

**IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR
(Commercial Division Srinagar Wing)**

Arb P No. 6/2023

Reserved on: 26.12.2024
Pronounced on: 12.02.2025

**Zaffar Abbas Din son of late Ghulam Nabi Din resident of
Khanabal, Anantnag Kashmir** **...PETITIONER(S)**

Through: - Mr. Shariq J Riyaz Advocate.

Vs.

**Nasir Hamid Khan son of Khwaja Hamid Ullah Khan resident of
216 Bagat Barzulla, Srinagar**

...RESPONDENT(S)

Through: - Mr. Z.A.Shah Sr. Advocate with
Mr. Hanan.
Mr. Jahangir Iqbal Ganai Sr. Advocate with
Mr. Owais Dar and Ms Mehnaz Rather Advocates

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1 The petitioner has filed the instant petition under Section 34 of the Jammu and Kashmir Arbitration and Conciliation Act, 1997 (hereinafter referred to as 'the Act of 1997') for setting aside award dated 21.01.2023, passed by the learned Arbitral Tribunal, presided over by Hon'ble Mr. Justice Mohd. Yaqoob Mir, former Chief Justice of the Meghalaya High Court. Before coming to the grounds of challenge, it would be apt to give a brief background of the facts leading to the filing of the present petition.

2 The petitioner happens to be the owner of a five-storeyed building known as 'Enso Tower', situated at Khanabal, Anantnag. An agreement came to be executed between the petitioner and the respondent on 04.05.2013, whereby the petitioner agreed to offer 3800 sq.ft. of space on the ground floor of the aforesaid Tower to the respondent for conducting the business of operating a supermarket mall/departmental store. It was agreed by the parties that the respondent would pay 4% of the gross total sales to the petitioner each month and in case the gross total sales fall below Rs.15.00 lacs per month, the respondent had to pay to the petitioner an amount of Rs.30,000 plus 2% of gross total sales per month. In terms of the agreement, it was also agreed that if the sales are satisfactory, the agreement would be renewed for another five years after the expiry of initial five years, with a similar renewal clause.

3 It appears that pursuant to the aforesaid agreement, the respondent set up the business in the premises offered by the petitioner. However, on 21.03.2018, the petitioner served a notice upon the respondent informing him that the sales are not satisfactory, and therefore, the agreement would terminate on the expiry of the first five years, i.e., on 06.05.2018. The respondent herein submitted his reply vide his communication dated 15.05.2018, contending that the sales are satisfactory and that a solution could be worked out by re-visiting clause (4) of the agreement. However, when the matter could not be resolved, the respondent filed a petition under Section 9 of the Act of 1997 before

the learned Principal District Judge, Anantnag, seeking interim relief. On 11.06.2018, the learned Principal District Judge, Anantnag directed that status quo be maintained and that the respondent's possession be not disturbed. However, the petition under Section 9 of the Act of 1997 came to be dismissed by the Principal District Judge, Anantnag, on 22.01.2019, and the interim direction was vacated.

4 Against the aforesaid order, the respondent filed an appeal before this Court bearing AA No. 1/2019. In the appeal, it was alleged by the respondent before the High Court that after dismissal of his petition under Section 9 of the Act of 1997, the premises was locked by the petitioner herein. On 25.01.2019, this Court, while issuing notice in the appeal, directed that none of the parties would use the premises in question in any manner whatsoever. Vide order dated 20.06.2019, the appeal filed by the respondent was allowed by this Court and the matter was remanded to the learned Principal District Judge, Anantnag for fresh decision. Vide order dated 07.02.2020, the learned District Judge again dismissed the petition filed by the respondent under Section 9 of the Act of 1997. Against the said order, the respondent filed an appeal before this Court which was registered as AA No. 4/2020. The respondent also filed a petition under Section 11 of the Act of 1997 with a prayer that the dispute may be referred to an Arbitral Tribunal. The said petition was registered as AP No. 8/2020.

5 Vide order dated 24.09.2021, Hon'ble the Chief Justice of this Court disposed of both the appeal filed by the respondent as well as

the petition under Section 11 of the Act of 1997 filed by him by a composite order. In terms of the said order, Hon'ble Mr. Justice Mohd Yaqoob Mir, former Chief Justice of Meghalaya High Court was appointed as an Arbitrator and the parties were given liberty to approach the learned Arbitrator for any interim protection or direction, if necessary, and it was left open to the learned Arbitrator to consider the same, notwithstanding the decision dated 07.02.2020 of the Principal District Judge, Anantnag.

6 Pursuant to the aforesaid order passed by Hon'ble the Chief Justice, the learned Arbitrator entered upon the reference and issued notice to both the parties. The respondent filed his statement of claims, whereas the petitioner herein filed his statement of defence before the learned Arbitrator. On the basis of the pleadings of the parties, the learned Arbitrator vide his order dated 15.01.2022 framed as many as thirteen (13) issues, which are reproduced as under:

- (i) Whether agreement dated 04.05.2013 between the parties, in terms of its clauses 4, 5 and 16 was extendable for more than 5 years;
- (ii) Whether in terms of clause 5 of the agreement satisfactory sale imply deemed renewal of the agreement;
- (iii) Whether expression "satisfactory sales" incorporated in clause 5 is itself explained in clause 4 of the agreement;
- (iv) If issue No. 3 is proved in negative then the expression "satisfactory sale" means what?;
- (v) whether premises were locked by respondent in the in the year 2018;

(vi) whether at the time of locking of the premises by the respondent stocks, cash sales etc worth Rs.2,84,34,869 of the petitioner were lying in the premises;

(vii) whether respondent managed to hobnob with the Municipal Council Anantnag as a result whereof despite interim order dated 20.02.2020 passed by the Hon'ble High Court, without notice or information to the petitioner the premises were opened and all the stocks, cash and things lying in the premises were removed/stolen;

(viii) Whether due to the acts of omission and commission of the respondent, claimant suffered loss of stocks/merchandise and cash worth Rs.2,84,34,869.

(ix) Whether due to the acts of omission and commission of the respondent, claimant was prevented from conducting business beyond March 2018, as a result whereof claimant suffered business losses of Rs.2.00 crores;

(x) Whether from March 2018 to May 2018 petitioner has not paid the consideration amount to the respondent as was required in terms of the agreement;

(xi) Whether TDS amount of Rs.2,70,326 for the financial year 2017-18 has not been deposited by the petitioner. If yes what is its effect: OPR

(xii) Whether petitioner is liable to pay an amount of Rs.2,15,68,334 to the respondent regarding occupation of the premises beyond May 2018;

(xiii) Relief.

7 After framing of the issues, both the parties were given opportunity to produce the witnesses in support of their respective versions and they were also given opportunity to produce the documents. The parties, accordingly, produced their witnesses as well as the documents and they also subjected the witnesses to cross-examination. The learned Arbitrator, on the basis of the evidence and the material on record, passed the impugned award, thereby holding the respondent

entitled to compensation on account of loss of stocks etc., in the amount of Rs.2,84,869.43. He has also been held entitled to loss of profits from the years 2019 to 2023 amounting to Rs.1,53,96,588. The petitioner herein has been held entitled to an amount of Rs.72,45,021,15 on account of 4% of the total sales for the years 2019 to 2023. Besides this, the learned Arbitrator concluded that agreement dated 04.05.2013 executed between the parties shall be deemed to have been renewed for another five years w.e.f 07.05.2018 carrying a similar renewal clause. The respondent has also been held entitled to costs in the amount of Rs.10.00 lacs and interest at the rate of 12% *per annum* from the date of the award till the payment is made to the respondent.

8 The learned Arbitrator, while deciding issues No. (i) to (iv) quoted above, upon interpretation of clauses (4) and (5) of agreement dated 04.05.2013, came to the conclusion that the said agreement was extendable beyond first five years and that the 'satisfactory sales' would mean the sales as contemplated in clause (4) of the agreement i.e., if the figure of sales is above Rs.15.00 lac per month, the same would be taken as 'satisfactory sales'. It was also concluded that clause (5) of the agreement implies a deemed renewal for five years w.e.f 07.05.2018 to 07.05.2023. While deciding issue No.(v) quoted above, the learned Arbitrator came to the conclusion that it is the petitioner herein who had locked the premises after 22.01.2019 when the petition filed by the respondent under Section 9 of the Act of 1997 was dismissed and the interim order was vacated by the Principal District Judge, Anantnag.

Regarding issue No.(vi), the learned Arbitrator came to the conclusion that when the premises was locked by the petitioner on 24.01.2019, stocks worth Rs.2,84,34,869.43 were lying in the premises. The learned Arbitrator, after considering the evidence on record relating to issue No. (vii) came to the conclusion that the premises where stocks of the respondent were lying, was opened by the Municipal Authorities at the behest of the petitioner, as a result whereof, not only the stocks were removed from the ground floor, but the order of status quo passed by the High Court was also violated. While deciding issue No.(viii), the learned Arbitrator came to the conclusion that the respondent-claimant had suffered loss of stocks/merchandise and cash worth Rs2,84,34,869.

9 Upon consideration of the evidence on record relating to issue No.(ix), the learned Tribunal computed the loss of profits in the business suffered by the respondent as Rs 1,53,96,588. While deciding issues No. (x) and (xii), the learned Arbitrator held the petitioner herein is entitled to an amount of Rs.72,45,021.15 on account of 4% of the gross sales for the years 2019 to 2023. Regarding issue No. (xi), it was concluded by the learned Arbitrator that it is the legal obligation of the respondent to deposit the TDS Amount. Upon decision of the issues No. (i) to (xi), the learned Arbitrator passed the impugned award in terms of the reliefs which have been already stated hereinbefore.

10 The petitioner has challenged the impugned award on the ground that the same is patently illegal because the learned Arbitrator has held that agreement dated 04.05.2013 is deemed to have been

renewed for another five years. It has been contended that the agreement is determinable by its very nature, as such, no specific performance of the agreement could have been granted by the learned Arbitrator. It is being contended that the agreement could not have been renewed without entering into a fresh agreement between the parties. According to the petitioner, the interpretation given by the learned Arbitrator to clauses (4) and (5) of agreement dated 04.05.2013, is neither plausible nor permissible and, as such, it constitutes a patent illegality, thereby making the impugned award liable to be set aside. It has also been contended that the learned Arbitrator, by holding that the fresh agreement would carry a similar renewal clause, has extended the agreement in perpetuity, which is a blatant violation of party autonomy as also against the fundamentals of contract law. The petitioner has further contended that there was no breach of contract, as such, there was no occasion for the learned Arbitrator to award compensation in favour of the respondent for the loss of profits in respect of a non-existent business agreement. According to the petitioner, the relationship between the parties was that of a lessor and lessee, as such, no compensation with respect to loss of profits to the lessee could not have been granted by the learned Arbitrator.

11 It has been further contended that there was overwhelming evidence on record to show that the stocks were removed from the premises by the Municipal Authorities, and despite this, the learned Arbitrator has saddled the petitioner with the liability to compensate the

respondent for the loss of stocks. It has been contended that the finding of the learned Arbitrator in this regard is perverse being not based upon any evidence. It has also been contended that in the face of interim order dated 25.01.2019 passed by the High Court whereby it was directed that none of the parties would use the premises, even the petitioner was not allowed to use the said premises, as such, it was not open to the learned Arbitrator to award compensation on account of loss of profits in favour of the respondent. It has been further contended that interpretation of the term 'satisfactory sales' as contained in clause (5) of the agreement with reference to clause (4) of the agreement, amounts to rewriting the terms of the agreement which is not permissible in law. Thus, according to the petitioner, the impugned award suffers from patent illegality.

12 I have heard the learned counsels appearing for the parties, perused the impugned award rendered by the learned Arbitrator, examined the record of the Arbitration, and considered the arguments advanced by the learned counsel for the parties.

