IN THE HIGH COURT AT CALCUTTA
COMMERCIAL APPELLATE DIVISION
ORIGINAL SIDE
COMMERCIAL DIVISION

BEFORE:
The Hon'ble Justice Soumen Sen
and
The Hon'ble Justice Biswaroop Chowdhury

AO-COM/38/2024
WITH
AP-COM/388/2024

DEEPAK BHARGAVA & ORS.
VS.
JAGRATI TRADE SERVICES PVT. LTD. & ORS.
With

AO-COM/37/2024
JAGRATI TRADE SERVICES PRIVATE LIMITED
VS.
DEEPAK BHARGAVA & ORS.

For the Appellant in item No.6 and Respondent in Item no.7	:	Mr. S.N. Mookherjee, Sr. Adv., Mr. Suman Dutt, Sr. Adv. Mr. P. Sinha, Adv. Mr. K. K. Pandey, Adv. Mr. Zeeshan Haque, Adv. Mr. Shubhrajit Mookherjee, Adv. Ms. Yamini Mookherjee, Adv. Ms. Easha Manchanda, Adv. Ms. Pooja Sett, Adv.
For Jagrati Trade Services	:	Mr. Ratnanko Banerji, Sr. Adv. Mr. Anirban Ray, Sr. Adv. Mr. Rudrajit Sarkar, Adv. Mr. Jai Kumar Surana, Adv. Mr. Debanghsu Dinda, Adv. Ms. Arundhuti Barman Roy, Adv. Mr. Abhimonyu Ray, Adv.
Hearing concluded on	:	26th February, 2025
Judgment on	:	5th March, 2025

Soumen Sen, J.

1. The appeal and the cross-appeal are arising out of a composite order dated 4th September, 2024 disposing of two applications for setting aside of arbitral awards on grounds stated therein under Section 34 of the Arbitration and Conciliation Act, (in short, "the 1996 Act").

2. The dispute is arising out of a Share Purchase Agreement (SPA) dated 24th March, 2021 entered into between the parties. The appellants in APOT No.328 of 2024 were the respondents in the arbitration proceeding and also in the proceeding for setting aside of the award initiated by the present appellants in AP-COM No.388 of 2024 (Old case No. AP 777 of 2023) **(*Deepak Bhargava & Ors. v. Jagrati Trade Services Pvt. Ltd. & Ors.*)**

3. The respondent No.1 in the said arbitration proceeding claimed specific performance of contract along with damages for the breach of the contract whereas the appellants by way of counterclaim prayed for specific performance of their version of the self-same agreement.

4. The aforesaid counterclaim was dismissed and had also resulted in an application for setting aside of the award limited to the refusal of the claim for interest from the date of payment of consideration till the date of commencement of the arbitration proceeding. The learned arbitrator allowed interest @ 9 per cent per annum from the date of filing of the statement of claim till realisation. The learned arbitrator rejected the claim for specific performance of the contract as claimed by the present appellants. However, the appellants were directed to refund the sum of Rs.19.90 crores (approximately) which was admittedly received by the appellants from the claimants towards consideration. Interest was also granted on the same. The

learned Single Judge has upheld the award and dismissed both the applications. This order is now under challenge by both the parties.

5. Briefly stated the appellant Nos.1 to 10 and respondent Nos. 4 and 5 were shareholders of the appellant No.11 company (hereinafter referred to as 'company'). The appellant Nos.1 to 10 and the respondent No.4 and 5 are treated as transferors and described collectively as Deepak and the respondent Nos.1, 2 and 3 are referred to as transferees and described allegedly as Jagrati for the sake of convenience. Jagrati was the claimant in the arbitration. The respondent Nos.2 and 3 were respondent No.14 and 15 in the arbitration respectively.

6. The appellant No.11 is a company and was a long term lessee of premises No.6, JLN Road, Kolkata-700013 measuring 2 bighas 13 cottah, 11 chittaks and 23 sq. Ft. There were six buildings in the premises all occupied by tenants. The Transferees agreed to acquire 100% shares of the appellant No.11 company through purchase of 100% shares in the same.

7. Three (3) agreements, all dated March 24, 2011, were entered into between the Transferors and Transferees. The agreements included i) Share Purchase Agreement, ii) Supplemental Agreement and iii) an Escrow Agreement.

8. Under the Share Purchase Agreement as relied upon by Deepak the transferors are required to pay a total consideration of Rs.82 crores for such transfer. Out of the said consideration of Rs.82 crores, the transferors have paid Rs.20 crores as share consideration for acquiring 36278 fully paid-up shares and Rs. 62 Crore was paid as a loan amount.

9. The Supplemental agreement provided for obtaining the vacant and peaceful possession of the premises in the occupation of the tenants of the company.

10. The Escrow Agreement provided for appointment of an Escrow Holder who would hold the share certificates in trust till completion of the transaction. The said Escrow agreement provided that the Share Purchase Agreement, Supplemental Agreement and all other documents would be prepared in triplicate, each set being in the possession of the transferor, transferees and the Company.

11. The Transferees inter-se entered into an understanding dated March 28, 2011 whereby they agreed that the Respondent No. 1, Respondent No. 2, and the Respondent No. 3 would acquire 40%, 40% and 20% shares, respectively in the appellant No. 11 company. Such agreement was further revised on August 04, 2011 whereby the share of the transferees was fixed as 46% for Respondent No.2, 36% for Respondent No. 1 and 18% for the respondent No. 3.

12. Another Memorandum of Understanding dated June 21, 2012 had been signed between the Respondent No. 1 and one, Tirupati Vancom Private Limited for assigning respondent No. 1's rights for 18% out of 36% shares at and for a consideration of Rs. 14.76 Crores i.e. exactly 50% of its obligations under the SPA.

13. The payment obligation of the Transferees on the basis of the shares to be acquired by them is reproduced as follows:-

TRANSFEREE	PAYMENT ON ACCOUNT OF SHARES	PAYMENT ON ACCOUNT OF LOANS	TOTAL PAYMENT
Jagrati (R1)(36%)	7.2 cr	22.32 cr	29.52 cr
Orbit (R2) (46%)	9.2 cr	28.52 cr	37.72 cr
Damani (R3)(18%)	3.6 cr	11.16 cr	14.76 cr
Total(100%)	20 cr	62 r	82 r

14. The respondent No. 2 claimed to have made excess payment of Rs.42.45 crores against its payment obligation of Rs.37.72 crores and respondent no.3 claimed to have paid Rs.11.26 crores out of the Rs.14.76 crores. The respondent no.2 agreed to adjust the excess amount paid by it against the deficit of Respondent no. 3 which was done.

15. The respondent No.1 only paid Rs.19.92 Crores out of Rs.29.52 Crores and alleged to have breached its payment obligations. A substantial part of the share consideration of the respondent No. 1 was claimed to have been paid by Tirupati Vancom Private Ltd.: Rs. 4.73 Cr. to the Company and Rs.1.84 Cr. to individual shareholders of the company. It is further alleged that Goldsmith Infrabuild Private Ltd. had paid Rs.69 lakhs to the individual shareholders of Deepak.

16. Disputes and differences arose between the parties in view of the non-payment of the balance consideration by Jagrati along with other consequential breaches. An attempt was made by Jagrati to obtain an injunction against the shares which failed vide the refusal of an order of injunction by an order dated 18th June, 2018 and thereafter disputes were referred to arbitration.

17. Jagrati as Claimant in the arbitration proceeding claimed an award for specific performance of the SPA dated March 24, 2011. Deepak as respondents also filed a counter claim for specific performance of the SPA by directing Jagrati to make payment of the balance amount due under the SPA. Orbit filed a statement of defence to the statement of claim filed by Jagrati. The respondent No. 3 did not participate in the arbitration proceedings.

18. The relief for specific performance as claimed by Jagrati was refused. The Tribunal held that the respondent No. 1 relied upon a false, suspicious and inadmissible version of the SPA and had failed to perform its payment obligations under the SPA and on other grounds as well, namely, delay and failure to discharge its 36% obligation.

19. The counter-claim filed by Deepak was refused on the ground of delay in making the claim, though not barred by limitation.

20. The learned arbitrator on 29th June, 2023 passed an award. In the impugned award the learned arbitrator has directed as follows:

(a) Refund of Rs.19,92,30,500/- to the Respondent No.1;

(b) Interest at the rate of 9% per annum on the principal sum of Rs.19,92,30,500/- from the month of December, 2019;

Costs were not awarded by the arbitrator to the party.

21. Thereafter, on 27th July, 2023 an application was filed by Deepak under Section 33(2) and 33(4) of the Arbitration and Conciliation Act 1996, praying,*inter alia*, for correction of the aforesaid award towards payment of cost on the basis of computation of the share of fees of the sole Arbitrator, the clerk and stenographer's charges for a sum of Rs.

26,65,500/-.A further prayer was made for an additional award for a grant of a sum of Rs.83,70,622 on account of legal express incurred by Deepak towards payment of fees of advocates on record and counsel and arbitration venue costs as indicated in paragraph 8 of the application. In short, it is an application for awarding costs claimed to have been incurred in the arbitration proceeding. The learned Arbitrator dismissed the said application reiterating that the Tribunal has exercised its discretion in terms of Section 31A of the Act in not granting cost to Deepak inasmuch as it is not coming within the purview of computation, clerical or typographical error or error of a similar nature and relied upon the case of ***Gyan Pakash Arya v. Titan Industries Limited***[1].

22. Deepak filed an application under Section 34 of the Arbitration and Conciliation Act, 1996, being AP-Com 388 of 2024.

23. Jagrati did not challenge the refusal of specific performance but only that portion of the Award as regards to the quantum of interest granted on refund of Rs. 19,92,30,500/-. The said application was renumbered as AP-Com 389 of 2024.

24. In the application filed by Jagrati being A.P-Com. 388 of 2024 the following grounds have been urged:-

> a) The Tribunal, having held that the claimant has relied upon a doctored document and was not entitled to relief for specific performance, ought not to have granted an award in its favour for Rs. 19,92,30,500/-;

[1]2023 (1) SCC 153

b) A direction for refund of the said sum would tantamount to granting a premium to a litigant who approached the Tribunal on the basis of a fraudulent document with unclean hands;

c) The prayer for refund in the alternative for specific performance was not pleaded nor prayed for in the Statement of Claim nor introduced by way of subsequent amendment as required by law. Hence, could not have been awarded;

d) The question of payment of interest in any event does not arise and the same would tantamount to the claimant being awarded a premium on the teeth of the finding that it was in breach;

e) The claimant was not entitled to refund of the entire sum or any part thereof, as it had already assigned 50% of its rights to Tirupati Vancom Private Ltd prior to the Award;

f) The Award of Rs. 19,92,30,500/- in favour of the claimant with interest tantamounts to unjust enrichment of the claimant at the cost of the appellants herein.

25. The Learned Single Judge heard both the applications under Section 34 together and was pleased to pass the impugned order dated September 04, 2024 (hereinafter also referenced as "the impugned order"). By the impugned order, the Learned Single Judge had dismissed both the applications under Section 34 and upheld the award in its entirety.

26. The aforesaid order is under challenge under Section 37 of the 1996 Act.

27. Mr. S.N Mookherjee, learned Senior Counsel appearing on behalf of the appellants has submitted that the learned arbitrator after arriving at a finding that the claimant has relied on an incorrect, suspicious and doctored agreement and therefore inadmissible document could not have allowed refund of the consideration amount as a party making out a false case cannot be allowed to succeed on the basis of its wrong conduct. Mr. Mookherjee in this regard has referred to various paragraphs of the award to show the findings of the learned arbitrator with regard to the genuineness and authenticity of the SPA agreement being CD-1 annexed to the statement of claim. Moreover, the claimant has not prayed for refund of the consideration amount in terms of Section 22 of the Specific Relief Act.

28. Mr. Mookherjee has submitted that in deciding the admissibility of the SPA as disclosed by the claimant in the arbitration proceeding being marked as CD-1, the learned arbitral tribunal observed that one of the most crucial questions to be decided in this Arbitration proceeding is whether the photocopy of SPA disclosed by the Claimant along with the Statement of Claim, marked as CD-1, is a true version of the SPA or whether the SPA disclosed by the Respondent Nos.1 to 13 in their Statement of Defence cum Counter Claim as Annexure-A is a correct version of the SPA.

29. Mr. Mookerjee has referred to the following observation of the learned arbitrator in the course of deciding the said issue to demonstrate that on the basis of the said findings no award could have been passed at all in favour of Jagrati:

> *"55. The Respondent Nos. 1 to 13 in their SOD while referring to the SPA dated 24th March, in paragraph 6 thereof have referred to it as*

Annexure-A but the Claimant in its Statement of Claim has referred to the said SPA but has nowhere stated that it is annexing a copy of the SPA as an Annexure to the SOC. The Claimant has merely filed along with the Statement of Claim three volumes of documents and in volume-1, serial no.-1 is the SPA. No one on behalf of the Claimant has pledged his oath that the document which is annexed as SPA and in respect of which the Claimant is seeking specific performance is a true copy of the SPA which was signed and executed between the parties.

