Reserved On : 07/05/2026
Pronounced On : 02/07/2026

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 4935 of 2023
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2023
In R/FIRST APPEAL NO. 4935 of 2023
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2024
In R/FIRST APPEAL NO. 4935 of 2023

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL
and
HONOURABLE MR.JUSTICE D.N.RAY

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Approved for Reporting	Yes	No

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INDORE SAHKARI DUGDH SANGH & ANR.
Versus
ASHUTOSH SHARMA - DIRECTOR & ANR.

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Appearance:
R P PANSARI(7439) for the Appellant(s) No. 2
MR.DHAVAL C.DAVE, SR.ADVOCATE WITH MR. UDIT N VYAS, ADVOCATE WITH MR. R.PANSARI, ADVOCATE (9255) for the Appellant(s) No. 1
MR. R.S.SANJANWALA, SR.ADVOCATE WITH MR ANKIT SHAH(6371) for the Defendant(s) No. 1

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CORAM: **HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL**
and
HONOURABLE MR.JUSTICE D.N.RAY

CAV JUDGMENT
(PER : HONOURABLE MR.JUSTICE D.N.RAY)

1. Heard Mr. Dhaval C. Dave, learned Senior Advocate with Mr. Udit N. Vyas, learned Advocate and Mr. R. P. Pansari, learned Advocate for the appellant and Mr. R. S. Sanjanwala,

learned Senior Advocate with Mr. Ankit Shah, learned Advocate for the respondent.

2. The present appeal arises out of proceedings initiated under the provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "**the Act, 1996**"). The appellant herein was the original applicant, whereas the respondents were the original opponents in Commercial Civil Miscellaneous Application No. 539 of 2021 instituted before the Commercial Court at Ahmedabad.

3. The appellant had challenged an arbitral award dated 16.07.2021 passed by the learned Sole Arbitrator by filing an application under Section 34 of the Act, 1996. The Commercial Court, Ahmedabad, by judgment and order dated 02.03.2023, dismissed the said application. Aggrieved thereby, the appellant has preferred the present appeal under Section 37 of the Act, 1996.

4. Brief facts leading to this appeal are as under:-

4.1 The appellant issued a Notice Inviting Tender (NIT) bearing No. ISDF/Engg/Civil/12-13 dated 29.09.2012 for execution of civil, structural, road and allied works, including supply of labour, materials and ancillary services, in connection with the construction and completion of a new dairy plant for Indore Dugdh Sangh. Pursuant to the said tender notice, several bids were received by the appellant. According to the appellant, one Mr. S.K. Sodani was found to be the highest responsive bidder; however, as he allegedly did not evince interest in undertaking the work, the contract came to be awarded to respondent No.1, who was stated to be the second highest responsive bidder. A work order dated 23.02.2013 was thereafter issued in favour of respondent No.1.

4.2 The work was required to be executed in accordance with the terms and conditions contained in the tender documents and the work order. Subsequently, an addendum agreement dated 30.03.2013 was also executed between the parties. It is not in dispute that respondent No.1 commenced the work and, during the course of execution, raised running account bills from time to time.

4.3 It is the case of the appellant that, up to the fourth running account bill, respondent No.1 had not raised any claim towards reimbursement of service tax and such a claim was first made in the fifth running account bill and the said claim was not accepted in view of the terms governing the contract. It is further the appellant’s case that, despite certain delays attributable to respondent No.1, extensions and relaxations were granted from time to time. The original contractual period contemplated completion of the project on or before 22.03.2014. However, the work ultimately came to be completed on 30.11.2017.

4.4 It is the further case of the appellant that having regard to the delay in completion of the project, liquidated damages/penalty became recoverable from respondent No.1 under the terms of the contract. The amount of such penalty was initially assessed at Rs.1,15,50,709/-. It is stated that certain representations made on behalf of respondent No.1 regarding delay in release of payments were considered by the appellant and, accordingly, the computation of penalty was revised.

4.5 Disputes subsequently arose between the parties in relation to payment of running account bills, reimbursement of service tax and other claims arising out of the execution of the contract. Respondent No.1 invoked the arbitration clause contained in Clause 68 of the tender conditions by communication dated 31.08.2019. Thereafter, the disputes were referred to arbitration and came to be adjudicated by a learned Sole Arbitrator.

