A.F.R.
Reserved on 01.08.2019
Delivered on 26.02.2020

Court No. - 34
Case :- FIRST APPEAL FROM ORDER No. - 1519 of 2017
Appellant :- Uttar Haryana Bijli Vitran Nigam Ltd.
Respondent :- M/S P.M. Electronics Ltd.
Counsel for Appellant :- Vivek Ratan Agrawal,Anil Kumar Srivastava,Baleshwar Chaturvedi
Counsel for Respondent :- Alok Kumar Yadav
Hon'ble Sudhir Agarwal,J.
Hon'ble Rajeev Misra,J.

(Delivered by Hon'ble Rajeev Misra, J.)

1. This First Appeal From Order under Section 37 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as Act, 1996) has been filed by Respondent-Appellant challenging judgement and order dated 08.09.2015 passed by District Judge, Kanpur Nagar in Misc. Case No. 100/74 of 2010 (M/s P.M. Electronics Limited Vs. Uttar Haryana Bijli Vitran Nigam Ltd. (UHBVNL) under Section 34 of Act, 1996, whereby Court below has set aside award dated 22.02.2010 delivered by U.P. State Micro and Small Industrial Facilitation Council Kanpur and remanded the matter before aforesaid Council Kanpur for decision a fresh on merits after giving notice and opportunity of hearing to the parties.

2. We have heard Mr. H. N. Singh, learned Senior Counsel assisted by Mr. Ashutosh Srivastava, Advocate alongwith Mr. M.C. Chaturvedi, learned Senior Counsel assisted by Mr. Baleshwar Chaturvedi. Learned counsel for Respondent-Appellant and Mr. Alok Kumar Yadav, learned counsel representing Claimant-Opposite Party.

3. Respondent-appellant Uttar Haryana Bijli Vitran Nigam Ltd. (hereinafter referred to as UHBVNL) is a Government of Haryana undertaking having its registered office at Shakti Bhavan Sector-6 Panchkula, Haryana (hereinafter referred to as 'Appellant'). Appellant is engaged in distribution of electricity.

4. Claimant-Opposite Party M/S P. M. Electronics Ltd. is a Company duly

incorporated under the Companies Act, 1956 (hereinafter referred to as Claimant-Opposite Party). Claimant-Opposite Party is engaged in manufacturing and marketing of power and distribution transformers of various KVA ratings.

5. Appellant awarded various purchase orders to Claimant-Opposite Party during the period 1991 to 2000. Things were going on smoothly and bills of Claimant-Opposite Party were being paid regularly. However, in the year 1997, it appears that there was some delay in payment of principal amount. Accordingly, Claimant-Opposite Party filed CMWP No. 7916 of 1997 before Punjab and Haryana High Court claiming payment of interest on principal amount for the period of delayed payment. During pendency of above mentioned writ petition, Claimant-Opposite Party filed a Civil Misc. Application in the aforesaid writ petition praying therein that directions be issued to Government of Haryana to establish Industrial Facilitation Council (hereinafter referred to as 'IFC') as contemplated under Sections 7A and 7B of Interest on Delayed Payment to Small Scale Ancillary Industrial Undertaking Act, 1993 (hereinafter referred to as Act, 1993) within a period of three months.

6. It transpires from record that by and large contract awarded to Claimant-Opposite Party was performed smoothly by him. However, in the year 2000, Claimant-Opposite Party is alleged to have failed in completing purchase orders resulting in immense loss to UHBVNL. Consequently, in view of above and in accordance with conditions of contract, UHBVNL encashed bank guarantee submitted by Claimant-Opposite Party.

7. It is further gathered from record that Claimant-Opposite Party filed an Original Suit in Civil Court at Panchkula, Haryana, but neither plaint of aforesaid suit nor any other document has been brought on record to show the relief claimed in aforesaid suit or what has ultimately happened in that suit.

8. Subsequently, Chief Engineer UHBVNL, Panchkula Haryana passed an order dated 3.10.2006, blacklisting Claimant-Opposite party, but there is nothing on record to show that aforesaid order dated 3.10.2006 was challenged by Claimant-Opposite party.

9. Punjab and Haryana High Court did not examine the merits of claim raised by petitioner i.e. Claimant-Opposite Party herein in CMWP No. 7916 of 1997 but disposed of the said writ petition finally vide order dated 13.02.2002.

