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

COMM. ARBITRATION APPEAL (L) NO.30982 OF 2025
IN
COMM. ARBITRATION PETITION NO.349 OF 2020
WITH
INTERIM APPLICATION (L) NO.31125 OF 2025

Arenel (Private) Limited .. Appellant
Vs.
M/s. Aakash Packaging .. Respondent

...

Mr. Rahul Narichania, Senior Advocate a/w Mr. Shrinivas Deshmukh, Mr. Sunilkumar Neelambaran, Mr. Aaron Fernandes i/by Mulla & Mulla & Craigie Blunt & Caroe, Advocates for the Appellant.
Mr. Mustafa Doctor, Senior Advocate a/w Mrs. Spenta Kapadia and Mr. Aashdin Chivalwala i/by Wadia Ghandy & Co., Advocates for the Respondent.

...

CORAM : SHREE CHANDRASHEKHAR, CJ &
GAUTAM A. ANKHAD, J.

Reserved on : 8th December 2025
Pronounced on : 9th March 2026

JUDGMENT

Per, Shree Chandrashekhar, CJ :

The Arenel (Private) Limited which made a claim before the Arbitrator for refund of USD 165,102.10 with interest, costs etc. is aggrieved by the judgment dated 8th September 2025 rendered in the Commercial Arbitration Petition No.349 of 2020 filed by M/s Aakash Packaging under section 34 of the Arbitration and Conciliation Act, 1996. By this judgment, the Award made on 2nd December 2019 in favor of the claimant-company has been set aside by the learned Single Judge of this Court. The claimant-

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company seeks to challenge the said judgment on the ground that the findings of fact recorded by the Arbitrator are not open to challenge and the materials laid before the Arbitrator cannot be re-appreciated in a petition under section 34 of the Arbitration and Conciliation Act. This is also a specific stand taken by the claimant-company that a post-amendment arbitral Award can be challenged on a very limited ground as indicated in "*Ssangyong Engineering and Construction Co. Ltd.*"[1] and no such ground is available in the present case.

2. The claimant-company is a foreign company engaged in the manufacture of biscuits and sweets in Zimbabwe. It entered into an understanding with M/s Aakash Packaging which is a partnership-Firm (in short, respondent-Firm) for supply of the packaging materials. There were five invoices altogether raised for supply of the packaging materials *vide* (i) AP/A002/2011-12 dated 5th March 2012 (ii) AP/A001/2012-13 dated 12th April 2012 (iii) AP/A002/2012-13 dated 10th September 2012 (iv) AP/A003/2012-13 dated 20th December 2012, and (v) AP/A004/2012-13. The claimant-company states that the packaging materials supplied in the first two instances *vide* invoices dated 5th March 2012 and 12th April 2012 were without any defect and as per the agreement and specifications required by it. However, the packaging materials supplied by the respondent-Firm for the invoices dated 10th September 2012 and 20th December 2012 were emitting odour and not upto the contractual specifications. Furthermore, the respondent-Firm did not supply the packaging materials qua 5th invoice *vide* AP/A004/2012-13 for which USD 43,500.25 was paid to it. The claimant-company raised an issue on 12th February

1 *Ssangyong Engineering and Construction Co. Ltd. v. National Highways Authority of India: (2019) 15 SCC 131.*

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2013 with the respondent-Firm regarding the odour from the packaging materials. There was exchange of emails between the parties and the respondent-Firm agreed on 20th March 2013 to visit Zimbabwe for inspecting the packaging materials. However, anyone from the respondent-Firm did not make a visit for inspecting the packing material supplied by it. Therefore, the claimant-company provided samples to the respondent-Firm for testing and it was sent to the SGS India. On 25th March 2013, a report from the SGS India was received with a finding that; *"when tested as specified, the submitted samples comply with the permissible safety limit as specified as stated in the German food, Articles of Daily Use & Feed Code of September 1, 2005 (LFGB), section 31. Hence the submitted sample complies with the limit as stated in the general requirements (Article 3) in EU regulation (EC) no.1935/2004 on materials and articles intended to come into contact with food*".

3. The claimant-company also directly sent samples to the SGS India which provided its report on 8th May 2013 stating that; *"when tested as specified, the submitted samples comply with the permissible safety limit as specified as stated in the German food, Articles of Daily Use & Feed Code of September 1, 2005 (LFGB), section 31. Hence the submitted sample complies with the limit as stated in the general requirements (Article 3) in EU regulation (EC) no.1935/2004 on materials and articles intended to come into contact with food"*. According to the claimant-company, the aforesaid reports from the SGS India differed in opinion regarding the packaging materials emitting odour and it sent a sample of the packaging materials for testing to the SGS Germany. In the report dated 18th June 2013, the SGS Germany observed; *"strongly*

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perceptible off flavour of the product packed therein and a strong smell of plastic, making it unfit for packaging edible products".

4. The dispute between the parties could not be resolved and a Sole Arbitrator was appointed in a petition filed by the claimant-company under section 11 of the Arbitration and Conciliation Act, 1996. The primary claim made by the claimant-company was for refund of the price paid for last three invoices on account of defective materials supplied to it and a claim for refund of USD 43,500.25 for non-supply of the packaging materials. The respondent-Firm raised counter-claims for USD 27,996 and USD 41,079 towards the balance payment and a claim for USD 1,30,000 on account of damages, costs and interest on its claims. Before the Arbitrator, both parties produced documentary evidence and led oral evidence through two witnesses each. The claimant-company examined Mr. Joshua Lepar who is the Managing Director as CW-1 and Mr. Pierre Piennar who is an expert witness as CW-2, who had got a sample of the packaging materials tested by (1) GunLab for comparative structural analysis, and (2) National Measurement Institute for Sensory Analysis following a Headspace Gas Chromatography with Mass Spectrometry Analysis. CW-2 visited the warehouse of the claimant-company in Zimbabwe and noticed very strong pungent chemical smell emanating from the packaging materials. The respondent-Firm examined its Export Manager as RW-1 and the Managing Director as RW-2.

