingent upon the release of the guarantees and mortgage of Claimant No.2 offered against the loan facility availed by the Company when the Claimants were in control thereof.

On 23.02.2015, the Claimants had brought in Rs.300 Crores and had repaid the fixed deposit of Rs.100 Crores which was to be lien marked in favour of the Company since Rs.300 Crores had been received in cash and Rs.100 Crores alternate security was lien marked in favour of the Company

on 24.02.2015 i.e. after the creation of the said fixed deposit issued its no objection to the Escrow Agent to release the collateral. This no objection was founded on good faith and representation of Claimant No. 2 that he would issue irrevocable instruction to the CUB to release the fixed deposit in favour of the Company in Designated Account No.2. In essence, the fixed deposit of Rs.100 Crores stood substituted as collateral for the remaining committed support of Rs.100 Crores. This in no way proves that the entire amount of Rs.400 Crores has been received by the Respondents. This position is confirmed by both CW-3 (Mr J. Dorai) and CW-4 (Mr S.L. Narayanan).

46. In the aforesaid background, it is clear that the Claimant No.2 failed to pay the Respondents the amount of Rs.100 Crores and, therefore, is in breach of Clause 6.3.2 of the SSPA and, therefore, obligated to compensate the Counter Claimants for the breach. The undertaking of Claimants was to bring in Rs.450 Crores as committed support was conditional upon discharge from Yes Bank and CUB. That both these Banks have discharged is not in dispute.

47. The original structure was that as per Clause 7.2.1, Rs.320 Crores was to be brought in by the Claimants (minus Rs.100 Crores in cash for Tranche-1) and the Respondents were required to seek discharges from the Banks. The original understanding as per Schedule H, therefore, was that the amount was to be deposited to Designated Account No.1. The amended position was that the second closure was to be under Clause 7.1 on 24.02.2015 instead of 15.02.2015 and within two days, consent of EDC was to be obtained. Seller No. 2 was mandated to bring in Rs.100 Crores and deposit the same in Designated Account No.2. The admitted position is that the sum of Rs.100 Crores did not come to the Designated Account No.2. As per Clause 6.3.2, personal guarantees given to CUB were to be released by 24.02.2015. The Claimants state that release of guarantees for an amount of Rs.100 Crores was done with the CUB. According to

Respondents, two conditions are envisaged on the basis of Clause 7.2.1 (6).

49. Certain peculiar features need to be noted at this stage is that there was a request for closing of the loan but there was no response from CUB. Interestingly, CUB closed the account of Makemytrip and select cargo. If the ED's order was within its knowledge, no explanation is coming forthwith as to how the account was closed. Similarly, if there was no instruction in terms of Clause 6.3.2 as there is no reference as to who would get the interest. Another interesting feature is that the interest was being credited to the account of Claimant No. 2 and it was being automatically credited to the personal account. Further, if the account was to be held as security and the interest was to be paid on maturity. It is quite suspicious that when instructions were already there as to the nature of the security of the deposit, what occasioned the certificate of the Bank, Exhibit C-63 to the Claimants.

50. In the counter claim, the Respondents have claimed Rs.100 Crores in addition to the interest paid by the Respondents to CUB for the loan of Rs.100 Crores. So far as the plea of specific performance is concerned, the foundation therefore is the readiness and willingness to do what was required to be done by the person who seeks the relief of specific performance. Nothing has been pleaded by the Claimants in this regard. Additionally, it is a fundamental requirement that one who seeks the relief of specific performance must come with clean hands. The admitted position being that the interest was being credited to the personal account of Claimant No.2, the conduct is not only suspicious but shows ulterior motives. Alternatively, it has been stated that the Respondents are still willing to issue the CRPS on the same terms subject to the Claimants fulfilling their part of the obligations. It is pointed out that there was a committed support undertaken by the Claimants to bring in Rs.450 Crores. That part of the arrangement has not been fulfilled by the Claimants. The question of any compensation,

therefore, does not arise in the absence of the requisite conditions of specific performance of contract having been fulfilled.