4.6 Upon conclusion of the arbitral proceedings, the learned Sole Arbitrator passed an award dated 16.07.2021 whereby various claims preferred by respondent No.1 were partly allowed. Under the award, respondent No.1 was held entitled to recover an aggregate amount of Rs.1,97,78,235/- under different heads. The award also granted interest on certain components of the claim at the rates specified therein, together with costs.

4.7 Being dissatisfied with the arbitral award, the appellant instituted Commercial Civil Miscellaneous Application No.539 of 2021 before the Commercial Court, Ahmedabad, under Section 34 of the Act, 1996, seeking to set aside the award. By judgment and order dated 02.03.2023, the Commercial Court dismissed the said application and upheld the award.

4.8 It is averred by the appellant that, respondent No.1, through its advocate, issued a notice dated 31.08.2019 seeking appointment of an arbitrator under Clause 68 of the tender conditions and subsequently proposed the name of the Sole Arbitrator by notice dated 05.11.2019. In response, the appellant addressed a communication dated 14.11.2019, asserting, *inter alia*, that under its bye-laws the Divisional Commissioner, Indore Division, functioned as the ex-officio Chairman of the organisation and was the authority competent to act as arbitrator in disputes arising from contractual transactions. The appellant therefore questioned the validity of the appointment of the learned Sole Arbitrator and raised objections regarding his jurisdiction. An application to that effect was filed before the learned Arbitrator on 02.02.2020. The said objection came to be rejected by the learned Arbitrator by order dated 01.03.2020.

4.9 It is further the appellant's case that, during the arbitral proceedings, the learned Arbitrator observed that although the agreement conferred jurisdiction upon the courts at Ahmedabad and stipulated Ahmedabad as the seat of arbitration, it was agreed that the arbitral sittings would be conducted at Indore for reasons of convenience, while jurisdiction of the courts at Ahmedabad would remain unaffected. The appellant has raised a grievance with regard to certain procedural aspects of the arbitral proceedings. Thereafter, the matter was taken up before the sole Arbitrator on 30.04.2021 and witnesses of claimant were examined, and thereafter, the matter was directed to be listed on 29.06.2021. It is stated that after examination of the claimant's witnesses, the matter was listed for further proceedings, and affidavits of Mr. Rajendra Singh and Mr. Shivaji Rao Jadhav were tendered on behalf of the appellant on the said date i.e. 29.06.2021.

4.10 The learned Sole Arbitrator observed that the affidavits filed under Order XVIII Rule 4 of the Code of Civil Procedure

(CPC) were not duly attested and, therefore, could not be treated as evidence and the right of respondent to lead evidence was closed on 30.06.2021. The learned Sole Arbitrator rendered the said award dated 16.07.2021. The appellant thereafter challenged the award under Section 34 of the Act, 1996.

5. Upon dismissal of the said challenge by the Commercial Court vide judgment and order dated 02.03.2023, the appellant has preferred the present appeal under Section 37 of the Act, 1996, with the following prayers:-

> *(a) Your Lordships may be pleased to allow the Appeal of the Appellant;*
>
> *(b) Your Lordships may be pleased to quash and set aside the impugned judgment dated 02.03.2023 in Comm. C.M.A No.539/2021 passed by the Ld. Judge. Commercial Court, City Civil Court, Ahmedabad and further be pleased to declare/hold that the impugned judgment dated 02.03.2023 in Comm. C.M.A No.539/2021 passed by the Ld. Judge, Commercial Court, City Civil Court, Ahmedabad was without jurisdiction;*
>
> *(c) Your Lordships may be pleased to call for the records and proceedings of Comm. C.M.A No.539/2021 from the file of the Ld. Judge, Commercial Court, City Civil Court, Ahmedabad;*
>
> *(d) Your Lordships may be pleased to pass any further relief or reliefs as deem fit and necessary in facts of the present case in the interest of justice;*

6. Mr. Dhaval C. Dave, learned Senior advocate appearing on behalf of the appellants, at the threshold, raised a preliminary objection going to the root of the matter, contending that the learned Sole Arbitrator manifestly lacked the requisite jurisdiction to adjudicate upon the arbitration proceedings, and consequently, the award directing reimbursement of service tax as well as the grant of interest in favour of the respondent No.1 is legally unsustainable, non-est in law, and liable to be set aside.