13 Before proceeding to determine merits of the grounds of challenge urged by the petitioner against the impugned award, it would be apt to consider the legal position as regards the scope and power of this Court under Section 34 of the Act to interfere with an award of an Arbitral Tribunal. It would also be relevant to determine as to which amongst the two legislations viz. the J&K Arbitration and Conciliation Act, 1997 or the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act of 1996') would be applicable to the instant case.

14. As per Section 21 of the Act of 1997, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. In the instant case, the request for appointment of an Arbitrator was made by the respondent to the petitioner in terms of his letter dated 15.05.2018. In the said letter, it was clearly stated by the respondent that in case his suggestion is not acceptable, he will be left with no other option, but to proceed in accordance with clause (17) of the agreement which provides for resolution of dispute through arbitration. Thus, the law that was applicable on the date of issuance of communication dated 15.05.2018 would govern the instant case. Since the Act of 1996 had not become applicable to erstwhile State of J&K at that time, as such, it is the provisions contained in the Act of 1997 that would govern the present case.

15 Section 34 of the Act of 1997, is the centre of focus in the present case. The said provision, as it stood at the relevant point of time, reads as under:

"34. Application for setting aside arbitral award.

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

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

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

(i) a party was under some incapacity ;or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any

indication thereon, under the law for the time being in force; or

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

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

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

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

(b) the Court finds that-

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

(ii) the arbitral award is in conflict with the public policy of State:

Explanation. Without prejudice to the generality of sub-clause (ii) of clause (b), it is hereby declared for the avoidance of any doubt, that an award is in conflict with the public policy of the State if the making of the award was induced or affected by fraud or corruption or was in violation of section 58 or section 64.

(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.

It is pertinent to mention here that Section 34 of the Act of 1997, underwent certain changes in terms of Act No. 18 of 2018 w.e.f 01.10.2018, but in this case, we are not concerned with the same because the arbitral proceedings have commenced prior to 01.10.2018.

16 Clause (a) of sub section (2) quoted above, is not attracted to the present case as the grounds of challenge raised by the petitioner which have been referred to hereinbefore, do not fall in any of the sub-clauses of clause (a). Even sub-clause (i) of clause (b) of sub-section (2) is not relevant for the purpose of determination of the present case. We are concerned only with sub-clause (ii) of clause (b) of subsection (2) quoted above, which provides that an arbitral award is liable to be set aside if the same is in conflict with the public policy of the State.

17 The ground on which the petitioner has challenged the impugned award is that the same is against the public policy of the State

being patently illegal and contrary to the settled legal position. For determination of merits of this contention of the petitioner, it is necessary to understand as to what is meant by the expressions “public policy of the State” or “public policy of India’ as they appear in the corresponding provisions of the Act of 1996. Explanation to clause (b) of subsection (2) of Section 34 of the Act of 1997, as quoted above, provides that an award would be in conflict with the public policy of the State if the making of the award was induced or affected by fraud or corruption or if it was in violation of Section 58 or Section 64. As to what is meant by the expressions ‘public policy of the State’ or ‘the public policy of India’ has been a subject matter of deliberation and discussion before the Supreme Court in a large number of cases. It would be apt to refer to some of these cases with a view to understand the scope and power of this Court to interfere with the award of an Arbitrator.

18 The Supreme Court has, in the case of **Oil and Natural Gas Corporation Ltd vs. Saw Pipes Ltd., (2003) 5 SCC 705**, while construing the expression “the public policy of India” as contained in Section 34 (2)(b)(ii) of the Act of 1996, held as under:

“31. Therefore, in our view, the phrase 'Public Policy of India' used in [Section 34](#) in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in

violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in [Renusagar's](#) case (supra), it is required to be held that the award could be set aside if it is patently illegal. Result would be - award could be set aside if it is contrary to: -

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

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

74 In the result, it is held that:-

A. (1) The Court can set aside the arbitral award under [Section 34\(2\)](#) of the Act if 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;*

(2) The Court may set aside the award:-

(i) (a) if the composition of the arbitral tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the arbitral tribunal was not in accordance with [Part-I of the Act](#).

(ii) if the arbitral procedure was not in accordance with:-

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with [Part-I of the Act](#).

However, exception for setting aside the award on the ground of composition of arbitral tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of [Part-I of the Act](#) from which parties cannot derogate.

(c) If the award passed by the arbitral tribunal is in contravention of provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:-

(a) fundamental policy of Indian law;

(b) the interest of India; or

(c) justice or morality, or

(d) if it is patently illegal.

(4) It could be challenged:-

(a) as provided under Section 13(5); and

(b) [Section 16\(6\)](#) of the Act.

B. (1) The impugned award requires to be set aside mainly on the grounds:-

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was the essence of the contract;

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable.

(vii) In certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract”.

19 Before proceeding to analyse the ratio laid down in the aforequoted observations of the Supreme Court it would be pertinent to mention here that vide Amendment Act No. 3 of 2016, certain amendments were carried out in Section 34 of the Act of 1996 w.e.f 23.10.2015. By virtue of this amendment Explanation 1 to clause (b)(ii) of sub section (2) of Section 34 was modified and Explanation 2 along with subsection (2A) was incorporated in Section 34 of the Act of 1996. Prior to that, the provisions contained in Section 34 of the Act of 1996 were identical to the provisions contained in Section 34 of the Act of 1997 as they existed at the relevant time. Vide Explanation 1, it was provided that the public policy of India would mean ‘fundamental policy of Indian law’ or ‘the most basic notions of justice or morality’ and vide Section (2A), the ground of patent illegality for setting aside an award was incorporated.

20 As we have already seen from the afore-quoted observations of the Supreme Court in **Saw Pipes Ltd's** case (supra), even prior to the incorporation of amendments in terms of the Act of 3 of 2016 in Section 34 of the Act of 1996, it was held by the Supreme Court that an award could be set aside if it is contrary to the fundamental policy of Indian law, the interest of India, or justice or morality, or if it is patently illegal. So, the expressions 'public policy of State/India' would embrace within their purview the expressions 'fundamental policy of India law', 'interest of India', 'justice or morality' and 'patent illegality'. Thus, non-incorporation of the amendments made vide Act No. 03 of 2016 to the Act of 1996 in the Act of 1997, which governs the present case, would not make any difference to the scope and power of this Court to interfere in the impugned award passed by the learned Arbitrator. The same can be set aside, if it is found against the public policy of the State/India, that is to say, if it is contrary to the interest of India or contrary to justice or morality or if it is patently illegal.

21 The question that arises for consideration is as to what is meant by the expressions "fundamental policy of Indian law/State law", "the interest of India/State", "justice or morality", or "patent illegality". These expressions came up for discussion and deliberation before the Supreme Court in the case of **Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49**. Paras (27) to (42) of the judgment are relevant to the context and the same are reproduced as under:

“Fundamental Policy of India 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.

28. In a recent judgment, *ONGC Ltd. v. Western Geco International Ltd.*, 2014 (9) SCC 263, this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held:

"35. What then would constitute the "fundamental policy of Indian law" is the question. The decision in *ONGC [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705]* does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial

approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

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

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223: (1947) 2 All ER 680 (CA)] of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the

adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."

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

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

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

34. *Application for setting aside arbitral award.-*

(1)xxxxxxxxx

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

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

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

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

(i)a finding is based on no evidence, or

(ii) an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

32 A good working test of perversity is contained in two judgments. In *H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons*, 1992 Supp (2) SCC 312 at p. 317, it was held:

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

In *Kuldeep Singh v. Commr. of Police*, (1999) 2 SCC 10 at para 10, it was held:

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

33 It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score.. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.*, (2012) 1 SCC 594, this Court held:

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

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

Interest of India

35 The next ground on which an award may be set aside is that it is contrary to the interest of India. Obviously, this concerns itself with India as a member of the world community in its relations with foreign powers. As at present advised, we need not dilate on this aspect as this ground may need to evolve on a case by case basis.

Justice

36 The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs. 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award

ultimately awards him 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice".

Morality

37 The other ground is of "morality". Just as the expression "public policy" also occurs in [Section 23](#) of the Indian Contract Act, so does the expression "morality". Two illustrations to the said section are interesting for they explain to us the scope of the expression "morality".

"(j) A, who is B's Mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the [Indian Penal Code](#) (XLV of 1860)."

38 In *Gherulal Parekh v. Mahadeo Dass Maiya*, 1959 Supp (2) SCR 406, this Court explained the concept of "morality" thus-

"Re. Point 3 - Immorality: The argument under this head is rather broadly stated by the learned Counsel for the appellant. The learned counsel attempts to draw an analogy from the Hindu Law relating to the doctrine of pious obligation of sons to discharge their father's debts and contends that what the Hindu Law considers to be immoral in that context may appropriately be applied to a case under [s. 23](#) of the Contract Act. Neither any authority is cited nor any legal basis is suggested for importing the doctrine of Hindu Law into the domain of contracts. [Section 23](#) of the Contract Act is inspired by the common law of England and it would be more useful to refer to the English Law than to the Hindu Law texts dealing with a different matter. Anson in his *Law of Contracts* states at p. 222 thus:

"The only aspect of immorality with which Courts of Law have dealt is sexual immorality..... ."

Halsbury in his Laws of England, 3rd Edn., Vol. 8, makes a similar statement, at p. 138 :

"A contract which is made upon an immoral consideration or for an immoral purpose is unenforceable, and there is no distinction in this respect between immoral and illegal contracts. The immorality here alluded to is sexual immorality."

In the Law of Contract by Cheshire and Fifoot, 3rd Edn., it is stated at p. 279:

"Although Lord Mansfield laid it down that a contract contra bonos mores is illegal, the law in this connection gives no extended meaning to morality, but concerns itself only with what is sexually reprehensible."

In the book on the [Indian Contract Act](#) by Pollock and Mulla it is stated at p. 157:

"The epithet "immoral" points, in legal usage, to conduct or purposes which the State, though disapproving them, is unable, or not advised, to visit with direct punishment."

The learned authors confined its operation to acts which are considered to be immoral according to the standards of immorality approved by Courts. The case law both in England and India confines the operation of the doctrine to sexual immorality. To cite only some instances: settlements in consideration of concubinage, contracts of sale or hire of things to be used in a brothel or by a prostitute for purposes incidental to her profession, agreements to pay money for future illicit cohabitation, promises in regard to marriage for consideration, or contracts facilitating divorce are all held to be void on the ground that the object is immoral.

The word "immoral" is a very comprehensive word. Ordinarily it takes in every aspect of personal conduct

deviating from the standard norms of life. It may also be said that what is repugnant to good conscience is immoral. Its varying content depends upon time, place and the stage of civilization of a particular society. In short, no universal standard can be laid down and any law based on such fluid concept defeats its own purpose. The provisions of [S. 23](#) of the Contract Act indicate the legislative intention to give it a restricted meaning. Its juxtaposition with an equally illusive concept, public policy, indicates that it is used in a restricted sense; otherwise there would be overlapping of the two concepts. In its wide sense what is immoral may be against public policy, for public policy covers political, social and economic ground of objection. Decided cases and authoritative text-book writers, therefore, confined it, with every justification, only to sexual immorality. The other limitation imposed on the word by the statute, namely, "the court regards it as immoral", brings out the idea that it is also a branch of the common law like the doctrine of public policy, and, therefore, should be confined to the principles recognized and settled by Courts. Precedents confine the said concept only to sexual immorality and no case has been brought to our notice where it has been applied to any head other than sexual immorality. In the circumstances, we cannot evolve a new head so as to bring in wagers within its fold."

