IN THE HIGH COURT OF DELHI AT NEW DELHI

% **Reserved on : 15th March, 2023**
Pronounced on: 26th April, 2023

\+ **O.M.P.(COMM) 28/2019 AND I.A. No.776/2019**

HUGHES COMMUNICATIONS INDIA PVT. LIMITED
..... Petitioner
Through: Mr.Arvind K. Nigam, Senior Advocate with Mr.Dharmesh Mishra and Mr. Prateek Luthra, Advocates

versus

IMAGING SOLUTIONS PVT LIMITED ..... Defendant
Through: Mr.Varun Kumar, Advocate

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The present petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, seeks to challenge the impugned Award dated 4th October 2018 to the extent that the registered Agreement dated 23rd March 2001 for sale of immovable property has been held to be determinable in nature and therefore not enforceable. The petitioner has also contended that the impugned Award is beyond the scope of reference and jurisdiction of the Learned Arbitrator. It has been prayed as under:

> *"a}. This Hon'ble Court may be pleased to set aside the award of the Learned Sole Arbitrator dated 04.10.2018 to the extent challenged above for the reasons and grounds mentioned above*

and this Hon'ble Court may further be pleased to refer the matter to that extent for adjudication by way of arbitration as per the arbitration agreement between the parties, upon setting aside the award.
b}. pass such other order / orders as this Hon'ble Court deems fit and proper in the interest of justice.
c}. Costs of the present proceedings be award in favour of the petitioner and against the respondent."

FACTUAL MATRIX

2. The background of the case is that on 3rd June 1997, the respondent was allotted land in Plot No. 1, Sector 18, Electronic City, Gurgaon, Haryana admeasuring 1000 sq. meters by Haryana Urban Development Authority (HUDA) and the petitioner on 17th March 1999 issued a letter offering the plot on lease to the petitioner. Between 20th February 1999 to 6th December 1999 various letters/mails were sent by the respondent to the petitioner for letting out the plot with entitlement to the petitioner to construct a building thereon, and with an option to purchase the plot subject to permission of law and on 14th February 2000, Power of Attorney was granted by the respondent to the petitioner and the Lease Deed was executed between the parties for a period of 20 years.

3. On 28th August 2000, the respondent obtained a Conveyance Deed dated 28th August 2000 from HUDA for 1000 sq. metres plot and later obtained a Conveyance Deed dated 24th March 2003 for an additional area of 200 sq. metres and on 10th December 2000, the respondent secured possession of the said plot measuring 1200 sq. metres from HUDA. The parties entered into an Agreement dated 23rd March 2001 as per the terms offered by the respondent and became effective from 1st June 2000.

4. In year 2002, the petitioner, having taken possession of the plot, constructed and completed building over the said plot and HUDA upon inspection of building in the year 2003 and after raising the receipt of demand with respect to compounding for deviation from sanctioned plans and FAR, granted and issued Occupation Certificate dated 1st September 2003.

5. On 27th July, 2006, upon expiry of six years of the term, the petitioner in writing elected and exercised the option vested and granted to it to purchase the property and offered to pay the agreed pre-determined sale consideration.

6. The petitioner on 2nd January 2007, asked the respondent to discharge its obligation to convey the title. The same was asked by the petitioner again vide e-mails dated 29th March 2007, 3rd April 2007, 15th May 2007 and subsequently vide Notice dated 21st December 2007, notified that upon failure to discharge its obligation, Arbitration shall be invoked.

7. On 8th February 2008, the petitioner invoked Arbitration and called upon the named Arbitrator. The named Arbitrator, on 3rd April 2008, entered upon reference and first Arbitral hearing was held on 28th April 2008 wherein schedule for filing of pleadings and other directions were issued by the Learned Arbitrator.

8. On 28th May 2008, the petitioner filed a Statement of Claim seeking specific performance and enforcement of Agreement to Sell to which the respondent on 11th July 2009, filed its Statement of Defence and subsequently, rejoinder was filed by the petitioner on 24th September 2008.

