SD/PSV/PVR

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION NO.332 OF 2021
WITH
INTERIM APPLICATION NO.925 OF 2022

Thomas Cook (India) Limited
having its registered office at
Thomas Cook Building,
Dadabhoy Naroji Road,
Fort, Mumbai – 400 001. … Petitioner

Versus

Red Apple Chandrarat Travel
A company registered as limited company
under the laws of Bangkok (Thailand),
having its Head office at 246, Soionnut
17, Suan Luang Sub-District, Suan Luang,
District Bangkok, Thailand
And
having its head office at 756/145,
Soi Pattanakarn, 38, Suan Luang,
Bangkok, Thailand …Respondent

Ms. Alpana Ghone with Mr. Cyrus Bharucha, Ms. Sheetal Sabnis, Mr. Rushil Mathur and Mr. Keanan Nagporwala i/b. Kochhar & Co. for Petitioner/Applicant.
Mr. Santosh Krishnan a/w. Mr. Rahul Totala, Mr. Ashwin Poojari and Rajat Malu for the Respondent.

CORAM: G. S. KULKARNI, J.
DATED: 13 January, 2023

JUDGMENT

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 [for short **'the Act'**] assails an arbitral Award dated 19th June, 2020, which is a domestic award in an international commercial arbitration, rendered by a Sole Arbitrator.

2. In the arbitral proceedings, the respondent (original claimant) had raised a claim against the petitioner for an amount of USD 2,64,491 along with interest at the rate of 18% per annum from January, 2014 till payment or realization. The respondent also claimed USD 1,00,000 for loss of business, loss of reputation and loss of opportunity.

3. The dispute between the parties had arisen under a contract dated 3 August, 2007 involving services to be provided by the respondent for 'lodging, sighting and allied facilities in Thailand', under which the respondent was to take care of the petitioner's customers, touring Thailand. The arbitral tribunal after hearing the parties on their respective contentions, has passed the following operative award:-

> *"(A) The Respondent is directed to make payment of USD 157931.8 to the Claimant against Claim No.1 along with interest at the rate of 18% p.a. from 1st September, 2014 till the date of the Award.*
>
> *(B) Claim No.2 is rejected.*
>
> *(C) The Respondent is directed to make payment of Rs.24,17,871/- (Rupees Twenty-Four Lakhs Seventeen Thousand Eight Hundred and Seventy-One) to the Claimant towards actual costs and Rs.1 Lakh towards exemplary costs along with interest at the rate of 18% p.a. from the date of the Award till payment and/or realization."*

4. The factual antecedents in relation to the disputes can be noted. The petitioner is a company incorporated under the laws of India, whereas the respondent company was registered under the laws of Thailand in 2009.

5. The case of the respondent/claimant was to the effect that the respondent is engaged in the business of providing travel, tourism and logistic services. The petitioner also is engaged in the same business and was offering tourism packages in India for domestic and international locations. It was the respondent's case that between 2009-2013, the petitioner had availed the respondent's services in arrangement of lodging, sighting and allied facilities in Thailand by requiring the respondent to cater to the petitioner's customers touring Thailand. The tours and travels as offered by the respondent were broadly divided into four groups, namely "summer/winter series", "summer (series)", "ad-hoc group VIP" and "FIT". These tours comprised of different fares and itineraries. Out of these tours the bulk activity was under the category of summers to winter (series).

6. The respondent contended that the parties had a principal to principal relationship and no third party intermediary was involved of any part of the transaction. The business communication between the parties was mostly by email and telephone. The respondent contended that for the services offered by the respondent to the petitioner, the respondent raised invoices from time to time, of which the petitioner was making ad-hoc payments partly discharging the amounts due and payable on different outstanding invoices. The respondent contended that there was a running

account between the parties and after adjustment of payments made by the petitioner and received by the respondent, as per the invoices, for the different category of tours between the period 2010-2013, a principal sum of USD 264,491 was due and payable by the petitioner to the respondent.

7. As the petitioner had failed to make payment of the said amounts, which according to the respondent were admittedly due and payable to the respondent under the contract, the respondent approached this Court by filing Company Petition No. 1057 of 2015 against the petitioner seeking a relief that the petitioner be wound up, as the petitioner was unable to pay its debts. In such proceedings by an order dated 4 December, 2017 read with order dated 6 November, 2017, by consent of the parties the disputes were referred to arbitration by constituting an arbitral tribunal of a sole arbitrator, to adjudicate the disputes and differences between the parties.

8. Before the arbitral tribunal, a statement of claim was filed by the respondent making a principal claim of USD 2,64,491. The respondent also claimed interest at the rate of 18% per annum payable from the date, the contractual relationship between the parties stood terminated vide email dated 4 January, 2014 of the petitioner and a sum of USD 1,00,000 for loss of business, loss of reputation and loss of opportunity.

9. In countering the respondent's claim, the petitioners' defence

before arbitral tribunal was primarily that the respondent's claim was barred by the law of limitation considering dates of invoices/bills, on the basis of which claims were made by the respondent. The petitioner also contended that there was no privity of contract between the respondent and the petitioner as an agreement dated 3 August 2007 was executed with one Red Apple Travel Pvt. Ltd. (for short "**RATL**")and the respondent was merely an associate of RATL. The petitioner contended that the invoices raised by the respondent were paid only under the instruction of RATL.

10. The petitioner however did not dispute that the respondent from time to time was raising invoices on the petitioner, in respect of each of the tours, as also to the fact that the petitioner was regularly making payment of the said invoices/bills, however, a defence was set up by the petitioner that it did not directly deal with the respondent. The petitioner hence contended that there were no amounts due and payable by the petitioner to the respondent.

11. Before the arbitral tribunal, the parties were given a complete opportunity to submit their respective pleadings as also lead their evidence. As seen from the statement of claim, the respondent categorically contended that there was a running account between the parties and that the petitioner was making ad-hoc payments qua the

various invoices. The respondent also referred to the statements reflecting the credit period within which payments were to be made by the petitioner to the respondent, against the outstanding invoices and it was only after such adjustments, the respondent contended that the principal amount of USD 2,64,491 was due and payable by the petitioner to the respondent. The relevant extracts from the statement of claim being claim 1 of the respondent can be noted, which read thus:-

> *"5.1 In these proceedings, Claimant seeks payment of the principal amount USD 2,64,491 being the aggregate due from invoices pending under all four categories of tours/ viz. (a) summer / winter (series), (b) ad hoc group, (c) VIP, (d) FIT, between the period 2010-2013. These bills were sent by email from time to time, as and when they were generated. Copy of the outstanding invoices is annexed herewith as* ***Annexure C/37****.*
>
> *5.2 As has been stated hereinbefore, there was a running account between the parties. The Respondent would make ad hoc part payments in respect of various invoices. The Claimant has prepared a statement duly reflecting the credit/part payment made by Respondent against the outstanding invoices. It is after this adjustment that the principal amount of USD 2,64,491 is found payable. Copy of the Statement of Outstanding is annexed herewith as* ***Annexure C/38****."*

12. As noted above, the respondent, however, denied the case of the respondent inter alia contending that there was no running account between the parties and the payments were made invoice-wise upon receiving instructions from RATL.