39 This Court has confined morality to sexual morality so far as [section 23](#) of the Contract Act is concerned, which in the context of an arbitral award would mean the enforcement of an award say for specific performance of a contract involving prostitution. "Morality" would, if it is to go beyond sexual morality necessarily cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. However, interference on this ground would also be only if something shocks the court's conscience.

Patent Illegality

40 We now come to the fourth head of public policy namely, patent illegality. It must be remembered that under the explanation to [section 34 \(2\) \(b\)](#), an award is said to be in conflict with the public policy of India if the

making of the award was induced or affected by fraud or corruption. This ground is perhaps the earliest ground on which courts in England set aside awards under English law. Added to this ground (in 1802) is the ground that an arbitral award would be set aside if there were an error of law by the arbitrator. This is explained by Lord Justice Denning in [R v. Northumberland Compensation Appeal Tribunal](#). Ex Parte Shaw., 1952 1 All ER 122 at page 130:

*"Leaving now the statutory tribunals, I turn to the awards of the arbitrators. The Court of King's Bench never interfered by certiorari with the award of an arbitrator, because it was a private tribunal and not subject to the prerogative writs. If the award was not made a rule of court, the only course available to an aggrieved party was to resist an action on the award or to file a bill in equity. If the award was made a rule of court, a motion could be made to the court to set it aside for misconduct of the arbitrator on the ground that it was procured by corruption or other undue means: see the statute 9 and 10 Will. III, c. 15. At one time an award could not be upset on the ground of error of law by the arbitrator because that could not be said to be misconduct or undue means, but ultimately it was held in *Kent v. Elstob*, (1802) 3 East 18, that an award could be set aside for error of law on the face of it. This was regretted by Williams, J., in *Hodgkinson v. Fernie*, (1857) 3 C.B.N.S. 189, but is now well established."*

41 This, in turn, led to the famous principle laid down in [Champsey Bhara Company v. The Jivraj Balloo Spinning and Weaving Company Ltd.](#), AIR 1923 PC 66, where the Privy Council referred to *Hodgkinson* and then laid down:

*"The law on the subject has never been more clearly stated than by Williams, J. in the case of *Hodgkinson v. Fernie*:*

"The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now, I think firmly

established viz., where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established."

"Now the regret expressed by Williams, J. in Hodgkinson v. Fernie has been repeated by more than one learned Judge, and it is certainly not to be desired that the exception should be in any way extended. An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned judges have arrived at finding what the mistake was is by saying: "Inasmuch as the Arbitrators awarded so and so, and inasmuch as the letter shows that then buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting Cl.52." But they were entitled to give their own interpretation to Cl. 52 or any other article, and the award will stand unless, on the face of it they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. Upon this point, therefore, their Lordships think that the judgment of Pratt, J was right and the conclusion of the learned Judges of the Court of Appeal erroneous."

This judgment has been consistently followed in India to test awards under [Section 30](#) of the Arbitration Act, 1940.

42 In the 1996 Act, this principle is substituted by the 'patent illegality' principle which, in turn, contains three subheads -

42.1(a) a contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is a really a contravention of [Section 28\(1\)\(a\)](#) of the Act, which reads as under:

"28. Rules applicable to substance of dispute.-(1) Where the place of arbitration is situated in India,-

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

42.2(b) a contravention of the [Arbitration Act](#) itself would be regarded as a patent illegality- for example if an arbitrator gives no reasons for an award in contravention of [section 31\(3\)](#) of the Act, such award will be liable to be set aside.

42.3(c) Equally, the third sub-head of patent illegality is really a contravention of [Section 28 \(3\)](#) of the Arbitration Act, which reads as under:

"28. Rules applicable to substance of dispute.-

(1) xxxxxx

(2) xxxxxx

(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be

something that no fair minded or reasonable person could do”.

22 In the recent case of **OPG Power Generation Private Ltd vs. Enexio Power Cooling Solutions India Private Limited and another**, **2024 SCC Online SC 2600**, the Supreme Court, after surveying its earlier decisions with regard to the legal principles governing challenge to an arbitral award, observed that, for an award to be to be against the policy of India, a mere infraction of the municipal laws of India is not enough. It was held that there must be, *inter alia*, infraction of fundamental policy of Indian law, including a law meant to serve public interest or public good. As to what is meant by the expression ‘fundamental policy of Indian law’, the Supreme Court observed that the said expression has to be accorded a restricted meaning in terms of Explanation 1 which was incorporated vide amendment made in the year 2015. Para 52 of the said judgment is relevant to the context and the same is reproduced as under:

“ 52. The legal position which emerges from the aforesaid discussion is that after the ‘2015 amendments’ in [Section 34 \(2\)\(b\)\(ii\)](#) and [Section 48\(2\)\(b\)](#) of the 1996 Act, the phrase “in conflict with the public policy of India” must be accorded a restricted meaning in terms of Explanation

1. The expression “in contravention with the fundamental policy of Indian law” by use of the word ‘fundamental’ before the phrase ‘policy of Indian law’ makes the expression narrower in its application than the phrase “in contravention with the policy of Indian law”, which means mere contravention of law is not enough to make an award vulnerable. To bring the contravention within the fold of fundamental policy of Indian law, the award must contravene all or any of such fundamental principles that provide a basis for

administration of justice and enforcement of law in this country. Without intending to exhaustively enumerate instances of such contravention, by way of illustration, it could be said that (a) violation of the principles of natural justice; (b) disregarding orders of superior courts in India or the binding effect of the judgment of a superior court; and (c) violating law of India linked to public good or public interest, are considered contravention of the fundamental policy of Indian law. However, while assessing whether there has been a contravention of the fundamental policy of Indian law, the extent of judicial scrutiny must not exceed the limit as set out in Explanation 2 to [Section 34\(2\)\(b\)\(ii\)](#). Most basic notions of morality and justice”

23 In the aforesaid judgment, the Supreme Court, while explaining the connotation of the expression ‘most basic notions of morality and justice’ observed as under:

“58. In the light of the discussion above, in our view, when we talk about justice being done, it is about rendering, in accord with law, what is right and equitable to one who has suffered a wrong. Justice is the virtue by which the society/ court / tribunal gives a man his due, opposed to injury or wrong. Dispensation of justice in its quality may vary, dependent on person who dispenses it. A trained judicial mind may dispense justice in a manner different from what a person of ordinary prudence would do. This is so, because a trained judicial mind is likely to figure out even minor infractions of law/ norms which may escape the attention of a person with ordinary prudence. Therefore, the placement of words “most basic notions” before “of justice” in Explanation 1 has its significance. Notably, at the time when the 2015 Amendment was brought, the existing law with regard to grounds for setting aside an arbitral award, as interpreted by this See paragraph 76 of the judgment in Ssyanyong (supra) Court, was that an arbitral award would be in conflict with public policy of India, if it is contrary to: (a) the fundamental policy of Indian law; (b) the interest of India; (c) justice or morality; and /or is (d) patently illegal. As we have already noticed, the object of inserting Explanations 1 and 2 in place of earlier explanation

to [Section 34\(2\)\(b\)\(ii\)](#) was to limit the scope of interference with an arbitral award, therefore the amendment consciously qualified the term 'justice' with 'most basic notions' of it. In such circumstances, giving a broad dimension to this category would be deviating from the legislative intent. In our view, therefore, considering that the concept of justice is open- textured, and notions of justice could evolve with changing needs of the society, it would not be prudent to cull out "the most basic notions of justice". Suffice it to observe, they ought to be such elementary principles of justice that their violation could be figured out by a prudent member of the public who may, or may not, be judicially trained, which means, that their violation would shock the conscience of a legally trained mind. In other words, this ground would be available to set aside an arbitral award, if the award conflicts with such elementary/ fundamental principles of justice that it shocks the conscience of the Court in conflict with most basic notions of morality or justice most basic notions of justice Morality

59. The other ground is of morality. On the question of morality, in [Associate Builders](#) (supra), this Court, after referring to the provisions of [Section 23](#) of the Contract Act, 1872; earlier decision of this Court in [Gherulal](#) (supra); and [Indian Contract Act](#) by Pollock and Mulla, held that judicial precedents have confined morality to sexual morality. And if 'morality' were to go beyond sexual morality, it would cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. The court also clarified that interference on this ground would be only if something shocks the court's conscience"

24 While explaining as to what is meant by the expression 'patent illegality' the Supreme Court, in the aforesaid judgment, clarified that it refers to such an illegality as goes to the root of the matter and does not amount to mere erroneous application of law.

25 From the foregoing analysis of law on the subject, it is clear that the power of this Court to interfere with an award of an Arbitrator is extremely limited and it is only on the grounds as mentioned in Section 34 of the Act of 1997 that this Court would be justified in interfering with the award of an arbitrator. In the present case, as already stated, we are only concerned with the question, as to whether the impugned award is against the public policy of the State which, as already stated, would include, 'fundamental policy of State law', 'interest of the State, the basic notions of justice and morality and 'patent illegality'. All these expressions have been explained by the Supreme Court in the judgments referred to hereinbefore.

26 It has to be borne in mind that when a Court is considering a challenge to an arbitral award, it has not to act as a Court of appeal. An award based on limited evidence or an interpretation given by an arbitrator to the terms of the agreement which is plausible cannot be interfered with by a Court while considering a challenge to the award. The Court cannot re-appreciate the evidence with a view to hold that the award suffers from patent illegality, nor can it interpret the terms of the agreement so as to undo the interpretation given by the arbitrator, provided the interpretation given by an Arbitrator to the terms of the agreement is plausible and reasonable. It is also clear that every error of law committed by the Arbitral Tribunal would not constitute a patent illegality.

27 A Single Judge of Madras High Court in the case of **Interbulk Trading Sa vs Adam And Coal Resources Private Limited, 2016 SCC Online Madras 10306** has beautifully explained the scope of interference by a Court with an arbitral award in the following words:

“. Let me preface this judgment with two aspects, which crossed my mind during the course of arguments advanced before me.

2. First, is there a perfect answer to every legal issue, which comes before the Court.

3. Second, will the Court try and reduce the rigours of obligations reflected in a commercial contract, executed between two entities, having equal bargaining power.

4. In so far as the first aspect is concerned, I would be the first one to confess, that there is no perfect answer to every legal problem, which is why, in an adversarial system, one party goes back, feeling dissatisfied.

5. A quietus is put to litigation, only because of a hierarchical system that the Courts maintain. As Judges we are trained to be interventionist. We attempt to set right, in a manner of speech, that slightly crooked picture hanging on the wall, till we reach, what according to us, is a just solution.

6. Whether such an approach is right or wrong, is often governed, both by the jurisdiction that a Judge sits in and the personal disposition as well as predilection of a person exercising that jurisdiction. Some jurisdictions have more width and amplitude than others. Restraints are often self imposed.

7. Arbitration is one such jurisdiction, where the temptation for a judge to straighten that proverbial crooked picture is, immense. Repeatedly, the interventionist in the Judge comes to fore, however, in my view and experience the rule, which should play out, is that, once, parties have made their

bed, they should be made to sleep on it. Any other approach is a recipe for docket clogging and is often seen to give succour to critics, and perhaps, rightly, that the alternate dispute resolution system is a failing proposition.

8. Having said so, the exception to this approach should be: that obvious case of fraud, compromised integrity of arbitrators and plainly erroneous awards, which go against the stated position of law and, hence, border on perversity and/or, those awards, which go against public policy”

28 Thus, from the above, it is clear that the Courts have to follow the principle of ‘minimal intervention’ while testing the validity of an arbitral award. Nonetheless, if the grounds set out for setting aside an arbitral award as contained in Section 34 of the Act are made out, the legislature has vested the power with the Court to step in and set aside such an award.

