

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

ARBITRATION APPEAL NO. 21 OF 2017

Ispat Industries Ltd. (Now JSW Steel Coated Products Ltd.) A company incorporated under the Companies Act, 1956, having its registered office at JSW Centre, Bandra Kurla Complex, Bandra (East), Mumbai-400051 and having its one of the Plant at A-10/1 & A-10/2, MIDC Industrial Area, Kalmeshwar-441501 & its one of the office at 2nd Floor, Poonam Plaza, Palm Road, Civil Lines, Near Akashwani Square, Nagpur – 440001, Tel.No. +91-7118-271401-06, Fax : +91-7118-271400/66, acting through its Principal Officer/Authorised Person Shri Sekar Santhana Bhadhawaj, Aged about 41 years, Occ. - Service, Resident of Nagpur.

.... **APPELLANT**

VERSUS

Maharashtra Airport Development Company Limited (MADC) having its office at 1st Floor, Central Facility Building, MIHAN SEZ, Nagpur 441 108, Maharashtra, INDIA, Tel.No. : + 91-7104-665665, Fax : + 91-7104-665600, E-mail :jmd@madcindia.org acting through its Managing Director/Joint Managing Director.

.... **RESPONDENT**

Ms. Akansha Wanjari, Counsel for the appellant,
Mr. Sumant Deopujari, Counsel for the respondent.

CORAM : ROHIT B. DEO, J.

DATE OF RESERVING THE JUDGMENT : 06-01-2021
DATE OF PRONOUNCING THE JUDGMENT : 28-01-2021

JUDGMENT :

The appellant is the original claimant (hereinafter referred to as the 'claimant') and is aggrieved by the judgment and order dated 09-12-2016 rendered by the learned Principal District Judge, Nagpur (PDJ) in Miscellaneous Civil Application 834/2009 whereby the application preferred by the claimant under Section 34 of the Arbitration and Conciliation Act (the Act) is rejected and the award dated 27-10-2009 made by the learned Arbitrator is upheld.

2. The claimant is engaged in manufacture of steel products.
3. The respondent-Maharashtra Airport Development Company Limited (hereinafter referred to as the MADC) is a Government company incorporated under the Companies Act, 1956 and tasked with the development of Airports. MADC is the Nodal Agency for development of the Multi-Model International Hub at Nagpur (MIHAN).
4. Substantial land was acquired in the vicinity of the Nagpur Airport and a Special Economic Zone (SEZ), is carved out, with the purpose of allotment of plots to industries who would avail certain tax and other fiscal benefits.

5. The factual backdrop of the dispute which is culled out by the learned Arbitrator may now be noted.
6. The claimant addressed letter dated 20-12-2006 requesting MADC to allot 2 hectares of land in the SEZ and to quote a competitive price. The said letter conveyed that the claimant's technical team would coordinate with the MADC and select the site.
7. MADC responded by letter dated 24-1-2007 and conveyed to the claimant its decision to allot 5 acres of land @ Rs. 40,00,000/- (Rupees Forty Lakhs) per acre. The recitals in the letter dated 24-1-2007 which are reproduced by the learned Arbitrator read thus :

“You are requested to send us 20% of the total consideration as advance within seven days from the receipt of this letter. The balance 80% of the amount is to be paid at the time of taking possession of the land which shall be done within sixty days. However if you so desire, we can accept a Bank Guarantee for the remaining 80% of the amount and give you benefit for 80% of the amount on quarterly installments with effect from the date of firm letter of allotment.

Please note that possession of the land has to be taken within sixty days and the building design has to be submitted to MADC Ltd., the Special Project Authority, for approval, which shall be given within thirty days thereafter. The date of approval shall be treated as the zero date and within six months from the date you have to use your entire FSI of 1.5. At the end of this any remaining FSI shall extinguish itself.

The area of about 5 Acres of land is subject to actual measurement on the ground, which shall be jointly done by your officers along with the officers of MADC Ltd.

The allotment is subject to approval of the Board of Directors, which shall be obtained after 20% of advance payment.”

8. The claimant then addressed letter dated 07-2-2007 expressing gratitude and conveying to MADC that the claimant is making arrangements to pay the advance amount of 20% within a week's time.
9. MADC responded by letter dated 08-2-2007 asking the claimant to ensure that the advance payment of Rs.40,00,000/- (Rupees Forty Lakhs) be paid on or before 14-2-2007, failing which the consideration shall stand revised to Rs.51,00,000/- (Rupees Fifty One Lakhs) per acre.
10. The claimant deposited the amount of Rs.40,00,000/- (Rupees Forty Lakhs) on 13-2-2007 and requested MADC to forward the draft format of the bank guarantee since the claimant intended to pay the balance consideration in quarterly installments of Rs.40,00,000/- (Rupees Forty Lakhs) due and payable from the date of receipt of possession.

11. The Board of Directors of MADC, in its meeting held on 30-3-2007, resolved to approve the proposal for allotment of 5 acres of land @ Rs.40,00,000/- (Rupees Forty Lakhs) per acre to the claimant.

12. MADC addressed letter dated 12-4-2007 acknowledging the receipt of the advance amount and put the claimant on notice that the balance consideration is payable at the time of receiving possession of the land within the stipulated period of sixty days from the allotment letter dated 24-1-2007.

13. MADC sent a draft format of the bank guarantee and asked the claimant to verify the same from its banker and submit the bank guarantee within seven days. MADC further sent copy of document titled Policy for Land Allotment in MIHAN, SEZ (Payments and Construction). Clauses I, II, III, III(a) of the policy document which are culled out by the learned Arbitrator read thus :

I. The lessee is to pay 20% of the consideration as an advance payment to indicate their confirmed interest in the land required by their company. The cost of the land payable is Rs.44/- lakh per Acre.

II. Balance 80% is to be paid within a period of 30 days after the confirmed allotment has been received and the lessee shall take possession of the land.

III. If there is a request from the lessee then, MADC may consider giving allotment of land on the bank guarantee for

the remaining 80% of the total consideration towards the said land, on such condition that MADC may decide, however in the system of installment also possession of the land has to be taken within 30 days from the letter of allotment.

III a. In the event of non-payment of any amount of the balance 80% payment within the given period of 30 days or in the absence of giving bank guarantee for the balance amount, the advance payment of 20% shall be forfeited”

14. The learned Arbitrator notes that the figure “44” in Clause-I is apparently a typographical error and correct figure is “40”.