6.1 Mr. Dave, learned Senior advocate, further urged that the learned Sole Arbitrator grossly erred in failing to appreciate the material and undisputed fact that there was an inordinate and unjustified delay on the part of the respondent in completion of the project within the stipulated timeline as prescribed under the Work Order. Mr. Dave further submitted that in terms of the express provisions of the tender document, a penalty of Rs. 1,15,50,709/- was duly proposed to be imposed upon the respondent on account of such delay; however, in view of the respondent's counter-claim pertaining to delay occasioned by the appellant in making timely payments, the said penalty was, in the interest of equity, reduced to a nominal sum of Rs. 11,76,000/-, equivalent to one week's levy.

6.2 It was further strenuously argued by Mr. Dave that the learned Sole Arbitrator, in violation of the principles of natural justice and the *audi alteram partem* rule, denied the appellant the fundamental right to be heard by refusing to permit any authorized legal representative of the appellant to remain present during the course of the arbitration proceedings, thereby occasioning prejudice and effectively depriving the appellant of the opportunity to adduce and lead evidence in support of its case. It was further vehemently contended that the affidavits duly filed in evidence under Order XVIII, Rule 4 of the Code of Civil Procedure, 1908 (CPC), were altogether accorded no consideration whatsoever by the learned Sole Arbitrator, rendering the award perverse and contrary to the settled principles of evidence.

6.3 Mr. Dave, learned Senior Advocate, further argued that the claimant-respondent raised the claim for reimbursement of service tax only commencing from the 5th Running Account Bill (RA Bill), which in fact, is a clear and unequivocal admission by conduct on the part of the claimant-respondent, demonstrating that no such entitlement to reimbursement of service tax or interest accruing thereupon existed in its favour.

6.4 Mr. Dave, learned Senior advocate, thereafter, submitted that there was a failure to correctly construe the definition of "Court" as enumerated under Section 2(e) of the Act, 1996, which expressly defines "Court" to mean the Principal Civil Court of original jurisdiction in a district, having the competence and jurisdiction to decide the questions constituting the subject matter of the arbitration.

6.5 Lastly, it was submitted that, in the facts and circumstances of the present case, since the arbitral award was passed at Indore, it is the Principal Civil Court of original jurisdiction at Indore that is exclusively vested with jurisdiction under Section 34 of the Act, 1996, to entertain and decide challenges to the said award.

7. Mr. R. S. Sanjanwala, learned Senior advocate appearing on behalf of the respondent, submitted that a plain reading of

Clause 6E of the Agreement unequivocally obligated appellant No. 1 to reimburse the Service Tax amount upon production of the requisite receipt or challan deposited by the respondent-Contractor in accordance with the applicable rules. Mr. Sanjanwala further contended that Clause 6E also mandated appellant No. 1 to disburse 75% of the value of each bill raised by the respondent within 5 working days of its submission, and the remaining 25% within 20 days thereafter, subject to verification by the appointed Consultant or Competent Authority, being M/s. Perfect Solutions, Engineering Consultant.

7.1 Mr. Sanjanwala further submitted that notwithstanding the persistent delay and default on the part of the appellants, the respondent continued to discharge its contractual obligations. Mr. Sanjanwala detailed the defaults attributable to the appellants, including non-supply of drawings and designs within stipulated timelines, slow bill verification by the Consultant, delayed payments under the running bills in breach of Clause 6C, failure to procure the requisite Pollution Certificate from the Pollution Control Board resulting in suspension of construction work for over 5 to 6 months, and waterlogging rendering the site unworkable. Despite repeated written communications and legal notices dispatched by the respondent bringing these defaults to the appellants' attention, the same were left wholly unaddressed and unanswered.

7.2 Mr. Sanjanwala further averred that the cumulative effect of the appellants' aforementioned defaults occasioned severe financial stringency upon the respondent, as payments due under the running bills were not released within the contractually stipulated timelines, certain amounts were unlawfully withheld without any authority, and Service Tax reimbursements mandated under Clause 6E were altogether denied. Mr. Sanjanwala, thereafter contended that the respondent is, therefore, legally entitled to reimbursement of the Service Tax paid, together with interest thereupon, as well as interest on the delayed payment of running bills and refund of the withheld amounts.