29 With the aforesaid legal position in mind, let us now proceed to determine the merits of the grounds urged by the petitioner for assailing the impugned award. The first ground urged by the learned counsel for the petitioner is that the learned Arbitrator, while interpreting clauses (4) and (5) of agreement dated 04.05.2013, has almost rewritten the said clauses by reading into these clauses a deemed renewal of agreement between the parties and by interpreting the term ‘satisfactory sales’ appearing in clause (5) of the agreement with reference to the sale figures mentioned in clause (4). It has also been contended that the agreement between the parties was that of a lessor and lessee, and it was not a business agreement as has been claimed by the respondent and accepted by the learned Arbitrator. According to the learned counsel, the

petitioner had only agreed to let out the ground floor of his building to the respondent for operating his business, and in consideration thereof, he had agreed to receive a certain percentage of sales. It has been submitted that as per Section 105 of the Transfer of Property Act, a lease is defined as the transfer of a right to enjoy immovable property in consideration of a price in the form of money, a share of crops or services or any other thing of value. Thus, according to the learned counsel, a certain share in the gross sales constituted the consideration for leasing out the premises in question by the petitioner to the respondent. Therefore, by no stretch of reasoning, it can be stated that the agreement between the parties was a business agreement and not a lease agreement.

30 In the above context, it would be apt to reproduce clauses (4) and (5) of the agreement dated 04.05.2013 which read as under:

“(4). That in consideration of the exclusive use of the premises by party No.2, it has been agreed by the parties that the party No.1 shall be entitled to 4% on the gross sales in any calendar month, should the sale be Rs.15 lacs or above in the month. If the sale is less than Rs.15 lacs per month in that eventuality party No.1 will be entitled to receive Rs.30000 for that month and 2% of the total gross sales as may be, conducted by party No.2 in the said premises. The amount payable to party No.1 shall be determined in the first week of every succeeding month and the amount as may be found due and payable to party No.1 shall be paid by party No.2 within seven days.

(5) that the agreement shall be initially valid for five years and after every five years fresh agreement along with fresh terms and conditions shall be entered between the parties. If the sales are satisfactory the agreement shall be renewed

for another five years carrying similar renewal clause and if the sales are not satisfactory the agreement shall be terminated after first five years,. on mutual consent basis”.

31 The learned Arbitrator has interpreted clause (5) quoted above by explaining that it covers three situations: (i) on completion of the first five years, a fresh agreement with fresh terms and conditions shall be entered into between the parties;(ii) if the sales are satisfactory, the agreement shall be renewed for another five years, carrying a similar renewal clause; and (iii) if the sales are not satisfactory, the agreement shall be terminated after the first five years on a mutual consent basis. The learned Arbitrator has further observed that situations No. (i) & (iii) are controlled by situation No. (ii).

32 While challenging the aforesaid interpretation of learned Arbitrator, the learned counsel for the petitioner has submitted that the agreement was renewable, meaning thereby that a fresh agreement had to be executed after the expiry of first five years. It has been contended that the agreement was not extendable, but it was renewable, but the learned Arbitrator has termed the agreement ‘to be extendable’, thereby rewriting the terms of the agreement. In this regard, the learned counsel for the petitioner has relied upon the judgment of the Supreme Court in the case of **State of UP and Ors vs. Lalji Tandon, (2004) 1 SCC 1** wherein it has been observed that there is a difference between an extension of a lease and renewal of a lease. In the case of an extension, it is not necessary to have a fresh lease deed executed, whereas in the case of a renewal, a fresh lease deed shall have to be executed between the

parties, failing which, another lease for a fixed term shall not come into existence.

33 The interpretation given by the learned Arbitrator that clause (5) of the agreement conceives of three situations;(i) renewal of lease after five years;(ii) compulsory renewal if the sales are satisfactory; and (iii) the option to terminate the lease after five years if the sales are not satisfactory, appears to be plausible and possible. If the aforesaid clause is interpreted to mean that the agreement has to be renewed by executing a fresh agreement after every five years in all the situations, then the covenant regarding compulsory renewal based upon satisfactory sales would become redundant. When the three portions of clause (5) of the agreement are harmoniously construed, the interpretation adopted by the learned Arbitrator appears to be logically sound. Apart from this, it has to be borne in mind that the agreement between the parties was relating to running of a supermarket/mall, which having regard to its nature cannot be relocated frequently, as such, a certain degree of perpetuity subject to the conditions agreed upon by the parties has to be inferred, while interpreting the covenants of the agreement. Thus, no fault can be found with the interpretation given by the learned Arbitrator.

34 So far as **Lalji Tandon's** case (supra) is concerned, it deals with a case of mining lease and not with a lease of a building. In any case, even if it is assumed that because of existence of the expression 'renewed' in clause (5) of the agreement, a fresh lease was required to be executed between the parties, still then, the interpretation given by the

learned Arbitrator that it was a case of compulsory renewal cannot be termed as ‘contrary to reason and logic’. Both the interpretations to clause (5) of the agreement, one given by the learned Arbitrator and one propounded by the learned counsel for the petitioner, appear to be possible.

35 The question that arises for consideration is as to whether this Court, even if it is satisfied that interpretation of clause (5) of the agreement as propounded by the learned counsel for the petitioner is possible and permissible, can step in and interfere with the interpretation accorded by the learned Arbitrator. The law on this aspect of the matter is well settled and no longer *res integra*. The Supreme Court has, in umpteen numbers of judgments, held that construction of terms of the contract is within the jurisdiction of Arbitrator and if a term of the contract is capable of two interpretations and the view taken by the Arbitrator is one of the possible views, the same cannot be interfered with by a Court. The Supreme Court has, in the case of **Parsa Kenta Collieries Ltd. vs Rajasthan Rajya Vidyut Utpadan Nigam, (2019) 7 SCC 236**, held that if a term of the contract has been construed in a reasonable manner, then the award ought not to be set aside on this ground. The Supreme Court has, in para (9) of the said judgment, observed as under:

“9. While answering the aforesaid question, certain decisions of this Court and the law declared on the jurisdiction of the appellate Court while considering the

award passed by the learned Arbitrator are required to be considered.

9.1 In the case of *Associate Builders* (supra), this Court had an occasion to consider in detail the jurisdiction of the Court to interfere with the award passed by the Arbitrator in exercise of powers under *Section 34* of the Arbitration Act. In the aforesaid decision, this Court has considered the limits of power of the Court to interfere with the arbitral award. It is observed and held that only when the award is in conflict with the public policy in India, the Court would be justified in interfering with the arbitral award. In the aforesaid decision, this Court considered different heads of “public policy in India” which, *inter alia*, includes patent illegality. After referring *Section 28(3)* of the Arbitration Act and after considering the decisions of this Court in the cases of *McDermott International Inc. v. Burn Standard Co. Ltd.*, reported in (2006) 11 SCC 181 (paras 112113) and *Rashtriya Ispat Nigam Limited v. Dewan Chand Ram Saran*, reported in (2012) 5 SCC 306 (paras 4345), it is observed and held that an arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. It is further observed and held that construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do. It is further observed by this Court in the aforesaid decision in paragraph 33 that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. It is further observed that thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score.

9.2 Similar is the view taken by this Court in the cases of *National Highways Authority of India v. ITD*

Cementation India Limited, reported in (2015) 14 SCC 21(para 25) and Steel Authority of India Limited v. Gupta Brother Steel Tubes Limited, reported in (2009) 10 SCC 63”.

36 A similar view has been taken by the Supreme Court in the case of **M/S Dyna Technologies Pvt. Ltd. vs M/S Crompton Greaves Ltd, (2019) 20 SCC 1**. In the said judgement, the Supreme Court has, in paragraph (25) observed as under:

“25. Moreover, umpteen number of judgments of this Court have categorically held that the Courts should not interfere with an award merely because an : 15: A.A. Nos.20 of 2018 & 35/2018 alternative view on facts and interpretation of contract exists. The Courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under [Section 34](#) of the Arbitration Act”.

37 Again in the case of **South East Asia Marine Engineering and Construction Limited v. Oil India Limited, (2020) 5 SCC 164**, the Supreme Court has held that where two views are possible, the Court cannot interfere in the plausible view taken by the Arbitrator supported by reasoning.

38 In the face of the aforesaid legal position, it is clear that once an Arbitrator has taken a view with regard to the interpretation of a particular clause of the agreement between the parties, which is plausible and not opposed to reason and logic, the Court cannot interfere with such an interpretation, even if another view is also possible. In the instant case, the learned Arbitrator has recorded his reasons for taking the view

that the agreement between the parties was compulsorily renewable after the expiry of first five years if the sales remained satisfactory. The said view, being plausible and possible, cannot be interfered with by this Court while exercising its powers under Section 34 of the Act.

39 Similarly, the learned Arbitrator has taken a view that the term ‘satisfactory sales’, as appearing in clause (5) of the agreement, would take its colour from clause (4) of the agreement, according to which, the petitioner was entitled to 4% of the total gross sales in a calendar month if the sales are to the tune of Rs.15 lacs or above and if the sales are less than Rs.15 lacs, the petitioner was to get only Rs.30000 plus 2% of the total gross sales. According to the learned Arbitrator, if the sales per month cross Rs.15 lacs, it would constitute ‘satisfactory sales’, otherwise it would be unsatisfactory sales. The term ‘satisfactory sales’ is otherwise not defined or interpreted in any other clause of the agreement between the parties. The petitioner claims that, for other floors of the same building, he is getting rent in excess of what he was getting from the respondent in terms of the agreement. According to the petitioner, the rent that is being paid to him by the Bajaj Allianz Insurance Company Ltd. For one floor of the same building is in excess of what he was getting from the respondent, as such, it cannot be stated that the sales pertaining to the business of the respondent were satisfactory.

40 The stand taken by the petitioner in this regard is not plausible, for the reason that, from the perspective of the petitioner, the

sales of the business that was being conducted by the respondent from the premises may not be satisfactory, but what is satisfactory cannot be left to the whim and caprice of one party to the agreement. In the absence of any criteria relating to the interpretation of the term 'satisfactory sales' it is logical and reasonable to fall back upon the clause (4) of the agreement. This is what the learned Arbitrator has done while explaining the term 'satisfactory sales', by concluding that if the sales are Rs.15 lacs or above in a month, the same would constitute 'satisfactory sales'. The logic and reasoning given by the learned Arbitrator for taking such a view is not only possible, but also plausible. In fact, the said view is the only view possible in the facts and circumstances of the case.

41 Another contention that has been raised by the learned counsel for the petitioner is with regard to the nature of agreement between the parties. While the petitioner claims it to be a 'lease agreement', the respondent claims that the same is a 'business agreement'. The learned Arbitrator has interpreted the agreement as a 'business agreement' and not as a 'lease agreement'.

42 The aforesaid aspect of the matter has been considered by this Court while referring the matter to the learned Arbitrator and in paras (9) and (10) of the judgment dated 24.09.2021 passed in AP No. 8/2019, Hon'ble the Chief Justice has clearly observed that the agreement in question is relating to sharing of profits of the business rather than that of leasing out of any premises. It has also been observed

that the nature of the agreement indicates that it is a profit-sharing agreement in connection with the property of the petitioner provided by him to the respondent for running a departmental store and it is not exactly a lease agreement. This observation of the Court has not been assailed by the petitioner before any higher forum, as such, the same has acquired finality. Therefore, it does not lie in the mouth of the petitioner to urge at this stage that the agreement between him and the respondent is a 'lease agreement' and not a 'business agreement'. In any case, as already stated, this Court, in exercise of its powers under Section 34 of the Act, is not competent to sit over the interpretation rendered by the learned Arbitrator on this issue. For all these reasons, the contention of the petitioner, in this regard, is found to be without any merit and is rejected.