15. The claimant addressed letter dated 20-7-2007 to MADC, the relevant portion of which reads thus :

“This is to bring to your notice that you have the balance payment due for all four installments and the 1st such instruments is due since 13th May, 2007 which you have ignored to make the payment. You would also note from the record that the advance payment of 20% was made on 13th February, 2007 and the balance 80% payment was to be made in four equal installments and the Bank Guarantee was to be furnished for the equal amount of the installments but since then more than five months passed neither the Bank Guarantee reached this office nor you have submitted the over due payments. Therefore, we are serving this notice that we are going to forfeit your advance and withdraw the allocation.”

16. The claimant deposited Rs.40,00,000/- (Rupees Forty Lakhs) on 23-8-2007 which the claimant termed as “second installment” and conveyed the factum of the deposit to MADC vide letter dated 26-8-2007. MADC informed the claimant, vide letter dated

29-8-2007 that the payment of the second installment was delayed by three months and more and amount of interest of Rs.1,31,500/- (Rupees One Lakh Thirty One Thousand Five Hundred) is debited to the claimant's account.

17. The claimant addressed letter dated 05-12-2007 to MADC and the relevant portion thereof reads thus :

“Upon scrutinizing the current operating circumstances/ status in the entire matter, we have decided to request you for the refund of the allotment money deposited with you for the price of land provisionally allotted to us”

18. MADC responded by letter dated 31-3-2007 thus :

“This refers to your letter of 25th inst. on the above subject (Refund of allotment money). In this connection we would request you to refer to our letter dated 24-1-2007 vide which we served upon your Company notice stating forfeiture of advance payment and withdrawing allocation of land. Your delay in decision has caused financial/ marketing loss to company”

19. The claimant then addressed letter dated 15-1-2008 and the relevant statements read thus :

“1. During personal meeting with Mr. Sittarasu, Marketing Manager of MADC with Mr. Manoj Sharma of Ispat atacit assurance was given that if Ispat was withdrawing from the provisional allotment, it could get the refund.

2. The allotment was provisional. Though it was assured that a formal firm letter of allotment would be issued in due

course and that the allotment was subject to the approval of board of directors Ispat had not received any communication from MADC regarding firm letter of allotment or approval of board of directors.

3. Ispat had decided to request for refund of allotment money, after scrutinizing current operating circumstances/status in the entire matter. The Mihaan project was delayed. Hence no new conditions could be introduced every now and then. The decision taken by Mr. Sittarasu was not tenable as it seemed to be his individual decision and did not have the backing of the board of directors.

4. No loss had been caused to MADC as new allotments were made at much higher price”

20. The claimant then addressed legal notice dated 12-5-2008 through Counsel which MADC replied vide communication dated 25-5-2008. MADC asserted that there was a concluded agreement between the claimant and MADC of which breach is committed and MADC is entitled to appropriate Rs. 40,00,000/- (Rupees Forty Lakhs) deposited by the claimant, as compensation. The relevant portions in the letter dated 28-5-2008 addressed by the MADC read thus :

“Without prejudice to the right of our client to initiate appropriate proceedings against you for the recovery of the amount, my client calls upon you to pay an amount of Rs.40.00 lakhs as my client have deposited an amount of Rs.80.00 lakhs whereas in the latter under reply, you have expressed your entitlement to the extent of Rs. 40.00 lakhs only towards the alleged damages and compensation which you are not legally entitled for.

You are therefore requested to kindly arrange refund of Rs.40.00 lakhs along with interest at the rate of 18% forthwith, without prejudice to the right of my client to claim

the balance of Rs. 40.00 lakhs as per law.”

21. MADC followed up by addressing elaborate letter dated 27-6-2008, alongwith which cheque dated 26-6-2008 for Rs.40,00,000/- (Rupees Forty Lakhs) was enclosed.

22. The claimant approached the High Court in Writ Petition 3463/2008 *inter alia* assailing the decision of MADC of appropriating/forfeiting of Rs.40,00,000/- (Rupees Forty Lakhs)., The claimant and MADC submitted a praecipe expressing joint desire to have the dispute adjudicated under the provisions of the Act. The parties consented to the appointment of Mr, Justice A.A. Ginwala (Retired), as the sole Arbitrator.

23. The learned Arbitrator held that MADC was justified in forfeiting the amount of Rs.40,00,000/- (Rupees Forty Lakhs) and the claimant is, therefore, not entitled to refund. However, qua the amount of Rs.40,00,000/- (Rupees Forty Lakhs) which MADC refunded belatedly, the learned Arbitrator held the claimant entitled to interest.

24. The claimant assailed the award made by the learned Arbitrator under Section 34 of the Act.

25. Paragraph 25 of the application under section 34 of the Act reads thus :

“25. That the applicant submits that the applicant filed written notes of arguments and raise various points in Part III of it's written notes, which were not even looked into and nor the same were discussed or any finding was given thereon and in absence of any answer to the points on the issue reproduced herein the award of the Hon'ble Arbitrator is per se legal and not sustainable.

Whether the NA which is the Government Company/Public authority, can forfeit the amount paid to it for allotment of land, when there is no concluded contract and it is guilty of violation of its own terms/fulfilling the reciprocal contract ?

Whether the public sector NA can forfeit the amount when it has not been able to perform its part of reciprocal contact (assuming there is a concluded contract) i.e. to provide the basic amenities like electricity and infrastructure even on date, which were promised to be given long back and it is guilty of violation of rules of natural justice, equity and good consciences ?

Whether an individual officer who is not authorised to consent for an offer, is having authority to forfeit the amount in the event of withdrawal ?

Whether the decision of forfeiture by any individual Officer, in absence of any authority from the Board or common uniform policy, is permissible, particularly when the officers of the company failed to issue a “firm letter of allotment” or fulfill the reciprocal contract ?

Whether contract can be said to concluded when the exact plot number and its allocation in SEZ area is not identified, nature of allotment is not referred or decided, period of allotment is not decided, “Firm letter of allotment”

as contemplated in the letter communicating the provisional allotment has not been issued, and so on.

Whether NA public sector Company, in the present facts, can be allowed to have unjust enrichment by forfeiting the amount and refusing to pay the interest in violation of doctrine of legitimate expectation and Interest Act, 1978, even though it has not suffered any loss nor it is likely to suffer any loss ?”

26. The claimant then asserted that the learned Arbitrator ignored the provisions of sections 7 and 51 of the Indian Contract Act, 1872 (Contract Act) and the doctrine of ‘unjust enrichment’.