9. The respondent on 19th July 2011 filed an application before the Learned ADJ, Gurgaon for termination of the mandate of the Learned Arbitrator under Section 14 of the Arbitration and Conciliation Act, 1996 which was dismissed by the Learned ADJ vide Order dated 2nd December 2011. The Order of the Learned ADJ was set aside by the High Court of Punjab and Haryana in Civil Revision Petition no. 7687/2011. The Hon'ble Supreme Court vide Order dated 14th December 2012 in SLP (C) no. 36603/2012 appointed a new arbitrator. The Learned Sole Arbitrator vide Order dated 4th August 2018 made and published the impugned Award. Aggrieved by the same, the instant petition has been filed.

SUBMISSIONS

(On behalf of the petitioner)

10. Learned counsel for the petitioner submitted that the Learned Sole Arbitrator went beyond the scope of reference and the jurisdiction while ascertaining that the agreement is determinable in nature and therefore not enforceable.

11. Learned counsel for the petitioner submitted that the Learned Sole Arbitrator rejected the claim of the petitioner for specific performance of sale of immovable property by applying Section 14(1)(c) of Specific Relief Act, 1963 and concept of *per se* determinability of the Contract. It is further submitted that the dispute was not even referred to the Arbitration in the Statement of Defence and that the Learned Sole Arbitrator committed error of jurisdiction by going beyond the scope of Contract.

12. Learned counsel for the petitioner submitted that the impugned Award suffers from patent illegality and is liable to be set aside to the extent it has been challenged for being in clear contravention of Section 28(3) of the Arbitration and Conciliation, 1996. Learned counsel for the petitioner submitted that option to terminate was only with the petitioner under Clause 9 but the Contract was neither terminated by the petitioner and nor by the respondent either before or after the Contract was put to enforcement.

13. Learned counsel for the petitioner submitted that impugned Award suffers from inherent contradictions because on one hand it was held that on exercise of option to purchase the agreement transforms into an agreement to sell, which as per Clause 6 is enforceable and on the other hand even upon an option vested with the petitioner to terminate having not being exercised in terms of clause 9, on hypothetical and academic basis it has been held that contract is determinable therefore not enforceable.

14. Learned counsel for the petitioner submitted that Section 14(1)(c) of the Specific Relief Act, 1963 is not applicable in the facts of the case and instead Section 10 is applicable. It is further submitted that all the judgments relied upon by the Learned Arbitrator to hold that Section 14(1) (c) is applicable pertained to movable goods or contract of services in which the contract had been terminated and party aggrieved was seeking injunction or performance. Thus, in these circumstances it was held that determinable contracts cannot be enforced. These are inapplicable to the terms of contract in present case and facts of present case.

15. In view of the aforesaid, the impugned Award dated 4th October 2018 to the extent that the registered Agreement dated 23rd March 2001 for sale of immovable property has been held to be determinable in nature and therefore not enforceable, be set aside.

(On behalf of the respondent)

16. Learned counsel for the respondent submitted that the respondent through various communications had categorically intimated the petitioner that the property could not be transferred. It further submitted that the Contract became unenforceable and determinable due to various breaches committed by the petitioner. Moreover, it is submitted that the Learned Sole Arbitrator went beyond the terms of the Contract by granting compensation which was never sought by the petitioner.

17. Learned counsel for the respondent submitted that the Lease Deed became revocable and determinable under the law as well as Section 28(3) of the Arbitration and Conciliation Act, 1996 and by violating the terms of the Deed, the petitioner cannot seek recourse to the Clauses of the Deed. Learned counsel for the respondent submitted that the impugned Award is completely based on the interpretation of the Lease Deed.

18. Learned counsel for the respondent submitted that the Award to the extent it has been impugned in question, is neither patently illegal or in contravention of fundamental policy of India because it has held the Deed to be determinable, revocable and unenforceable. Moreover, it is also submitted that the same is well reasoned on substantive law. Learned counsel for the respondent submitted that if compensation is the remedy available for breach of a Contract, then the same should be availed before

the remedy becomes unavailable under Section 21 of the Specific Relief Act, 1963.

19. Learned counsel for the respondent submitted that the judgments relied by the Learned Sole Arbitrator are relevant to the case at hand and that every judgment is different but the ratio is what is to be gathered from the judgment.

