IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 18th DAY OF SEPTEMBER, 2025

PRESENT

THE HON'BLE MRS. JUSTICE ANU SIVARAMAN

AND

THE HON'BLE DR. JUSTICE K.MANMADHA RAO

COMMERCIAL APPEAL No.403 OF 2023

BETWEEN:

THE STATE OF KARNATAKA
THROUGH THE COMMISSIONER
OF PUBLIC INSTRUCTION
DEPARTMENT OF SCHOOL
EDUCATION AND LITERACY
K.R.CIRCLE, BENGALURU-560 001.

...APPELLANT

(BY SRI. KIRAN V. RON, AAG A/W
SRI ADITYA VIKRAM BHAT, AGA)

AND:

1. M/S. SIDDHARTH INFOTECH PVT. LTD.,
A COMPANY INCORPORATED UNDER THE
PROVISIONS OF THE COMPANIES ACT, 1956
HAVING ITS REGISTERED OFFICE AT
NO.303, SHIVAPRAKRUTHI APARTMENTS,
TALACAUVERY LAYOUT,
AMRUTHAHALLI,
BENGALURU-560 092,
BY ITS DIRECTOR
MR. B.G.KUMARASWAMY.

2. EVERONN EDUCATION LTD.,
(IN LIQUIDATION),
REP. BY ITS OFFICIAL LIQUIDATOR
HIGH COURT OF MADRAS,
CORPORATE BHAVAN,
2ND FLOOR,
NO.29, RAJAJI SALAI,
NORTH BEACH ROAD,
CHENNAI-600 001.

…RESPONDENTS

(BY SRI. CHINTAN CHINNAPPA M., ADVOCATE FOR R-1
SRI K.S.MAHADEVAN, ADVOCATE FOR R-2)

THIS COMMERCIAL APPEAL IS FILED UNDER SECTION 13(1A) OF THE COMMERCIAL COURTS ACT, 2015 R/W SECTION 37(1)(C) OF THE ARBITRATION AND CONCILIATION ACT, 1996, PRAYING TO CALL FOR RECORDS IN COM AP.79/2022 FROM THE HON'BLE LXXXII ADDITIONAL CITY CIVIL AND SESSIONS JUDGE AT BANGALORE AND SET ASIDE THE JUDGMENT DATED 31.07.2023 PASSED IN COM.A.P.NO.79/2022 ON THE FILE OF THE HON'BLE LXXXII ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, AT BANGALORE AND ETC.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 22.07.2025 AND COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, **DR. K.MANMADHA RAO, J.,** PRONOUNCED THE FOLLOWING:

CORAM: HON'BLE MRS. JUSTICE ANU SIVARAMAN
and
HON'BLE DR. JUSTICE K.MANMADHA RAO

CAV JUDGMENT

(PER: HON'BLE DR. JUSTICE K.MANMADHA RAO)

The current commercial appeal has been filed by the Appellants being aggrieved by the concurrent findings passed by the Hon'ble Arbitrator vide award dated 18.05.2022 and the judgment in challenge to the arbitration award under Section 34 of Arbitration and Conciliation Act, 1996, dated 31.07.2023, in Com.A.P.No.79/2022 on the file of LXXXII Additional City Civil & Sessions Judge, Bengaluru (CCH.83) (herein after referred to as 'the Commercial Court' for short).

Facts leading to the filing of this appeal are as under:

2. The State Government decided to implement the Scheme of Government of India, known as Information and Communication Technologies (ICT), which was to cover 4396 schools and the total cost was Rs. 412 Crores. Accordingly, it was decided that the Department of Educational Research and Training (DSERT) would be implementing through Karnataka State Electronics Development Corporation (KEONICS) and agreement as at Ex.P9 was entered into between State Government and KEONICS on 22.07.2011. Accordingly,

KEONICS invited tenders in which, respondent No.2 herein emerged as the successful bidder and an agreement as at Ex.P10 was entered into between respondent No.2 and KEONICS on 27.07.2011, pursuant to which respondent No.2 was to discharge its obligations and was accountable to M/s KEONICS. The respondent No.1 and Ricoh India Ltd., formed consortium with respondent No.2. Further, due to the delay caused for the implementation of Scheme, on account of request for cancellation and return of Bank Guarantees by respondent No.2, State issued termination letter as Ex.P51 dated 11.08.2016.

3. The respondent No.1 filed Civil Miscellaneous Petition No.9/2021, before this Court seeking appointment of Arbitrator in terms of Clause 37(4) of the agreement at Ex.P9 and this Court was allowed the petition and appointed the Arbitrator. Thereafter, the statement of claim was filed on behalf of the claimant as on 04.09.2021. The first meeting of Arbitration was held on 10.12.2021. The respondent – Government remained absent in spite of sufficient notice and was placed *ex-parte*. Thereafter, learned HCGP participated

in the proceedings from second meeting of arbitration as on 23.12.2021. On steps being taken, order placing the respondent *ex-parte,* was recalled.

4. The Arbitrator after hearing both the sides, has framed the following points for determination :

> *(i) Whether the Respondent No-1 proves that there is no privity of contract between the claimant and the said Respondent and that the claim statement should be dismissed on that ground?*
>
> *(ii) Whether the termination of the project, for the reasons assigned by the Respondent Government is unlawful, arbitrary and unfair?*
>
> *(iii) Whether the claimant is entitled to damages from the Respondent-Government, if so, how much?*
>
> *(iv) What Award?*

5. The learned Arbitral Tribunal after considering the records placed and hearing both the sides, gave the following findings and ordered as under:-

> *"34. It is thus evident that the contract is composite and also makes express provisions for sub contractors and consortium partners. It significantly,*

brings about a direct nexus between the consortium and the respondent Government. It cannot be said that the State government would be in a position to sue the consortium and not vice-versa"

"37. In the above background it may not be tenable for government to contend that the Claimant and other consortium partners are strangers…..And Action on the part of the State Government, touching upon the project, particularly its termination-would, to the knowledge of the State government, affect the third party agencies, such as claimant and not KEONICS, which merely acting as a 'go-between' or agent in, having the project implemented through the consortium. Hence, the claim being brought by a party which is directly affected by the action of the State is maintainable"

"62. It is hence held by this tribunal that from the above it is clear that in the absence of any apparent 'remodelling of the project', as was claimed in the actual termination letter, the several reasons which were approved by the state cabinet and mulled over by the government, were apparently false, arbitrary and unfair and could never have been assigned. In any event, the so-called reason, in fact assigned, is not attempted to be demonstrated, let alone being placed on record-in these proceedings and is hence not established as being a valid reason for termination of the project."

"106. The Claimant shall hence be paid a total sum of Rs.178,98,38,525/- (Rupees One Hundred and

Seventy Eight Crore Ninety Eight Lakhs Thirty Eight Thousand Five Hundred Twenty Five Only) with interest, at a rate of 18% per annum on the said total amount, by the State Government-respondent, from the date of award till the payment. The Respondent-Government shall also pay and bear the costs incurred by the claimant in respect of this arbitration proceedings and the stamp duty and registration fee, applicable in respect of this Award."

6. The Arbitral Tribunal, after hearing both the sides allowed the claim and passed an award dated 18.05.2022 awarding Respondent No.1 to pay a sum of Rs.1,78,98,38,525/- under various heads.

7. Aggrieved by the award passed by the arbitral tribunal, the State-appellant herein, preferred an appeal before the LXXXII Additional City Civil and Sessions Judge at Bangalore. The Appellate Court, framed the following questions for consideration:

i) Whether there are grounds to set aside the impugned award under section 34 of the Arbitration & Conciliation Act?

ii) What order?

8. On perusal of the records placed before it, the Appellate Court gave the following relevant findings:

> *"32. The Contents of the bank guarantee clearly states the name of the consortium partner, this bank guarantee was duly forwarded by the KEONICS to the petitioner state. The names of the consortium partners/sub contract was once again specifically notified in writing by way of letters to the KEONICS and duly acknowledged and admitted by them. On perusal of the documents and agreement it is clear that the findings given by the learned arbitrator is not found with fault and not illegal and against the public policy."*

> *"50. On a parting note, I would like to add, that the challenge to the various clauses of contract by the petitioner under the present petition is not tenable. It is accordingly, held that the Arbitral Award is neither against the fundamental policy of India nor in contravention of law. Therefore, I find no perversity in the Arbitral Award and the same is upheld."*

9. The Appellate Court, after hearing both the sides, gave the finding that the arbitral award is neither against the fundamental policy of India, nor in contravention of law, and there by confirmed the Arbitral Award by judgment and order dated 31.07.2023, the operative portion of the same reads as follows:

"The petition filed under section 34 of the Arbitration and Conciliation Act, 1996, is dismissed.

The Arbitral Award dated 18.05.2022 is hereby confirmed.

The petitioner shall pay the cost of this proceeding to the Respondent.

Office is directed to return the arbitral records to the arbitration after the appeal period is over.

The office is directed to send copy of this judgment to both the parties to their email IDs as required under Order XX Rule 1 of the Civil Procedure Code as amended under section 16 of the Commercial Courts Act."