51. The rival stands have been considered. As per the amended structure of Schedule H of the SPA, second closing under Clause 7.1 was to be achieved by 15.02.2015 which was amended to 24.02.2015. Seller 2 was mandated to bring in Rs. 100 Crores to the Designated Account No. 2. The admitted position is that Rs. 100 crores did not come to Designated Account No. 2. Personal guarantees by way of mortgages given to CUB were to be released by 24.02.2015. The release of guarantees was to be back by fixed deposit of Rs. 100 crores with CUB. The same is claimed to have been done but Rs. 100 crores as noted above did not come to Designated Account No. 2. If one looks at the requirements of Clause 6.3.2 they are as follows:

(1) Fixed Deposit of Rs. 100 Crores;

(2) Release of personal guarantees; and

(3) Seller No. 2 to CUB in the matter of released to the Company.

The first two steps appear to have been done, but not the third one. The inflow of Rs. 450 crores included Rs. 320 Crores for Tranche-1 shares. There was a requirement for deposit of Rs. 220 crores in to the Designated Account No. 2. It is clear from a reading of Clause 6.3.2(b) that two consents were required which deepened on conditions relating to Clause 7.2.1 (b). As noted above, CUB had time from 15.04.2015 till 11.05.2015 when ED's order was received. The evidence of Mrs. Dorai of UCB was that the bank had knowledge about the attachment from media reports. Much stress has been led by Claimants on the certificate of the Bank issued to the Claimants vide Exhibit C-63 relating to irrevocable security. Neither the bank official nor the

Claimants could explain as to why the certificate was necessary if instructions claimed to have been given were already there.

52. There are two options which are available to the parties, (1) As noted supra, the Respondents have stated that they are still waiting to issue the CRPS on the same terms, subject to the Claimants fulfilling their part of obligations as detailed above. Let the Claimants take decision on the present offer made by the Respondents and such terms may be mutually acceptable to them within two months. If no effective solution is found within a period of two months, thereafter, the Respondents shall return the amount of money received in the manner laid down in the SPA for the issuance of CRPS. Since the Tranche-2 payment of Rs. 100 crores has not been made, the Respondent No. 1 has raised a counter claim of Rs. 100 Crores (2) In effect if the arrangement indicated above does not work out, the Respondents shall return the amount as may be worked out relating to the funds brought in by the Claimants within two months of the failure, if any, to work out the solution. To put it differently, the Claimants will be entitled to Rs. 270,86,99,209/- after deduction of the counter claim amount of Rs. 100 crores."

78. The learned Tribunal, while making extensive observations upon appreciating the terms of the Agreement between the parties as well as the subsequent course of the events unfolded between the parties, concluded as under:

(2) The parties shall explore the possibility of giving effect to and exercise the option as described in detail: In case the efforts do no fortify, the Respondents shall within a period of one month thereafter refund the amount in question i.e., Rs. 270,86,99,209/- to the Claimant No. 2 (which is arrived at after adjusting the counter claim of Rs. 100 crores which has been allowed.)"

79. The learned Tribunal, while referring to the claims of the respondents herein, observed that the respondents were required to make the payment of Rs. 220,02,93,039/-, which stood paid. While coming to conclusion the Arbitral Tribunal also noted that out of the total consideration of Rs. 220,02,93,093/- to be paid by the respondents towards the Tranche-I CRPS amount, the respondents had made a total payment of Rs. 120,02,83,038/-, leaving Rs. 100 Crores to be payable. The Arbitral Tribunal was of the view that since, the payment towards Tranche-I was made by the respondents herein, but the supplementary obligation of issuance of the CRPS was not fulfilled by the petitioners, the petitioners were liable to pay back and refund the sum so deposited by the respondent after deducting the sum of the amount which remained uncredited, i.e., Rs. 100 Crores.

80. In accordance with the Agreement, the respondents herein were to make a fixed deposit of Rs. 100 Crores. However, it was observed that the said amount was never found to be deposited in the designated bank account in terms of the agreed mutual terms of the Agreement between the parties. The Counter-Claim pertaining to the said amount was, hence, decided in the favour of the petitioners herein and was deducted from their liability towards the respondents amounting to Rs. 370,86,99,209/-. From a bare perusal of the aforesaid, it is evident that the learned Tribunal has provided adequate reasoning as to the issue of refund of Rs. 270,86,99,209/-.

81. It has been further argued on behalf of the petitioners that all obligations were fulfilled by them in accordance with the Agreement,

however, the Tribunal, upon appreciation of the entire circumstances as well as the material and record before it, found that the CRPS were not issued in terms of the Agreement.