20. Learned counsel for the respondent submitted that the whole of the Specific Relief Act is applicable to the case and that the Deed was determinable and unenforceable from inception.

21. Learned counsel for the respondent submitted that no rights or interest could have vested in the petitioner and the building can be bought back by the respondent under the buyback Clause in the Deed and the respondent is ready and willing to do so.

22. Learned counsel for the respondent submitted that the respondent had the right to terminate the Agreement and the same was rightly done so and no right could have been vested in favour of petitioner as no right could be transferred under the prevailing and current HUDA laws.

23. Learned counsel for the respondent submitted that no Agreement can be irrevocable, non-determinable even if either party commits a breach of the Contract, and such a Contract would itself be void ab initio.

24. Learned counsel for respondent submitted that the Lease Deed has been terminated by the respondent and struck down by the Learned Arbitral Tribunal. It is also submitted that the Lease Deed has not become Agreement to Sell due to illegal acts and ill deeds of the petitioner.

25. Learned counsel for respondent submitted that the compensation was never sought by the petitioner and therefore, that part of the

impugned Award is bad in law and the respondent has filed a petition under Section 34 of the Act of 1996 to that effect.

26. Therefore, in view of the aforesaid it is submitted that the instant petition being devoid of merits is liable to be dismissed.

QUESTION FOR ADJUDICATION

27. Heard learned counsels for the parties and perused the record.

28. The present petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, seeks to challenge the impugned Award dated 4th October 2018 to the extent that registered agreement dated 23.03.2001 for sale of immovable property has been held to be "determinable in nature therefore not enforceable". It is the petitioner's averment that only on that basis the claim of the petitioner for specific enforcement of agreement of sale of immovable property has been rejected.

29. Therefore, the only question before this Court is to adjudicate that whether the registered agreement dated 23.03.2001 for sale of immovable property has rightly been held to be "determinable in nature therefore not enforceable", and hence the dismissal of claim of the petitioner for specific enforcement of agreement of sale of immovable property was just and proper.

Spirit of the Arbitration Act

30. 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.

31. 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 a 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.

32. 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."*

33. 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.

34. The petitioner before this Court has 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

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.]*
>
> *[(2A) 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.] …"*

35. 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.

36. 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.

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."

37. With the repeal of Arbitration 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.

38. 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.

39. 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.

Scope of Powers of Arbitrator & Intervention of Courts

40. The Arbitrator, who in his 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 his functioning would defeat the spirit and purpose of the Arbitration Act, as discussed in the foregoing paragraphs.

41. 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.

42. There is 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 and Conciliation Act, 1996, an Arbitrator needs only to adhere to and fulfil the requirements under Section 31 of the Act. The limited requirements under Section 31 are reproduced hereunder:-

> *"Form and contents of arbitral award. –*
>
> *(1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.*
>
> *(2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.*
>
> *(3) The arbitral award shall state the reasons upon which it is based, unless—*
>
> > *(a) the parties have agreed that no reasons are to be given, or*
> >
> > *(b) the award is an arbitral award on agreed terms under section 30*
>
> *(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.*
>
> *(5) After the arbitral award is made, a signed copy shall be delivered to each party.*

> *(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award. …"*

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.

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 is 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. 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 Wednesbury6 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."

48. 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. 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."*

49. 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."*

50. 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 shall not sit in an appeal while adjudicating a challenge to an Award which is passed by an Arbitrator, the master of evidence, after due consideration after 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.

ANALYSIS

51. Upon perusal of the pleadings and hearing the parties at length, this Court opines that the controversy between the parties qua the impugned Award may be narrowed down to adjudicate the following issues:

i. Whether the Learned Sole Arbitrator went beyond its jurisdiction by holding that the Agreement dated 23rd March 2001 is a Determinable Agreement.

ii. Whether the impugned Award is patently illegal and in conflict with the Public Policy of India.

Issue no. 1

52. The impugned findings of Arbitrator on the question of agreement being determinable while declaring the Arbitral Award are enclosed below:

> *"47. I will first deal with the contention of the learned counsel for the Respondent that agreement being determinable under Clauses 9 thereof, is not capable of being specifically enforced under Section 14(1)(c) of the Specific Relief Act, 1963 and the*

plea of the learned counsel for the Claimant that Section 14(1)(c) is not at all attracted to the facts of the case.