10. The learned Counsel for the Appellants would contend that, as far as the maintainability is concerned, there is no privity between Appellant and Respondent No-1 and therefore, the claims of Respondent No-1 were not maintainable. As far as the privity is concerned, there is no agreement between Appellant and Respondent No-1 as such there is no privity.

11. It was also contended that, M/s KEONICS was responsible for the implementation of Phase 3 of the scheme

and so, the privity is intended to be with M/s KEONICS. However, M/s KEONICS was not made party before the Arbitral Tribunal. Further, it was also contended that there is no Arbitration Agreement between State and Respondent No.1 and as such, State should not have been arrayed as a party before the Arbitral Proceedings.

12. On this Aspect, learned counsel for the appellant has relied upon Section 7 of Arbitration and Conciliation Act, 1996, and the following Judgments:

Kerela SEB vs Kurien E Kalathil, (2018) 4 SCC 793

36) Jurisdictional precondition for reference to arbitration under Section 7 of the Arbitration and Conciliation Act is that the parties should seek a reference or submission to arbitration....Since referring the parties to arbitration has serious consequences of taking them away from the stream of civil courts and subject them to the rigour of arbitration proceedings, in the absence of arbitration agreement, the court can refer them to arbitration only with written consent of parties either by way of joint memo or joint application; more so, when Government or statutory body like the appellant Board is involve.

Waverly Jute Mills Co.Ltd vs Raymon & Co. (India) (P) Ltd, 1962 SCC Online SC 70

4[3]) An agreement for arbitration is the very foundation on which the jurisdiction of the arbitrators to act rests, and where that is not in existence, at the time when they enter on their duties, the proceedings must be held to be wholly without jurisdiction. And this defect is not cured by the appearance of the parties in those

proceedings, even if that is without protest, because it is well settled that consent cannot confer jurisdiction.

Consulting Engineers Group Limited Vs National Highways Authority of India *Reported in* ***2022 SCC OnLine Del 3253***

31) the consultants, l.e., M/s. Aecom in association with the petitioner can invoke the disputes resolution clause. It is the consultants and not the petitioner in his individual capacity who are referred to as "parties" in the arbitration agreement as contained in the Consultancy Agreement. Petitioner not being a party to the arbitration agreement in its individual capacity, cannot take recourse to the arbitration clause in its individual capacity, or approach this Court in individual capacity.

Geo Miller & Co. Pvt Ltd Vs Bihar Urban Infrastructure Development Corporation Limited & Anr, *Reported in* ***2016 SCC OnLine Del 6248***

26) It was then contended that the agreement has been signed not only by Gammon India but also by Geo Miller and therefore Geo Miller could its own capacity seek to invoke the arbitration clause. The Court is unable to agree with the above submission. The wording of the agreement is clear that the consortium would be represented through M/s. Gammon India Limited, lead member of the consortium through its authorised signatory. The parties never intended that one of the members of the consortium separately invoked the arbitration agreement....

13. By relying upon the above mentioned precedents, it is contended by learned counsel for the appellants that the award without an arbitration agreement is without jurisdiction.

14. It is further contended that the Claimants did not have locus to maintain the Arbitral Proceedings and thereby had no locus to make any against the Appellant herein. Other contention that was raised was Obligations under contracts cannot be assigned. The following precedents are relied upon:

> ***Khardah Company Ltd Vs Raymon and Co (India) Private Ltd,*** *Reported in* ***AIR 1962 SC 1840*** *in Para 7*
>
> ***(Para 7) -*** *An assignment of a contract might result by transfer either of the rights or of the obligations thereunder. But there is a well-recognised distinction between these two classes of assignments. As a rule obligations under a contract cannot be assigned except with the consent of the promise, and when such consent is given, it is really a novation resulting in substitution of liabilities. On the other hand rights under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties.*
>
> ***7. Kapilaben And Others Vs Ashok Kumar Jayantilal Sheth And Others,*** *Reported in* ***(2020) 20 SCC 648*** *in Para 24 & 30 to 31*
>
> ***(Para 24)*** *- A party to a contract obligations/liabilities without the consent of the other cannot assign their party*
>
> ***(Para 30) -*** *Where the conferment of a right or benefit is contingent upon, or coupled with, the discharge of a burden or liability, such right or benefit cannot be transferred without the consent of the person to whom the co-extensive burden or liability is owed.*
>
> ***(Para 31) -*** *It would be inequitable for a promisor to contract out his responsibility to a stranger if it is apparent that the promisee would not have accepted performance of the contract had it been offered by a third party. This is especially important in business relationships where the pre-existing goodwill between parties is often a significant factor influencing their decision to contract with each other.*

15. Additionally, it was also contended that non-joinder of of M/s KEONICS renders award a nullity by relying upon the following judgment:

> ***Khetrabasi Biswal vs Ajaya Kumar Baral and Ors*** *reported in* ***(2004) 1 SCC 317*** wherein it was held that,
>
> ***(Para 6) -*** *The procedural law as well as the substantive law both mandates that in the absence of a necessary party, the order passed is a nullity and does not have a binding effect.*

16. It is further contended that that multiple arbitral proceedings cannot be initiated for same subject and for the same claim in AC No. 298/2022 and AC 204/2021. In this regards, the appellant placed reliance on the following Judgments:

> In ***Gammon India Ltd. and Anr vs National Highways Authority of India,*** *reported in* ***2020 SCC Online DEL 659,*** wherein it was observed as under:
>
> ***(Para 28) -*** *Multiple arbitrations before different Arbitral Tribunals in respect of the same contract is bound to lead to enormous confusion. The constitution of multiple Tribunals in respect of the same contract would set the entire arbitration process at naught, as the purpose of arbitration being speedy resolution of disputes, constitution of multiple tribunals is inherently counter-productive.*
>
> ***M/s Tantia Constructions Limited Vs Union Of India,*** *Reported in* ***2022 LiveLaw (SC) 624***

There cannot be two arbitration proceedings with respect to the same contract/transaction.

Himalaya Complex Vyapari Kalyan Sangh Supela Bhilai Society Vs Himalaya Commercial Complex Private Limited, In high Court of Chhattisgar, In ARBR No.11/2024 *Reported in* ***2024:CGHC:47358*** *in Para 10*

(Para 10) – *Since another petition being ARR No.41/2023 has already been filed by one Meharban Singh in an individual capacity, who is also stated to be a member of the applicant-Society, this petition is not maintainable as two petitions for the same relief, cannot be entertained.*

17. It is also contended that Respondent No.2 delegated its obligation to the Respondent No.1 for consideration which violates the tender process and Agreement and ultimately committing a fundamental breach of the Contract and if Respondent No-2 really wanted to delegate its obligations, it should have done with the consent of M/s KEONICS and Appellant. Therefore, the Award is liable to be set aside.

18. As regards the claiming of damages are concerned, it is contended that the Respondent No.2 has acted upon the letter dated 17.10.2015, i.e., to include the clauses in the bank guarantee that were there in the earlier bank

guarantees and therefore, respondents having acted upon should not have claimed damages against the appellant.

19. It is further contended that the Respondent No-2 requested for cancellation and agreed not to initiate any legal action claiming any kind of damages. Having agreed not to initiate legal action, now Respondent No-1 cannot claim damages, being a member of consortium with Respondent No.2, they are bound by the undertaking given by the Respondent No.2.

20. With regard to unsustainability of damages, it is contended that the Arbitral Tribunal failed to independently appreciate the evidence lead by Respondent No-1 and also failed to independently assess the evidence. Without, even corroboration, a sum of Rs.4,13,35,588/- has been awarded on the ground of employing nearly 150 persons for the purpose of conducting a survey over 30 days in respect of 4396 schools, incurring cost of Rs.9403/- per school. It is further contended that without there being any specific pleading in the claim statement filed by Respondent No-2, the

Arbitral Tribunal awarded the damages under various heads in contrary to the judgments

In Oil And Natural Gas Corporation Limited Vs Off-Shore Enterprises Inc, *Reported in* ***(2011) 14 SCC 147*** *in Para 11 to 25*

(Para – 20)-*"The award of Rs 8.7 crores. This itself showed that the figures were not based on any acceptable basis and were imaginary. Further, though the claim was for 90 days, at the time of arguments before the arbitrators, the claim was increased to Rs 1306.80 lakhs for 180 days which works out to Rs 7.26 lakhs per day. There is absolutely no basis for such a claim. Further, it should be remembered that the drill-ship was never got repaired and the claim which was an estimate was increased by several times on "guess-estimates" at the time of arguments before the arbitrators. We have referred to this aspect just to show that the claims were increased by ONGC without any basis and accepted and awarded by the Arbitral Tribunal in a casual manner, which amounts to legal misconduct."*

State Of Rajasthan and Another Vs Ferro Concrete Construction Private Limited, *Reported in* ***(2009) 12 SCC 1*** *in Para 55*