5. The Arbitrator formulated the following 14 issues for trial:

	ISSUES	***Findings***
1	*Whether the Claimant proves that the disputed consignments were defective and sub-standard?*	*Yes*
2	*Whether the Claimant proves that the*	*Yes*

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	Respondent by supplying defective and sub-standard packaging material has breached the contract between the parties?	
3	*Whether the Respondent proves that purported defect in the packaging material supplied by the Respondent is not attributable to the Respondent?*	*No*
4	*Whether the Respondent proves that the Respondent manufactured the material which was to be dispatched by way of second container of 2nd consignment as per instructions of the Claimant?*	*No*
5	*Whether the Claimant proves that the Claimant is entitled to claim refund of the principal amount of USD 48,487.75 made on 18.9.2012, USD 30,614.10 made on 16.11.2012 and USD 87,000.25 made on 11.1.2013 aggregating to USD 165,102.10?*	*Yes*
6	*Whether the Claimant is entitled to USD 62,204.50 being the charges incurred by the Claimant towards the consignment as stated in para 11.1 of the claim?*	*Partly Yes*
7	*Whether the Claimant is entitled to amount of USD 18,750.33 in respect of the costs incurred towards application filed before the Hon'ble Supreme Court?*	*Yes*
8	*Whether the Claimant is entitled to interest of USD 44,281.90 on the principal claim and claim towards reimbursement of various charges?*	*Partly Yes*
9	*Whether the Claimant is entitled to interest at 12% on the entire claim amount from the date of filing of the claim till payment and/or realization?*	*No*
10	*Whether the Respondent is entitled to an amount of USD 27,996 & USD 41,079 (or any other amounts or at all) towards the balance price payable by the Claimant towards the first and second containers, respectively?*	*No*
11	*Whether the Respondent is entitled to costs and damages in an amount of UDS 130,000 or in any other amount or at all?*	*No*
12	*Whether the Respondent is entitled to interest on its claims and if so, at what rate?*	*No*
13	*What Award?*	*As ordered*
14	*What costs?*	*As ordered*

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6. The Arbitrator rendered his findings in favor of the claimant-company to the effect that (i) disputed consignments were defective and sub-standard; (ii) respondent-Firm committed the breach of contract by supplying defective and sub-standard packaging materials and; (iii) claimant-company is entitled for the refund and costs. The Arbitrator also allowed, in part, the claims for charges incurred by the claimant-company towards consignment under paragraph no. 11.1 of the claim petition and award of interest on the principal claim and towards reimbursement of various charges. However, the claim made by the claimant-company for interest at the rate of 12% from the date of filing of the claim till its payment and/or realization was declined by the Arbitrator. The counter-claims made by the respondent-Firm were also rejected. The Arbitrator made the Award dated 2nd December 2019 in the following terms:

"AWARD

(i) The respondent is directed to pay to the Claimant, in accordance with the provisions of THE FOREIGN EXCHANGE MANAGEMENT ACT, 1999.

(a) US Dollars 47,487 with interest at Libor Rate prevailing on the date of the Award + 3% from 20.09.2012 till the date of payment;

(b) US Dollars 30,614 with interest at Libor Rate prevailing on the date of the Award + 3% from 20.11.2012 till the date of payment;

(c) US Dollars 87,000 with interest at Libor Rate prevailing on the date of the Award + 3% from 15.1.2013 till the date of payment;

(d) US Dollars 1125 with interest at Libor Rate prevailing on the date of the Award + 3% from 16.02.2015 till the date of payment;

(e) As and by way cost:

(i) Rs.5,80,000/- and Rs.89,717/- in all amounting to Rs.6,69,717/-;

(ii) US Dollars 82392;

(iii) AUD 16649;

(iv) Euro 4018.

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(ii) In the event, the Respondent fails to apply for permission, for payment of the Award amount in US Dollars or in the event, the Foreign Exchange Authorities do not grant such a permission, the Respondent is directed to pay the equivalent of the Amount awarded in prayer clause (i) above (including Interest & cost) in Indian Rupees to the Claimant as per the Exchange Rate prevailing on the date of this Award.

(iii) The Counter Claim filed by the Respondent is rejected."

7. The Award dated 2nd December 2019 was successfully challenged by the respondent-Firm in a petition filed under section 34 of the Arbitration and Conciliation Act. The learned Single Judge of this Court held that the Arbitrator recorded an illegal finding that the SGS India reports have no evidentiary value, reversed the burden of proof and relied on inadmissible evidence tendered by CW-2. The learned Single Judge further held that the impugned Award shocks the conscience of the Court and is in conflict with the public policy of India. The objection taken by the claimant-company that perversity is not a ground to challenge the impugned Award was not accepted by the learned Single Judge holding that the impugned Award is in conflict with the public policy of India and in conflict with the basic notion of justice and shocks the conscience of the Court. The learned Single Judge considered the rival submissions and held as under :

"37. The learned Arbitrator ought to have considered that the laboratory reports of SGS India were the most objective and contemporaneous evidence produced by both the parties as they tested the samples virtually concurrently to them having been supplied. The SGS India Report dated 25th March, 2013 had been prepared pursuant to the test done at the request made by the Respondent vide e-mail dated 13th March, 2013 and which concluded that the samples had passed the test as it had complied with the permissible safety limits. Further, the SGS India Report dated 8th May, 2013 obtained by the Respondent had also concluded that the samples had passed the test as both the samples submitted by the Respondent complied with the permissible safety limits. On sensorial examination of both samples, odour and taste, the test results were lower than the maximum permissible limits. Thus, the learned Arbitrator by holding that the SGS

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India Reports have no evidentiary value, has arrived at a grossly erroneous finding which is contrary to the admitted facts and record and which shocks the conscience of the Court.