82. The course of procedure taken by the Arbitral Tribunal as well as the findings as reproduced above are evidently not in contravention of any of the provisions under the Arbitration Act or even any substantive law. There is nothing in the observations in the impugned Award to suggest that the Tribunal contravened or went beyond the terms of Agreement executed between the parties. The Tribunal provided reasons for the findings delivered and there is no perversity which is either apparent on the face of the record or which goes to the root of the matter. Therefore, the impugned Award cannot said to be patently illegal.

83. To test the validity and legality of the impugned Award and the observations made therein the test of fundamental policy of law was also before this Court, however, upon a perusal of the Award, this Court does not find that the Award suffers from non-application of mind. Not only did the Tribunal go into elaborate details of the claims raised and submissions thereto made by the parties, it also appreciated the material on record and passed an Award which is supported by reasons. The inference drawn by the Tribunal based on the reasons provided by it do not constitute an interference which on the face of it is untenable or unreasonable. Under the scope of Section 34 of the Arbitration Act, this Court is to be concerned only about the aforementioned considerations to make an observation *qua* the impugned Award, without entering the merits of the case and the evidence in the matter, and in view of the

findings of the Arbitral Tribunal with respect to the claims raised against refund of the amount, this Court is of the opinion that there is nothing perverse in the impugned Award to say that it is against the fundamental policy of law.

84. Furthermore, the observations of the Arbitral Tribunal and the conclusion drawn in the impugned Award do not signify anything which is against the settled principles of law or against the public good or interest. There is no deviation from the fair and just principles of morality, equity, objectivity in the impugned Award or even the course taken by the Tribunal in conducting and concluding the proceedings. Hence, the Award is not against the public policy of the Country.

85. To sum up, none of the ingredients under Section 34 of the Arbitration Act are made out against the Arbitral Award at hand.

86. The petitioners also raised an objection on the interest levied by the Arbitral Tribunal submitting to the effect that the interest @12% per annum on the amount to be refunded towards Warrants and @18% per annum in case of non-payment within the stipulated time period is erroneous. The Tribunal awarded interest in favour of the respondents herein as under:

> *"(3) Since the amount covered by conclusion (1) was with the Respondents since November 2015, they would have become liable to pay interest on the same. Though, interest at the rate of 18% per annum has been claimed, we are of the view that since Respondent No.1 Company took over a huge liability and also paid interest on the tax amount payable by the Claimants, interest at the rate of 12% on Rs.308,21,89,461/- would be appropriate. The amount has*

to be accordingly calculated for about 30 months. Additionally, in view of the finding relating to the CRPS claim and the proved position that the Respondents have paid interest / servicing charges of around Rs.29 Crores, the counter claim to that extent is allowed.

(5) In case the payments, as directed, to be made by the Respondents are not so made within two months from the relevant date, the Claimants shall be entitled to interest @ 18% from the last date of the due date in terms of this Award.

87. There is no dispute to the fact that an Arbitral Tribunal has the jurisdiction and power to make an award pertaining to interest. The Hon'ble Supreme Court has time and again reiterated that an Arbitrator has sufficient powers to pass an Award on the question of interest. In ***Delhi Airport Metro Express (P) Ltd. (Supra),*** the Hon'ble Supreme Court held as under:

*"**13.** Shri Harish N. Salve, learned Senior Counsel is justified in relying on the majority judgment of this Court in Hyder Consulting (UK) [Hyder Consulting (UK) Ltd. v. State of Orissa, (2015) 2 SCC 189 : (2015) 2 SCC (Civ) 38] . S.A. Bobde, J. in his judgment in the said case observed thus : (SCC pp. 200-202, paras 2-14)*

> *"2. It is not possible to agree with the conclusion in S.L. Arora case [State of Haryana v. S.L. Arora & Co., (2010) 3 SCC 690 : (2010) 1 SCC (Civ) 823] that Section 31(7) of the Act does not require that interest which accrues till the date of the award be included in the "sum" from the date of award for calculating the post-award interest. In my humble view, this conclusion does not seem to be in consonance with the clear language of Section 31(7) of the Act.*

3. Sub-section (7) of Section 31 of the Act, which deals with the power of the Arbitral Tribunal to award interest, reads as follows:

> *'**31. (7)(a)** Unless otherwise agreed by the parties, where and insofar as an arbitral award is for the payment of money, the Arbitral Tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.*
>
> ***(b)** A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.'*

4. Clause (a) of sub-section (7) provides that where an award is made for the payment of money, the Arbitral Tribunal may include interest in the sum for which the award is made. In plain terms, this provision confers a power upon the Arbitral Tribunal while making an award for payment of money, to include interest in the sum for which the award is made on either the whole or any part of the money and for the whole or any part of the period for the entire pre-award period between the date on which the cause of action arose and the date on which the award is made. To put it differently, sub-section (7)(a) contemplates that an award, inclusive of interest for the pre-award period on the entire amount directed to be paid or part thereof, may be passed. The "sum" awarded may be the principal amount and such interest as the Arbitral Tribunal deems fit. If no interest is awarded, the "sum" comprises only the principal. The significant words occurring in clause (a) of sub-section (7) of Section 31 of the Act are "the sum for which the award is made". On a plain reading, this expression refers to the total

amount or sum for the payment for which the award is made. Parliament has not added a qualification like "principal" to the word "sum", and therefore, the word "sum" here simply means "a particular amount of money". In Section 31(7), this particular amount of money may include interest from the date of cause of action to the date of the award.

5. Oxford Dictionary gives the following meaning to the word "sum":

> *Sum, "if noun".—A particular amount of money.*
>
> *Sum, "if verb".—The total amount resulting from the addition of two or more numbers, amounts, or items.*

6. In Black's Law Dictionary, the word "sum" is given the following meaning:

> *'Sum.—In English law—A summary or abstract; a compendium; a collection. Several of the old law treatises are called "sum". Lord Hale applies the term to summaries of statute law. Burrill. The sense in which the term is most commonly used is "money"; a quantity of money or currency; any amount indefinitely, a sum of money, a small sum, or a large sum. United States v. Van Auken [United States v. Van Auken, 24 L Ed 852 : 96 US 366 (1877)] and Donovan v. Jenkins [Donovan v. Jenkins, 52 Mont 124 : 155 P 972 (1916)] , P at p. 973.'*

7. Thus, when used as a noun, as it seems to have been used in this provision, the word "sum" simply means "an amount of money"; whatever it may include — "principal" and "interest" or one of the two. Once the meaning of the word "sum" is clear, the same meaning must be ascribed to the word in clause (b) of sub-section (7) of Section 31 of the Act, where it provides that a sum directed to be paid by an arbitral award 'shall ... carry interest ...' from the date of the award to the date of the payment i.e. post-award. In other

words, what clause (b) of sub-section (7) of Section 31 of the Act directs is that the "sum", which is directed to be paid by the award, whether inclusive or exclusive of interest, shall carry interest at the rate of eighteen per cent per annum for the post-award period, unless otherwise ordered.

8. Thus, sub-section (7) of Section 31 of the Act provides, firstly, vide clause (a) that the Arbitral Tribunal may include interest while making an award for payment of money in the sum for which the award is made and further, vide clause (b) that the sum so directed to be made by the award shall carry interest at a certain rate for the post-award period.

9. The purpose of enacting this provision is clear, namely, to encourage early payment of the awarded sum and to discourage the usual delay, which accompanies the execution of the award in the same manner as if it were a decree of the court vide Section 36 of the Act.

10. In this view of the matter, it is clear that the interest, the sum directed to be paid by the arbitral award under clause (b) of sub-section (7) of Section 31 of the Act is inclusive of interest pendente lite.

11. At this juncture, it may be useful to refer to Section 34CPC, also enacted by Parliament and conferring the same power upon a court to award interest on an award i.e. post-award interest. While enacting Section 34CPC Parliament conferred power on a court to order interest "on the principal sum adjudged" and not on merely the "sum" as provided in the Arbitration Act. The departure from the language of Section 34CPC in Section 31(7) of the 1996 Act is significant and shows the intention of Parliament.

12. It is settled law that where different language is used by Parliament, it is intended to have a different effect. In the Arbitration Act, the word "sum" has deliberately not been qualified by using the word "principal" before it. If it had been so used, there

would have been no scope for the contention that the word "sum" may include "interest". In Section 31(7) of the Act, Parliament has deliberately used the word "sum" to refer to the aggregate of the amounts that may be directed to be paid by the Arbitral Tribunal and not merely the "principal" sum without interest.