(Para 55) - *While the quantum of evidence required to accept a claim may be a matter within the exclusive jurisdiction of the arbitrator to decide, if there was no evidence at all and if the arbitrator makes an award of the amount claimed in the claim statement, merely on the basis of the claim statement without anything more, it has to be held that the award on that account would be invalid. Suffice it to say that the entire award under this head iswholly illegal and beyond the jurisdiction of the arbitrator, and wholly unsustainable.*

Rajasthan State Mines & Minerals Ltd Vs Eastern Engineering Enterprises And Another, *Reported in* ***(1999) 9 SCC 283*** *in Para 44j*

(Para 44j)-*The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable; the arbitrator is a tribunal selected by the parties to decide the disputes according to law*

Bharat Coking Coal Ltd Vs L.K Ahuja, *Reported in* ***(2004) 5 SCC 109*** *in Para 24.*

(Para 24)-*Here when claim for escalation of wage bills..... It is not unusual for the contractors to claim loss of profit arising out of diminution in turnover on account of delay in the matter of completion of the work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted. In this case, no such material is available on record. In the absence of any evidence, the arbitrator could not have awarded the same. This aspect was very well settled in Sunley (B) & Co. Ltd. v. Cunard White Star Ltd. [(1940) 1 KB 740: (1940) 2 All ER 97 (CA)) by the Court of Appeal in England. Therefore, we have no hesitation in deleting a sum of Rs 6,00,000 awarded to the claimant.*

Unibros Vs All India Radio, *Reported in* ***(2023) SCC OnLine SC*** *1366 in Para 20*

(Para 20)*-The First Award was interfered with by the High Court for the reasons noted above. The Arbitrator, in view of such previous determination made by the High Court, could have granted damages to the appellant based on the evidence on record. There was, so to say, none which on proof could have translated into an award for damages towards loss of profit. A claim for damages, whether general or special, cannot as a matter of course result in an award without proof of the claimant having suffered injury. The arbitral award in question, in our opinion, is patently illegal in that it is based on no evidence and is, thus, outrightly perverse; therefore, again, it is in conflict with the "public policy of India" as contemplated by section 34(2)(b) of the Act.*

Kailash Nath Associates Vs Delhi Development Authority And Another *Reported in* ***(2015) 4 SCC 136*** *in Para 43.6, 44.*

(Para 43.6)-*The expression "whether or not actual damage or loss is proved to have been caused thereby means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.*

(Para 44)-*The Division Bench has gone wrong in principle. As has been pointed out above, there has been no breach of contract by the appellant. Further, we cannot accept the view of the Division*

Bench that the fact that DDA made a profit from re-auction is irrelevant, as that would fly in the face of the most basic principle on the award of damages-namely, that compensation can only be given for damage or loss suffered. If damage or loss is not suffered, the law does not provide for a windfall.

Batilboi Environmental Engineers Limited Vs Hindustan Petroleum Corporation Limited And Another *Reported in* ***(2024) 2 SCC 375*** *in Para 16*

(Para 16)-*This is without doubt, a sound legal and correct proposition. However, the computation of damages should not be whimsical and absurd resulting in a windfall and bounty for one party at the expense of the other. The computation of damages should not be disingenuous. The damages should commensurate with the loss sustained....*

21. It is contended that, regarding the Earnest Money Deposit, Arbitral Tribunal has awarded Rs. 1,32,31,438/- on the ground of delay in return of Earnest Money Deposit, even when, 10 crores payment towards Earnest Money Deposit was not made by Respondent No-1. Coming to Bank Guarantees, it was contended that the Respondent No-1 has claimed Rs.85,65,16,439/- towards Bank Guarantees without there being production of any documents to show that it had furnished 21 bank guarantees.

22. Regarding other heads for awarding, such as Travel, Food, Beverage Cost of employees, and salary of staff, Supply of excess furniture it is contended that even without any documentary evidence, the sum was awarded and therefore

the same cannot sustain. Further it is contended that, for the Project Monitoring Software, without there being production of any documents as to where the said project monitoring software was installed, a sum of Rs. 5,97,87,030 was awarded and as such is outside the scope of the agreement and thereby patently illegal.

23. With regards to the award of sum of Rs. 21.60 crores towards the loss of profits and opportunity, it is contended that the Respondent No-2 has gone into the liquidation and the same cannot be attributed to the State, appellant herein.

24. Per contra, it is contended by the Learned Counsel for the Respondent No-1 that the State has raised several additional grounds which were not raised before the commercial court and the interference of by an appellate Court under section 37 of the Arbitration and Conciliation Act, 1996 is even more restricted, i.e., the scope of interference is narrower under Section 37 of the Arbitration and Conciliation Act, 1996, as discussed in the judgments referred below:

Konkan Railway Corporation Limited vs Chenab Bridge Project Undertaking, (2023) 9 SCC 85,

"18. *At the outset, we may state that the jurisdiction of the court under Section 37 of the Act, as clarified by this Court in MMTC Ltd. v. Vedanta Ltd. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293] , is akin to the jurisdiction of the court under Section 34 of the Act. [Id, SCC p. 167, para 14:"14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision."] 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."*

NTPC Ltd. v. L&T - MHPS Boilers (P) Ltd., (2023) 5 HCC (Del) 158 : 2023 SCC OnLine Del 4225

13. It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2-A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

MMTC Ltd. Vs Vedanta Ltd., *reported in* ***(2019) 4 SCC 163,*** *wherein it was held that*

"14. *As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be*

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

In State of Maharastra vs M/s Hindustan Construction Co. Ltd. *reported in* ***AIR 2010 SC 1299****, wherein it was held as follows:*

36. *As noticed above, in the application for setting aside the award, the appellant set up only five grounds viz. waiver, acquiescence, delay, laches and res judicata. The grounds sought to be added in the memorandum of arbitration appeal by way of amendment are absolutely new grounds for which there is no foundation in the application for setting aside the award. Obviously, such new grounds containing new material/facts could not have been introduced for the first time in an appeal when admittedly these grounds were not originally raised in the arbitration petition for setting aside the award. Moreover, no prayer was made by the appellant for amendment in the petition under Section 34 before the court concerned or at the appellate stage.*

37. *As a matter of fact, the learned Single Judge in para 6 of the impugned order has observed that the grounds of appeal which are now sought to be advanced were not originally raised in the arbitration petition and that the amendment that is sought to be effected is not even to the grounds contained in the application under Section 34 but to the memo of appeal. In the circumstances, it cannot be said that discretion exercised by the learned Single Judge in refusing to grant leave to the appellant to amend the memorandum of arbitration appeal suffers from any illegality.*

25. Respondent No.1 has also taken support from the Judgment of Bombay High Court, in **Goa Shipyard Ltd. vs Shoft Shipyard (P) Ltd. 2024 SCC Online Bom 1168** wherein it was held as follows:

> 52. A perusal of the impugned orders passed by the District Court shows that there is no whisper of such a ground having been agitated in the applications filed under Section 34 of the Arbitration Act. No such ground has been raised even in the appeals filed before this Court under Section 37 of the Arbitration Act. While discussing the scope of jurisdiction under Section 37 of the Arbitration Act, this Court hereinabove has found that an appellant cannot be permitted to raise grounds that have not been raised before the Court below under Section 34 of the Arbitration Act. This is because, a proceeding under Section 37 of the Arbitration Act may be referred to as an appeal, but it is not an appeal on facts and law as in the classical sense, since the jurisdiction being exercised by the Court under Section 37 of the Arbitration Act is narrow, limited and in any case, it cannot go beyond the specified jurisdiction available to the Court under Section 34 of the Arbitration Act.

26. It is further contended that Appellant cannot seek to vary its defence with every stage of challenge and therefore shall restrict their grounds only to

i) The Arbitral Tribunal has not substantively answered with respect to the preliminary objection raised by the state government that there is no privity of contract between the appellant state and the claimant Respondent.

ii) The appellant state was not given time to adduce evidence or cross examine the claimant's witness. Hence, the award is one sided.

iii) The Claim of the claimant is based on mere guesstimate.

iv) The damages arise from a non-existent contract.

27. It was also contended that the Appellant state is seeking a re-assessment of merits and re-appreciation of evidence adduced which is not permissible under the law. Further it was contended that, the Appellant State had an opportunity to test the veracity of the evidence adduced before the Sole arbitrator, however, the appellant state neither objected for the marking of the documents nor the state cross examined the claimant witness or adduce its own and the cross examination was treated as NIL. The precedents that were relied upon in this regard are as follows:

Chief Engineer IV, Delhi State Industrial and Infrastructure Development Corporation Ltd. vs. Well Protect Manpower Services Pvt. Ltd. *reported in* ***MANUL/DE/1012/2022***

"34. The scope of examination under Section 34(2A) of the A&C Act is limited This Court is not required to revaluate and reappreciate the evidence and supplant its opinion over that of the Arbitral Tribunal. Unless the decision is found to be patently illegal, no interference with the Arbitral Award is called for. In Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.: Supreme court had authoritatively explained that even an erroneous view would not vitiate the Arbitral Award on the ground of patently illegality unless the error is manifest and one that strikes at the root of the matter. It is trite law that an Arbitral Tribunal is a final adjudicator of the evidence and its conclusion cannot be interfered with except where it is found to be patently illegal or in conflict with the public police of India. In Dyna Technologies Private Limited v. Crompton Greaves Limited: MANU/SC/1765/2019 (2019) 20 SCC 1, the Supreme Court had held that courts would not interfere merely because an alternative view on facts exists. Similarly, in the case of Associate Builders v. Delhi Development Authority: MANU/SC/1076/2014: (2015) 3 SCC 49, the Supreme Court had belt that "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.'