38. Insofar as the SGS Germany Report obtained by the Respondent, the finding arrived at was that "smell of plastic, significant deviation" and on taste "strongly perceptible off-flavour, significant deviation objectionable". The report noted that "possibly benzaldehyde from the inner white plastic tray (odour) or a contamination of the food during the production process (off-flavour appears to be stronger than the smell)". This finding is in relation to the inner white plastic tray which had not been supplied by the Petitioner but was procured directly by the Respondent. Further, the contamination of the food as noted in the Report was during the production process and also the responsibility of the Respondent. Thus, even the report of SGS Germany obtained by the Respondent and produced in evidence by them containing the aforementioned findings cannot be attributed to the Petitioner.

39. The submission on behalf of the Petitioner that the learned Arbitrator has reversed the burden of proof by holding that "had any question been put in cross examination to CW-1 about the condition of consignment and presence of or absence of smell in January 2013 or even to CW-2 with regard to above quoted portion of his report, it would have thrown some light about the presence or absence of smell in January 2013". (Petition's/Page 66/Para50/Award) merits acceptance. The learned Arbitrator ought to have appreciated that there was no requirement to cross examine either CW-1 or CW-2 in view of CW-1's Affidavit not containing any positive assertion and CW-2's evidence being in the nature of hearsay evidence.

40. The learned Arbitrator by rejecting the most objective and contemporaneous evidence produced by the parties i.e. the SGS India Reports which had tested the samples concurrently to them having been supplied, and relying on the expert evidence (CW-2) produced by the Respondent which was evidently not within the knowledge of CW-2 and thereafter faulting the Petitioner for not cross-examining the CW-2 on hearsay evidence, shocks the conscience of this Court.

41. I do not find merit in the contention on behalf of the Respondent that the Petitioner has raised the plea that the two SGS India Reports were admitted documents and for the first time in the Section 34 Petition i.e. not raised before the learned Arbitrator, and hence cannot be considered. It is apparent from the finding of the learned Arbitrator that the Petitioner had relied upon the two SGS India Reports which according to the Petitioner was of best evidentiary value in view of SGS India having tested the samples in question concurrently to them having been supplied. Thus, the evidentiary value of the SGS India Reports was clearly raised by the Petitioner. The fact of these Reports

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being admitted documents is in support of the plea of the Petitioner raised before the Arbitrator viz. that the SGS India Reports ought to have been taken into consideration by the learned Arbitrator as being of best evidentiary value. Thus, the Judgments relied upon by the Respondent in support of their contention that the Petitioner cannot raise a plea, not raised before the Arbitrator, for the first time before this Court in Section 34 Petition, is inapplicable in the circumstances of this case.

42. The Respondent has also contended that it is settled law that mere marking of document in evidence does not prove the contents of the document. The Respondent has relied upon Judgments of the Supreme Court and this Court in support of his contention. The Petitioner as aforementioned has not merely relied upon the marking of the SGS India Reports in evidence as proving their contents, but has gone on to establish that the SGS India Reports were of best evidentiary value considering that SGS India had tested the samples in question, concurrently to them having been supplied. The Reports of SGS India having found that the samples had passed the test, was required to be taken into consideration by the learned Arbitrator. Instead, the learned Arbitrator has relied upon, the Expert's Evidence which in my considered view is hearsay evidence i.e. evidence of CW-2 of what he had been told by the staff members of the Respondent in the year 2016 about the smell in the packaging material, when they received the same in the year 2013.

43. Further, the contention of the Respondent that evidence of the contents of the document, to be hearsay evidence is to be accepted only if the writer thereof is examined is inapplicable in the present case. It is evident from the face of the Report of CW-2 that CW-2 has referred to the information given by the staff members of the Respondent in the year 2016 about the smell in the packaging material when they received the same in 2013. Thus, compared to the two Reports of SGS India which tested the samples in question concurrently to them having been supplied, the Report of CW-2 had no evidentiary value as it is ex-facie in nature of hearsay evidence. Thus, the learned Arbitrator by failing to consider the Reports of SGS India, and placing reliance upon the Report of the Expert (CW-2) which is based on hearsay evidence, has acted in an arbitrary manner, contrary to justice, which shocks the conscience of this Court.

44. The settled position of law as regards challenge to an Award (passed in an international commercial arbitration) under Section 34 of the Arbitration Act has been laid down by the Supreme Court in the Judgments which have been relied upon by the Petitioner viz. Associate Builders (supra) ; Ssangyong Engineering & Construction Company Limited (supra); Dyna Technology Pvt. Ltd. (supra) and Delhi Airport Metro Express Private Limited (supra). These Judgments hold that if an

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award shocks the conscience of the Court, it can be set aside as being in conflict with the most basic notions of justice, as per Explanation 1(iii) to Section 34(2)(b)(ii) of the Arbitration Act, as it is in conflict with the public policy of India.

45. The contention of the Respondent that the grounds of challenge of the Petitioner on non-consideration of admitted documents and consideration of hearsay evidence are not maintainable as they fall under perversity which is covered by ground of patent illegality and not available to a challenge as the present award is a domestic award passed in international commercial arbitration, is misconceived. The grounds of challenge to the impugned Award include the impugned Award being in conflict with the public policy of India, as it is in conflict with the most basic notions of justice and shocks the conscience of the Court. This ground can certainly be raised to challenge the impugned Award which is a domestic award passed in International Commercial Arbitration. Thus, this ground of challenge in the present Commercial Arbitration Petition under Section 34(2)(b)(ii) is maintainable.