27. It would be apposite to notice the grounds raised by the claimant in the application under section 34 of the Act.

“i) That, the entire approach of the Hon’ble Arbitrator is faulty, perverse, biased against the settled principles of law and the principles of natural justice, and therefore, the award passed by the Hon’ble Arbitrator is liable to be set aside and modified thereby allowing the entire claim of the applicant.

ii) That, the Applicant has challenged the appreciation of the Terms of Contract and facts and came to a capricious conclusion that the non- applicant was entitled to forfeit the amount even without a notice of termination of the contract and therefore, the award passed by the Sole Arbitrator is liable to be modified thereby allowing the entire claim of the applicant.

iii) The finding of the Hon’ble Arbitrator that the letter dated 24-1-2007 was a concluded contract is not sustainable as such the award passed by the Sole Arbitrator is liable to be modified thereby allowing the entire claim of the applicant.

iv) *That the finding of the arbitrator that the applicant failed to prove that there existed a reciprocal contract which required no proof thereof and therefore the award passed by the Hon'ble Arbitrator is liable to be modified thereby allowing the entire claim of the applicant.*

v) *That, the arbitral award passed by the Hon'ble Arbitrator in excess of the authority and beyond the scope of this submission of the arbitration. It is submitted that it was beyond the scope of the arbitrator to interpret the terms and conditions and arrive at a presumption that the Board Resolution was known to the applicant more particularly in view of the categorical admission of the non-applicant in cross- examination that the same was not communicated. By passing the award in such a fashion, the Arbitrator has clearly acted in excess of his power and authority and, therefore, the award passed by the Arbitrator is liable to be modified thereby allowing the entire claim of the applicant.*

vi) *The award passed by the Arbitrator is apparently perverse, prejudiced and illegal order which is bound to be set aside by the Hon'ble Court in the instant proceedings. The Applicant submits that the Arbitrator, in excess of his power which is evident from the fact that the letter dated 24-1-2007 which refers to "Firm letter of allotment" is interpreted in the manner beneficial to the non-applicant ignoring the last line of the same letter that the approval was subject to the decision of the Board of Directors and as such the award is liable to be modified thereby allowing the entire claim of the applicant.*

vii) *That the Hon'ble Arbitrator exceeded the jurisdiction in arriving at a conclusion that there was a presumption regarding the knowledge of the resolution of the Board of Directors hence the award is liable to be modified accordingly.*

viii) *That the Hon'ble Arbitrator exceeded the jurisdiction in arriving at a conclusion that the money paid was earnest money and was liable to be forfeited and as such the said observations are to be modified.*

ix) *That the Hon'ble Arbitrator exceeded the jurisdiction though appreciated that the non-applicant accepted the fact*

that there was no allotment, no allocation of plot no. etc. however concluded that the payment of the 2nd installment was prejudicial to the interest of the applicant and as such there was an acceptance of the terms, which is liable to be set aside and modified accordingly.

x) That the interest awarded by the arbitrator in favour of the applicant is not as claimed by the applicant, which is liable to be modified, thereby allowing the entire claim of the applicant.

xi) 'Without meaning or intending any disregard or disrespect for the Arbitrator, the delay, in the present facts of the matter is unjustified and attacks the very procedure of the matter. The matter was heard by Hon'ble Arbitrator, who is around 80 years of age, on 16-8-2009, for a period of more than an hour, while the Award came to be pronounced only on 27-10-2009. This delay of more than 2 months and 10 days itself is fatal and it reflects in not considering very precious pleas, to be specific about the evidence of officer of MADC which was summoned by the IIL. In R.C. Sharma v. Union of India (1976) 3 SCC 474, the Apex Court after noticing that the Civil Procedure Code did not provide a time-limit in delivery of a judgment, held : "Nevertheless, we think that an unreasonable delay between hearing of arguments and delivery of a judgment. Unless explained by exceptional or extraordinary circumstances, is highly undesirable even when written arguments are submitted. It is not unlikely that some points which the litigant considers important may have escaped notice. But, what is more important is that litigants must have complete confidence in the result of litigation. This confidence tends to be shaken if there is excessive delay between judgment. Justice, as we have often observed, must not only be done but must manifestly appear to be done."

28. The learned PDJ rejected the application under section 34 of the Act vide judgment dated 09-12-2016. Paragraphs 2 to 5 of the judgment refer to the factual backdrop of the dispute and the operative part of the award. Paragraphs 5 and 6 refer to the submissions of the learned

counsel and in paragraph 7, the points arising for determination are culled out thus :

- 1) Does the applicant prove that the Award is vitiated by patent illegality appearing on the fact of the Award ?
- 2) Whether interference is warranted in the impugned Award ?
- 3) What order ?

29. Paragraph 9 onwards are preceded by the caption “reasons”. In paragraph 9, the learned PDJ delineates scope of interference in arbitral award.

30. In paragraph 10, reference is to the reasons given by the learned Arbitrator for rejecting the claim of refund of Rs.40,00,000/- (Rupees Forty Lakhs). Paragraph 11 of the judgment of the learned PDJ reads thus :

“11. The reasoning of the Learned Arbitrator on all the objections (a) to (d) raised by the Ispat appears to be plausible and cogent on the basis of material on record. No perversity in the Award at all could be shown by the Learned Counsel on behalf of the claimant.”

31. In paragraph 12 of the judgment of the learned PDJ, it is observed that the learned Arbitrator rightly held that the MADC sent to the claimant a document styled as ‘Land Allotment Policy’ and that the

witness of the claimant admitted that the terms and conditions thereof were acceptable to the claimant.

32. Paragraphs 13, 14, 15, 16 and 17 primarily cull out the observations and findings in the arbitral award and paragraphs 18 and 19 note the decisions cited.

33. The learner PDJ then observes in paragraph 20 thus :

“20. The Learned Arbitrator has minutely considered the oral and documentary evidence on record and with cogent reasons discussed the each and every point raised by the parties and passed the Award. No perversity in the Award. I answer Points No.1 and 2 according and pass the following order.

Order

(1) The Misc. Civil Application No. 834 of 2009 is rejected with costs.”

34. The learned Counsel Ms. Akanksha Wanjari for the claimants would submit that the learned Arbitrator committed a patent illegality in ignoring the substantive law of the land, and the learned PDJ, therefore, erred in not interfering with the award. The submission in the alternative is that the judgment of the learned PDJ is virtually unreasoned and the matter may be remanded.