48. In order to appreciate the contentions of learned counsel for the parties, it will be necessary to extract clauses 9.1 and 9.2 of the agreement:

> *9.1 At the Option of the Lessee*
>
> *The Lessee may any time during the term hereof terminate this agreement at its sole option by a 60-day written notice.*
>
> *The Lessee shall not be liable to pay or incur any charges, costs or expenses or for any incidental, consequential, direct. or indirect damages including loss of opportunity or anticipated profits.*
>
> *9.2 Termination due to default of Lessor*
>
> *The Lessee may terminate this agreement by a 30 day written notice due to failure of the Lessor to adhere to any of its obligations under this Agreement. In such an event the Lessee shall not be liable to pay or incur any payment; compensation charges, costs of expenses or for any incidental, consequential, direct or indirect damages including loss of opportunity of anticipated profits.*
> *In the event this Agreement is terminated in terms of either clauses 9.1. or 9.2 the Lessor undertakes to buyback the Building at the book value from the Lessee.*

49. As is evident from the aforesaid clauses the agreement is terminable at the option of the Lessee. Question that arises for consideration is whether such an agreement which is determinable can be enforced. The answer to the question lies in Section 14 of the Act…

50. According to sub-section 1 of Section 14, agreements that fall within the ambit of any of its sub-clauses cannot be

> *enforced. In the instant proceeding the Claimant seeks an award in its favour and against the Respondent for specific performance of the agreement to sell land admeasuring 1200 Sq. Meters and a three storied Building standing thereon shorn of details the Claimant seeks specific performance of a determinable contract. Since the agreement is determinable it attracts clause c of sub section 1 of section 14. This being so, as per the mandate of the provision, the agreement cannot be specifically enforced."*

53. Upon a bare perusal of the impugned Arbitral Award, this Court is of the opinion that the Learned Sole Arbitrator has correctly deduced its findings while passing the Arbitral Award and has correctly interpreted the terms of Agreement dated 23rd March 2001.

54. In any case, Section 14(1) of the Act prior to amendment and as applicable to the instant case, clearly delineates the contracts which cannot be specifically enforced, and under Section 14(1)(c), specific performance cannot be granted in a contract which is determinable in nature.

55. As rightly observed by the Learned Arbitrator and in view of clauses 9.1 and 9.2 of the Agreement, the same is determinable at the option of the lessee. Therefore, the findings of the learned arbitrator on the question of agreement being determinable do not suffer from any illegality whatsoever.

56. Issue No. 1 stands adjudicated accordingly.

Issue No. 2

57. The ground taken by the petitioner while assailing the Arbitral Award is that the impugned Arbitral Award is ex-facie erroneous and

suffers from patent illegality, contrary to the fundamental policy of Indian Law. The law regarding patent illegality and public policy of India is no more *res integra* and has been authoritatively clarified by the Hon'ble Supreme Court in a number of judicial pronouncements.

58. Since, it has been settled that the scope of interference under Section 34 of the Arbitration Act is limited, it is now pertinent to see the considerations that are to be considered while adjudicating upon a challenge and in what circumstances may an Award may be set aside.

59. 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, based on no evidence and delineates no reason for passing the Award.

60. The petitioner has raised the ground of patent illegality as well as contravention to public policy while impugning the Award dated 4th October 2018.

61. The Hon'ble Supreme Court in ***BCCI vs. Cricket Association & Ors.*** **(2015) 3 SCC 251,** on the question of public policy, 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 case27 , SCC pp. 482-83, para 32)*

> *"3 2. 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."

95. *In ONGC Ltd. v. Western GECO International Ltd., this Court was examining the meaning of "fundamental policy of Indian law", an expression used by this Court in Saw Pipes case. Extending the frontiers of what will constitute "public policy of India" this Court observed: (Western GECO International Ltd. case , SCC pp. 278-80, paras 35 & 38-39)*

"35. What then would constitute the 'fundamental policy of Indian law' is the question. The decision in ONGC 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 a 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 a judicial approach in judicial and quasi-judicial determination lies in the fact that 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 bona fide 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.