7.3 In respect of the quantum of the claim, Mr. Sanjanwala submitted that Clause 2 of the Agreement establishes a clear hierarchy of precedence among the constituent documents, with the Agreement form taking primacy over all other documents. On the basis of the said contractual framework, he asserted that the respondent is entitled to a sum of Rs. 1,82,88,627/- towards reimbursement of Service Tax along with interest at 24% per annum, Rs. 64,78,952.60/- on account of delayed payment of running bills with interest, and Rs. 1,43,11,209/- in respect of amounts unlawfully withheld by the appellants along with interest thereupon, aggregating to a total claim of Rs. 3,90,78,788.60/-.

ANALYSIS AND FINDINGS :-

8. The contours of a ***"second look"*** at an award under Section 34 of the Act, 1996 are provided in the amended provisions as under :-

> ***"34. Application for setting aside arbitral award.***
>
> *(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*
>
> *(2) An arbitral award may be set aside by the Court only if—*
>
> > *(a) the party making the application [establishes on the basis of the record of the arbitral tribunal that] -*
> >
> > > *(i) a party was under some incapacity, or*
> > >
> > > *(ii) the arbitration agreement is not valid under the law to*

which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

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

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

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

(b) the Court finds that -

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

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, -

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2. - For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law *shall not entail a review on the merits of the dispute.]*

[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

[(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.]"

9. In this regard, it is apposite to refer to the landmark decision of the Hon'ble Apex Court in ***Vidya Drolia and Others v. Durga Trading Corporation***, reported in ***(2021) 2 SCC 1,*** wherein the Hon'ble Apex Court has observed and

held as under:

> *"71. Complexity is not sufficient to ward off arbitration. In terms of the mandate of Section 89 of the Civil Procedure Code and the object and purpose behind the Arbitration Act and the mandatory language of Sections 8 and 11, the mutually agreed arbitration clauses must be enforced. The language of Sections 8 and 11 of the Arbitration Act are peremptory in nature. Arbitration Act has been enacted to promote arbitration as a transparent, fair, and just alternative to court adjudication. Public policy is to encourage and strengthen arbitration to resolve and settle economic, commercial and civil disputes. Amendments from time to time have addressed the issues and corrected the inadequacies and flaws in the arbitration procedure. It is for the stakeholders, including the arbitrators, to assure that the arbitration is as impartial, just, and fair as court adjudication. It is also the duty of the courts at the post-award stage to selectively yet effectively exercise the limited jurisdiction, within the four corners of Section 34(2)(b)(ii) read with Explanation 1 and 2 and check any conflict with the fundamental policy of the applicable law. We would subsequently refer to the **'second look'** 39 principle which is applicable in three specific situations dealing with arbitrability as per the mandate of Section 34 of the Arbitration Act.*
>
> *... ... ...*
>
> *85. The Arbitration Act based upon the UNCITRAL Model Law introduced an entirely new regimen with the objective to promote arbitration in commercial and economic matters as an alternative dispute resolution mechanism that is fair, responsive and efficient to contemporary requirements. One of the primary objectives of the Arbitration Act is to reduce and minimize the supervisory role of courts. Accordingly, the statutory powers of the arbitral tribunal to deal with and decide jurisdictional issues of non-arbitrability were amplified and the principles of separation and competence- competence were incorporated, while the courts retained some power to have a **'second look'** in the post-award challenge proceeding. On the jurisdiction of the court at the referral stage, views of this Court have differed and there have been statutory amendments to modify and obliterate the legal effect of the court decisions.*
>
> *... ... ...*

102. B.N. Srikrishna, J. in Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. and Another,49 a case relating to transnational arbitration under the New York Convention, had invoked the principle of ex visceribus actus for interpretation of the Arbitration Act. Sub-section (3) of Section 8 of the Arbitration Act envisages that even in a situation where an application to the court has been made in a pending proceeding, arbitration proceedings may commence and continue and even an award can be made. Section 16, it was held, incorporates the principles of separation and competence-competence thereby clearly indicating that the 49 (2005) 7 SCC 234 arbitrator can decide his or her own jurisdiction even when the validity of the main contract or the arbitration agreement is challenged. Section 34 states that the Court can go into three different aspects of arbitrability at the post-award stage. Therefore, the Arbitration Act itself envisages that the arbitral tribunal should rule on the questions of non-arbitrability subject to the ***second look*** *of the court post the award. This helps in expeditious and quick disposal of matters before the court at the first stage while reserving the court's power to examine the three facets of arbitrability at the third stage. This also prevents the possibility of a multiplicity of trials, an aspect highlighted in Sukanya Holdings (P) Ltd.*

... ...