13. The arbitral tribunal framed eleven points for determination, as set out in paragraph 24 of the award. The subject matter of deliberation in the present proceeding is issue no.8 namely 'whether the petitioner (org.

respondent) proved that the claim was barred by the law of limitation.' To have a bird's-eye view of the arbitral issues, the points for determination as framed by the arbitral tribunal can be noted which read thus:-

Sr.No.	Points for determination	Findings
(i)	Whether the Claimant proves that there is privity of contract between the Claimant and the Respondent?	In the affirmative.
(ii)	Whether the Claimant proves that the Claimant had a running account directly with the Respondent and that the claimant raised bills upon the Respondent pursuant to which the Respondent made *ad hoc* payments from time to timed?	In the affirmative.
(iia)	Whether the Claimant proves that the Claimant provided non-gratuitous services to the Respondent for which the Respondent is obliged to compensate it?	In the affirmative.
(iii)	Whether the Claimant proves that it is entitled to an award in the sum of USD 2,64,491 along with the interest at the rate of 18% per annum on the said amount from 4th January 2014 till payment or realization?	In the affirmative. As per final award.
(iv)	Whether the Claimant proves that it is entitled to an award in the sum of USD 1,00,000 in lieu of loss of business , opportunity and professional reputation?	In the negative.
(v)	Whether the Respondent proves that the Claimant is an associate concern of Red Apple Travel Pvt. Ltd.?	In the negative.
(vi)	Whether the Respondent proves that it was required to make payment to the Claimant only upon instructions from Red Apple Travel Pvt. Ltd. and that the payments made to the Claimant were pursuant to instructions received from Red Apple Travel Pvt. Ltd?	In the negative.
(vii)	Whether the Respondent proves that in the absence of Red Apple Travel Pvt. Ltd., the dispute in the present arbitration proceedings cannot be decided.	In the negative.
(viii)	**Whether the Respondent proves that the claim is barred by the law of limitation?**	**In the negative**
(ix)	Whether the Respondent proves that the Claimant failed to provide proper services to its customers in tours TCAZ 2312 and TCAZ 2612?	In the affirmative
(x)	What order?	As per final award.
(xi)	What order as to costs?	As per final award.

(emphasis added)

14. The arbitral tribunal on examining the evidence on record recorded a finding of fact that there was a running account between the parties which was reflected in the petitioner's e-mail dated 4 January 2014 (Exhibit CW1/16), e-mail dated 25 March 2014 (CW1/19) and email dated 7 April 2014 (CW1/22). In such context, the relevant finding as recorded by the arbitral tribunal appreciating evidence/materials on record can be noted, which reads thus:-

> *"38. As rightly pointed out by the learned Counsel for the Claimant, the Respondent itself recognized that there was a running account between the parties which is reflected in the Respondent's email dated 4th January 2014 (Exhibit CW1/16) whereby while discontinuing with the services of the Claimant, the Respondent stated that "We are looking on the overall Outstanding of Series, FIT and Adhoc and need the final Outstanding Statement for us to clear the same after checking." By its further email dated 25th March 2014 (Exhibit CW1/19) the Respondent asked for 'Need the break-up and the contract copies on an urgent basis for us to start closing the outstanding." This was followed by an email dated 7th April 2014 (Exhibit CW1/22) from the Respondent to the Claimant stating that "..we need the final Outstanding statement as per your records." In its email dated 12th May 2014 (Exhibit CW1/24) the Respondent stated that "We are in the process of checking the Outstanding statement sent by youI." and " do send the break-up of the last tour so that we can take a call on the final payments to be made." In the said email, the Respondent raised 6 points as stated therein. It is pertinent to note that this email dealt with old invoices of 2010, 2011 and 2012. It was not the case of the Respondent that it was not liable to make payments in respect of the old invoices on the ground that the same were old.*
>
> *39. These emails show that there was a running account between the parties. It is also clear that the Respondent was aware that there was a running account between the parties. The denial of the running accounts has appeared for the first time in the Respondent's Advocates' reply dated 1st September 2014 (Exhibit CW1/31) to the Claimant's legal notice."*

15. In making the above observations, the arbitral tribunal accepted the

case of the respondent that there was a running account between the parties. Once the respondent's case of a running account existing between the parties was accepted by the tribunal, the assertion and/or the case of the respondent that the respondent's claim was barred by the law of limitation as alleged by the petitioner, could not find acceptance by the arbitral tribunal. The arbitral award from paragraphs 87 to paragraph 111 provides for a detailed reasoning for the arbitral tribunal coming to a conclusion that the claims of the respondent were not barred by limitation.

16. Further, the arbitral tribunal considering the admitted correspondence between the parties on the record of the proceedings, observed that the e-mails of the petitioner addressed to the respondent were a clear acknowledgment of the petitioner's liability to pay amounts to the respondent. Each of such e-mails and the context of each of the mails was discussed by the learned arbitrator as clearly seen from the observations made in paragraph 96. The arbitral tribunal accordingly observed that the petitioner had clearly admitted that there was a jural relationship with the respondent. It was observed that from time to time, invoices were raised by the respondent upon the petitioner, and several such invoices from the year 2010 had not been cleared by the petitioner either fully or partly. Notably, the arbitral tribunal has observed that there was no denial of liability by the petitioner to make payments under the

invoices in any of the e-mails and more particularly, to make payment of these invoices/bills raised by the respondent in the year 2010, 2011, 2012 or 2013 much less on the ground that the same were time barred. The observations of the arbitral tribunal are to the effect that the petitioner had continuously assured the respondent to make payment and sought to justify/ explain the delay in non-payment, due to reasons like non-availability of the signing authority or the bank being closed or the accountant not being in office or the like. Such are the categorical observations of the arbitral tribunal.

