

In the High Court at Calcutta
Ordinary Original Civil Jurisdiction
Original Side

The Hon'ble Mr. Justice Sabyasachi Bhattacharyya

AP-COM No.529 of 2024
IA NO: GA-COM 1 of 2025
SREI EQUIPMENT FINANCE LIMITED
VS
ROADWINGS INTERNATIONAL PRIVATE LIMITED

AP-COM No.530 of 2024
IA NO: GA-COM 1 of 2025
SREI EQUIPMENT FINANCE LIMITED
VS
ROADWINGS INTERNATIONAL PRIVATE LIMITED

AP-COM No.674 of 2024
SREI EQUIPMENT FINANCE LIMITED
VS
ROADWINGS INTERNATIONAL PVT LTD

AP-COM No.675 of 2024
SREI EQUIPMENT FINANCE LIMITED
VS
ROADWINGS INTERNATIONAL PVT LTD.

For the petitioner : Mr. Jayanta Kumar Mitra, Sr. Adv.
Mr. Tilak Kumar Bose, Sr. Adv.
Mr. Sankarsan Sarkar, Adv.
Mr. Aditya Kanodia, Adv.
Ms. Sharfaa Ahmed, Adv.

For the respondent : Mr. Ranjan Bachawat, Sr. Adv.
Mr. Soumabho Ghosh, Adv.
Mr. Orijit Chatterjee, Adv.
Mr. Shubham Raj, Adv.
Ms. Safura Ahmed, Adv.

Heard on : 19.08.2024, 07.02.2025, 25.04.2025,
12.09.2025, 16.01.2026, 30.01.2026,
06.02.2026, 13.02.2026, 20.02.2026
& 27.02.2026

Hearing concluded on : 27.02.2026

Judgment on : 13.03.2026

Sabyasachi Bhattacharyya, J.:-

1. All the matters are taken up together for hearing, in view of the parties being the same and the causes of actions being identical. AP (COM) No. 529 of 2024 and AP (COM) No. 530 of 2024 are, respectively, applications under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”), against a purported award dated September 17, 2020 passed in respect of Contract No. 130853 dated April 15, 2017 and a purported award dated September 21, 2020 passed in respect of Contract No. 138524 dated July 15, 2017 passed by the self-same Arbitrator, whereby the claims of the petitioner herein against the respondent were turned down by the learned Arbitrator.
2. The other two applications have been filed by the petitioner under Section 36(2) of the 1996 Act, making alternative prayer for stay of the respective awards impugned in the two Section 34 applications.
3. The premise of the challenge is that there was neither any arbitral proceeding nor any award passed therein at all in respect of either of the contracts. The petitioner alleges that both the purported awards are

products of fraud, since there is no existence of any valid award in the eye of law.

4. Learned senior counsel appearing on behalf of the petitioner relies on Section 31(5) of the 1996 Act, which mandates a signed copy of an arbitral award, after it is made, to be delivered to each party. In the present case, it is alleged that the existence of the purported awards first came to the knowledge of the petitioner from photocopies thereof annexed with an affidavit filed by the respondent before the National Company Law Tribunal (NCLT) on January 25, 2024 in connection with an ongoing proceeding before the said Tribunal.
5. The petitioner submits that upon detection of financial irregularities committed by the previous management of the petitioner-Company, the Reserve Bank of India (RBI) appointed an Administrator. A Corporate Insolvency Resolution Process (CIRP) was also initiated in respect of the petitioner-Company, which culminated in the present management of the petitioner-Company taking over.
6. Learned senior counsel for the petitioner contends that the respondent has failed to produce either any signed copy of any of the said awards or any document pertaining directly to the arbitration proceeding, including pleadings, affidavits of evidence (if any), minutes of the sittings before the Arbitrator and/or the original award.
7. It is submitted that the petitioner, after coming to know of the existence of such purported awards, wrote to the learned Arbitrator asking for the relevant documents and copies of the awards. However, the learned

Arbitrator replied in writing by asserting that all documents had been handed over to the parties and that the original awards were still lying with her, which would be released only upon the petitioner paying the entire costs of the arbitration, the particulars of which were disclosed in the reply. Thus, in the absence of any trace of the awards, serious doubt is cast as to whether such awards were at all passed.

8. Learned senior counsel cites *Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd.*, reported at (2021) 7 SCC 657, where it was held that an award takes legal effect only after it is signed by the Arbitrator, which gives it authentication, and there can be no finality of the award except after it is signed, since signing of the award gives legal effect and validity to it. The making and delivery of the award were held to be different stages of an arbitration proceeding and it was observed that an award is made when it is authenticated by the person who makes it.
9. While dealing with the objection raised by the respondent as to the applications under Section 34 of the 1996 Act being time-barred, learned senior counsel appearing for the petitioner relies on the above judgment to argue that the receipt of a signed copy of the award is the date from which the period of limitation for filing objections under Section 34 would commence.
10. On the issue of limitation, the petitioner also relies on *Union of India v. Tecco Trichy Engineers & Contractors*, reported at (2005) 4 SCC 239, where it was observed by the Hon'ble Supreme Court that the delivery of an arbitral award under sub-section (5) of Section 31 is not a matter of mere formality

but a matter of substance. As the delivery of the signed copy of an award has the effect of conferring certain rights to the parties as also bringing to an end the right to exercise those rights on expiry of the prescribed limitation, which would be calculated from that date, the delivery of the copy of award by the Tribunal and the receipt thereof by each party constitutes an important stage in the arbitral proceedings.

11. Learned senior counsel for the petitioner next cites *State of Maharashtra v. Hindustan Construction Co. Ltd.*, reported at (2010) 4 SCC 518, for the proposition that although new grounds cannot be added in the Memorandum of Appeal after the expiry of limitation, the Appellate Court is empowered to grant leave to amend the Memorandum of Appeal.
12. In the present case, it is submitted that the court permitted a supplementary affidavit to be filed by the petitioner, *inter alia*, incorporating additional grounds. Even otherwise, the applications under Section 34 themselves contain sufficient grounds to constitute a valid challenge to the impugned awards. It is pointed out that the applications under Section 34 were filed within the statutory limitation period as prescribed in Section 34(3) of the 1996 Act, calculated from the date when the photocopies of the purported awards were first disclosed to the petitioner in the NCLT proceedings, and the supplementary affidavit was filed within the additional time of 30 days thereafter, as stipulated in the proviso to the said subsection. Thus, it is argued that the challenges to the arbitral awards have been made within the prescribed period of limitation.

13. Learned senior counsel next argues that in terms of the language of Section 34(1) of the 1996 Act, recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-sections (2) and (3) of the said Section. Conspicuously, the subsequently-introduced sub-section (2-A) was not incorporated in sub-section (1), thereby specifically excluding the necessity of any application to be filed for challenging an award on the ground of patent illegality. It is contended that the Legislature, in its wisdom, omitted to incorporate sub-section (2-A) in sub-section (1) simultaneously with the introduction of sub-section (2-A) by the Amending Act 3 of 2016 (with retrospective effect from October 23, 2015). Hence, a challenge on the ground of patent illegality as envisaged in sub-section (2-A), it is argued, need not be specifically spelt out in an application and the court may itself look into such ground.
14. Learned senior counsel next distinguishes between the specific language of Clauses (a) and (b) of sub-section (2) of Section 34. Whereas the former starts with the opening words “the party making the application establishes on the basis of the record”, Clause (b) commences with “the Court finds that”.
15. Similarly, the language used in sub-section (2-A) is also “if the court finds that”. Hence, the distinctive languages of sub-sections (2)(b) and (2-A) on the one hand and sub-section (2)(a) on the other makes it abundantly clear that whereas for the grounds enumerated in Clause (a) of sub-section (2), it is the applicant who has to establish such grounds, in case of the other two

Clauses, the burden is not on the applicant but it is open to the court itself to find out from the records the grounds enumerated therein.