46. The Respondent has also sought to contend that the Petitioner is seeking re-appreciation of evidence by this Court which is not permissible as per the provision to Section 34(2) of the Arbitration Act. This contention is also, in my view, misconceived. The Petitioner is not seeking a re-appreciation of evidence by this Court, but is in fact contending that the learned Arbitrator has failed to consider the evidence viz. the SGS India Reports by holding that they are of no documentary evidence worth considering, which would decide a core issue of whether packaging material emitted odour. This finding of the learned Arbitrator itself is flawed in view of the laboratory reports of SGS India which tested the samples in question virtually concurrently to them having been supplied.

47. The learned Arbitrator although observing that neither in the Statement of Claim nor in the evidence of the Respondent's only witness of fact (CW-1) has it been stated that CW-1 noticed any smell on the material date i.e. in January 2013 has nonetheless gone on to hold that "...it is not possible to conclude on the basis of this omission that there was no smell as alleged." The learned Arbitrator has based his finding on the hearsay evidence of CW-2 who was brought in only in his capacity as an expert witness. This after first rejecting the report made by CW-2 and thereafter relying upon the same only on the specious ground that the same is annexed to the Affidavit of Evidence of CW-1. In view of these findings, the impugned Award has shocked the conscience of Court and accordingly is in conflict with public policy of India and is required to be set aside under Section 34(2)(b)(ii) of the Arbitration Act."

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8. Mr. Rahul Narichania, the learned senior counsel for the claimant-company contended that no exceptional circumstance as envisaged in "*Ssangyong Engineering and Construction Co. Ltd.*"[2] is demonstrable from the facts on record and the petition under section 34 of the Arbitration and Conciliation Act was not maintainable on the ground of infraction of any fundamental notion or principles of justice. The learned senior counsel for the claimant-company referred to *"Vijay Karia"*[3] to contend that all grounds relating to patent illegality are outside the scope of interference with the International Commercial Arbitration Awards made in India and submitted that the Award dated 2nd December 2019 being rendered in an International Commercial Arbitration is not open to challenge. It was submitted that an altogether new plea which was never raised by the respondent-Firm before the Arbitrator has been considered by the learned Single Judge who held that the SGS India reports are admitted documents. The learned senior counsel relied on the decisions in *(i) "Narbada Devi Gupta"*[4]*; (2) "Malay Kumar Ganguly"*[5]*, (iii) "Om Prakash Berlia"*[6] *and (iv) "Hiren P. Doshi"*[7] to contend that the SGS India reports cannot be held admissible in evidence merely because those reports were marked as exhibits. The learned senior counsel further submitted that the Arbitrator is the best judge of the quality and quantity of the evidence and a plausible view taken by the Arbitrator is not open to challenge. No finding has been recorded by the learned Single Judge for a claim for advance payment of USD 43,500.25, which was admittedly paid

2 *Ssangyong Engineering and Construction Co. Ltd. v. National Highways Authority of India: (2019) 15 SCC 131.*
3 *Vijay Karia v. Prismian Cavi E Sistemi SRL: (2020) 11 SCC 1.*
4 *Narbada Devi Gupta v. Birendra Kumar Jaiswal: (2003) 8 SCC 745.*
5 *Malay Kumar Ganguly v. Dr. Sukumar Mukherjee: (2009) 9 SCC 221.*
6 *Om Prakash Berlia v. Unit Trust of India: AIR 1983 Bom 1.*
7 *Hiren P. Doshi v. State of Maharashtra & Anr.: 2015 SCC OnLine Bom 6090.*

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to the respondent-Firm towards Invoice No. A004 raised for the fifth order. It is further submitted that an Award has to be read as a whole and not in bits and pieces and here and there for its true and correct meaning. *Per contra*, Mr. Mustafa Doctor, the learned senior counsel for the respondent-Firm contended that the findings recorded by the Arbitrator are *ex-facie* illegal and contrary to the rules of natural justice. The learned Single Judge is entitled to examine whether the Arbitrator failed to apply the fundamental rules of law and evidence and the impugned judgment is well within the scope of section 34 of the Arbitration and Conciliation Act. The learned senior counsel further submitted that a rejection of admissible evidence such as Exhibit-C16 and Exhibit-C17 led to a patently wrong conclusion and in making an illegal Award which has rightly been set aside by the Court.

9. According to the Arbitrator, the claimant-company could prove that the disputed consignments were defective and sub-standard. The Arbitrator further held that the respondent-Firm could not prove that the defect in the packaging materials was not attributable to it. The Arbitrator observed that the witnesses examined by the respondent-Firm had no personal knowledge about verification of the packaging materials. RW-2 admitted in the course of cross-examination that there was no in-house quality control equipment. RW-2 further admitted that he did not personally scrutinize the finished products or examined the packaging materials. The Arbitrator placed heavy reliance on the evidence of CW-2 and held that he was a truthful witness who deposed before the Tribunal that there was a strong odour emanating from the disputed goods. The credibility of CW-2 was challenged by the respondent-Firm but the Arbitrator held that the aberrations in the

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evidence of CW-2 were minor in nature. The Arbitrator referred to e-mails exchanged between the parties and held that the conduct of the respondent-Firm in avoiding to visit Zimbabwe is one more fact which lends credibility to the claimant's case. The Arbitrator held as under :