56. The Claimant in the SOC has also not given any details of the circumstances how the alleged errors were noticed in the SPA and which were later on rectified and pages after rectification were replaced and why the Claimant's representative Mr.Sarda had to leave the place after such alleged detection of mistakes. All these explanations by the Claimant have been incorporated in the Rejoinder. This Tribunal after hearing the parties and considering the records carefully does not find that the case allegedly made out by the Claimant in its Rejoinder about alleged detection of mistakes in the SPA after its execution and Mr. Sarda's leaving the place in view of an urgent work and subsequent rectification and replacement of the pages is very plausible in view of the reasons discussed hereinbelow.

57. Even if it is accepted that the Agreement namely SPA was drafted by mutually appointed Solicitor, Mr. Sarda's explanation that the Agreement was being drafted when price negotiations were underway is prima-facie not very plausible. In an Agreement of this description where each party is investing several crores of rupees, fixation of price is a very major part of the exercise which is normally finalized before the drafting of the Agreement takes place. This is consistent with normal human conduct. Therefore, the alleged version of the Claimant that fixation of price is still under process while the Agreement was being drafted is an unnatural state of things. Apart from that the version given in paragraph 4 of the

Rejoinder Affidavit where Mr. Sarda has stated that after signing of the Agreement it was realized by the parties that price of both the acquisition of share and also the amount of loan to be infused in Respondent No. 13 have been wrongly printed in the Agreement by the concerned advocates is also very strange. Normally these vital things are verified before the document is signed. Mr. Sarda's next version is that pages 13, 14 and 15 of the said Agreement were replaced. Mr. Sarda has not given any explanation when the prices were agreed upon and fixed by the parties and how after fixation of the price by parties it could be wrongly printed in the Agreement and why such wrong printing of price in the Agreement was not detected by the parties prior to the signing of the Agreement. The absence of these explanations by Mr. Sarda appears to any man of ordinary prudence as missing links in the background of the execution of SPA dated 24th March, 2011. The SOC filed in this proceeding wherein specific performance of the SPA is prayed for is totally silent on these circumstances stated above.

64. What Mr. Sarda has disclosed before this Tribunal is not the original of the document which was forwarded to him but a photocopy of the same. This appears from his answer to Q. no. 65 where the photocopy of the document that is the SPA was marked Exhibit CD-1.

65. In the course of hearing before this Tribunal, Mr. Sarda has never produced the original of the document from which he has made a photocopy. In the course of Claimant's argument, in order to prove what has been disclosed by Mr. Sarda as the SPA is a genuine one, it has been urged that Mr. Sarda has given evidence before this Tribunal as a signatory to the said Agreement along with other signatories except of course not signing those three crucial pages where consideration for share price and loan amount have been mentioned.

It was argued on behalf of Mr. Sarda that those three pages where consideration was mentioned was signed by the other parties

namely on behalf of Respondent Nos. 1 to 12, and Respondent Nos. 14 and 15. It was argued on behalf of the Claimant, that Mr. Dilip Singh Mehta affirmed the Statement of Defense of Respondent Nos. 1 to 13 but he did not come to give evidence in this Arbitration proceeding. Mr. Prakash Damani who was also a signatory did not come to give evidence, nor did Mr. Deepak Bhargava the signatory in the Agreement, come to give evidence. The Agreement was marked Exhibit CD-1 without any objection of the Respondents. The further arguments of the Claimant is the only other person who signed the Agreement was Sanjit Singh, who was the Escrow Agent and he came to give evidence. Mr. Sanjit Singh specifically denied to produce the Agreement dated 24th March, 2011 when he was called upon to produce the original of the said Agreement being CD-1 which was supposed to be in his possession. But he refused to answer and explained why he did not produce.

66. However, the aforesaid stand of the Claimant in the written-notes of submission is not borne out from the records of this Tribunal. In his Examination-in-Chief, Sanjit Singh, produced the original Share Purchase Agreement before this Tribunal. The said original Share Purchase Agreement which was produced by Shri Sanjit Singh (RW-1) was marked-'A' by this Tribunal subject to objection and is lying in the custody of his Tribunal.(Question 8 of the Examination-in-Chief of Sanjit Kumar Singh, RW-1).

Mr. Sanjit Singh was asked how he came to be in possession of the original SPA dated 24th March, 2011, and to that he answered that as the authorized representative of Respondent Nos. 1 to 12, he came to have the original (Q. 9 in Chief). Then he was asked whether he knew of the contents of the Deed and he answered in the affirmative (Q. 10 in Chief). He was also asked whether he was present at the time of execution of the document, to that also he answered in the affirmative (Q. 13 in Chief). He was also asked to identify signatories on the SPA and which he did (Qs. 11 and 12 in Chief).

67. While cross-examining Mr. Sanjit Singh (RW-1), the learned Counsel for the Claimant hardly ever questioned him on the SPA which he had filed with the Tribunal and claimed to be the original and which has been marked Exhibit-A.

Only once, vide question no. 261, a suggestion was given that too very generally about the genuineness of SPA which he filed as Annexure-A to SOD and to that Mr. Sanjit Singh stood his ground and answered "I do not agree. This is the correct document". Apart from this question Exhibit-A which is at page 75 of the SOD filed by Mr. Sanjit Singh and an original of which has been filed with the Tribunal was not at all assailed by the learned Counsel for the Claimant in his cross-examination of RW-1, Mr. Sanjit Singh.

68. The learned Counsel for the Claimant had only shown RW-1 one page of CD-1 and suggested to the witness that signature which appears at page 32 of CD-1 on behalf of Respondent No. 14, whether that is of Mr. Dilip Singh Mehta and to that RW-1 says "Yes". But by showing only one page of the document its authenticity or genuineness cannot be proved.

69. On the question whether a CD-1 is the correct version of SPA this Tribunal can consider the evidence of Mr. Sarda, the Claimant's witness and which will show that CD-1 apart from being a photocopy, there are various Annexures to it which are admittedly missing from the photocopy but those Annexures are in the original SPA which has been disclosed by the Respondents 1 to 13 in their SOD.

70. About the alleged detection of mistakes in the SPA in respect of which the Claimant made out its case in the Rejoinder Affidavit discussed earlier, Mr. Sarda (CW-1) was asked in question no. 102, when the so called mistakes were noticed by him. To that Mr. Sarda answered that it was at the same moment but because it was taking some time and discussion was going on and the issues were dealt with by the common Solicitors and since he had an urgent work, he had to leave. Then he was asked in question no. 103 whether he

recorded such mistakes in any letter or correspondence with the Solicitor or with the parties. To that Mr. Sarda answered that this was not required. Then in question no. 105 Mr. Sarda was positively asked when the mistake that was noticed and who noticed it. To that Mr. Sarda answered that he does not exactly remember and then said obviously the Solicitors have realized the mistake while proof-reading it.

71. Mr. Sarda was then asked question on a comparison between the SPA disclosed by the Claimant (CD-1) and the SPA disclosed by the Respondents Nos. 1 to 13 in their SOD. Mr. Sarda was asked with reference to Annexure-B of CD-1 at page 35. The said Annexure-B is referred to in paragraph (vii) (page 10 of CD-1). Mr. Sarda was asked with reference to said Annexure-B in question no. 246 and in question no.247. Mr. Sarda was asked, whose signatures are at the bottom of page 35. To that he answered it is the signature of Mr. Bhargava, Mr. Damani and probably the third signature is of Mr. Mehta. Mr. Sarda admits that photocopies are not very legible. Then Mr. Sarda was asked vide question no. 248 why only three persons signed Annexure-B which formed part of the SPA relied on by the Claimant. Mr. Sarda could not give any answer and replied "I cannot recall whether it was missed or it was amended by the common Solicitors". Then Mr. Sarda was confronted with Annexure-B of SPA disclosed and relied on by the Respondents and he was asked whether he finds that all five persons including himself had signed Annexure-B. To that Mr. Sarda could not give any satisfactory answer except by saying that he cannot comment on the document which the Claimant had not relied upon and the document should not have been existing. Mr. Sarda was also asked vide question no. 252 to tell the Tribunal whether his signature appears on Annexure-B of the SPA disclosed by the Respondent Nos. 1 to 13 at page 114 of SOD and Mr. Sarda refused to answer that question.

> *72. It will thus appear that the SPA allegedly relied upon by the Claimant does not contain signatures of all the parties on Annexure-B which is part of SPA whereas the one which has been filed by the Respondent vide Annexure-A to SOD of Respondents 1 to 13, contains the signature of all the parties. From this unimpeachable piece of evidence it is clear to this Tribunal that the version of the SPA which the Claimant has annexed as CD-1 to the SOC is not a correct version of the SPA."* (emphasis supplied)

30. The underlined highlighted portions are the portions of the award on which Mr. Mookherjee has emphasised in contending that having regard to the aforesaid finding no award could have been passed in favour of Jagrati.

31. Mr. Mookherjee has submitted that the aforesaid paragraphs would clearly show that there is a definite finding that no one had alleged that the SPA in the statement of claim is a true copy. The witness of Jagrati could not state the urgent reason for which he had to leave the place of execution after signing the agreement inasmuch as an attempt was made to explain about the error in the respondent No.1's copy of SPA in rejoinder and not prior thereto. During the proceeding Jagrati had never produced the original copy of the share agreement of its Share Purchase Agreement but the other version has been produced by Sanjit Singh (RW1). In view of such unreliable testimony coupled with the fact that the document was held to be doctored, no relief could have been granted to the respondent No.1 in the said proceeding.

32. Mr. Mookherjee submits that allowing any such relief in the aforesaid background facts would likely to shock the conscience of the court

and is against the fundamental policy of Indian law and most and basic notions of justice as reiterated in various decisions of the Hon'ble Supreme Court including the following:

a) ***S.P Chengalvaraya Naidu (Dead) by LRS vs. Jagannath (Dead) by LRS & Ors.*** reported in **(1994) 1 SCC 1** (paragraph 6)**.**

b) ***Dalip Singh vs. State of Uttar Pradesh & Ors.*** reported in **(2010) 2 SCC 114,** paragraphs 1, 2, 4, 7, 10.

c) ***Associated Builders v. DDA*** reported in **(2015) 3 SCC 49** (Paragraphs18, 27 & 36-39).

d) ***Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI)*** reported in **(2019) 15 SCC 131** (Paragraphs 36, 37, 70-77).

e) The learned Senior Counsel has submitted that it is a trite law that a party cannot take advantage of his own wrong and in this regard he has referred to the decision of the Hon'ble Supreme Court in ***Devendra Kumar v. State of Uttaranchal & Ors.*** reported in(Paragraphs 18 to 26), **2007 12 SCC 621** (Paragraph 14).

33. The said decision is cited in the context of allowing the claim for refund by the learned arbitrator in favour of the respondent No.1 inspite of a finding that CD-1 is a suspicious agreement.

34. Mr. Mookherjee submits that in any event and in any view of the matter having regard to the fact that the respondent No.1 had failed to make

payment of Rs.29.52 crores in terms of the SPA and a memorandum of understanding dated 21st June, 2012 had been signed between Jagrati and one Tirupati Vancom Private Limited for assigning its rights for 18% out of 36% of share transferred to it at a consideration of Rs.14.76 crores that is exactly 50% of the obligation under the SPA, the claimant could not have proceeded with the reference and no award could have been passed in favour of the claimant. It is further argued even after assigning, Jagrati paid only Rs.19.92 crores out of the stipulated Rs.29.52 crores as per its payment obligations. Out of the total amount paid by Jagrati, a substantial part of it was paid by Tirupati Vancom Private Limited Rs.4.73 crores to the appellant no.11 company and Rs.1.84 crores to individual shareholders of the said company. A further sum of Rs.69 lakhs was paid by one Goldsmith Infrabuild Private Ltd. to the shareholders of appellant no.11 company.

35. Therefore, since Jagrati was in breach of its obligations, the said respondent was not entitled to any equitable consideration in its favour. Accordingly, it is submitted that no relief could have been granted to Jagrati.

36. It is submitted that the learned Single Judge however, negated the aforesaid argument of the appellants with regard to refund based on the finding of the learned arbitrator that during the arbitration proceeding the appellants have offered to refund the said sum of Rs.19.92 cores.

37. It is submitted that the appellant's offer to refund was conditional that it would not pay any interest, if called upon to refund. The Tribunal could not have accepted a part offer and rejected a portion of the same. The offer, if at all, ought to have been taken as a whole.

38. The statement made in paragraph 6 of the application for modification of the order dated 13 September, 2023 was made in a post Award Section 9 application. The appellants were faced with an order of injunction attaching their bank account to the extent of Rs. 26,34,82,336.25/-. The statement made in the application under Section 36 was required to have been viewed in such background and not as an acknowledgment of the portion of the Award directing refund of principle with interest. Thus, there is no question of volunteering to give up such right and/or waiver and/or estoppel.

39. In questioning the discretion and wisdom of the ld. Arbitrator in allowing refund Mr. Mookherjee has submitted that the finding of the Learned Arbitrator that it has a discretion to give a refund even though there was no prayer for amendment is against the basic notion of justice merely as Jagrati as a claimant had relied upon a fraudulent document before the Tribunal. The discretion to the Court/Tribunal to direct refund is essentially to balance the equities. Both the Tribunal and the Learned Single Judge erred in not appreciating that fraud and equity do not dwell together.