- 16.** Learned senior counsel cites a Division Bench judgment of the Delhi High Court in the matter of *Devas Employees Mauritius v. Antrix Corpn. Ltd.*, reported at 2023 SCC OnLine Del 1608, and a judgment of the Supreme Court in *State of Chhattisgarh v. SAL Udyog (P) Ltd.*, reported at (2022) 2 SCC 275, in support of the contention that for the purpose of Sections 34(2)(b) and 34(2-A), it is open to the court itself to find out whether such grounds are satisfied on the basis of the arbitral records, irrespective of whether such ground is taken in the application.
- 17.** Even otherwise, it is submitted, the principal grounds covered by the said provisions find place substantially in the instant applications under Section 34 themselves. The supplementary affidavit filed later only supplements the said grounds.
- 18.** It is argued that apart from the violation of Section 31(5) of the 1996 Act, the fundamental policy of Indian Law has been contravened, since the patent illegality and fraud emanating from the absence of any valid award as asserted by the respondent is opposed to public policy and in conflict with basic notions of morality and justice, which are good grounds of challenge to the impugned awards under Section 34.
- 19.** Learned senior counsel proceeds to point out several infirmities in the awards. It is conspicuous that the respondent, although placing reliance on the purported awards, did not produce either the originals or signed copies thereof and/or any records of the arbitral proceedings.

- 20.** In the purported awards, it has been mentioned that one Mr. Ayan Chakraborty, learned Advocate for the petitioner, had sent a letter dated May 23, 2018. Accordingly, the petitioner enquired in writing of the said learned Advocate, asking for details of the arbitral proceedings, on April 22, 2024. In his reply dated April 30, 2024, the said learned Advocate said that he had no knowledge of any such proceeding, nor had he participated therein. This itself, it is submitted, shows that the awards are procured and manufactured.
- 21.** The stamp papers on which the photocopies of the awards produced by the respondent were printed were apparently purchased in the name of the Arbitrator on March 20, 2020
- 22.** The impugned awards refer to several pleadings and documents, none of which were disclosed by the respondent. The learned Arbitrator, in the purported awards, speaks about a joint reference by both the parties by a letter dated December 29, 2019. However, there is no document on record to show that there was ever any such joint reference by the parties. The respondent has produced only a purported request under Section 21 of the 1996 dated May 20, 2019 issued by a Chief Manager of the petitioner-Company, who was already serving a notice period upon his resignation at the time of alleged issuance of such request and, as such, did not have the authority to issue such request on behalf of the petitioner-Company.
- 23.** Conspicuously, the copy of a letter dated December 29, 2019 has been produced by the respondent, which was supposed to have been sent unilaterally by the respondent to the Arbitrator, purportedly giving consent

to the request under Section 21. Apart from the said consent letter not being served at any point of time on the petitioner, the same was written about seven months after the alleged request under Section 21, which time-lag itself casts serious suspicion in that regard. Moreover, the said unilateral letter could not, by any stretch of imagination, be construed to be a 'joint reference'.

- 24.** The petitioner further submits that contradictory findings find place in the latter part of the impugned awards as well. In subsequent portions of the impugned awards, the learned Arbitrator herself recorded that the claimant (present petitioner) sent a letter asking for commencement of arbitration, to which the respondent consented. Such contradictory findings in the impugned awards, it is argued, vitiate the same.
- 25.** Learned senior counsel appearing for the petitioner points out that although the respondent claims that its Advocate had sent a letter on May 23, 2018 annexing copies of the awards, the same was also purportedly received by an employee of the petitioner-Company who was serving notice period at the relevant juncture. That apart, after the alleged dates of passing of the impugned awards, there was continuous correspondence between the parties regarding the claims covered by the contracts which were allegedly decided by the awards. On June 9, 2021, the petitioner had sent a letter to the respondent alleging Rs. 1,51,43,238.35 p. to be payable by the respondent as on March 31, 2021, even prior to the initiation of proceedings by the Reserve Bank of India (RBI) against the previous management of the petitioner-Company on the ground of defalcation. On October 20, 2021, the

petitioner-Company demanded Rs. 92,23,301/- as per the records as they stood on October 19, 2021. Again, on September 20, 2022, the Administrator, who was then in charge of the affairs of the petitioner-Company, sent a letter to the respondent alleging outstanding dues of Rs. 3,01,55,013.98 p. in the petitioner's books as on June 30, 2022. The respondent disputed such claim by its letter dated October 7, 2022, written to the Administrator. Subsequently on January 30, 2023, the petitioner-Company (still under the Administrator) made a demand before a proceeding under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short, "the IBC") was initiated in respect of the petitioner-Company.

- 26.** On August 30, 2023, the petitioner's advocate issued a letter to the respondent claiming dues in respect of the subject contracts, when the Implementation and Monitoring Committee had taken over the management of the petitioner-Company pursuant to an approved Resolution Plan.
- 27.** On September 4, 2023, the respondent gave a reply disputing its liability and claiming that the duly added accounts showed that all liabilities had been discharged by it in full.
- 28.** In none of the communications during the relevant period after the awards did the respondent raise any objection to the petitioner's claims on the ground that there were two arbitral awards deciding such claims. Rather, the respondent spoke about "resolution" of the disputes, without a single reference to any arbitral award. Hence, it is evident from the conduct of the respondent itself that there was no arbitral proceeding or any award passed at any point of time in respect of the subject contracts.

- 29.** In the impugned awards, it is pointed out by the petitioner, it was mentioned that one Reach Stacker (one of the secured assets in dispute) was handed over on March 8, 2020. However, claims in respect of the said equipment was included in the petitioner's e-mail dated August 20, 2020 and virtually admitted by the respondent in its letter dated October 7, 2022. The October 7, 2022 e-mail refers to a reconciliation statement of August 20, 2020 but such statement does not mention Rs. 75,00,000/-, as mentioned in the awards, as the value of any of the assets as recorded in the award.
- 30.** Learned senior counsel appearing for the petitioner next contends that even if, for argument's sake, it is assumed that a notice under Section 21 was issued by the petitioner, there was no consent to the same on the part of the respondent within a reasonable period. The alleged consent, given 7 months thereafter, was not served on the petitioner itself but allegedly sent to the Arbitrator directly. Thus, there was no 'consent' at any point of time in respect of appointment of Arbitrator.
- 31.** The respondent has heavily relied on the fact of an application under Section 9 of the 1996 Act having been filed by the petitioner in July, 2018 and the withdrawal of the same on August 14, 2018. However, it is submitted by the petitioner that such withdrawal, by itself, does not necessarily lead to the automatic conclusion that arbitral proceedings were initiated on the dispute subsequently or that the petitioner participated therein. The petitioner categorically denies that the reach tracker machines, which were the secured assets, were ever handed over to the petitioner.

Thus, the findings of the learned Arbitrator in that regard, it is submitted, are incorrect.