> *"46. Mr. Lohia is not right in contending that the witness has claimed at page 30 (internal page 6) of his report that the Tests were carried out over several days. At page 30, what the witness has said is that he "requested that one of the biscuit packages ....be incubated.... for several days".*
>
> *47. It is true that the answers reproduced in the aforesaid two paragraphs being paragraphs 44 and 45 do indicate that CW-2 had made incorrect statements in the Report. It however also indicates that the said witness was honest enough to admit lapses in his statements. Considering the overall evidence of CW-2, there is no doubt that the above answers constitute only a minor aberration in what otherwise is a honest evidence.*
>
> *48. Mr. Lohia further submitted that the evidence of CW-1 did not indicate that CW-1 noticed any smell, when the consignment arrived in January 2013 and that according to CW-1 the Claimant noticed the alleged smell only after complaints were received from his customers around 10.02.2013. Contrary to this, according to Mr. Lohia, it was CW-2's evidence that as soon as the consignment of January 2013 was received, the Claimant had noticed the smell and that this evidence of CW-2 was clearly contrary to the evidence of CW-1. That it was further claimed by CW-2 that despite noticing the smell, claimant proceeded to use the packaging material hoping that smell would dissipate over a period of time and that no such case was made out by the Claimant in the pleading or in the evidence of CW-1. That there was no explanation provided by the Claimant as to why if the smell was so significant, the claimant did not notice it in January 2013 itself.*
>
> *49. It is a fact that neither in the Statement of Claim nor in the evidence of CW-1 viz. Examination-in-Chief, it has been stated that CW-1 noticed any smell in January 2013. It is undoubtedly one of the factors to be considered while evaluating the entire evidence. But it is not possible to conclude on the basis of this omission that there was no smell as alleged. In this regard, what is stated in paragraph 4 (unnumbered) of the report of CW-2 in its conclusion at internal page 14 is relevant and is reproduced hereunder :*
>
>> *"it was interesting to note that... Yet, when batch 3 and batch 4 arrived from Aakash Packaging, Staff at Arenet Biscuit and Sweet Company was immediately aware of the odour. Yet, because there had been no issue whatsoever with the first two batches Arenel Biscuit and Sweet Company, went ahead and in fact packed Shorties and marie biscuits, thinking that the*

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> *odour would dissipate with time. It simply (and incorrectly) assumed that by the time the biscuits reached the retail outlets, the odour would have dissipated enough not to be detectable by discerning and loyal consumers. In fact had the cause of the odour been solvents, then the assumption and reasoning may well have been applicable, but unfortunately the source is 2, 6-dichloronaisol, and therefore was never going to disappear and or dissipate"*

> *50. The above report forms part of CW-1's additional affidavit dated 29.03.2016. The portion of the said Report extracted above shows that according to CW-2 because there had been no issues with previous batches, Claimant went ahead with packing of the biscuits thinking that the odour would dissipate with time. Cross examination of CW-1 began thereafter i.e. after the above Report was disclosed, on 13.05.2016 and was concluded on 13.12.2016. The Respondent was therefore aware of the said report when the cross examination of CW-1 started. Had any question been put in Cross examination to CW-1 about the conditions of consignment and the presence or absence of smell in January 2012 or even to CW-2 with regard to the above referred quoted portion of this Report, it would have thrown some light about the presence or absence of smell in January 2013. In the absence thereof, it is not possible to ignore the above quoted portion of CW-2's report."*

10. In a claim for refund, damages and costs, the claimant-company is required to prove the existence of the fact that the packaging materials were defective and emitting a strong foul odour. The evidence tendered by CW-1 and CW-2 are in the realm of hearsay evidence and the contention raised on behalf of the claimant-company that the evidence of CW-2 is substantive piece of evidence as he is a witness of fact is liable to be rejected. The Arbitrator accepted the stand of the respondent-Firm that CW-1 did not laid a factual foundation in his examination-in-chief that he noticed any smell in the packaging materials in January, 2013. However, the Arbitrator referred to e-mails exchanged between the parties and concluded that CW-1 has personal knowledge of the defective packaging materials. The object and purpose of pleadings in a civil litigation is to ensure that each side is fully aware of the case of the other side, and the questions that are likely to be raised.

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The Court or Tribunal can consider the pleadings which contain the necessary averments even if not in a specific term to make out a particular case. But this course is adopted by the Court or Tribunal only in exceptional cases, when it is fully satisfied as to the requirement of natural justice. As CW-1, the Managing Director of the claimant-company stated in his examination-in-chief that the claimant-company received complaints from its customers around 10th February 2013 regarding chemical test and smell. He stated that the claimant-company on his instructions inspected and tested the unutilized balance portion of the shipment. He further stated that the claimant-company noticed that the package was defective and emitting a strong chemical smell and that smell was so strong that it would contaminate the biscuits rendering unpalatable for human consumption. However, CW-1 did not indicate the name of any customer. He did not even indicate the name of any employee of the claimant-company who had inspected and tested the unutilized balance portion of the shipment. The respondent-Firm set up a defence that the foul smell was likely to have resulted from inner tray holding the biscuits. But the claimant-company did not produce any witness who could have deposed before the Arbitrator that he himself perceived and felt foul smell was emitting from the packaging materials and that would have contaminated the biscuits. Quite apparently, CW-1 is a hearsay witness and the layman theory as spoken by him is not supported by any oral evidence of a customer or any employee of the claimant-company.

11. CW-2 is not the author of the sample reports obtained by him from the Gunn Lab and National Measurement Institute. CW-2 admitted in the cross-examination *vide* question nos.39, 40, 42, 45, 47, 68 and 71 that no test was conducted by him and that the

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samples were taken in June 2016. The Arbitrator has also recorded a finding that CW-2 admitted that he made incorrect statements in the reports. However, he has extensively referred to and relied upon the evidence of CW-1 and CW-2 to hold that the claimant-company has proved that the packaging materials were defective and not as per specifications. By doing so, the Arbitrator has clearly acted contrary to the fundamental laws applicable in civil proceedings.