13. Thus, it is apparent that vide clause (a) of sub-section (7) of Section 31 of the Act, Parliament intended that an award for payment of money may be inclusive of interest, and the "sum" of the principal amount plus interest may be directed to be paid by the Arbitral Tribunal for the pre-award period. Thereupon, the Arbitral Tribunal may direct interest to be paid on such "sum" for the post-award period vide clause (b) of sub-section (7) of Section 31 of the Act, at which stage the amount would be the sum arrived at after the merging of interest with the principal; the two components having lost their separate identities.

14. In fact this is a case where the language of sub-section (7) clauses (a) and (b) is so plain and unambiguous that no question of construction of a statutory provision arises. The language itself provides that in the sum for which an award is made, interest may be included for the pre-award period and that for the post-award period interest up to the rate of eighteen per cent per annum may be awarded on such sum directed to be paid by the arbitral award."

15. *It could thus be seen that the majority view of this Court in Hyder Consulting (UK) [Hyder Consulting (UK) Ltd. v. State of Orissa, (2015) 2 SCC 189 : (2015) 2 SCC (Civ) 38] is that the sum awarded may include the principal amount and such interest as the Arbitral Tribunal deems fit. It is further held that, if no interest is awarded, the "sum" comprises only the principal amount. The majority judgment held that clause (a) of sub-section (7) of Section 31 of the 1996 Act refers to the total amount or sum for the payment for which the award is made. As such, the amount awarded*

under clause (a) of sub-section (7) of Section 31 of the 1996 Act would include the principal amount plus the interest amount pendente lite. It was held that the interest to be calculated as per clause (b) of sub-section (7) of Section 31 of the 1996 Act would be on the total sum arrived as aforesaid under clause (a) of sub-section (7) of Section 31 of the 1996 Act. S.A. Bobde, J. in his judgment, has referred to various authorities of this Court as well as Maxwell on the Interpretation of Statutes. He emphasised that the Court must give effect to the plain, clear and unambiguous words of the legislature and it is not for the courts to add or subtract the words, even though the construction may lead to strange or surprising, unreasonable or unjust or oppressive results.

16. *Sub-section (7) of Section 31 of the 1996 Act is already reproduced in the judgment of S.A. Bobde, J. in Hyder Consulting (UK) [Hyder Consulting (UK) Ltd. v. State of Orissa, (2015) 2 SCC 189 : (2015) 2 SCC (Civ) 38] . Applying the principle of plain interpretation of the language employed by the legislature, the position that would emerge, on an analysis of clause (a) of sub-section (7) of Section 31 of the 1996 Act, is as under:*

(i) It begins with the words "Unless otherwise agreed by the parties".

(ii) Where and insofar as an arbitral award is for the payment of money, the Arbitral Tribunal may include interest component in the sum for which the award is made.

(iii) The interest may be at such rate as the Arbitral Tribunal deems reasonable.

(iv) The interest may be on the whole or any part of the money.

(v) The interest may be for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

> ***17.*** *It could thus be seen that the part which deals with the power of the Arbitral Tribunal to award interest, would operate if it is not otherwise agreed by the parties. If there is an agreement between the parties to the contrary, the Arbitral Tribunal would lose its discretion to award interest and will have to be guided by the agreement between the parties. The provision is clear that the Arbitral Tribunal is not bound to award interest. It has a discretion to award the interest or not to award. It further has a discretion to award interest at such rate as it deems reasonable. It further has a discretion to award interest on the whole or any part of the money. It is also not necessary for the Arbitral Tribunal to award interest for the entire period between the date on which the cause of action arose and the date on which the award is made. It can grant interest for the entire period or any part thereof or no interest at all.*
>
> ***20.*** *If clause (a) of sub-section (7) of Section 31 of the 1996 Act is given a plain and literal meaning, the legislative intent would be clear that the discretion with regard to grant of interest would be available to the Arbitral Tribunal only when there is no agreement to the contrary between the parties. The phrase "unless otherwise agreed by the parties" clearly emphasises that when the parties have agreed with regard to any of the aspects covered under clause (a) of sub-section (7) of Section 31 of the 1996 Act, the Arbitral Tribunal would cease to have any discretion with regard to the aspects mentioned in the said provision. Only in the absence of such an agreement, the Arbitral Tribunal would have a discretion to exercise its powers under clause (a) of sub-section (7) of Section 31 of the 1996 Act. The discretion is wide enough. It may grant or may not grant interest. It may grant interest for the entire period or any part thereof. It may also grant interest on the whole or any part of the money."*