- 32.** Learned senior counsel for the petitioner further points out that the impugned awards recorded that the parties are to bear their own costs. However, the learned Arbitrator, by her letter dated March 5, 2024, demanded the entire costs in respect of both the arbitral proceedings from the claimant/petitioner, which is *ex facie* contradictory and illegal.
- 33.** It is submitted that the purported arbitral proceedings allegedly went on during a period when the Covid-19 Pandemic was in full swing and the ensuing lockdowns were in place. Yet, in her letter to the petitioner, the learned Arbitrator mentioned about venue charges and conveyance expenses, which were evidently not based on facts.
- 34.** It is thus argued that the above circumstances unerringly indicate that no award was passed at any point of time in any arbitration proceeding between the parties.
- 35.** Dealing with the challenge thrown by the respondent to the effect that the pleadings of fraud in the Section 34 applications do not contain any particulars and are not properly verified, learned senior counsel for the petitioner argues that a Board Resolution of the petitioner-Company duly authorised the Constituted Attorney, who affirmed the affidavits supporting the said applications, to do so. In view of the change of management after the date of the purported awards, the knowledge of the petitioner and the deponent in the affidavits could only be on the basis of information received from the records. In the applications, it is categorically alleged that there is

no existence of the awards in the records of the Company. The contention of the respondent that the current management did not write to the previous one is absurd, since the previous management was removed on the ground of financial irregularities, leading to an Administrator being appointed by the RBI and ultimately a Corporate Insolvency Resolution Process being initiated in respect of the petitioner-Company. Thus, it is irrelevant whether the current management wrote to the previous one. The petitioner does not dispute the proposition of law that mere change of management or shareholding does not change the juristic entity of the Company, but such proposition has no manner of application in the present case. The reliance on the change of management by the petitioner was merely for the purpose of elaborating the circumstances of the case.

- 36.** Learned senior counsel further argues that the contention of the respondent, that all documents were not disclosed in the Section 34 applications but some were produced subsequently by way of a supplementary affidavit filed by the petitioner, is incorrect, since some of the documents were traced out only subsequently and in any event, during the pendency of the present matter, all documents at the disposal of the petitioner have been disclosed.
- 37.** Learned senior counsel argues that the purported awards are not only vitiated by fraud but also suffer from patent illegality and ought to shock the conscience of the court and, as such, ought to be set aside.
- 38.** In respect of the conduct of the respondent, it is submitted that the letter dated September 20, 2020 annexed at Page 31 of GA 1 of 2025 shows that

the respondent demanded removal of the ROC (Registrar of Companies) charges. It is doubtful as to how such demand could be made even before the date of passing of the second award, that is, September 21, 2020.

- 39.** Moreover, in the said application, filed at the stage of hearing of the Section 34 applications, the respondent has not sought to rely on the supplementary affidavit which was initially sought to be filed but not accepted by the court, including its annexures, although such supplementary affidavit and its annexures have been annexed to the application nonetheless. Yet, at the time of arguments, the respondent sought to rely on the supplementary affidavit and its annexures, which cannot be looked into by the court.
- 40.** Learned senior counsel also points out that there is serious doubt as to whether reliance can be placed on the purported documents of repossession of the equipment-in-question from the customer site at Nagalapalli on March 9, 2020 since, if the recovery took place on such date, there could not have been any valuation at the instance of the respondent on the previous day, that is, March 8, 2020 at the Concord Yard, Hyderabad.
- 41.** Thus, the petitioner seeks that the impugned awards be set aside on the above grounds.
- 42.** Learned senior counsel appearing for the respondent, on the other hand, contends that the material averments with regard to fraud are verified in the Section 34 applications as “submissions”. The deponent of the said affidavits is one Sohan Kumar Jha, an alleged Power of Attorney holder of the petitioner-Company. No responsible/authoritative person of the

petitioner-Company takes responsibility for the serious allegations of fraud. Thus, the grounds taken in the Section 34 applications ought to be overlooked altogether. In any event, it is argued that particulars of fraud have not been pleaded in the Section 34 applications, as required in law.

43. Placing reliance on *A.L.N. Narayanan Chettyar and another v. Official Assignee of the High Court, Rangoon and another*, reported at AIR 1941 PC 93 [= (1941) 54 LW 606], it is argued that there cannot be any finding of fraud on the basis of mere suspicion and conjecture. Placing reliance on *Ranganayakamma v. K.S. Prakash*, reported at (2008) 15 SCC 673, and *Union of India v. K.C. Sharma & Co.*, reported at (2020) 15 SCC 209, it is argued that allegations such as fraud are to be proved beyond reasonable doubt as well as the particulars thereof are to be specifically pleaded in the pleadings. Learned senior counsel also cites *Union of India v. Chaturbhai M. Patel & Co.*, reported at (1976) 1 SCC 747 for the self-same proposition.
44. A judgment of this Court in *Avijhit Ghosh v. State of West Bengal*, reported at 2022 SCC OnLine Cal 1822, is also relied on for the purpose of arguing that allegations of fraud cannot be based on surmise. Mere allegations of fraud are not enough but it has to be proved beyond doubt, it is argued, in support of which proposition the respondent cites *Raj Kumar Dhar v. A. Stuart Lewis*, reported at AIR 1958 Cal 104.
45. Dwelling on the question as to whether the court of its own, under Section 34 of the 1996 Act, can come to findings on the grounds stipulated in sub-sections (2)(b) and (2-A) of the said Section, learned senior counsel cites *Welspun Specialty Solutions Ltd. v. ONGC*, reported at (2022) 2 SCC 382, and

Ssangyong Engg. & Construction Co. Ltd. v. NHAI, reported at (2019) 15 SCC 131, where the restrictive operation of Section 34 was highlighted. The last above-mentioned citation also took note of the 246th Law Commission Report, in which it was opined that Section 34(2-A) is to be read into Section 34(1), thus necessitating an application under Section 34(1) in the first place even to raise grounds specified in sub-section (2-A) thereof. A restrictive interpretation of the powers of court to intervene was stressed and expansive arguments in that regard were negated in the Law Commission Report as well.

46. Learned senior counsel appearing for the respondent next cites a Division Bench judgment of this Court in *Anil Kumar Bhandari v. Kolkata Municipal Corporation*, reported at (2009) 2 CHN 56, in order to highlight the importance of verifications.
47. Regarding limitation, learned senior counsel for the respondent submits that the bogey of 'new management' has been raised by the petitioner, without even caring to write to the past management to confirm as to whether there was any reference to arbitration in respect of the contracts-in-question or any awards were passed therein. Thus, it is argued that adverse presumption ought to be drawn against the petitioner.
48. Inasmuch as some of the additional grounds of challenge were raised in the supplementary affidavit of the petitioner for the first time, the respondent submits that such affidavit was filed beyond the limitation period of three months as stipulated in Section 34(3), without any explanation to come

within the proviso thereto; therefore such additional grounds ought not to be permitted to be raised by the petitioner.