12. This is a well settled proposition in law that a civil proceeding is decided on the principles of preponderance of probability, which would mean a positive element of probability. The plaintiff or a claimant in a civil proceeding is required to prove its claim by leading such evidence which would establish a higher degree of existence of a fact. In the legal parlance, a fact is said to be proved when the Court or a Tribunal after considering the matters before it, either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of a particular case, to act upon the supposition that it exists. The defendant or respondent in a civil proceeding is however required simply to demonstrate that there is a possibility that the fact or a claim did not exist. The burden of proof of the claimant is not discharged even if the respondent fails to prove its defence. However, the Arbitrator reversed the burden on the respondent-Firm and held that it did not produce any material to suggest even remotely that it took steps to ensure that the consignment was free from any defect and/or odour and, that, the defects in the consignment were not attributable to it. Section 102 of the Indian Evidence Act provides that the burden of proof in a suit or proceeding lies on that person, who would fail if no evidence at all, was given on either side. The strict rules of the Evidence Act may not be enforced in an arbitral proceeding but the

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fundamental rules of law and evidence cannot be ignored to affirm an Award which on the face of it is patently illegal.

13. Every party to a civil proceeding has a reasonable expectation that a Court or Tribunal shall make a determination as per the well settled fundamental principles in law. The procedure adopted by the Arbitrator is open to challenge on the ground of patent illegality, howsoever limited this ground may be. The decision rendered by the Arbitrator is not one which is a result of wrong application of law. The decision rendered by the Arbitrator is against all notions of justice and shocks the conscience of the Court.

14. The Arbitrator held that the SGS India and Germany reports, though marked, have no evidentiary value inasmuch as the authors were not examined. The Arbitrator further held that there was no documentary evidence led by the parties on the core issue and the witnesses, except CW-2, were interested witnesses. The decisions cited at the Bar indicate that objection to the admissibility of a document may be (i) an objection that the document which is sought to be proved is itself inadmissible in evidence or (ii) where the objection is not to admissibility of the document in evidence but is directed towards the mode of proof of the document. An objection to the admissibility of evidence is taken when the document is tendered for its marking. If a document is produced and marked as exhibit without objection by a party, that party cannot question the admissibility of the document. The objection as regards mode of proof of Exhibit-C16 and Exhibit-C17 was also not raised at any stage nor even before us. However, the marking of a document does not amount to proof of its contents or its truthfulness. The truth of the contents of a document cannot be proved merely by producing

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the document for the inspection of the Court. But the position is a little different in the present case. The SGS India report dated 25th March 2013 vide Exhibit-C16 which was obtained by the respondent-Firm at the instance of the claimant-company and the SGS India report dated 8th May 2013 *vide* Exhibit-C17 which was obtained by the claimant-company must bind the claimant-company and it cannot dispute the truthfulness of the contents of the SGS India reports merely by denying it through CW-1 in his cross-examination. The SGS Germany report *vide* Exhibit-C18 which was obtained by the claimant-company has been disputed by the respondent-Firm and the Arbitrator rightly excluded this piece of evidence from consideration.

15. The respondent-Firm acted on the premise that the SGS India reports have been duly admitted in evidence. Had there been any challenge to the SGS India reports, the respondent-Firm could have taken steps for proving these reports or obtained permission of the Arbitrator to lead additional evidence on this issue. There was no question put to RW-1 and RW-2 as to the contents of these reports. The context in *"Malay Kumar Ganguly"* was of a criminal trial. In that case the documents were exhibited without any demur and the witness was not made available for cross-examination. It was in that context that the Hon'ble Supreme Court held that such a document is not admissible in evidence. Pertinently, those documents were held admissible before the Consumer Court on the ground that those documents were appended to the complaint petition and no question as to the correctness of the documents was raised either before the Consumer Commission or the Court. In *"Narbada Devi Gupta"*, the issue was admissibility of rent receipts which were produced in evidence and marked as exhibits. The Hon'ble Supreme

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Court held that the execution of a document has to be proved by the evidence of those persons who can vouchsafe for the truth of facts in issue but the situation would be different where the document is admitted by the opposite party and the signature thereon is also admitted by him. *"Om Prakash Berlia"* and *"Hiren P. Doshi"* also do not avail any help to the claimant-company. It was contended that the claimant-company did not admit the SGS India reports or truthfulness of the contents thereunder. However, there is no pleadings by the claimant-company in this regard. At any stage, the claimant-company did not raise a question on admissibility or truthfulness of the contents of the SGS India reports, except when a question was put to CW-1 in his cross-examination. The effect of such a denial by CW-1 in his cross-examination is not that the SGS India reports have been rendered inadmissible in evidence.

16. The counter-claim made by the respondent-Firm was rejected. The Arbitrator held that the respondent-Firm failed to prove that the defect in the packaging materials was not attributable to it and it also failed to prove that the packaging materials were manufactured as per the instructions of the claimant-company. The Arbitrator held that the respondent-Firm is not entitled to any claim towards the balance payment or for costs and damages or any interest on its claims because the packaging materials were defective. Issue No.10, which was presumably framed in relation to the counter-claim made by the respondent-Firm has been dealt with by the Arbitrator as under:

> *"96. The Counter Claim of the Respondent consists of an amount of US Dollars 27,996 being the balance amount payable by the Claimant to the Respondent under the Respondent's Invoice No.53 and the amount of US Dollars 41,079 being the balance amount payable by the Claimant to the Respondent under Proforma Invoice No. 004.*
>
> *97. In view of the findings of the Tribunal that the goods dispatched*

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by the Respondent were defective, the Respondent is not entitled to the balance amount of US Dollars 27,996 under Invoice No. 53.

98. Similarly, the Respondent is also not entitled to the balance amount of US Dollars 41,079 since the Tribunal has come to the conclusion that the goods under the said Proforma Invoice No.004 were not manufactured.