35. The learned Counsel Mr. Sumant Deopujari would submit, with

equal vehemence, that the learned PDJ was not expected to write a judgment as if sitting in appeal. Mr. Sumant Deopujari would submit that considering the scope of judicial interference in exercise of power under section 34 of the Act, the learned PDJ was not expected to consider and record a finding on every ground raised in the application. The extension of the submission is that in the absence of perversity, the learned PDJ committed no error while upholding the award made by the learned Arbitrator, and, therefore, the reasons recorded by the learned PDJ will have to be tested in the said perspective.

36. In my considered view, the submissions of the learned Counsel Ms. Akansha Wanjari that the judgment impugned is virtually unreasoned, is will merited. In view of the order which proposed to pass, it would neither be necessary nor appropriate to consider muchless record a finding on the objections to the arbitral award on merits.

37. Paragraph 11 of the judgment of the learned PDJ which is reproduced supra, indicates that the learned PDJ found the reasoning of the learned Arbitrator on the objections (a) to (d) plausible and cogent on the basis of material on record. The learned PDJ observes that no perversity in the award could be shown. The learned PDJ then observes in paragraph 20 that the learned Arbitrator has minutely

considered the oral and documentary evidence on record and with cogent reasons discussed each and every point raised by the parties and that there is no perversity.

38. While the learned PDJ observes that the reasons qua objections (a) to (d) is plausible and cogent, it is not clear from the record whether the reference is to the submissions of the claimant in the arbitral proceedings or then the objections to the arbitral award raised in the memo of the application under section 34 of the Act. I have noted supra, that several objections were raised in the application under section 34 of the Act including the objection that the learned Arbitrator ignored the substantive provisions of sections 7 and 51 of the Contract Act and the doctrine of 'unjust enrichment'. The learned PDJ did not specifically deal with muchless adjudicate the grounds and labouring under the assumption that it would only be perversity or a ground akin thereto, that would render the arbitral award vulnerable, was content with recording her approval and confirmation of the findings with the cryptic observation that there is no perversity in the award and the findings on certain objections are plausible and cogent.

39. Mr. Sumant Deopujari would submit that the scope and ambit of the judicial interference in arbitral award would determine the nature

and extent of the reasons. It would, therefore, be apposite to consider the scope and ambit of Section 34 of the Act.

40. Section 34 of the Act, prior to the amendment introduced vide Act 3 of 2016, read thus:

“34. Application for setting aside arbitral award. -
(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).

2. An arbitral award may be set aside by the Court only if-

(a). the party making the application furnishes proof that-

(i). a party was under some incapacity, or

(ii). the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii). the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv). the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v). the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the

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

(b). the Court finds that-

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

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

Explanation – Without prejudice to the generality of sub-clause (ii) of clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside 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 that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.”

41. The phrase “public policy of India” was interpreted by the Supreme Court in a catena of decisions. Suffice it to refer to the

decision of the Supreme Court in *Oil and Natural Gas Corporation Limited vs. Western Geco International Limited, (2014)9 SCC 263*. The Supreme Court noted that the expression “public policy of India” fell for interpretation in *ONGC vs SAW Pipes Ltd.* and referred to and reproduced paragraph 31 of the said decision, which reads thus:

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

- (a) fundamental policy of Indian law; or*
- (b) the interest of India; or*
- (c) justice or morality; or*
- (d) in addition, if it is patently illegal.*

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

42. The Supreme Court then proceeded to consider the width and amplitude of the expression “fundamental policy of Indian Law”. It would be relevant to reproduce the following observations of the

Supreme Court, which are illuminating:

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

36. In Ridge v. Baldwin, the House of Lords was considering the question whether a Watch Committee in exercising its authority under Section 191 of the Municipal Corporations Act, 1882 was required to act judicially. The majority decision was that it had to act judicially and since the order of dismissal was passed without furnishing to the appellant a specific charge, it was a nullity. Dealing with the appellant’s contention that the Watch Committee had to act judicially,

Lord Reid relied upon the following observations made by Atkin L.J. in R. v. Electricity Commissioners, ex p. London Electricity Joint Committee Co. (1920) Ltd: (KB p.205)

“....Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King’s Bench Division exercised in these writs.”

37. The view taken by Lord Reid was relied upon by a Constitution Bench of this Court in [Associated Cement Companies Ltd vs. P.N. Sharma](#) wherein Gajendragadkar, C.J. speaking for the Court observed : (AIR p.1601, para 14)

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

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

The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian Law.

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

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an arbitral tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest".

43. The articulation in **ONGC vs Western GICO**, which significantly expanded the scope of the phrase "public policy" impelled the legislature to legislatively interject and the dominant intent of the amendment is, therefore, to minimize the interference of the Court in the decision of the Arbitral Tribunal.

44. Section 34 as amended by Act 3 of 2016 w.e.f. 23.10.2015 reads thus:

“34. Application for setting aside arbitral award. - (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).

2. An arbitral award may be set aside by the Court only if-

(a). the party making the application furnishes proof that -

(i). a party was under some incapacity, or

(ii). the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii). the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv). the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v). the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b). the Court finds that-

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

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

policy of India.

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

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

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

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

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

[2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.]

(3) An application for setting aside 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 that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time

determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section(5) is served upon other party.]”

45. The legislative intent to minimize the interference of the Court in the decision of the Arbitral Tribunal is manifested from the substitution of Explanation-1 to section 34(2)(b) which clarifies that an Award is in conflict with the public policy of India, **only** (emphasis supplied) – if

- (i) The making of the Award was induced or affected by fraud or corruption or was in violation of section 75 or section 81 or;
- (ii) It is in contravention with the fundamental policy of Indian law or;
- (iii) It is in conflict with the most basic notions of morality or justice.

46. The scope of interference in exercise of jurisdiction under section 34 of the Act, on the ground that the Award is in contravention with the fundamental policy of Indian law is further reduced in view of

explanation-2 which provides that the test as to whether there is a contravention with the fundamental policy of Indian law, **shall not entail a review on the merits of the dispute**. (emphasis supplied)

47. The learned counsel, are however, in unison that since the arbitration application under section 34 of the Act is preferred on 27.11.2009, albeit decided on 09.12.2016, the pre-amendment provisions of section 34 would apply. The submission is consistent with the enunciation of the Supreme Court in ***Ssangyong Engineering and Construction Company Limited vs. National Highways Authority of India (NHAI)***, [(2019) 15 SCC 131] which reads thus:

“16. Since the [Section 34](#) petition in the present case is dated 30.07.2016, an important question as to the applicability of the parameters of review of arbitral awards would arise in this case. More particularly, radical changes have been made by the Arbitration and Conciliation (Amendment) Act, 2015 [the 2015 Amendment Act] with effect from 23.10.2015 – in particular, in the “public policy of India” ground for challenge of arbitral awards. The question which arises is whether the amendments made in [Section 34](#) are applicable to applications filed under [Section 34](#) to set aside arbitral awards made after 23.10.2015.