10. Perusal of order dated 13.02.2002 goes to show that aforesaid writ petition was disposed of finally on the undertaking given by counsel for State of Haryana. For ready reference order dated 13.02.2002 referred to above is reproduced herein-below:

> *" In pursuant to order dated December 20, 2001, Mrs. Meenaxi Anand Chaudhary, Principal Secretary, to government of Haryana, Department of Power is present in Court. She has stated that the Government shall constitute the requisite council as provided under Section 7A of the Interest on Delayed Payment to Small Scale and Ancillary Industrial Undertakes (Amendment) Act, 1958. She has further stated that in fact is the Small Scale Industries Department, which is directly concerned with this matter. However, she has stated for and on behalf of the Government of Haryana that Council shall be constituted within a period of three months from today.*
>
> *In this view of the matter, the application has been rendered instructions and the same is disposed of accordingly.*
>
> *Dasti on payment."*

11. Pursuant to aforesaid order dated 07.05.2002 passed by Punjab and Haryana High Court, Government of Haryana established IFC at Chandigarh. Accordingly, Claimant-Opposite Party filed his claim before IFC (Haryana) under Act 1993, vide claim dated 31.07.2002 claiming a sum of Rs.12,70,89,049/- alongwith pendente-lite and future interest as well as cost of claim petition.

12. Perusal of Claim Petition dated 31.07.2002 filed by claimant-opposite party goes to show that Claimant-Opposite Party in support of of it's claim of Rs.12,70,89,049/- pleaded that claimant-opposite party is a small scale industrial unit having permanent registration certificate. Claimant-

Opposite party supplied various goods under different purchase orders to appellant. However, appellant failed to make timely payment i.e. within the time period prescribed by Act 1993. It was then pleaded that claimant-opposite party falls within the category of 'Supplier' as defined under section 2 (f) of Act 1993. Respondent-appellant is a 'Buyer' and therefore, liable under the statute i.e. Act 1993 to make payment on or before period prescribed under Act 1993. As appellants have failed to make payment on or before due date, as envisaged under section 3 of Act 1993, they are liable to pay interest for the period of delayed payment as per the rates prescribed is Sections 4 and 5 of Act 1993. Aforesaid provisions cast a statutory duty upon Purchaser to pay interest for the period of delayed payment.

13. During pendency of aforesaid Claim Petition dated 31.07.2002 filed by claimant-opposite party before IFC, Haryana Micro Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as Act, 2006) came into force on 02.10.2006. By reason of Section 32 of Act 2006, old Act of 1993 stood repealed.

14. Consequently, after coming into force of Act, 2006, IFC (Haryana) losts its existence. As a result of aforesaid, dispute of parties pending before IFC Haryana came to be stayed and thereafter adjourned as IFC (Haryana) now had no jurisdiction to decide claim of Claimant-Opposite Party. Under the new Act 2006, jurisdiction to decide claim of Claimant-Opposite Party now vested with Micro and Small Industrial Facilitation Council Haryana or Micro and Small Industrial Facilitation Council, Uttar Pradesh which were established at Chandigarh and Kanpur respectively as per Section 20 read with Section 21 of Act, 2006.

15. Claimant-Opposite Party filed an application dated 21.03.2007 before Director of Industries Haryana-Cum-Chairman Industries Facilitation Council Haryana praying therein that original file pertaining to claim submitted by claimant-opposite party be sent to U.P. State Micro & Small Industrial Facilitation Council, Directorate of Industries (U.P.) Kanpur.

Thereafter, Claimant-Opposite Party filed reminders dated 27.11.2006, 08.12.2006, 22.12.2006, 07.02.2007 and 07.04.2007 in continuation of transfer application dated 21.3.2007 earlier filed by him.

16. However, as no consequential action was taken on aforesaid applications/representations submitted by claimant-opposite party, they submitted a new claim dated 19.06.2007 before U.P. State Micro and Small Industrial Facilitation Council which was constituted under Act, 2006. Claimant-Opposite Party now revised its claim to Rs.42,19,02,100/-. The break up of same is as follows:

> *"Interest due as per Section 16 and 17 of Act i.e. Rs. 40,74,54,079/-*
>
> *Cost of goods supplied Rs. 43,50,817/-*
>
> *Cost of recoveries made illegally through encahsment of Bank Guarantee and the cost of material supplied Rs.1,00,97,204/-"*

17. Subsequently, Haryana State Micro and Small Industrial Facilitation Council passed an order dated 02.04.2008 directing Claimant-Opposite Party to approach Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur as Claimant-Opposite Party is registered in Uttar Pradesh. For ready reference order dated 02.04.2008 is reproduced herein-below:-