131. Section 34 of the Act is applicable at the third stage post the award when an application is filed for setting aside the award. Under Section 34, an award can be set aside – (i) if the arbitration agreement is not valid as per law to which the party is subject; (ii) if the award deals with the disputes not contemplated by or not falling within the submission to arbitration, or contains a decision on the matter beyond the scope of submission to arbitration; and (iii) when the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force. Thus, the competence - competence principle, in its negative effect, leaves the door open for the parties to challenge the findings of the arbitral tribunal on the three issues. The negative effect does not provide absolute authority, but only a priority to the arbitral tribunal to rule the jurisdiction on the three issues. The courts have a ***'second look'*** *on the three aspects under Section 34 of the Arbitration Act.*

... ...

154. Discussion under the heading 'Who decides Arbitrability?' can be crystallized as under:

154.1 Ratio of the decision in Patel Engineering Ltd. on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23.10.2015) and even post the amendments vide Act 33 of 2019 (with effect from 09.08.2019), is no longer applicable.

154.2 Scope of judicial review and jurisdiction of the court under Section 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3 The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of ***"second look"*** *on aspects of non- arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.*

154.4 Rarely as a demurrer the court may interfere at the Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non- existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably 'non-arbitrable' and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the arbitral tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."

(Emphasis Supplied)

10. In the recent report of the **High-Level Expert Committee on Arbitration Law Reforms**, constituted under the Chairmanship of Dr. T. K. Vishwanathan, former Secretary, Ministry of Law and Justice, Government of India (Chairman), to examine the working of the Arbitration and Conciliation Act, 1996, and recommend legislative reforms thereto, submitted on 07.02.2024, the Committee, inter alia, made the following recommendations pertaining to "second look" by courts at the post-award stage, which reads as under:

> ***"1.2.6 Recommend statutory means to minimise recourse to judicial authorities/Courts in arbitration centric dispute resolution mechanisms:***
>
> > *(i) While oversight by a court is essential to the legitimacy and integrity of the arbitral process, its role must be limited to overall supervision, and a **second-look** at the post-award stage. A **second-look** by courts must also be within the parameters provided in Section 34 of the Act;*
> >
> > *(ii) There is an urgent need to institutionalize the process of appointment of arbitrators, and minimize court intervention at the very first stage;*
> >
> > *(iii) In any event, the Supreme Court and the High Courts must endeavour to dispose of applications for appointment of arbitrators expeditiously, and without any delay."*

11. Thus, the second look contemplated under Section 34 of the Act, 1996 is not a review on the merits of the award. Therefore, before taking a second look on the parameters

provided in Section 34, we feel it necessary to examine the specific contention of Mr. Dave that the award is vitiated due to violation of *audi alteram partem.* To us, if we have eventually hold that the procedural safeguard by the Tribunal we need not enter into further examination of the other contentions raised by Mr. Dave.

12. A perusal of the award shows that the learned Arbitrator was fully cognizant of the implications of the order dated 08.03.2021 passed by the Hon'ble Apex Court in *Suo Motu* Writ Petition (Civil) No. 3 of 2020 regarding the extension of limitation on account of the COVID-19 pandemic. However, despite noting and recording the said order, the right of the respondents to lead evidence was closed. For the aforesaid purpose, the observations contained in paragraph Nos. 21 to 25 of the award are reproduced hereinbelow:

> *"21) The matter was directed to be taken on 27.3.2021 but with the consent of the parties it was taken on 3.4.2021. Shri Ayush Sharma was cross-examined and after cross-examination he was discharged on 3.4.2021. One Mr. Rajiv Moure was cross-examined on his affidavit on 6.4.2021, by mistake on top of the cross-examination the date was shown as 20.3.2021.On 6.4.2021 the Claimant closed his evidence, Mr. Ashutosh Neemgaonkar submitted that he would file affidavit of Respondents' witnesses within two weeks. The matter was directed to be taken up on 22.4.2021.*