- 49.** The plinth of the petitioner's case is that the new management did not find any arbitral award or records in respect thereof. In the Section 34 applications, it was sought to be made out that after a search of all the documents of the petitioner-Company, no such award could be found. However, in the supplementary affidavit filed later, certain further documents were disclosed, thus belying the petitioner's stand that it had disclosed all papers lying with it. Hence, it is contended, no credence can be lent to the premise of challenge in the Section 34 applications, that despite thorough search no award could be found lying in the records of the petitioner-Company.
- 50.** Again, when the respondent annexed certain further documents in its applications, bearing GA Nos. 1 of 2025, the petitioner did not deny the existence of those, but merely set up a lame excuse as to the persons issuing the request under Section 21 of the 1996 Act and receiving the communication annexing copies of the awards respectively to have been under notice period at the relevant point of time. However, no document of resignation of the author of the Section 21 notice has been produced, thereby belying such excuse.
- 51.** The petitioner, it is further argued, is guilty of suppression of several important documents, including the letter dated May 23, 2018, which has been annexed to the supplementary affidavit, the filing of the Section 9 application by it, the respondent's letter offering return of financial assets,

the orders passed in the Section 9 proceeding as well as the Section 21 notice issued by the petitioner. Thus, the entire endeavour of the petitioner is to rely on conjecture and surmise, without any specific particulars being disclosed as to how and by whom fraud was perpetrated. Relying on the judgments cited by it, the respondent reiterates that the serious ground of fraud has to be established beyond doubt and cannot be based on mere conjecture and surmise.

- 52.** The petitioner, it is contended, never explained as to how further new documents were discovered by the new management after the filing of the Section 34 applications, which falsifies the claim in the Section 34 applications that the new management had no other records or documents than those disclosed in such applications. Thus, the petitioner is guilty of selective disclosure only upon being called out on their suppression of relevant documents.
- 53.** Learned senior counsel for the respondent further submits that no criminal action was initiated by the petitioner against its erring officers who had respectively issued the Section 21 notice and received the communication of the respondent dated December 8, 2020, along with which copies of the arbitral awards were served. The petitioner merely relies on its internal memos in that regard but has not disclosed as to what steps were taken against its said employees.
- 54.** It is argued that that mere non-reference to the awards in the reconciliation statement dated October 7, 2022 does not indicate any admission on the part of the respondent as to non-existence of the awards. Mere failure to

refer to the awards in the communication of even date by a layman dealing with several contracts does not vitiate the awards.

55. Learned senior counsel contends that nothing has been shown by the petitioner to establish that copies of the awards were not served on it, particularly since copies thereof were served on it as long back as on December 8, 2020, with the letter of the respondent. It is stressed that the entire challenge under Section 34 is based on conjecture and surmise without anybody taking responsibility on behalf of the petitioner for the serious allegations of fraud made therein, not only against the respondent but also casting aspersions against the Arbitrator, without even any attempt to ascertain from the previous management as to the veracity of the arbitral awards or the arbitral proceedings leading thereto.
56. Learned senior counsel for the respondent relies on *Ramesh B. Desai v. Bipin Vadilal Mehta*, reported at (2006) 5 SCC 638, and *Ranganayakamma (supra)*¹ in support of the proposition that particulars in the pleadings is a *sine qua non* for allegations of fraud.
57. Lastly, learned senior counsel cites *Green Hut Pvt. Ltd v. State of W.B.*, reported at 2010 SCC OnLine Cal 610, for the proposition that change in shareholding does not change the company and, as such, the distinction sought to be created by the petitioner between the new management and the old management of the petitioner-Company is artificial and not tenable in law.

¹ *Ranganayakamma v. K.S. Prakash*, reported at (2008) 15 SCC 673

58. Thus, it is submitted that the applications under Section 34 as well as the applications for stay under Section 36(2) of the 1996 Act ought to be dismissed.

59. Upon hearing learned counsel for the parties and appreciation of the materials on record as well as the relevant provisions of the 1996 Act, the Court comes to the following conclusions:

(i) Verification

60. The respondent argues that the applications under Section 34 of the 1996 Act ought to be dismissed *inter alia* on the ground that the allegations made therein, particularly pertaining to fraud, have been verified as ‘true to records’ and ‘submissions’ and not ‘true to knowledge’, thus, any person of authority of the petitioner-Company refusing to take responsibility for such allegations.

61. However, in view of the peculiar nature of the allegations made in the said applications, primarily on the ground that there was no award at all, there is little or no possibility of there being direct knowledge as such on the part of the current dispensation in charge of the petitioner-Company, which has taken over pursuant to a successful Resolution Plan much after the impugned awards were alleged to be passed. The allegations of fraud in the instant *lis* are based on negative assertions as to there being no award at all. One can vouchsafe the truth of the existence of something, for example, that there is an award. However, a negative fact, such as there being no award at all, cannot strictly be said to be ‘true’ to one’s knowledge. It can at best be

said that as per the available records, no such awards, or documents directly related to the proceedings leading to such awards, can be traced out. For enquiring into the sufficiency of pleadings with regard to assertions of such negative nature, the court is to ascertain whether the foundational facts leading to the same have been pleaded.

- 62.** The statements that the Monitoring Committee, after the approval of the Resolution Plan has handed over the documents of the company to the new management and/or Board of the petitioner-Company and that the new management of the petitioner-Company, after making necessary searches, came to learn the facts mentioned in the applications, has been pleaded as “true to knowledge”. The relevant facts regarding an Administrator being appointed by the RBI due to the fraudulent activities of the previous management of the petitioner-Company and the initiation of a CIRP before the NCLT, Kolkata have been pleaded as ‘true to knowledge derived from the records’. Similar oath has been rendered in the jurat portion of the affidavit supporting the Section 34 applications in respect of the petitioner coming to know for the first time about the alleged awards from the affidavit filed by the respondent before the NCLT and regarding the new management having enquired from the Administrator and written a letter to the learned Advocate mentioned in the awards, in reply to which the said learned Advocate claimed ignorance of the arbitral proceedings or the awards as well as the reply of the learned Arbitrator dated March 14, 2024 where she stated that she had returned all the documents to the parties and retained the original awards with her.

- 63.** The allegation of fraud, to the extent that there is no existence of any of the impugned awards, necessarily has to rely on 'submissions' of the petitioner, based on the aforementioned facts. Hence, the defect of pleadings alleged by the respondent is not acceptable.
- 64.** This Court does not find any irregularity in the affirmance of the affidavits supporting the Section 34 applications to the effect that the foundational facts as pleaded by the deponent are true to his information as derived from the records, since it is obvious that a company is a juristic entity and the new management can only rely on the records to ascertain the state of affairs. The deponent need not have direct knowledge of the facts but it would suffice if he has knowledge from the records available with the Company. Since a Board resolution of the petitioner-Company duly authorised the deponent to affirm the affidavits supporting the Section 34 applications, there cannot be said to be any illegality in presenting the applications in their present form.
- 65.** The reliance of the respondent on *Anil Kumar Bhandari (supra)*², to the effect that an affidavit must be properly verified and must clearly state what is based on knowledge and what is based on belief, rendered in the context of a writ petition, where both pleadings and evidence are to be stated clearly, is of no direct relevance to the present case.
- 66.** Hence, the applications cannot be said to be not maintainable on the ground of defect in verification.

² ***Anil Kumar Bhandari v. Kolkata Municipal Corporation*, reported at (2009) 2 CHN 56**

(ii) Limitation

67. Section 34(3) of the 1996 Act is set out hereinbelow:

“34(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.”