17. This Court, in *BCCI v. Kochi Cricket (P.) Ltd.* (BCCI) has held that the [Amendment Act, 2015](#) would apply to [Section 34](#) petitions that are made after this date. Thus, this Court held (SCC pp 335 & 338 – 39, paras 75 and 78):

“75. Shri Viswanathan then argued, relying upon [R. Rajagopal Reddy v. Padmini Chandrasekharan](#), [Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.](#) [SEDCO Forex](#)

International Drill Inc. v. CIT and [SEDCO Forex International Drill Inc. v. CIT, (2005) 12 SCC 717] and Bank of Baroda v. Anita Nandrajog, that a clarificatory amendment can only be retrospective, if it does not substantively change the law, but merely clarifies some doubt which has crept into the law. For this purpose, he referred us to the amendments made in Section 34 by the Amendment Act and stated that despite the fact that Explanations 1 and 2 to Section 34(2) stated that “for the avoidance of any doubt, it is clarified”, this is not language that is conclusive in nature, but it is open to the court to go into whether there is, in fact, a substantive change that has been made from the earlier position or whether a doubt has merely been clarified. According to the learned Senior Counsel, since fundamental changes have been made, doing away with at least two judgments of this Court, being Saw Pipes Ltd. and Western Geco, as has been held in para 18 in HRD Corpn. v. GAIL (India) Ltd., it is clear that such amendments would only be prospective in nature. We do not express any opinion on the aforesaid contention since the amendments made to Section 34 are not directly before us. It is enough to state that Section 26 of the Amendment Act makes it clear that the Amendment Act, as a whole, is prospective in nature. Thereafter, whether certain provisions are clarificatory, declaratory or procedural and, therefore, retrospective, is a separate and independent enquiry, which we are not required to undertake in the facts of the present cases, except to the extent indicated above, namely, the effect of the substituted Section 36 of the Amendment Act.

78. The Government will be well-advised in keeping the aforesaid Statement of Objects and Reasons in the forefront, if it proposes to enact Section 87 on the lines indicated in the Government’s Press Release dated 7-3-2018. The immediate effect of the proposed Section 87 would be to put all the important amendments made by the Amendment Act on a back-burner, such as the important amendments made to Sections 28 and 34 in particular, which, as has been stated by the Statement of Objects and Reasons,

“... have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act”,

and will now not be applicable to [Section 34](#) petitions filed after 23-10-2015, but will be applicable to [Section 34](#) petitions filed in cases where arbitration proceedings have themselves commenced only after 23-10-2015. This would mean that in all matters which are in the pipeline, despite the fact that [Section 34](#) proceedings have been initiated only after 23-10-2015, yet, the old law would continue to apply resulting in delay of disposal of arbitration proceedings by increased interference of courts, which ultimately defeats the object of the 1996 Act. [These amendments have the effect, as stated in [HRD Corpn. v. GAIL \(India\) Ltd.](#), of limiting the grounds of challenge to awards as follows: (SCC p. 493, para 18)

*“18. In fact, the same Law Commission Report has amended [Sections 28](#) and [34](#) so as to narrow grounds of challenge available under the Act. The judgment in *ONGC v. Saw Pipes Ltd.*, has been expressly done away with. So has the judgment in *ONGC v. Western Geco International Ltd.* Both [Sections 34](#) and [48](#) have been brought back to the position of law contained in [Renusagar Power Plant Co. Ltd. v. General Electric Company](#), where “public policy” will now include only two of the three things set out therein viz. “fundamental policy of Indian law” and “justice or morality”. The ground relating to “the interest of India” no longer obtains. “Fundamental policy of Indian law” is now to be understood as laid down in *Renusagar*. “Justice or morality” has been tightened and is now to be understood as meaning only basic notions of justice and morality i.e. such notions as would shock the conscience of the Court as understood in [Associate Builders v. DDA](#). [Section 28\(3\)](#) has also been amended to bring it in line with the judgment of this Court in *Associate Builders*,*

making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one.”]

It would be important to remember that the 246th Law Commission Report has itself bifurcated proceedings into two parts, so that the [Amendment Act](#) can apply to court proceedings commenced on or after 23-10-2015. It is this basic scheme which is adhered to by [Section 26](#) of the Amendment Act, which ought not to be displaced as the very object of the enactment of the [Amendment Act](#) would otherwise be defeated.”
(emphasis supplied)

18. There is no doubt that the amendments made in Explanations 1 and 2 to [Section 34\(2\)\(b\)\(ii\)](#) have been made for the avoidance of any doubt, which language, however, is not found in [Section 34\(2A\)](#). Apart from the anomalous position which would arise if the Section were to be applied piecemeal, namely, that Explanations 1 and 2 were to have retrospective effect, being only to remove doubts, whereas sub-section (2A) would have to apply prospectively as a new ground, with inbuilt exceptions, having been introduced for the first time, it is clear that even on principle, it is the substance of the amendment that is to be looked at rather than the form. Therefore, even in cases where, for avoidance of doubt, something is clarified by way of an amendment, such clarification cannot be retrospective if the earlier law has been changed substantively. Thus, in [Sedco Forex International Drill, Inc. v. CIT \(SEDCO\)](#), this Court held: (sc P.724, para 17)

“17. As was affirmed by this Court in *Goslino Mario* a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also [Reliance Jute and Industries Ltd. v. CIT](#). An Explanation to a statutory provision may fulfill the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [[See Sonia Bhatia v. State of U.P.](#), SCC at p. 598, page 1282, para 24]. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect

from the time that the main provision came into force [[See Shyam Sunder v. Ram Kumar](#), SCC (para 44); [Brij Mohan Das Laxman Das v. CIT](#), SCC at page 354, [CIT v. Podar Cement \(P\) Ltd.](#), SCC at p. 506]. But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are “it is declared” or “for the removal of doubts”.