40. It is submitted that the arbitral tribunal and also the learned Single Judge have failed to take into consideration that in the statement of claim the appellants have not prayed for refund. Even the concession made during the arbitration proceeding with regard to refund of the said sum was hedged with condition and after the said offer was not accepted by Jagrati, the appellants have made it clear that they would argue on the entire claim of the claimant on merits. Even at that stage no attempt was made to amend the statement of claim. In absence of any pleadings to that effect in the

statement of claim the appellant could not deal with the said issue in its rejoinder. In fact, no issue was framed by the learned arbitrator in this regard. The learned arbitrator in allowing the said claim for refund had travelled beyond the pleadings and submissions made by either party. The same is a valid and just ground for setting aside the award. The said direction in the award violates Section 28(2) read with Section 34(2)(a)(iv) of the Arbitration and Conciliation Act, 1996.

41. The appellants have never authorised the learned Arbitrator to adopt such a procedure.

42. Mr. Mookherjee has submitted that in **Ssangyong** *(supra)* and ***PSA Sical Terminals Pvt. Ltd. vs. Board of Trustee of V.O. Chidambranar Port Trust Tuticorin & Ors***.,[2] the law has been clearly laid down with regard to the power of the arbitrator to decide the dispute. It has to be in accordance with the agreement and the arbitrator cannot travel beyond the scope of reference. The said two decisions are in the context of the learned tribunal allowing refund although such issue was never raised or referred to for arbitration. The issue was limited to the claim for specific performance of SPA.

43. Mr. Mookherjee submits that the award is in conflict with the justice and morality as it has not only granted relief for refund on the basis of a SPA which was held to be inadmissible and suspicious but without any pleading for refund. In this regard Mr. Mookherjee has referred to ***Ssangyong*** (*supra*) and relied upon the following paragraphs:

[2]AIR 2021 SC 4661:2021 SCC OnLine SC 508.

"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 [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , 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 [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . 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 [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as understood in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , 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." (emphasis supplied)

44. The learned Senior Counsel has submitted that the learned Single Judge has completely misconstrued Section 34 (2)(b)(i) and Section

34(2)(a) of the Arbitration and Conciliation Act, 1996 in deciding the objections raised by the appellants with regard to the arbitral award being in conflict with the public policy of India and was passed in contravention with the fundamental policy of Indian law and the most basic motions of morality or justice. The power of the court is not denuded if the court "finds" that the award is vitiated by patent illegality appearing on the face of the award. Mr. Mookherjee submits that the application for modification of the award was made before the expiry of the time limit prescribed for setting aside of the award. The award was passed on 29th June, 2023. The additional award was passed pursuant of an application under Section 33 of the 1996 Act on 21 August, 2023. The application under Section 34 was filed by Deepak on 18th October, 2023 though the time period available to do the same was till 17th November, 2024 extendable by another 30 days to 17th December, 2023. The said time period of 90 days extendable to 120 days is given by the statute to the aggrieved party to take legal advice and challenged the award on any and all grounds available to do. The modification application was filed on 10th October, 2023 that is before the time period on expiry for filing the application for setting aside of the award under Section 34 of the 1996 Act. In view thereof it was neither proper nor legally permissible for the Hon'ble Single Judge to rely upon any statement made by Deepak in connection with the application for modification of an order dated 13th September, 2023 in connection with a best award under Section 9 of the application.

45. Mr. Mookherjee submits that once it is eminently clear that the award contravenes public policy and fundamental policy of Indian law there

can be no estoppel against statute or against grounds related to public policy being raised.

46. Mr. Mookherjee submits that the finding of the learned Single Judge that since an aggrieved party can choose whether or not to file a Section 34 application and this in turn makes the right of challenge under the said provision waivable militates against the principle that there cannot be any estoppel against the statute. The claim of the Appellants is that the award is contrary to public policy of India and against the fundamental policy of Indian Law. The said ground does not confer any discretion on the Court to exercise or not to exercise discretion under Section 34. "May" in Section 34 must be read as "shall" when public policy is involved. It therefore becomes a mandatory provision. Therefore, there cannot be an estoppel against law/statute. There cannot be waiver on the ground of public policy.

47. For the proposition that the court may have the suo motu power in an application for setting aside the award on grounds following under Section 34 (2)(b) and 34 (2A) Mr. Mookherjee has referred to ***State of Chhattisgarh vs. Sal Udyog Private Limited***[3]**.** Our attention has been drawn to paragraphs 24 to 26 of the said report which reads as follows:-

> *"24. We are afraid, the plea of waiver taken against the appellant State on the ground that it did not raise such an objection in the grounds spelt out in the Section 34 petition and is, therefore, estopped from taking the same in the appeal preferred under Section 37 or before this Court, would also not be available to the respondent Company having regard to the language used in Section 34(2-A) of the 1996 Act that empowers the Court to set aside an award if it finds that the*

[3](2022) 2 SCC 275

same is vitiated by patent illegality appearing on the face of the same. Once the appellant State had taken such a ground in the Section 37 petition and it was duly noted in the impugned judgment, the High Court ought to have interfered by resorting to Section 34(2-A) of the 1996 Act, a provision which would be equally available for application to an appealable order under Section 37 as it is to a petition filed under Section 34 of the 1996 Act. In other words, the respondent Company cannot be heard to state that the grounds available for setting aside an award under sub-section (2-A) of Section 34 of the 1996 Act could not have been invoked by the Court on its own, in exercise of the jurisdiction vested in it under Section 37 of the 1996 Act. Notably, the expression used in the sub-section is "the Court finds that". Therefore, it does not stand to reason that a provision that enables a Court acting on its own in deciding a petition under Section 34 for setting aside an award, would not be available in an appeal preferred under Section 37 of the 1996 Act.

25. Reliance placed by the learned counsel for the respondent Company on the ruling in Hindustan Construction Co. Ltd. [State of Maharashtra v. Hindustan Construction Co. Ltd., (2010) 4 SCC 518 : (2010) 2 SCC (Civ) 207] is found to be misplaced. In the aforesaid case, the Court was required to examine whether in an appeal preferred under Section 37 of the 1996 Act against an order refusing to set aside an award, permission could be granted to amend the memo of appeal to raise additional/new grounds. Answering the said question, it was held that though an application for setting aside the arbitral award under Section 34 of the 1996 Act had to be moved within the time prescribed in the statute, it cannot be held that incorporation of additional grounds by way of amendment in the Section 34 petition would amount to filing a fresh application in all situations and circumstances, thereby barring any amendment, however material or relevant it may be for the consideration of a Court, after expiry of the prescribed period of limitation. In fact, laying emphasis on the very expression "the Court finds that" applied in Section 34(2)(b) of the 1996 Act, it has been held that the said provision empowers the Court to grant leave to amend the Section 34 application if the circumstances of the case so warrant and it is required in the interest of justice. This is

what has been observed in the preceding paragraph with reference to Section 34(2-A) of the 1996 Act.

26. To sum up, existence of Clause 6(b) in the agreement governing the parties, has not been disputed, nor has the application of the Circular dated 27-7-1987 issued by the Government of Madhya Pradesh regarding imposition of 10% supervision charges and adding the same to cost of the Sal seeds, after deducting the actual expenditure been questioned by the respondent Company. We are, therefore, of the view that failure on the part of the learned sole arbitrator to decide in accordance with the terms of the contract governing the parties, would certainly attract the "patent illegality ground", as the said oversight amounts to gross contravention of Section 28(3) of the 1996 Act, that enjoins the Arbitral Tribunal to take into account the terms of the contract while making an award. The said "patent illegality" is not only apparent on the face of the award, it goes to the very root of the matter and deserves interference. Accordingly, the present appeal is partly allowed and the impugned award, insofar as it has permitted deduction of "supervision charges" recovered from the respondent Company by the appellant State as a part of the expenditure incurred by it while calculating the price of the Sal seeds, is quashed and set aside, being in direct conflict with the terms of the contract governing the parties and the relevant circular. The impugned judgment dated 21-10-2009 is modified to the aforesaid extent."(emphasis supplied)

48. Mr. Mookherjee has referred to following observation in ***Bani Prasad (Dead) through Legal Representatives vs. Durga Devi***[4]**,** in furtherance of the aforesaid submission:

"19. In the decision in R.S. Maddanappa v. Chandramma [R.S. Maddanappa v. Chandramma, AIR 1965 SC 1812], this Court considered the object of estoppel. It was held that its object is to prevent fraud and secure justice between the parties by promotion of honesty and good faith. It was therefore, further held that when one party makes a representation to the other about a fact he would not be shut out by the rule of estoppel if that other person knew the true

[4]2023 (6) SCC 708

state of facts and must consequently not have been misled by the misrepresentation.

20. In the decision in Pratima Chowdhury v. Kalpana Mukherjee [Pratima Chowdhury v. Kalpana Mukherjee, (2014) 4 SCC 196 : (2014) 2 SCC (Civ) 504] , while considering Section 115 of the Evidence Act, this Court held that four salient conditions are to be satisfied before invoking the rule of estoppel. Firstly, one party should make a factual representation to the other party. Secondly, the other party should accept and rely upon the aforesaid factual representation. Thirdly, having relied on the aforesaid factual representation, the second party should alter his position. Fourthly, the instant altering a position, should be such, that it would be iniquitous to require him to revert back to the original position. After holding so, it was further held that the doctrine of estoppel would apply only when, based on a representation by the first party, the second party alters his position, in such manner, that it would be unfair to restore the initial position.

21. In the decision in B.L. Sreedhar v. K.M. Munireddy [B.L. Sreedhar v. K.M. Munireddy, (2003) 2 SCC 355] , this Court held that when rights are invoked estoppel may with equal justification be described both as a rule of evidence and as a rule creating or defeating rights. The appellant relies on this decision, more particularly para 30 of the said decision and it reads thus : (SCC p. 370)
"30. If a man either by words or by conduct has intimated that he consents to an act which has been done and that he will not offer any opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that which they otherwise might have abstained from, he cannot question the legality of the act he had sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct."

It is to be noted that in the said decision this Court clarified that a legal status expressly denied by a statute could not be conferred on the basis of estoppel." (emphasis supplied)

49. Mr. Mookherjee submits that the learned arbitrator as well as the learned Single Judge have failed to take into consideration that even if it is considered for the sake of argument that a concession was made on behalf of the appellants to refund the consideration, it was incumbent upon the claimant Jagrati to show that based on such representation it has altered its position to its detriment and it would be inequitable to require him to revert back to the original position. There is no pleading or finding of the learned arbitrator to that effect.

50. The statutory right to raise such dispute is even preserved under Section 34 of the Arbitration and Conciliation Act as Section 34(2)(b) and Section 34(2A) clearly mandate that if the court finds that the arbitral award is in conflict with the public policy of India and is vitiated by patent illegality appearing on the face of the award the court can on its own set aside the award. This statutory right cannot be diluted even if it is considered that the appellant had agreed to refund the consideration. In this regard Mr. Mookherjee has referred to the following decisions:

1) ***Bhau Ram vs. Baij Nath Singh &Ors.*** reported in **AIR 1961 SC 1327** paragraphs 6,7,8,12
2) ***Prashant Ramchandra Deshpande v. Maruti Balaram Haibatti*** reported in**1995 Supp (2) SCC 539** paragraphs 2,3,5
3) ***P.R Deshpande vs. Maruti Balaram Haibatti*** reported in **(1998) 6 SCC 507** paragraphs 9,11, 12

51. Mr. Mookherjee has submitted that both the learned arbitrator and learned Single judge have relied upon the decision of the ***Shenbagam***

& Ors. v. K.K Rathinavel[5] in overruling the objection that without specific pleading no refund can be allowed overlooking the fact that in the said decision in a suit for specific performance the respondent in the alternative prayed for a refund of the advance amount. The effect of pleading for refund according to Mr. Mookherjee has been conclusively settled in ***Desh Raj & Ors. v. Rohtash Singh***[6] in which in paragraphs 33 to 36 the legal position was discussed and it has held that: *"In the absence of such a prayer, it is difficult to accept that the courts would suo motu grant the refund of earnest money irrespective of the fact as to whether Section 22(2) of the SRA Act is to be construed directory or mandatory in nature."* (emphasis supplied)

52. In so far as the claim for interest is concerned Mr. Mookherjee has submitted that the claim for refund arose in the course of arbitration proceeding and even if it is assumed that it give rise to a cause of action the claim for such amount would only arise once the bargain/contract between the parties fail. Mr. Mookherjee has placed reliance upon a decision of the Hon'ble Supreme Court in ***Revanasiddayya v. Gangamma Alias Shashikala & Anr.***[7] in this regard and has drawn our attention to Paragraphs 23 to 25 of the said judgment and more particularly the second sentence in paragraph 24 which reads: "*One cannot dispute the legal position that once the bargain to sale/purchase of any land fails, the unsuccessful buyer becomes entitled in law to claim refund of earnest money from the seller under Section 22 of the Specific Relief Act, 1963."* In the instant case, the

[5] 2022 SCC Online 71
[6] (2023) 3 SCC 714
[7] 2018 (1) SCC 610

bargain between the parties had not failed. Both sides were demanding specific performance in response to allegations of breach of agreement. There was no termination of the agreement. There was no recession and/or repudiation of the contract. The parties did not pray for any reliefs as such.Therefore, at the highest, the cause of action for claim of interest arose when the Learned Arbitrator refused the prayers for specific relief, and directed refund (albeit wrongly), and not prior to that. Therefore, interest payable, if any is only from the date of the award and not prior to that. The learned arbitrator therefore committed a palpable failure in exercising its discretion under Section 31(7) of the 1996 Act by disregarding the well-known principles of law in that regard.