68. In *Tecco Trichy Engineers & Contractors (supra)*³, the Hon’ble Supreme Court categorically observed that the delivery of an arbitral award under Section 31(5) is a matter of substance and not a mere formality and it is only after the stage under Section 31 has passed that the stage of termination of arbitral proceedings within the meaning of Section 32 of the 1996 Act arises. The delivery of arbitral award to the party, to be effective, was held to have been received by the party. It was further observed by the Hon’ble Supreme Court that this delivery by the Arbitral Tribunal and the receipt by the party of the award set in motion several periods of limitation, including an application for setting aside an award under Section 34(3). The provisions of Sections 31(5) and 34(3) were dealt with *in extenso* in the said judgment. Section 31(5) of the 1996 Act provides that after the arbitral award is made, a “signed copy” shall be delivered to each party, obviously referring to a copy

³ *Union of India v. Tecco Trichy Engineers & Contractors, reported at (2005) 4 SCC 239*

of the award duly signed by the Arbitrator; whereas Section 34(3) uses the expression “arbitral award” (as opposed to “a copy of the arbitral award”), the date of receipt of which is the starting point of limitation.

- 69.** In the present case, the reply of the learned Arbitrator to the letter of the petitioner asking for copies of the award and relevant documents clearly discloses that, as per the Arbitrator, all documents and records of the case had been handed over to the parties and that the learned Arbitrator retained the original awards.
- 70.** It has not been established at all that any signed copy of the awards were delivered to either of the parties. It is conspicuous to note that even the respondent served only photocopies of the awards on the petitioner at different points of time, without producing a signed copy of the same even before this Court. Thus, in the absence of proof of delivery of a signed copy and receipt of the same by the petitioner, the starting point of limitation never commenced inasmuch as the petitioner is concerned.
- 71.** The issue of limitation is, thus, decided in favour of the petitioner, holding that the applications under Section 34 of the 1996 Act are not barred by limitation.
- 72.** In fact, going by the ratio of *Tecco Trichy Engineers & Contractors (supra)*⁴, in the absence of delivery of signed copies of the awards-in-question and receipt thereof by the petitioner, the period of limitation for the applications for setting aside such purported awards under Section 34(3) has not been set in motion at all.

⁴ ***Union of India v. Tecco Trichy Engineers & Contractors, reported at (2005) 4 SCC 239***

- 73.** This takes us to the next important question as to whether the court, under Section 34 of the 1996 Act, has the power to declare that there was no award at all.

(iii) Scope of declaring “no award” in a proceeding under Section 34 of the 1996 Act

- 74.** A conundrum of seminal importance has fallen for consideration before this Court. A thorough perusal of the language of Section 34 indicates that the recourse contemplated therein is against “an arbitral award”, which expression has been used throughout the said provision. Thus, on a plain reading of the said Section, there has to exist an otherwise valid arbitral award for it to be challenged under the said provision.
- 75.** Drawing analogy from an entirely different species of proceedings, in view of the issue at hand being somewhat *pari materia* therewith, it is to be noted that a similar situation sometimes arises in matrimonial proceedings. Under the matrimonial laws in India, in particular, the Hindu Marriage Act and the Special Marriage Act, an appeal lies to the District Court under the said statutes when an application contemplated under those is filed, for divorce, judicial separation, restitution of conjugal rights and the like. However, courts have consistently held that if the plaintiff bases his/her case on there being no marriage between the parties at all and does not invoke the grounds for divorce etc. provided under the said Acts, the relief available in such a suit is in the nature of a declaration of the status of the parties and the suit lies before the ordinary Civil Court having jurisdiction,

as a declaratory suit outside the purview of the matrimonial laws, which will be the civil court at the base of the hierarchy of courts having pecuniary jurisdiction and not the District Court. Such a suit, thus, will be tried as an ordinary civil suit under the general civil law and not as a proceeding under the matrimonial statutes.

- 76.** However, if the same principle is applied to a challenge to an arbitral award on the ground that there is no award in existence at all, the parties would be relegated to a regular declaratory suit before a Civil Court, complete with all its procedural *paraphernalia*. Such a construction of Section 34 of the 1996 Act would be patently contrary to the very purpose of enactment of the said Act.
- 77.** In the Statement of Objects and Reasons of the 1996 Act, as originally promulgated, one of the main objectives enumerated was to minimise the supervisory role of courts in the arbitral process.
- 78.** Again, in the Statement of Objects and Reasons of the Amending Act 3 of 2016 to the 1996 Act, it was stated that the UNCITRAL Model Law on International Commercial Arbitration, as adopted in 1985 by the United Nations Commission on International Trade Law, was the guiding light of the 1996 Act. It was further specified that with the passage of time, some difficulties in the applicability of the Act had been noticed to the effect that interpretation of the provisions of the Acts by the courts in some cases had resulted in delay in disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tended to defeat the object of the Act. It was further elaborated that with a view to overcome the

difficulties, the matter was referred to the Law Commission of India which, in its 246th Report, proposed the 2016 Amendments to “facilitate” and “encourage” Alternative Dispute Mechanism, especially arbitration, for settlement of disputes in a more user friendly, cost effective and expeditious disposal of cases since India is committed to improve its legal framework to obviate in disposal of cases. The declared purpose of the 2016 Amendment was to facilitate quick enforcement of contracts, easy recovery of monetary claims and award of just compensation for damages suffered and to reduce the pendency of cases and hasten the process of dispute resolution through arbitration, so as to encourage investment and economic activity.

- 79.** Thus, speedy disposal of cases relating to arbitration with least court intervention was highlighted as one of the declared objects of the 1996 Act.
- 80.** It is such aspiration which is also reflected in Section 5 of the 1996 Act, which provides that no judicial authority shall intervene “except where so provided in this Part”, referring to Part I of the Act, relating to domestic arbitrations.
- 81.** The principle of least judicial interference and restrictive interpretation of Section 34 were, thus, highlighted in the 246th Law Commission Report, as recognized in *Ssangyong Engg. & Construction Co. Ltd. (supra)*⁵ as well as *Welspun Specialty Solutions Ltd. (supra)*⁶.
- 82.** However, if a restrictive interpretation is to be given to Section 34 in the context under discussion, it has to be held that a party to an arbitration agreement cannot challenge an award passed in an arbitral proceeding on

⁵ ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, reported at (2019) 15 SCC 131**

⁶ ***Welspun Specialty Solutions Ltd. v. ONGC*, reported at (2022) 2 SCC 382**

the ground that there was ‘no award’ at all under Section 34 of the 1996 Act, since all the grounds of challenge contemplated in the provision refer to “an arbitral award”, apparently pre-supposing the existence of an award in the first place, which is challenged. Unfortunately, there is no other provision than Section 34 within the four corners of the 1996 Act for challenging an arbitral award. Section 37 of the said Act, the only other provision of challenge by way of an appeal, does not contemplate a direct challenge to an award at all. Hence, if strictly interpreted on a restrictive premise, the only scope of challenge to an arbitral award on the ground of ‘no award’ would be to file a regular civil suit, since a party to an arbitration agreement cannot be left completely remediless against the egregious act of another party to such agreement relying on a non-existent award, as such a vacuum would contravene the fundamental legal principle *ubi jus ibi remedium*.

- 83.** Hence, for the purpose of furtherance of the objective of the 1996 Act and to avoid rendering its provisions nugatory by relegating the parties to the rigmarole of a regular civil suit, the power to entertain a challenge even on the ground of non-existence of a purported award has to be read into the fabric of Section 34 itself. In order to achieve such objective, the expression “an arbitral award” in Section 34 has to be read up to include “or a purported award” as well. If so construed, a challenge to a so-called award on the ground of non-existence of such award will come under the umbrella of Section 34 itself, subject, of course, to the grounds stipulated in Section 34 being otherwise attracted.