Ircon International Ltd. vs. Afcons Infrastructure Ltd. *reported in* ***MANU/DE/2675/2023***

78. In view of the aforementioned judgment, it is evident that the Arbitrator, being the ultimate master of the Arbitration, can adjudicate the claims in a manner that is on the lines of basic tenants of Law and the Principles of Natural Justice and Jurisprudence. As long as the Award does not shock the conscience of the Court, it warrants no interference of the Court.

79. In the instant case, a perusal of the award, as well as the findings which have also been reproduced above, shows that the learned Arbitrator has passed an extremely elaborate and comprehensive Award after dealing with each claim raised on

behalf of the parties, the facts of the case, the material on record, including documents referred to, the precedents cited on behalf of the parties.

80. xxx

81. xxx

82. xxx

83. The law which has been settled by the Hon'ble Supreme Court is that the scope of interference with an Arbitral Award under Section 34 of the Act, 1996 is fairly limited and narrow. The Courts shall not sit in an appeal while adjudicating a challenge to an Award which is passed by an Arbitrator, the master of evidence, after due consideration of facts, circumstances, evidence, and material before him."

Union of India and 2 others v. Larsen and Tubro Limited (L&T) *reported in* ***2023:AHC:117074-DB***

"27. The law is settled that, where the Arbitrator has assessed the material and evidence placed before him in detail, the court while considering the objections under Section 34 of the said Act does not sit as a court of appeal and is not expected to re-appreciate the entire evidence and reassess the case of the parties. The jurisdiction under Section 34 is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the Court to interfere with the award merely because in the opinion of the Court, another view is possible. The duty of the Court in these circumstances is to see whether the view taken by the Arbitrator is a plausible view on the fact, pleadings and evidence before the Arbitrator.

28. As laid down by the Supreme Court in Mcdermott International Inc vs Burn Standard Co. Ltd. & Ors6, the supervisory role of the Court in arbitration proceedings has been kept at a minimum level and this is because the parties to the agreement make a conscious decision to exclude the courts' jurisdiction by opting for arbitration as the parties prefer the expediency and finality offered by it.

29. That in the matter of SSangyong Engineering and Construction Company Pvt. Ltd. v. NHA17, the Hon'ble Supreme Court has clarified that, under no circumstances, can any court interfere with an Arbitral Tribunal on the ground that justice seems not to have been done. This would amount to, entering into the merits of the

dispute, which is contrary to the ethos of Section 34 of the Arbitration Act.

30. In view of the aforesaid facts and circumstances, we come to the conclusion that the appellants have failed to make out any case for interference under Section 37 of the Arbitration Act. The Arbitral Tribunal after considering all the evidence on record has passed a detailed speaking order dealing with each and every aspects of the claim separately. All the claims of the claimant were not allowed and only those amount which were actually payable was awarded by the Arbitral Tribunal. Consequently, the application under Section 34 of the Arbitration Act has rightly been dismissed by the Commercial Court, Jhansi. The appellants (herein) has failed to make out any case which would call for interference by this Court."

State of U.P. v. Allied Constructions *reported in* ***2003 (10) AIC 148 para 4;***

"4. Any award made by an arbitrator can be set aside only if one or the other term specified in Sections 30 and 33 of the Arbitration Act, 1940 is attracted. It is not a case where it can be said that the arbitrator has misconducted the proceedings. It was within his jurisdiction to interpret Clause 47 of the Agreement having regard to the fact-situation obtaining therein. It is submitted that an award made by an arbitrator may be wrong either on law or on fact and error of law on the face of it could not nullify an award. The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof. Interpretation of a contract, it is trite, is a matter for arbitrator to determine (see M/s Sudarsan Trading Co. v. The Government of Kerala, MANU/SC/0361/1989: [1989]1SCR665). Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law. An error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is a plausible one, the Court will refrain itself from interfering [see Chemicals Ltd. U.P. V. Searsole State Electricity Board MANU/SC/0118/2001:

[2001]2SCR13a n d ISPAT Engineering & Foundry Works, B.S. City, Bokaro v. Steel Authority of India Ltd., B.S. City, Bokaro - MANU/SC/0389/2001: [2001]3SCR1190]."

28. ***The Judgment in Larsen Air Conditioning and Refrigeration Company vs Union of India and Ors.,*** reported in ***(2023) 15 SCC 472*** was relied upon to contend that the scope of interference to the Appellate Court to review findings under section 37 of the Act is narrower, wherein it was observed as follows :

> *15. The limited and extremely circumscribed jurisdiction of the court under Section 34 of the Act, permits the court to interfere with an award, sans the grounds of patent illegality i.e. that "illegality must go to the root of the matter and cannot be of a trivial nature"; and that the Tribunal "must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground" [ref : Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , SCC p. 81, para 42]. The other ground would be denial of natural justice. 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.*

29. The Other judgments relied upon by the Respondent along with the observations are as follows:

Haryana Tourism Limited vs Kandhari Beverages Limited *reported in* ***(2022) 3 SCC 237*** *it was observed as follows:*

9. As per settled position of law laid down by this Court in a catena of decisions, an award can be set aside only if the award is against the public policy of India. The award can be set aside under Sections 34/37 of the Arbitration Act, if the award is found to be contrary to : (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal. None of the aforesaid exceptions shall be applicable to the facts of the case on hand. The High Court has entered into the merits of the claim and has decided the appeal under Section 37 of the Arbitration Act as if the High Court was deciding the appeal against the judgment and decree passed by the learned trial court. Thus, the High Court has exercised the jurisdiction not vested in it under Section 37 of the Arbitration Act. The impugned judgment and order [Kandhari Beverages Ltd. v. Haryana Tourism Ltd., 2018 SCC OnLine P&H 3233] passed by the High Court is hence not sustainable.

Dyna Technologies Pvt. Ltd Vs Crompton Greaves Ltd. *reported in* ***(2019) 20 SCC 1 :***

24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, 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. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial

wisdom behind opting for alternate dispute resolution would stand frustrated.

Associate Builders vs. Delhi Development Authority *reported in* ***MANU/SC/1076/2014***

"12.....

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. Thus an award based on 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. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts."

Sudarsan Trading Co. vs. Government of Kerala & Ors. *Reported in* ***MANU/SC/0361/1989***

"32. …….. Once there is no dispute as to the contract, what is the interpretation of that contract is a matter for the arbitrator and on which court cannot substitute its own decision"

"35. In the instant case, the High Court seems to have fallen into an error of deciding the question on interpretation of the contract. In the aforesaid view of the matter we are of the opinion that the High Court was in error. It may be stated that if on a view taken of a contract, the decision of the not the only correct view, the award cannot be examined by the court in the arbitrator on certain amounts awarded, is a possible view though perhaps manner done by the High Court in the instant case.

36. In light of the above, the High Court, in our opinion, had no jurisdiction to examine the different items awarded clause by clause by the arbitrator and

to hold that under the contract these were not sustainable in the facts found by the arbitrator."

Tamil Nadu Civil Supplies Corporation Ltd. vs. Albert & Co. *reported in* ***MANU/TN/0178/2000***

"12. It is clear from section 34(2) of the Arbitration and Conciliation Act that the award may be set aside by the court only under certain contingencies. The party making the application must furnish proof that the party was under some incapacity or the arbitration agreement is not valid under law or the party making the application was not given proper notice of the appointment of an arbitrator. According to sub-clause (4), the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration and according to section 34(2)(b), the party must establish that the arbitral award is in conflict with the public policy of India. It is therefore, clear that only limited ground is available to enable the party to set aside the award passed by the arbitrator. It is settled position of law that the award cannot be interfered with simply because another view is possible on the available things. Only if the petitioner is able to establish that his case falls within the category of Section 14. this court can interfere.

13. Normally, the general principles which the court dealing with the arbitrator on the evidence is Justified; the court has to confine itself to the restrictions enumerated therein and where the parties get the matter adjudicated through the arbitrator of their own choice and the arbitrator gives a detailed award, the court can interfere in the decision only if the Arbitrator is a Judge of the choice of the parties and his decision unless there is an error apparent on the face of the award which makes it unsustainable is not to be set aside even the curt as a court of law would come to a different conclusion on the same facts. The court

cannot reappraise the evidence and it is not open to the court to sit on the appeal over the conclusion of the arbitrator. It is not open to the court to set aside a finding be cancelled are those mentioned in the Arbitration Act. Where the arbitrator of fact arrived at by the arbitrator and only grounds on which the award can assigns cogent grounds and sufficient reasons and no error of law or misconduct is cited, the award will not call for interference by the court in exercise of the power vested in it. Where the arbitrator is a qualified taking into consideration the technical aspects of the matter, the court would technical person and expert, who is competent to make assessment by generally not interfere with the award passed by the arbitrator."