> *" Regd. No. TS/IFC/22/2006-07*
>
> *From*
>
> *The Director of Industries & Commerce, Haryana-cum-Chairman-Haryana Micro and Small Enterprises Facilitation Council 30 Bays Building, Ist Floor, Section 17, Chandigarh.*
>
> *To*
>
> *M/s P.M. Electronics Ltd.,*
>
> *B-10 & 11, Surajpur Site-C, Greater Noida,*
>
> *Distt. Gautam Budh Nagar,*
>
> *Dated Chandigarh, the*
>
> *Subject: Ist Meeting of Haryana Micro and Small Enterprises Facilitation Council fixed for 22.01.2008 at 11-00 AM under the Chairmanship of Shri D.R.Dhingra, IAS, Director of Industries & Commerce, Haryana-Cum-Chairman , HMSEFC.*
>
> *Sir,*
>
> *Reference this office letter No. TS/HMSEFC/Ist*

*meeting/392-A dated 8.1.2008 on the subject cited above.*

*2. The Ist meeting of Ist Meeting of Haryana Micro and Small Enterprises Facilitation Council fixed for 22.01.2008 at 11-00 AM under the Chairmanship of the undersigned. The decision of the Council is reproduced below:*

*"M/s P.M. Electronics Pvt. Ltd. Noida has submitted an applicati0on for transfer of their case to Micro & Small Enterprises Facilitation Council set up by the U.P. State, since HMSEFC under the Micro, Small & Medium Development Act, 2006 does not have jurisdiction to proceed further in their case. To this effect the claimant has submitted various representations dated 21.3.07,7.4.07, 29.10.07 and 22.1.2008 respectively.*

***On the request of the Claimant, the Council decided to dispose of the case since the unit of the claimant is registered in U.P. Sate with the direction to claimant to approach MSEFC set up by the U.P. Govt. if they so desire"***

*This is for your kind information.*

*(D.R. Dhingra)*

*Director of Industries & Commerce, Haryana- Cum-Chairman, HMSEFC"*

18. It is pursuant to aforesaid order that claim of Claimant-Opposite Party submitted on 19.6.2007, came to be considered by Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur.

19. Notices were issued to opposite party, i.e. Appellant herein by Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur. Accordingly, Appellant filed objections dated 22.12.2008 before Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur. According to Appellant, claim raised by Claimant-Opposite Party is not tenable as Claimant-Opposite Party had originally filed a claim of Rs.12,70,89,049.00, which was pending before Haryana Industrial Facilitation Council and later on before Haryana Micro and Small Enterprises Facilitation Council, Chandigarh. Aforesaid claim was transferred to U.P. Micro and Small Enterprises Facilitation Council (UPMSME), vide order dated 22.01.2008. Therefore, filing of a fresh claim without disclosing pendency of previous pending claim amounts to concealment of fact and therefore, claim is liable to be dismissed on

aforesaid ground. Apart from above, fresh claim as filed by claimant opposite party is barred by limitation and therefore liable to be dismissed.

20. It may be noted that proceedings before Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur were to be conducted as per provisions of Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act, 1996').

21. Ultimately, Uttar Pradesh Micro and Small Industries Facilitation Council, Kanpur gave arbitral award dated 22.02.2010, whereby claim of Claimant-Opposite Party M/S P.M. Electronics Ltd. was rejected.

22. Perusal of award dated 22.02.2010 passed by Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur goes to show that Council has rejected claim of Claimant-Opposite Party by formulating two points of consideration;

> A. Whether Claimant can file petition for interest being treated to be a supplier as defined in Section 2(n) of the Act.
>
> B. Whether Claimant can claim interest on due interest when principal amount has already been received by him.

23. While considering the first point of consideration as to whether claimant is to be treated as 'Supplier' as defined in Section 2(n) of Act, 2006, Council considered meaning of the term 'Supplier', as defined in Section 2(n) read with Section 8 of Micro and Small and Medium Enterprises Development Act, 2006, to ascertain whether claimant i.e. opposite party herein, is covered within the meaning of term “Supplier' as defined in Section 2(n) of Act, 2006. For ready reference Section 2 (n) and Section 8 of Micro and Small and Medium Enterprises Development Act, 2006 relied upon by Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur, are reproduced herein-below:-

> *“**Section 2(n)**. “Supplier” means a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-section (1) of section 8, and includes,-*
>
> *(i) The National Small Industries Corporation, being a company,*

