NEUTRAL CITATION
2026:GUJHC:24560-DB

Reserved On : 03/02/2026
Pronounced On : 06/04/2026

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 4652 of 2025

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL

and
HONOURABLE MR.JUSTICE SANJEEV J.THAKER

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Approved for Reporting	Yes	No
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ACCURATE THERMAL SPRAY PRIVATE LIMITED
Versus
SKF ENGINEERING AND LUBRICATION INDIA PRIVATE LIMITED

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Appearance:
MR SN SOPARKAR, SENIOR ADVOCATE with MR U.D. SHUKLA, SR. ADVOCATE with MR ADITYA C YAGNIK(8228) for the Appellant(s) No. 1
JAYANI B SHAH(8495) for the Appellant(s) No. 1

MR KAMAL TRIVEDI, SENIOR ADVOCATE with MR DEVANG NANAVATI, SENIOR ADVOCATE with MR PA JADEJA with MS KIRAN R UDASI with MS RUPAL BHATIA with MR VINAY BAIRAGRA with MR MANGESH KHANDELWAL, ADVOCATE for the Defendant(s) No. 1

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CORAM: **HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL**
and
HONOURABLE MR.JUSTICE SANJEEV J.THAKER

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CAV JUDGMENT

(PER : HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL)

Introduction:-

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 *(in short as 'the Act' 1996')* is directed against the judgment and order dated 09.10.2025 passed by the Additional District Judge, Ahmedabad (Rural) namely, the Commercial Court in allowing the Commercial Civil Miscellaneous Application No.19 of 2024 filed under Section 34 of the Act' 1996, setting aside the arbitral award dated 17.06.2024, the order dated 16.09.2024 as also the modified award dated 07.10.2024, passed by the learned sole Arbitrator.

2. The brief facts relevant to decide the controversy at hands as noted in the order impugned, are that the appellant herein – original claimant, namely Accurate Thermal Spray Private Ltd. *(hereinafter referred to as 'the claimant')* entered into a Business agreement dated 02.10.2008 with the respondent, namely SKF Engineering and Lubrication India Private Ltd. *(hereinafter referred to as 'the respondent' or 'SKF'),* whereunder the claimant would set up the facility and invest in equipment for coating and painting of the Large size bearing ('LSB' in short) of the specified dimensions and the respondent – SKF would provide a minimum guaranteed quantity of bearings each year for coating and painting, failing

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which it would pay 60% of the average basic price for the shortfall.

3. Prior to the execution of the Business agreement, several meetings and e-mail exchanges took place between October, 2007 and September, 2008 concerning logistics, investment and sub-contracting arrangements. On 26.02.2008, the parties entered into a Confidentiality agreement regarding specifications, rights and obligations relating to coating and painting of LSBs of specified dimensions.

4. On 12.03.2008, a meeting was held at Karnavati Club, Ahmedabad followed by a detailed “First Hand Report” dated 02.05.2008 prepared by the claimant. The said report proposed installed capacity for coating 3,600 bearings in the first year, increasing to 14,000 bearings over 5 years, along with investment estimates.

5. Between June and July 2008, the claimant attended international trade events, procured machinery and visited SKFs facilities abroad. On 20.08.2008 the claimant informed SKF of acquiring land adjoining SKF’s Bavla Plant for the project and sought an approach road through SKF’s land. The Business agreement was executed on 08.10.2008 and signed by the parties on 17.10.2008. The claimant purchased land on 03.03.2009 for the facility but the constructions could not commence due to non-availability of the approach road by the SKF.

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6. The claimant alleged that SKF later shelved its plan to manufacture large size bearings at Bavla and diverted production abroad, thereby committed breach of the Business agreement. The respondent SKF, however, denied this allegation and maintained that it was not obliged to supply bearings until the claimant had established and commissioned the facility as per contractual specifications.

7. The respondent – SKF, contented that the provision of access road was never part of the Business agreement dated 02.10.2008 executed on 17.10.2008 and categorically denied any such commitment.

8. It seems that various meetings and correspondences ensued between 2009 and 2010, with no resolution.

9. The arbitration proceedings were initiated following a notice dated 18.07.2014 for appointment a sole Arbitrator. The High Court vide order dated 12.12.2014 in Arbitration Petition No.57 of 2014 appointed the learned sole Arbitrator who has rendered the final award dated 17.06.2024. On an application filed under Section 33 of the Act' 1996, an order dated 16.09.2024 was passed and a modified award was delivered on 07.10.2024.

Arbitrator's Award:-

10. The learned Arbitrator has framed the following main issues arising from the contract and pleading of the parties;

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1. Whether the claimant was ready and willing to perform its part of obligation under the Business agreement dated 17.10.2008?

2. Whether the claimant failed to fulfill its obligations under the Business agreement dated 17.10.2008?

4. Whether the respondent committed breach of the Business agreement dated 17.10.2008?

5. Whether the respondent failed to provide access / approach road to the adjoining land purchased by the claimant?

6. Whether the failure / breach of the respondent prevented the claimant from constructing factory?

7. Whether the respondent has manufactured large size bearings as per drawings No.106480 and 106490 during the stipulated duration from June 2009 to March 2014? If yes, in what quantity?

8. Whether the claimant was required to set up proper facility before it could call upon the respondent to give bearing for processing as contended by the respondent in the statement of defence?

9. Whether the respondent committed breach of the Business agreement by not providing contracted volume of the bearings as averred by the claimant in the statement of claim? If yes, what is the effect thereof?

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Other issues with regard to the time being essence of the contract, claim of damages, interest and cost put forth by the claimant are ancilliary to the above noted main issues.

11. Issue Nos.1, 3, 4, 5, 6 and 9 were answered in the affirmative whereas Issue Nos. 2, 7 and 8 were answered in the negative.

12. The final award pronounced by the learned Arbitrator reads that:

> *"233. For the reasons recorded in the body of the Award, the Tribunal partly allows the claims raised by the Claimant and issues following final directions:*
>
> > *(1) Claims raised by the Claimant are partly allowed.*
> >
> > *(2)The Claimant is held entitled to and the Respondent is held liable to pay to the Claimant an amount of Rs.25,00,00,000/- (Rupees Twenty Five Crore only).*
> >
> > *(3) The Claimant is also held entitled to claim interest on the awarded amount of Rs.25,00,00,000/- (Rupees Twenty Five Crore only) at the rate of 10% (ten per cent) per annum from the date the Claimant initiated arbitration proceedings by issuing Notice for Arbitration i.e. with effect from 18-07-2014 (C3-p.461);*
> >
> > *(4) The Claimant is also entitled to claim costs of arbitration proceedings quantified at Rs.50,00,000/- (Rupees Fifty Lakh only) from the Respondent;*
> >
> > *(5) Rest of the claims of the Claimant are dismissed;"*

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13. The Issue Nos.1, 2 and 4 have been taken together by the learned Arbitrator being the primary issues, having bearing on the claims put forth by the claimant. While answering the said issues in favour of the claimant, it was held by the learned Arbitrator that;

> *"108. Having considered the entire material on record, the Tribunal feels that the grievance raised by the Claimant is well-founded and has been substantiated by leading reliable evidence and by placing adequate material on record.*
>
> *109. As already noted earlier, the Claimant has his own working place at Odhav where he was doing his business of coating work for corrosion, abrasion and wear resistance. It was the Respondent who wanted to avail services of the Claimant for its process and contacted him. Various meetings had been held and Business Agreement had been entered into.*
>
> *110. It is also clear from the record that it was the Respondent who wanted the Claimant to set up big factory nearby factory of the Respondent at Bavla which was agreed by the Claimant and, accordingly, land was purchased by the Claimant. Various e-mails referred to in the earlier part clearly go to show that the Claimant had tried his best to get land near SKF property and finally purchased the land from Chimanbhai by paying substantial amount of Rs.65,00,000/- to the owner. It is also pertinent to note that in the said Sale-Deed, reference was made of absence of approach road to Claimant's factory land. But it was the Respondent who failed to provide approach road. Hence, the Claimant could not set up his factory there.*
>
> *111. Thus, on overall consideration of the matter, the Tribunal holds that it is proved by the Claimant that he was always ready and willing to perform his part of the obligations. The Respondent has failed to prove that the Claimant had failed to fulfill his obligations under the Contract. It is also proved by the Claimant that it was*

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the Respondent who had committed breach of Business Agreement.

112. For the foregoing reasons, Issue Nos. 1 and 4 are decided in the Affirmative, i.e, in favour of the Claimant and against the Respondent while Issue No.2 is decided in the Negative, i.e. against the Respondent and in favour of the Claimant."

14. The learned Arbitrator had taken into consideration the following events and surrounding circumstances besides the terms and conditions of the Business Agreement to arrive at the findings extracted above:-

(i) pre-agreement events;
(ii) correspondence between the claimant and respondent;
(iii) execution of agreements;
(iv) post confidentiality agreement activities;
(v) land issue and approach road;
(vi) development after purchase of land by claimant;
(vii) whether respondent agreed to provide road / way to claimant?;
(viii) trial-run;
(ix) setting of factory by claimant;
(x) real problem;
(xi) modification in business agreement;
(xii) non-supply of large scale bearings between June, 2009 and March, 2014 under the business agreement dated 02/17.10.2008;
(xiii) Enercon bearings;
(xiv) insistence for new agreement by respondent to arrive at the findings extracted hereinabove.

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15. The crux of the discussion made and the findings recorded under the aforesaid headings in the arbitral award are:-

(i) In the first meeting held on 18.10.2007 between the claimant and respondent, the parties discussed regarding coating work of large size bearings. The claimant explained the respondent about thermal spray coating and its methodology and also showed samples and photographs thereof. The respondent stated that it was in the process of establishing their own manufacturing facility at Bavla plant, Ahmedabad and they were in search of an agency which could provide coating services for large size bearings manufactured by the respondent.

(ii) The correspondence exchanged between the parties after the first meeting dated 18.10.2007 show that during the course of discussion, the respondent suggested the claimant may consider to establish its factory near the factory of respondent at Bavla for logistical convenience. The claimant also agreed to the said suggestion and stated that such investment would be feasible provided the claimant was assured of substantial volume of work from the respondent. The respondent, in turn, assured that it will be worked out under the agreement.

(iii) On 26.02.2008, confidentiality agreement had been entered into between the claimant and the respondent and

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meetings were held between the representatives of the parties to clear the queries put forth by the claimant.

(iv) There is a reference of an e-mail dated 08.04.2008 (C1-p.70) of the claimant sent to the respondent in the award stating that the claimant had seen land near SKF property in Bavla and was also working with supply of machineries for the project.

(v) The Business agreement had been executed thereafter on 02.10.2008 and signed by the parties on 17.10.2008 (C1-pp.5-9).

(vi) The Business agreement provided the respondent to get their Large Size Bearings (LSBs) coated and painted by the claimant in the size range of outer diameter 1500 mm to 2500 mm from June 2009, and diameter 1500 mm to 3500 mm from April 2011 of LSBs bearing Nos.106480 and 106490.

(vii) It is recorded by the learned Arbitrator that the claimant said to have made investments in procuring land adjacent to the respondent's Bavla plant as per the respondent's instructions that the claimant's factory should be close to respondent's factory. And according to the claimant, assurance was given by the respondent to provide aid and assistance in establishing his factory next to respondent's Bavla plant. The claimant pleaded that it had made huge investments in procuring land adjacent to the respondent's Bavla Plant, on the assurance given by the respondent that it

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would provide approach road by way of lease or on sale to the claimant from its own land, to access the land procured by the claimant for establishing its factory.

(viii) The learned Arbitrator taking note of various correspondences exchanged between the parties during the period from 23.06.2008 to 10.09.2008 proceeded to record that in the month of October, 2008 the claimant had entered into the agreement of sale of land and paid the purchase price. The sale deed itself noted that the land had no direct approach to claimant's factory land and a small piece of land admeasuring 162 sq meters was required to be taken on lease / sale for the access road.

(ix) After purchase of the aforesaid land, on 03.03.2009, the claimant got the land boundary surveyed and after performing the ritual such as Bhumi Poojan and Khat Mahurat, an application under Section 63AA of the Gujarat Tenancy and Agricultural Land Reforms Act, 1948 was made for seeking Non-agricultural use permission. Further the layout plan for the proposed factory and office building had been prepared; an application for supply of electric connection was made; quotations were obtained for proposed factory and building.

(x) After purchase of the land, the claimant placed orders for purchase of plant and machinery after conducting national and international trips and making preparations for getting required finance etc.

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(x) It was then concluded by the learned Arbitrator that the claimant had taken all steps which were required to be taken by the claimant under the agreement in the direction of execution of the project.

(xii) On the sub-issue framed as to "whether the respondent agreed to provide approach road / way to claimant?", it was observed by the learned Arbitrator '83' to '85' in the award as under:

> *"83. It is the say of the Claimant that it was the Respondent who persuaded the Claimant to purchase land near the factory of the Respondent at Bavla for logistical convenience. The Claimant agreed to the said suggestion on the condition that sufficient work would be supplied by the Respondent to the Claimant, The Respondent agreed to such suggestion. The Claimant, thereafter, made attempts to get the land available near the factory of the Respondent and found that one Chimanbhai was having his property situated near the factory of SKF. Chimanbhai was also willing to sell land to the Claimant. The problem, however, was that it had no approach road, to SKF property. The Claimant, hence, took up the matter with the Respondent's official. Several e-mails referred to above clearly go to show that the Respondent was considering the proposal of providing approach road to the Claimant either on sale or on lease.*
>
> *84. Relying on such assurances and promises, the Claimant purchased substantial portion of land from Chimanbhai (about 7500 sq.mtrs.). Sale-Deed was executed on 03-03-2009. It is pertinent to note that even in the said Sale-Deed, it had been mentioned that there was no approach road to reach at Claimant's property which would be done by providing approach road to the Claimant by SKF on lease or on sale.*

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> *85. It is no doubt contended on behalf of the Respondent that no promise, much less, firm promise had been given by the Respondent to the Claimant that such approach road would be provided by the Respondent to the Claimant. As far as Agreement is concerned, nowhere it provided that the Claimant would construct his factory near factory of the Respondent and the Respondent would provide any land to the Claimant for any purpose, including approach road. It was also contended that even if it is assumed that Hemant Jog, Puran Lala, Alain or any person/individual/official of the Respondent had given such assurance or promise, it would not bind the Respondent and the Claimant cannot rely upon so-called promise for failure to perform his obligations under the Agreement. It may be stated here that as far as Hemant Jog is concerned, he was the Head of Manufacturing and Supply Chain of the Respondent and it was Hemant Jog who had signed Business Agreement on 17-10-2008 for and on behalf of the Respondent SKF. It is, thus, clear that the Respondent agreed to provide approach road to the Claimant."*

(xiii) While holding that the respondent had agreed to provide approach road to the claimant, in the aforesaid paragraphs under the award, the learned Arbitrator proceeded to record that the trial-run conducted by the claimant in July, 2008 in Germany even before execution of the business agreement on 02/17.10.2008 goes to show that the claimant was very much interested in the project proposed by the respondent and had proceeded in that direction even prior to execution of Business agreement between the parties and concluded that the claimant was ready and willing to perform his part of the contract.