30. It is further contended regarding the locus standi, to make claim against the Appellant state, that the Appellant State had, earlier in WP No. 56088/2016 which was filed on the same subject matter, admitted themselves that the matter had to be referred to the arbitration and thereby indicating their approbation and reprobation wherein on one hand claiming that respondents have no locus and on the other hand seeking the matter to be referred to the arbitration.

31. The Respondent’s objections to the stand of appellants that respondent has no locus standi are as follows:-

i) The manner in which entire project was structured was in such a way that the state would have executed the same using technically sound third parties (a single entity or a consortium) commissioned by KEONICS and references to consortium are made at various instances such as a) The Request for proposal tabled for the bid process in Clause 7; b)Prime bidder in clause 7 mentions that "in case of a consortium"; c) Clause 8 of RFP also specified that the bidders could be individual companies or a consortium of companies. Though the Request for Proposal loses its significance once the award was made and the contract was executed, it is necessary to be looked into in order to determine whether a consortium and sub-contractors were contemplated in the tender process.

ii) In the agreement between the appellant state and KEONICS there was a specific clause regarding the "sub-contractors" and the said clause mandates the KEONICS to keep the state informed of all the sub contracts awarded. The agreements not only make provisions for the consortium but also brings a direct nexus between the government and the

consortium and therefore, respondent being a partner in consortium, can maintain claims against the state appellant and the state cannot possibly argue that the partners of consortium are strangers and have no nexus to urge claim against the state.

32. It was contended on the point of privity of contract that the court though restricted the scope of privity of contract to the signatories initially, expanded the scope over the years and in the instant case, the claimant has been engaged in both the performance and the consequent termination of contract. It was also contended that the appellant state was expressly informed and accepted the bank guarantees as well and hence, doctrine of acquiescence and estoppel apply squarely on the Appellant, State. As far as the privity of contract is concerned, the following cases have been relied upon:

> ***SOCAR Turkey Petrol Enerji Dagitim vs. MV Amoy Fortune and Ors.***
>
> ***45.*** *In the facts of the case and considering the law cited, we find substance in the submissions advanced by the learned Senior Counsel Mr. Chinoy that at an interlocutory stage it would not be appropriate to deal*

with the issue of privity of contract. It can only be dealt with after leading evidence.

46. *We are of the view that merely based on the bunker invoice and delivery receipt, it would be difficult to form a conclusive opinion at an interlocutory stage that there was no privity of contract between the appellant and the respondent. There is no such overwhelming material to reach to such conclusion. The issue in this case is that whether privity of contract is presumed to be in existence. Such issue relating to the maritime claim in question would thus be required to be addressed at the trial of the suit. It is an admitted position that the Master/Chief Engineer of the vessel had acknowledged the receipt of bunkers supplied to the vessel.*

47. *We further find substance in the submissions advanced by the learned Senior Counsel Mr. Chinoy that even if bunkers were supplied at the instance of Force shipping/Sentex LDX, the liability of the vessel to pay for the bunkers supplied does not get diminished on the plea of lack of privity of contract.*

Khushalbhai Mahijibhai Patel v. Firm of Mohmadhussain Rahimbux, 1980 Supp SCC 1 at page 4

10. *Two main contentions were pointedly raised before the High Court: (1) that the supply of the goods by the plaintiff to the defendant Firm and the issuance of cheques by the latter in favour of the former shifted the onus of proof on the point of privity of contract to the defendant Firm, and, (2) that the failure of the defendant Firm to produce the best evidence which was available to it in the form of its own and firm R.K. Patel's account books should have been treated as a clincher.*

13. *After hearing learned counsel for the parties at length we are of the opinion that the very approach of the High Court to the determination of the crucial question in the case, namely, that of privity of contract between the parties, is erroneous. The fact that the goods had been sent to the defendant Firm by the plaintiff and had been received by the former was admitted on all hands and was sufficient to raise a*

presumption, till the contrary was proved, that an order had been placed for the supply of the goods with the plaintiff by the defendant Firm; and it was immaterial whether the person actually placing the order was a partner of the defendant Firm or a person authorised by it. The plaintiff could thus bank on the said fact for the purpose of discharging the initial onus which lay on him to prove privity of contract between the parties and it was for the defendant Firm to rebut the presumption which the fact raised as stated above. In rejecting the first of the two main contentions raised before the High Court on behalf of the plaintiff, therefore, the High Court fell into a serious error.

M/S Global emerald vs Meck Petroleum DMCC *(Karnataka High Court: Original Side Appeal No. 10/2024 in Civil Petition No. 56/2024) it was observed as follows:*

In Paras 44 and 46 of the Judgment in Socar Turkey's case referred to supra, the Hon'ble Supreme Court held that a privity of contract shall have to be presumed even if bankers were not supplied against clear and specific order placed by the master of the chief engineer of the vessel and the pliantiff's door cannot be shut on the principle of lack of privity of contract. It was further held that merely based on the bunker invoice and the delivery receipt, it would be difficult to form conclusive opinion at an interlocutory stage about the privity of contract between the parties and such issue relating to the maritime claim requires to be addressed at the trial of the suit.

33. As far as the evidence for the various heads of damages that are awarded, it was contended that the respondents had sufficiently proved and the exhibits were marked from P32 to P99 and the state, appellant, did not file any admission or denial of documents thereby giving way to deemed admission. It was further contended that it is

permissible under law, the usage of discretion in certain claims and award of damages. In this regard, the following cases have been relied upon,

Construction and Design Services vs Delhi Development Authority *reported in* ***AIR 2015 SC 1282***

"17. *Applying the above principle to the present case, it could certainly be presumed that delay in executing the work resulted in loss for which the respondent was entitled to reasonable compensation. Evidence of precise amount of loss may not be possible but in the absence of any evidence by the party committing breach that no loss was suffered by the party complaining of breach, the court has to proceed on guesswork as to the quantum of compensation to be allowed in the given circumstances. Since the respondent also could have led evidence to show the extent of higher amount paid for the work got done or produce any other specific material but it did not do so, we are of the view that it will be fair to award half of the amount claimed as reasonable compensation."*

Maula Bux vs Union of India *reported in* ***AIR 1970 SC 1955*** , wherein it was observed as follows:

6. *".....In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him."*

34. In counter to the contention of the appellant (State), that 'there is a misrepresentation of facts', it was contended that the Appellant failed to state what facts were misrepresented and the same was not raised in objections before the Arbitral Tribunal. It was further contended that the Appellant made general denials instead of dealing the averment specifically and failure to do so would amount to admission of the same per judgment of The Delhi High Court in ***Asha Kapoor vs Hari Om Sharda***, reported in ***MANU/DE/1807/2010*** wherein it was held that

> *"17. The effect of Order 8 Rule 3 read along with rr 4 and 5 of the Code is that defendant is bound to deal specifically with each allegation of fact not admitted by him he must either deny or state definitely that the substance of each allegation is not admitted. The main allegations which form the foundation of the suit should be dealt with in that way and expressly denied. Facts not specifically dealt with will be taken to be admitted under Order 8 Rule 5 of the Code.*
>
> *"Order 8 Rule 5 of the Code is known as doctrine of non-traverse which means that where a material averment is passed over without specific be a statement that the fact is not admitted. If the plea is not taken in that must either be denied specifically or by necessary implication or there should manner, then the allegation should taken to be admitted."*
>
> *Hebbar and Ors. MANU/SC/7278/2007: 2007 (5) SCALE 598, observed: 19. Supreme Court in M. Venkataraman Hebbar (D) Bv L.RS. v. M. Rajgopal "Thus, if a plea which was relevant for the purpose of maintaining a suit had that*

the same had been admitted. A fact admitted in terms of Section 58 of not been specifically traversed, the Court was entitled to draw an inference the Evidence Act need not be proved."

Iswar Bhai C. Patel vs Harihar Behera and Ors. *reported in* ***AIR 1999 SC 1341***

"21. A Division Bench of the Patna High Court in Devji Shivji v. Karsandas Ramji and Anr. MANU/BH/0096/1954 1954(2)BLJR82, relying upon the decision of the Privy Council in Sardar Gurbakhsh Singh v. Gurdial Singh and Anr. (supra) and the Madhya Pradesh High Court in Guild Kharagjit Carpenter v. Narsingh Nandkishore Rawat MANU/MP/0042/1970: AIR1970MP225 have also taken the same view. The Madhya Pradesh High Court also relied upon the following observation of the Calcutta High Court in Pranballav Saha and Anr. v. Smt. Tulsibala Dassi and Anr MANU/WB/0183/1958: AIR1958Cal713:

The very fact that the defendant neither came to the box herself nor called any witness to contradict evidence given on oath against her shows that these facts cannot be denied. What was prima facie against her became conclusive proof by her failure to deny.