*registered under the Companies Act, 1956 (1 of 1956)*

*(ii) The Small Industries Development Corporation of a State or a Union territory, by whatever name called, being a company registered under the Companies Act, 1956 (1 of 1956)*

*(iii) any company, co-operative society, trust or a body, by whatever name called, registered or constituted under any law for the time being in force and engaged in selling goods produced by micro or small enterprises and rendering services which are provided by such enterprises;*

***Section 8**. Memorandum of micro, small and medium enterprises-(1) Any person who intends to establish-*
*(a) A micro or small enterprise, may, at his discretion, or*
*(b) A medium enterprise engaged in providing or rendering of services may, at his discretion; or*
*(c) A medium enterprise engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951) shall file the memorandum of micro, small, or as the case may be, of medium enterprise with such authority as may be specified by the State Government under sub-section (4) or the Central Government under sub-section (3):*

*Provided that any person who, before the commencement of this Act, established-*
*(a) a small scale industry and obtained a registration certificate, may, at his discretion; and*
*(b) an industry engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), having investment in plant and machinery of more than one crore rupees but not exceeding ten crore rupees and, in pursuance of the notification of the Government of India in the erstwhile Ministry of Industry (Department of Industrial Development) number S.O.477(E) dated the 25th July, 1991 filed an Industrial Entrepreneur's Memorandum, shall within one hundred and eighty days from the commencement of this Act, file the memorandum, in accordance with the provisions of this Act.*
*(2) The form of the memorandum, the procedure of its filing and other matters incidental thereto shall be such as may be notified by the Central Government after obtaining the recommendations of the Advisory Committee in this behalf.*
*(3) The authority with which the memorandum shall be filed by a medium enterprise shall be such as may be specified by notification, by the Central Government.*
*(4) The State Government shall, by notification, specify the authority with which a micro or small enterprise may file the memorandum.*
*(5) The authorities specified under sub-sections (3) and (4) shall follow, for the purposes of this section, the procedure notified by the Central Government under sub-section (2)."*

24. Upon consideration of Section 2 (n) read-with Section 8 of Act, 2006, Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur concluded that though it is not obligatory for every Micro Small and Medium Enterprise to file a memorandum but only those Enterprises who have filed memorandum can be treated to be 'Supplier' as per Section 2(n) of Act, 2006. It was further observed that as per Section 8 of Act, 2006 such memorandum is required to be filed within 180 days from the date of enforcement of Act, 2006. Since there is nothing on record to show that Claimant-Opposite Party ever filed memorandum before competent authority, as required under Section 8 of Act 2006, he cannot be treated as 'Supplier' as defined under Section 2 (n) of Act, 2006. Consequently, Council concluded that as Claimant-Opposite Party does not fall within the meaning of the term 'Supplier' as defined in Section 2(n) of Act, 2006, its claim cannot be considered. With regard to second point of consideration regarding claim of interest on due interest when Claimant Opposite Party has already received principal amount, Council concluded that claim was barred by limitation.

25. Feeling aggrieved by award dated 22.02.2010, Claimant-Opposite Party filed objections against the same before District Judge, Kanpur in terms of Section 34 of Act, 1996. Same came to be registered as Misc. Case No. 100/74 of 2010 (M/s P.M. Electronics Limited Vs. Uttar Haryana Bijli Vitran Nigam Ltd. (UHBVNL).

26. Perusal of objection under Section 34 of Act, 1996 filed by Claimant-opposite party no.2 goes to show that award dated 22.02.2010 rendered by Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur was challenged by Claimant-Opposite Party on the grounds that finding recorded by Council to the effect that Claimant-Opposite Party does not fall within the meaning of term supplier as defined under Section 2 (n) of Act, 2006 is incorrect. It was further alleged that at the time of presentation of claim in October 2002, Act 2006 relied upon by Uttar