(xiv) While answering the Issue No.1 about the readiness and willingness of the claimant to perform his part of the contract, it is also noted by the learned Arbitrator that the claimant had

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his own factory at 6, Pranami Estate, Odhav, Ahmedabad from where he was doing his business. However, when the representatives of the respondent had met the claimant and discussed about the business on a large scale, the claimant agreed to set up a big factory near the factory of SKF at Bavla, that too, since the respondent wanted the claimant to setup his factory near the factory of SKF at Bavla. And that since the respondent had agreed to provide huge work as set out in the agreement from June, 2009 to March, 2014, the claimant had invested sizeable amount by purchasing land and placing orders for equipment and machineries.

(xv) However, as the approach road was not available, the claimant initially tried to persuade the owner who had refused to sell or lease out a part of his land to provide access road, then the claimant had approached the respondent who had agreed to provide approach road vide e-mail dated 10.10.2009 (C-2– p.313). Referring to the said e-mail, it was recorded by the learned Arbitrator in paragraph '96' as under:

> *"96. The record also shows that the Respondent had agreed to provide approach road to the Claimant. Vide e-mail dated 10-10-2009 (C2-p.313), Mandar Vaidya of Respondent informed Nirav Mehta of Claimant that the Respondent was ready for "land sale possibility to M/s. ATS". Fair market value was Rs. 1500 per sq.yd. All expenses* were to *be borne by the Claimant. Acceptance of the Claimant was also sought by the Respondent."*

(xvi) Having observed the above, the learned Arbitrator proceeded to examine the Issue No.4 as to "whether the respondent committed breach of the Business agreement

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under the headings "(x) to (xiv)" as noted hereinabove and recorded as under:

(a) The agreement in question between the claimant and respondent had been entered into on 17.10.2008 keeping in view that the coating and painting of Slewing bearings (106480 and 106490) were to be performed for Suzlon. However, the arrangement between Suzlon and SKF could not be materialised and in turn having lost its biggest customer, the respondent could not provide large size bearings No.106480 and 106490 to the claimant, for which the claimant cannot be made responsible.

(b) Referring to the meeting dated 25.06.2009 and e-mail correspondences dated 07.09.2009, 10.10.2009 and 08.11.2009 (post Business agreement), it was recorded by the learned Arbitrator that the respondent - SKF initially conveyed that they wanted minor modification in the Business agreement but later they sought for modifications which were of such a nature and magnitude that the very purpose of the agreement would be defeated and hence the claimant did not agree to the changes and modifications suggested by the respondent. Moreover, such changes and modifications in the Business agreement dated 02/17.10.2008 was sought by the respondent while agreeing to sell land for approach road to the claimant vide e-mail dated 10.10.2009.

(c) Under the Business agreement dated 02/17.10.2008, the respondent was required to supply large size bearing 106480 and 106490 between June, 2009 to March, 2014. As per

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volume requirement and guarantee (pricing) Clauses '3' and '4' in the agreement. However, the respondent did not supply even a single LSBs in accordance with the terms of the Business agreement till the transaction fizzled out. Infact, the respondent itself never manufactured LSBs in its factory in the year 2009 and, as such, could not provide the same to the claimant so that the claimant could perform work of coating and painting on such LSBs.

(d) The respondent, however, offered work of painting of Enercon bearings to the claimant in order to cover up its inaction and breaches in not providing LSBs of Suzlon in consonance with the Business agreement. Several e-mails have been exchanged between the parties on that issue and the claimant insisted that all obligations under the Business agreement must be performed by the respondent and the approach road must also be made available to the claimant, only thereafter change, if any, in the Business agreement, as asked by the respondent may be considered.

(e) Referring to the e-mails dated 06.04.2010 and 30.04.2010 between the parties, the learned Arbitrator recorded that the respondent alleged that the claimant had committed breach of the Business agreement in not setting up its factory, in spite of grant of time and hence the Business agreement did not survive and fresh terms of the agreement would have to be entered into.

(f) The claimant, however, in rebuttal stated that it was the respondent who had committed various defaults and for the

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alleged delay, the respondent was solely responsible. The production of LSBs as per drawings was not possible as contemplated in the Business agreement and the respondent was not in a position to supply the material to the claimant to carryout the coating and painting work. The claimant refused to extend the time and to re-negotiate terms and conditions in the said circumstance and also called upon the respondent to pay an amount of Rs.4 Crores as per Clause '4.11' of the Business agreement.

(g) It is with the above discussions and findings, the learned Arbitrator has held that the claimant was always and ready and willing to perform its part of obligation under the Business agreement dated 17.10.2008; and that the claimant has never failed to fulfill its obligations under the said agreement; further the breach of business agreement was committed on the part of the respondents.

Issues Nos.1, 2 and 4 were decided accordingly, against the respondent.

(xvii) On issue Nos.5 and 6 the learned Arbitrator while reiterating its findings on issue Nos.1, 2 and 4, as noted hereinbefore, further added that because of lengthy process of coating and painting of LSBs, the respondent wanted the claimant to setup his factory adjoining the factory of the respondent. It is the respondent who insisted the claimant to buy the land adjoining to the respondent's factory and the claimant had agreed to do so. It is also noted by the learned Arbitrator that the demand for approach road was finanlised

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and sale price was also fixed but the respondent had refused to provide the approach road to the claimant, as it wanted to change certain terms and conditions of the Business agreement and insisted that the claimant should agree to the modified terms and conditions. Since the claimant did not agree to the modification in terms and conditions of the business agreement and because of refusal by the respondent to provide approach road, the claimant could not construct its factory. It was held that the respondent failed to provide access / approach road to claimant and the failure / breach of respondent prevented claimant from constructing factory.

(xviii)The issue No.7 was answered while holding that it is not proved by the respondent that it had manufactured LSBs as per drawings 106480 and 106490 as agreed to be supplied to the claimant under the contract.

(xix) On the issue No.8 “whether the claimant was required to setup proper facility before calling upon respondent to allot processing work”, it was concluded by the learned Arbitrator that the respondent was unable to prove that the claimant failed to establish factory or to provide proper facility. The situation having been created by the respondent , it cannot hold the claimant liable.

(xx) On issue No.9, it was held that in view of the findings on the aforesaid issues, the respondent had committed breach of Business agreement by non providing contracted value of work to the claimant.

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(xxi) On issue No.10 on the entitlement of claims, it was observed in the award as under:-

> *"194. Now, certain facts are no more in dispute. They are either admitted or proved by placing on record reliable material. The Tribunal, in the light of the above facts and circumstances, will try to grant relief which would serve the ends of justice, equity and fair play.*
>
> *195. Contention on behalf of the Respondent that breach of Contract was by the Claimant and not by the Respondent has been rejected by the Tribunal keeping in view the relevant Clauses of the Business Agreement and several communications referred to in the earlier part of the Award and the Tribunal has held that breach of Agreement was by the Respondent and the Respondent alone. The Claimant has not even contributed to such a situation.*
>
> *196. But the record also shows that when the Respondent contacted the Claimant and discussed about the work of coating and painting of LSBs, it was not only known to the Respondent but to the Claimant as well (and the said fact had been highlighted and heavily relied upon by the Claimant and his Senior Counsel) that such raw material was to be supplied by Suzlon Group Company (SE Forge) to the Respondent which was in turn to be provided by the Respondent to the Claimant for coating, painting and processing.*
>
> *197. Record shows that Suzlon was the main (or sole) customer from whom the Respondent was to get raw-material and in turn supply to the Claimant for necessary process. Record also shows that due to some problem, Suzlon could not supply raw-material to the Respondent which resulted in non-supply of such material by the Respondent to the Claimant. Thus, it may not be the fault of the Claimant when the Respondent failed to supply raw material to the Claimant, but it was also not deliberate, intentional or mala-fide act on the part of the Respondent in not making available such material to the Claimant and to allot the said work or Contract to*

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someone else for getting more money. On the facts of the case, the Tribunal is of the view that it was fizzling out arrangement between the Respondent and Suzlon which affected the Respondent as well as the Claimant.

198. Keeping in view this aspect and consideration, I have to decide the demand of claim raised by the Claimant from the Respondent."

(xxii) It was further observed therein as under:

"199. As far as minimum guarantee is concerned, there is no dispute inasmuch as it is in black and white. The Agreement provides for minimum supply of commodity, failing which, the Respondent was required to pay amount of 60% (sixty per cent) to the Claimant.

200. The Claimant has alleged in SoC that due to default and breach of Agreement by the Respondent, he had suffered huge loss. The Claimant, therefore, in SoC, prayed for an amount of Rs.64,92,12,990/- under the Business Agreement (para 55 of SoC). The Claimant has also claimed interest at the rate of 15% which would come to Rs.27,99,55,748/- Thus, the Claimant has claimed total amount of Rs.92,91,68,738/-. It was also prayed that interest which was calculated was upto 31-03-2015 and the Claimant is entitled to further interest on the awarded amount at the rate of 15% per annum from 01-04-2015 till payment/realization of amount.

201. Now, I have already observed earlier, though the Claimant was not at fault and had not committed breach of Contract, this was also not a case where the Respondent had taken undue advantage by taking away work from Claimant and the same had been entrusted to someone else with malicious intention, oblique motive or for more profit. In my opinion, the said factor cannot be ignored altogether. Moreover, virtually, the Business Agreement had been terminated by the Respondent. Thereafter, it was open to the Claimant to take any other work / assignment, etc. It is not case of the Claimant that even after so-called termination of Business Agreement,

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the Claimant remained at the site with all equipments and man-power all throughout. In my opinion, even otherwise, normally, in such a situation any reasonable and prudent businessman would leave the place. It is true that immovable property purchased by the Claimant only for the Project in question was there for which the Claimant spent Rs. 70,00,000/- (approx.) and it cannot be shifted and would remain as it is without productive use. But I am of the view that in view of "so called termination of Business Agreement in June, 2010, the Claimant would not have remained idle on the said site at Bavla along with men and machinery upto the end of March, 2014. i.e. more than three and half years

202. In SoC, the Claimant has stated that there was fundamental and flagrant breach of arrangement by the Respondent which prevented the Claimant from performing his part of obligations to provide services as envisaged by the Business Agreement. Even minimum assured guarantee as provided in the Business Agreement had also not been provided by the Respondent which resulted in huge financial loss to the Claimant. The Claimant is, therefore, entitled to clam damages under the Business Agreement which comes to Rs.65 Crore (approx.) (para 55 of SoC).

203. The claim has been denied by the Respondent. It was stated that the Respondent was not aware regarding various approvals, preparation of factory lay out plan, electric power, etc. The Respondent was also not aware about purchase of machinery, advance payment to suppliers, etc. Even other contents of the Claimant were denied. According to the Respondent, hence, the Claimant cannot claim any loss of profit (SoD, para 54).

204. The Claimant has stated that inasmuch as no work of coating and painting of LSBs had been allotted to the Claimant, the Respondent had committed breach of Business Agreement. Since the breach was on the part of the Respondent, it was bound to pay minimum amount as mentioned Clause 4.II of Business Agreement."

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(xxiii)It was, thus, concluded by the learned Arbitrator that:-

> *"205. I have already stated earlier that according to the Claimant, vide e-mail dated 06-04-2010 (C2-pp.332-38), the Respondent informed the Claimant that in changed circumstances, original Contract and time line would not survive. It was the Respondent who stated that Business Agreement was required to be modified and indication was also provided to the Claimant in the Contract (see e-mail dated 07-10-2009, C2-pp.311-12) referred to earlier. It is true that according to the Claimant, changes and modifications suggested by the respondent were of substantial nature and, hence, the claimant did not agree to those changes. But in view of the fact that since the claimant did not agree to those changes, the respondent also refused to provide approach road to the claimant, which was essential requirement for construction of factory where raw materials in the form of LSBs were to be provided. Thus, at least by April, 2010, the Claimant came to know that the Business Agreement was not be implemented and it would be impossible for the Claimant to undertake work of coating and painting of LSBs. As noted earlier, the Agreement was for more than four years (from June, 2009 to March, 2014) and subject to renewal with consent of parties.*
>
> *206. In the light of the above facts and circumstances, in my opinion, as a reasonable and prudent business man, the Claimant would not have stayed at Bavla near the factory of the Respondent, when the Respondent was not to provide raw material and the Claimant had his own business at 6 and 7, Pranami Estate, at Odhav. It is possible that he might have stayed there for some time but the Respondent failed to act on original Agreement of 17-10-2008. It was thus a fait accompli, which could not be altered. I am aware of the fact that immovable property (land) purchased by the Claimant from Chimanbhai was very much there. For that property, the Claimant had spent Rs 70,00,000/- (approx). But he must have or in any case could have shifted machinery and man-power either at Odhav on somewhere else, inasmuch as after April, 2010, there was no chance to use such machinery or man-power.*

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> *207. Thus, on overall consideration, I am of the opinion that it would be in the interest of justice if I award an amount of Rs 25,00,00,000 (Twenty Five Crore only) to the Claimant and direct the Respondent to pay such amount under the Head Minimum Assured Quantity under Clause 4.1 of Business Agreement.*
>
> *208. For the foregoing reasons, I partly allow the claim of the Claimant and direct the Respondent to pay an amount of Rs.25,00,00,000/- (Rupees Twenty Five Crore only) to the Claimant."*

(xxiv)On the claim of interest, the learned Arbitrator has awarded 10% interest per annum on the awarded amount of Rs.25 crores under the Business agreement, from the date on which the arbitral proceedings had been initiated by the claimant i.e. notice invoking arbitration dated 18.07.2014 till the date of payment / realization of amount by the claimant. Further, Rs.50 lakhs has been awarded towards cost to the claimant.

Commercial Court's order under Section 34:-

16. The Commercial Court in the proceedings under Section 34 of the Act' 1996 has set aside the award including the modifications thereto after framing points of considerations as under:

> *1. Whether the impugned award is liable to be set aside on the ground that the learned Sole Arbitrator travelled beyond the scope of the Business Agreement and the disputes referred to arbitration, in contravention of Section 34(2)(a)(iv) of the Act?*

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2. Whether the findings of the learned Sole Arbitrator on the issues of (i) provision of an access road by the Applicant to the Claimant and (ii) the alleged impact of non-receipt of Suzlon's orders, are contrary to the terms of the Business Agreement, unsupported by evidence, and amount to "patent illegality" under Section 34(2A) of the Act?