17. It was hence observed by the arbitral tribunal that the e-mails certainly constituted an acknowledgment of liability by the petitioner to pay the respondent the outstanding amounts. It was observed that even assuming that there was no running account between the parties, and that the period of limitation for each invoice, was to be reckoned from the date such invoice became payable, however, in view of the acknowledgment of payment by the petitioner in such e-mails, a fresh period of limitation was required to be computed from the respective acknowledgments which would also bring the respondent's claim within the period of limitation.

18. The arbitral tribunal has also referred to the settled position in law in such context by referring to the decisions as cited by both the parties, to come to a conclusion that the respondent had clearly proved its case as

pleaded in paragraph 4.4 to 4.16 of the statement of claim on evidence, that the e-mails of the petitioner pertaining to all pending invoices at the relevant time, had the acknowledgment of the claims as made by the respondent and such acknowledgment had been made by the petitioner with regularity. It was thus held by the arbtiral tribunal that the claims as made by the respondent were well within the prescribed limitation as per the provisions of Section 18 and Article 113 of the Limitation Act, and more particularly considering that under such arrangement between the parties, the last payment which was made by the petitioner to the respondent was on 18 November 2013. It was hence observed that a fresh period of limitation would be required to be computed from such date which certainly demonstrated that the respondent's claim was within the prescribed limitation. Accordingly, on examining such mixed question of law and fact, the arbitral tribunal held that the claim of the respondent was within the prescribed limitation.

19. The impugned award was rendered in favour of the respondent on 31 January 2020 by which the petitioner was ordered to pay USD 157,931.80 (approximately Indian Rupees 1,12,53,513.70 alongwith interest at the rate of 18% p.a.) from 1 September 2014 until the date of the award and interest as per Section 31(7)(b) of the Act from the date of the Award until payment. Further the applicant was directed to pay

arbitration costs of Rs.24,17,871/- and exemplary costs of Rs.1,00,000/- to the respondent alongwith interest at the rate of 18% p.a. from the date of the Award until payment.

20. On 19 June 2020, corrections/clarifications to the Award were sought on an application as made by the respondent under Section 33(1) of the Act.

21. Further an Execution Application (COMEX(L) No.8094 of 2020) was filed by the respondent alongwith Interim Application No.489 of 2021 seeking disclosure of assets by the petitioner. There was also a prayer for an order and injunction to be passed against the petitioner's assets. The petitioner filed a reply to the said Interim Application stating that it is a commercially solvent company and has a positive net worth and that the award was yet to attain finality.

22. By an order dated 14 February 2022 passed by a co-ordinate Bench of this Court, considering the contentions as urged on behalf of the petitioner, the petitioner was directed to furnish a bank guarantee of Rs.2,91,84,139/- in favour of the Prothonotary and Sr.Master of this Court, being the amount payable by the petitioner to the respondent under the impugned award, as on 14 February 2022. By an application dated 25 February 2022, the respondent sought modification of the said

order dated 14 February 2022. In compliance of the said orders, the petitioner has furnished a bank guarantee with the Prothonotary and Sr.Master of this Court for an amount of Rs.2,91,84,139/-. This Court by an order dated 8 March 2022 disposed of the Interim Application in the Execution Application in view of the bank guarantee being furnished by the petitioner.

Scope

23. At the outset, it is required to be noted that the scope of interference in an arbitral award is limited on the grounds which are available under Section 34(2) of the Act, more particularly when the arbitral award is an international commercial award. In the present case the ground of patent illegality is not available as the award under challenge is an award in an international commercial arbitration. The proviso to sub-section (2-A) of Section 34 of the Act further clarifies 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.

Submissions on behalf of the Petitioner:-

24. In so far as the grounds of challenge to the impugned award as set out in the petition are concerned, it is required to be noted that there are lengthy and verbose grounds on the merits of the disputes and mostly dealing with factual issues. If these grounds are considered for

adjudication, then certainly the Court would not be adjudicating those proceedings on the parameters, as to what Section 34 of the Act would postulate, in fact any such adjudication would take the colour of an appeal under Section 96 of the Code of Civil Procedure, 1908. This would certainly involve re-appreciation of evidence, the Court being required to come to a different conclusion than what has been appreciated by the arbitral tribunal. This is certainly not the scope of proceedings under Section 34 of the Act. Being conscious of such restrictions, Ms. Ghone, learned counsel for the petitioner has fairly stated that the petitioner cannot cross the well defined parameters of interference in arbitral awards as ordained by Section 34 of the Act. She has accordingly confined her submissions to the illegality of the award on the grounds which, according to her, can be urged under Section 34 of the Act.

25. The following are the submissions of Ms. Ghone in assailing the award:-

(i) Drawing the Court's attention to paragraphs 27, 36, 37 of the impugned award, it is submitted that the arbitral award is of such nature which would shock the conscience of the Court as there is no document on record to show that there was a running account and the arbitral tribunal has come to a perverse conclusion that there was a running account between the parties.

(ii) Consequently the impugned arbitral award is contrary to the fundamental policy of Indian law and the notions of justice. The arbitral tribunal ought to have considered that there were number of invoices of different dates, which would set down a different period of limitation. Considering each of the invoices, the respondent's claims were barred by limitation, as each invoice would be required to be construed as an independent contract. There was no running account in whatsoever form, as produced by the respondent and hence observations made in paragraphs 36, 38 and 39 of the award could not have been made.

(iii) Even if, the respondent's case, of the petitioner acknowledging the debt was to be considered by the arbitral tribunal, the question would arise, as to under which set of the invoices such debt was acknowledged, requiring the arbitral tribunal to consider whether the claims were barred by the law of limitation.

(iv) It is submitted that in a wholesale manner, the invoices together could not have been considered by the arbitral tribunal to hold that the total claim of the respondent based on these invoices was a claim within limitation. Hence, the whole approach of the arbitral tribunal is perverse calling for interference of the Court

within its jurisdiction under Section 34 of the Act.

26. These are the only submissions as urged on behalf of the petitioner. In support of the above submissions, reliance is placed on the decisions of the Supreme Court in (i) **Pundlik Jalam Patil (dead) by LRS Vs. Executive Engineer, Jalgaon Medium Project and Another**[1] and (ii) **Basawaraj and Another Vs. Special Land Acquisition Officer**[2].

Submissions of the Respondent

27. On the other hand, Mr. Krishnan, learned counsel for the respondent in opposing the petition has made the following submissions:-

(i) No ground for interference has been made out by the petitioner and more particularly considering the provisions of sub-section (2-A) of Section 34 of the Act as no ground of patent illegality on the face of the award could be demonstrated by the petitioner.