53. Lastly, on the issue of costs it is submitted that the learned Single Judge merely noted that the Ld. Sole Arbitrator had refused to grant costs due to cost sheets not being filed though no direction for filing of the same had been given.

54. Moreover, the Ld. Single Judge also highlighted the fact that the Ld. Sole Arbitrator was aware of the parameters for granting of costs, since the administration fees and remuneration of the Ld. Sole Arbitrator were known to him, in addition to the distribution of costs being submitted to the Ld. Sole Arbitrator on the first sitting.

55. Despite noting the above, the Ld. Single Judge failed to render any decision on the awarding of costs. It is submitted that the material facts pertaining to the costs incurred, such as Arbitrator fees and steno fees were available in the 1" Minutes itself of the meeting held on 13th August 2019 and was therefore before the Ld. Sole Arbitrator from the beginning of

arbitration proceedings. Hence, there could have been no reason for not proper apportionment and award of costs.

56. Moreover, no direction or opportunity was given to file cost sheet and therefore the Ld. Sole Arbitrator cannot rely on the absence of a cost sheet to refrain from awarding costs.

57. It is argued that an order of costs even if discretionary has to be a reasoned order as held in ***Associate Builders v. Delhi Development Authority***[8] (paragraph 42.2):

> *"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."*

58. Per contra, Mr. Ratnanko Banerjee, learned Senior Counsel appearing on behalf of the Cross-appellants has submitted that the proceeding before the learned Arbitrator would clearly demonstrate that Deepak and his group has consistently made an offer to refund a sum of Rs.19.90 crores which was admittedly received by them from the claimant. Mr. Banerjee in this regard has referred to paragraphs 121 and 123 of the award dated 29th June, 2023, order dated 13th September, 2023 passed in A.P 664 of 2023 and paragraphs 6, 7, 8, 9 and 11 of the modification application being G.A 1 of 2023 filed in A.P 664 of 2023. Further reference is made to paragraphs 57 and 58 of the impugned order dated 4th September, 2024.

[8](2015) 3 SCC 49

59. Mr. Banerjee in referring to the modification application filed by Deepak and his group in connection with an application under Section 9 of the 1996 Actbeing G.A No.01 of 2023 has specifically drawn our attention to paragraph 6 of the said application to show that Deepak in the said paragraph has categorically accepted the portion of the award directing payment of the principal sum of Rs.19,92,30,500/- to Jagrati and was willing to return the said sum. Further submission is made to the effect that Deepak has clarified that the present appellants would intend to challenge the portion of the award whereby interest had been awarded on the said sum. Thus, the appellants themselves and through counsel have repeatedly reiterated, reaffirmed and assured to refund the said sum of Rs.19.92 crores (approximately) at various stages of the litigation and also at the post award stage had unhesitatingly and unreservedly expressed their intention that they are aggrieved by the interest component of the award and not with regard to the refund of the principal sum.

60. Further, even after filing the Section 34 proceedings, the Appellant Nos. 1, 2 and 11 in A.O. Com/38/2024 have filed a suit being C.S. (Com) No. 764 of 2024 before this Hon'ble Court on 14th August, 2024, inter alia, praying for a declaration that the Award dated 29th June, 2023 is binding on Tirupati Vancom Private Limited and Goldsmith Infrabuild Private Limited. In fact, in paragraph 29 of the plaint, it has been specifically admitted that sums were paid by Tirupati Vancom Private Limited and Goldsmith Infrabuild Private Limited on behalf of the Award Holder.

61. The aforesaid suit was filed after filing of the Section 34 application by the award debtor being C.S.(COM) 764 of 2024. In the plaint

the award debtor clearly accepted the entirety of the award including the interest component. The learned Senior Counsel has specifically relied upon prayer (b) in the plaint to show the admission of liability to the extent of refund. It reads:

> *(b) Alternatively, a further decree of declaration that the award dated 29th June, 2023 passed in the Arbitration between the defendant no. 1 herein and the plaintiffs herein is binding on the defendant nos. 3 and 4.*

62. The money paid by Jagrati on behalf of the said Defendants in the aforesaid suit is wholly irrelevant as such plea was never urged earlier ever and in any event the Defendant No.4 (Tirupati Vancom Private Limited) is not a party to the arbitration.

63. The repeated prayers of the Award Debtors namely the Bhargav has to make payment of the principal sum awarded in the Award dated 29th June, 2023 and also praying for a decree in terms of the Award, they should be estopped from pursuing any further challenge to the award.

64. The cross appellants, Award Debtors for the first time in the Section 34 proceedings have raised the contention that money has been paid by diverse entities and not just the Award Holder.

65. The Award Debtors in the Arbitral Proceedings had always admitted that the Award Holder had paid a sum of Rs.19,92,30,500/- out of which a sum of Rs.3,68,94,500/-wastowards Share Purchase Consideration and the balance sum of Rs.16,23,36,000/- was towards the loan advanced to the Award Debtors. The said fact would be evident from Paragraph 121 of the Award dated 29th June, 2023.

66. Any other contention is contrary to records and is also untenable in law. The contention that money had been paid by Tirupati Vancom Private Limited and Goldsmith Infrabuild Private Limited on behalf of the Award Holders to the Award Debtors and hence the same should be returned to these two companies was not the issue before the Learned Arbitrator and the same is between the Award Holders and the two companies.

67. Moreover, there is no privity of contract between the Award Debtors and Tirupati Vancom Private Limited and Goldsmith Infrabuild Private Limited and both the said entities are not part of the Arbitration proceedings.

68. Tirupati Vancom Private Limited and Goldsmith Infrabuild Private Limited can have no claim on the award debtor. Claim, if any by Tirupati Vancom Private Limited and Goldsmith Infrabuild Private Limited can only be against Jagrati Trade Services, being the award holder.

69. The Learned Senior Counsel has referred to paragraphs 34 to 39, 41 to 52, 56 to 57, 60 to 61 of the impugned order dated 4th September, 2024 to show that all these issues raised by the Award Debtors have been considered by the Hon'ble Single Judge in the order dated 4th September, 2024 in the said paragraphs.

70. The learned Senior Counsel has refuted the submission made on behalf of Deepak with regard to non inclusion of any prayer for refund of the consideration amount as according to Mr. Banerjee the provision of Section 22(2) of the 1963 Act regarding a relief to be specifically pleaded and

asked before such relief could be granted is a technical objection and not mandatory.

71. Mr. Banerjee referred to the proviso of the said section to show that it contemplates amendment which could be done at any stage during the course of the arbitration and the relief cannot be refused due to non inclusion of the same in the original proceeding. It is further argued that Section 22(2) is only to ensure that none of the parties are taken by surprise by a particular claim. In the instant case, both the parties have extensibly argued on the aspects of the matter namely the relief of refund and interest. The learned Arbitrator dealt with both the issues in his own way and has passed an award on consideration of all material facts and relevant evidence in this regard.

72. Deepak and its group have repeatedly offered to refund the principal amount at various stages of the proceeding and it does not stand to reason as to why non-inclusion of such relief in the statement of claim would disentitle the claimant from being granted such amount altogether.

73. The Award Debtors had offered to refund the consideration paid by the Award Holder and did not press for the specific performance of its Share Purchase Agreement as would be evident from Paragraph 135 of the Award.

74. Section 22 of the Specific Relief Act ex-facie do not apply in the instant case as this is not a case of specific performance of a contract for transfer of an immoveable property and nor are the amounts of Rs.3.68 crore and Rs.16.23 crore are Earnest Money Deposits (EMD) for transfer of immoveable property. Therefore arguments made on behalf of the award

debtor that there is a provision in law with regard to return of the consideration without amendment of the claim are not applicable. The appellants have failed to show that there is any bar in law for return of part share consideration and loans given under the agreement of 24th March, 2011 to the award holder. The retention of the part consideration to one of those parties to the agreement when specific performance has been refused to the other party would amount to an unjust enrichment on the part of that party and in this regard reliance has been placed on sections 65 and 70 of the Contract Act. The said sections require any advantage received under an agreement which is either becomes void or the consideration not having been paid gratuitously, the party receiving the consideration or advantage has to restore it to the persons whom he received it. The award for return of such consideration while denying specific performance to the appellant by the Arbitrator cannot be held to be an impossible view and therefore it is submitted that the award does not call foran interference by this Court.

75. In so far as the argument of Mr. Mookherjee that no award could have been passed on a doctored document it is submitted that refund stands on a different footing than specific performance. The said claim was allowed on the admitted fact the amount was paid by the claimant and not a relief based on the authenticity of the agreement.

76. Mr. Banerjee has drawn our attention to Section 31(7) (a) of the 1993 Act and has argued that the contention of Deepak that there is no provision in the agreement dated 24th March, 2011 for providing interest is fallacious and contrary to the Share Purchase Agreement. It is submitted that Section 31(7)(a)empowers the learned Arbitrator to grant interest 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.Clause 9.2.(b) of the Share Purchase Agreement as relied upon by the Petitioners mentions that in case the Transferor Shareholders have committed a breached in their obligations, the Transferee Shareholders have an option to have the money paid by it as consideration refunded with interest of 12% p.a. In any event, Rs. 16,23,36,000/- was admittedly provided as a loan by Jagrati. In terms of the Agreement dated March 24, 2011, as disclosed by Deepak in their Statement of Defence, interest of 12% p.a. was to be paid on such sum as stipulated in Article 3.2. It is contended that since the learned Arbitrator has awarded refund of the principal amount, the cause of action for interest would also commence not from the date of the award but from the date of the payment of such principal amount by the claimant, which was the cause of action for the refund as well.

77. Mr. Banerjee has drawn our attention to Section 31(7)(a) of the Arbitration and Conciliation Act, 1996 to show that the arbitrator has been given the discretion to grant interest from the date when the cause of action arises. The claim for refund is due to non-performance of the agreement by the cross appellants. The entitlement to receive the money arises by reason of failure on the part of the cross appellants to perform their obligation under the contract. If the retention of the amount is held to be unjustified and the learned arbitrator on that premise observed that refusal to direct refund of the consideration would amount to unjust enrichment then the benefit of such amount utilised by the cross appellants from the date when such amount was received should have been the date to be reckoned for the

purpose of granting interest on such refunded amount. In fact, the agreement contemplates interest to be paid on loan at the rate of 12% per annum. The learned Arbitrator has not only failed to direct payment of interest from the date of the transaction when the amount was received but had reduced the rate of interest to 9%.

78. Mr. Banerjee has submitted that the learned Arbitrator has misconstrued the said section and on an erroneous interpretation of law has refused to grant interest from the date of payment of the principal amount.

79. The contention of Deepak that the Learned Arbitrator failed to take into consideration that there was a forfeiture clause in the Agreement dated March 24, 2011 is contrary to records and untenable in law as the grounds for forfeiture as stipulated in both versions of the agreement were different from the present facts of the case.

80. The Appellants cannot refuse to perform the contract on the ground that the consideration is insufficient to perform the contract while at the same time wrongfully retain the money which the claimant had paid in course of a commercial transaction as consideration. However, the other transferees Orbit and Damani despite having not paid their part of the consideration, the shares were transferred in their favour and also the part of the loan which was advanced by them to the Company was also returned.

81. Moreover, paragraph 126 of the award would show that no argument has been advanced by appellants that they have right to forfeit or confiscate the award in course of the Arbitration Proceeding.

82. On the question that costs should have been awarded to the award debtor by the Learned Arbitrator, it is submitted that awarding of cost

is also a discretion of the Learned Arbitrator and there can be no question in this case awarding any cost to the award debtor because it is also in the losing side having failed to pursue or establish its claim for specific performance of the agreement dated 23rd April, 2011. The arbitrator has dealt with the cost issue which has been explained in the order dated 21st August, 2023 rendered in an application under Section 33(2) and 33(4) filed by the award debtors. The order clearly records as to why cost was refused to the award debtors after holding that the award debtor was not the successful parties to the proceedings.

83. Mr. Banerjee further submits that the scope of an appellate court under Section 37 of the Arbitration and Conciliation Act is even narrower to the scope in relation to the power exercised by the court under Section 34 of the Arbitration and Conciliation Act.

84. The learned senior counsel has placed reliance on the following judgments to show the nature and extent of power of a court in an application for setting aside of an arbitral award:

a. **UHL Power Company Limited v State of Himachal Pradesh,** reported in **(2022) 4 SCC 116** (Para 16, 18 and 22);

b. **Konkan Railway Corporation Ltd v Chenab Bridge Project Undertaking,** reported in **(2023) 9 SCC 85** (Para 19 and 29);

c. **Reliance Infrastructure Limited v State of Goa,** reported in **(2024) 1 SCC 479**(Para 57).

d. **Punjab State Civil Supplies Corporation Limited & Anr. vs. Sanman Rice Mills & Ors.** reported in **2024 SCC OnLine SC 2632** (para-20);

e. **Somdatt Builders-NCC- CEC(JV) vs. National Highways Authority of India & Ors.** reported in **2025 SCC OnLine SC 170** (para-27, 36)

85. It is submitted that the aforesaid judgments have conclusively held that the power of the appellate court under Section 37 is narrower and it cannot travel beyond the restrictions laid down under Section 34.