The Allahabad High Court in Arjun Singh v. Virender Nath and Anr. MANU/UP/0007/1971: AIR1971All29, held that:

the explanation of any admission or conduct on the part of a party must, if the party is alive and capable of giving evidence, come from him and the court would not imagine an explanation which a party himself has not chosen to give.

It was further observed that:

If such a party abstains from entering the witness box it must give rise to an inference adverse against him.

Maroti Bansi Teli v. Radhabai w/o Tukaram Kunbi and others *reported in* ***AIR 1945 Nag 60***

"12…….

The usual practice at the bar is to accept matters which are not challenged either in the pleadings or in cross-examination as fully established once a person enters the box and swears to it. If the rule were otherwise parties would be obliged to encumber the record with a mass of material which in the result might prove wholly unnecessary. The practice, therefore, is when it is intended to challenge a point which is not specifically challenged in the pleadings to cross-examine to it formally the first time it is raised in a witness's deposition. The other side is then placed upon-its guard and is given notice that it must establish the point as fully as it can. When that is not done it means that the point is not challenged and can be accepted."

A.E.G. Carapiet v. A.Y.Derderian *reported in* ***AIR 1961 Cal 359***

"9. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses."

A.S.Duraisami Chettiar Sons v. S. Rathnaswami Gounder *reported in* ***MANU/TN/0025/1992***

"4……

Not merely can the court base its conclusion of the effect of evidence taken as a whole but it may also draw adverse inference against a party who being in a position to adduce better evidence deliberately abstains from doing so, MANU/PR/0053/1916: AIR 1917 PC 6, Guruswami Nadan v. Gopalaswami Odayar, ILR 42 Mad

629: AIR 1919 Mad 444 and Raghavendra Rao v. Venkataswami Naicken MANU/TN/0316/1929 : AIR1930Mad251 We respectfully accept the correctness of the said observations."

Jagajeet Singh Lyallpuri (dead) through LRs & others v. M/s. Unitop Apartments and builders *by order dated 03.12.2019 passed in Civil Appeal No.692/2016*

"13. From a perusal of the proceedings dated 28.11.2009 it would be clear that both contentions raised by the learned counsel for the respondent herein and which were accepted by the learned Single Judge to ultimately remand the matter, would not be justified. Firstly, in the presence of the parties and their learned counsel it has been recorded that they do not wish to cross-examine any of the witnesses whose affidavits have been discharged without being cross-examined and no grievance was made either by the parties or their learned counsel and who were present. It is in that view the evidence was taken as closed on 28.11.2009 and the issues fro consideration was settled for arguments on the same day. In that circumstance having consented to the said procedure, it would not be open for the respondent herein to approbate and reprobate so as to raise a different contention at this point. Having accepted the said procedure and respondent is estopped from raising such contention before the learned Single Judge that the arbitrator misconducted himself by not permitting the parties to cross-examine the witness and also that the learned Arbitrator being more than 70 years of age and suffering from knee problem has pressurized the respondent to speed up the matter and the evidence was closed. It is rather intriguing for us to note that such contention has not only been permitted to be raised, but also accepted by the learned Single Judge to remand the matter, which is wholly unjustified.

14. We are of such opinion for the reason be followed in arbitration proceedings was settled by a separate order

dated 13.01.2010. 28.11.2009 during the course of the proceedings before the learned Arbitrator. Thereafter the award was passed only on Though the respondent was represented by their learned counsel and the order dated 28.11.2009 was passed while recording the proceedings of that day, neither, any application had been filed before the learned Arbitrator to recall the said order and provide opportunity to tender evidence any other or cross examine, nor was a challenge raised by initiating proceedings, before the award was passed. It is only subsequent to the award being passed such contention is being raised as an afterthought, which in such event cannot be accepted.

Construction and Design Services v. Delhi Development Authority *reported in* ***AIR 2015 SC 1282***

"18. Applying the above principle to the present case, it could certainly be presumed that delay in executing the work resulted in loss for which the Respondent was entitled to reasonable compensation. Evidence of precise amount of loss may not be possible but in absence of any evidence by the party committing breach that no loss was suffered by the party complaining of breach, the Court has to proceed on guess work as to the quantum of compensation to be allowed in the given circumstances. Since the Respondent also could have led evidence to show the extent of higher amount paid for the work got done or produce any other specific material but it did not do so, we are of the view that it will be fair to award half of the amount claimed as reasonable compensation."

The Apex Court in ***Muddasani Venkata Narsaiah v. Muddasani Sarojana*** *reported in* ***(2016) 12 SCC 288***, observed as follows:

"15. Moreover, there was no effective cross-examination made on the plaintiff's witnesses with respect to factum of execution of sale deed, PW 1 and

> *PW 2 have not been cross-examined as to factum of execution of sale deed. The cross-examination is a matter of substance not of procedure one is required to put one's own version in cross-examination of opponent. The effect of non-cross-examination is that the statement of witness has not been disputed. The effect of not cross-examining the witnesses has been considered by this Court in Bhoju Mandal v. Debnath Bhagat [Bhoju Mandal v. Debnath Bhagat, AIR 1963 SC 1906] . This Court repelled a submission on the ground that the same was not put either to the witnesses or suggested before the courts below. Party is required to put his version to the witness. If no such questions are put the Court would presume that the witness account has been accepted as held in Chuni Lal Dwarka Nath v. Hartford Fire Insurance Co. Ltd. [Chuni Lal Dwarka Nath v. Hartford Fire Insurance Co. Ltd., 1957 SCC OnLine P&H 177 : AIR 1958 P&H 440].”*

35. It was also contended that the State Government, despite being notified by eight (8) emails, remained absent before the Arbitral Tribunal, i.e., no one appeared on behalf of the Appellant, State and no objections were filed on behalf of the State and thus The Arbitral Tribunal was left with no option but to place the Appellant, State *ex-parte* by order dated 10.12.2021. It was further contended that, after Claimant adducing further evidence and getting marked the exhibits P77 to P99, the Appellant State’s evidence was taken as NIL and the Appellant State did not take any steps to cross examine or to adduce any evidence and therefore it is the

state who intentionally chose not to cross examine and adduce evidence.

36. It was also contended that the additional grounds raised for the first time are also beyond the limitation period by relying upon following citations

Satyam Computer Services Limited v. Venture Global Engineering Ltd. and others *reported in* ***(2010) 3 CompLJ 690 (AP);***

"17. In Pushpa P. Mulchandani v. Admiral Radhakrishin Tahilani MANU/MH/0021/2001: (2001) 1 Comp Lj 66 (Bom): (2001) 2 Arb LR 284 (Bom), B.N. Srikrishna, J (as His Lordship then was) referring to Madan Lal case, supra, agreed with the view that a petition under Section 34 of the Arbitration Act has to be made within limitation prescribed by the Act and that it is not permissible for the court to permit amendment of the petition after period of limitation as it would tantamount to entertain a fresh petition beyond period of limitation. Sitting in a Bench, the same learned judge in Vastu Invest and Holdings Private Limited v. Gujarat Lease Financing Limited MANU/MH/0105/2001: (2001) 2 Arb LR 315 (Bom) (DB), was emphatic that a ground not initially raised in the petition to challenge the award would not be permitted to be subsequently raised by the amendment if the application for amendment itself was beyond the limitation fixed for filing the petition challenging the award'. A similar view was taken by Aurangabad Bench in Anilkumar Jinabhai Paid v. Pravinchandra jinabhai Patel MANU/MH/0333/2007: (2007) 3 Arb LR 91 (Bom) and a judgment, dated 29.4.2009 in Patel Engineering Company Limited v. Konkan Railway Corporation Limited MANU/MH/0383/2009: (2010) 3 Comp 646 (Bom).

Vastu Invest and Holdings Private Limited v. Gujarat Lease Financing Limited *reported in* ***MANU/MH/0105/2001;***

"15. We may point out that under the 1940 Act, the limitation for bringing a petition to challenge an award was prescribed by the Limitation Act, subject to the provisions of the Limitation Act and the power of condonation of delay contained therein. The 1996 Act has radically altered the situation. We cannot lose sight of the fact that the 1996 Act is intended to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law, inter alia, as indicated in the preamble. Consequently, the Act has permitted very limited scope of challenge to an arbitral award. Section 34(1) provides that an arbitral award may be challenged only by an application for setting aside such award in accordance with subsections (2) and (3). Sub-sections (2) and (3) of Section 34 provide that an arbitral award may be set aside only on the grounds narrated in subsection (2). Finally, sub-section (3) provides that such an application for setting aside an award may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 33, from the date on which the said request had been disposed of by the Arbitral Tribunal. Thus there is extremely narrow power of condonation of delay vested in the Court by the proviso. The proviso empowers the Court, if satisfied that the applicant was prevented by sufficient cause from making the application within the period of three months, to entertain the application "within a further period of 30 days, but not thereafter".