22) The parties appeared before me on 29.6.2021, affidavits of Mr. Rajendra Singh S/o Devi Singh Nayak and Shivaji Rao S/o Govind Rao Jadhav were filed. The said affidavits were unattested affidavits. Neither those were attested by Notary Public or the Oath Commissioner or any Competent Authority. After going through the provisions of Law, specially Order 18 Rule 4 CPC, I observed that unattested affidavits cannot be considered as evidence. As counsel for the Respondents was not present and there was no legal evidence from the side of the Respondents, I closed the right of the Respondents to lead evidence and closed the case for arguments on 30.6.2021. On 30.6.2021 Mr. Ashutosh Neemgaonkar on behalf of the Respondents filed an application for taking notarized affidavits on record and permit cross-examination. The only reason given in the application for not filing the notarized affidavits was that because of the lock-down Notaries or Oath Commissioners were not available and, therefore, unattested affidavits were filed. I observed that right of the parties to submit affidavit and lead evidence was closed then that was end of the matter. The application filed along with affidavits of Rajendra Singh and Shivaji Rao was rejected. Parties were heard and the matter was closed for Award.

23) Section 29A (1) of the Arbitration & Conciliation Act provides that the Award shall be made within a period of 12 months from the date the Arbitral Tribunal enters upon the reference. If the Award is not made within the period of one year, the parties may by consent extend the period of one year for making Award for a further period not exceeding 6 months. In the present matter the parties were directed to appear before the Arbitrator on 3.1.2020; however, the matter could not be completed because of imposition of lock-down due to Corona and again imposition of lock-down because of second wave of Corona in 2021, the parties agreed that the period may be extended for further 6 months. However, in the matter of suo moto Writ Petition (Civil) No.3 of 2020 in re-cognizance for extension of limitation the Supreme Court in its order dated 8th March, 2021 observed as under:-

"Due to onset of COVID-19 pandemic, this Court took suo moto cognizance of the situation arising from difficulties that might be faced by the litigants across the country in filing petitions/applications/suits/appeals all other proceedings within the period of limitation prescribed under the general law of limitation or under any special laws (Both Central or State), by order dated 23.03.2020 this Court extended the period of limitation prescribed under the general law or special laws whether compoundable or not with effect from 15.03.2020 till further orders. The order dated 23.03.2020 was extended from time to time. Though, we have not seen the end of the pandemic, there is considerable improvement. The lockdown has been lifted and the country is running to normalcy. Almost all the courts and tribunals are functioning either physically or by virtual mode. We are of the opinion that the order dated 23.03.2020 has served its purpose and in view of the changing scenario relating to the pandemic, the extension of limitation should come to an end.

We have considered the future course of action.

We deem it appropriate to issue the following directions:

> *(1) In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 14.03.2021 shall stand excluded. Consequently, the balance period, if any, shall become available with effect from 15.03.2021.*
>
> *(2) In case where limitation would have expired during the period between 15.03.2020 till 14.03.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 15.03.2021. In the event the actual balance period of limitation remaining with effect from 15.03.2021, is greater than 90 days, that longer*

> *period shall apply.*
>
> *(3) The period from 15.03.2020 till 14.03.2021 shall also stand excluded in the computing the periods prescribed under Section 23(4) and 29A of the Arbitration & Conciliation Act, 1996, Section 12A of the Commercial Court Act, 2015 and provisions (b) and (c) of Section 13B of the Negotiable Instruments Act, 1881 and any other laws which prescribe period(s) of limitation for instituting proceedings, other limits (within which the court or tribunal can condone delay) and termination of proceedings.*
>
> *(4) The Government of India shall amend the guidelines for containment zones, to state 'Regulate movement will be allowed for medical emergencies, provision of essential goods and services, and other necessary functions, such as, time bound applications, including for legal purposes, and educational and job related requirements.*

The suo moto writ petition is disposed of accordingly."

24) On 23.3.2020 the Supreme Court extended the period of limitation prescribed under general law or special laws whether compoundable or not with effect from 15.3.2020 till further orders, the order dated 23.3.2020 was extended from time to time observing that the Court had not seen end of the pandemic, the lock-down has been lifted in the country returning to normalcy. The Supreme Court opined that the order dated 23.3.2020 has served its purpose and in view of the changing scenario relating to the pandemic the extension of limitation should come to an end. The Court observed that in computing the period of limitation for any suit, appeal, application or proceedings the period from 15.03.20 till 14.03.21 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.21, if any, shall become available with effect from 15.03.21.