86. Attention is drawn to the grounds of challenge to show Deepak have raised new grounds of challenge namely ground No.XV, LV, LVIII, LIX, LX, LXI and LXXV in the Section 37 proceedings which were never taken even at the stage of Section 34 proceedings and the same cannot be taken into consideration.

87. In distinguishing the cases cited by Mr. S.N. Mookherjee, Senior Counsel on behalf of the appellant it is submitted that no ground has been disclosed by the Award Debtors for setting aside of the Award as mentioned in the cases of **Ssangyong** (*supra*) **Associate Builders** (*supra*) or **PSA Sical** (*supra*).

88. The cases of ***Shenbagam & Ors.*** (*supra*) and ***Desh Raj & Ors***. (*supra*) are pertaining to Section 22 of the Specific Relief Act, 1963 and are not applicable in the instant case as they pertain to transfer of immovable property and possession with respect to the same. The ***Shenbagam*** case on the other hand has been relied on by the Learned Arbitrator at paragraph 41 for the proposition "given the blemished conduct of the Respondent/Plaintiff in indicating his willingness to perform the contract, we decline in any event to grant the remedy of specific performance of the contract. However, we order a refund of the consideration together with interest @ 6% per annum." From the judgment it is clear that the refund was ordered on the basis of a

prayer also made for a refund of the advance made as recorded in paragraph 5 of the judgement and pointed out by the appellant. The case of ***SP Chengalvaraya Naidu*** (*supra*) was not pertaining to Arbitration and in that case preliminary decree was obtained by fraud. In the present case, the Award Holders had led evidence to prove its version of the Share Purchase Agreement.

89. The case of ***Dalip Singh*** (*supra*) was not pertaining to Arbitration and in that case the Court had been misled to pass order in favour of the Petitioner and the issue of law was pertaining to the power of a Court to grant relief under Article 226 of the Constitution of India.

90. The case of ***Devendra Kumar*** (*supra*) was also not pertaining to Arbitration. In that case, the service of constable had been terminated as he had suppressed pending criminal proceedings against him.

91. The above cases are not at all relevant because they are all cases on the principle that a party who suppresses documents is not entitled to any relief from court. The matter does not involve suppression of any document at all. The Arbitrator in his wisdom has refused to grant specific performance to the award holders on more than one ground including the ground, according to him, that the agreement was doctored. Such finding cannot in any manner affect the question of refund to the award holder as on the other grounds the award debtors have also been refused the specific performance.

92. The case of ***Revanasiddayya*** (*supra*) is also not pertaining to Arbitration and the issue in that case is not relating to Section 31(7)(a) of the 1996 Act. As such, no reliance on the same can be placed to argue that

the Learned Arbitrator failed in exercising his discretion under Section 31(7)(a) of the 1996 Act.

93. In the case of ***State of Chattisgarh*** (*supra*) the issue of law was whether additional ground could be taken in Section 37 proceedings which was not taken in the petition filed under Section 34 of the 1996 Act.

94. The judgments passed in the cases of ***Bhau Ram*** (supra), ***Prashant Ramchandra Deshpande*** (*supra*), ***P.R Deshpande*** (*supra*) and ***Bani Prasad*** (*supra*) are not pertaining to principles of estoppel in Arbitration proceedings.

95. All the above cases are on the principle that a statutory right to appeal cannot be taken away by reason of the appellant abiding by or taking advantage of something done under the decree. In ***P.R Deshpande*** (*supra*) the Court had required an undertaking to be given by the tenant for stay of operation of the judgment and it was held that such undertaking would not deprive the tenant to a right of appeal. These cases do not apply to the acts of the award debtors as they were under no compulsion to make any statement with regard to satisfaction of the award as has been done in modification application being G.A. NO.1 of 2023 filed in A.P. No.664 of 2023. This was a wholly voluntary act and voluntary statements being made on the merits of the matter and including their filing the suit [C.S. (COM) No. 764 of 2024). In spite of a voluntary act of submitting to the award and wanting to satisfy the award cannot be treated as losing a right of a statutory appeal.

96. In his brief reply Mr. S.N. Mookherjee has argued that the Tribunal having held that the copy of the agreement relied upon by the

respondents was doctored could not have directed repayment of funds based on such doctored document. The relief for refund of principal of Rs.19,92,30,500/- was based on purported admission that a portion of the funds was received from the respondent. In fact, the respondent never claimed the refund but throughout the Arbitration proceeding insisted on specific performance of the Agreement dated 24th March, 2011.

97. Significantly, the learned Single Judge in paragraph 30 of the impugned order has not dealt with the case made out by Deepak Bhargava and others (the appellants in APOT 328 of 2024) regarding refund and only dealt with it as a technical defence. The relief of refund of the money with interest was not granted on admission or on the basis that the appellants i.e. Deepak Bhargava and others gave up its claim for specific performance. In fact, the award denies relief of specific performance on merits.

98. In so far as the suit filed by the cross appellant is concerned it is submitted that the plaint has been filed without prejudice to the rights of the appellants and in the pending Section 34 application which was pending on that date as would appear from paragraph 20 to 32 of the plaint. There is no acceptance of the award made in the plaint. The written statement filed by the defendant no. 4 in the said suit bears testimony to the fact that the learned Arbitrator has erroneously directed refund of the sums of money to the respondent herein, without the respondent obtaining No Claim Certificate from Tirupati Vancom Private Limited and Goldsmith Infrabuild Private Limited. It now appears that the stand of the defendant no. 4 that is, Tirupati Vancom Private Limited in the suit is in sync with the argument

recorded in paragraph 10 of the impugned order dated 4th September, 2024.

99. There was no claim for interest prayed by the respondent before the Arbitrator. The offer to refund the money advanced without interest was an offer to settle but was refused by the Respondent. No pleadings were made before the Arbitrator by the respondent as to its right to claim interest. The claimant i.e. Jagrati did not deal with the decision cited by the appellant that "cause of action" for refund would only arise if the bargain to purchase failed as held in ***Revanasiddayya*** (*supra*) at para 23 to 25 of the said report.

100. The Trial Court has held that award of interest is in the discretion of the Tribunal under the Act. It was submitted that such discretion has to be exercised based on such legal principles. The right to claim interest on a money claim is deprivation of use of money. The respondent became entitled to the money on the suo motu direction of the Tribunal to refund the advanced paid to avoid unjust enrichment. There was no pleading claiming interest.

101. The Arbitrator in paragraph 109 of the Award has held that the respondent has also committed breach in performance of its obligation. Having so held, to compensate the claimant by directing the refund of money advanced with interest tantamounts to giving a premium to such default committed by the respondent.

102. Mr. Mookherjee has submitted that the decision relied upon by the appellants on the scope of Section 22(2) of Specific Relief Act clearly

mandates that in absence of any prayer for refund the court would have no jurisdiction to direct refund.

103. Section 22 of the Specific Relief Act, 1963 is a mandatory provision. A prayer for refund is a sine qua non for grant of the relief of refund. In the instant case, admittedly, there was no prayer at any point of time made by the claimant for refund of the consideration it had allegedly paid. Further, the Learned Arbitral Tribunal had erred in granting the relief of refund de-hors the provision of Section 22 of the Specific Relief Act, 1963.

104. The decision in ***Shenbagam*** (*supra*) is irrelevant in the facts and circumstances of the case and the directions passed in paragraph 41 of the said decision cannot be taken out of the context. In paragraph 41 of the said decision, the Hon'ble Supreme Court had ordered a refund of the consideration (along with interest), while declining the prayer for specific performance. However, on a perusal of the said judgment itself, it is evident that the Plaintiff therein had already prayedfor the refund of advance with interest as would appear from paragraph 5 of the report. Therefore, the decision of the Hon'ble Supreme Court is in consonance with section 22 of the Specific Relief Act, 1963 and therefore this decision does not enure to the benefit of the claimant.

105. The ratio of the decision in ***Punjab State Civil Supplies Corporation Limited*** (*supra*) and ***Somdatt Builders NCC*** (*supra*) are not relevant since the said decisions arrived at a finding that the view taken by the arbitrator was a plausible view and there was no reason to interfere with the award under Section 37 read with the Section 34. The view on interpretation of the contract by the arbitrator was found to be a plausible

view. The learned Single Judge has not interpreted the contract and hence the said decision cannot have any manner of application.

106. Moreover, in ***Punjab State Civil Supplies Corporation Limited*** (*supra*) the arbitral award was held to be not against the public policy whereas in the instant case, the learned Single Judge has clearly erred in upholding the award which is against the public policy and the fundamental policy of Indian Law. Under Section 34(2) of the Arbitration and Conciliation Act, 1996 if the award is against the public policy which, inter alia, would include any decision of an arbitrator contrary to a decision of a court the award so passed is required to be set aside. Under such circumstances reviewing the said decision is permissible under Section 37 of the Arbitration and Conciliation Act, 1996. In view of the fact that the challenge of the impugned order was that the award is against the fundamental policy of Indian Law and contrary to Section of the Specific Relief Act and principles underlying the said provision the decisions in ***Reliance Infrastructure Limited*** (supra) may not have any application. It is submitted that one cannot disregard that Section 22 of the Specific Relief Act is part of substantive law of India and any award contrary to such substantive law would be against the fundamental policy of Indian Law. The modification application on which reliance has been placed has to be read as a whole as the alleged admission was not unconditional.

107. The learned Senior Counsel has referred to several orders namely the orders dated 13th September, 2023, 20th November, 2023 read with 24th November, 2023, 6th December 2023 and 18th December, 2023 to demonstrate that neither the court nor the claimants have relied upon or

acted upon or had altered their position on the basis of the alleged admission. Furthermore, in the affidavit in opposition to Section 34 of the application the cross appellants/claimants has not pleaded that it had relied upon or altered his position pursuant to such alleged admission made by the appellant. Under such circumstances there is no question of any bar or estoppel operating against the claimant in preferring its application under Section 34 or in challenging the entirety of the award. The plea of estoppel has to be pleaded or proved. In absence of any such pleading or proof in view of the law laid down in ***Bani Prasad*** (supra) and more particularly paragraph 21 of the said decision which clearly lays down the law that there can be no estoppel against law or a statute argument of the cross appellant the cross appeal must fail and the award is required to be set aside.

108. In this background, the challenge to the order of the learned Single Judge needs to be examined.

109. The essential dispute is with regard to refund of the consideration amount with interest.While Deepak have assailed the award as a whole, the limited ground of challenge to the award by the cross appellants are in respect of the period for which interest was not granted that is to say, prior to the filing of the statement of claim.

110. In an application for setting aside of the award under Section 34 of the Arbitration and Conciliation Act, 1996 it is now well settled by catena of decisions that the Court does not act and function as a court of appeal over the arbitral award and may interfere on merits limited to the grounds mentioned in Section 34 (2) of the said Act. It is relevant to note that by way of amendment in 2016 Sub-section (2A) has been inserted in Section 34

which provided that in case of domestic arbitration violation of public policy of India would also include patent illegal ex facie must appear on the face of the award. However, the ground of patent illegality would not be available in the event an application for setting aside of the award is filed prior to amendment in 2005 i.e. 23rd October, 2015 [See **Ssangyong**(*supra*)]. The application for setting aside of the award was filed on 18th October, 2023. By way of clarification in the amendment it was made clear that the award shall not be set aside merely on the ground of an erroneous application of law or by re-appreciation of evidence which is merely a reiteration of the earlier views expressed by the Hon'ble Supreme Court that in deciding the application for setting aside the award the court is not exercising its jurisdiction as an appellate authority and the powers of the appellate court would not be available to a court deciding such an application. The scope of jurisdiction under Section 34 and Section 37 of the Act is not akin to normal appellate jurisdiction. The powers of the Court are circumscribed by the limited grounds as mentioned in Section 34. The reason being that the arbitration proceedings are not considered and comparable to judicial proceedings before the Court and a party can opt for an arbitration before any person who is not required to have a degree in law or any prior legal experience. Once the parties have consented to an appointment of an arbitrator it should be presumed that they have bestowed their faith and trust on the arbitrator and wanted a decision in an informal manner. This was recognised in ***Dyna Technologies (p) Limited v. Crompton Greaves Ltd.***[9] in which it is observed in paragraph 29: "*There is no gainsaying that*

[9] 2019 (20) SCC 1

arbitration proceedings are not per se comparable to judicial proceedings before the Court. A party under the Indian Arbitration Law can opt for an arbitration before any person, even those who do not have prior legal experience as well. In this regard, we need to understand that the intention of the legislature to provide for a default rule, should be given rational meaning in light of commercial wisdom inherent in the choice of arbitration" and reiterated in ***K. Suguman vs. Hindustan Corporation Limited***[10] in the following words:

> "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".