43 The next contention, that has been raised by the learned counsel for the petitioner, is that the petitioner could not have been saddled with the compensation on account of loss of stocks that were lying in the premises on account of the fact that the stocks were removed from the premises at the behest of the Municipal Committee, Anantnag and that the petitioner had nothing to do with it. It has been contended that the finding of the learned Arbitrator that the petitioner had hobnobbed with the Municipal Authorities, is perverse, inasmuch as the learned Arbitrator has conveniently ignored the evidence led by the petitioner on this aspect of the case. It has also been contended that by virtue of the status quo order passed by this Court in the earlier round of

litigation between the parties even the petitioner was denied use of the premises which has resulted in loss to him, but this aspect of the matter has not been considered by the learned Arbitrator.

44 In the above context, if we have a look at the impugned award, the learned Arbitrator has, after analysing the material on record found that the complaint made by the Masjid Committee to the Municipal Authorities for cleaning the premises which was lying locked was, in fact, made at the behest of the petitioner with a view to remove the respondent from the possession of the premises. The said finding of the learned Arbitrator is based upon the fact that the Municipal Authorities had issued notice only to the petitioner and not to the respondent who was owner of the stocks lying in the premises. This aspect of the matter is not in dispute. It has been noted by the learned Arbitrator that nobody from the Masjid Committee was produced as a witness to show that the complaint, in fact, was made by the Masjid Committee. Besides this, the application made by the Masjid Committee does not bear the name of any person and in the said application, the cell number recorded therein, upon verification through Truecaller, was found to be that of the petitioner. It has also been noted by the learned Arbitrator that despite the order of status quo having been passed by this Court, the Municipal Authorities under the guise of Covid-19 pandemic removed the merchandise/stocks, both rotten as well as the stocks in good condition from the ground floor which clearly shows that the petitioner was in league with the Municipal Authorities. All these

findings of the learned Arbitrator are based upon the material that was available before him.

45 In the instant case, it is an admitted fact that when the stocks belonging to the respondent were removed by the Municipal Authorities from the premises in question, an order of status quo passed by this Court was in operation and the petitioner was in knowledge of the said fact. It has been established from the material made available to the learned Arbitrator that the cost of the stocks was Rs.2,84,869.43. The petitioner has admittedly received a notice from the Municipal Authorities. As a reasonable and prudent person, it was the duty of the petitioner to inform the Municipal Authorities that there is a stay order in operation and, as such, permission of the Court for removal of rotten stocks was required to be obtained. It was also the duty of the petitioner to inform the Municipal Authorities that the stocks belong to the respondent to whom a notice was required to be served before undertaking the job of removal of rotten stocks. Admittedly, he did not take these steps. The aforesaid conduct of the petitioner, clearly points to the fact that he has somehow tried to dispossess the respondent from the premises in question with the help of Municipal Authorities under the garb of removal of rotten stocks from the premises. Not only this, when the learned Arbitrator appointed a Commissioner to prepare an inventory of the stocks lying in the premises, the Commissioner visited the spot and found that in the ground floor of the building from where the respondent was operating his business, no stocks at all were lying. Even

the shelves were lying dismantled and some of the items had been shifted to first floor of the building and these items were lying in such a haphazard manner that it was not possible for the Commissioner to prepare an inventory thereof. It is also pertinent to mention here that the premises in question was locked by the petitioner and not by the respondent. This is clear from the report of the Commissioner who could open the premises only with the help of the petitioner. This is further confirmed from the statements of the officials of the Municipal Authorities who undertook the cleaning operation. They have categorically stated that the premises was opened by the petitioner.

46 From the above, it is evident that there was overwhelming material on record before the learned Arbitrator to show that it is the petitioner who locked the premises and it is he, who was in-charge of the premises at the time when the stocks were removed from the said premises. Therefore, the burden was on the petitioner to explain the circumstances in which the stocks belonging to the respondent were removed from the premises and as to what is the present status of those stocks. The petitioner has miserably failed to explain this either before the learned Arbitrator or before this Court. Thus, the findings of the learned Tribunal on this aspect of the matter can, by no stretch of reasoning, be termed as 'perverse'. The compensation awarded by the learned Arbitrator on account of loss of stocks etc. is, therefore, legally justified.

47 That takes us to the claim relating to compensation on account of loss of profits. Once, it is concluded that the agreement between the parties was compulsorily renewable after first five years for a similar term because the sale figures in the first five years of the agreement were satisfactory, none of the parties had the power to terminate the contract unilaterally. Any such action on the part of either of the parties would amount to breach of contract making the party at breach liable for damages. In the instant case, the learned Arbitrator, on the basis of the sale figures for the five years, has rightly come to the conclusion that the same were satisfactory in the light of covenant incorporated in clause (4) of the agreement. Thus, it was incumbent upon the parties to carry on the business in accordance with the terms of the agreement for another five years. However, in the instant case, the petitioner has by his actions/omissions as explained hereinbefore made it impossible for the respondent to operate the business agreement for another term of five years. Thus, it is the petitioner who is responsible for breach of the terms of the agreement and, as such, he is liable to compensate the respondent for the said breach.

48 If we have a look at the impugned award passed by the learned Arbitrator, the compensation on account of breach of agreement by the petitioner has been computed on the basis of loss to the business of the respondent/ claimant by taking into account the average profits earned by the respondent during the first five years of currency of the agreement between the parties. After deducting the amount, which was

payable to the petitioner on account of charges for use of the premises, in terms of Clause (4) of the agreement, the loss of profits has been computed by the learned Arbitrator. The figures and facts in this regard are not in dispute.

49 That takes us to the to the question as to whether the damages computed by the learned Arbitrator in the manner stated above is in accordance with the law. The agreement between the parties does not contain any covenant with regard to the manner in which the loss of profits is to be computed in case of premature termination of the agreement, nor does it contain any specific covenant laying down any particular sum as the measure of damages in case of a breach. The agreement does not lay down any notice period for its termination. It only provides that if, after the first five years, the sales are found to be satisfactory, the agreement has to be renewed for another five years. As the learned Arbitrator has found that the sales during the first five years were satisfactory, he has computed the losses by deeming that the agreement has been renewed for another five years. Once it has been established that there were satisfactory sales in the first five years, the respondent became entitled to operate the business for another five years and the agreement could not have been terminated prior to the expiry of said period. For this limited purpose of quantifying the damages for breach of the agreement, the same has to be deemed to be in operation for next five years. In that view of the matter, the respondent would be entitled to claim the loss of profits for the next five years. The learned

Arbitrator has computed the loss of profits for five years at Rs.1,53,96,488 and deducted there from an amount of Rs.72,45,021 on account of 4% of the total sales for those years, which would form share of the petitioner. The method adopted by the learned Arbitrator in computing the losses in business suffered by the respondent, in the absence of any notice period provided in the agreement and in the face of entitlement of the respondent to carry on business for another five years, appears to be perfectly in accordance with the law.

50 It has been next contended by the learned counsel for the petitioner that the compensation on account of loss of profit calculated by the learned Arbitrator, in terms of the impugned award, is untenable in law, for the reason that, in terms of Section 73 of the Indian Contract Act, only the loss or damage that naturally arises in the usual course of events from a breach of contract, or which the parties knew, at the time of making the contract, was likely to result from such a breach, can be awarded against the party in default. It has been contended that no indirect loss or damage sustained due to a breach can be awarded in terms of Section 73 of the Contract Act. The learned counsel, while relying upon the judgment of the Supreme Court in the case of **Unibros vs. All India Radio, 2023 SCC Online SC 1366** has submitted that, to support a claim for loss of profit, it is imperative for the claimant to substantiate that he had taken steps to minimize the losses. It has been contended that in the instant case, the respondent/claimant did not

produce any evidence before the learned Arbitrator to show that he has taken any such steps to minimize the losses.

51 The contention of the petitioner that the respondent has not taken any steps for minimizing the losses is without any merit, as the present case pertains to a profit-sharing business agreement and not to a works contract. Once the goods belonging to the respondent were locked by the petitioner in his premises, it was impossible for the respondent to take out those stocks and put them to sale at any other place. The conduct of the petitioner, as stated hereinabove, had made it impossible for the respondent to find a buyer for the stocks or to shift those stocks to some other place for starting fresh operations. Therefore, there was no occasion for the respondent to minimize the losses in the facts and circumstances of the present case. The contention of learned counsel for petitioner is, therefore, without any substance.

52 The star argument advanced by the learned counsel for the petitioner for assailing the impugned award is that the agreement between the parties was determinable by its very nature, as such, it was not open to the learned Arbitral Tribunal to hold that the same is deemed to have been renewed for another five years with a similar renewal clause as the same would amount to granting specific performance of the agreement which was legally impermissible. To support his contention, learned counsel for the petitioner has relied upon the judgment of the Supreme Court in the case of **Indian Oil Corporation Ltd vs Amritsar Gas Service and Ors, 1991 SCC (1) 533** and the judgment of the High

Court of Delhi in the case of **ABP Network Private Ltd., vs. Malika Malhotra**, 2021 SCC Online Del 4733.

53 In the instant case, the learned Arbitrator has, vide relief para 19(a) of the impugned award held the respondent entitled to renewal of the agreement for five years with a similar renewal clause. This does amount to granting the relief of specific performance to the respondent. As per Section 14(d) of the Specific Relief Act, a contract which, by its nature, is determinable, cannot be specifically enforced. The question that poses itself before this Court, is as to whether the agreement between the parties was determinable in nature.

54 As to what is meant by the expression ‘in its nature determinable’ has been a matter of discussion and deliberation in a number of judgments of the Supreme Court as well as of various High Courts of the Country. The High Court of Delhi in the case of **ABP Network Pvt. Ltd’s case** (supra), has analysed this aspect of the matter with reference to various precedents on the issue and observed as under:

“26 The expression "in its nature determinable" is, to say the least, delightfully vague. The exact import of the words "in its nature" is not easy to discern. Nor is it easy to distinguish a contract which is "in its nature determinable", from a contract which is merely "determinable".

27. An early decision which considered the issue of whether a contract was "in its nature determinable" is to be found in [Premier Automobiles Ltd v. Kamlekar Shantaram Wadke](#)¹⁰. The case related to an agreement, dated 31st December, 1966, between Premier Automobiles Ltd. (PAL) and the Sabha Union of its workmen, for availing certain

incentives. Subsequently, a settlement dated 9th January, 1971 was executed between PAL and another Union of its workmen, namely the Association Union. Certain members of the Sabha Union, who were aggrieved by the settlement, instituted a suit before the Bombay City Civil Court, for a declaration that the settlement dated 9th January, 1971, was not binding on them and all others who were not members of the Association Union. Additionally, permanent injunction, restraining PAL from enforcing or implementing the settlement dated 9th January, 1971, was also sought.

28 Among other issues, the Supreme Court considered, in para 29 of the report, the question of whether perpetual injunction could be granted in view of [Section 14\(1\)\(c\)](#) of the pre-amended [Specific Relief Act](#). [Section 19\(2\)](#) of the Industrial Disputes Act, 1947 ("the [ID Act](#)") provided for termination of settlement between workmen and the management, and read thus:

"19. Period of operation of settlements and awards. -

(1) A settlement shall come into operation on such date as is agreed upon by the parties to the dispute, and 10 (1976) 1 SCC 496 if no date is agreed upon, on the date on which the memorandum of the settlement is signed by the parties to the dispute.

(2) Such settlement shall be binding for such period as is agreed upon by the parties, and if no such period is agreed upon, for a period of six months from the date on which the memorandum of settlement is signed by the parties to the dispute, and shall continue to be binding on the parties after the expiry of the period aforesaid, until the expiry of two months from the date on which a notice in writing of an intention to terminate the settlement is given by one of the parties to the other party or parties to the settlement."