25) In the present matter, I directed the parties to appear before me on 3.1.2020, one-year limitation was to expire on 2.1.2021 and extended period of 6 months was also to expire on 2.7.2021; however, the period between 15.3.2020 to 14.3.2021 i.e., one year is deducted from the period of limitation the Award can be made within a period of at least 9 months from today. Under the circumstances the Award as made is within limitation.

13. Thus, it would be seen that the learned Arbitrator has recorded a clear finding that "the award can be made within a period of at least 9 months from today...".

14. What is not palatable to us is that, despite noting the fact that ample time was available for the award to be made and that the respondents had notarized affidavits which they were seeking to place on record in the proceedings, which were being conducted right in the midst of the second wave of the COVID-19 pandemic, the learned Arbitrator closed the right of the respondents and proceeded to deliver the award.

15. Mr. Sanjanwala, learned Senior Advocate, has handed over copies of the proceedings before the learned Arbitrator. The proceedings dated 06.04.2021 are reproduced hereunder:

“Parties as before.

Shri Rajiv Moure appeared as witness. He was enquired that whether in addition to the statement made in the affidavit he wanted to state something further, he stated that he was not required to state anything. He was put under oath and was cross-examined by Shri Ashutosh Neemgaonkar. After cross-examination he was discharged.

The Claimant submits that he has no further witness for cross-examination.

Shri Ashutosh Neemgaonkar submits that he would file affidavits of Respondents' witnesses within two weeks from today and shall also supply advance copies of the same to the Claimant or his counsel. The date for further examination and cross-examination shall be fixed after affidavits are received by the Tribunal.

Let affidavits be filed on 22.04.2021”

16. On a pointed query as to why no proceedings dated 22.04.2021 could be found on record, Mr. Sanjanwala, learned Senior advocate, submitted that no proceedings were held on 22.04.2021 and, in fact, the next proceedings were held only on 29.06.2021 on account of the ongoing severe second wave of the COVID-19 pandemic. The proceedings dated 29.06.2021 are reproduced hereunder:

“<u>29.06.2021</u>

Claimant Ashutosh Sharma with his counsel Shri Ajay Assudani.

Shri Shri Shivaji Rao S/o Govind Rao Jadhav is present in person and represents the Respondent.

The matter was last taken on 06.04.2021 and was directed to be taken up on 22.04.2021 for filing of the affidavits on behalf of the witnesses of the Respondent. Mr. Rajendra Singh S/o Devisingh Nayak has filed his affidavit in evidence. The affidavit is neither singed by Mr. Rajendra Singh nor has been attested by any competent person. Such an affidavit is not an affidavit in the eyes of law and it cannot be taken to be evidence under Order 18 Rule 4 CPC.

Shri Shivaji Rao S/o Govind Rao Jadhav has also filed his affidavit. Though the affidavit has been signed by the deponent but the same has not been attested either by the Notary Public or any Oath Commissioner or competent authority. Such an affidavit which is unattested cannot be considered in the evidence under Provisions of Order 18 Rule 4 CPC. It was made clear on the last date that if the affidavits are not filed or the witness is not brought or the witnesses are not kept in attendance for their examination and cross examination the Arbitrator may proceed to close the right of the Respondent to lead evidence.

The matter was not taken on 22.4.2021 but after sometime the affidavits were filed. Though the said affidavits are absolutely incomplete the matter was directed to be taken up on 26.6.2021 but at the request of Shri Ashutosh Neemgaonkar it is taken today. The time was fixed for 2 PM, it is already 2.30. As the counsel for the Respondent does not appear and as there is no legal evidence on the record, left *with no choice I close the right of the Respondent to lead evidence and close the case for arguments.*

Put up on 30.06.2021 at 2.30 PM."

17. Thus, after closing the right of the respondents to lead evidence and closing the matter for arguments, the matter was posted on 30.06.2021 at 02:30 p.m. The order sheet dated 30.06.2021 records the following:

"<u>30.06.2021</u>
Claimant Ashutosh Sharma with his counsel Shri Ajay Assudani.

Shri Ashutosh Neemgaonkar counsel for the Respondent.

Yesterday taking an exception to the unattested affidavits of Rajendra Singh and Shivaji Rao I have held that these affidavits are no evidence under the provisions of Order 18 Rule 4 CPC and cannot be taken as evidence. Nobody was appearing in the witness box on behalf of the Respondent and as it was already 2.30 PM I closed the right of the Respondent to lead evidence and closed the case for arguments.