84. Hence, in order to give full effect to Section 5 of the 1996 Act and to preclude dilution of the very purpose of enactment of the said Act as well as to further the legislative intent behind such enactment, a challenge under Section 34 has to be construed to include a challenge on the ground that there was no valid award at all, subject to satisfaction of the grounds enumerated in Section 34 of the 1996 Act.

(iv) The importance of pleadings vis-à-vis grounds of challenge under sub-sections (2) (b) and (2-A) of Section 34 of the 1996 Act

85. The petitioner argues that since sub-section (2-A) is not included in sub-section (1) of Section 34, which necessitates an application for taking recourse to a court against an arbitral award, the intention of the Legislature is to confer power on the court to set aside an award on the ground of patent illegality under sub-section (2-A) even without any application under Section 34(1) being made.

86. In *Devas Employees Mauritius (supra)*⁷, a Division Bench of the Delhi High Court interpreted the expression “the court finds that”, occurring in Section 34(2)(b) and Section 34(2-A) of the 1996 Act, to mean that it enables the court to discover even *suo motu* whether an award is in conflict with the public policy of India, to discover on its own whether making an award is induced or affected by fraud or corruption and to *suo motu* discover grounds of public policy and set aside an arbitral award on such basis.

⁷ *Devas Employees Mauritius v. Antrix Corpn. Ltd.*, reported at 2023 SCC OnLine Del 1608

- 87.** In *SAL Udyog (P) Ltd. (supra)*⁸, the Hon'ble Supreme Court dwelt on the expression "the court finds that" and held that if no objection with regard to the ground enumerated in Section 34(2-A) is spelt out in the Section 34 application but such point is raised for the first time under Section 37 of the 1996 Act, the court is sufficiently empowered to pass an award accordingly.
- 88.** On the other hand, the 246th Law Commission Report, relied on by the respondent, specifically recommended that Section 34(2-A) be incorporated in Section 34(1). However, it is to be noted that despite such recommendation, till date there is no such amendment in the statute.
- 89.** In *Ssangyong Engg. & Construction Co. Ltd. (supra)*⁹ and *Welspun Specialty Solutions Ltd. (supra)*¹⁰, the Hon'ble Supreme Court held in favour of restrictive interpretation of Section 34 in order to give effect of Section 5 of the 1996 Act, to ensure that the scope of Section 34 is not unnecessarily widened to include premises of challenge not contemplated in the said provision.
- 90.** It cannot be overlooked that the language of sub-section (2)(a) of Section 34 is entirely different from sub-sections (2)(b) and (2-A). Whereas the former provides that the party making the application has to establish the grounds stipulated therein on the basis of the records of the Arbitral Tribunal, there may be interference under the latter provisions if the court finds that the grounds mentioned therein are satisfied.
- 91.** However, the above sub-sections are couched in such language as to intrinsically link one with the other. Notably, sub-section (2-A) of Section 34

⁸ *State of Chhattisgarh v. SAL Udyog (P) Ltd.*, reported at (2022) 2 SCC 275

⁹ *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, reported at (2019) 15 SCC 131

¹⁰ *Welspun Specialty Solutions Ltd. v. ONGC*, reported at (2022) 2 SCC 382

uses the expression “may also be set aside”. The term “also” links the said sub-section with sub-section (2) which, in turn, requires an application under sub-section (1) of Section 34 to set it into motion.

92. An arbitral award may be set aside by the court only if the grounds stipulated in sub-clauses (a) and (b) of sub-section (2) or sub-section (2-A) are satisfied. However, sub-section (2) and, by necessary implication, sub-section (2-A) [by use of the term “also” to connect it conjunctively with sub-section (2)], are inextricably linked with sub-section (1), which provides that recourse to a Court against an arbitral award may be made *only* by an application for setting aside such award in accordance with sub-section (2) and sub-section (3). Hence, it is obvious that recourse under Section 34 cannot be taken at all unless there is an application in place for setting aside the impugned award.

93. It is quite obvious that the Legislature did not specifically include any reference to sub-section (2-A) in sub-section (1) in terms of the recommendation of the 246th Law Commission since such inclusion is implicit in the very scheme of Section 34 itself. As sub-section (2-A) uses the expression “also” to link it up with sub-section (2), which provides that an arbitral award may be set aside by the court only if the grounds enumerated therein are met, and as a challenge under sub-section (2) can only be made by way of an application as contemplated in sub-section (1), the apparent discrepancy flagged above can easily be reconciled by construing that an application under Section 34 is a *sine qua non* for a challenge to an arbitral award on any of the grounds enumerated in Section

34, whether under sub-section (2) or under sub-section (2-A), in the light of the discussions above.

- 94.** Having said so, the yardstick of satisfaction in case of sub-section (2)(a), as opposed to sub-sections (2)(b) and (2-A), are premised differently, as evident from the clear language used by the Legislature. Whereas in respect of the former, the party making the application has to establish the grounds stipulated in sub-section (2)(a) for the court to set aside the award, with regard to the grounds mentioned in sub-sections (2)(b) and (2-A) of Section 34, the award can be set aside on an application being filed, if the court finds from the records that any of the grounds enumerated in the said sub-sections exists. The only difference between sub-section (2)(b) and (2-A) is that while in the case of the former the court can satisfy itself of the grounds from the arbitral records as a whole, in case of the latter, the patent illegality should appear “on the face of the award”, without looking further into the records.
- 95.** Hence, harmoniously construed, the Legislative scheme contemplated in Section 34 of the 1996 Act is as follows:
- a. An application under sub-section (1) of Section 34 of the 1996 Act is a *sine qua non* and a prerequisite for interference by the court under any of the grounds enumerated in sub-sections (2) and (2-A) of the said Section;
 - b. Whereas, in case of the grounds mentioned in clause (a) of sub-section (2), it is the applicant which has to establish on the basis of the records such grounds, in case of the grounds enumerated in

clause (b) of sub-section (2) and sub-section (2-A) of Section 34, the court may, respectively from the arbitral records and from the face of the award, satisfy itself as to the existence of any of such grounds.

(v) Whether the awards impugned herein are vitiated under any of the grounds contemplated in Section 34, sub-sections (2) (b) and (2-A) of the 1996 Act

- 96.** As discussed above, in the applications under Section 34, the petitioner has averred that it has not been able to trace out any signed copy of the awards impugned herein and/or documents pertaining to the alleged arbitral proceedings leading to the same. At the same time, it has pointed out that there are several infirmities in the purported awards and lacunae on the part of the respondent with regard to bringing before the court any material to substantiate the validity and existence of the awards.
- 97.** The learned Arbitrator, in her written reply to the query of the petitioner, categorically mentioned that the original awards are lying with her, thereby negating the possibility of the original award being produced by either of the parties. However, simultaneously, the learned Arbitrator stated that she had returned all documents pertaining to the arbitral proceeding to the parties. In the light of such statement, which has not been challenged by the respondent, it was the incumbent duty of the respondent, which asserts the existence of the awards and relies on the same, to bring forth materials in support of such assertion. It is not for the petitioner to prove the negative

fact to the effect that no arbitral award exists at all. The foundational facts of no arbitral award or documents pertaining to the proceeding being available in the office of the petitioner-Company have been sufficiently pleaded in the Section 34 application, thereby shifting the onus of proving the existence of the awards to the respondent.

98. The respondent, however, has miserably failed to substantiate the same. In view of the specific assertion of the learned Arbitrator that copies of all documents were returned to the parties, and in the teeth of the petitioner's stand that no such document is available in its office, it was for the respondent to bring before the court documents in support of the existence of the awards. Conspicuously, nothing of that sort has been done by the respondent. The respondent has not even made out a case that signed copies of the awards were delivered to it at any point of time. Rather, it has furnished photocopies of the awards only.