17. In these circumstances, we are of the view that the Chamber Summons, if it was intended to raise an independent ground of challenge to the arbitral award, could not have been entertained after the period of three months plus the grace period of 30 days as provided in the proviso to sub-section (3) of Section 34. If, on the other hand, it was not intended to raise an independent ground, on the basis that the petition Itself contained the ground, the chamber summons was wholly unnecessary as necessary amplifications could be put forward during submissions. Looked at either way, the chamber summons was rightly dismissed, in our view. Consequently, we find no substance in Appeal No. 683 of 2000. Hence, this appeal must fail and is hereby dismissed."

Prakash Industries Limited v. Bengal Energy Limited and others *reported in* ***MANU/WB/0536/2020;***

"18. It should be reiterated that although Hindustan Construction spoke in favour of an expansive view of amendments in the interest of justice, the proposed amendments in that decision were ultimately disallowed since they were found to constitute new grounds which did not have a foundation in the original application. In the present case, the grounds relating to the Sale of Goods Act cannot be traced to the existing grounds and would therefore constitute new grounds in that sense (as opposed to Venture Global, where subsequent facts, disclosed after the passing of the Award, were allowed as having a causative link with the facts, constituting the Award). In the considered view of this court, the test for allowing or rejecting an amendment to existing grounds in an Arbitration Petition is whether the proposed grounds would necessitate filing of a fresh application for setting aside of the Award. As several of the new grounds also do not have a foundational basis in the existing petition, the petitioner cannot enter through the 'amplification' route as has been contended and if the amplification recourse fails, the petitioner has no other statutory cushion to fall back on under the existing law

Para "19. In the present case, the grounds relating to the provisions of the Sale of Goods Act and related grounds concerning the issues of damages are new grounds which would take the application for amendment outside the purview of "amplification" of the existing grounds as contended by the petitioner. Since this Court is inclined to follow the dictum of Fiza and Emkay in that an application for setting aside will ordinarily not require anything beyond the record of what was before the Arbitrator, the present amendment is not one which should be permitted".

37. As regards the group of companies doctrine and binding of non–signatory to the contract, following Judgment is relied:

Cox & Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1 : (2024) 2 SCC (Civ) 1 : (2024) 251 Comp Cas 680 : 2023 SCC OnLine SC 1634 at page 83

148. *This Court in Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] observed : first, that the use of the expression "any person" reflects the legislative intent of enlarging the scope of the words beyond the "parties" who are signatory to the arbitration agreement; second, a signatory party to an arbitration agreement may have a legal relationship with the party claiming through or under the party on the basis of the Group of Companies doctrine; and third, in case of a multi-party contract, a subsidiary company which "derives" its basic interest from the parent contract would be covered under the expression "claiming through or under".*

149. *The first proposition of law relies on the construction of the expression "any person" to conclude that the language of Section 45 has wider import. However, the expression "any person" cannot be singled out and construed devoid of its context. The context, in terms of Sections 8 and 45, is provided by the subsequent phrase — "claiming through or under". Therefore, such "any persons" are acting only in a derivative capacity. Since an arbitration agreement excludes the jurisdiction of national courts, it is essential that the parties consent, either expressly or impliedly, to submit their dispute to the Arbitral Tribunal.*

150. *The second and third propositions of law state that a non-signatory party may claim through or under a signatory party by virtue of its legal or commercial relationship with the latter. However, this proposition is contrary to the common law position as evidenced in Sancheti [Mayor & Commonalty & Citizens of the City of London v. Sancheti, 2009 Bus LR 996 : 2008 EWCA Civ 1283 (CA)] and Tanning Research Laboratories [Tanning Research Laboratories Inc. v. O'Brien, 1990 HCA 8 (Aust)] according to which a mere legal or commercial connection is not sufficient to allow a non-signatory to claim through or under a party to the arbitration agreement. In A. Ayyasamy [A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386 : (2017) 1 SCC (Civ)*

79] , this Court observed that the Arbitration Act should be interpreted "so as to bring in line the principles underlying its interpretation in a manner that is consistent with prevailing approaches in the common law world". Therefore, even though a subsidiary derives interests or benefits from a contract entered into by the company within a group, they would not be covered under the expression "claiming through or under" merely on the basis that it shares a legal or commercial relationship with the parties.

151. *One of the questions that has been referred before us is whether the phrase "claiming through or under" in Section 8 could be interpreted to include the Group of Companies doctrine. The Group of Companies doctrine is founded on the mutual intention of the parties to determine if the non-signatory entity within a group could be made a party to the arbitration agreement in its own right. Such non-signatory entity is not "claiming through or under" a signatory party. As mentioned above, the phrase "claiming through or under" is used in the context of successors-in-interest that act in a derivative capacity and substitute the signatory party to the arbitration agreement. To the contrary, the Group of Companies doctrine is used to bind the non-signatory to the arbitration agreement so that it can agitate the benefits and be subject to the burdens that it derived or is conferred in the course of the performance of the contract. The doctrine can be used to bind a non-signatory party to the arbitration agreement regardless of the phrase "claiming through or under" as appearing in Sections 8 and 45 of the Arbitration Act.*

152. *In Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] , this Court joined the non-signatory entities as parties to the arbitration agreement in their own rights on the basis that they were signatories to ancillary agreements which were closely interlinked with the performance of the principal agreement containing the arbitration agreement. This Court in Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] reasoned that the non-signatory entities, being part of the same corporate group as the signatory parties, were subsidiaries in interest or subsidiary companies, and therefore were "claiming through or under" the signatory parties. As*

held above, the phrase "claiming through or under" only applies to entities acting in a derivative capacity and not with respect to joinder of parties in their own right. Therefore, we hold that the approach of this Court in Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] to the extent that it traced the Group of Companies doctrine to the phrase "claiming through or under" is erroneous and against the well-established principles of contract and commercial law. As observed above, the existence of the Group of Companies doctrine is intrinsically found on the principle of the mutual intent of parties to a commercial bargain.

170. *In view of the discussion above, we arrive at the following conclusions:*

170.1. *The definition of "parties" under Section 2(1)(h) read with Section 7 of the Arbitration Act includes both the signatory as well as non-signatory parties;*

170.2. *Conduct of the non-signatory parties could be an indicator of their consent to be bound by the arbitration agreement;*

170.3. *The requirement of a written arbitration agreement under Section 7 does not exclude the possibility of binding non-signatory parties;*

170.4. *Under the Arbitration Act, the concept of a "party" is distinct and different from the concept of "persons claiming through or under" a party to the arbitration agreement;*

170.5. *The underlying basis for the application of the Group of Companies doctrine rests on maintaining the corporate separateness of the group companies while determining the common intention of the parties to bind the non-signatory party to the arbitration agreement;*

170.6. *The principle of alter ego or piercing the corporate veil cannot be the basis for the application of the Group of Companies doctrine;*

170.7. *The Group of Companies doctrine has an independent existence as a principle of law which stems*

from a harmonious reading of Section 2(1)(h) along with Section 7 of the Arbitration Act;

170.8. *To apply the Group of Companies doctrine, the Courts or tribunals, as the case may be, have to consider all the cumulative factors laid down in Discovery Enterprises [ONGC Ltd. v. Discovery Enterprises (P) Ltd., (2022) 8 SCC 42 : (2022) 4 SCC (Civ) 80] . Resultantly, the principle of single economic unit cannot be the sole basis for invoking the Group of Companies doctrine;*

170.9. *The persons "claiming through or under" can only assert a right in a derivative capacity;*

170.10. *The approach of this Court in Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] to the extent that it traced the Group of Companies doctrine to the phrase "claiming through or under" is erroneous and against the well-established principles of contract law and corporate law;*

170.11. *The Group of Companies doctrine should be retained in the Indian arbitration jurisprudence considering its utility in determining the intention of the parties in the context of complex transactions involving multiple parties and multiple agreements;*

170.12. *At the referral stage, the referral court should leave it for the Arbitral Tribunal to decide whether the non-signatory is bound by the arbitration agreement; and*

170.13. *In the course of this judgment, any authoritative determination given by this Court pertaining to the Group of Companies doctrine should not be interpreted to exclude the application of other doctrines and principles for binding non-signatories to the arbitration agreement.*

222. *Finally, in ONGC Ltd. v. Discovery Enterprises (P) Ltd. [ONGC Ltd. v. Discovery Enterprises (P) Ltd., (2022) 8 SCC 42 : (2022) 4 SCC (Civ) 80] while the decision on whether the non-signatory was a party was remitted to the Arbitral Tribunal, the Court undertook a comprehensive review of the academic literature and judicial pronouncements on the issue. The Court*

compendiously concluded the following : (SCC p. 75, paras 40-41)

"40. In deciding whether a company within a group of companies which is not a signatory to arbitration agreement would nonetheless be bound by it, the law considers the following factors:

(i) The mutual intent of the parties;

(ii) The relationship of a non-signatory to a party which is a signatory to the agreement;

(iii) The commonality of the subject-matter;

(iv) The composite nature of the transaction; and

(v) The performance of the contract.