111. In ***Vidya Drolia & Ors. v. Durga Trading Corporation***[11] it is stated:

> *"18. Arbitration is a private dispute resolution mechanism whereby two or more parties agree to resolve their current or future disputes by an Arbitral Tribunal, as an alternative to adjudication by the Court or a public forum established by law. Parties by mutual agreement forgo their right in law to have their disputes adjudicated in the courts/public forum. Arbitration agreement gives contractual authority to the Arbitral Tribunal to adjudicate the disputes and bind the parties."* (emphasis supplied)

112. In ***Konkan Railway Corporation Ltd.*** *(supra)* a three judge bench in paragraph 18 stated thus:

> *"Scope of interference by a court in an appeal under Section 37 of the Act in examining an order, setting aside or refusing to set aside an award, is restricted and subject to the same grounds*

[10] 2020(12) SCC 539 at 540
[11] 2021(2) SCC 1

as the challenge under Section 34 of the Act." (emphasis supplied)

113. The aforesaid view has been reiterated in paragraph 26 in ***Bombay Slum Redevelopment Corporation Pvt. Ltd. v. Samir Narain Bhojwani***[12]**.** It was held thus:

> *"26. The jurisdiction of the appellate court dealing with an appeal under Section 37 against the judgment in a petition under Section 34 is more constrained than the jurisdiction of the Court dealing with a petition under Section 34. It is the duty of the appellate court to consider whether Section 34 Court has remained confined to the grounds of challenge that are available in a petition under Section 34. The ultimate function of the appellate court under Section 37 is to decide whether the jurisdiction under Section 34 has been exercised rightly or wrongly. While doing so, the appellate court can exercise the same power and jurisdiction that Section 34 Court possesses with the same constraints."* (emphasis supplied)

114. If it appears to the court under Section 37 on a reading of the award along with grounds of challenge made in the application for setting aside of the award that the court in deciding such application has failed to take into consideration that the finding in the award was based on no evidence at all or if the award had ignored vital evidence in arriving at its decision and thereby render itself liable to be set aside on the ground of patent illegality or where the court in deciding the application has interfered with the finding on facts and appreciation of evidence or interference with the interpretation of the terms of the contract or refuse to accept the view of the arbitrator which could be a possible, plausible and alternative view on

[12] 2024 (7) SCC 218

facts the court in exercise of its power under Section 37 may either set aside or uphold the award as the case may be. However, the aforesaid illustrations are not exhaustive and it depends upon the nature of the order of the court deciding the application for setting aside of the application.

115. In view of the nature of proceeding interference to an arbitral award is extremely limited and would be justified only in cases of commission of misconduct by an arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator. (See ***K. Sugumar*** (*supra*). This insulation of an award acts as a guard-wall from an assault on the award on the ground of misappreciation of evidence or interpretation of the contract or application of erroneous legal principle. It is for this protection and immunity that an award enjoys the courts have held that :

> (i) construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it can be said to be something that no fair-minded or reasonable person could do. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award (Per Justice M.R. Shah in **Parsa Kenta Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam**.[13]
>
> ii) Court should not interfere with an award merely because an alternative view on facts and interpretation of contract exists (**Dyna Technologies** (supra).
>
> (iii) Unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award an arbitral award should not be interfered with in a casual and cavalier manner (**Dyna Technologies** (supra).

[13] AIR 2019 SC 2908: 2019 (7) SCC 236

> (iv) It is well settled law that where two views are possible, the court cannot interfere if the plausible view taken by the arbitrator is supported by reasoning. In other words if there are two plausible interpretations of the terms and conditions of the contract, then no fault can be found, if the learned arbitrator proceeds to accept one interpretation as against the other. (**Dyna Technologies** (supra) followed in **South East Asia Marine Engineering and Construction Ltd. (SEAMEC Ltd.) v. Oil India Limited; 2020(5) SCC 164 and UHL Power Company Ltd.** (supra).

116. There were various changes which were brought about in the 1996 Act from the 1940 Act. The purpose of the new Act was to have speedy disposal through the forum of arbitration.

117. Section 34 introduces itself by saying that the grounds mentioned thereunder are the "only" grounds on which an arbitral award may be set aside. However, apart from the grounds mentioned under S.34, the Act also provides for other grounds as under S.13, S.16, S.75 and S.81 on the basis of which the award can be set aside.

118. The grounds given under S.34(2)(a) are crisp and precise and lay the law as it is without the inclusion of any open-ended expression which otherwise would have given the courts an opportunity to widen their scope of interference with the arbitral awards. The only open-ended expression which can be and has been of concern is the ground of public policy of India. It has been under many cases defined as an unruly horse thus giving the interpretation that it can never be defined or be a certain thing. However, for the purpose of achieving the aim of the new Act, the Act of 1996 – the legislature while drafting the Act limited the scope of public policy in its explanation restricted it to:-

a) Fraud

b) Corruption

c) S.75 or S.81 (confidentiality breach or admissibility of evidence). The scope of public policy was, however, widened after Supreme Court in its decision of ***Oil & Natural Gas Corporation Ltd. v. Saw Pipes 62 Ltd.***[14] (also referred to as : "Saw Pipes Case") interpreted it to include "patent illegality" in its definition.

119. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. It is a settled law that interpretation of the contract and appreciation of the evidence by the arbitral tribunal cannot be reopened by arguing that the award is contrary to the contract. Arbitration is consensual and some amount of laxity should be given while scrutinizing an award. A sense of informality is attached to such proceeding. It cannot be scrutinized with an Eagle's eye or eye of a needle and as an appellate authority.

120. Once it is found that the arbitrator's approach is not arbitrary or capricious it has to be accepted. He is the last word on facts. The construction of the terms of the contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person would do, of course, the arbitrator cannot wander outside the contract and deals with the matters not forming the subject matter or allotted to him as

[14] 2003 (5) SCC 705

in that case he would commit jurisdictional error. (See ***Delhi Airport Metro Express (P) Ltd. v. DMRC)***[15]

121. In ***Delhi Development Authority v. R.S. Sharma***[16]**,** the Hon'ble Supreme Court summarized the law on the subject. In paragraph 21 it is stated:

> "*21.From the above decisions, the following principles emerge:*
>
> *(a) An Award, which is*
>
> *(i) Contrary to substantive provisions of law; or*
>
> *(ii) The provisions of the Arbitration and Conciliation Act, 1996; or*
>
> *(iii) Against the terms of the respective contract; or*
>
> *(iv) Patently illegal, or*
>
> *(v) Prejudicial to the rights of the parties, is open to interference by the Court under S.34(2) of the Act.*
>
> *(b) 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;*
>
> *(c) The Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court;*
>
> *(d) It is open to the Court to consider whether the Award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India."*

122. In ***KV Mohd. Zakir v. Regional Sports Centre***[17] it held that the courts should not interfere unless reasons given are outrageous in their defiance of logic or if the arbitrator has acted beyond his/her jurisdiction.

---

[15]2022 (1) SCC 131
[16]2008(13) SCC 80

123. In ***P.R. Shah Shares & Stock Brothers v. M/s. B.H.H. Securities (P) Ltd.***[18] it is clearly stated that a court does not sit in appeal over the award of an arbitral tribunal by re-assessing or re-approaching the evidence. An award can be challenged only on the grounds mentioned in S.34(2) of the Act.

124. In ***Associate Builders*** (*supra*) the Supreme Court has laid down the principle on which an award can be held to be perverse. The Apex Court held:

> *"32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum- Assessing Authority v. GopiNath& Sons [1992 Supp (2) SCC 312], it was held: (SCC p. 317, "7. ... It is, no doubt, true that if a finding of fact is para 7) arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law." In Kuldeep Singh v. Commr.of Police [(1999) 2 SCC 10: 1999 SCC (L&S) 429], it was held: (SCC p. 14, para 10)*
>
> *"10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with. 33. It must clearly be understood that <u>when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award</u>. Thus an award based on*

[17]AIR 2009 SC (Supp) 2517
[18]2012 (1) SCC 594

> *little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score."* (emphasis supplied)

125. Even if the reasoning provided in the award is implied, unless such award portrays "perversity unpardonable" under Section 34 of the Arbitration and Conciliation Act, it cannot be set aside [See paragraph 25 of Dyna Technologies (supra)].

126. Once it is found that the arbitrators' approach is not arbitrary or capricious then he is the last word on facts.

127. Reasonableness of the decision cannot be a matter of judicial review in deciding an application for setting aside and award.

128. Once the arbitrator has come to a finding the Court should not interfere with the award unless reasons given are outrageous in their defiance of logic or if the arbitrator has acted beyond his jurisdiction. Moreover, the Court does not sit in appeal over the award of the arbitral tribunal by re-assessing, re-approaching or re-appreciating the evidence. It is well settled that the Court does not sit in appeal over an award. It is not for this Court to reassess the evidence on record. It is also not for this Court to weigh the quality and quantity of the evidence put forward before the Arbitration. In ***Ravindra Kumar Gupta & Co. v. Union of India***[19] it is reiterated that reappraisal of evidence by the Court is not permissible. Where the reasons have been given by the arbitrator in making the award the court cannot examine the reasonableness of the reasons. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisement of evidence. The arbitrator is the sole judge of the

[19] 2010 (1) SCC 409

quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a Judge on the evidence before the arbitrator. The award can be challenged only on the ground mentioned in Section 34(2) of the Act.

129. An erroneous application of the law by itself is not a ground to challenge an award under Section 34 of the Arbitration and Conciliation Act. For an award to be set aside there must be a patent illegality, an error which goes to the very root of the matter and affects the jurisdiction of the arbitrator in deciding a dispute. If the arbitrator lacks the authority to decide the dispute the award is a nullity. If the disputes are by nature non-arbitrable the assumption of jurisdiction would be an illegality.

The judgment in ***Associate Builders*** (*supra*), which was passed in relation to a domestic award also recognized and reaffirmed the settled law that where a cause or matters in differences are referred to an arbitrator, whether lawyer or layman, he is considered to be the sole and final judge of all questions of law and of fact obviously with the limited grounds of interference, namely, if it is opposed to fundamental policy of Indian Law, interest of India, justice or morality and patent illegality. If an award is perverse it would be against the public policy of India.

130. Violation of Indian statutes linked to public policy or public interest and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. It would also mean that the arbitral award is against basic notions of justice or morality. An arbitral award can be set aside on the ground of patent

illegality i.e. where the illegality goes to the root of the matter but re-appreciation of evidence cannot be permitted under the ground of patent illegality. (See. **Ssangyong** (*supra*))

131. In ***PSA Sical*** (*supra*) is has been reiterated as under:

> *"40. … 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". It is only such arbitral awards that* shock the conscience of the court, that can be set aside on the said ground. *An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, re-appreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award."* (emphasis supplied)

132. A patent illegality would mean an illegality which goes to the root of the matter and not a mere erroneous application of the law is the view in ***Associate Builders*** (*supra*) which was reiterated in **Ssangyong** (*supra*) in paragraphs 37, 39, 40 and 41 of the said report which reads:

> *"37. Insofar as domestic awards made in India are concerned, an additional ground is now available Under Sub-section (2A), 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.*
>
> *39. To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of Associate Builders (supra), 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 paragraphs 42.3 to 45 in Associate Builders (supra), 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(2A).

41. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of Associate Builders (supra), 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."

133. The "fundamental policy of Indian law" has been recently considered in ***Batliboi Environmental Engineers Limited v. Hindustan Petroleum Corporation Limited & Ors***.[20] It has been opined in paragraph 43 of the report that the said expression includes "*all fundamental principles providing as basis for administration of justice and enforcement of law in this country. There were three distinct and fundamental juristic principles which form a part and parcel of "fundamental policy of Indian law". The first and foremost principle is that in every determination by a court or an authority*

[20] 2024 (2) SCC 375

that affects the rights of a citizen or leads to civil consequences, the court or authority must adopt a judicial approach. Fidelity to judicial approach entails that the court or authority should act in an arbitrary capricious or whimsical manner. The court or authority should act in a bona fide manner and deal with the subject in a fair, reasonable and objective manner. Decision should not be actuated by extraneous considerations. Secondly, the principles of natural justice should be followed. This would include the requirement that the Arbitral Tribunal must apply its mind to the attending facts and circumstances while taking the view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best done by recording reasons in support of the decision". (emphasis supplied)

134. Given the facts and circumstances of the case and as it reveals from the proceedings there has been a clear representation by Deepak in course of arbitration and also in subsequent proceedings wherever the issue of refund of the consideration amount came up for consideration and they had agreed to refund the said amount. The subsequent conduct as would be evident from the application for modification of the order passed in a post award Section 9 application has to be read along with the observations of the learned Arbitrator in paragraph 123 of the award. For the sake of convenience and brevity paragraphs 123 and 124 of the award are reproduced below.