3. Whether the learned Sole Arbitrator committed an error apparent on the face of the record in awarding damages of Rs. 25,00,00,000/- to the Claimant without proof of actual loss, in contravention of Sections 73 and 74 of the Indian Contract Act, 1872, thereby rendering the Award in conflict with the fundamental policy of Indian law under Section 34(2)(b)(ii) of the Act?

4. Whether the award of interest at the rate of 10% per annum from 18.07.2014 till realization and costs of Rs. 50,00,000/- is arbitrary, excessive, or without contractual/statutory basis?

5. Whether the claims in the arbitration were barred by limitation, and if so, whether the impugned Award is liable to be set aside on that ground under Section 34(2)(b)(ii) of the Act?

6. What final order?

17. On the scope and limitation of judicial review, the Commercial Court has addressed itself *in extenso* to record that the function of the Court under Section 34 of the Act' 1996 is to ensure that the Arbitrator acted within his authority, observed the principles of fairness, and the impugned award does not suffer from perversity or illegality apparent on its face. Error of interpretation or evaluation of evidence within the Arbitrator's jurisdiction do not call for interference.

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18. On the merits of the award, while answering point Nos.1 and 2 it was held that:

> *"11.4 The contractual text is the starting point. The Agreement is detailed on volumes, prices, timelines, exclusivity, payment, inspection, liability, and jurisdiction. It contains a Time Plan for the Claimant's facility. However, there is no clause-express or incorporated by reference-requiring the Applicant to provide an access road through its premises or to transfer/dedicate any part of its immovable property for the Claimant's benefit. There is also no clause that makes the Applicant's performance contingent on "Suzlon orders" or any third-party business. No further facts are available on the record regarding any subsequent written amendment to insert such an obligation.*
>
> *11.5 In Section 34 review, this Court does not re-appreciate evidence. But it must ensure that the learned Arbitrator did hot decide on a basis the parties never contracted for. Under Section 34(2)(a)(iv), if the Award "deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission," it cannot stand. As explained by Hon'ble Supreme Court in ONGC v. Saw Pipes and MSK Projects (supra), an arbitrator cannot "wander outside the contract."*
>
> *11.6 On the access road: the Claimant relied on e-mails, conduct an oral testimony to contend there was an assurance. The SKF, on the other hand, highlighted e-mails up to May 2009 showing only requests and negotiations with adjoining owners, with no written commitment by SKF; and pointed out that the first allegation of delay due to lack of access road surfaces only in the Claimant's mail of 18.07.2009. On this material, the question is not whether some inference could be drawn in equity but whether the Arbitrator could, in law, import into the contract a new primary*

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obligation on the Applicant-SKF to create/provide an access road.

11.7 In my view, once the written Agreement is silent, the Arbitrator could not create an additional obligation of this nature merely from surrounding circumstances. The principle reiterated in Ssangyong Engineering, Associate Builders, and followed in Batliboi Environmental and SAL Udyog is that an arbitrator must interpret and apply the contract, not re-write or add to it. Even if the correspondence showed sympathetic consideration or ongoing discussions, that by itself does not convert a request into a contractual promise-more so when the alleged obligation concerns immovable property and the Agreement is otherwise detailed. The Arbitrator's contrary approach amounts to deciding beyond the contract and the reference, attracting Section 34(2)(a)(iv).

11.8 The Time Plan confirms the Claimant's sequencing burden-land, approvals, construction, machinery, trial run by May 2009, and production from June 2009. The Claimant had admittedly not set up oг commissioned the facility by the date of termination. The Applicant's case that its reciprocal obligations (including any minimum off-take) would arise only after the Claimant's readiness is consistent with Sections 51-55 Contract Act and with the scheme of the agreement. By contrast, treating the minimum guarantee as automatically operative despite non-commissioning is inconsistent with the contractual structure and ignores reciprocal promises, thereby touching patent illegality under Section 34(2A) (Refer: Ssangyong Engineering: also Shree Ganesh Petroleum, Godhra Electricity, Maula Bux on damages discipline).

11.9 On Suzlon orders: the Agreement does not premise the Applicant's obligations on any third-party order flow. Importing "Suzlon dependency" as a decisive factor changes the contractual risk allocation. As held in Associate Builders and Ssangyong (supra), reading into the contract considerations alien to it crosses the line from interpretation to re-writing. The Arbitrator's reliance on Suzlon as a controlling premise is therefore

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extraneous to the contract and vitiates the Award both as jurisdictional overreach [Section 34(2)(a)(iv)] and as patent illegality [Section 34(2A)].

11.12 Turning to damages causation within this point: once the access-road duty and Suzlon contingency are found extra-contractual, the chain by which breach was inferred against the Applicant breaks. The premise that the Claimant's failure to construct the factory was because the Applicant failed to provide an access road is not a finding the contract can sustain. Damages premised on that foundation cannot survive Section 34 scrutiny. This too is a facet of patent illegality.

11.13 I am conscious that courts must not nit-pick arbitral reasoning. But this is not a case of choosing between two plausible readings within the contract. It is a case where the award steps out of the contract-first, by fastening a non-existent primary obligation (access road), and second, by substituting the agreed risk matrix with a third-party order dependency (Suzlon). That crosses the statutory line drawn in Section 34(2)(a)(iv) and Section 34(2A).

11.14 For completeness, I record that nothing in the Agreement, the pleadings, or the correspondence placed before me shows any written modification incorporating an access road obligation or making performance contingent on Suzlon. No further facts are available on the record regarding any novation or subsequent addendum to that effect.

11.15 In view of the above discussion, I hold that the findings of the learned Sole Arbitrator on (i) the alleged obligation to provide an access road, and (ii) the Suzlon-based premise of performance, are beyond the scope of the Business Agreement and the reference and, in any event, disclose patent illegality apparent on the face of the Award. The Award to that extent is also in conflict with the fundamental policy of Indian law, inasmuch as it disregards the contract as the governing charter of rights and obligations, and overlooks the basic principles of reciprocal promises under Sections 51 to 55 of the

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Indian Contract Act, 1872, which lie at the heart of contractual performance.”

19. The conclusion drawn by the Court under Section 34 of the Act’ 1996, thus, is that the impugned award being founded on consideration extraneous to the contract, cannot be sustained within the narrow but firm boundaries of Section 34. The findings of the learned Arbitrator on the obligation of the respondent to provide an access road and Suzlon based premise of performance, are beyond the scope of the Business agreement and patently illegality as is apparent on the face of the award for the fact that the learned Arbitrator overlooked the basic principles of reciprocal promises aligned in the terms and conditions of the contract.

20. On point no.3 regarding damages and quantum, it was though held by the learned Commercial Court that once claimant failed to establish and commission the facility as contemplated in the Business agreement, as part of its reciprocal promise, no contractual liability could arise on the respondent, and consequently no damages could be awarded. However, it still proceeded to deliberate on the law on damages under Sections 73 and 74 of the Indian Contract Act, 1872 to observe that the provisions require proof of actual loss or a reasonable basis for its estimation. The phrase “which naturally arose in the usual course of things” in Section 73 restricts recovery to losses that are foreseeable and proximate, not remote or speculative. The claimant has not shown any cogent evidence of having incurred

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expenditure on machinery, construction or operational readiness. The only evidence before the learned Arbitrator was the purchase of land which in fact is a profitable investment and a few quotations for imported machinery which were never acted upon. In absence of proof of actual or even measurable losses, the award of damages to the tune of Rs.25 crores is plainly unsustainable.

21. It is further held that the reasoning of the learned Arbitrator that the claimant suffered a loss of business opportunity and a frustration of its future potential to earn profits from the contractual quantity, treating these as sufficient proof of damages, directly contradict Sections 51 and 55 of the Indian Contract Act, 1872 since the respondent's obligation to supply the guaranteed quantity could arise only after the claimant's readiness to perform. It was concluded that disregarding the said statutory principles further brings the award into conflict with the fundamental policy of Indian law under Section 34(2)(b)(ii), as under:-

> *"12.10 Resultantly, the Award on damages suffers from multiple infirmities: (i) it is founded on a non-existent contractual obligation, (ii) it disregards the statutory principles governing reciprocal promises and damages under Sections 51 to 55 and 73 to 74 of the Contract Act, and (iii) it is patently disproportionate and speculative. Each of these aspects independently constitutes patent illegality under Section 34(2A) and collectively brings the Award into conflict with the fundamental policy of Indian law."*

22. On the point of interest and cost, it was held by the Commercial Court that both the interest and costs awarded

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are found to be arbitrary and without contractual or evidentiary foundation.

23. However, on the issue of limitation, the findings of the learned Arbitrator was affirmed holding that the Court under Section 34 of the Act' 1996 cannot re-appreciate the evidence to attach illegality to the reasoning in the award.

24. The Court under Section 34 of the Act' 1996 has then set aside the arbitral award holding it suffering from jurisdictional error and patent illegality apparent on its face, on the ground that the learned Arbitrator travelled beyond the express terms of the Business agreement dated 02.10.2008, by introducing obligations regarding an access road and Suzlon orders which were absent in the written contract. The findings being extraneous to the reference and unsupported by contractual foundation, amount to jurisdictional overreach under Section 34(2)(a)(iv) and patent illegality under Section 34(2A) of the Act' 1996.

Appellant's case:-

25. Mr. Saurabh Soparkar, learned Senior Counsel appearing for the claimant / appellant herein would vehemently argue that the Commercial Court under Section 34 proceedings has committed a fundamental error of fact in appreciating the challenge to the findings of the learned Arbitrator. The submission is that the learned Arbitrator, infact, has not reached at a finding that the respondent – SKF committed breach of Business agreement by not providing

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the approach road. Rather the finding is that the respondent committed breach by failing to provide the LSBs for the job work. The Business agreement imposes obligation upon the respondent to provide the guaranteed quantity of job work though it simultaneously imposes the obligation upon the claimant to setup the factory. However, when the claimant complained about the breach of the respondent for not providing job work (bearings), the respondent started raising a defence that the claimant committed breach by not setting up the factory.

26. It was argued that the learned Arbitrator while deciding the issue of readiness and willingness of the claimant to perform it as part of the contractual obligations, has categorically recorded that the claimant had performed his part of contractual obligations which were in his control, i.e. by acquiring lands and taking subsequent steps by applying N.A. permission; preparing layout plans for the proposed factory; applying for electrical work appointing architectural and structural consultant; obtaining quotations for civil contract work for proposed factory; negotiating with the vendors; and placing orders for equipments that had larger delivery period of more than three months; making advance payments and taking deliveries of some equipments; taking quotations for equipments that had delivery period of less than three months so as to procure them as and when required.

27. With the above, it was vehemently argued by Mr. Soparkar, learned Senior Counsel for the claimant / appellant

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that the learned Arbitrator has categorically noted that the respondent has effectively prevented the claimant from performing his part of the contractual obligation by not providing the approach road. Non-setting up of the factory, i.e. non performance of his obligations by the claimant to set up the factory was not a breach on his part, rather it was a breach in the account of the respondent for not providing the approach road.

28. It was submitted that as per the settled legal position non performance of the contract does not amount to breach in certain cases such as frustration, or when the other party obstructs or prevents the performance of the contract by another party. Such obstruction or prevention may not necessarily be arising out of any contractual obligation of other party, but it may arise in the peculiar facts and circumstances of the individual case, as found by the learned Arbitrator in the present one.

29. The reference made by the learned Arbitrator in the award about the failure to provide access road by the respondent has to be read in a holistic manner and in the context of the entire award, which would reflect that it is a case where the respondent obstructed and / or prevented the claimant from setting up the factory, i.e. performing the contractual obligation of the claimant, though the claimant was found to be ready and willing to perform its obligation to setup the factory under the Business agreement.

30. Much emphasis has been laid to the findings by the learned Arbitrator on issue Nos. 5 and 6, to submit that they are in respect of reciprocal obligations of the parties arising from the Business agreement and the findings thereon clearly show that the learned Arbitrator placed burden on both the parties rather than the respondent only.

31. Further, assailing the reasoning of the Commercial Court to set aside the award, it was vehemently argued by the learned Senior Counsel appearing for the appellant – claimant that a fundamental error has been committed in reappreciating the evidence by violating the mandate of Section 34 of the Act' 1996 in holding the award being in conflict with the public policy of India, on the premise of being in contravention with "the fundamental policy of Indian law", without any reasoning. It was urged that the casual statement made in the Section 34 order that the award in disregarding the basic principles governing reciprocal promises under Sections 51 to 55 of the Indian Contract Act, 1872, and the discipline of compensation under Sections 73 and 74, thereby conflicting with "the fundamental policy of Indian law" as contemplated under Section 34(2)(b)(ii), is an act of overreaching its jurisdiction by the Commercial Court under Section 34.

32. The submission is that in arriving at that conclusion, the learned Commercial Court has completely ignored the caution employed in Explanation 2 to Section 34(2)(b)(ii), in furtherance of Explanation 1 (iii), which clearly mandates the test that the question "as to whether there is a contravention

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with the fundamental policy of Indian law shall not entail a review on the merits of the dispute". It was vehemently argued that the Commercial Court has indulged in an extensive evaluation / reappreciation of evidence to arrive at its conclusion that the award suffers from vice of Section 34(2)(b)(ii), which exercise being in ignorance of the caution added by the legislature by way of Explanation 2 to Section 34(2)(b)(ii) is to be held illegal and beyond jurisdiction of the Court under Section 34.

33. The learned Senior Counsel relying upon the decision of the Apex Court in ***OPG Power Generation Private Ltd. Vs. Enexio Power Cooling Solutions India Private Ltd & Another.***[1] placing special emphasis on paragraph '37' thereof, would submit that for an award to be against "the public policy of India", a mere infraction of Indian law is not enough. There must be, *inter alia,* infraction of "fundamental policy of Indian law" including a law meant to serve public interest or public good.