(ii) On a perusal of grounds as set out in the memo of the petition, it has become clear that the grounds are mostly on the merits of the disputes and none of these grounds fall within the permissible parameters to assail an award under Section 34 of the Act. The contentions of the petitioner in challenging the award are

1 (2008) 17 Supreme Court Cases 448
2 (2013) 14 Supreme Court Cases 81

mostly in the nature of inviting this Court to re-appreciate evidence, and record fresh findings after re-appreciating evidence which is certainly not the scope of jurisdiction under Section 34 of the Act.

(iii) The arbitral tribunal has recorded findings of fact based on materials and not a single ground as urged by the petitioner could be labelled to be any observations/findings of the arbitral tribunal which are not borne out by the record. It is submitted that there was substantial material which was available and as discussed in the arbitral award for the arbitral tribunal to hold that there was a running account between the parties which was clear from the admission of liability from the letters/e-mails of the petitioner which formed part of the record. Based on such material, the petitioner cannot contend that there was no material for the arbitral tribunal to come to a conclusion that there was no running account between the parties and/or the claims of the respondent were not acknowledged. It is hence submitted that the claims as made by the respondent were well within the prescribed limitation. It is submitted that it is a settled principle of law that the arbitral tribunal is the master of the quantity and quality of evidence in adjudication of the arbitral disputes.

(iv) From the submissions as urged on behalf of the petitioner as

also the grounds as raised in the petition, the contention of the petitioner is of the impugned award being hit by patent illegality, which is a ground, not available to the petitioner when the challenge is to an award, which is in an international arbitration, as sub-section (2-A) of Section 34 of the Act would provide.

28. In support of the above submissions, reliance is placed on the decisions of the Supreme Court in (a) **Renusagar Power Co. Ltd. vs. General Electric Co.**[3], (b) **Associate Builders vs. Delhi Development Authority**[4], (c) **Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI)**[5], (d) **Vijay Karia & Ors. vs. Prysmian Cavi E Sistemi SRL & Ors.**[6], (e) **Oriental Insurance Company Ltd. vs. April Usa Assistance Inc.**[7], (f) **Delhi Airport Metro Express Pvt. Ltd. vs. Delhi Metro Rail Corporation Ltd.**[8] and (g) **Aircon Beibars FZE vs. Heligo Charters Pvt. Ltd.**[9]

Reasons and Conclusion :-

29. Having heard learned counsel for the parties and having perused the record and the impugned award, at the outset, it needs to be noted that the arbitration in question is an international commercial arbitration as domestically held under Part I of the Act. Considering such nature of the

3 1994 Supp(1) Supreme Court Cases 644
4 (2015) 3 Supreme Court Cases 49
5 (2019) 15 Supreme Court Cases 131
6 (2020) 11 Supreme Court Cases 1
7 2021 SCC OnLine Del 4843
8 (2022) 1 Supreme Court Cases 131
9 2022 SCC OnLine Bom 329

award, the contention as urged on behalf of the respondent that sub-section (2-A) of Section 34 of the Act, which provides that an arbitral award which arises out of arbitrations which are international commercial arbitrations, the ground that the award is vitiated by patent illegality, appearing on the face of the award would not be applicable. Also such arbitral award cannot be set aside merely on the ground of erroneous application of law or re-appreciation of evidence. For convenience, it would be appropriate to extract Section 34 of the Act to appreciate the scope of interference by the Court in an arbitral award. Section 34 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 sub-section (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 reappreciation 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."

(emphasis supplied)

30. As the arguments and the deliberation on the proceedings was

focused on the observations as made by the arbitral tribunal in paragraphs 29, 36, 38, 39, 87, 88 and 89 of the impugned award, it would be convenient to note these observations, which read thus:-

> *"29. It is the case of the Claimant that there was a running account between the parties and that the Respondent made ad-hoc part payments in respect of various invoices. The Claimant has prepared a statement reflecting the credit/part payment made by the Respondent against the outstanding invoices and states that after this adjustment the principal amount of USD 264,491 is payable by the Respondent.*
>
> *36. Mr. Krishnan, learned Counsel for the Claimant relies upon the judgment of the Delhi High Court in Bharath Skins Corporation vs. Taneja Skins Company Pvt. Ltd., 2011 SCC Online Del 5523 to submit that the provision of services by the Claimant to the Respondent from 2009 to 2013 is a single contractual relationship and that the account between the parties was an open running and non-mutual account. He relied upon paragraphs 2 to 8 and 13 to 25 of the said judgment. In paragraph 14, the Delhi High Court has held that "Where 'A' sells goods to 'B' from time to time and 'B' makes payments towards the price from time to time, there is only a 'single' contractual relationship, namely, that of buyer and seller, between the parties. 'A' has demands against 'B' for items sold, but 'B' can have no demands against 'A'." In paragraph 20, it has been held that "In case of a running and non-mutual account between the buyer and seller, when goods are delivered by the seller to the buyer, the value of the goods is debited in the debit column and when amounts are paid by the buyer to the seller, they are entered in the credit column. The difference is continuously struck in the column for balance. In such a case, when the buyer defaults to make balance payment, the seller's action is not for the price of goods sold and delivered but for the balance due at the foot of an account. Thus, Article 14 would have no application in suits for recovery of money due on a running and a non-mutual current account between the buyer and seller.'*
>
> *38. As rightly pointed out by the learned Counsel for the Claimant, the Respondent itself recognized that there was a running account between the parties which is reflected in the Respondent's email dated 4th January 2014 (Exhibit CW1/16) whereby while discontinuing with the services of the Claimant, the Respondent stated that "We are looking on the overall Outstanding of Series, FIT and Adhoc and need the final Outstanding Statement for us to clear the same after checking." By its further email dated 25" March 2014 (Exhibit CW1/19) the Respondent asked for "Need the break-up and the contract copies on an urgent basis for us to start closing the outstanding." This was followed by an email dated 7th April 2014 (Exhibit CW1/22) from the Respondent to the Claimant stating that "...we need the final Outstanding statement as per your records." In its email dated 12" May 2014 (Exhibit CW1/24) the Respondent stated that "We are in the process of checking the Outstanding statement sent by you." and "Do send the break-up of the last tour so that we can take a call on the final payments to be made." In the said email, the Respondent raised 6 points as stated therein. It is pertinent to note that this email dealt with old invoices of 2010, 2011 and 2012. It was not the case of the Respondent that it was*

not liable to make payments in respect of the old invoices on the ground that the same were old.