19. There is no doubt that in the present case, fundamental changes have been made in the law. The expansion of “public policy of India” in [ONGC Ltd. v. Saw Pipes Ltd.](#), [“Saw Pipes”] and [ONGC Ltd. v. Western Geco International Ltd.](#), [“Western Geco”] has been done away with, and a new ground of “patent illegality”, with inbuilt exceptions, has been introduced. Given this, we declare that [Section 34](#), as amended, will apply only to [Section 34](#) applications that have been made to the Court on or after 23.10.2015, irrespective of the fact that the arbitration proceedings may have commenced prior to that date”.

48. The Arbitral Award and the decision of the learned PDJ who interfered in exercise of jurisdiction under section 34 of the Act, will, therefore, have to be tested on the anvil of the pre-amended provisions of section 34. It would be necessary to briefly note few decisions of the Supreme Court on the pre-amended section 34, to understand the scope and amplitude of the jurisdiction of the Court to interfere with the Arbitral Award.

49. In *Renusagar Power Co. Ltd..vs.. General Electric Co, 1993(4) SCALE 44*, the Supreme Court while construing the expression “public policy” in the context of a foreign award, held that the award would be

set aside, as contrary to the public policy of India, if the Award is contrary to:

- (i) The fundamental policy of Indian law;
- (ii) The interest of India;
- (iii) Justice or morality.

50. The Supreme Court further held that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India since the statute is enacted to protect the economic interest of the nation. Disregarding orders passed by the superior Courts in India, was cited as an instance of contravention of the fundamental policy of Indian law.

51. In *ONGC vs SAW Pipes Ltd*, the Supreme Court held that in addition to the three grounds mentioned in *Renusagar Power Co. Ltd. v. General Electric Co.* “patent illegality” would be a ground to set aside an Arbitral Award. The Supreme Court added that the illegality must go to the root of the matter, and if the illegality is of trivial nature, it cannot be held that the Award is against the public policy. The Supreme Court further held that the Arbitral Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. In *Delhi Development Authority vs. R.S. Sharma and*

Company, New Delhi, [(2008)13 SCC 80, the Supreme Court summarize the law in paragraph 21, which reads thus:

“21. From the above decisions, the following principles emerge:

(a) An Award, which is

- (i) contrary to substantive provisions of law ; or*
- (ii) the provisions of the Arbitration and [Conciliation Act, 1996](#) ;*

or

- (iii) against the terms of the respective contract ; or*
 - (iv) patently illegal, or*
 - (v) prejudicial to the rights of the parties;*
- is open to interference by the Court under [Section 34\(2\)](#) of the Act.*

(b) Award could be set aside if it is contrary to :

- (a) fundamental policy of Indian Law; or*
- (b) the interest of India; or*
- (c) justice or morality;*

(c) The Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court.

(d) It is open to the Court to consider whether the Award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

With these principles and statutory provisions, particularly, [Section 34\(2\)](#) of the Act, let us consider whether the Arbitrator as well as the Division Bench of the High Court were justified in granting the Award in respect of Claims 1 to 3 and additional Claims 1 ti 3 of the claimant or the appellant DDA has made out a case for setting aside the Award in respect of those claims with reference to the terms of the Agreement duly executed by both parties.

52. I have already quoted the relevant observations in *Oil and*

Natural Gas Corporation Limited vs. Western Geco International Limited, supra. The said decision was considered by the Supreme Court in ***Associate Builders VS. Delhi Development Authority***, [(2015)3 SCC 49, and the enunciation is that the juristic principle of “judicial approach” demands that a decision be fair, reasonable and objective. Paragraphs 29 to 34 of the decision in *Associate Builders*, read thus :

“29. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

30. The Audi Alteram Partem principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in [Sections 18](#) and [34](#) (2) (a) (iii) of the Arbitration and Conciliation Act. These Sections read as follows:

"18. Equal treatment of parties.- The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

34. Application for setting aside arbitral award.- (1) ***

(2) An arbitral award may be set aside by the Court only if-

(a) the party making the application furnishes proof that-

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; "

31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where-

- (i) a finding is based on no evidence, or*
- (ii) an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or*
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.*

32. A good working test of perversity is contained in two judgments. In *Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons*, it was held (SCC page 317, para 7):

"7.It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

In Kuldeep Singh v. Commr. of Police, it was held (SCC 14 at para 10):

"10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. 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. *In PR. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.*, this Court held (SCC pp.

601 – 02, para 21):

"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in [Section 34\(2\)](#) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under [Section 34\(2\)](#) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

34. It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood."

53. The pre-amended section 34, therefore, envisaged judicial interference in the Arbitral Award, *inter alia*, if the Award is contrary to the fundamental policy of the Indian law, is patently illegal, is so unfair and unreasonable that it shocks the conscience of the Court, is contrary to the substantive provisions of law or the provisions of the Act or is against the terms of the contract or is prejudicial to the rights of the parties or the learned Arbitrator fails to adopt a "judicial approach". Notably, while in *Associate Builders VS. Delhi Development Authority*,

the Apex Court observes that it is neither necessary nor proper to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law, if on the facts proved the Arbitral Tribunal fails to draw an inference which ought to have been drawn, or if the inference drawn, is on the face of it, untenable resulting in miscarriage of justice, the Award shall be vulnerable to challenge.

54. The learned PDJ was, therefore, not right in assuming that the judicial interference in the arbitral award/s is confined to awards which are perverse. The pre-amendment position of law was that an arbitral award could be set aside, *inter alia* on the ground that the learned Arbitrator ignored the substantive provisions of law or the terms of the contract or the award is prejudicial to the rights of the parties or the learned Arbitrator failed to adopt a judicial approach. The award is also vulnerable to challenge on the anvil of the pre-amendment provisions if on the facts proved the learned Arbitrator fails to draw an inference which ought to have been drawn or the inference drawn, is on the face of it, untenable resulting in miscarriage of Justice.

55. Recording of reasons sub-serves twin salutary purposes. An unreasoned quasi judicial or judicial order does no service to the legal

dispensation system. The litigant is vitally interested in knowing the thought process underlying the decision and his faith in the credibility of the justice dispensation system is eroded if his contentions are merely recorded and no reasons given for rejection. The other purpose and jurisprudential logic that reasons must be recorded as would bring in public domain the link between the material and the ultimate decision, is that the superior Court would be better equipped to test the decision which is reasoned. Notably, section 37 of the Act provides the remedy of statutory appeal challenging the decision under Section 34 of the Act.

56. In *Gurdial Singh Fijji v. State of Punjab* (1979) 2 SCC 368, the Supreme Court observes that reasons are the link between the material and the actual conclusions. In *Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota v. Shukla and Brothers*, (2010) 4 SCC 785, the Supreme Court emphasized that the requirement of recording reasons is applicable with the greater rigor to the judicial proceedings.