Today Mr. Ashutosh Neemgaonkar on behalf of the Respondent has filed an application for taking notarized affidavits on record and permit cross examination. The only reason given in the application for not filing the notarized affidavits is that because of the lock down Notaries or Oath

Commissioners were not available and, therefore, unattested affidavits were filed.

This could have been said yesterday but unfortunately nobody submitted so. Once the right of a party to submit affidavits and lead evidence is closed then that was end of the matter. The application filed along with the affidavits of Rajendra Singh and Shivaji Rao is rejected.

Parties are heard. The matter is closed for Award.”

18. Thus, from the concluding portion of the order dated 30.06.2021, we can discern a tone of irritability, if not anger, merely because something which could have been submitted on 29.06.2021 came to be submitted on 30.06.2021.

19. In our view, the eventual decision to close the right of the respondents, despite the affidavit being ready and available for submission before the Tribunal, keeping in mind that the proceedings were being conducted during the midst of a severe COVID-19 period, coupled with the fact that the Tribunal had ample time to pass the award, cannot be sustained. We hold that the treatment meted out to the respondents was such as to vitiate the proceedings on account of the volatility and lack of even temperament demonstrated

by the learned Arbitrator.

20. In ***Narinder Singh and Sons v. Union of India through Divisional Superintendent Engineer-II, Northern Railway, Ferozepur Division, Ferozepur***, reported in ***(2022) 18 SCC 690***, it has been held as under:

> *"8. Section 19 of the Act states that while the Arbitral Tribunal is not bound by the Code of Civil Procedure, 1908 or the Evidence Act, 1872, in the absence of any agreement between the parties as to the procedure to be followed, the Arbitral Tribunal may conduct the proceedings in the manner it considers appropriate.*
>
> *9. Section 18 mandates that both parties shall be treated with equality, and each party shall be given a full opportunity to present his case. Reference can also be made to Sections 24 and 25 and newly enacted Section 29-A of the Act, which though not applicable to this case, emphasize on quick and prompt adjudications. Idioms carping "delay" and "hurry" in adjudication highlight the importance of both speedy disposal and reasonable opportunity, as both are essential for an even-handed and correct decision. Neither should be sacrificed nor inflated, as to prolong or trample a just and fair adjudication. A pragmatic and common-sense approach would invariably check any discord between the desire for expeditious disposal and adequacy of opportunity to establish one's case.*
>
> *10. In the context of the present case, we agree with the High Court that there was unnecessary haste and hurry by the arbitrator, especially when the respondent had filed the affidavit by way of evidence on 21-10-2010. Earlier, the respondent had filed written statement shortly after the appellant had filed the claim statement. The respondent was also deprived of reasonable and fair opportunity to cross-examine Paramdeep Singh (PW-1). The respondent had also moved an application for waiver of costs, which was rejected on 21-10-2010, albeit the arbitrator decided to continue the arbitration to proceed ex parte and adjourned the matter to 9-11-2010 for final arguments. As the evidence of the respondent by the way of affidavit was not taken on record,*

their contentions and evidence were not considered and thus debilitated the respondent from stating their case. Given the aforesaid factual position, there was violation of principles of natural justice and lack of full opportunity as envisaged by Section 18 of the Act, thereby, impeding a fair and just decision. Consequently, the award suffers and is liable to be set aside in terms of clause (iii) to Section 34(2)(a) as well as clause (ii) to Section 34(2)(b) of the Act.”

21. Following the aforesaid decision of the Hon’ble Apex Court, we are of the firm opinion that the award deserves to be set aside on account of the violation of Section 18 of the Act, 1996, inasmuch as the respondents were not treated fairly and equally in the facts and circumstances noted hereinabove. The present appeal is hereby allowed. Accordingly, the award dated 16.07.2021 and order dated 02.03.2023 passed in Commercial Civil Misc. Application No. 539 of 2021 are hereby quashed and set aside. No order as to costs.

22. We hereby issue the following consequential directions:

The parties are free to initiate fresh arbitration or Court proceedings, if so advised. If the same is initiated within a period of four (4) weeks from the date of uploading of a copy of this judgment, then the period between the commencement of the previous round of arbitration and this judgment shall be excluded for the purposes of calculating the period of limitation under the Limitation Act, 1963.

(SUNITA AGARWAL, CJ)

(D.N.RAY,J)

BINA SHAH