39. These emails show that there was a running account between the parties. It is also clear that the Respondent was aware that there was a running account between the parties. The denial of the running account has appeared for the first time in the Respondent's Advocates' reply dated 1st September 2014 (Exhibit CW1/31) to the Claimant' legal notice.

87. Point for Determination no. (viii)

"Whether the Respondent proves that the claim is barred by the law of limitation?"

88. Ms. Ghone, learned Counsel for the Respondent submits that as the payments were made invoice-wise, a claim would have to be made as and when there is a default invoice wise in making the payment. I have already held that it is proved that there was a running account between the parties and that the payments having being made invoice-wise does not negate the existence of a running account between the parties. In view thereof, I reject the contention that claims ought to have been made as and when there was a default in making payment towards a certain invoice. It must be borne in mind that it was a long standing and continuing business relationship between parties over a span of 4 years and extending to hundreds of tours and several thousand dollars during which part payments were made from time to time towards the same invoices. The contractual relationship came to an end only on 4th January 2014 and therefore, the period of limitation to file a suit or an arbitral reference cannot be said to begin before 4th January, 2014. The reliance upon the judgment of the Hon'ble Delhi High Court in Additional Commissioner of Income-tax vs. Roshan 1982 SCC Online Del 54 by the learned counsel for the claimant to state that the fact that the respondent made payment invoice-wise may be relevant but is not determinative of the non-existence of a running account is apposite. Learned counsel for the claimant relied upon the judgment of the Hon'ble Delhi High Court in M/s. Naraingarh Sugar Mills Ltd. vs. Krishna Malhotra, 2012 SCC Online Del 1492 in which case payment had been made invoice-wise and yet it was held that it was a running account.

89. Mr. Krishnan, learned Counsel for the Claimant submitted that a running account is not confined to Article 1 of the Limitation Act, 1908. He submitted that if an account is not registered and not mutual then Article 113 of the Limitation Act, 1908 would apply, which provides for a period of limitation for 3 years from when the right to sue accrues. He relies upon the judgment of the Hon'ble Delhi High Court in Bharath Skins Corporation (supra), followed by the Hon'ble Madras High Court in Renganathan (supra) and Division Bench of the Hon'ble Delhi High Court in Advert Communications Pvt. Ltd. v. JSL Media Ltd. dated 16th September, 2016 in RFA (OS) No. 48/2016. On the other hand, Ms. Ghone, learned counsel for the respondent submits that Article 14 of the Schedule to the Limitation Act, 1963 would be the correct article applicable to the present case. She relies upon the judgment of the Hon'ble Bombay High Court in Vijaykumar Satishchandra & Co. vs. Rajgopal Badrinarayan Malpani, reported in 1996 Mh. L.J. 594."

31. It is thus seen that the arbitral tribunal has discussed *in extenso* the materials on the basis of which such findings have been recorded. In the light of such findings as recorded on appreciation of the evidence on record, it is difficult to accept the case as urged on behalf of the petitioner that the findings as recorded by the arbitral tribunal are of a nature which would shock the judicial conscience.

32. There is also much substance in the contentions as urged on behalf of the respondent and more particularly considering the elaborate findings as recorded by the arbitral tribunal that the arbitral tribunal is the master of the quantity and quality of evidence and it would not be the jurisdiction of the Court under Section 34 of the Act to re-appreciate evidence and interfere with the findings of the arbitral tribunal. On such context the following discussion would throw further light.

33. The petitioner's basic case is that the claims as made by the respondent were barred by limitation. In so far as the issue of limitation is concerned, the arbitral tribunal appreciating the evidence on record and more particularly, the correspondence between the parties namely the admitted e-mails has recorded a clear finding that there was a running account between the parties. The arbitral tribunal has observed that the amounts as payable by the petitioner to the respondent were acknowledged, as seen from the e-mails as addressed by the petitioner to

the respondent, hence, the amounts were due and payable by the petitioner to the respondent under the invoices, being not disputed, is a finding of fact, as recorded by the arbitral tribunal. The obvious consequence of such evidence of admission of liability was that the petitioner was under an obligation to make payment of the amounts under the unpaid invoices. At no point of time, the invoices were disputed and/or liability under the same was denied in a manner known to law. These are the findings of fact as recorded by the arbitral tribunal.

34. Thus, it cannot be said that there was any perversity in the arbitral tribunal coming to a conclusion in regard to acknowledgment of liability by the petitioner and that there was a running account between the parties. The case of the petitioner being set up contrary to the materials on record cannot be accepted. Such contentions as urged on behalf of the petitioner at the most are in fact contentions on patent illegality of the arbitral award, which is not available to the petitioner to be urged in the present proceedings, when the arbitration in question is an international commercial arbitration. The position in law in such context is required to be considered.

35. Prior to 1996, before the present Act was brought into the force, foreign awards could be enforced as per the provisions of the Foreign

Awards (Recognition and Enforcement) Act 1961 (for short ""Foreign Awards Act"), the question in regard to the enforcement of a foreign awards under the Foreign Awards Act had fell for consideration of the Supreme Court in the case of *Renusagar Power Co. Ltd. (supra)*. The Supreme Court held that the scope of enquiry before the Court in which a foreign award was sought to be enforced, was limited to grounds which were mentioned in Section 7 of the Foreign Awards Act. It was observed that such provision did not enable a party to the said proceedings to impeach the award on merits. As Section 7(1)(b)(ii) of the Foreign Awards Act used the word "public policy", it was held that such words would be required to be given a meaning to be the public policy of India. The Court observed that it cannot be held that by not using the words "public policy of India" and only using the words "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act, Parliament intended to deviate from the provisions of the New York Convention contained in Article V(2)(b) which uses the words "public policy of that country" implying the public policy of the country where recognition and enforcement was sought. It was held that it was borne out by the amendment introduced to the Act, by Amendment Act 47 of 1973, which was after the decision of the Supreme Court in *V/O Tractoroexport, Moscow vs. Tarapore & Co. case (AIR1971 SC 1)*, whereby Section 3 was substituted to bring the same in accord with the provisions of the New