99. The issue is therefore decided against the Respondent."

17. The respondent-Firm set up by way of counter-claim against the claim of the claimant-company a claim in respect of a cause of action accruing to it against the claimant-company. It is well settled that a counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment both on the original claim and on the counter-claim. This is a fundamental rule that a counter-claim must be adjudicated separately and determined by a reasoned order. In "*Bollepanda P. Poonacha"*[8], the Hon'ble Supreme Court observed that a right to file counter-claim is an additional right. The Arbitrator rejected the counter-claims made by the respondent-Firm on the ground that the packaging materials were defective. On the other hand, the learned Single Judge has held that the Arbitrator recorded the findings in breach of the fundamental laws of India and set aside the Award. A logical effect of which could have been that the respondent-Firm became entitled to agitate its claim for balance payment for the materials supplied to the claimant-company. The learned Single Judge however did not deal with the counter-claim on balance payment to be made to the respondent-Firm, and there is no cross-objection or any challenge to this by the respondent- Firm.

18. There is another error committed by the learned Single Judge to which there is a specific challenge by the claimant-company. The claim made by the claimant-company for USD 43,500.25 on

8 *Bollepanda P. Poonacha v. K. M. Madappa: AIR 2008 SC 2003.*

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account of non-supply of packaging materials qua 5th invoice is totally unconnected with the dispute relating to the defective packaging materials. This claim is distinct and severable from the other claims made by the claimant-company. There is no dispute that the claimant-company made payment of USD 43,500.25 to the respondent-Firm against 5th invoice for supply of the packaging materials. The respondent-Firm has also not denied receipt of this amount and does not claim that it supplied the packaging materials to the claimant-company. In *"Gayatri Balasamy"*[9] the Hon'ble Supreme Court held that the authority to severe invalid portion of an arbitral Award from the valid portion is inherent in the Court's jurisdiction within the narrow confines of Section 34. In "Gayatri Balasamy" the Hon'ble Supreme Court discussed the power of the Court to severe and uphold the valid portion of an arbitral Award in the following manner :

> *"II. Severability of awards*
> *32. In the present controversy, the proviso to Section 34(2)(a)(iv) is particularly relevant. It states that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the arbitral award which contains decisions on matters non-submitted may be set aside. The proviso, therefore, permits courts to sever the non-arbitrable portions of an award from arbitrable ones. This serves a twofold purpose. First, it aligns with Section 16 of the 1996 Act, which affirms the principle of kompetenz-kompetenz, that is, the arbitrators' competence to determine their own jurisdiction. Secondly, it enables the Court to sever and preserve the "valid" part(s) of the award while setting aside the "invalid" ones. [The "validity" and "invalidity", as used here, does not refer to legal validity or merits examination, but validity in terms of the proviso to Section 34(2)(a)(iv) of the 1996 Act.] Indeed, before us, none of the parties have argued that the Court is not empowered to undertake such a segregation.*
> *33. We hold that the power conferred under the proviso to Section 34(2)(a)(iv) is clarificatory in nature. The authority to sever the "invalid" portion of an arbitral award from the "valid" portion, while remaining within the narrow confines of Section 34, is inherent in the Court's*

9 *Gayatri Balasamy v. ISG Novasoft Technologies Limited: 2025 SCC OnLine 986.*

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jurisdiction when setting aside an award.

34. To this extent, the doctrine of omne majus continet in se minus—the greater power includes the lesser—applies squarely. The authority to set aside an arbitral award necessarily encompasses the power to set it aside in part, rather than in its entirety. This interpretation is practical and pragmatic. It would be incongruous to hold that power to set aside would only mean power to set aside the award in its entirety and not in part. A contrary interpretation would not only be inconsistent with the statutory framework but may also result in valid determinations being unnecessarily nullified.

35. However, we must add a caveat that not all awards can be severed or segregated into separate silos. Partial setting aside may not be feasible when the "valid" and "invalid" portions are legally and practically inseparable. In simpler words, the "valid" and "invalid" portions must not be interdependent or intrinsically intertwined. If they are, the award cannot be set aside in part.

36. The Privy Council, in Ram Protap Chamria v. Durga Prosad Chamria [Ram Protap Chamria v. Durga Prosad Chamria, 1925 SCC OnLine PC 58 : AIR 1925 PC 293] addressed this issue with the following pertinent observations: (Dasuram Mirzamall [Dasuram Mirzamall v. Balchand Surana, 1957 SCC OnLine Gau 21] , SCC OnLine Gau para 18)

> *"18. … if, however, the pronouncement of the arbitrators is such that matters beyond the scope of the suit are inextricably bound up with matters falling within the purview of the litigation, in that case, the court would be unable to give effect to the award because of the difficulty that it cannot determine to what extent the decision of the subject-matter of the litigation has been affected and coloured by the decision of the arbitrators in regard to matters beyond the ambit of the suit."*

Thus, the power of partial setting aside should be exercised only when the valid and invalid parts of the award can be clearly segregated—particularly in relation to liability and quantum and without any corelation between valid and invalid parts.

37. We would now proceed to examine, the permissibility and scope of the Court's modification powers, within the parameters of Section 34 of the 1996 Act. In doing so, we will distinguish the Court's power of modification from: (i) the Court's power of setting aside an award; (ii) the arbitrator's power under Section 33 to correct, reinterpret, and/or issue an additional award; and (iii) the power of the Court to remand the award to the arbitrator under Section 34(4).

III. Difference between setting aside and modification

38. This distinction lies at the heart of many arguments canvassed

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before us. The parties opposing the recognition of a power of modification of the courts have strenuously contended that modification and setting aside are distinct and sui generis powers. While modification involves altering specific parts of an award, setting aside does not alter the award but results in its annulment. Their primary concern is that recognising a power of modification may invite judicial interference with the merits of the dispute—something arguably inconsistent with the framework of the 1996 Act.