34. By 2015 amendment, Explanations 1 and 2 were added, while substituting old Explanation to Section 34(2)(b)(ii), to remove any doubt as to when an award can be held to be in conflict with the public policy of India. The Apex Court in ***OPG Power Generation Private Ltd.***[1] has discussed succinctly as to how the expression "in contravention with the fundamental policy of Indian law" would be interpreted and understood by the Court, while considering the law laid down by the Apex Court in ***SSangyong Engineering &***

1 (2025) 2 SCC 417

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Construction Co. Ltd. Vs. National Highways Authority of India (NHAI)[2]. Paragraphs '55' and '56' of ***OPG Power Generation Private Ltd.***[1] have been placed before us to elaborate and emphasize on his arguments by the learned Senior Counsel for the appellant, which read as under:-

> *"55. 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.*
>
> *56. 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,*

2 (2019) 15 SCC 131

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the extent of judicial scrutiny must not exceed the limit as set out in Explanation 2 to Section 34(2)(b)(ii).”

35. It was, thus, argued that the Apex Court has categorically held therein that to bring the contravention within the fold of “the 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. None of the illustrations given by the Apex Court as a guideline to assess whether there has been a contravention of “the fundamental policy of Indian law” within the scope of judicial scrutiny, as set out in Explanation 2 to Section 34(2)(b)(i), would be attracted in the facts of the present case.

36. Moreover, the inquiry conducted by the learned Commercial Court was on the merits of the dispute, which is the prohibited arena as clarified in Explanation 2 to Section 34(2)(b)(ii). The decision of the Commercial Court in setting aside the award on the ground of being in conflict with “the fundamental policy of Indian law” as contemplated under Section 34(2)(b)(i), itself is sufficient to set aside the impugned judgment, as a whole.

37. However, the second ground on which the award has been declared “patently illegal” by the Commercial Court is that the learned Arbitrator travelled beyond the express terms of Business agreement dated 02/17.10.2008, by introducing obligations regarding access road and Suzlon orders of large size bearings (LSBs) as per the specification designs, which

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are absent from the written contract. The Commercial Court has illegally held that the findings in the award of the learned Arbitrator proceeded on extraneous to the reference and unsupported by contractual foundation, amount to jurisdictional overreach under Section 34(2)(a)(iv) and patently illegality under Section 34(2A) of the Act' 1996.

38. The contention is that patent illegality as a ground to set aside the arbitral award under Section 34(2A) of the Act' 1996, as held by the Apex Court in ***SSangyong Engineering & Construction Co. Ltd.***[2] refers to "patent illegality appearing on the face of the award". It was held therein that sub-section (2A) of Section 34 of the Act' 1996 containing the ground of "patent illegality", refers to such illegality which goes to the root of the matter, but not which amounts to mere erroneous application of law or contravention of a statute.

39. Relying upon paragraph '68' of the judgment in ***OPG Power Generation Private Ltd.***[1] , it was argued that the Apex Court has noted therein the clarification given in (para '37') in ***SSangyong Engineering & Construction Co. Ltd.***[2] that "what is subsumed within the fundamental policy of Indian law, namely the contravention of a statute not linked to public policy or public interest", cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality. In any case, reappreciation of evidence is not permissible, inasmuch as, the scope of inquiry under Section 34(2A) is circumscribed by the words "the award is vitiated by the patent illegality on the face of the record".

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40. Another limb of reasoning given by the learned Commercial Court that the award suffers from jurisdictional overreach under Section 34(2)(a)(iv) of the Act' 1996, incorporated in the second ground, as above, to set aside the Arbitral award under Section 34 can be said to be "perversity taken as a ground to do so".

41. It is submitted that the Apex Court in ***SSangyong Engineering & Construction Co. Ltd.***[2] while laying down the legal position post the 2015 amendment in Section 34 of the Act' 1996 has observed that the perversity no longer remained a ground for challenge under "public policy of India", though it would certainly amount to patent illegality appearing on the face of the record.

42. The tests laid down in ***SSangyong Engineering & Construction Co. Ltd.***[2] to examine the arbitral award on the ground of perversity, falling within the scope of "patent illegality" under Section 34(2A) are;

(a) that an award is based on no evidence, or it ignores vital evidence;

(b) the finding based on documents taken behind the back of the parties by the Arbitrator would also qualify as a decision based on no evidence, inasmuch as, such decision is not based on evidence led by the parties;

(c) the decision of the Arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it;

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(d) the construction of the contract by the learned Arbitrator is such that no fair or reasonable person would take such view; or
(e) the view of the learned Arbitrator is not even a possible view;

(f) the Arbitrator deciding a matter not within its jurisdiction; and

(g) or violating the fundamental principles of natural justice.

43. It was argued that a possible view of the Arbitrator on facts cannot be corrected, inasmuch as, mere error of fact or wrong appreciation of evidence by itself is not a ground to set aside the domestic award under sub-section (2A) of Section 34 of the Act' 1996. Even a mere erroneous application of law is not a ground to set aside the arbitral award on the premise of suffering from patent illegality, unless it goes to the very root of the matter.

44. It was argued that the phrase "possible view by the Arbitrator on facts" is to be applied keeping in mind that an award based on little evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on the ground of perversity. The settled principle is that the Arbitrator is the ultimate master of quantity and quality of the evidence to be relied upon and once the learned Arbitrator construes the contract by appreciating the evidence on record, it is not possible to hold, in judicial scrutiny, that the

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view of the learned Arbitrator is not a possible view and to form an alternative view by reappreciation of evidence.

45. It was urged that in the facts of the instant case, it cannot be said that the learned Arbitrator has decided a matter not within his jurisdiction. The reason is that though the Business agreement was the subject matter of the Arbitration but while construing the terms of the contract in a reasonable manner, it was permissible for the learned Arbitrator to take into account not only the terms and conditions of the Business agreement, but all surrounding circumstances to give a true meaning to the rights and obligations of the parties under the contract.

46. The question to be answered by this Court under Section 37, while examining the correctness of the order under Section 34 of the Act' 1996, would be, whether the learned Arbitrator can see material beyond the written contract to decide on the rights and obligations of the parties. It was urged that it is a settled legal proposition that the rights and obligations of the parties under the contract may be unwritten, oral, entered into before or after the execution of the contract, can be taken into consideration for the purposes of construction of the contract.

47. The Arbitrator is not prohibited to look into the surrounding circumstances to give a true meaning to the rights and obligations of the parties under the contract. In any case, there being no prohibitory clause under the contract, and the Arbitrator being the best judge has

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interpreted the contractual terms in the facts and circumstances of the present case in a plausible manner. The present is not a case where the learned Arbitrator has travelled into the prohibited areas, rather on a collective consideration of the terms of the Business agreement and the correspondences exchanged between the parties, the learned Arbitrator has reached at the conclusion that it was the obligation of the respondent to provide access road to enable the claimant to discharge its part of the obligations under the contract to its fullest by setting up the factory on the land purchased by it.

48. It was urged that on appreciation of the evidence on record, the learned Arbitrator has provided a plausible construction to the contract. It was not open for the Commercial Court to indulge in the exercise of the reappreciation of evidence, to hold that only the Business agreement was the subject matter of the Arbitration and the learned Arbitrator has introduced obligations beyond the written contract, extraneous to the reference. The Commercial Court has made a fundamental error in assuming that the learned Arbitrator cannot look beyond the written contract or findings in the award that failure to provide approach road is the breach of the respondent, are creating an additional obligation.

49. It was submitted that, infact, the Commercial Court posed a wrong question of fact and law to itself and then proceeded to reappreciate evidence and applied inapplicable law on the findings of the learned Arbitrator based on the

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pleadings and evidence, the order under Section 34, thus, suffers from jurisdictional error. The conclusion drawn by the Commercial Court that the award being extraneous to the reference and unsupported by any contractual foundation amounts to judicial overreach under Section 34(2)(a)(iv) and resultantly suffering from patent illegality under Section 34(2A) of the Act' 1996, is a result of the wrong question posed to itself by the Commercial Court.

50. The whole dispute falling within the domain of the Arbitral tribunal, no error can be said to have been committed by the learned Arbitrator in deciding the issue of the approach road which was contemplated by and /or falling within the terms of submissions to arbitration and it cannot be said that the learned Arbitrator has wandered outside the contract.

51. Elaborating this submission, it was argued by the learned Senior Counsel that the arbitration proceedings were initiated after an application under Section 8 of the Act' 1996 was filed by the respondent in the suit of the appellant herein. The respondent in the said application before the Civil Court had submitted that all parts of the suit claim fall within the arbitration agreement signed by the parties. It is, thus, not open for the respondent to turn around to claim that any part of the suit claim, such as providing approach road, falls outside the jurisdiction of the Arbitrator. The submission is that from this point of view as well, the opinion of Section 34 Court that the Arbitrator could not have decided the matter beyond contract and the reference, is absolutely wrong.

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52. It is vehemently argued that the surrounding circumstances on record can always be taken into consideration as an aid to interpret or construe the contract as per the express or implied terms of the contract. The intention of the parties at the time of entering into the contract has to be gathered not only from the reading of the terms and conditions of the contract but by including previous and subsequent conduct. The Arbitrator is not wedded to the written contract. Once it is held that the Arbitrator had jurisdiction to decide the dispute or the dispute is arbitrable, the Commercial Court, on an erroneous reading of the award, in the instant case, has illegally held that the findings as to the approach road given by the learned Arbitrator created an additional obligation on the claimant beyond the written contract.

53. Reliance is placed on the following decisions to substantiate the above submission:

(i) ***Ramesh Kumar Jain Vs. Bharat Aluminium Company Limited (BALCO)***[3] ;
(ii) ***Arvind Mills Ltd. Vs. Bharat Heavy Electrical Ltd.***[4]; and
(iii) ***Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya & Another***[5]

54. Assailing the correctness of the findings of the Commercial Court on damages that it is founded on a non-

3 (2025) SCC Online SC 2857
4 Order dated 14.11.2025 in First Appeal No. 1180 of 2007
5 (2003) 5 SCC 531

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existent contractual obligations and disregards governing reciprocal promises and damages under Sections 51 to 55 and 73 and 74 of the Indian Contract Act, 1872 and that it is patently disproportionate and speculative, it was submitted by Mr.Soparkar, learned Senior Counsel for the appellant that the Commercial Court has failed to appreciate that in cases of damages, there are two separate types, i.e. loss of profit and /or loss of profitability. The present is a case where breach is on the part of the respondent in not providing the job work. The learned Arbitrator invoked Minimum Guarantee clause of the Business agreement to hold that due to default and breach of Agreement by the respondent, the claimant suffered huge financial loss. And hence the respondent had committed breach of Business agreement by not providing job work of coating and painting of LSBs, it was bound to pay minimum amount as mentioned in Clause 4.II of the Business agreement. The submission is that the award of damages for loss of profit due to non-execution of obligation under the contract is governed by the ratio of the law as laid down in the case of ***State of West Bengal and Others Vs. S.K. Maji***[6].

55. Reliance is further placed on the decision of the Apex Court in ***BPL Limited Vs. Morgan Securities and Credits Private Ltd.***[7] to submit that once there is a clause in the contract providing consequences of breach, the same has to follow. The contract is valid and the breach of the respondent was proved. The learned Arbitrator cannot be said to have

6 [2025 SCC OnLine Cal 3945]
7 [(2026) 3 SCC 1]

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erred in invoking the damage clause in the contract itself, and what is provided referred to as the damage in the award, is the amount arising from the consequence of breach of loss of profit from the assured business agreed between the parties. No error can be attached to the quantification of damages by the learned Arbitrator as per the damage clause of the contract and, moreover, when the learned Abitrator has awarded damages on equitable considerations, awarding only 25 crores as against demanded 65 crores, there is no reason to interfere.

56. It was vehemently argued by the learned Senior Counsel that this Court in the present proceedings under Section 37 of the Act' 1996 is to confine its judicial scrutiny to the only question "as to whether the Commercial Court was justified in setting aside the arbitral award in exercise of power under Section 34 of the Act' 1996", by examining the approach of the Commercial Court to see whether it has exceeded its jurisdiction. The proceedings in the appeal under Section 37 are to be restricted only to the exercise of deciding whether the Commercial Court was justified in reversing the arbitral award. In this process, this Court cannot substitute itself to the Court of inquiry under Section 34 of the Act' 1996, and the reversal cannot be sustained on the grounds other than the grounds stated in the order impugned, passed by the Commercial Court. It would not be appropriate for this Court to examine the correctness of the arbitral award on its own, independent to the findings of the Commercial Court, as it would result in a serious miscarriage of justice, because the

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claimant would be deprived of an important step / remedy under Section 34 of the Act' 1996. In other words, the submission is that if this Court finds that the Commercial Court has erred in reversing the arbitral award for the reasoning given therein, there is no question of sustaining its conclusion by referring to the arbitral award independently and the only course open for this Court is to set aside the order passed by the Commercial Court, and / or remand the matter back to the Commercial Court.

57. Further, reliance is placed on the decision of the Apex Court dated 07.01.2026 in ***Jan De Nul Dredging India Pvt. Ltd. Vs. Tuticorin Port Trust***[8], on the scope of inquiry under Section 34 of the Act' 1996 into the Arbitral award. Reference has also been made to the following judgments of the Apex Court to substantiate the arguments on the exercise of power of Court under Section 34:-

(i) ***McDermott International Inc. Vs. Burn Standard Co. Ltd***[9]**;**
(ii) **Swan Gold Mining Ltd. Vs. Hindustan Copper Ltd.**[10] paragraphs '11' – '12' & '19'**;**
(iii) ***Associate Builders Vs. DDA***[11]; paragraphs '29-'34' & '40'-'47';
(iv) ***UHL Power Co. Ltd Vs. State of H.P.***[12] paragraphs '15'-'22'; and

8 SLP (C) No.8803 of 2021
9 (2006) 11 SCC 181
10 (2015) 5 SCC 739
11 (2015) 3 SCC 49
12 (2022) 4 SCC 116

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(v) ***Reliance Mediaworks Limited Vs. Nishant Construction Private Limited***[13]***;*** (paragraphs '8'-'12');

(vi) ***Prakash Atlanta (JV) Vs. National Highways Authority of India***[14]

Respondent's case:-

58. In rebuttal, Mr. Kamal Trivedi, learned advocate for the respondent would submit that the Business agreement laying down rights and obligations of the parties had been signed on 17.10.2008 whereas the claimant has entered into an agreement of sale of land (to set up the factory) after signing the said Business agreement. As per own case of the claimant, part payments were made towards purchase of land in December, 2008 and the sale deed was executed on 03.03.2009.

59. As recorded in the arbitral award, the sale deed itself noted that the land had no direct approach to the claimant's factory land and a small piece of land admeasuring 162 sq meters was required to be taken on lease / sale. In none of the communications prior to the execution of the Business agreement, there was any so called promise or assurance given by the respondent about the approach road. Any reference to the communication dated 23.06.2008, at page '255' of the paper-book is neither here nor there. It was argued that admittedly the Business agreement does not make

13 Order dated 01.07.2024 passed in First Appeal No.1548 of 2021
14 Civil Application No.4513 of 2025

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any reference to “access road” or about the respondent’s alleged obligation / promise / assurance to provide for the same. So far as the respondent’s obligation under the Business agreement is concerned, it refers only to provide large size bearings (LSBs) to the claimant for coating and painting and does not refer to access road.