York Convention. It was observed that the Foreign Awards Act was enacted to give effect to the New York Convention which seeks to remedy the defects in the Geneva Convention of 1927 that hampered the speedy settlement of disputes through arbitration. It was observed that the Foreign Awards Act is, hence was intended to reduce the time taken in recognition and enforcement of foreign arbitral awards. It was observed that the New York Convention seeks to achieve the said objective by dispensing with the requirement of the leave to enforce the award by the courts where the award is made and thereby avoid the problem of "double exequatur". It was observed that the Act also restricted the scope of enquiry before the Court enforcing the award, by eliminating the requirement that the award should not be contrary to the principles of the law of the country in which it is sought to be relied upon. It was observed that enlarging the field of enquiry to include public policy of the Courts whose law governs the contract or of the country of the place of arbitration, would run counter to the express intent of the legislation. It was further observed that in view of the absence of a workable definition of "international public policy" the expression "public policy" as used in Article V(2)(b) of the New York Convention cannot be construed to be an international public policy. It was observed that the such expression must be construed to mean the doctrine of public policy as applied by the courts in which the foreign award is sought to be enforced. The Supreme Court

held that the expression 'public policy' in Section 7(1)(b)(ii) of the Foreign Awards Act means the doctrine of public policy as applied by the courts in India. It was also observed that a distinction is required to be drawn while applying the rule of public policy between a matter governed by domestic law and a matter involving conflict of laws, while observing that the application of the doctrine of public policy in the field of conflict of laws is more limited than that in the domestic law and that the courts are slower to invoke public policy in cases involving a foreign element than when a purely municipal legal issue is involved. It was also held that transactions containing a foreign element may constitute a less serious threat to municipal institutions than purely local transactions. In this context, it was held that the defence of public policy which is permissible under Section 7(1)(b)(ii) should be construed narrowly. The Supreme Court concluded that applying the said principles, it must be held that the enforcement of a foreign award could be refused only on the ground that it is contrary to public policy if such enforcement is contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality. The observations of the Supreme Court in paragraphs 65 and 66 are required to be noted which read thus:-

> *"65. This would imply that the defence of public policy which is permissible under Section 7(1)(b)(ii) should be construed narrowly. In this context, it would also be of relevance to mention that under Article I(e) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the*

public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Protocol & Convention Act of 1837 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression "public policy" covers the field not covered by the words "and the law of India" which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.

66. Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression "public policy" in Article V(2)(b) of the New York Convention and Section 7(1)(b)(ii) of the Foreign Awards Act is not used in the same sense in which it was used in Article 1(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that "public policy" in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract to bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality."

36. The decision of the Supreme Court in **Renusagar Power Co. Ltd. vs. General Electric Co.** (supra) was applied with approval by the Supreme Court in its decision in **Associate Builders vs. Delhi Development Authority** (supra) when the Court reiterated the principles of interference in an arbitral award under Section 34 of the Act and in the context of fundamental policy of Indian law. Learned counsel for the respondent

would be right in his contention relying on the decision of **Associate Builders vs. Delhi Development Authority** (supra) when he submits that the contention as urged on behalf of the petitioner on limitation cannot be argued as an issue under Section 34(2)(b)(ii) of the Act namely the arbitral award being in conflict with most basic notions of morality and justice. The Supreme Court in **Associate Builders vs. Delhi Development Authority** (supra) has clearly observed 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. It was observed that a possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. The Supreme Court has observed that one of the grounds of public policy is, when an award is against justice or morality. It was observed that these are two different concepts in law. The Supreme Court observed that an award can be said to be against justice only when it shocks the conscience of the Court when it succinctly set out an illustration as to when it would be something which would shock the conscience of the Court. The illustration being, when the claimant is restricting his claim to Rs. 30 lakhs in a statement of claim before the arbitral tribunal and at no point of time does he seek to claim anything more, however, the arbitral award when awards him Rs.45 lakhs without any acceptable reason or justification, this

obviously, would be something which would shock the conscience of the Court, and for such reason the arbitral award would be liable to be set aside on the ground that it is contrary to justice. Applying such parameters, I would be at a loss to understand as to how the petitioner can fit its case within the permissible parameters of interference under Section 34(2)(b)(iii) of the Act to label the award as against the basic notions of morality or justice.

37. In **Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI)** (supra), again the concept of public policy was explained by the Supreme Court to hold that the expression "public policy of India", whether contained in Section 34 or in Section 48 of the Act, would mean the "fundamental policy of Indian law" as explained in paragraphs 18 and 27 of **Associate Builders vs. Delhi Development Authority** (supra) which read thus:-

> *"18. In Renusagar Power Co. Ltd. v. General Electronic Co., 1994 Supp (1) SCC 644, the Supreme Court construed Section 7 (1)(b) (ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961:*
>
> > *"7. **Conditions for enforcement of foreign awards**.-(1) A foreign award may not be enforced under this Act-*
> > *(b) if the Court dealing with the case is satisfied that-*
> > *(ii) the enforcement of the award will be contrary to the public policy."*
>
> *In construing the expression "public policy" in the context of a foreign award, the Court held that an award contrary to*
> *(i) The fundamental policy of Indian law,*
> *(ii) The interest of India,*
> *(iii) Justice or morality,*

would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (see para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law.

Fundamental Policy of Indian Law

27. Coming to each of the heads contained in the Saw Pipes judgment, we will first deal with the head "fundamental policy of Indian Law". It has already been seen from the Renusagar judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law."

38. The Supreme Court in Ssangyong Engineering & Construction Co. Ltd.(supra) also observed that the fundamental policy of Indian law would be relegated to the "Renusagar" understanding of this expression. The observations of the Supreme Court in that regard are required to be noted which read thus:-

"34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the "Renusagar" understanding of this expression. This would necessarily mean that Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of

the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of the Associate Builders (supra).

35. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paragraphs 36 to 39 of Associate Builders, as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders, or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders. Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders, and paragraphs 28 and 29 in particular, is now done away with.

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, paragraph 42.1 of Associate Builders, namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of Associate Builders (supra), however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

44. In Renusagar (supra), this Court dealt with a challenge to a

> *foreign award under Section 7 of the Foreign Awards (Recognition and Enforcement) Act, 1961 ["Foreign Awards Act"]. The Foreign Awards Act has since been repealed by the 1996 Act. However, considering that Section 7 of the Foreign Awards Act contained grounds which were borrowed from Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ["New York Convention"], which is almost in the same terms as Sections 34 and 48 of the 1996 Act, the said judgment is of great importance in understanding the parameters of judicial review when it comes to either foreign awards or international commercial arbitrations being held in India, the grounds for challenge/refusal of enforcement under Sections 34 and 48, respectively, being the same."*

39. In the context of the above observations and the nature of the challenge as urged on behalf of the petitioner, the observations of the Supreme Court in paragraph 76 in **Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI)** (supra) as relied on behalf of the petitioner are certainly not applicable. For convenience, paragraphs 75 and 76 of the said case are required to be noted which read thus:-