39. We agree with this argument, but only to a limited extent. It is true that modification and setting aside have different consequences: the former alters the award, while the latter annuls it. [The words used in the statute must be interpreted contextually, taking into account the purpose, scope, and background of the provision. Many words and expressions have both narrow and broad meanings and thereby open to multiple interpretations. Legal interpretation should align with the object and purpose of the legislation. Therefore, we may not strictly apply a semantic differentiation while interpreting the words "modification" or "setting aside". Instead, a holistic and purposive interpretation of these words will be consistent with the intent behind the provision and the 1996 Act. Linguistically and even jurisprudentially, a distinction can be drawn between the expressions — "modification", "partial setting aside", and "setting aside" of an arbitral award in its entirety. However, we must note that the practical effect of partially setting aside an award is the modification of the award.] However, we do not concur with the view that recognising any modification power will inevitably lead to an examination of the merits of the dispute. It will completely depend on the extent of the modification powers recognised by us. In the following part of our Analysis, we outline the contours of this limited power and explain why, in our view, recognising it will ultimately yield more just outcomes.

IV. A limited power of modification can be located in Section 34

40. A core principium of arbitration, an alternative dispute resolution (hereinafter referred to as "ADR") mechanism, is to provide a quicker and cost-effective alternative to courtroom litigation. While this suggests minimal judicial interference, the role of domestic courts remains crucial, as they function in a supportive capacity to facilitate and expedite the resolution of disputes. Therefore, it follows that judicial intervention is legitimate and necessary when it furthers the ends of justice, including the resolution of disputes.

41. To deny courts the authority to modify an award—particularly when such a denial would impose significant hardships, escalate costs, and lead to unnecessary delays—would defeat the raison d'être of arbitration. This concern is particularly pronounced in India, where

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applications under Section 34 and appeals under Section 37 often take years to resolve.

42. Given this background, if we were to decide that courts can only set aside and not modify awards, then the parties would be compelled to undergo an extra round of arbitration, adding to the previous four stages: the initial arbitration, Section 34 (setting aside proceedings), Section 37 (appeal proceedings), and Article 136 (SLP proceedings). In effect, this interpretation would force the parties into a new arbitration process merely to affirm a decision that could easily be arrived at by the Court. This would render the arbitration process more cumbersome than even traditional litigation.

43. Equally, Section 34 limits recourse to courts to an application for setting aside the award. However, Section 34 does not restrict the range of reliefs that the Court can grant, while remaining within the contours of the statute. A different relief can be fashioned as long as it does not violate the guardrails of the power provided under Section 34. In other words, the power cannot contradict the essence or language of Section 34. The Court would not exercise appellate power, as envisaged by Order 41 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code").

44. We are of the opinion that modification represents a more limited, nuanced power in comparison to the annulment of an award, as the latter entails a more severe consequence of the award being voided in toto. Read in this manner, the limited and restricted power of severing an award implies a power of the Court to vary or modify the award. It will be wrong to argue that silence in the 1996 Act, as projected, should be read as a complete prohibition.

45. We are thus of the opinion that the Section 34 Court can apply the doctrine of severability and modify a portion of the award while retaining the rest. This is subject to parts of the award being separable, legally and practically, as stipulated in Part II of our Analysis."

19. For the aforesaid reason, the claimant-company is held entitled for the claim made by it for the refund of USD 43,500.25. Except to this extent, the conclusion arrived at by the learned Single Judge, that the Award dated 2nd December 2019 was liable to be set aside, is correct and not liable to any interference by this Court under section 37 of the Arbitration and Conciliation Act.

20. There is no substance in the submission that the arbitral Award dated 2nd December 2019 is not open to interference on the

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ground of patent illegality. This argument is based on proviso to section (2-A) which was incorporated by amendment in section 34. By the amendment in section 34, the term "most basic notions of justice" is included in Explanation 1 to sub-section (ii) of section 34(2)(b). This expression has been interpreted in *"Ssangyong Engineering and Construction Co. Ltd."* to mean a breach of the fundamental principles of justice, substantively or procedurally, and which shocks the conscience of the Court. In *"Ssangyong Engineering and Construction Co. Ltd."* the Hon'ble Supreme Court held that the interference based on public policy violations under section 34(2)(b)(ii) shall be limited to the fundamental policy of Indian law. It has further been held that the Court cannot interfere merely because the arbitrator lacked a "judicial approach". The decision in *"Vijay Karia"*[10] proceeds on the similar lines and follows the same reasoning. In our opinion, a fundamental principle of law and justice would be breached by a decision which is rendered beyond the pleadings and evidences led by the parties. A decision which is based on irrelevant material or excludes relevant material and thus is rendered perverse on the face of record shall be in breach of the fundamental principles of justice. The decision of the learned Single Judge as to admissibility of the SGS reports and the evidence of CW-1 and CW-2 is not an outcome of the exercise in the realm of appreciation of evidence. The judgment rendered by the learned Single Judge is not beyond the scope of section 34(2) of the Arbitration and Conciliation Act. It is manifest on the face of the record that the Award dated 2nd December 2019 contravenes the fundamental policy of Indian law, it suffers from patent illegality and the invalid portion thereof is liable to be set aside.

10 *Vijay Karia v. Prismian Cavi E Sistemi SRL: (2020) 11 SCC 1.*

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21. In the result, we do not find any reason to interfere with the judgment dated 8th September 2025 in Commercial Arbitration Petition No.349 of 2020 except to the extent as indicated herein-above. Consequently, the Award made in favor of the claimant-company for USD 43,500.25 for the payment made by it to the respondent-Firm *qua* 5th invoice is restored and rest of the Award made on 2nd December 2019 stands quashed. Commercial Arbitration Appeal (L) No.30982 of 2025 is partly allowed to the aforesaid extent.

22. Interim Application (L) No.31125 of 2025 is also disposed of.

[GAUTAM A. ANKHAD, J.] **[CHIEF JUSTICE]**

PRAVIN DASHARATH PANDIT

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