29 The Supreme Court, in para 29 of the report, held that, by virtue of [Section 19\(2\)](#) of the ID Act, the settlement, between the Association Union and PAL was "in its nature determinable". Per corollary, it was held, the settlement was not specifically enforceable by virtue of [Section 14\(1\)\(c\)](#); consequently, injunction, restraining breach of the settlement, could not be directed in view of the proscription contained in [Section 41\(e\)](#) of the Specific Relief Act, 1963.

30. A contract which was otherwise stipulated as being valid for a particular period of time, and was determinable prior thereto at the option of either of the parties to the contract was, therefore, held to be "in its nature determinable". No injunction, restraining breach of such a contract could, therefore, be granted".

55 In the aforesaid judgment, the Delhi High Court has also relied upon the judgment in the case of **Indian Oil Corporation Ltd'** (supra) for explaining the contours of expression 'in its nature determinable'. Para (12) of the aforesaid judgment of the Supreme Court in this regard is relevant to the context and the same is reproduced as under:

12. ... The award further says as under:

"This award will, however, not fetter the right of the defendant Corporation to terminate the distributorship of the plaintiff in accordance with the terms of the agreement dated April 1, 1976, if and when an occasion arises."

This finding read along with the reasons given in the award clearly accepts that the distributorship could be terminated in accordance with the terms of the agreement dated April 1, 1976, which contains the aforesaid clauses 27 and 28. Having said so in the award itself, it is obvious that the arbitrator held the distributorship to be revokable in accordance with clauses 27 and 28 of the agreement. It is in this sense that the award describes the Distributorship Agreement as one for an indefinite period, that is, till terminated in accordance with clauses 27 and 28. The finding in the award being that the Distributorship Agreement was revokable and the same being admittedly for rendering personal service, the relevant provisions of the [Specific Relief Act](#) were automatically attracted. Sub-section (1) of [Section 14](#) of the Specific Relief Act specifies the contracts which cannot be specifically enforced, one of which is 'a contract which is in its nature determinable'. In the present case, it is not necessary to refer to the other clauses of sub-section (1) of [Section 14](#), which also may be attracted in the present case since clause (c) clearly applies on the finding read with reasons given in the

award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant-Corporation is contrary to the mandate in [Section 14\(1\)](#) of the Specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made according to 'the law governing such cases'. The grant of this relief in the award cannot, therefore, be sustained."

56 From the aforesaid analysis of law on the subject, it is clear that an agreement that is determinable by the situations such as the efflux of time, at the option of either or both the parties, or by the happening of an eventuality, would be an agreement determinable in nature.

57 Coming to the facts of the present case, clause (5) of the agreement provides that the agreement would be valid for five years, and after five years, a fresh agreement with fresh terms and conditions will have to be entered into between the parties. It also provides that if the sales are satisfactory, the agreement shall be renewed for another five years carrying a similar renewal clause. It further provides that if the sales are not satisfactory, the agreement can be terminated after first five years on a mutual consent basis. Clause (16) of the agreement provides that the agreement shall remain valid and operational for the first five years unless the parties mutually agree to terminate it before that date. Thus, the agreement provides a mechanism for its termination. It can be terminated after the first five years by mutual consent of the parties, and it can be terminated even before that by mutual consent of the parties. It is to be compulsorily renewed for another five years if the sales are

satisfactory, with a similar renewal clause. It is not an agreement which would run in perpetuity with no possibility of its termination even by consent of the parties. Thus, it is an agreement which, by its nature, is determinable, as it can be terminated with the consent of the parties.

58 In view of the above, the learned counsel for the petitioner is right in his submission that the agreement is determinable in its nature. He is also right in his submission that in view of statutory bar contained in Section 14(d) of the Specific Relief Act, no specific performance of such an agreement can be granted either by the Court or by the arbitral Tribunal. The learned Arbitrator by holding that the agreement is still in existence carrying a similar renewal clause, has, in fact, granted the relief of restoration of business of the respondent which is contrary to the mandate of Section 14(d) of the Specific Relief Act. The same, in view of the ratio laid down by the Supreme Court in **Indian Oil Corporation's** case (supra), is an error apparent on the face of the award which, in other words, constitutes a patent illegality.

59 The question that arises for consideration is as to whether in view of the aforesaid findings, the award as a whole is required to be set aside or only those portions of the award which are contrary to the public policy of the State are required to be set aside. The Supreme Court has, in the case of **National Highway Authority of India vs M Hakeem, (2021) 9 SCC 1**, followed by the decisions rendered in **Larson Air Conditioning and Refrigeration Co. vs Union of India, (2023) 15 SCC 472** and **S.V Samudram vs. State of Karnataka and another,**

2024 SCC Online SC 19, held that a Court under Section 34 of the Arbitration Act does not have jurisdiction to modify an arbitral award as the same would amount to crossing 'Lakshman Rekha'. In these judgments, it has been held that all that is required under Section 34 is to see whether the contracting parties have agreed to bind themselves to the terms, with only the supervisory jurisdiction of the *Court* to consider a breach thereof. It has been further held that if an award is found to be in conflict with the grounds specified in Section 34 of the Act, the same would be unsustainable in law.

60 In the face of the aforesaid legal position and having regard to the conclusion that the relief granted by the learned Arbitrator vide the impugned award to the extent of holding that the agreement between the parties is still in existence with a renewal clause, constitutes a patent illegality, the question arises whether the entire award is liable to be set aside, or whether other parts of it, which do not suffer from any illegality, can be saved.

61 If we have a look at the judgments rendered by the Supreme Court in **M Hakeem's case (supra)**, **Larson Air Conditioning and Refrigeration Company's case (supra)** and **S.V.Samudram's case, (supra)** what the Supreme Court has held is that the Court, while considering a petition under Section 34 of the Act, does not have jurisdiction to modify the award. The question that poses itself before this Court is whether a part of the award, which is not in consonance with law, can be set aside, leaving the other parts of the award, which are

in consonance with law, untouched. It has to be borne in mind that there is a lot of difference between the terms ‘modification’ and ‘setting aside’. While modification means changing or altering something with a view to improving it, whereas, setting aside means annulling or making invalid. Thus, the basic difference between modification and setting aside is that, while modifying an award, it is sought to be improved by keeping its base intact, whereas while setting aside an award, the whole award is annulled.

62 An award made by the Arbitrator usually comprises decisions upon several claims and counter claims put forth by the parties. While the Arbitrator may allow some of the claims, it is quite possible that other claims may be disallowed. Thus, an Arbitrator passes a conglomeration of several awards while making a final award. This conglomeration of awards or sub-awards pertain to different claims and counter claims made by the parties before the Arbitrator. If the sub-awards are severable from each other, then those sub-awards that are contrary to the law can certainly be set aside, while saving the others that are not contrary to law. This, in my considered opinion, would not amount to modification of an award, rather it would amount to setting aside of certain portions of the award that are severable from the others. The ratio laid down by the Supreme Court in **M Hakeems’s case (supra)** and other subsequent cases is, therefore, required to be analyzed and understood in this context. In the cases referred to in the preceding Para, the Supreme Court was not seized of the issue with regard to

severability of offending portions of an arbitral award from the other portions of the award so the said issue did not come up for discussion before the Court.

63 A Full Bench of the Bombay High Court in the case of **R.S. Jiwani vs. Ircon International Ltd., 2009 SCC Online Bombay 2021** has comprehensively dealt with the issue of severability of offending portions of an award after surveying the legal position on the subject. It would be apt to refer to relevant extracts of the said judgment to understand the legal position on this issue. The same are reproduced as under:

“17. The argument raised before us is that sub-clauses (i) to (iii) and (v) of clause (a) of sub-section (2) of [section 34](#) are the grounds where it is mandatory for the Court to set aside the whole award and there is no other choice before the Court. It is only in the class of cases falling under [section 34\(2\)\(a\)\(iv\)](#) that with the aid of the proviso to that sub-section, the Court can apply principle of severability. In that case, if the matter submitted to the arbitration can be separated from the one not submitted then the Court may set aside that part of the award alone which is not submitted to arbitration. This argument is founded on the Division Bench judgment of this Court in the case of [Mrs. Pushpa P. Mulchandani v. Admiral Radhakrishin Tahiliani, 2008\(7\) LJ Soft, 161](#), and which was relied upon by the respondents for inviting the decision against the Appellant. Thus, we have to examine the provision of [section 34](#) of the 1996 Act to find whether it permit of any other interpretation than the one put forward by the respondents. Sub-clauses (i), (ii), (iii) and (v) of clause (a) of sub-section (2) of [section 34](#) deal with certain situations which may require the Court to set aside an award of the arbitral tribunal. These may be the cases where the party was under incapacity, the agreement is not valid under the law in force, where proper

notice was not given to the party or otherwise enable to present his case, and the composition of arbitral tribunal or procedure was not in accordance with the agreement between the parties and lastly the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force. Explanation to [section 34\(2\)](#) which is in the nature of a declaration further explains that when an award is in conflict with the public policy of India when the award was induced or affected by (i) fraud or (ii) by corruption; or (iii) was in violation of section 75 or 81 of the Act. It is difficult for this Court to hold that under all these categories it would be inevitable for the Court to set aside the entire award. It may not be very true that even under these categories, it would be absolutely essential for the Court to set aside an award. It is true that where a party was under incapacity or was not served with the notice at all and the arbitration agreement itself was not valid that an award may have to be set aside in its entirety. But even within these clauses, there is possibility of a situation where it may not be necessary for the Court to set aside the entire award. Let us take an example that where a party is given a notice has participated in the proceedings before the arbitral tribunal but was unable to lead evidence or present himself or submit his counter claim. Would it be fair for the Court to set aside an award of the arbitral tribunal in its entirety in this situation? A party who participated in the arbitral proceeding even led evidence and cross-examined the witnesses of the claimants in relation to the claims but for any reason was not able to place his evidence on record in relation to the counter claims or he was not granted sufficient opportunity to present his case or for some reason was unable to present his case before the arbitral tribunal, would it not be just, fair, equitable and in line with the object of the Act of 1996 to consider setting aside award only regarding counter claim. Is such a party which has succeeded in the claims made by it, which are otherwise lawful and not hit by any of the stated circumstances, should be awarded his reliefs while either rejecting or even altering the award with regard to the counter claim filed by the aggrieved party before the Arbitrator. Situation may be different where arbitration agreement is not valid. In other

18. In the event the arbitration agreement between the parties is not valid means where it is unlawful or void, the whole award will have to be set aside as the very root of the matter suffers from a defect of law and is not valid under the law for the time being in force. Severability is an established concept. It is largely applicable to various branches of civil jurisprudence. Where it is possible to sever the bad part from the good part, the good part of the contract can always be enforced and partial relief can be granted. Doctrine of severability has been applied to law of Contract since time immemorial of course, it could be said that substantial severability and not textual divisibility is the principle controlling this concept.

15. It is no doubt true that a Court of law will read the agreement as it is and cannot rewrite nor create a new one. It is also true that the contract must be read as a whole and it is not open to dissect it by taking out a part treating it to be contrary to law and by ordering enforcement of the rest if otherwise it is not permissible. But it is well settled that if the contract is in several parts, some of which are legal and enforceable and some are unenforceable, lawful parts can be enforced provided they are severable.

xx

20. *The cases would be different where it is not possible or permissible to sever the award. In other words, where the bad part of the award was intermingled and interdependent upon the good parts of the award there it is practically not possible to sever the award as the illegality may affect the award as a whole. In such cases, it may not be possible to set aside the award partially. However, there appears to be no bar in law in applying the doctrine of severability to the awards which are severable. In the case of Messrs. [Basant Lal Banarsi Lal v. Bansi Lal Dagdulal](#), AIR 1961 SC 823,*

though the Supreme Court was dealing with an application for setting aside an award passed by the Bombay City Civil Court, contending that forward contract in groundnuts were illegal as making of such contracts was prohibited by Oil Seeds (Forward Contract Prohibition) Order, 1943 and hence arbitration clause contained in the forward contracts in groundnuts between the parties was null and void, where it was found as a matter of fact that it was not possible to segregate the dispute under the various contracts as there was direct link between them.