Pradesh Micro and Small Industrial Facilitation Council, Kanpur was not in existence and therefore, claim of Claimant-Opposite Party could not be rejected on the aforesaid ground. Under the Provisions of Act 1993, Claimant-Opposite Party was covered within the definition of term "Supplier" as defined in Section 2 (F) of Act, 1993. Company is not under legal obligation to submit its memorandum as per Section 8(1) (A) of Act, 2006. Thus, Section 8 of Act, 2006 has wrongly been relied upon in case of Claimant-Opposite Party. It was next urged that Section 8 of Act, 2006 grants freedom to Small Scale Industries to present or not to present their memorandum. Therefore, Section 2(n) of Act, 2006 is not to be read alongwith Section 8 of Act, 2006 but independent of the same. It was then contended that finding has been recorded by Council that some dues are pending payment in the hands of purchaser but in spite of the same claim of payment of interest for the period of delayed payment was denied. In elaboration of aforesaid, it was urged that Gauhati High Court in its decision reported in **2002 (1) GLT 947** has held that Act, 1993 creates a statutory liability under the aforesaid Act upon purchaser and he cannot be relieved of his liability to pay interest on delayed payment. Claimant-Opposite Party has raised its claim regarding delayed payment and for that purpose has submitted separate bills which are liable to be paid by Appellant. It was also alleged that Section 3 of Act, 1993 defines statutory obligation of purchaser. The purchaser is bound to make payment of goods received on or before agreed date and in case the purchaser fails to make payment as aforesaid, he shall be liable to pay interest. According to Claimant-Opposite Party, his claim was rejected by Council on the ground that it was barred by limitation as 'Supplies' were made 7 to 10 years before. View taken by the Council is contrary to mandate of Section 14 of Limitation Act, 1963 inasmuch as the period spent in pursuing a wrong legal remedy is liable to be excluded. Admittedly, Claimant-Opposite Party filed CMWP No. 7916 of 1997 in Punjab and Haryana High Court, which was disposed of finally vide order dated 07.05.2002. Upon

exclusion of aforesaid period, it cannot be said that claim of Claimant-Opposite Party is barred by limitation. Award rendered by Council is against Public Policy of India and therefore, liable to be set aside under Section 34 (2) (B) (II) of Act, 1996. It was also pleaded that Council did not give equal opportunity to parties which is contrary to mandate of Section 18 of Act, 1996. Award has been passed against Claimant-Opposite Party on non-existent grounds. No objection was ever raised before Council that Claimant-Opposite Party is not a 'Supplier' within the meaning of aforesaid term as defined under Section 2 (n) of Act, 2006. Thus Council has erroneously interpreted Section 8 (1) of Act, 1996. The award has been rendered after a period of 90 days which is in gross violation of Section 8 (1) of Act, 1996. On aforesaid factual and legal premise, claimant-opposite party prayed that award itself is liable to be set aside.

27. Appellant contested the objections filed by Claimant-Opposite Party by filing reply. A preliminary objection was raised on behalf of Appellant that objections under Section 34 of Act, 1996 filed by Claimant-Opposite Party are not maintainable being barred by provisions of Code of Civil Procedure as well as relevant provisions of Act, 1996 in respect of territorial jurisdiction of Court. On merits of the claim, it was pleaded that grounds raised by Claimant-Opposite Party for setting aside award do not fall within ambit and scope of Section 34 of Act, 1996. Claim Petition filed by Claimant-Opposite Party in the year 2008 is hopelessly barred by limitation. It was also contended that Claimant-Opposite Party is not a 'Supplier' within the meaning of term “Supplier” as defined in Section 2 (n) of Act, 2006. Section 2 (n) of Act, 2006 deals with such 'Supplier', who has filed memorandum before authority mentioned in Section 8 of Act, 2006, which is nominated by State Government. Claimant-Opposite Party has failed to establish itself as a 'Supplier' within the meaning of Act, 2006. The pendency of Claim Petition before Haryana **MSMEFC** was not disclosed in fresh Claim Petition filed by Claimant-Opposite

Party.

28. District Judge, Kanpur upon consideration of pleadings of parties, the provisions of Act, 1993, Act, 1996 as also Act, 2006 passed judgement and order dated 08.09.2015 whereby award dated 22.02.2010 passed byUttar Pradesh Micro and Small Industries Facilitation Council, Kanpur was set aside and matter remanded to aforesaid Council to decide same on mertis a fresh after giving notice and opportunity of hearing to parties.

29. Court below concluded that Principal Civil Court, Kanpur has jurisdiction to hear objections under section 34 of Act 1996 filed by claimant-opposite party. In support of aforesaid conclusion reliance was placed upon judgment of Supreme Court in **Executive Engineer, Road Development Division No.III, Panvel and another V. Atlanta Limited, 2014 (11) SCC 619**, wherein it has been held that where High Court and District Court have jurisdiction to decide objections under Section 34 of Act, 1996 then in that eventuality challenge to award shall lie only before High Court otherwise it shall lie before District Court being Principal Civil Court of original jurisdiction. Reliance was also placed upon Constitution Bench judgement in **Bharat Aluminum Company Vs. Kaisar Aluminum Technical Services and Others, 2012 (9) SCC 552**, wherein it has been held that the Court having jurisdiction over place where arbitration took place will have jurisdiction to hear objections under sections 34 of Act 1996. Since award dated 22.02.2010 was rendered by Uttar Pradesh Micro and Small Industrial Facilitation Council at Kanpur and arbitral proceedings were conducted by Council at Kanpur as per provisions of Act 1996, therefore, Principal Civil Court Kanpur shall have jurisdiction to decide objections under section 34 filed by claimant-opposite party.