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 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 wherever the same are available."

> ***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. ....”*

62. While discussing the fundamentals of patent illegality, the Hon’ble Supreme Court in ***State of Chhattisgarh vs. 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 lndia,-*
>
> *(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. NHAJ9, 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 Builders8 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 Builders8, 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".”*

63. 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.

64. In order to set aside an Award under Section 34 the petitioner must show that illegality which has been alleged goes to the root of the matter and is not an illegality of trivial nature. In failure 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 void.

65. To argue that the impugned Award before this Court is liable to set aside in the instant petition it has been argued that the findings of the learned Arbitrator are patently illegal and against the fundamental policy of India. 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. In the case at hand, the petitioner has

not been able to show that the impugned Award suffers from such illegality that is apparent on the face of record and upholding the same would be against the law.

66. A clear reading of the precedents cited proves that under the limited scope of Section 34, the present case does not warrant the interference of this Court, as the grounds stated by the petitioner in the instant petition do not meet the scope of this section. Accordingly, with reference to the aforesaid judgments and the impugned Arbitral Award, the Petitioner cannot have the benefit of the "ground of patent illegality" to assail the impugned Arbitral Award under Section 34 of the Act, 1996.

67. Reiterating as previously observed, "patent illegality" is an illegality that goes to the root of the matter but excludes the erroneous application of the law by an arbitral tribunal or re-appreciation of evidence by an appellate court. In this instant case, the Arbitral Award was a well-reasoned award, with the findings being clearly arrived at based on all the documents/evidence on record.

68. The learned Arbitrator has clearly considered Statement of Claim relevant Clauses of the Terms of the Agreement to Sell dated 23rd March 2001 and the ground that the Learned Sole Arbitrator has passed the Arbitral Award which is beyond the scope of its jurisdiction does not stand validated as per the submissions of the Petitioner and under the observation of the Court. The impugned Award is in no way in contravention of the Arbitration and Conciliation Act, 1996, to reason that the Award is patently illegal.

69. Therefore, as regards to Issue No. II, this Court is of the considered view that the petitioner has not been able to show that the grounds laid

under Section 34 of the Arbitration Act for setting aside the impugned Award are made out on behalf of the petitioner. None of the impugned findings of the learned Arbitrator is such that it shows that the impugned Award is patently illegal to shock the conscience of the Court, against public policy or fundamental policy of India or falls under the grounds laid down in Section 34 of the Arbitration Act.

CONCLUSION

70. In the lights of facts, submissions and contentions in the pleadings, this Court find that the petitioner has failed to substantiate its grounds for setting aside the impugned Arbitral Award on the ground that the Learned Sole Arbitrator went beyond its jurisdiction by holding that the Agreement is a Determinable Agreement and is patently illegal. The Court is of the view that the Learned Sole Arbitrator was well within its jurisdiction to declare the Agreement dated 23rd March 2001 as Determinable Agreement in the view of Statement of Claim of the respondent and Terms of the said Agreement.

71. It is settled law that the ground of Patent illegality gives way to setting aside an Arbitral Award with a very minimal scope of intervention. A party cannot simply raise an objection on the ground of patent illegality if the Award is simply against them. Patent illegality requires a distinct transgression of law, the clear lack of which thereof makes the petition simply a pointless effort of objection towards an Award made by a competent Arbitral Tribunal. Further, the petitioner has not been able to prove that the impugned Arbitral Award is patently illegal, and contrary to the fundamental policy of Indian Law, and hence is liable to be set aside.

72. Therefore, after consideration of the material on record, including the impugned Arbitral Award, submissions on behalf of the parties this Court is of the view that there is no finding or conclusion reached by the learned Arbitrator which warrants interference of this Court. The petitioner has not been able to substantiate her case for setting aside of the impugned Award.

73. Accordingly, the instant petition is dismissed since there is no cogent reason to set aside the impugned Award.

74. Pending applications, if any, also stand disposed of.

75. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

APRIL 26, 2023
Sv/AK