24. Now a further question that falls for consideration of this Court is as to whether there is anything contained in 1996 Act which prohibits in law the Court from adopting the approach applicable under the 1940 Act or prohibits applicability of principle of severability to the awards under 1996 Act. We are unable to see any prohibition much less an absolute bar in the provisions of [section 34](#) of 1996 Act to that effect. There could be instances falling under [section 34\(2\)\(a\)](#), sub-sections (iii) and (v) where the principle of severability can safely be applied. These provisions do not specifically or impliedly convey legislative intent which prohibits the Courts from applying this principle to the awards under the 1996 Act. Again for example, an Arbitral Tribunal might have adopted a procedure at a particular stage of proceeding which may be held to be violative of principles of natural justice or impermissible in law or the procedure was not in accordance with the agreement between the parties but the parties waived such an objection and participate in the arbitration proceedings without protest, in that event it will be difficult for the Court to hold that the good part of the award cannot be segregated from the bad part.

25. [Section 4](#) of the 1996 Act has been enacted by the Legislature to control the conduct of the parties during the arbitral proceedings. The purpose appears to be that unnecessary technical objections with regard to the continuation or otherwise of the arbitration proceedings and challenge to an award on that ground at a subsequent stage should be discouraged. This itself is indicative of the legislative intent not to unnecessarily prolong the litigation

on such believable objection which may be waived. The language of section 34(2) does not use any specific language which debars the Court from exercising its discretion otherwise vested in it by virtue of its very creation to set aside the award wholly or partially as the case may be.

30. If the principles of severability can be applied to a contract on one hand and even to a statute on the other hand, we fail to see any reason why it cannot be applied to a judgment or an award containing resolution of the disputes of the parties providing them such relief as they may be entitled to in the facts of the case. It will be more so, when there is no statutory prohibition to apply principle of severability. We are unable to contribute to the view that the power vested in the Court under [section 34\(1\)](#) and (2) should be construed rigidly and restrictedly so that the Court would have no power to set aside an award partially. The word —set aside cannot be construed as to only to set aside an award wholly, as it will neither be permissible nor proper for the Court to add these words to the language of section which had vested discretion in the Court. Absence of a specific language further supported by the fact that the very purpose and object of the Act is expeditious disposal of the arbitration cases by not delaying the proceedings before the Court would support our view otherwise the object of [Arbitration Act](#) would stand defeated and frustrated.

64. In the aforesaid case, the Full Bench of the Bombay High Court, after noticing the ratio laid down by the Supreme Court in **Mcdermott International Inc vs Burn Standard Co. Ltd. & Ors, (2006) 11 SCC 181**, wherein it was held that the court cannot correct errors of the arbitrators and it can only quash the award leaving the parties free to begin the arbitration again, if desired, explained the

context in which the Supreme Court has made the aforesaid observations by stating as under:

“Thus, the above observations and dictum held in paragraph 52 has to be construed in the context in which it has been referred to and decided. If an issue is not raised before the Court, no arguments are addressed on that issue and no reasons on an issue is recorded by the Court, such a judgment cannot be treated as a precedent applicable to a subsequent case on the correct application of the principle of ratio decidendi. order for a judgment to apply as a precedent, the relevant laws and earlier judgments should be brought to the notice of the Court and they should be correctly applied. Mere observations in a previous judgment may not be binding on a subsequent Bench if they are not applicable to the facts and controversies in a subsequent case as per settled principle of ratio decidendi. The rule of precedent, thus, places an obligation upon the Bench considering such judgments that the Court should discuss the facts and the law of both the cases and then come to a conclusion as to whether the principle enunciated in the previous judgment is actually applicable on facts and in law of the subsequent case. In the case of [Commissioner of Customs \(Fort\) v. Toyota Kirloskar Motor \(P\) Ltd.](#), (2007) 5 SCC 371, the Supreme Court stated the law relating to precedents and held that a decision, as is well known, is an authority for what it decides and not what can logically be deduced therefrom. The ratio of a decision must be culled out from the facts involved in a given case and need not be an authority in generality without reference to the reasons, discussions and facts of the case. The Supreme Court was primarily stating the principles which have been kept in mind by the Courts while interfering with the award of the Arbitral Tribunal that it was to outline the supervisory role of the Courts within the ambit and scope of [section 34](#). It is true that the Court like a Court of appeal cannot correct the errors of arbitrator. It can set aside the award wholly or partially in its discretion depending on the facts of a given case and can even invoke its power under [section 34\(4\)](#). It is not expected of a party to make a separate application under [section 34\(4\)](#) as the provisions open with the language on receipt of application under sub-section (1), the Court may.....” which obviously means that application would be one for setting aside the arbitral award to be made under [section 34\(1\)](#) on the

grounds of reasons stated in [section 34\(2\)](#) and has to be filed within the period of limitation as stated as reply under [section 34\(3\)](#). The Court may if it deems appropriate can pass orders as required under [section 34\(4\)](#). In other words, the provisions of [section 34\(4\)](#) have to be read with [section 34\(1\)](#) and [34\(2\)](#) to enlarge the jurisdiction of the Court in order to do justice between the parties and to ensure that the proceedings before the Arbitral Tribunal or before the award are not prolonged for unnecessarily. In our humble view, the Division Bench appears to have placed entire reliance on para 52 by reading the same out of the context and findings which have been recorded by the Supreme Court in subsequent paragraphs. It is also true that there are no *pari materia* provisions like [sections 15](#) and [16](#) of the Act of 1940 in the 1996 Act but still the provisions of [section 34](#) read together, sufficiently indicate vesting of vast powers in the Court to set aside an award and even to adjourn a matter and such acts and deeds by the Arbitral Tribunal at the instance of the party which would help in removing the grounds of attack for setting aside the arbitral award. We see no reason as to why these powers vested in the Court should be construed so strictly which it would practically frustrate the very object of the Act. Thus, in our view, the principle of law stated by the Division Bench is not in line with the legislative intent which seeks to achieve the object of the Act and also not in line with accepted norms of interpretation of statute”

65 Again, the Supreme Court has, in the case of **J.G.Engineers Private Ltd. vs. Union of India, (2011) 5 SCC 758**, while upholding the jurisdiction of a Court to partially set aside an award observed as under:

“24. The arbitrator had considered and dealt with Claims 1, 2, 3, 4 and 5, 6, 7 and 8, 9 and 11 separately and distinctly. The High Court found that the award in regard to Items 1, 3, 5 and 11 was liable to be set aside. The High Court did not find any error in regard to the award on Claims 2, 4, 6,

7, 8 and 9, but nevertheless chose to set aside the award in regard to these six items, only on the ground that in the event Counterclaims 1 to 4 were to be allowed by the arbitrator on reconsideration, the respondents would have been entitled to adjust the amounts awarded in regard to Claims 2, 4, 6, 7, 8 and 9 towards the amounts that may be awarded in respect of Counterclaims 1 to 4; and that as the award on Counterclaims 1 to 4 was set aside by it and remanded for fresh decision, the award in regard to Claims 2, 4, 6, 7, 8 and 9 was also liable to be set aside.

25. It is now well settled that if an award deals with and decides several claims separately and distinctly, even if the court finds (2011) 5 SCC 758 that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent. As the award on Items 2, 4, 6, 7, 8 and 9 was upheld by the civil court and as the High Court in appeal did not find any infirmity in regard to the award on those claims, the judgment of the High Court setting aside the award in regard to Claims 2, 4, 6, 7, 8 and 9 of the appellant, cannot be sustained. The judgment to that extent is liable to be set aside and the award has to be upheld in regard to Claims 2, 4, 6, 7, 8 and 9”

66 More recently, a Single Judge of the Delhi High Court has, in the case of **National Highway Authority of India vs. Trichy Thanjavur Expressway Ltd, 2023 SCC Online Del 5183** explained the ratio laid down by the Supreme Court in the case of **M. Hakeem’s case** (supra) in the following manner:

“31. It must, however, be borne in mind that M. Hakeem was essentially concerned with the validity of the District and Sessions Judge enhancing the amount of compensation as awarded by the Collector in its award while entertaining a petition under [Section 34](#) of the Act. It was in that backdrop that the Supreme Court observed that the only option available to the [Section 34](#) court would have been to set aside the award if it be found to suffer from any of the

infirmities prescribed in [Section 34](#) and that while considering a challenge to an award, no power existed in a court to modify or vary the terms of the award.

32. As a preface to the discussion which follows, it must therefore be recognised that the question which falls for consideration would be whether M. Hakeem while proscribing a modification of an award by a [Section 34](#) court should be read as an authority for the proposition that there can be no partial setting aside. While dealing with this aspect we would have to also bear in mind whether a conscious decision by the Legislature to desist from adopting provisions akin to [Sections 15](#) and [16](#) of the Arbitration Act, 1940 should be read as being representative of an intent to deprive courts from exercising a power to set aside an award partially.

67. The High Court of Delhi in the aforesaid judgment has, after noticing the provisions contained in [Section 34](#) of the Act drawn a distinction between modification of an award and its partial setting aside. Paras (37) to (43) and (54) and (55) of the judgment are relevant to the context and the same are reproduced as under:

37. That takes us to the heart of the issue that arises, namely, the partial annulment of an award. Undisputedly, [Section 34\(2\)\(a\)\(iii\)](#) speaks of a part of an award being exorcised from the rest. The Court also finds no justification to lend too much credence on [Article 34](#) of the Model Law ultimately failing to allude to a partial setting aside power even though that was provisioned for in explicit terms in draft [Articles 29, 30, 40](#) and [41](#). This since neither the Working Group Reports nor the contemporaneous material that we have noticed hereinbefore seem to suggest a conscious deletion of that power. The considerable material, on the aspects surrounding partial setting aside that we have had an occasion to review, does not evidence any deliberation or discussion which may have predicated or actuated its deletion. The said material is also not indicative of any

principled decision that may have been taken by member nations for deletion of the partial setting aside power. Its absence from Article 34 which came to be ultimately adopted stands lost in a mist of conjecture. The Court, however, is of the opinion that no useful purpose would be served in speculating on this aspect any further since one would still have to consider whether the power to set aside an award in part stands lost by virtue of Section 34 as it presently stands. The Court has in any case found that the deletion of references to partial setting aside does not appear to have been premised on any principled decision to deprive courts of such a power.

38. In our considered opinion, therefore, the answer to the question which stands posed would have to be rendered on an interpretation of the phrase 'setting aside' as ultimately adopted and forming part of Section 34. As was noticed hereinbefore, Section 34(2)(a)(iii) does speak of an award being set aside in part. We find that the key to understanding the intent underlying the placement of the Proviso in sub-clause (iv) of Section 34(2)(a) is in the nature of the grounds for setting aside which are spoken of in clause (a). As would be manifest from a reading of the five sub-clauses which are positioned in Section 34(2)(a), those constitute grounds which would strike at the very heart of the arbitral proceedings. The grounds for setting aside which are set forth in clause (a) strike at the very foundation of validity of arbitration proceedings. Sub-Clauses (i) to (v) thus principally constitute grounds which would render the arbitration proceedings void ab initio. Although the Section 34(2)(a)(iv) ground for setting aside also falls in the same genre of a fundamental invalidity, the Legislature has sought to temper the potential fallout of the award being set aside in toto on that score. The Proviso to sub-clause (iv) seeks to address a comprehensibly conceivable situation where while some parts of the award may have dealt with non-arbitrable issues or disputes falling outside the scope of the reference, its other components or parts constitute an adjudication which could have been validly undertaken by the AT. The Proviso thus seeks to address such a situation and redeems as well as rescues the valid parts of an award. This saves the parties from the spectre of commencing arbitral proceedings all

over and from scratch in respect of all issues including those which could have validly formed part of the arbitration.