57. In *State of Rajasthan v. Rajendra Prasad Jain*, (2008) 15 SCC 711, the Supreme Court emphasized that reason is the heartbeat of every conclusion and without reason the conclusion becomes lifeless.

58. It would be apposite to note the following observations of this Court in *Pipe Arts India (P) Ltd. v. Gangadhar Nathuji Golamare*, (2008) 6 Mah.LJ 280.

“18. Providing of reasons in orders is of essence in judicial proceedings. Every litigant who approaches the Court with a prayer is entitled to know the reasons for acceptance or rejection of such request. Either of the parties to the lis has a right of appeal and, therefore, it is essential for them to know the considered opinion of the Court to make the remedy of appeal meaningful. It is the reasoning which ultimately culminates into final decision which may be subject to examination of the appellate or other higher Courts. It is not only desirable but, in view of the consistent position of law, mandatory for the Court to pass orders while recording reasons in support thereof, however, brief they may be. Brevity in reasoning cannot be understood in legal parlance as absence of reasons. While no reasoning in support of judicial orders is impermissible, the brief reasoning would suffice to meet the ends of justice at least at the interlocutory stages and would render the remedy of appeal purposeful and meaningful. It is a settled canon of legal jurisprudence that the Courts are vested with discretionary powers but such powers are to be exercised judiciously, equitably and in consonance with the settled principles of law. Whether or not, such judicial discretion has been exercised in accordance with the accepted norms, can only be reflected by the reasons recorded in the order impugned before the higher Court. Often it is said that absence of reasoning may ipso facto indicate whimsical exercise of judicial discretion. Patricia Wald, Chief Justice of the D.C. Circuit Court of Appeals in the Article, “The Problem with the Courts : Black-robed Bureaucracy Or Collegiality Under Challenge observed as under:-

“My own guiding principle is that virtually every appellate decision requires some statement of reasons. The discipline of writing even a few sentences or paragraphs explaining the basis for the judgment insures a level of thought and scrutiny by the Court that a bare signal of

affirmance, dismissal, or reversal does not."

19. *The Court cannot lose sight of the fact that a losing litigant has a cause to plead and a right to challenge the order if it is adverse to him. Opinion of the Court alone can explain the cause which led to passing of the final order. Whether an argument was rejected validly or otherwise, reasoning of the order alone can show. To evaluate the submissions is obligation of the Court and to know the reasons for rejection of its contention is a legitimate expectation on the part of the litigant. Another facet of providing reasoning is to give it a value of precedent which can help in reduction of frivolous litigation. Paul D. Carrington, Daniel J Meador and Maurice Rosenberg, Justice on Appeal 10 (West 1976), observed as under:-*

"When reasons are announced and can be weighed, the public can have assurance that the correcting process is working. Announcing reasons can also provide public understanding of how the numerous decisions of the system are integrated. In a busy Court, the reasons are an essential demonstration that the Court did in fact fix its mind on the case at hand. An unreasoned decision has very little claim to acceptance by the defeated party, and is difficult or impossible to accept as an act reflecting systematic application of legal principles. Moreover, the necessity of stating reasons not infrequently changes the results by forcing the judges to come to grips with nettlesome facts or issues which their normal instincts would otherwise cause them to avoid."

21. *It will be useful to refer words of Justice Roslyn Atkinson, Supreme Court of Queensland, at ALJA Conference at Brisbane on 13-9-2002 in relation to Judgment Writing. Describing that some judgment could be complex, in distinction to routine judgments, where one requires deeper thoughts, and the other could be disposed of easily but in either cases, reasons they must have. While speaking about purpose of the judgment, he said,*

"The first matter to consider is the purpose of the judgment. To my mind there are four purposes for any judgment that is written: -

(1) to clarify your own thoughts;

- (2) to explain your decision to the parties;*
- (3) to communicate the reasons for the decision to the public;*
and
- (4) to provide reasons for an appeal Court to consider."*

22. *Clarity of thought leads to proper reasoning and proper reasoning is the foundation of a just and fair decision. In Alexander Machinery (Dudley) Ltd. v. Crabtree, the court went to the extent of observing that 'Failure to give reasons amounts to denial of justice'. Reasons are really linchpin to administration of justice. They are link between the mind of the decision-taker and the controversy in question. To justify our conclusion, reasons are essential. Absence of reasoning would render the judicial order liable to interference by the higher Court. Reasons are the soul of the decision and its absence would render the order open to judicial chastisement. The consistent judicial opinion is that every order determining rights of the parties in a Court of law ought not to be recorded without supportive reasons. Issuing reasoned order is not only beneficial to the higher Courts but is even of great utility for providing public understanding of law and imposing self-discipline in the Judge as their discretion is controlled by well established norms. The contention raised before us that absence of reasoning in the impugned order would render the order liable to be set aside, particularly, in face of the fact that the learned Judge found merit in the writ petition and issued rule, therefore, needs to be accepted. We have already noticed that orders even at interlocutory stages may not be as detailed as judgments but should be supported by reason howsoever briefly stated. Absence of reasoning is impermissible in judicial pronouncement. It cannot be disputed that the order in question substantially affect the rights of the parties. There is an award in favour of the workmen and the management had prayed for stay of the operation of the award. The Court has to consider such a plea keeping in view the provisions of [Section 17-B](#) of the Industrial Disputes Act, where such a prayer is neither impermissible nor improper. The contentions raised by the parties in support of their respective claims are expected to be dealt with by reasoned orders. We are not intentionally expressing any opinion on the merits of the contentions alleged to have been raised by respective parties*

before the learned single Judge. Suffice it to note that the impugned order is silent in this regard. According to the learned Counsel appearing for the appellant, various contentions were raised in support of the reliefs claimed but all apparently, have found no favour with the learned Judge and that too for no reasons, as is demonstrated from the order impugned in the present appeals."

59. In *Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota v. Shukla and Brothers*, the Supreme Court articulate thus :

25. We would reiterate the principle that when reasons are announced and can be weighed, the public can have assurance that process of correction is in place and working. It is the requirement of law that correction process of judgments should not only appear to be implemented but also seem to have been properly implemented. Reasons for an order would ensure and enhance public confidence and would provide due satisfaction to the consumer of justice under our justice dispensation system. It may not be very correct in law to say, that there is a qualified duty imposed upon the Courts to record reasons.