99. It remains unexplained as to what prevented the respondent, despite getting opportunity throughout the present proceedings under Section 34 of the 1996 Act and in spite of having even filed a belated application at the hearing of the said proceeding, from disclosing any document directly pertaining to the arbitral proceeding. No copy of any of the minutes of the several sittings of the learned Arbitrator, notice to either of the parties of any of the alleged dates of hearing, receipts in respect of payment of arbitral costs by the respondent to the Arbitrator, pleadings (including the Statement of Claim and/or Defence) of either of the parties, affidavits of evidence (if any), any copy of interlocutory application/opposition filed in the

arbitral proceeding or any documentary evidence produced before the Arbitrator has been brought by the respondent before this Court.

100.In the absence of any such document, this Court is constrained to draw adverse inference against the respondent, on the premise that either no such document relating to the arbitral proceedings, including the purported awards, exists at all or, if produced, those would belie the assertion of valid awards having been passed therein.

101.The respondent heavily relies on a purported notice under Section 21 of the 1996 Act issued to it by the petitioner on May 20, 2019. Although the petitioner claims that the author of the said letter, the then Chief Manager of the petitioner-Company, was serving notice period at the relevant juncture, in the absence of any steps being taken by the petitioner against its said employee with regard to issuance of such notice and/or any proof of his actual resignation, such defence of the petitioner cannot be accepted.

102.However, even proceeding on the premise that such a notice was actually issued, mere issuance of the same does not automatically signify the initiation of an arbitral proceeding pursuant thereto. Although, in law, a notice under Section 21 of the 1996 Act is not merely a precursor to arbitration but is also construed to be the initiation of the arbitral proceeding itself, it is to be shown from the materials on record that such a proceeding actually ensued upon issuance of the notice. A mere notice under Section 21 without a follow-up arbitral proceeding is an empty formality leading nowhere. There may be several circumstances under which arbitration may not happen at all even after the issuance of such notice. For

example, the disputes may be settled amicably, or, upon refusal by the noticee to agree to the arbitrator or to subject itself to arbitration, an application for appointment of arbitrator under Section 11 of the 1996 Act is necessitated, which culminates in a dismissal on the ground of non-arbitrability of the dispute or otherwise, requiring a fresh issuance of notice under Section 21. Again, instead of going for arbitration, the parties may initiate legal action on the disputes before a different forum or court after issuance of a Section 21 notice, or it may even so happen that the party issuing such notice chooses not to pursue its legal remedy on the disputes any further. Hence, there cannot be any foregone conclusion that a Section 21 notice must have led to an arbitral proceeding; rather, it is to be ascertained independently from available materials as to whether an arbitral proceeding actually followed such notice.

103. The respondent in the present case alleges that consent was given to the said request under Section 21 on December 31, 2019. The said response giving consent, surprisingly, was not served on the petitioner or even alleged to be so served, although it was by way of a “response” to the petitioner’s notice. Moreover, it came forth after a long hiatus of about seven months from the Section 21 notice. Under the scheme of the 1996 Act, as reiterated in *Tecco Trichy (supra)* ¹¹, several provisions and limitation periods are pressed into action upon the refusal to accede to a notice under Section 21.

104. Under Section 11 of the 1996 Act, if the parties fail to agree on the Arbitrator within 30 days on a receipt by a request by one party from the

¹¹ *Union of India v. Tecco Trichy Engineers & Contractors, reported at (2005) 4 SCC 239*

other to so agree, the party issuing the notice is entitled to make an application for appointment for Arbitrator before the Hon'ble The Chief Justice of the concerned High Court in case of domestic arbitration. Thus, law recognizes a 30-day period as a reasonable waiting period for such assent to come, after which a right accrues in favour of the party issuing the Section 21 request to deem refusal on the part of noticee to accede to such request and seek an appointment of Arbitrator from the Court under Section 11 of the 1996 Act. However, in the present case, the alleged response was issued after more than seven months without any explanation whatsoever for the delay. That too, such response was given directly to the Arbitrator, without any material on record to substantiate that the petitioner had any means of knowing about such response/acceptance of the respondent or that, upon getting such response, the Arbitrator notified the petitioner of any date of sitting.

105. Thus, the reliance of the respondent on the Section 21 notice is not tenable in the eye of law, since the said notice was rendered futile by abstinence on the part of the respondent for the prolonged period of seven months, which is six months beyond the period recognized in Section 11(5) to enable the initiator to seek of appointment before the court. By necessary implication, Section 11(5) of the 1996 Act recognizes the period within which response is to be given to be 30 days, since an application under Section 11 before the High Court for appointment of Arbitrator is necessarily premised on a deemed refusal on the part of the noticee to accede to the request of appointment made under Section 21 of the 1996 Act. Hence, the so-called

response of the respondent cannot be construed to be a valid response in law.

106.In any event, in the absence of any document whatsoever directly pertaining to subsequent arbitral proceedings, to establish the initiation of such proceedings and/or the same having culminated in valid awards, the notice under Section 21 of the 1996 Act in the instant case to be treated to be a still-born baby.

107.The respondent next relies on the filing of an application under Section 9 of the 1996 Act with regard to disputes pertaining to the contracts-in-question at the behest of the petitioner. The said application was made in the month of July, 2018. The late lamented learned Single Judge taking up the application recorded in his order dated July 17, 2018 that the respondent no.1 had produced an e-mail dated July 16, 2018, wherefrom it appeared that the respondent wished to make over possession of the hypothecated assets, which were the bone of contention, to the petitioner. The hearing of the application was adjourned on the premise of such submission.

108.By the next order dated August 14, 2018, it was recorded that the learned Advocate appearing for the petitioner submitted that the petitioner did not wish to press the application and accordingly, the said application under Section 9, bearing AP No.358 of 2018, was dismissed as not pressed.

109.The petitioner insists that it did not receive back the reach stackers, the equipment-in-question, from the respondent. The documents produced by the respondent also pertain to only one of the several reach stackers which comprised of the secured assets.

110. The dismissal of the Section 9 Application as not pressed was evidently on the premise of the impression given by the respondent no.1 that it would make over possession of the hypothecated assets (equipment-in-question) to the petitioner and it was not recorded at any point of time by the Section 9 Court that the actual handover of possession had taken place. From the observations recorded in the aforesaid orders, it is clear that the non-prosecution of the Section 9 application on the part of the petitioner was on the assurance given by the respondent no. 1 therein (present respondent) to return the equipment, without actual return having taken place.

111. However, it cannot be automatically inferred therefrom that the petitioner had actually initiated an arbitral proceeding subsequently. In fact, from the materials actually on record before this Court, the turn of events seems to be that upon dismissal of the Section 9 Application, since the equipment was not returned to the petitioner, it issued a notice under Section 21 of the 1996 Act to the respondent. However, after failing to elicit any response from the respondent in that regard within a reasonable period, the petitioner did not further proceed with the arbitration.

112. In the meantime, due to financial irregularities committed by the previous management of the petitioner-Company, the RBI appointed an Administrator who took charge of the management of the Company and thereafter a proceeding under Section 7 of the IBC was initiated, leading to a CIRP which culminated in a Resolution Plan being approved and the management of the petitioner-Company being handed over to the current dispensation. From the contemporaneous reconciliation statement produced

before this Court, the Court does not find any mention of any arbitral award.