60. It was urged that clause 1 of the business agreement providing for the scope of the agreement is clear and unambiguous. As per Clause 2 of the agreement, the period of agreement commenced from the date of signing which is 17.10.2008 and the agreement was valid till 31.03.2014. As per Clause 3 thereof, the obligation of supplying LSBs on the part of the respondent would commence only from June, 2009. Thus, from October, 2008 to June, 2008, as per the time plan for setting up ATS (claimant’s factory) appended thereto, all the obligations were on the part of the claimant only. Unless and until all the obligations on the part of the claimant’s were fulfilled, including the purchase of land, setting up factory installation of machines, trial-run and commencement of production, the obligation of the respondent of supplying large size bearings (LSBs) does not get triggered. As per own case of the claimant, as noted in the award, the claimant had purchased the land and applied for N.A. permission and prepared layout plan only, but unless and until factory was set up, it was not even possible for the claimant to carry out job work, and hence there was no question of supply of LSBs by the respondent, which as per the agreement was to commence in the month of June, 2009.

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61. The setting up of factory was a pre-requisite for the Business agreement to commence and it was the sole obligation of the appellant / claimant. The respondent in no eventuality can be held responsible for the non setting up of the factory by the claimant.

62. Even otherwise, the claimant at the time of signing of Business agreement was well aware and it had identified the land prior to signing of the Business agreement. This fact is evident from the e-mails dated 08.04.2008 (at page '152' of the Convenience Compilation-Part 1 (CC-1)), 20.08.2008 (page '273' of CC-1) and 10.09.2008 (page '280' of CC-1), where the claimant though communicated about the identification of land near SKF property in Bavla and that there was no approach road but had never asked for to include the requirement of providing access road by the respondent in the Business agreement.

63. It is submitted that the Business agreement is a duly negotiated agreement, inasmuch as, even the draft of MOU and Business agreement was shared between the parties on e-mail dated 04.08.2008 of the appellant (at page '263' of CC-1), e-mail dated 01.09.2008 sent by the respondent (at page '278' of CC-1), e-mail dated 10.09.2008 sent by the appellant (at page '280' of CC-1), e-mail dated 20.09.2008 sent by the respondent (at page '287' of CC-1), e-mail dated 24.09.2008 sent by the appellant (at page '292' of CC-1) and e-mail dated 26.09.2008 sent by the respondent (at page '300' of CC-1).

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64. The submission is that all these correspondences are pertaining to the draft of MOU / Business agreement and in none of them, it was even suggested by the claimant that the respondent was required to make a promise to provide access road to facilitate the claimant to set up its factory on the land identified by it. It is submitted that from the bare reading of these communications between the parties only, it can be discerned that there was some discussion in relation to the requirement of approach road but there is no promise on the part of the respondent.

65. The attention of the Court is invited to the e-mail dated 20.08.2008 of the appellant wherein the appellant suggested the option that if the respondent – SKF agree to give / sell the land for approach road they can go ahead to buy the land identified by them. In the reply e-mail dated 01.09.2008 (at page '278' of CC-1) sent by the respondent, there is only an inclination to discuss the land / approach way requirements while sending the modified sheet of MOU with the comments of the respondent – SKF.

66. The inputs by the respondent – SKF sent along with the e-mail dated 01.09.2008 (at page '279' of CC – 1) were placed before us to demonstrate that there was no suggestion on the part of the respondent – SKF to incorporate the requirement of approach road in the proposed MOU. The response e-mail dated 10.09.2008 sent by the appellant (at page '280' of CC-1) rather demonstrates that the claimant was negotiating with the owner for the approach road. The draft of MOU was sent

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by the claimant with the e-mail dated 24.09.2008 (at page '292' of CC-1), and there is no mention therein about the approach road.

67. The final draft of MOU was, thereafter, sent to the claimant vide e-mail dated 26.09.2008 after final discussion in the meeting held on 25.09.2008, however, in none of these communications there is even a reference of the approach road. The time plan which is forming part of the Business agreement, shared by the claimant vide e-mail dated 01.10.2008 for setting up ATS factory, does not have any mention of requirement of access road, though it contains the detail of all stages of the land procurement and setting up of the factory.

68. By placing the aforesaid documents from the record, it is submitted by the learned Senior Counsel for the respondent that even if the correspondences exchanged between the parties are taken into account, it is evident that the Business agreement was a well negotiated commercial agreement between the parties and the claimant themselves have never proposed to incorporate the requirement of providing of access road as part of obligation of the respondent in the Business agreement, despite being alive of the said issue at the time of signing of the Business agreement. It is, thus, evident that the parties had signed the Business agreement with open eyes with the clear understanding that the obligation to set up factory was entirely of the claimant and the respondent has no obligation towards the same. The

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claimant cannot now turn around and submit that there was a promise on the part of the respondent. Any offer given by the respondent at any time after execution of the Business agreement cannot be incorporated in the agreement as obligation of the respondent. The discussion made about the feasibility of providing access road by the respondent, prior to the execution of the Business agreement, cannot be given undue importance, so as to hold that there was promise or even assurance by the respondent. Moreover, in absence of any promise, the question of failure on the part of the respondent would not arise.

69. With these submissions, it was vehemently submitted by learned Senior Counsel for the respondent that breach of Business agreement was committed by the claimant and not by the respondent and the finding of the learned Arbitrator that the claimant was ready or willing to perform its part of the obligations under the Business agreement and the breach is on the part of the respondent is a patent illegality apparent on the face of the record.

70. There was no question of invoking Clause 3 and Clause 4.II providing for obligations / liability of the respondent to supply minimum assured quantity of LSBs of a specified design to the claimant as admittedly factory was never set up. The obligation of the respondent for minimum assured quantity and compensation in case of failure, were to kick in only after being ready for the job work by the claimant for which the prerequisite was to set up the factory.

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71. Even otherwise, the respondent could not be forced to provide its immovable property to the claimant, so as to enable the claimant to perform its part of the obligations to set up the factory for commencement of the job work for coating and painting of LSBs.

72. It was, thus, argued that the language of the Business agreement being unambiguous, plain and clear, it was even otherwise not permissible for the learned Arbitrator to take aid from any material or circumstances outside the business agreement by referring to the communications exchanged between the parties.

73. Reliance is placed on the judgments of the Apex Court in ***The Godhra Electricity Co. Ltd. and Another Vs. The State of Gujarat and Another***[15]; ***Sepco Electric Power Construction Corporation Vs. GMR Kamalanga Energy Ltd.***[16] and ***Oil and Natural Gas Corporation Ltd. Vs. JSIW Infrastructure Pvt. Ltd.***[17] to substantiate the said submissions.

74. The decisions relied by the learned Counsel for the appellant / claimant in ***Ramesh Kumar Jain***[3] and ***Arvind Mills Ltd.***[4] were sought to be distinguished having been rendered on the facts and circumstances of the said cases.

15 (1975) 1 SCC 199
16 (2026) 2 SCC 542
17 2025 SCC OnLine Del 3811

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75. It is submitted that there cannot be a quarrel about the proposition pressed by the learned Counsel for the claimant that in the matter of construction of a contract, the Arbitrator is the best judge and that the Arbitrator can look to the surrounding circumstances in addition to the terms of the written contract to determine the intention of the parties in the matter of construction of the contract, however, the same would depend upon the language of the contract itself. In a case where there is no ambiguity in the contract, there is no question of employing external aids of correspondences / exchanges between the parties to discern their rights and obligations aligned under the contract.

76. In the instant case, the issue of access road was never in contemplation of the parties in a sense that the respondent can be forced to provide its immovable property to the claimant so that claimant could perform its obligation. The submission is that none of the judgments relied by the claimant can come to its aid and cannot support the reasoning given by the learned Arbitrator about the failure or breach on the part of the respondent.

77. It is further submitted that the learned Arbitrator has proceeded on extraneous consideration in interpreting the proposal of the respondent to modify the Business agreement. Emphasis laid by the learned Arbitrator in the award on point [(xiv) insistence for new agreement by respondent] by referring to the e-mails dated 06.04.2010 and 30.04.2010 exchanged between the parties is nothing but a glaring

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demonstration of the mistake committed by the learned Arbitrator in appreciating the evidence on record. The contention is that since the appellant failed to set up the factory / facility and the time line of starting the job work in June, 2009 had expired, it became imperative to modify the Business agreement. The terms for modification of Business agreement along with resolution for the access road were discussed in the meeting held on 15.09.2009 which was sent by the respondent to the claimant vide e-mail dated 07.10.2009, (at page '396' of CC-1). However, the respondent's proposal to modify the Business agreement was refused by the claimant vide e-mail dated 08.11.2009 (at page '407'-'408' of CC-1).

78. The Business agreement was never modified and the provision of access road by the respondent to appellant was never incorporated in the Business agreement or agreed upon between the parties to be an obligation of the respondent.

79. The learned Arbitrator in the award (at paragraph '101'), though referred to the e-mail dated 08.11.2009 to record that the claimant did not agree to changes and modifications suggested by the respondent stating that they change the very nature of business agreement but has conveniently avoided to reach at any conclusion. The submission is that the learned Arbitrator has twisted the facts of the case to suit the claim of the claimant and has ignored the material circumstances in which the respondent asked for modification in the Business agreement. In any case, the exchanges between the parties

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on the counter offer by the respondent in October, 2009 to resolve the issue cannot be read against the respondent so as to hold it liable for breach of a non-existent obligation allegedly causing any loss to the claimant.

80. On the submission of the learned Senior Counsel for the appellant / claimant on the damages for loss of profit, it was submitted that the claimant had not placed any document to prove the alleged investments made by it in furtherance to the Business agreement before the Arbitral tribunal. The respondent, on the other hand, in several e-mails asked the claimant to share the details of the investments made by it, which were never provided by the claimant. For any claim of loss of profit or damages, the claimant was required to lead substantive evidence for the proof of actual investment made by it for setting up the factory or machinery or otherwise in furtherance of the Business agreement. The only expenses / investment incurred by the claimant was towards the purchase of land, as also recorded in the award itself. There was, thus, no justification for the learned Arbitrator to award a huge amount of 25 crores towards damages along with interest @ 10% from 18.07.2014 and that too, with the cost of Rs.50 lakhs, when the claimant has failed to establish its claim by leading cogent evidence.

81. As regards, the contention of the learned Senior Counsel for the appellant herein / claimant that the compensation or damages are referable to Clause 4.II of the Business agreement, the submission is that the occasion for invoking

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the said clause could have arisen once the claimant had set up its factory, leading to shifting of obligation upon the respondent to provide LSBs for the job work of coating and painting.

82. It is submitted that even otherwise Clause 4.II of the Business agreement fixing the amount @ 60% of the average price of the coating and paining of the shortfall of the minimum assured quantity of bearings, payable to appellant in the event of the breach of the Business agreement by the respondent, is the genuine pre-estimate of loss caused to the claimant. The same is nothing but the optimum limit of liquidated damages fixed under the Business agreement, payable to the claimant, provided that the losses caused to the claimant were proved.

83. It is submitted that the contract law in India is a codified law and any compensation payable under the contract for its breach by a party has to be in consonance with the provisions of Sections 73 and 74 of the Indian Contract Act, 1872. As per Section 73 read with Section 74 of the Indian Contract Act, 1872 and the consistent view taken by the Apex Court where the alleged loss or damage is capable of being determined, proof of such loss is mandatory. Damages are compensatory and not punitive, and the burden squarely lies upon the claimant to establish that it has suffered a quantifiable loss directly attributable to the alleged breach.

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84. It cannot be contended that merely because a contract provides for liquidated damages, i.e. genuine pre-estimate of the loss, the same must be granted as a matter of course. In a case where loss is capable of being proved, the requirement of evidence cannot be dispensed with. It was vehemently argued that in the present case neither it is the case of the the claimant that the loss is impossible to be determined nor the learned Arbitrator has arrived at any such conclusion for awarding damages to the claimant without any evidence.

85. Referring to the decisions of the Apex Court in ***ONGC Ltd Vs Saw Pipes Ltd.***[18] and ***Construction & Design Services Vs DDA***[19], it is submitted that the position of law stated therein to the extent of permitting award of damages without proof of loss, has been substantially clarified by subsequent binding decisions of the Apex Court while following one of the most celebrated judgments of the Constitution Bench in the case of ***Fateh Chand v. Balkishan Dass***[20]. Reliance was placed on the following:-

(i) ***Vishal Engineers & Builders v. Indian Oil Corporation Limited***[21]***;***

(ii) ***Kailash Nath Associates v. Delhi Development Authority & Another***[22]***;***

(iii) ***Unibros v. All India Radio***[23]

18 (2003) 5 SCC 705
19 (2015) 14 SCC 263
20 1963 SCC OnLine SC 49
21 2011 SCC OnLine Del 5124
22 (2015) 4 SCC 136
23 2023 SCC OnLine SC 1366

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(iv) ***Batliboi Environmental Engineers Ltd. v. Hindustan Petroleum Corpn. Ltd.***[24]***;*** and

(v) ***Sharekhan Ltd. v. Monita Kisan Khade***[25]

86. Special emphasis has been made to the observation in paragraph '23' of the judgment of the Division Bench of Delhi High Court in ***Vishal Engineers***[21] ***(Supra)***.

> *"23. In our view these observations have to be read in the context of the pronouncement of the Constitution Bench pronouncement in Fateh Chand case (supra). If it is so, all that it implies is that where it is impossible to assess the compensation arising from breach and that factor is coupled with the parties having agreed to a pre-determined compensation amount not by way of penalty or unreasonable compensation then that amount can be awarded as a genuine pre-estimate of the loss suffered by a party. It cannot be read to mean that even if no loss whatsoever is caused to party it can still recover amounts merely by reason of the opposite party being in breach."*

87. The observations in paragraph '43.3' and '43.6' in ***Kailash Nath Associates***[22] placed before us are relevant to be noted hereinunder:-

> *"43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section."*
>
> *"43.6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where*

24 (2024) 2 SCC 375
25 2025 SCC OnLine Bom 5464

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damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded."

88. The observation in paragraph '16' in ***Batliboi Environmental Engineers Ltd.***[24] pressed into service are relevant to be extracted hereunder:-

"16. This is without doubt, a sound legal and correct proposition. However, the computation of damages should not be whimsical and absurd resulting in a windfall and bounty for one party at the expense of the other. The computation of damages should not be disingenuous."