88. Therefore, it is apparent that the Arbitral Tribunal had the jurisdiction and the power to grant and award an interest while passing

the Award, since there existed no prior agreement between the parties pertaining to such interest. Along with such power and jurisdiction, there is a vast degree of discretion which is vested with the Arbitral Tribunal. The Hon'ble Supreme Court explicitly stated in the aforesaid judgment that "*It has a discretion to award the interest or not to award"*. Hence, there is not dispute to this effect that since there were no explicit terms pertaining to the issue of interest decided and agreed between the parties before this Court, the Arbitral Tribunal was free to exercise its discretion and grant or not grant an award of interest to the best of its judgment, upon looking into the entirety of the material before it, while also ensuring that such an award does not render the Award patently illegal.

89. In the instant case, the discretionary power of awarding interest was exercised by the Arbitral Tribunal and the award of interest was made while keeping in view that there was a default on the part of the petitioners herein. It was also observed that the interest on the amount would have been accruable in the month of November in the year 2015, and hence, it was found just to allow an award of interest @12% per annum, as opposed to the original claim of 18% raised on behalf of the respondents herein.

90. This observation of the Tribunal also does not invite the vigours of the principles set out above that warrant an intervention under Section 34 of the Arbitration Act. While passing the Award, on merits as well as on the issue of interest, Arbitral Tribunal has taken a judicial approach while passing the Award and has given sufficient reasoning, backed by the facts and material. There is also nothing to show that the principles of natural

justice were not observed by the Tribunal since the parties were given sufficient opportunity to put forth their case and further the Arbitral Tribunal has also considered and appreciated the entirety of the matter while passing the impugned Award, which is backed by reasons. Such an interest was granted by the Arbitral Tribunal, in its wisdom being the master of evidence, after appreciation of the objections, claims and material adduced by the parties.

91. There is also nothing in the Award, even to the aspect of interest, which would lead this Court to take the view that there is any gross illegality which goes to the root of the matter or error apparent on the face of the record which would render the Arbitral Award patently illegal. Furthermore, the conclusions drawn and findings given are not of the nature that would shock the conscience of this Court.

CONCLUSION

92. As discussed in the foregoing paragraphs, this Court is barred from entering into the merits of an Award unless there is an error that is apparent on the face of the record or an illegality that goes to the root of the matter. As per the mandate of law, settled by the Hon'ble Supreme Court, this Court shall also not look into the merits of the reasoning and findings given by the Arbitral Tribunal, as long as there are reasoned findings given by the Tribunal while passing the Award, which is clearly the case in the instant matter.

93. The Arbitral Tribunal considered the submissions and objections of the parties, framed issues, considered and appreciated the material facts

and evidence and then passed the Award by giving sufficient reasoning. Further, the Arbitral Tribunal considered the pleadings and evidence placed before it and arrived at a conclusion that is plausible. There is nothing in the impugned Award to suggest otherwise.

94. There is nothing in the impugned Award to suggest that it suffers from patent illegality and the findings therein are perverse and will shock the conscience of this Court. In the instant case, the petitioners have not been able to prove that the impugned Arbitral Award is patently illegal, against public policy of India or fundamental policy of law and thus have failed to make out a case for the award to be set aside.

95. Therefore, in the light of such circumstances, the pleadings before this Court and submissions therein, the contentions raised during the course of arguments and the law surrounding Section 34 of the Arbitration Act being settled as well as the contents of the impugned Award, this Court is of the considered view that the petitioners have failed to substantiate the grounds for setting aside the impugned Arbitral Award.

96. After consideration of the entirety of the matter this Court does not find any cogent reason to interfere in the impugned Award dated 20th July 2018 passed by the Arbitral Tribunal in the arbitration proceedings initiated between the parties before this Court.

97. Accordingly, the instant petition is dismissed along with pending applications, if any.

98. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

JULY 31, 2023
gs/ms/ds