> *123) In the course of argument, Mr. Jishnu Saha, the learned Senior Counsel for the Respondent Nos. 1 to 13 offered to refund the amount paid by the Claimant back to the Claimant without any interest. The learned Counsel for the Claimant refused to accept that money paid by it without interest.*

> *Ultimately however the learned Senior Counsel for the Respondent Nos. 1 to 13 argued that as there is no prayer by the Claimant for refund of that amount and the Tribunal cannot refund the said amount and in support of that contention cited judgments.*
>
> *124) The facts which the Tribunal has to consider is that Claimant has admittedly paid an amount of Rs. 19.92 crores which may be inadequate for it to seek specific performance of the contract as it does not fulfil its obligation to pay 36% of 82 crores towards share price and loan amount, which is the admitted amount under SPA, the original of which is lying with the Tribunal.* (emphasis supplied)

135. The said paragraphs are to be read along with the paragraph 6 to 9 of the modification application being GA 01 of 2023 filed in AP 664 of 2023 which reads as follows:

> *"6. The Applicants accept the portion of the award dated 29th June, 2023 directing payment of the principal sum of Rs. 19,92,30,500/- to the petitioner and intend to pay the said sum at the earliest. The Applicants further intend to challenge the portion of the award whereby interest has been awarded to the petitioner on the said sum of Rs. 19,92,30,500/-. The Applicants intend to do so within the statutory period available under the provisions of the Arbitration and Conciliation Act, 1996.*
>
> *8. The Applicants state and respectfully submit that the Applicants reasonably and bona fide expects to be able to pay the entire principal awarded sum of Rs. 19,92,30,500/- on or before March, 2024. The Applicants accordingly propose to pay into this Hon'ble Court the entirety of the sum of Rs. 19,92,30,500/- on or before March, 2024 for being made over to the petitioner and / or its associates towards satisfaction of the principal sum awarded under the award dated 29th June, 2023.*
>
> *9. As will appear from the award dated 29th June, 2023 the said sum of Rs. 19,92,30,500/- has been directed to be refunded to the petitioner as the moneys paid by the petitioner to the Respondents No.1 to 13 towards purchase of 36% shares in the Respondent No. 13 company. It is, however, matter of record that the said sums have been paid by the petitioner and by one Tirupati Vancom Private Limited and one Goldsmith Infrabuild*

Private Limited for and on its behalf. This will, inter alia, be evident from the payment schedule annexed by the petitioner in its Statement of Claim filed in the Arbitral Proceeding and the acknowledgment of payments, made by or on behalf of the petitioner, by the Respondents No. 1 to 13 in their Statement of Defense cum Counter Claim filed in the same proceeding. Copies of such payment statements are annexed hereto and marked withthe Letter - "D" and "E" respectively. In the circumstances, the Applicants pray that the sum of Rs. 7.00 Crores being presently paid into the Hon'ble Court towards part satisfaction of the awarded amount of Rs. 19,92,30,500/- and further amount that the Applicants will pay into Court towards satisfaction of the entirety of the principal sum awarded to the petitioner, be released to the petitioner only upon the petitioner furnishing, to the satisfaction of this Hon'ble Court, appropriate "No Claim Certificate of the said Tirupati Vancom Private Limited and one Goldsmith Infrabuild Private Limited in favour of the Respondents No. 1 to 13.

11. The instant application is made bona fide and with the object of relieving the Applicants from the burden of interest on the principal amount of Rs. 19,92,30,500/- awarded against them. Asstated hereinabove, the Applicants intend to challenge the award of interest on the said sum of Rs. 19,92,30,500/-in an application filed under Section 34 of the Arbitration and Conciliation Act, 1996 within the statutory period available for the same. The Applicants, however, intend to secure even such claim, first by the security of the entire seventh floor of the building at the Premises No. 6, Jawaharlal Nehru Road, Kolkata - 700013 and twelve car parking spaces thereat and thereafter by making a cash deposit in Court out of the first receipt of the proceeds from such sale." (emphasis supplied)

136. The said application was filed for modification of the order dated 13th September, 2023 in which an interim order was passed, relevant portion whereof is stated below:-

"Considering all the facts and material presented on behalf of the parties, this Court deems it fit to direct that the respondent no.1-13 will not operate their individual or collective bank accounts without keeping aside a sum of Rs.26,34,82,336.25/-. The interim order will remain in place for a period of ten weeks from today or until the respondent nos.

1-13 and/or the award-debtors apply for stay of the Award and obtain necessary orders therein, whichever is earlier."

137. Subsequent thereto in January, 2025 the appellants filed the suit in this court being CS (Com) 764 of 2024 praying inter alia, for the following reliefs:

> *"a. A decree of declaration declaring that the plaintiffs are discharged of all liability to the defendant no.3 and 4 in respect of payment of the said amount of Rs.69,47,250/- and Rs.6,57,90,250/- together with interest thereon upon deposit of the same with the Registrar, Original Side, High Court at Calcutta in terms of orders passed in AP No.664 of 2023.*
>
> *b. Alternatively, a further decree of declaration that the award dated 29th June, 2023 passed in the Arbitration between the defendant no.1 herein and the plaintiffs herein is binding on the defendant nos. 3 and 4.*
>
> *c. A decree of permanent injunction restraining the defendants and each of them from claiming a sum of Rs.7,27,37,500/- together with interest, if any, as any part or portion thereof from the plaintiffs.*
>
> *d. Mandatory injunction directing the defendant nos. 3 and 4 to have their claims against the plaintiffs for alleged advance made on behalf of defendant no.1 be entered and adjusted from the fund deposited with the Registrar, Original Side in terms of the order dated 18th December, 2023 passed in AP NO. 664 of 2023.*
>
> *e. Receiver.*
>
> *f. Injunction.*
>
> *g. Costs.*
>
> *h. other reliefs."* (emphasis supplied)

138. In the plaint after referring to the award it has been stated in paragraphs 28 and 29 that a sum of Rs.69,47,250/- has been paid by the Goldsmith Private Limited and a sum of Rs.6,57,90,250/-has been paid by

Tirupati Private Limited respectively on behalf of Jagrati Private Limited. The appellants alleged that in spite of depositing the entire awarded sum in the High Court the other two entities have demanded payment. It was thus, contended that by reason of depositing the aforesaid sums the appellants are discharged from any liability in respect of the sums due to Goldsmith and Tirupati and in the suit had prayed for declaration to that effect.

139. In the facts and circumstances of the case and having regard to the conduct of the parties during the arbitration proceeding and subsequent thereto it is not possible for us to go to a conclusion that the award is patently illegal or against the public policy of India. In order to succeed on the ground of patent illegality it has to be established that the award was passed in contravention of the substantive law of India, contravention of the 1996 Act and contravention of the terms of the contract or that it shocks the conscience of the court. In terms of Section 34(2)(b)(ii) an arbitral award can be interfered with only when the findings of the arbitrator are found to be arbitrary, capricious or perverse or when the conscience of the court is shocked or when the illegality goes to the root of the matter. A possible view passed on facts does not call for any interference [See **PSA Sical** (supra)].

140. Section 22(2) the said section relates to refund of consideration money in an agreement for sale of immovable property. The said section may not have any application in relation to the present dispute, although the principle as regards a prayer for refund may have some relevance. The contention that in the absence of the pleading with regard to a definite claim for refund of the consideration amount even by way of an amendment does not hold good since Deepak knew that they had consciously made a clear

representation to refund the principal amount and only dispute was with regard to the interest component. The acceptance of the said amount by Deepak is not in dispute. By way of reiteration paragraph 6 of the modification application would clearly reaffirm that the stand of Deepak before the Arbitral Tribunal was to settle the issue by payment of the principal sum. Deepak was never taken by surprise by reason of an award against Deepak with regard to the refund of the principal sum. The plaint in C.S (Com) No. 764 of 2024 filed by the appellants bears testimony to such conduct. Deepak was clearly estopped by conduct and representation as would be clearly manifest from the record before the learned arbitrator and the subsequent proceedings. The decision in ***Desh Raj*** (*supra*) was distinguished by the learned Arbitrator in paragraph 131 and 132 of the Award which are reproduced below:

> *"131) Mr. Jishnu Saha, the learned Senior Counsel for the Respondents as noted above, cited two decisions to contend that in the absence of a prayer by the Claimant claiming return of the amount paid by it, the amount cannot be returned.*
>
> *So ultimately the objection to return the amount boils down to only an absence of prayer by the Claimant. Initially as noted above the same learned Counsel in the course of his argument offered to pay the money back to the Claimant without interest, which the Claimant's Counsel refused to accept.*
>
> *The first decision cited on this point was rendered in the case of Desh Raj and Others versus Rohtash Singh reported in (2022) SCC OnLine SC 1719. The learned Counsel relied on paragraphs 31 to 33 of the judgment. The Court was dealing with a suit for specific performance and in paragraph 30, the question which was asked by the Court is whether Respondent was entitled to recover earnest money. From the relevant clause relating to earnest money, quoted in paragraph 30 of the judgment, it is clear that there is a provision for confiscation of the earnest*

money. Here Claimant is not asking for return of earnest money, nor is there any provision for confiscation.

In that factual background, the court in paragraph 31 referred to Section 22 of the Specific Relief Act which permits the relief of refund of earnest money or deposit provided the party seeking such refund seeks an amendment of the plaint at any stage of the proceeding.

The Court found in that case the Respondent did not amend the prayer and as such Court cannot "suo moto" grant the refund of earnest money. The Court however did not decide whether Section 22(2) of Specific Relief Act is mandatory or not.

132) That case is distinguishable both on facts and law.

Section 22 of Specific Relief Act which applies to a suit refers to Civil Procedure Code and Section 22 has been given an overriding effect on the Code.

Admittedly while dealing with Arbitration, an Arbitral Tribunal is not bound by the Code even though fundamental principles will apply. Amendment of a plaint "at any stage of the proceeding is purely a procedural matter.

Here it is not Respondent's case that they are taken by surprise in the absence of an amendment by the Claimant.

The Claimant's prayer for refund of the money paid by it with interest was argued by the Claimant and the Respondents were initially agreeable to refund it without interest which the Claimant did not accept Apart from that in Desh Raj (Supra), it was the case of refund of earnest money. The clause in the Contract (pare 30) show if the Sale Deeds executed within the prescribed date, the first party will be entitled to confiscate the earnest money. Here there is no such clause in SPA. Neither confiscation or forfeiture of the money held by the Clement has been argued.

So the decision in Desh Raj (supra) does not apply in the present case."

141. The argument of Mr. Mookherjee that the award of the learned arbitrator is contrary to the law laid down by the Hon'ble Supreme Court in ***Desh Raj*** (*supra*) would fall within the expression fundamental policy of

Indian law is not acceptable having regard to the fact that the issue before the learned arbitrator was with regard to the interest on the amount already advanced. The acceptance of such consideration amount was never in dispute. The learned arbitrator has upon consideration of the conduct of the parties during the proceeding decided the issue upon taking into consideration the relevant factors. The ratio of the judgement in ***Shenbagam*** *(supra)* is in paragraph 41 where it was held that the "blemished conduct" does not disentitle the Plaintiff from receiving back the advance even though specific performance was not granted to the Plaintiff. The direction for refund of the amount with interest has to be considered in the background of the conduct of the parties and their admissions in the proceeding. The proceeding before an arbitrator is not a proceeding before a court of law. An element of informality is attached to such proceeding and the views of the arbitrator as appear from the award is required to be considered in the said perspective and keeping in mind the immunity that an award enjoys under the Act.

142. The conduct of the parties clearly supports the view taken by the Learned Arbitrator that there may not be any requirement to make a separate prayer for refund of the consideration amount when the willingness on the part of Deepak and its group is clearly evident. Even at the subsequent stages of the proceeding they had agreed to refund notwithstanding an objection being recorded in paragraph 123 of the award regarding payment of interest on the refunded amount. It is quite manifest that in course of arbitration proceeding the appellants were willing to refund the principal sum and the same stand has been reiterated in the post award

stage whenever the issue was considered. Deepak is estopped by conduct and pleading from raising such issues in the application for setting aside of the award. In such circumstances, the argument advanced on behalf of Deepak that the said award has been passed disregarding Section 22(2) of the Specific Relief Act and hence it is in conflict with the public policy of India or is vitiated by patent illegality is not plainly acceptable. A mere contravention of the substantive law of India, by itself is no more a ground available to set aside an arbitral award in view of paragraph 39 of **Ssangyong** (*supra*). At the highest it could be said to be erroneous application of the law, although we are not agreeable to accept such submission and the view expressed by the learned Single Judge in this regard is accepted.

143. For an award to be set aside there must be a patent illegality, an error which goes to the very root of the matter and affects the jurisdiction of the arbitrator in deciding a dispute. If the arbitrator lacks the authority to decide the dispute the award is a nullity. If the disputes are by nature non-arbitrable the assumption of jurisdiction would be an illegality.

144. The view taken by the learned arbitrator is a rational view having regard to the conduct of parties during arbitration. The conduct of Deepak in course of arbitration has clearly induced a belief in the mind of the claimant that there is no requirement or necessity to amend the Statement of Claim as the dispute was only restricted to payment of interest on refund which has been the stand and canvassed even after the award was passed.

145. The decision of the Arbitral Tribunal in the instant case is a possible view and an acceptable outcome which is clearly defensible in respect of the facts and law.

146. The jurisdiction of the Court in interfering with an award has been pithily stated in ***Mt. Aftab Begam Vs. Haji Abdul Majid Khan***[21] in the following words:-

> *"They may be right, they may be wrong, it is no business of the court. Judges cannot be reminded too often that an arbitrator in substance, ousts the jurisdiction of the Court, except for the purpose of controlling the arbitrators and preventing misconduct, and for regulating the procedure after the award. So far as the hearing of the merits is concerned and the decision contained in the award, the court has nothing to say, good, bad or indifferent. It has no right to review it or to consider it....."*

Although the above decision was rendered in the context of the old law and even before the Arbitration Act of 1940 Act but the said decision is equally applicable under the 1996 Act. Though the underlying philosophy in arbitration law in this country has undergone a sea-change from what it was under the Arbitration Act, 1940 to what it is now under the 1996 Act and several Supreme Court judgments caution against interpreting the provisions of the 1996 Act by referring to the 1940 Act, the fundamental basis in dealing with a challenge to an arbitral award remains unaltered. In the most traditional approach, the court would not step in to correct every perceived wrong complained of by a challenger simply on the ground that since the challenger was a party to an agreement that took the assessment away from the sovereign forum to a private forum, the challenger had to live with the decision of the forum of its choice. The same proposition, put in a

[21] AIR 1924 All 800

different form, is simply this: when there is a proper submission, whether of fact or of law, to arbitration, it is not for the court to sit as an ordinary court of appeal over an arbitral award because the arbitrator has taken a view of law or of fact which a court of law may not have taken if such court were trying the dispute. The everlasting principle, unaffected by the paradigm shift in the arbitration law in this country, is that except to the extent expressly or by necessary implication permitted by the governing statute, the court will not revise, remit or set aside an arbitral award. [See ***State of West Bengal v Pam Developments Private Limited***[22]]. The Court is not hearing an appeal from the award. The recent decision of the Hon'ble Supreme Court in ***Associate Builders*** (*supra*) has also recognized the same principle.