> *"75. Insofar as the argument that a new contract had been made by the majority award for the parties, without the consent of the appellant, by applying a formula outside the agreement, as per the Circular dated 15.02.2013, which itself could not be applied without the appellant's consent, we are of the view that this ground under Section 34(2)(a)(iv) would not be available, given the authorities discussed in detail by us. It is enough to state that the appellant argued before the arbitral tribunal that a new contract was being made by applying the formula outside what was prescribed, which was answered by the respondent, stating that it would not be possible to apply the old formula without a linking factor which would have to be introduced. Considering that the parties were at issue on this, the dispute as to whether the linking factor applied, thanks to the Circular dated 15.02.2013, is clearly something raised and argued by the parties, and is certainly something which would fall within the arbitration clause or the reference to arbitration that governs the parties. This being the case, this argument would not obtain and Section 34(2)(a)(iv), as a result, would not be attracted.*

> *76. However, when it comes to the public policy of India argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the agreement continued to be applied till February, 2013 – in short, it is not correct to say that the formula under the agreement could not be applied in view of the Ministry's change in the base indices from 1993-94 to 2004-05. Further, in order to apply a linking factor, a Circular, unilaterally issued by one party, cannot possibly bind the other party to the agreement without that other party's consent. Indeed, the Circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the Circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority award has created a new contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the agreement by another formula de hors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any Court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment."*

40. In **Vijay Karia & Ors. vs. Prysmian Cavi E Sistemi SRL & Ors.** (supra), the Supreme Court taking a review of the law on enforceability of a foreign arbitral award, observed that it is only when a foreign award fails to determine a material issue which goes to the root of the matter or fails to decide a claim or counter-claim in its entirety, the award may shock the conscience of the Court and may not be enforced as on such

considerations the award would then offend the most basic notion of justice in this country. It was observed to be always remembered that poor reasoning, by which a material issue or a claim is rejected, can never fall in this class of cases. It was also emphasized that the foreign award must be read as a whole, fairly, and without nit-picking. In paragraphs 83 and 88, the Court observed thus:-

> *"83. Having said this, however, if a foreign award fails to determine a material issue which goes to the root of the matter or fails to decide a claim or counter-claim in its entirety, the award may shock the conscience of the Court and may not be enforced, as was done by the Delhi High Court in Campos on the ground of violation of the public policy of India, in that it would then offend a most basic notion of justice in this country. It must always be remembered that poor reasoning, by which a material issue or claim is rejected, can never fall in this class of cases. Also, issues that the tribunal considered essential and has addressed must be given their due weight – it often happens that the tribunal considers a particular issue as essential and answers it, which by implication would mean that the other issue or issues raised have been implicitly rejected. For example, two parties may both allege that the other is in breach. A finding that one party is in breach, without expressly stating that the other party is not in breach, would amount to a decision on both a claim and a counter-claim, as to which party is in breach. Similarly, after hearing the parties, a certain sum may be awarded as damages and an issue as to interest may not be answered at all. This again may, on the facts of a given case, amount to an implied rejection of the claim for interest. The important point to be considered is that the foreign award must be read as a whole, fairly, and without nit-picking. If read as a whole, the said award has addressed the basic issues raised by the parties and has, in substance, decided the claims and counter-claims of the parties, enforcement must follow.*
>
> *88. … … The fundamental policy of Indian law, as has been held in Renusagar (supra), must amount to a breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised. "Fundamental Policy" refers to the core values of India's public policy as a nation, which may find expression not only in statutes but also time-honoured, hallowed principles which are followed by the Courts. Judged from this point of view, it is clear that resistance to the enforcement of a foreign award cannot be made on this ground."*

41. In **Oriental Insurance Company Ltd. vs. April Usa Assistance Inc.** (supra), the challenge before the learned Single Judge of Delhi High Court in a petition filed under Section 34 of the Act was to an arbitral award. The principal grounds on which the impugned award was assailed was that it allowed the claims which were barred by limitation. In such context, the Court observed that Explanation 2 of Section 34 (2) of the Act clarifies that the question whether there is any contravention of the fundamental policy of Indian law does not entail a review on the merits of the dispute. It was observed that even if it is assumed that the statute of limitation is a part of the fundamental policy of Indian law, the question whether a claim is barred by limitation is a mixed question of fact and law.

42. In **Aircon Beibars FZE vs. Heligo Charters Pvt. Ltd.** (supra), this Court was considering an issue in regard to enforcement of a foreign award within the meaning of Section 44 Part II of the Act. In opposing the enforcement of the award, an issue was raised before the Court that a finding as recorded by the arbitral tribunal was based on no evidence and being not based on evidence, therefore the same was perverse. The Court in such context observed that jurisdictional errors would include situations when an arbitrator wanders outside the contract and deals with matters which were not referred to him and this may be considered to be a patent illegality but this would not be applicable to international commercial

arbitrations. The Court observed that the public policy exception must be narrowly viewed and only an award which shocks the conscience of the Court would be set aside. Such observations were made referring to the decisions of the Supreme Court in **Renusagar Power Co. Ltd. vs. General Electric Co.** (supra), **Associate Builders vs. Delhi Development Authority** (supra), **Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI)** (supra) and **Vijay Karia & Ors. vs. Prysmian Cavi E Sistemi SRL & Ors.** (supra).

43. Now coming to the decisions as relied on behalf of the petitioner, firstly Ms. Ghone relies on the decision of the Supreme Court in **Pundlik Jalam Patil (dead) by LRS Vs. Executive Engineer, Jalgaon Medium Project and Another** (supra). In my opinion, this decision would not assist the petitioner for more than one reason, firstly, the principles as discussed in paragraphs 25 and 26 of the said decision, are not in the context of any challenge to an arbitral award under Section 34 of the Act. The controversy before the Supreme Court arose in challenge to a judgment and order of the High Court allowing the applications filed by the respondent/Executive Engineer under Section 5 of the Limitation Act, 1963 whereby a prayer was made to condone the delay of 1724 days in filing appeals against the award passed by the Civil Judge, Senior Division, Jalgaon in a land acquisition case. The High Court accepted the

explanation offered by the respondent-Executive Engineer for the apparent inordinate delay in filing the appeals against the award of the Reference Court. The Supreme Court, however, did not find favour in the orders of the High Court condoning delay, when it observed that the Limitation Act did not provide for a different period to the government in filing appeals or applications. It was observed that no case was pleaded and/or proved by the respondent therein to make out a sufficient cause for condonation of such delay. It was observed that the High Court had gravely erred in exercising its discretion to condone the inordinate delay of 1724 days and accordingly set aside the orders passed by the High Court. It is in such context, the Court had observed that the law of limitation is founded on public policy. Such observations of the Supreme Court would not assist the petitioner in the present context and more so considering Section 34(2-A) of the Act.