41. Consent and party autonomy are undergirded in Section 7 of the 1996 Act. However, a non-signatory may be held to be bound on a consensual theory, founded on agency and assignment or on a non-consensual basis such as estoppel or alter ego [Gary Born, International Commercial Arbitration, 2nd Edn., Vol. 1, at p. 1418.] ."

223.5. *In Discovery [ONGC Ltd. v. Discovery Enterprises (P) Ltd., (2022) 8 SCC 42 : (2022) 4 SCC (Civ) 80] , the Court comprehensively reviewed the above cases and ironed out the various tests formulated in them. It held that (a) mutual intent of the parties, (b) relationship of the non-signatory to the signatory, (c) commonality of subject-matter, (d) composite nature of transaction, and (e) performance of the contract, are the factors to determine whether the non-signatory is a party. [Id, para 40] These factors emphasise mutual intention and draw from the tests laid down in Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] and Reckitt Benckiser [Reckitt Benckiser (India) (P) Ltd. v. Reynders Label Printing (India) (P) Ltd., (2019) 7 SCC 62 : (2019) 3 SCC (Civ) 453] but do not include the test of single economic reality as a determinative factor, as*

held in MTNL [MTNL v. Canara Bank, (2020) 12 SCC 767].

It is pertinent to mention in brief the earlier round of litigation before this Court on the same subject matter:

38. The petitioners sought quashing of the termination and release of their bank guarantees. The State argued that the petitioners had no locus standi as they were not signatories to the original agreement. The Court held that even though the petitioners were not direct parties, their rights were affected as subcontractors whose guarantees were accepted by the State, thereby giving them sufficient locus. However, since the dispute involved complex questions of fact and there existed an arbitration clause, the Court declined to exercise its writ jurisdiction under Article 226 of the Constitution. Instead, it dismissed the petitions but granted the petitioners liberty to pursue arbitration or any other legal remedy available in law.

39. The State of Karnataka challenged the order of the learned Single Judge dated 11.09.2019 in W.P. No. 56088 of 2016, wherein while dismissing the writ petition filed by

Siddharth Infotech Pvt. Ltd., the Court had granted the petitioner liberty to invoke the arbitration clause or pursue any other legal remedy. The State contended that Siddharth Infotech had no right to seek remedy against it, as there was no direct privity of contract between them. However, the Division Bench of this Court dismissed the appeal, holding that the mere grant of liberty to seek legal remedies does not prejudice the State and that any party claiming violation of rights must have a remedy in law, invoking the principle "ubi jus ibiremedium." The Court clarified that whether the remedy will ultimately succeed or not is a question for the appropriate forum, and that all contentions on both sides would remain open in any arbitration or civil proceedings. Thus, the appeal was dismissed with no costs.

40. The petitioners therein, The State of Karnataka claimed that they are not parties to the agreement between Respondent No.1 (Siddarth Infotech Pvt. Ltd.) and Respondent No.3 (Everonn Education Ltd.) and therefore should not be included as a party in any arbitration. The court held that this issue will only arise when arbitration is initiated,

and at that time, the petitioners can raise their objection. The decision on their inclusion will be made by the Court or Arbitrator based on merits and law and finally keeping the question open for future determination, the Special Leave Petition was disposed of accordingly.

41. Having considered the arguments advanced and perusing the citations and materials placed before this court, before dwelling upon the actual issue involved in the current appeal, this court would like to examine the scope of interference under Section 37 of Arbitration and Conciliation Act 1996.

> ***The Apex Court In MMTC Ltd. v. Vedanta Ltd.,*** *reported in* ***(2019) 4 SCC 163,*** *it was observed as follows:*
>
> ***11.*** *As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury*

[Associated Provincial Picture Houses v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

The Observations in Haryana Tourism Ltd. v. Kandhari Beverages Ltd., *reported in* ***(2022) 3 SCC 237****, reads as follows:*

9. *As per settled position of law laid down by this Court in a catena of decisions, an award can be set aside only if the award is against the public policy of India. The award can be set aside under Sections 34/37 of the Arbitration Act, if the award is found to be contrary to : (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal. None of the aforesaid exceptions shall be applicable to the facts of the case on hand. The High Court has entered into the merits of the claim and has decided the appeal under Section 37 of the Arbitration Act as if the High Court was deciding the appeal against the judgment and decree passed by the learned trial court. Thus, the High Court has exercised the jurisdiction not vested in it under Section 37 of the Arbitration Act. The impugned judgment and order [Kandhari Beverages Ltd. v. Haryana Tourism Ltd., 2018 SCC OnLine P&H 3233] passed by the High Court is hence not sustainable.*

Larsen Air Conditioning & Refrigeration Co. v. Union of India, (2023) 15 SCC 472 : 2023 SCC OnLine SC 982 at page 478

15. The limited and extremely circumscribed jurisdiction of the court under Section 34 of the Act, permits the court to interfere with an award, sans the grounds of patent illegality i.e. that "illegality must go to the root of the matter and cannot be of a trivial nature"; and that the Tribunal "must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground" [ref : Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015)

2 SCC (Civ) 204] , SCC p. 81, para 42]. The other ground would be denial of natural justice. 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.

Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213 : 2019 SCC OnLine SC 677 at page 170

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.

Delhi Airport Metro Express (P) Ltd. v. DMRC, *reported in* ***(2022) 1 SCC 131 : (2022) 1 SCC (Civ) 330 : 2021 SCC OnLine SC 695 at page 150***

29. *Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and*

> *dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality".*
>
> *40. From the conspectus of the above judgments, it is clear that the court exercising the jurisdiction under section 37 of the Act, can set aside the award if the award is found to be contrary to : (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal and the patent illegality means illegality that goes to the root of the matter.*

42. Now, let us examine the role of KEONICS. The record is clear that KEONICS was the nodal agency through which the entire project was conceived, tendered, contracted and supervised. The agreement was between the State and KEONICS; the claimant derived its position only through KEONICS, and it was KEONICS that invited tenders, executed agreements, and channeled obligations to the consortium. Without KEONICS, there would have been no contract at all. Yet, KEONICS was not impleaded before the Tribunal. In the absence of KEONICS, the Tribunal could not have effectively adjudicated whether the termination was justified or whether damages were attributable to the State. The exclusion of

KEONICS has deprived the proceedings of the presence of the one party whose role was indispensable and this is where the foundational defect arises. Infact, there is no privity of contract between the State and the claimant, as the contract is with the KEONICS and not with the State. The claimant's rights and liabilities were derived solely through KEONICS, and in its absence, there was no direct contractual nexus with the State that could give rise to an arbitrable dispute.

> *The Apex Court in* ***Khetrabasi Biswal v. Ajaya Kumar Baral, (2004) 1 SCC 317 : 2004 SCC (L&S) 182 : 2003 SCC OnLine SC 1292 at page 319*** *observed as follows :*
>
> *6. The procedural law as well as the substantive law both mandates that in the absence of a necessary party, the order passed is a nullity and does not have a binding effect.*
>
> *The Apex Court in* ***Ram Kumar v. State of U.P., (2023) 16 SCC 691 : 2022 SCC OnLine SC 1312 at page 694,*** *regarding the non-joinder of necessary parties observed as follows:*
>
> *15. This Court in Mumbai International Airport [Mumbai International Airport (P) Ltd. v. Regency Convention Centre & Hotels (P) Ltd., (2010) 7 SCC 417 : (2010) 3 SCC (Civ) 87] had an occasion to consider as to who is a necessary party to the proceedings. It will be relevant to refer to para 15 of the said judgment, which reads thus : (SCC p. 423)*
>
> *"15. A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is*

> *liable to be dismissed. A "proper party" is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance."*
>
> *16. It could thus be seen that a necessary party is a person in whose absence no effective decree could be passed by the Court. It has been held that if a "necessary party" is not impleaded, the suit itself is liable to be dismissed.*

43. Thus, it is clear that it is important that a necessary party is to be impleaded and in the absence of the necessary party, order passed would not have any binding effect. In the case at hand, KEONICS was not a peripheral or optional party but the nodal agency through which the project was structured, tendered, and administered. In its absence, the Tribunal lacked the capacity to effectively determine whether the termination was valid or whether liability for damages could properly be attributed to the State or the claimant. By proceeding without KEONICS, the Tribunal, in the opinion of this court committed an error of law that goes to the root of the matter. This omission deprived the proceedings of

completeness, led to adjudication without consideration of vital obligations and evidence, and rendered the award inherently defective. Such a foundational flaw does not amount to a mere error of law, but an illegality that goes to the root of the matter in the view of this Court and thereby, qualifying as patent illegality under the statutory framework and therefore, the Award is unsustainable under law.

44. In view of the above circumstances, the appeal is ***allowed*** and the Order dated 31.07.2023, in Com.A.P.No.79/2022 on the file of LXXXII Additional City Civil & Sessions Judge, Bengaluru (CCH.83) and the Award dated 18.05.2022 passed by the Arbitral Tribunal, are hereby set aside.

Sd/-
(ANU SIVARAMAN)
JUDGE

Sd/-
(DR. K.MANMADHA RAO)
JUDGE

BNV
ct-adp