26. Our procedural law and the established practice, in fact, imposes unqualified obligation upon the Courts to record reasons. There is hardly any statutory provision under the *Income Tax Act* or under the Constitution itself requiring recording of reasons in the judgments but it is no more *res integra* and stands unequivocally settled by different judgments of this Court holding that, the courts and tribunals are required to pass reasoned judgments/orders. In fact, Order XIV Rule 2 read with Order XX Rule 1 of the Code of Civil Procedure requires that, the Court should record findings on each issue and such findings which obviously should be reasoned would form part of the judgment, which in turn would be the basis for writing a decree of the Court.

27. By practice adopted in all Courts and by virtue of judge

made law, the concept of reasoned judgment has become an indispensable part of basic rule of law and, in fact, is a mandatory requirement of the procedural law. Clarity of thoughts leads to clarity of vision and proper reasoning is the foundation of a just and fair decision. In the case of Alexander Machinery (Dudley) Ltd., there are apt observations in this regard to say "failure to give reasons amounts to denial of justice". Reasons are the real live links to the administration of justice. With respect we will contribute to this view. There is a rationale, logic and purpose behind a reasoned judgment. A reasoned judgment is primarily written to clarify own thoughts; communicate the reasons for the decision to the concerned and to provide and ensure that such reasons can be appropriately considered by the appellate/higher Court. Absence of reasons thus would lead to frustrate the very object stated hereinabove.

28. The order in the present case is as cryptic as it was in Sunil Kumar Singh Negi. Being a cryptic order and for the reasons recorded in that case by this Court which we also adopt, the impugned order in the present appeal should meet the same fate."

60. The learned PDJ indeed observes that the findings recorded by the learned Arbitrator are not perverse and are plausible and cogent. However, that the findings recorded by the learned Arbitrator are not perverse and are plausible and cogent, are conclusions. I have not come across in the judgment, the reasons recorded in support of the conclusions reached by the learned PDJ. Independent application of mind to the issues involved is not discernible. It is not as if the claimant did not raise grounds involving arguable and contentious issues. While the jurisdiction under section 34 of the Act is certainly not akin to appellate jurisdiction, in view of the judicial interpretation

of the pre-amendment of section 34, the scope of judicial interference was not as narrow and restricted as the learned PDJ assumed. It would have been appropriate had the learned PDJ independently considered the submission that the learned Arbitrator ignored the substantive provisions of law, the contractual terms and that the inference drawn on the basis of proved facts was untenable and recorded reasons either way. This, the learned PDJ failed to do. The learned PDJ merely referred to the findings recorded by the learned Arbitrator and then declared that the award is not perverse and the findings are plausible and cogent.

61. Before I part with the judgment, it would be apposite to note, as an illustration, one of the submissions canvassed before the learned Arbitrator, and reiterated in the application under Section 34 of the Act, once withdrawal of offer is accepted will render the award vulnerable, on the touchstone of the pre-amendment provisions.

62. The claimant averred in paragraph 5.4 of the statement of claim that the MADC did not suffer any loss due to the withdrawal of the offer. In paragraph 6.5, the claimant invoked the doctrine of unjust enrichment and restitution’.

63. The learned Arbitrator considered the said submission in paragraphs 30 and 31 of the award and held that the advance payment of Rs.40,00,000/- (Rupees Forty Lakhs) was an earnest which could be forfeited irrespective of the loss suffered.

64. The claimant reiterated the submission supra in Paragraph 26 and Ground VIII of the application under Section 34 of the Act.

65. Perusal of the award reveals that other than reproducing the conclusions drawn by the learned Arbitrator, no thought is bestowed on the submission supra. While the claimant did not specifically refer to the provisions of section 74 of the Contract Act, 1872, in view of the pleadings and the factual matrix, the applicability, if any, and the effect and implication thereof, of the said provision, ought to have been considered by the learned Arbitrator, who dismissed the submission of the claimant relying on the decision of the Apex Court in ***Shree Hanuman Cotton Mills v. Tata Air Craft Ltd., (1969) 3 SCC 522.***

66. In ***Kailash Nath and Associates v. DDA, 2007 SCC OnLine Del 1229***, the Apex Court considered the issue in the context of the fact that the Delhi Development Authority (DDA) forfeited the amount of Rs.78,00,000/- (Rupees Seventy Lakhs) deposited by the successful bidder as earnest on the premise that breach of the conditions of the

auction shall entail forfeiture of the earnest amount.

67. The learned Single Judge of the Delhi High Court set aside the forfeiture and while allowing the appeal preferred by the DDA, the Division Bench held that the DDA was entitled to forfeit the earnest amount.

68. The Apex Court set aside the judgment of the Division Bench of the Delhi High Court on two counts. The Apex Court held that there was no breach of contract. The Apex Court further held that DDA not having been put to any loss, even if DDA could insist on a contractual stipulation in its favor, it would be arbitrary to allow DDA as a public authority to appropriate Rs.78,00,000/- (Rupees Seventy Eight Lakhs) without any loss being caused.

69. Notably, the Division Bench of the Delhi High Court heavily relied on *Shree Hanuman Cotton Mills v. Tata Air Craft Ltd.* The Apex Court distinguished the said decision and summarised its conclusions on compensation for breach of contract under Section 74 of the Contract Act thus :

“43. On a conspectus of the above authorities, the law on compensation for breach of contract under [Section 74](#) can be stated to be as follows:-

43.1 Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining

of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

43.2 Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in [Section 73](#) of the Contract Act.

43.3 Since [Section 74](#) awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

43.4 The section applies whether a person is a plaintiff or a defendant in a suit.

43.5 The sum spoken of may already be paid or be payable in future.

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.

43.7 [Section 74](#) will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, [Section 74](#) would have no application.

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 the 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.”

70. I have referred to the decision *supra* only to emphasize that even in the context of the restricted scope of judicial interference, in view of the pre-amendment law, the award will have to be set aside as falling foul of the substantive law of the land, if the submission of the claimant that in the absence of loss there cannot be a forfeiture of the earnest amount, is accepted. I have not considered the submission on merits. The learned PDJ would be expected to consider the said submission on its merits, since I propose to remit the matter to enable the learned PDJ to render a reasoned decision after hearing the parties.

71. In the light of the discussion *supra*, the appeal is partly allowed and the matter is remitted to the learned PDJ for fresh decision after hearing the parties. The learned PDJ is requested to dispose of the application under section 34 of the Act, as expeditiously as possible, and in any event, within six months from the date of communication of this judgment

JUDGE

adgokar