44. In **Basawaraj and Another Vs. Special Land Acquisition Officer**, the Supreme Court was considering a challenge to the orders passed by the High Court on appeals filed by the appellants therein, under Section 54 of the Land Acquisition Act, 1894. Such appeals filed before the High Court were time barred as the same were preferred after a delay of five and half years and no satisfactory explanation was furnished in the application for condonation of delay, for not approaching the Court within the prescribed

limitation.The High Court had rejected the delay condonation application as no sufficient cause to condone such delay was made out. In such context, the Court observed that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. It is in such context, it was observed by the Supreme Court that the law of limitation was founded on public policy, as its aim was to secure peace in the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. It was also observed that it seeks to bury all acts of the past which have not been agitated unexplainably and have from lapse of time become stale. It is in such context referring to the decision of **P. Ramachandra Rao v. State of Karnataka, AIR 2002 SC 1856**, the Court held that judicially engrafting principles of limitation, amounted to legislating and would fly in the face of law as laid down by the Constitution Bench in the case of **A. R. Antulay v. R.S. Nayak, AIR 1992 SC 1701**. Even this decision would not assist the petitioner as the observations are also not in the context as to what the parameters of Section 34 of the Act would provide on the touchstone of what has been as laid down by the Supreme Court in the decisions of Renusagar Power Co. Ltd. vs. General Electric Co. (supra), Associate Builders vs. Delhi Development Authority (supra), Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI) (supra) and Vijay Karia & Ors. vs. Prysmian Cavi E Sistemi SRL & Ors. (supra).

45. Adverting to the principles of law as discussed above in the context of the challenge to the arbitral award as mounted in the present proceedings, it needs to be stated that the contention as urged on behalf of the petitioner that the impugned award needs to be interfered on the ground that the same is in conflict with the basic notions of morality and justice cannot be accepted, when the challenge is primarily on the ground that the claims as made by the respondent were barred by limitation.

46. As discussed above the arbitral tribunal has considered the respondent's claims being not barred by limitation by recording a finding of fact that there was a running account between the parties and which clearly stood established from materials on record. Question is whether such finding of fact be re-examined by appreciating evidence. The answer would be an obvious no. When the petitioner poses such question, it is implicit that it is nothing different than to call upon the Court to re-appreciate the evidence and to record a finding contrary to what has been held by the arbitral tribunal namely that no running account could be established on the basis of the materials/evidence on record. I am afraid that such course of action is at all be permissible, as this would not only involve re-appreciation of evidence, but the Court in exercise of jurisdiction under Section 34 of the Act coming to a conclusion different from what the arbitral tribunal has held as if the proceedings is an appeal.

47. In any event, the ground of limitation, being a mixed question of law and fact, can never be a ground which would involve any basic notion of morality of justice for an arbitral award to be set aside. This would also entail a review of the award on the merits of the disputes. It is also well settled as observed by the Supreme Court in **Associate Builders vs. Delhi Development Authority** (supra) that the arbitral tribunal is the master of the quantity and quality of evidence and it is the final adjudicator on such questions. It is also well settled that the Courts would not interfere merely because an alternative view on facts would exist. The Court would also not interfere in an arbitral award, if a possible view is taken by the arbitral tribunal on the basis of material before it. It is thus totally unsuitable for the petitioner to urge that the impugned award is required to be interfered by this Court, by coming to a conclusion that the impugned award is in conflict with the basic notions of morality of justice.

48. Further the petitioner's assertion that in the facts of the present case, the principles of the arbitral award being in conflict with public policy of India, and/or it is in contravention with the fundamental policy of Indian law, stand attracted, when an issue of the claims being barred by limitation are canvassed, is an assertion not well founded. This for the reason that this is not a case where an *ex facie* and a brazenly time barred claim or a

deadwood, was awarded by the arbitral tribunal of a nature which would shock the conscience of the Court. The issue of limitation in the present case clearly being a mixed question of law and fact was examined by the arbitral tribunal on materials/evidence on record, so as to come to a factual finding that the claim as made by the respondent was within the prescribed limitation.

49. In the light of the above discussion, no case has been made out for interference in the impugned arbitral award within the limited jurisdiction of the Court under Section 34 of the Act. The petition is accordingly dismissed.

50. In view of dismissal of the petition, interim application would not survive. It is accordingly disposed of.

(G. S. Kulkarni, J.)

51. At this stage, learned counsel for the parties have drawn the Court's attention to an order dated 14 February, 2022 passed by a co-ordinate Bench of this Court (B.P. Colabawalla, J.) on Interim Application No. 489 of 2021 in Execution Application (L) No. 8094 of 2020 filed by the respondent whereunder impugned award was sought to be executed. By such order, the petitioner was directed to furnish a bank guarantee of the

award amount with a further direction that the bank guarantee shall abide by the orders to be passed by this Court in section 34 petition and that any further directions in relation to the bank guarantee shall be given by the Court hearing the Section 34 petition, namely, the present proceedings. Accordingly, the bank guarantee as furnished by the petitioners was of an amount of Rs.2,91,84,139/- of the Kotak Mahindra Bank. The relevant part of the said order passed by the co-ordinate Bench of this Court is required to be noted, which reads thus:

> *"6. The furnishing of this bank guarantee shall abide by the orders passed by this Court in the Section 34 Petition or any interlocutory applications filed therein. Any further directions in relation to the aforesaid bank guarantee shall be given by the Court hearing the Section 34 Petition filed by the Judgment Debtor herein. The Judgment Creditor is also at liberty to make an appropriate application in the Section 34 proceedings seeking a withdrawal of this amount. If any applications are filed in the Section 34 proceedings, they shall be disposed of on their own merits and in accordance with law uninfluenced by any observations in this order."*

52. In view of above orders passed by this Court, there are two requests made before the Court on pronouncement of the above orders dismissing the section 34 petition. The first request is on behalf of the respondent that the respondent be permitted to encash the bank guarantee. In opposition, there is a request on behalf of the petitioner that as the petitioner intends to assail the order passed on the present Section 34 proceedings, encashment of bank guarantee by the respondent be deferred for some period. It is stated that the bank guarantee is kept alive till the pendency of the proceedings.

53. In the above circumstances, in my opinion, to enable the petitioner to assail the present order before the Supreme Court, the respondent is directed not to encash the bank guarantee for a period of 15 days from today.

[G. S. Kulkarni, J.]