89. It is vehemently urged that applying the above referred settled principles, even assuming for a moment without admitting that there was a breach on the part of the respondent, the award of damages is wholly untenable in law. The reason being that the claimant failed to lead any cogent or reliable evidence to establish actual loss, loss of profit, loss of profitability, or loss of business opportunity, i.e. damages. Award of damages in the absence of proof, would amount to conferring a windfall and unjust enrichment of the claimant, which is impermissible under Sections 73 and 74 of the Indian Contract Act 1872 and contrary to the law declared by the Apex Court.

90. The submission is that the learned Senior Counsel for the claimant has misinterpreted the judgment in the case of ***State of West Bengal and Others***[6] to contend that loss of profit does not require evidence and the proof is required only

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in a claim of loss of profitability. The decision in ***BPL Limited***[7] relied on by the learned Senior Counsel for the claimant is sought to be distinguished as having been rendered in the facts and circumstances of the said case.

91. It was submitted that the only evidence led by the claimant was investment of Rs.70 lakhs towards purchase of land, as against the projected initial investment of Rs.15.87 crores towards machineries and equipment. The absence of proof of such investment itself negates any claim of loss, as alleged or otherwise. As regards, the investment of Rs.70 lakhs, the same being towards the purchase of immovable property, the Commercial Court has rightly considered it as an asset of the claimant while rejecting the claim for damages. Even otherwise, there was no justification for award of huge amount of Rs.25 Crores towards damages for lack of evidence of the claimant.

92. Lastly, it was argued that the award of the learned Arbitrator is in contravention of the terms and conditions of the Business agreement, and consequently in violation of Section 28(3) of the Act' 1996, inasmuch as, the learned Arbitrator has travelled beyond the Business agreement and consequently acted without jurisdiction. The award having being passed on extraneous facts, i.e. access road and Suzlon order, which are outside the scope of the Business agreement, suffers from patent illegality. The learned Arbitrator unnecessarily and illegally emphasized on the issue of access

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road and Suzlon order, repeatedly in the award, it seems to justify its findings.

93. The law on reciprocal promise enshrined under Sections 54 and 55 of the Indian Contract Act, 1872 has been completely ignored by the learned Arbitrator. It has completely sidelined the main issue that the obligation of the respondent to provide LSBs had to start only after setting up of the factory by the claimant, which admittedly the claimant failed to set up. All the findings returned by the learned Arbitrator upon the correspondences exchanged between the parties and the statement in the purported sale deed executed between the claimant and the seller in aid to its opinion of the breach on the part of the respondent, suffer from glaring perversity and patent illegality which go to the root of the matter.

94. The learned Arbitrator has grossly disregarded the principles of construction of a written contract and has committed an error of jurisdiction making its award vulnerable. From any angle, no infirmity can be found in the order of the Commercial Court in setting aside the arbitral award suffering from patent illegality under Section 34(2A) and being beyond the scope of the reference under Section 34(2)(a)(iv) of the Act' 1996. It is submitted that as the learned Arbitrator has completely ignored the codified law of contract under the Indian Contract Act, 1872, the opinion drawn by the Commercial Court that the award is in contravention with the fundamental policy of Indian law,

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cannot be said to suffer from any error, inasmuch as, no deeper inquiry into the facts of the case was required or even made by the Commercial Court.

95. It is contended that the submissions of the learned Senior Counsel for the appellant that the Commercial Court has committed an error of jurisdiction in going beyond the scope of inquiry under Section 34 of the Act' 1996 by reappreciation of evidence led before the learned Arbitrator, are devoid of any force and are liable to be rejected outrightly. As there is no error, much less a jurisdictional error in the order of the Commercial Court, no interference is called for in the present appeal under Section 37 of the Act' 1996.

96. Further relying upon the decision of the Apex Court in ***UHL Power Company Limited Vs. State of Himachal Pradesh***[12], it is submitted that, as such, the jurisdiction conferred under Section 34 of the Act is fairly narrow, however, when it comes to the scope of an appeal under Section 37 of the Act, the jurisdiction of the appellate Court in examining an order passed by the Commercial Court, either setting aside or refusing to set aside the award, is all the more circumscribed. The Commercial Court in the judgment under challenge has set aside the award completely being patently illegal and perverse, based on well reasoned findings within the confines of Section 34 of the Act' 1996, and for the submissions made above, the said findings may not be interfered with.

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97. Lastly on the issue raised by the learned Senior Counsel for the appellant herein that whether this Court while exercising its appellate jurisdiction under Section 37 of the Act' 1996 can examine the correctness of the arbitral award of the learned Arbitrator, for testing the legality and validity of the order under Section 34 of the Act' 1996, it was submitted that the said inquiry, on the following issues would be necessary so as to examine the correctness of the order passed under Section 34 of the Commercial Court both in a case where award is upheld or set aside:-

(i) whether the award do not represent plausible and possible view or;
(ii) the learned Arbitrator has construed the contract in a manner that no fair mined or reasonable person would, or;
(iii) the findings arrived at in the award is based on no evidence, or;
(iv) learned Arbitrator has taken into the account something irrelevant to the decision, which he arrives at.

98. Without having a look to the arbitral award, within the scope of judicial scrutiny under Section 37 of the Act' 1996, it would not be possible for the appellate Court to arrive at any conclusion either to sustain the challenge or to set aside the order of the Commercial Court in upturning the award. The care and caution to be taken by the appellate Court under Section 37 of the Act' 1996 would not mean to exercise of power in a mechanical manner.

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99. In any case, the award being the basis of challenge, is to be carefully looked into by the Court making judicial scrutiny both under Sections 34 and 37 of the Act' 1996 with the rider that reappreciation of evidence is impressible in such an inquiry.

Tracing the Legal Principles on the scope of Judicial Scrutiny:-

100. Having considered the submissions made by the learned Counsel for the parties and perused the record, at the outset, we may briefly note the principles of law guiding the scope of judicial scrutiny under Sections 34 and 37 of the Act' 1996 as a reminder to ourselves.

101. As we do not find it proper to burden this judgment with the long line of decisions on the well settled principle of the scope of inquiry under Sections 34 and 37 of the Act' 1996, we find it profitable to refer to only two latest decisions of the Apex Court.

102. In ***PSA Sical Terminals (P) Ltd. Vs. Board of Trustees V.O. Chidambranar Port Trust Tuticorn and Others***[26] the Apex Court referred to the decisions in ***MMTC Ltd Vs. Vedanta Ltd***[27] and ***SSangyong Engineering & Construction Co. Ltd.***[2] in paragraph '38', '40', '41' and '42' as under:-

26 (2023) 15 SCC 781
27 (2019) 4 SCC 163

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"38. *Before that, it will be apposite to refer to the judgment of this Court in MMTC Ltd. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293] , wherein this Court has revisited the position of law with regard to scope of interference with an arbitral award in India. It will be relevant to refer to the following observations of this Court in MMTC Ltd. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293] : (SCC pp. 166-67, paras 11-14)*

> *"11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.*
>
> *12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but*

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goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Also see ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] ; Hindustan Zinc Ltd. v. Friends Coal Carbonisation [Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445] ; and McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181])

13. It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2-A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral

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award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."

41. A decision which is perverse, though would not be a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. However, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.

42. To understand the test of perversity, it will also be appropriate to refer to paras 31 and 32 from the judgment of this Court in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , which read thus : (SCC pp. 75-76)

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

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

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

(iii) ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312] , it was held : (SCC p. 317, para 7)

'7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies

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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 [Kuldeep Singh v. Commr. of Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] , it was held : (SCC p. 14, para 10)

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

103. In ***OPG Power Generation Private Ltd.***[1] relied by the learned Counsel for the appellant herein / original claimant, the Apex Court while noticing the statement of object and reasons of 2015 amendment, the amended provision of Sections 28, 34 and 48 of the Act' 1996, has noted the previous decision in ***SSangyong Engineering & Construction Co. Ltd.***[2] **,** to record in paragraph '54 as under:-

"54. After taking note of the supplementary report, the Statement of Objects and Reasons of the 2015 Amendment Act, and the amended provisions of Sections 28, 34 and 48, this Court held : (Ssangyong Engg. case [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , SCC pp. 169-71 & 194, paras 34, 37-41 & 69)

"34. What is clear, therefore, is that the expression "public policy of India", whether

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contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] understanding of this expression. This would necessarily mean that Western Geco [ONGC Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be the grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .

*35.-36.****

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

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when it comes to setting aside an award on the ground of patent illegality.

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

39. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with the matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC

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(Civ) 204] , while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterized as perverse.

***

69. We therefore hold, following the aforesaid authorities, that in the guise of misinterpretation of the contract, and consequent "errors of jurisdiction", it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise the aforesaid misinterpretation (which would include going beyond the terms of the contract), could be said to have been fairly comprehended as "disputes" within the arbitration agreement or which were referred to the decision of the arbitrators as understood by the authorities above. If an arbitrator is alleged to have wandered outside the contract and dealt with matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of "patent illegality", which, as we have seen, would not apply to international commercial arbitrations that are decided under Part II of the 1996 Act. To bring in by the backdoor grounds relatable to Section 28(3) of the 1996 Act to be matters beyond the scope of submission to arbitration under Section 34(2)(a)(iv) would not be permissible as this ground must be construed narrowly and so construed, must refer only to matters which are beyond the arbitration agreement or beyond the reference to the Arbitral Tribunal."

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104. Paragraphs '55' and '56' of ***OPG Power Generation Private Ltd.***[1] have already been extracted hereinbefore.

105. A careful reading thereof indicates that it is held therein that the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor, to set aside an arbitral award on the ground of patent illegality. The phrase "in conflict with the public policy of India" in Section 34(2)(b)(ii), 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", occurring in the 1996 Act by way of 2015 amendments. 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 the country. Some of the instances of such contravention by way of illustration given in paragraph '56' in ***OPG Power Generation Private Ltd.***[1] would include "violating law of India linked to public good or public interest".

106. We, thus, have to examine in the facts of the present case as to whether the Commercial Court has exceeded the limit of judicial scrutiny as set out in Explanation 2 to Section 34(2)(b)(ii) Act' 1996.

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107. On the issue as to whether the finding of the Commercial Court of the award suffering from the patent illegality appearing on the face of the record under Section 34(2A) and that it is a result of judicial overreach under Section 34(2)(a)(iv) of the Act' 1996, we are required to keep in mind the following principles:-

(i) the construction of the terms of the contract is primarily for an Arbitrator to decide. Unless the arbitrator construes the contract in a manner that no fair minded or reasonable person would, or in other words, the arbitrator's view is not even a possible view to take, the award cannot be interfered on the ground of patent illegality;

(ii) However, if the arbitrator wanders outside the contract and deals with the matters not allotted to him, this would be a jurisdictional error which can also be corrected on the ground of patent illegality. This ground of challenge, thus, falls under section 34(2A) of the Act' 1996.

(iii) However, to bring the challenge on the grounds relatable to Section 28(3) of the 1996 Act, to the matters beyond the scope of submission to arbitration, Section 34(2)(a)(iv) of the Act' 1996 must be construed narrowly and in a manner such that it must refer only to matters which are beyond the arbitration agreement or beyond the reference to the arbitral tribunal. In the guise of misinterpretation of the contract and consequent "errors of jurisdiction", it is not possible to state that the arbitral award would be beyond the scope of

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submission to arbitration, if otherwise the aforesaid misinterpretation can be said to have been fairly comprehended as “disputes within the arbitration agreement or which were referred to the decision of the arbitrators”.

(iv) It is held in ***SSangyong Engineering & Construction Co. Ltd.***[2] that the grounds of “patent illegality” where the arbitrator committed an error of jurisdiction and misinterpretation of the terms of contract cannot be a ground to assail the award under Section 34(2)(a)(iv), on the premise that the aforesaid misinterpretation would include going beyond the terms of the contract. In a case where it could be fairly comprehended that the dispute is within the arbitration agreement or the matters referred to the decision of the arbitrator, it would not be permissible to say that the arbitrator has wandered outside the contract and dealt with matters not allotted to him.

(iv) In other words, we have to keep in mind the scope of inquiry permissible under Section 34(2A) of the Act’ 1996 which clearly mandates that the award can be held to be suffering from patent illegality only if the court finds such illegality appearing on the face of the award.

Analysis and findings:-

108. In light of the above legal principles, in the facts of the present case, we are required to have a look to the terms and conditions of the contract namely the Business agreement

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which lays down (i) scope of agreement; (ii) period of agreement; (iii) volume requirements and guarantee; (iv) pricing for coating and painting of LSBs, (v) Clause 4, the Clause to pay the fixed cost for differential quantity, as against the minimum assured quantity of a year indicated in Clause 3 (volume requirement clause), payment terms as agreed thereunder. For the sake of ready reference, these clauses of the contract are extracted hereinbelow:

> ***"1. Scope of Agreement:***
>
> *SKF Intends to get their Large Size Bearings coated and painted from ATS in the size range of outer diameter 1500 mm to 2500 mm starting from June-2009 and diameter 1500 mm to 3500 mm starting from April-2011. ATS agrees to setup facility and invest in the equipments to process the said components as per specifications supplied by SKF. ATS shall match the ramp up plans of SKF and supply the processed bearings as per volumes indicated in the section of Volume Requirements indicated in Point No. 3 here in after.*
>
> *AS ATS are investing and setting up the factory mainly for SKF, SKF will give all the quantities to ATS for job work and not to any other vendors and not to do job work in-house, except doing coating - under the seal, as per requirement.*
>
> *ATS can take other party's job work for coating and painting except large size bearings. If quantity increases, then also ATS will have the first right/chance of refusal/acceptance and the necessary capacity enhancement will be done by ATS. SKF will give well in advance intimation for such quantity increase. However if ATS expresses its inability to meet the SKF demands inspite of giving sufficient time for development, as mutually agreed (3 months prior to any changes), then SKF will be at a liberty to get this done from other service provider.*

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2. Period of Agreement:

The period of this agreement will be from the date of signing the Agreement and will be Valid till 31st March 2014. It will be renewable by mutual agreement of both the parties 2 months prior to the due date of expiry.

3. Volume Requirements & Guarantee:

SKF guarantees minimum volume off take as indicated below :-

June 2009 to March 2010: 1,375 Bearings (*)
April 2010 to March 2011: 3,900 Bearings (*)
April 2011 to March 2012: 6,000 Bearings (*)
April 2012 to March 2013: 7,500 Bearings (*)
April 2013 to March 2014: 7,500 Bearings (*)

(*) - Variation in quantities to be within ±5%.