147. The Learned Arbitrator has also observed that there is no provision in the SPA for forfeiture/confiscation of the amount which has been admittedly paid by the claimant but which is inadequate to cover its obligation to ensure specific performance and no argument has been advanced by Deepak that they have a right to forfeit or confiscate the amount paid by the claimant. It was in that context the learned arbitrator applied the principle of unjust enrichment as denial of such relief would mean that a party having received the money would be allowed to retain the said sum at the expense of the another person.When there is a clear representation that the principal amount shall be refunded retention of the said amount and denying such benefit would amount to unjust enrichment.We have to keep in mind that the award was not passed by a

[22] 2017 SCC OnLine Cal 13272

layman. The observations and finding by the learned Arbitrator, a former judge by the Hon'ble Supreme Court, is backed by years of experience as a judge and is a rational view.

148. Reasonableness of a decision becomes relevant when certain questions that come up before the tribunal do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation with a range of rational and acceptable solutions. The decision of the Learned Arbitral Tribunal falls within a range of possible, acceptable outcomes and are defensible in respect of the facts and law. Even when the court exercise its power of judicial review decision of an administrative action, which is not hedged with restrictions in comparison to the limited scope of enquiry as specifically indicated in Section 34 of the Arbitration and Conciliation Act, 1996, the reviewing courts have consistently refused to exercise its discretionary jurisdiction when the view of the administrative authority is a reasonable and possible view. The scrutiny of the award is more restricted and requires less invasive intervention having regard to the clear provision of Section 34 of the 1996 Act and the object of the Act is to ensure minimum interference with an arbitral award. The court deciding an application for setting aside is not exercising the power of judicial review as commonly understood. The views of the learned arbitrator in our opinion is a possible, plausible and rational view and rightly accepted by the learned Single Judge.

149. The award can be interfered only on the limited grounds as envisaged under the Act. Moreover, when the view taken by the arbitrator is

a possible view the court in deciding an application for setting aside the award shall not interfere with such a view or substitute such view with its own view. Once the interpretation given by the arbitrators are backed by logic and are reasonable the same is required to be upheld as held in:

i) ***MMTC Ltd. v. Vedanta Ltd.*** reported in ***2019(4) SCC 163*** **paragraph 14**

ii) ***UHL Power Company Ltd. v. State of Himachal Pradesh*** reported at ***2022 (4) SCC 116*** **paragraphs 18 and 22**.

150. The jurisdiction of the court under section 37 of the Act, as clarified in ***MMTC*** (*supra*) and reiterated in ***Konkan Railway Corporation Ltd.*** *(supra*) is akin to the jurisdiction of the court under Section 34 of the Act. The scope of interference by a court in an appeal under Section 37 of the Act, in examining an order setting aside or refusing to set aside an award, is restricted and subject to the same grounds as the challenge under Section 34 of the Act. The jurisdiction under Section 34 of the Act is exercised only to see if the Arbitral Tribunal's view is perverse or manifestly arbitrary. [See ***Konkan Railways Corporation Ltd.*** (*supra*)].

151. In ***Somdatt Builders*** (*supra*) the Hon'ble Supreme Court in referring to **M/s. *Larsen Air Conditioning and Refrigeration Company v. Union of India*[23]** and ***Reliance Infrastructure Ltd. v. State of Goa*[24]** has observed that:

> *"It is necessary to remind the courts that a great deal of restraint is required to be shown while examining the validity of an arbitral award*

[23] 2023 INSC 708
[24] 2024 (2) SCC 613

when such an award has been upheld, wholly or substantially, under Section 34 of the 1996 Act. Section 37 of the 1996 Act grants narrower scope to the appellate court to review the findings in an arbitral award if it has been upheld or substantially upheld under Section 34. Frequent interference with arbitral awards would defeat the very purpose of the 1996 Act." (emphasis supplied)

152. The aforesaid view has been reiterated in a fairly recent decision in ***C & C Construction Ltd. v. Ircon International Ltd.***[25] in which it has been stated that "*in appeal, Section 37 of the Act grants narrower scope to the appellate court to review the findings in an award, if it has been upheld, or substantially upheld under Section 34"*. The views expressed by the Arbitral Tribunal have been accepted by Justice Sabyasachi Bhattacharyya and therefore the court under Section 37 would be extremely chary and circumspect in scrutinizing the award.

153. In the context of the fact stated and narrated in the award, we are of the view that the decision to refund is not amenable to a judicial scrutiny under Section 34 of the Arbitration and Conciliation Act, 1996. The direction to return the principal amount was with a view to prevent unjust enrichment. The learned arbitrator has felt that the retention of the said principal sum would be unjust and inequitable. The retention of the money would be contrary to justice or against equity. The concept of unjust enrichment and equitable doctrine has been recognised in several decisions of the Hon'ble Supreme Court including the decision in ***Sahakari Khand Udyog Mandal Ltd. v. Commissioner of Central Excise & Customs***[26] in

[25] 2025 SCC OnLine SC 218
[26] (2005) 3 SCC 738

which **Hon'ble justice C.K Thakker** speaking on behalf of the Bench had stated the principle in the following words:

> *"31. Stated simply, "unjust enrichment" means retention of a benefit by a person that is unjust or inequitable. "Unjust enrichment" occurs when a person retains money or benefits which in justice, equity and good conscience, belong to someone else.*
>
> *32. The doctrine of "unjust enrichment", therefore, is that no person can be allowed to enrich inequitably at the expense of another. A right of recovery under the doctrine of "unjust enrichment" arises where retention of a benefit is considered contrary to justice or against equity.*
>
> *33. The juristic basis of the obligation is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or the doctrine of restitution.*
>
> *34. In the leading case of Fibrosa v. Fairbairn [(1942) 2 All ER 122 : 1943 AC 32 : 167 LT 101] Lord Wright stated the principle thus : (All ER p. 135 H)*
>
> *"[A]nycivilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution."*
>
> *35. Lord Denning also stated in Nelson v. Larholt [(1947) 2 All ER 751 : (1948) 1 KB 339] : (All ER p. 752 E-F)*
>
> *"It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires."*
>
> *The above principle has been accepted in India. This Court in several cases has applied the doctrine of unjust enrichment."* (emphasis supplied)

154. The argument that Jagrati has approached the Arbitral Tribunal with unclean hand is also not of much consequence as there are two versions of the agreement and the dispute is with regard to the actual consideration amount and payment obligations. Even if we consider their version of the agreement executed on the same date i.e., 24th March, 2011, Deepak had never disputed to have received Rs.19.92 crores and have clearly evinced its intention to refund the said amount in course of the arbitration proceeding and also subsequently to which reference have already been made in the earlier paragraphs. In so far as the claim for interest, the learned arbitrator has given the following reasons:

> *"137) But this Tribunal has held that this Claimant is entitled to a refund of the amount admittedly paid by it or its entities namely Rs. 19,92,30,500/-. From Annexure-J to the SOD of the Respondent Nos. 1 to 13 it appears that the said amount has been paid by the Claimant or its entities through bank-transfer on diverse dates between 2011 and 2017. But the Claimant is not entitled to get a refund of the aforesaid amount with interest from those dates. The grant of interest and the rate of such interest depends on the discretion of this Tribunal. The Claimant has filed the SOC in connection with this arbitration proceeding on 26 November, 2019. As such the Claimant is entitled to claim interest on the aforesaid amount of Rs. 19,92,30,500/- with effect from the month of December, 2019. The Respondent has claimed 18% interest in their Counter-Claim but however this Tribunal is not willing to grant interest at that rate to the Claimant.*
>
> *138. It is not in dispute that the transaction between the parties is a commercial transaction. The claimant has been deprived of the use of the aforesaid money and the aforesaid amount which the Claimant paid was lying at the disposal of the Respondents for its business. Considering all these facts, the Tribunal grants interest at the rate of 9% per annum which has to be paid by the Respondents to the Claimants on the aforesaid amount of Rs. 19,92,30,500/- from the month of December, 2019, till the date of the Award at a rate of 9% per annum, which comes to about Rs*

> *26,34,82,335.25/- in total (ie. Rs. 19,92,30,500/- as principal and Rs. 6,42,51,835.25/- by way of interest). Such amount has to be paid to the Claimant by the Respondents within a period of 6 weeks from date. Failing which the Respondents will have to pay the aforesaid amount of Rs. 25,34,82,335.25/, namely the principle and the interest along with an interest at the rate of 11% on the total amount from the date of default till the date of actual payment.:"*

155. Submissions have been made on behalf of Deepak that interest, if at all allowed, it should be on and from the date when such claim is adjudicated that is, the date of the award, is also not acceptable in view of admission of its group of accepting the said amount of Rs.19.92 crores and its utilization. They have enjoyed the said amount from the date when such amount had received by Deepak. Subsequently, they agreed to refund the principal amount. The reasoning of the learned Arbitrator as would reflect from the aforesaid paragraphs in granting interest for the period mentioned therein falls within the discretionary jurisdiction of the Arbitral Tribunal and is not amenable to a challenge under Section 34 of the Arbitration and Conciliation Act, 1996. In fact, we agree with the learned single judge that in so far as the period to which the interest was a granted, that is to say, on and from date of filing on the statement of claim was a lenient view and such leniency also falls within the discretion of the tribunal. The tribunal having held that the Deepak is liable to refund the entire consideration amount despite no relief specifically included in that regard in the Statement of Claim there cannot be any justifiable reason to hold that only the interest component can be segregated and the cause of action held to have arisen with the award. Once there is a clear finding that the claimant is entitled to refund of the principal amount interest becomes a necessary

corollary. We completely agree with the finding of the learned Single Judge in this regard. The challenge to the interest component by either side fails when considered in the context of the restricted and limited jurisdiction that the court exercises under Section 34 and 37 of the Arbitration and Conciliation Act, 1996. The scope of investigation is extremely myopic and only confined to the grounds mentioned in the said section.

156. The challenge to the awarding of costs is also untenable. The Tribunal in paragraph 139 of the Award has made the following finding:

> *"139. In this matter, the respondents have not filed any cost sheet nor have they argued on the question of cost. Claimants have filed a cost sheet but they are not entitled to any cost in view of their conduct. Therefore, no cost is awarded to either of the parties. Parties to bear their own cost."*

157. The cost issue was considered in an application under Section 33(2) and 33(4) by the cross appellant. In the said order in referring to the observation made in paragraph 139 of the Award the learned Tribunal has dealt with the issue in the manner following:

> *"(b) The learned counsel for the respondents did not challenge the aforesaid recording of the fact by the Tribunal and accepted that he did not argue before the Tribunal on the question of cost nor did the respondents file any cost sheet.*
>
> *(c) It is an accepted position that in the matter of grant of cost, the Tribunal has a discretion (see section 31A of the Act)*
>
> *(d) In the instant case, the Tribunal has exercised its discretion for not granting cost to the respondents not only because they did not pray for cost in their SODs and they did not argue for the same, but because the respondents are not actually successful parties to the proceedings.*
>
> *(e) Respondents' case was to oppose the claimant's prayer for refund of money which the claimant had admittedly deposited towards specific performance. The respondents' argument is that*

Claimant has no right to get refund of the money which it had deposited in the absence of any prayer in the Statement of Claim and the respondents cited authorities in support of their contention.

(f) This Tribunal overruled those contentions and directed refund of money to the claimant with interest for the reasons discussed in the Award. Therefore, it is clear that before the Tribunal, the respondents are not successful parties. However, the claimant succeeded in a limited way. That is also one of the reasons which weighed with the Tribunal in not granting cost. This might not have been spelt out in so many words but this is clear from the reasoning of the Tribunal.

(g) Assuming the Tribunal has made an error in its aforesaid stand in refusing to award cost to the respondents, the same does not come within the purview of computation, clerical or typographical error or error of a similar nature. In this connection, the judgment cited by the Claimant's counsel is of considerable assistance and the Tribunal follows the same."

158. The aforesaid order clearly records the reason as to why no cost was awarded to the cross appellant. The learned Arbitrator has given a reason and the discretion exercised by the learned Arbitrator is not amenable in a proceeding under Section 34 of the Arbitration and Conciliation Act, 1996.

159. On such consideration we do not find any reason to interfere with the impugned order passed by the learned Single Judge.

160. The appeal and the cross objection fail.

(Soumen Sen, J.)

I agree

(Biswaroop Chowdhury, J.)

Later:

On the prayer of the learned counsel for the appellant in AO-COM/38/2024, the execution proceeding shall remain stayed for a period of four weeks from date.

(Soumen Sen, J.)

(Biswaroop Chowdhury, J.)