113. Several subsequent items of correspondence between the parties have been placed before this Court. It is rather surprising that in none of the letters issued by it, subsequent to the purported awards being passed, did the respondent even whisper or refer to any arbitral award having been passed, although the contracts-in-question were specifically referred to in at least one of the said documents. The stand of the respondent in such correspondence was that there was “reconciliation” on the amounts payable under the said contracts. The term ‘reconciliation’ may have various shades of meaning, depending on the circumstances. If there were arbitral awards staring at the face of the parties in respect of the two contracts-in-question, it is quite obvious that the respondent would merely have thrown such awards on the face of the petitioner in reply to petitioner’s claims with regard to the contracts-in-question and would have denied any such claim on such ground alone. The utter failure of the respondent to do so clearly indicates that there was no award passed at all.

114. The respondent also relies on a purported document indicating the valuation of the secured assets, which formed the core of the dispute. However, the valuations made with regard to the equipment in such statements do not substantially tally with the valuation mentioned in the arbitral award. In the final reconciliation figure reflected in the e-mail dated August 20, 2020, there was no reflection of the said awards or any adjustment on the basis of such awards and/or any scaling down of the dues in view of return of the

equipment, despite the equipment-in-question having been claimed to have been surrendered. Rather, the pricing in respect of the said equipment was reflected therein. Notably, the said reconciliation statement was dated immediately prior to the impugned awards, which were allegedly passed respectively on September 17 and September 21, 2020, but finds no mention in the awards. In the several items of correspondence between the parties, particularly the one dated September 20, 2022, made by the petitioner, claims were made in respect of the amounts due on the contracts-in-question as well, referring to a letter dated July 16, 2022 issued by the respondent. In the respondent's letter dated July 16, 2022, no mention of the awards found place. Rather, in a subsequent letter dated October 7, 2022, the respondent claimed that it had already surrendered all assets. Specifically referring to the contracts in dispute in the present proceeding, the claims of the petitioner of June 9, 2021 and October 20, 2021 respectively were mentioned in the respondent's letter of October 7, 2022, regarding which the respondent took a stand that it had "reconciled" the account with the Vice President of the petitioner, without any mention of any arbitral proceedings or awards passed therein.

115. There is no scope for this Court, under Section 34 of the 1996 Act, to enter into the question as to whether there was actual return of the equipment-in-question, but the Court cannot fail to take note of the implicit infirmity of the respondent's case, inasmuch as it never referred to the arbitral awards in any subsequent correspondence, and the palpable discrepancy between the documents and claims made by the respondent with regard to the

contracts-in-question in its different pieces of correspondence and the valuation of the equipment stated in the impugned awards.

116. Another discrepancy cannot be overlooked. In the impugned awards, the Arbitrator, in the very first paragraph, categorically mentioned that she was appointed as a sole Arbitrator “jointly by the Claimant and the Respondent vide its Reference Letter dated 29.12.2021”, whereas the letter of even date produced by the respondent shows the unilateral consent given by the respondent directly to the Arbitrator, without any murmur of “joint reference”.

117. Again, in gross contradiction of such statement, in Paragraph No.16 of the awards, it was recorded that the claimant-Company (present petitioner) issued a letter to the Arbitrator nominating her as sole Arbitrator, which appointment was allegedly consented to by the respondent. However, no such letter by the petitioner-Company to the Arbitrator, nominating her in such capacity, is found from the records. Moreover, the said statement is in direct contradistinction with the first paragraph of the awards which mention a joint reference by the parties on a date on which the respondent, and not the petitioner, issued such consent purportedly to the Arbitrator.

118. In view of the above, the failure of the petitioner to prove the negative fact of non-existence of the awards pales into insignificance due to the utter failure on the part of the respondent to produce any document pertaining to the arbitral proceedings or any signed copy of the purported awards.

119. The court cannot also brush aside the contention of the petitioner that in her letter to the petitioner, the learned Arbitrator made huge claims of

arbitral costs, demanding the same solely from the petitioner, which is contrary to the conclusion of the impugned awards directing both the parties to bear their respective costs.

120. Furthermore, the inclusion of conveyance charges and venue charges in the arbitral costs claimed by the learned Arbitrator in her letter to the petitioner during the thick of the Pandemic period, in conjunction with the failure of the respondent to produce any document directly related to the arbitral proceedings, including copies of the pleadings of the parties, documentary evidence, interlocutory applications/objections, minutes of the arbitral proceedings and/or notice of any of the sittings to either of the parties, leads unerringly to the conclusion that there were neither any arbitral proceedings nor any awards passed therein.

121. Since no signed copies of the awards were served on the parties by the learned Arbitrator, even if there were any arbitral proceedings at all, those did not reach their terminus by crossing the threshold of Section 31 (5) of the 1996 Act, which mandates the delivery of signed copies of the awards to each party. Hence, even otherwise, it cannot be said that any valid and enforceable award exists in respect of either of the disputed contracts-in-question.

122. It is not necessary that, in order to arrive at the conclusion that an award is “induced or affected by fraud”, as contemplated in Explanation 1 (i) of sub-section (2)(b)(ii) of Section 34 of the 1996 Act, the act of fraud has necessarily to be attributed a particular person. The Section 34 Court has to proceed on the basis of the materials before it and cannot convert itself

into an investigating agency to trace out the perpetrators of the fraud. Suffice to say that the impugned arbitral awards are conspicuous by their absence. The nature of fraud found herein is not by commission but by omission, since the court comes to the conclusion that there was no existence of the alleged arbitral proceedings and/or arbitral awards, on which the respondent relies, at all.

123. Moreover, the utter absence of any relevant document whatsoever to directly prove the carriage of arbitral proceedings and/or of any award which is valid and enforceable in the eye of law shocks the judicial conscience of the Court and is in conflict with the basic notions of morality and justice in the sense as used in Explanation 1(iii) of sub-section (2)(b)(ii) of Section 34 of the 1996 Act. It would be a gross perpetration and perpetuation of injustice, quite antithetical to notions of due process of law, if the non-existent purported awards which are assailed herein are upheld to be valid and enforceable awards in the eye of law. Thus, the impugned purported awards are in conflict with the public policy of India, being not only induced and affected by fraud and corruption but also in conflict with the basic notions of morality and justice.

124. Hence, this issue is also decided in favour of the petitioner.

CONCLUSION

125. In view of the above findings, this Court comes to the conclusion that the impugned purported awards dated September 17, 2020 and September 21, 2021 respectively, in respect of Contract No. 130853 dated April 15, 2017

and Contract No. 138524 dated July 15, 2017, between the parties are not valid and/or enforceable awards in the eye of law and, as such, cannot be sustained.

126. Accordingly, AP-COM No. 529 of 2024 and AP-COM No. 530 of 2024 are allowed on contest, thereby setting aside the impugned purported awards dated September 17, 2020 and September 21, 2021 respectively and holding the said purported awards to be invalid and unenforceable in the eye of law.

127. In view of the above conclusions, there does not arise any question of enforcement of the impugned awards and, consequentially, Section 36(2) of the 1996 Act is not attracted vis-à-vis the impugned awards.

128. Hence, AP-COM 674 of 2024 and AP-COM 675 of 2024 are also disposed of in the light of the above observations.

129. The connected applications, bearing GA-COM 1 of 2025 in both the matters, are also disposed of in the light of the above observations.

130. There will be no orders as to costs.

131. Urgent certified copies of this order, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)