4. Pricing:

I. Prices are indicated in the offer dated 19th Sept, 2008 and is based on technical inputs provided till date. Any new Information impacting commercial and technical performance will call for suitable changes in the prices.

Year	***Qty (inclusive of both 106490 and 106480 bearings)***	***Basic price for Coating and painting of bearing no. 106490***	***Basic price for Coating and painting of bearing no. 106480***
June 2009 to March 2010	*1375*	*Rs. 44,900*	*Rs.54,600*
April 2010 to March 2011	*3900*	*Rs.41,900*	*Rs.50,960*
April 2011 to March 2012	*6000*	*Rs.40,250*	*Rs.49,000*
April 2012 to March 2013	*7500*	*Rs.37,400*	*Rs.45,500*
April 2013 to March 2014	*7500*	*Rs.37,400*	*Rs.45,500*

Taxes (VAT, Service Tax, Excise duty etc.) as applicable, if any levied by any competent authority from time to

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time to be borne by SKF.

II. In case, if SKF fails to take the minimum assured quantity for a year as indicated in "Volume Requirements clause", SKF shall pay only the fixed cost for the differential quantity, i.e., 60% of the average basic prices of coating and painting the bearings.

III. Payment terms as agreed are stated below:

1st Year - Payment against delivery and acceptance of processed bearings.
2nd Year - Payment within 15 days of receipt and acceptance of processed bearings.
3rd Year onwards - Payment within 30 days of receipt and acceptance of processed bearings."

109. From a bare reading of the Clause 1, namely, the scope of agreement, it discerns : (i) the respondent SKF intended to get their LSBs of specific designs coated and painted from claimant ATS, starting from June 2009 for diameter 1500 mm to 2500 mm and for diameter 1500 mm to 3500 mm starting from April 2011; (ii) the ATS agrees to setup facility and invest in the equipments to process the said components, as per specification supplied by SKF; (iii) as ATS was investing and setting a factory mainly for SKF, SKF assured to give all the quantities to ATS for job work and not to any other vendors. Simultaneously, the ATS could have taken other parties for job work for coating and painting, except large size bearings promised to claimant; (iv) ATS agreed to match the ramp up plans of SKF and supply the processed bearings as per volumes indicated in point no. 3; (v) if quantity increases then also ATS will have a first right / chance of refusal/ acceptance and the necessary capacity enhancement will be

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done by ATS. SKF will give well in advance information for such quantity increase; (vi) if ATS expresses its inability to meet the SKF demands inspite of giving sufficient time for development, as mutually agreed, then SKF will be at a liberty to get the job done from other service provider.

110. From the scope of agreement, as aligned in clause 1 of the Business agreement, it is evident that there were reciprocal promises made by the parties to bind each other for the job work, clearly providing that the SKF is bound to give all quantities to ATS for job work for the reason that ATS agreed to set up facility and invest in the equipment mainly for SKF. The further clauses about period of agreement, volume requirements & guarantee and to pay the fixed cost for the differential quantity at 60 %of the average basic prices of coating and painting the bearings, were dependent upon clause 1, which clearly laid down the terms and conditions of the agreement. Nowhere in the agreement, there is any indication of any liability or responsibility of the respondent - SKF to facilitate ATS in setting up its factory in any manner. The terms and conditions providing for reciprocal promises made by the parties are clear to the extent that ATS will set up the factory by making investment to process the LSBs as per specifications supplied by SKF and maintain the timeline to supply the processed bearings. Reciprocating the investment made by the ATS in setting up the factory, SKF will give entire quantity of LSBs to ATS and promised for minimum assured quantity for job work in a year as indicated in Clause 3, failing which SKF shall pay the fixed cost for the

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differential quantity.

111. From the careful reading of the agreement, we do not find any ambiguity in the terms of the contract so as to apply any external aid to find out the rights and obligations of the parties under the Business agreement.

112. The law in the matter of interpretation of contract is fairly well settled that though in the process of interpretation of the terms of the contract, the Court can frequently take assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or in receiving performances under it. The parties can, by mutual agreement, make their own contracts and they can also by mutual agreement remake them. The process of practical interpretation and application, however, cannot be regarded by the parties or by the Courts as a remaking of the contract. It should be considered merely a further expression by the parties of the meaning that they give or have given to the terms of their contract previously made. There is no good reason why the Courts should not give great weight to these further expressions by the parties, in view of the fact that they still have the same freedom of contract that they had originally. ***[Reference: para '11' The Godhra Electricity Co. Ltd. and Another[15]]***.

113. However, the extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning and that evidence of the acts done

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under it is a guide to the intention of the parties, particularly, when acts are done shortly after the date of the instrument ***[*Reference: para '18' *The Godhra Electricity Co. Ltd.*[15]**. In the case of an ambiguity, judicial notice may be taken of the way in which the parties themselves have interpreted their rights and duties under the contract.

114. The inquiry as to what was the intention of the parties is to be gathered from the language used. If the meaning of the word or phrase or sentence is clear, extrinsic evidence is not admissible. It is only when there is latent ambiguity that extrinsic evidence in the shape of interpreting statement in which both parties have concurred should be admissible. It may so happen that the parties themselves might not have been clear as to the meaning of the word or phrase when they entered into the contract. Unanticipated situation might arise or come into the contemplation of the parties subsequently which would sharpen their focus and any statement made by them which would illuminate the darkness arising out of the ambiguity of the language should not be shut out. In the case of an ambiguous instrument, there is no reason why subsequent interpreting statement should be inadmissible (**Reference: *The Godhra Electricity Co. Ltd.*[15] *paragraph '16').***

115. In ***Indian Oil Corporation Limited Vs. Shree Ganesh Petroleum Rajgurunagar*[28]** the Apex Court has held that the arbitral tribunal being a creature of contract, is bound to act

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in terms of the contract under which it is constituted. An arbitral tribunal is entitled to interpret the terms and conditions of a contract while adjudicating a dispute. An error in interpretation of a contract in a case where there is a valid and lawful submission of arbitral disputes to an arbitral tribunal is an error within jurisdiction. The court does not ordinarily interfere with interpretation made by the arbitral tribunal of a contractual provision, unless such interpretation is patently unreasonable or perverse. Where a contractual provision is ambiguous or is capable of being interpreted in more ways than one, court cannot interfere with the arbitral award only because the court is of the opinion that another possible interpretation would have been a better one. However, an arbitral tribunal, or for that matter, the Court cannot alter the terms and conditions of a valid contract executed between the parties with their eyes open.

116. In ***Indian Oil Corporation Limited***[28]***,*** there were two distinct agreements, namely, the lease agreement and the dealership agreement. Under the lease agreement, a premises was taken on lease by the appellant Indian oil corporation from the respondent for a term of 29 years pursuant to which a deed of lease was duly registered, in order to set up a retail outlet for sale of its petroleum products. Under a separate and distinct dealership agreement executed between the same parties, the respondent was appointed a dealer of the retail outlet. During a routine inspection, certain irregularities were noticed with regard to functioning of the retail outlet of which the respondent had been appointed dealer. A show cause

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notice was issued, supplies were suspended and the dealership agreement was terminated. The arbitration proceedings were initiated challenging the order of termination of dealership agreement by the respondent and a prayer for damages and alternative prayer for amendment of lease agreement to enhance the monthly rent of the premises were made.

117. The learned Arbitrator while rendering the award had held the termination of dealership order as valid, legal and binding upon the parties and that the claimant had no entitlement for restoration of dealership. However, while observing that there shall be no income of dealership to the claimant other than the lease which is too low to survive, the learned Arbitrator directed that the claimant was entitled to get some reasonable increase in the monthly lease rent of the land for survival.

118. It is this arbitral award which was subject matter of challenge on the ground of suffering from patent illegality both under Sections 34 and 37, where challenge was upturned by the District Court and the High Court. The Apex Court has categorically observed that the lease agreement and the dealership agreement were distinct agreements, independent of each other. The disputes under the lease agreement were not referable to arbitration under the clauses therein. The claimant / respondent therein invoked the arbitration clause under the dealership agreement and the sole arbitrator had no authority and / or jurisdiction to

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adjudicate any dispute pertaining to the lease agreement. It was, thus, held that the decision enhancing the lease rent is patently beyond the scope of submission to arbitration. It was observed that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the lease agreement. The role of the arbitrator was to arbitrate within the terms of the contract and he had no power apart from what the parties had given him under the contract. It was not open to the arbitrator to rewrite the terms of the contract and award a higher rate of lease rent. In doing so, the arbitrator has travelled beyond the contract and, as such, would be acting without jurisdiction.

119. In ***PSA Sical Terminals (P) Ltd.***[26] while answering the question as to whether the arbitral tribunal was justified in construction of the contract, by noticing a change in law, it was noticed that from the documents placed on record that the Court will have to take into consideration the conduct of the parties and their intention as could be gathered from the said material.

120. The Apex Court has referred in paragraph '59' therein, the observation in paragraph '16' in ***MMTC Ltd***[27] which read as under:-

> *"59. In this respect, it will be relevant to refer to para 16 in MMTC Ltd. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293] , which reads thus : (SCC p. 168)*

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> *"16. It is equally important to observe at this juncture that while interpreting the terms of a contract, the conduct of parties and correspondences exchanged would also be relevant factors and it is within the arbitrator's jurisdiction to consider the same. [See McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] ; Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission [Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission, (2003) 8 SCC 593] and D.D. Sharma v. Union of India [D.D. Sharma v. Union of India, (2004) 5 SCC 325] .]"*

121. Proceeding further, the Apex Court therein has also put a word of caution to itself by noticing that neither under Section 34 nor under Section 37 of the Act' 1996, the Court is entitled to reappreciate the evidence and that the said limitation would be equally applicable to the Apex Court also. However, upon an exhausted consideration of the agreement entered into between the parties and the material on record, it was held therein that the arbitral tribunal has thrust upon a new term in the agreement between the parties against the wishes of one of the parties and the "royalty payment method" has been totally substituted by the arbitral tribunal, with the "revenue sharing method" noticing the change in law initially applicable on the date of execution of the agreement. The award has, thus, created a new contract for the parties by unilateral intention of one party as against the intention of the other party.

122. It was, thus, concluded that the fundamental principles of justice as held by the Apex Court in ***SSangyong***

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Engineering & Construction Co. Ltd.[2] has been breached, by unilateral addition or alteration of a contract foisted upon an unwilling party. It was noted that in ***SSangyong Engineering & Construction Co. Ltd.***[2], the Apex Court has held that a party to the agreement cannot be made liable to perform something for which it has not entered into a contract. It was held in ***PSA Sical Terminals (P) Ltd.***[26] that:-

> *"85.....In our view, rewriting a contract for the parties would be breach of fundamental principles of justice entitling a court to interfere since such case would be one which shocks the conscience of the court and as such, would fall in the exceptional category."*

123. The observations in paragraphs '84', '87', '88', '89' and '90' in ***PSA Sical Terminals (P) Ltd.***[26] are also relevant to be noted hereinunder:-

> *"84. After referring to various international treaties on arbitration and judgments of other jurisdictions, this Court in Ssangyong Engg. & Construction Co. Ltd. [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , observed thus : (SCC pp. 199-200, para 76)*
>
> > *"76. However, when it comes to the public policy of India, argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the agreement continued to be applied till February 2013 — in short, it is not correct to say that the formula under the agreement could not*

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be applied in view of the Ministry's change in the base indices from 1993-1994 to 2004-2005. Further, in order to apply a linking factor, a circular, unilaterally issued by one party, cannot possibly bind the other party to the agreement without that other party's consent. Indeed, the circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the circular does not and cannot apply. This being the case, it is clear that the majority award has created a new contract for the parties by applying the said unilateral circular and by substituting a workable formula under the agreement by another formula dehors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment.

87. It has been held that the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction.

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> *88. It will also be apposite to refer to the following observations of this Court in Army Welfare Housing Organisation v. Sumangal Services (P) Ltd. [Army Welfare Housing Organisation v. Sumangal Services (P) Ltd., (2004) 9 SCC 619] : (SCC p. 646, para 43)*
>
> > *"43. An Arbitral Tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its power ex debito justitiae. The jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject-matter of reference."*
>
> *89. It has been held that an Arbitral Tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its powers ex debito justitiae. It has been held that the jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject-matter of reference.*
>
> *90. In that view of the matter, we are of the considered view, that the impugned award would come under the realm of "patent illegality" and therefore, has been rightly set aside by the High Court."*

124. In a three Bench judgment of the Apex Court in ***State of Chhattisgarh v. SAL Udyog (P) Ltd.***[29], it was held that failure on the part of the Arbitrator to decide in accordance with the terms of the contract governing the parties, would certainly attract "patent illegality ground", as the said oversight amounts to gross contravention of Section 28(3) of Act' 1996, that enjoins the arbitral tribunal to take into account the terms of the contract while making an award.

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125. The said principles are also echoed in ***Sepco Electric Power Construction Corporation***[16] relied by the learned Senior Counsel for the respondent. The Apex Court therein has observed that time and again, the Apex Court has emphasized that the Arbitrator lacks the power to deviate from or to reinterpret the terms of the contract while making an award. The award must be within the parameters of the agreement entered into between the parties. Any deviation from the mandate of Section 28(3) of the Act' 1996 is a valid ground for lambasting an arbitral award. It was observed therein that the contract is paramount to the working, scope, and interpretation for the purpose of an award by the Arbitrator. The thumb rule of interpretation is that the documents forming written contract should be read as a whole and the clauses thereof so far as possible, as mutually explanatory. It was underlined that due to the existence and powers of an Arbitrator, it being a creature of the agreement between the parties, it is the terms of the contract which serves as a fundamental basis for the procedure to be adopted by the arbitral tribunal. The concerned Arbitrator is restricted to the terms of the contract thereof and cannot go outside its scope or what is, *per se,* specified therein.

126. Further, referring to another three Judge Bench judgment in ***Union of India v. Bharat Enterprise***[30] it was noted in ***Sepco Electric Power Construction Corporation***[16] that "a disregard to the specific provisions of

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the contract would incur wrath of the award being imperiled. This position cannot be in the region of dispute".

127. It was noted therein that the Arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction.

128. In the facts of the case, in ***Sepco Electric Power Construction Corporation***[16], upon perusal of the contractual provisions, the Apex Court goes on to say that the basic and fundamental principles of Indian legal system and the provisions of Act' 1996 mandated that no attempt can be made to frustrate the patent or latent commercial wisdom of the parties, demonstrated through the very terms agreed by the parties while curating their arbitration agreement. The interference under the jurisprudence laid down under Sections 34 and 37 of the Act' 1996 is narrow. However, this jurisprudence also clarifies that the principles of natural justice and the public policy of India are parameters paramount and cannot be ignored or sidelined in an attempt to frustrate the patent or latent commercial wisdom of the parties to seek an alternative means of dispute resolutions.