39. The grounds for setting aside encapsulated in [Section 34\(2\)\(b\)](#) on the other hand relate to the merits of the challenge that may be raised in respect of an award and really do not deal with fundamental invalidity. However, the mere fact that the Proviso found in sub-clause(iv) of [Section 34\(2\)\(a\)](#) is not replicated or reiterated in clause (b) of that provision would not lead one to conclude that partial setting aside is considered alien when a court is considering a challenging to an award on a ground referable to that clause. In fact, the Proviso itself provides a befitting answer to any interpretation to the contrary. The Proviso placed in [Section 34\(2\)\(a\)\(iv\)](#) is not only an acknowledgment of partial setting aside not being a concept foreign to the setting aside power but also of parts of the award being legitimately viewed as separate and distinct. The Proviso itself envisages parts of an award being severable, capable of segregation and being carved out. The Proviso is, in fact, the clearest manifestation of both an award being set aside in part as well as an award comprising of distinct components and parts.

40. Undoubtedly, an award may comprise a decision rendered on multiple claims. Each claim though arising out of a composite contract or transaction may be founded on distinct facts and flowing from separate identifiable obligations. Just as claims may come to be preferred resting on a particular contractual right and corresponding obligation, the decision which an AT may render on a particular claim could also be based on a construction of a particular covenant and thus stand independently without drawing sustenance on a decision rendered in the context of another. If such claims be separate, complete and self-contained in themselves, any decision rendered thereon would hypothetically be able to stand and survive irrespective of an invalidity which may taint a decision on others. As long as a claim is not subordinate, in the sense of being entwined or interdependent upon another, a decision rendered on the same by the AT would constitute an award in itself. While awards as conventionally drawn, arranged

and prepared may represent an amalgam of decisions rendered by the AT on each claim, every part thereof is, in fact, a manifestation of the decision rendered by it on each claim that may be laid before it. The award rendered on each such claim rules on the entitlement of the claimant and the right asserted in that regard. One could, therefore, validly, subject of course to the facts of a particular case, be entitled to view and acknowledge them as binding decisions rendered by the AT on separate and distinct claims.

41. The Court notes in this regard that Mr. Mukhopadhaya, Mr. Rajshekhar Rao, learned senior counsels as well as Mr. Ashim Sood had urged that while an award as ultimately rendered may contain findings on numerous claims, the decision rendered in respect of each such claim is entitled to be viewed as an award in itself. This, according to learned counsels, clearly flows from the power of the AT to not just render a final award but also and in the course of arbitral proceedings render interim awards in respect of various claims. It was rightly pointed out by learned counsels that each such decision on a claim could stand independently and be final and binding in itself. Those findings or decisions in relation to various claims that stand placed before the AT may each constitute an award itself and the operative directions framed representing the disposition of all such claims. As was rightly contended by Mr. Mukhopadhaya, the declaration with respect to entitlement and the award of a money claim consequent thereto would be liable to be viewed as independent Arbitral Awards. Mr. Sood had chosen to describe such a disposition of claims as being an "agglomeration" of awards. The Court accords its emphatic and wholehearted acceptance to the aforementioned submissions and comes to the conclusion that an award is thus liable to be viewed and understood accordingly. It thus comes to conclude that each such decision rendered by an AT could be validly viewed as the decision rendered on a particular claim and thus constituting an independent award in itself.

42. Once an award is understood as comprising of separate components, each standing separately and independent of the other, there appears to be no hurdle in the way of courts adopting the doctrine of severability and invoking a power

*to set aside an award partly. The power so wielded would continue to remain one confined to setting aside as the provision bids one to do and would thus constitute a valid exercise of jurisdiction under [Section 34](#) of the Act. That takes us to the question whether the adoption of such a course would be contrary to what the Supreme Court had forbidden in *M. Hakeem*.*

*43. The Supreme Court in *M. Hakeem*, as would be evident from the passages of that decision extracted hereinabove, has enunciated the setting aside power as being equivalent to a power to annul or setting at naught an Arbitral Award. It has essentially held that bearing in mind the plain language of [Section 34](#) coupled with the Act having desisted from adopting powers of modification or remission that existed in the erstwhile 1940 Act, a court while considering a challenge under [Section 34](#) would not have the power to modify. The expression 'modify' would clearly mean a variation or modulation of the ultimate relief that may be accorded by an AT. However, when a [Section 34](#) Court were to consider exercising a power to partially set aside, it would clearly not amount to a modification or variation of the award. It would be confined to an offending part of the award coming to be annulled and set aside. It is this distinction between a modification of an award and its partial setting aside that must be borne in mind.*

xx

*54 As was rightly propounded in *Alcon Builders*, the injunct of modification as enunciated in *M. Hakeem* would only apply where the Court were to consider rendering its own decision or substituting its own view over that of the Arbitrator on a particular claim. The learned Judge also rightly noticed a situation where a decision only on some parts of an award or counter claims may be laid before a Court. It was in that backdrop significantly observed that it would be wholly unnecessary for a court to set aside the award in its entirety even though the challenge itself may stand confined to certain parts thereof. In *Alcon* too the learned Judge propounded the principles of severability and claims not being inter-dependent so as to enable the Court to consider partially setting aside the award. The views thus expressed in the aforesaid decision clearly commends acceptance and a power of partial setting aside being*

*recognized to inhere in courts. We have already found that **Section 34(2)(a)(iv)** cannot be construed as being indicative of the legislative intent for a partial setting aside power being available to be invoked only in cases that may fall within the ambit of that clause. In light of the foregoing discussion, we are of the firm opinion that the expression 'setting aside' as employed in **Section 34** would include the power to annul a part of an award provided it is severable and does not impact or eclipse other components thereof.*

55. Viewed in light of the aforesaid, learned counsels appear to be correct in their submission that M. Hakeem does not really deal with the question of a partial setting aside of an award. In fact, they appear to be correct in their submission that a partial setting aside may not amount to a variation or modification at all”.

68 It appears that the Supreme Court in **M. Hakeem’s case** (supra) has not dealt with the issue of partial setting aside of an award. Even in latter cases of **Larsen Air Conditioning and Refrigeration** (supra) and **S.V.Samudaram** (supra), the issue of modification of the awards was under consideration before the Supreme Court. In the case of **S.V. Samudram** (supra), the Court while exercising power under section 34 of the Act, had slashed the percentage of cost escalation whereas in the case of **Air Conditioning and Larsen Refrigeration** (supra), the Court while exercising the power under Section 34 of the Act, had interfered with the interest awarded by the Arbitrator. Thus, both these cases involved modification of the awards and not their partial setting aside. The ratio laid in these cases would, therefore, be in applicable to a case involving the issue of partial setting aside of an award.

69 A Coordinate Bench of this Court has, in the case of **Union Territory of Jammu and Kashmir vs M/S Hindustan Construction Co. Ltd and ors** (AA No. 7/2020 and connected case, decided on

04.07.2024), after relying upon the ratio laid down by the Supreme Court in the cases of **M. Hakeem's, S.V Samudaram and M/S Larsen Air Conditioning and Refrigeration Co.** (supra), held that there is no power to modify an arbitral award. However, in the said case, the learned Single Judge has not adverted to the issue of partial setting aside of an award, when the offending portions of the award are severable and independent. In fact, another Coordinate Bench of this Court has, in the case of **Chief Engineer vs. Karam Chand Thaper and Bros.** (AA No. 17/2017, decided on 30.01.2024), held that Court under Section 34 of the Act is vested with power to resort to partial setting aside of the award of an arbitral Tribunal.

70 From the foregoing analysis of law on the subject, it is clear that the Court, while exercising jurisdiction under Section 34 of the Act, is vested with the power to segregate different parts of the award that may relate to independent claims. It would be open to the Court to uphold those parts of the award that do not suffer from any legal infirmity or those that do not contravene the grounds of challenge set out in Section 34 of the Act, and save the same, after setting aside those independent and identifiable claims that fall foul of the grounds of challenge set out in Section 34 of the Act. However, while doing so, the Court has to undertake the onerous task of determining as to whether those parts of the award which are liable to be set aside are really independent and segregable from those parts of the award which the Court proposes to uphold.

71 The Supreme Court in the case of **Shin Satellite Co. Ltd vs. M/S Jain Studios Limited, (2006) 2 SCC 628** has held that the proper test for deciding validity or otherwise of an agreement or order is ‘substantial severability’ and not ‘textual divisibility’. It has also been held that it is the duty of the Court to sever and separate trivial or technical parts by retaining the main or substantial part and by giving effect to the latter if it is legal, lawful, and otherwise enforceable. Thus, if the result of setting aside of a part of the award would lead to fall of entire substratum of an award, a partial setting aside of the award is not permissible under law. However, if the partial setting aside of the award would not affect the other portions of the award, the same is permissible and the same would not amount to modification of the award.

72 Keeping the aforesaid legal position in view, let us now come to the facts of the present case. So far as the claim of the respondent with regard to the loss on account of stocks, amounting to Rs.2,84,869.43, which has been awarded by the learned Arbitrator in his favour is concerned, the same has no connection with the issue as to whether the agreement between the parties was determinable in nature or whether it was to continue in perpetuity. Therefore, the claim in this regard is distinct and separate and the same can stand on its own.

73 That takes us to the claim with regard to the loss of profits. As already stated, there is no covenant in the agreement between the parties which relates to the measure of damages in the event of breach of the contract. It is not a case where the contract could have been

terminated by giving notice of a particular period to the adverse party. Had it been the case, the claimant would have been entitled to damages in the shape of loss of profits for the notice period only. However, in this case, there is a covenant with regard to compulsory renewal for five years, which means that, once it is found that sales for the first five years are satisfactory, the agreement has to run for another five years and it cannot be terminated unilaterally prior to that. The learned Arbitrator has found that the sales were satisfactory, and the said finding has been upheld by this Court. Thus, in ordinary course, the agreement between the parties was to continue for another five years as it could not have been terminated prior to that without mutual consent of the parties. The respondent/claimant is, therefore, entitled to loss of profits for these five years which has been computed by the learned Arbitrator at Rs.1,53,96,488. This amount has to be deducted by the share of the petitioner which comes to Rs.72,45,021. The computation of loss of profits is not dependent upon the question as to whether or not, the agreement between the parties was to continue in perpetuity. This claim is also segregable from the other claims. So, are the claims with regard to the costs and interest.

74 The relief granted by the learned Arbitrator vide para 19(a) of the impugned award which pertains to deemed renewal of the agreement for five years, carrying a similar clause, as already, held, contravenes Section 14(2) of Specific Relief Act, as the agreement between the parties was determinable in nature. The said relief granted

by the learned Arbitrator to the respondent claimant is segregable and independent, as such, the same can be set aside on the ground of patent illegality being contrary to public policy of the State. This, however, would not affect the other reliefs granted by the learned Arbitrator to the respondent/claimant.

75 For the foregoing reasons, the petition is partly allowed and the relief granted to the respondent to the extent of para No. (19) (a) of the impugned award, is set aside and the said award to the extent of reliefs granted vide paras (19)(b)(c)(d)(e)(f)& (g) is upheld.

(Sanjay Dhar)
Judge

Srinagar
12.02.2025
“Bhat Altaf-Secy”

Whether the order is speaking: **Yes**
Whether the order is reportable: **Yes**