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129. It was further observed that such issues attack the root of the Indian legal system and the Courts cannot be made a mere spectator to such gross violations. It was held that the direct omission of the mandate of Sections 18 and 28(3) of the Act' 1996 would be an attack on "the fundamental policy of Indian law" allowing for reappreciation of the arbitral award and the Division bench of the High Court therein cannot be faulted with on the ground of having exceeded its jurisdiction under Section 37 of the Act' 1996. It was, thus, held that the Division Bench of the High Court after considering all the material placed on record and particularly the relevant statutory provisions and the law laid down on the issue by the Apex Court, has found the award to be one which shocks the conscience of the Court, on various aspects that the arbitral award was in violation of "the fundamental policy of the Indian law", the principles of natural justice and most basic notion of justice. The Apex Court has specifically noted that the arbitral tribunal has awarded certain claims which were neither pleaded nor argued before it and that the arbitral tribunal had modified the contract between the parties by holding in favour of one party about due waiver of notice but denied the same to the other and, as such, discriminatory treatment was meted out to the other party.

130. The observations in paragraph '125' in ***Sepco Electric Power Construction Corporation***[16] are relevant to be extracted hereinunder:-

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> *"125. We summarize the aforesaid findings as, despite the limited scope of interference, the Division Bench was obligated to have interfered with the arbitral award owing to fulfilment of conditions mandating a reappreciation of the merits of the award under Section 34 of the 1996 Act. Non-interference and non-setting aside of the award would have hampered upon the fundamental policy of Indian law as well as the public policy of India. The Arbitral Tribunal, itself being a creature of the EPC agreements, could not have travelled beyond its mandate to rewrite the constitution of its own existence through observing the condition of notice having been waived. It further discriminated between the parties, showcasing violation of the provisions of the 1996 Act. As this arbitral award could not have been severed owing to the aforesaid reasons, thereby it is apt to set aside the whole arbitral award."*

131. Keeping in mind the above, we are required to answer the singular issue as to whether the Commercial Court in the exercise of its jurisdiction under Section 34 of the Act' 1996 has committed an error in interfering with the arbitral award on the ground that the learned Arbitrator has travelled beyond its mandate to rewrite the terms of the contract governing the parties and thus acted without jurisdiction.

132. The ancillary questions would be as to (i) whether the award is a result of oversight with the terms of the contract governing the parties amounting to gross contravention of Section 28(3) of the Act' 1996 and can, thus, be said to suffer from patent illegality under Section 34(2A), and jurisdictional overreach under Section 34(2)(a)(v) of the Act' 1996; (ii) whether the imposition of a new term of providing approach road amounts to contravention of the fundamental policy of

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Indian law as contemplated under Section 34(2)(b)(ii), as held by the Commercial Court in Section 34 proceedings.

133. On a conspectus facts of the case, as noted hereinbefore, the Business agreement is completely silent about any promise or even an assurance given by the respondent or any obligation of the respondent under the Business agreement to provide access road from its land to facilitate the claimant to set up its factory.

134. Section 2 of the Indian Contract Act, 1872 provides the meaning to the words and expression “proposal”, “ promise”, “consideration for the promise”, “agreement”, “reciprocal promises” and “contract” as a guiding principle, unless a contrary intention appears from the context. The meaning as assigned to the word “proposal” therein is that when one person signifies to another his willingness to do, with a view to obtaining the assent of the other to such act, he is said to make a proposal. The person to whom the proposal is made when signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted becomes a promise.

135. The person making the proposal is called the “promisor” and the person accepting the promised proposal is called the “promisee”. When, at the desire of the promisor, the promisee or any other person has done, or promises to do something, such act or promise is called a consideration for the promise. Every promise and every set of promises, forming the consideration for each other, is an agreement. An agreement

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enforceable by law is a contract. Promise which form the consideration or part of the consideration for each other, are called reciprocal promises.

136. Thus, until a proposal is accepted, it will not give rise to an agreement. If there is no agreement, there was no contract between any party. There is no promisor or promisee and the desire expressed remained a proposal only. In such a situation there is no question of breach.

137. In the instant case, the learned Arbitrator while holding that it was the respondent who has failed to provide the approach road which has resulted in non setting up the factory by the claimant has given much emphasis on the deliberations between the parties before signing of the Business agreement about the requirement to set up factory nearby the factory of the respondent at Bavla. The burden was laid on the respondent for non-providing of the approach road to access the land purchased by the claimant, after signing of the Business agreement, based on the previous communications between the parties which do not indicate any promise having been made by the respondent to any proposal of the claimant for providing access road, prior to the execution of the Business agreement.

138. The learned Arbitrator further giving undue emphasis to the fact that the claimant had his own factory at 6, Pranami Estate, Odhav, Ahmedabad where he was doing his business, has said that the claimant had agreed to set up a new factory

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near the factory of respondent at Bavla, because the respondent wanted the claimant to set up a new factory near the factory of the respondent at Bavla. He, however, has completely sidelined the admitted fact that the claimant had agreed to invest by setting up a new factory as its already existing factory was not equipped to carry out the job work of large size bearing (LSBs) of the specifications agreed. It seems that the claimant had agreed to make investment in setting up a new factory on the land procured adjacent to the respondent's Bavla plant on the assurance by the respondent that it will provide entire job work of coating and painting of LSBs, as agreed under the contract, to the claimant as per the guaranteed volume. But there was no agreement or even a promise or assurance by the respondent that it will aid or assist the claimant in establishing its factory by providing approach road from the respondent's land by way of lease or on sale, or even otherwise.

139. Any such promise or assurance even if may be discerned from the e-mail exchanges between the parties prior to the execution of the Business agreement on 17.10.2008, but as no such term was incorporated in the Business agreement, which is a written contract signed by the parties with open eyes, the assurance, if any, cannot be elevated to the status of an agreement or a contract so as to bind the respondent to carry out the promise, failure whereof would amount to breach of the Business agreement.

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140. The communications between the parties subsequent to the Business agreement for modification of Business agreement as proposed by the respondent with the possible resolution for the access road will not throw any light on the obligations of the parties under the Business agreement, inasmuch as, no agreement had been arrived at.

141. It is a case where the language of the contract is unambiguous, clear and express as to the reciprocal promises made by the parties. The first step therein was required to be completed by the claimant by setting up its factory by June' 2009 as per the time line agreed under the contract. Time may not be essence of the contract but the obligations of the respondent to provide large size bearing (LSBs) to the claimant would arise only upon the claimant having set up its factory / facility and carried out the trial run to the satisfaction of the respondent.

142. The issue that the respondent had lost its biggest customer Suzlon and was not in a position to provide Slewing bearings (large scale bearings (LSBs)) for coating and painting by the claimant as agreed under the Business agreement was an extreneous consideration upon which undue emphasis has been given by the learned Arbitrator. Suffice it to say that the occasion for providing the job work did not arise as the claimant did not set up its factory / facility to carry out the job work. There was, therefore, no question to consider the aspect of fizzling out of the Suzlon order.

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143. The present is the case of frustration of the contract where the subsequent efforts made by the parties to modify the Business agreement in order to carry out their reciprocal promises also did not materialise. The finding of the learned Arbitrator that the claimant was ready and willing to perform its part of the contract and it was the respondent who had committed the breach of Business agreement, is based on wholly irrelevant considerations. The communications between the parties prior to and subsequent to the execution of the Business agreement dated 17.10.2008 have no bearing on the reciprocal promises aligning rights and obligations of the parties transcribed in the Business agreement.

144. By holding that the respondent had agreed to provide approach road to the claimant and non providing of the same had obstructed / prevented the claimant from setting up the factory, i.e. from performing the contractual obligation of the claimant, the learned Arbitrator has thrust upon a new liability upon the respondent unilaterally as against its intention. That being the case, it is clear that the award had created a new contract for the parties on unilateral intention of the claimant against the intention of the respondent. A fundamental principle of justice has been breached by unilateral addition or alteration of the contract foisted upon an unwilling party. As held in ***SSangyong Engineering & Construction Co. Ltd.***[2] such a course of conduct would be contrary to the fundamental principles of justice as followed in this country and shocks the conscience of the Court. In the

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instant case, the learned Arbitrator having travelled beyond the contract, had acted without jurisdiction. In that view of the matter, the impugned award would fall under the realm of "patent illegality", and therefore, has been rightly set aside by the Commercial Court.

145. The learned Senior Counsel for the claimant has also argued that the issue of providing approach road was very much a subject matter of the dispute referred to arbitration and the award cannot be said to be suffering from the vice of jurisdiction. The reason urged is that the arbitration proceedings were initiated after an application under Section 8 of the Act' 1996 was filed by the respondent before the civil court wherein the respondent stated that all parts of the suit claim would fall within the arbitration agreement signed by the parties. The submission is that the issue of approach road was submitted to the Arbitrator by the parties while making the reference after the respondent made such a statement in the civil suit. The respondent, therefore, cannot be permitted to turn around to say that the adjudication of the dispute pertaining to the approach road falls outside the jurisdiction of the Arbitrator. It was submitted that the Arbitrator in deciding the issue of obligation of the respondent for making available access road, cannot be said to have exercised his jurisdiction beyond the reference. The said issue was very much contemplated by and /or falling within the terms of submission to Arbitration, hence in deciding the same the learned Arbitrator cannot be said to have wandered outside the contract. The submission is that, in any case, the

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Arbitrator is not wedded to the contract. Reliance is placed on ***Sukanya Holdings (P) Ltd.***[5] to substantiate this submission.

146. To deal with this submission, suffice it to say that the Arbitrator is a creature of the contract. The role of the Arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. The jurisdiction of the Arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject matter of reference. As noted in ***PSA Sical Terminals (P) Ltd.***[26] an arbitral tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its power *ex debito justitiae.*

147. The learned Arbitrator, in the instant case, was appointed under a business contract, he was, thus, required to adjudicate the dispute relating to approach road, once raised, while confining himself within the four corners of the said agreement. There cannot be a dispute about the legal position that it is well within the jurisdiction of the Arbitrator, while interpreting the terms of a contract, to take into account the conduct of parties and correspondences exchanged, which would be relevant factors. Under no circumstance, can any court interfere with an arbitral award on the ground that it is a result of wrong construction of the contract by the Arbitrator unless and until the Court reaches at a conclusion that the concerned Arbitrator has committed a jurisdictional

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error in doing so.

148. In a case where the Arbitrator has construed the contract in a manner that no fair minded or reasonable man would do, would be a case of error committed by the learned arbitrator within his jurisdiction and has to be tested within the scope of “patent illegality” under Section 34(2A) of the Act’ 1996. However, in a case where the learned Arbitrator made an award in a manner that it has created a new contract for the parties, foisting upon a new term in the agreement between the parties against the wishes of one of the parties, it would be a case where the learned Arbitrator can be said to have acted without jurisdiction by wandering outside the contract.

149. The present case falls in the latter category, and hence the Commercial Court cannot be said to have erred in holding that the award suffers from the vice of jurisdictional overreach under Section 34(2)(a)(iv) and patent illegality under Section 34(2A) of the Act’ 1996.

150. No error can be attached to the reasoning of the Commercial Court that the learned Arbitrator has travelled beyond the express terms of the Business agreement dated 02/17.10.2008, by introducing obligations regarding access road and Suzlon orders which are absent from the written contract and there being no contractual foundations, the award suffers from patent illegality apparent of the face of the record.

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151. Adding to what has been held by the Commercial Court, it is observed that rewriting a contract for the parties would be breach of the fundamental principles of justice entitling the Court to interfere. Since the present case would fall in the said exceptional category, the one which shocks the conscience of the Court, no error can be said to have been committed by the Commercial Court in setting aside the arbitral award.

152. On the issue of award of damage, suffice it to say that the present is a case where the contract itself was frustrated as the claimant failed to set up the factory. There was no occasion for the respondent to commence supply of LSBs for the job work of coating and painting. The offer given by the respondent to modify the terms of the Business agreement because of lapse of time in setting up the factory by the claimant and to resolve the request of the claimant to provide approach road from the respondent's land, which was proposed to be incorporated in the new contract, was refused by the claimant or could not be materialized. Even after the notice given by the respondent on 06.04.2010 accusing the claimant of having committed breach of the Business agreement, several meetings were held and letters were exchanged to resolve the issue but to no avail. A new offer given by the respondent for Enercorn bearings for coating in July-August, 2010 also did not materialize.

153. It is, thus, evident that in view of the supervening

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circumstances, it became impossible for the parties to perform their reciprocal promises under the contract. The present case being a case of frustration of the contract, none of the clauses of the contract could have been invoked to claim damages or any compensation by the claimant as agreed under the contract. Invoking Clause 4.II of the Business agreement to award damages to the claimant by the learned Arbitrator, thus, was impermissible. The decision of the learned Arbitrator, therefore, suffers from an error apparent on the face of the record.

154. As we reach at an irresistible conclusion that Clause 4.II could not have been invoked by the claimant to seek compensation or damages attributing failure of the respondent when the claimant failed to perform its obligation leading to the frustration of the contract, we need not to deliberate on the scope of Sections 73 and 74 of the Indian Contract Act, 1872.

155. We, therefore, conclude by saying that we do not find any reason to burden this judgment dealing with the extensive arguments of the learned Senior Counsels for the parties on the question of award of damages / compensation, on the principles of loss of profit or loss of profitability under Sections 73 and 74 of the Indian Contract Act, 1872.

156. The award of damages or compensation is whimsical and absurd resulting in a windfall and bounty to the claimant at the expense of the respondent. The Commercial Court has

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rightly held that the award on damages suffers from multiple infirmities including that it is founded on a non-existent contractual obligation.

157. The award in question, in totality not only suffers from jurisdictional overreach under Section 34(2)(a)(iv) and patent illegality under Section 34(2A) of the Act' 1996, but also has been rightly held to be in conflict with the fundamental policy of Indian law, suffering from the vice of Section 34(2)(b)(ii) of the Act' 1996.

158. For the reasons discussed above, no interference is called for in the judgment and order dated 09.10.2025 passed by the Additional District Judge, Ahmedabad (Rural) in Commercial Civil Miscellaneous Application No.19 of 2024. The appeal stands dismissed. No order as to costs.

(SUNITA AGARWAL, CJ.)

(SANJEEV J.THAKER, J.)

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