30. On the issue of parallel remedies being availed by claimant-opposite party, inasmuch as, an original suit has been filed before civil Court at Panchkula, Haryana and during pendency of aforesaid civil suit, claim regarding payment of interest for the period of delayed payment has been

raised, Court below concluded that from record it appears that original suit was in respect of purchase order nos. 23 and 24. However, it is not clear whether the claim raised in original suit is the subject matter of present proceeding. In the absence of material regarding above being brought on record, Court below opined that the cause of action pleaded in original suit as well as present proceedings are different.

31. In respect of finding recorded by Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur in the impugned award dated 22.2.2010 that claim raised by claimant respondent is barred by limitation, Court below set aside the same. Reference was made to section 32 of Act 2006 which provides that any proceedings initiated under the Repeal Act shall be deemed to have been filed and pending under the new Act of 2006. For ready reference, Section 32 of Act 2006 relied upon by Court below is reproduced herein under:

> *"32. Repeal of Act.-- (1) The interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 (32 of 1993) is hereby repealed.*
>
> *(2) Notwithstanding such repeal, anything done or any action taken under the Act so repealed under sub-section (1) shall be deemed to have been done or taken under the corresponding provisions of this Act."*

32. Furthermore, after coming into force of Act 2006, IFC (Haryana) had no jurisdiction to hear claim of claimant-opposite party. Consequently, vide order dated 2.4.2008 IFC (Haryana) refused to hear the claim of claimant-respondent and transferred record to Medium and Small Enterprises, Faciliation Council, U.P. As such, by virtue of section 18 (4) of Act 2006, Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur acquired jurisdiction to decide the claim.

33. Lastly, Court below concluded that new claim was filed to avoid delay as IFC (Haryana) had no jurisdiction to decide the claim. This fact has been noted in the order dated 22.1.2008, passed by the Director of Industy/Chairman, Haryana Micro and Small Enterprises Facilitation Council. As the new claim presented by claimant-opposite party is in

continuation of their old claim, it cannot be said to be barred by time. To butress aforesaid conclusion, Court below relied upon judgement of Apex Court in **M/s Shakti Tubes Ltd. through Director Vs. State of Bihar and Others, 2009 (1) SCC 786,** wherein it has been held that period spend in bonafide pursuing a wrong legal remedy should be excluded. In the light of aforesaid judgement, claim presented before IFC (Haryana) will have to be excluded and consequently, the claim of claimant-opposite party cannot be said to be barred by limitation.

34. Court below also considered the question, "whether claimant-opposite party falls within the meaning of term 'Supplier' as defined under section 2 (n) of Act 2006." For this purpose, Court below referred to section 2 (n) and section 8 (1) of Act 1996. Thereafter, Court below referred to a notification bearing No. 2/311123007-MSNE POL (PL) Government of India, whereby filing of Industrial Entrepreneur's Memorandum was made discretionary. Court below further held that above mentioned notification was not placed by Claimant-Opposite party before Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur, which is a bonafide mistake. Claimants have also filed copy of certificate showing that claimant is registered as a Small Scale Industry. It thus concluded that claimant-opposite party falls within the meaning of the term "Supplier" as defined in section 2 (n) of Act 2006.

35. Another issue that was considered by Court below was that Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur by placing reliance upon judgement of **Assam High Court** in **Assam State Electricity Boards and Others Vs. Trusses and Towers Pvt. Ltd., AIR 2002 Assam 49,** rejected claim petition filed by claimant opposite party on the ground that claim for payment of interest alone was not maintainable. Aforesaid finding was reversed by Court below, by referring to the case of **M/s. Shakti Tubes Ltd. Through. Director v. State of Bihar & Ors, reported in 2009 (1) SCC 786,** wherein it has been held that period spent in pursuing a writ petition

before High Court should be excluded in reckoning limitation period. Reference was also made to **Purvanchal Cabels and Conductors Pvt. Ltd. Vs. Assam State Electricity Board and Others, 2012 (7) SCC 462**, wherein it has been held that under scheme of Act, 2006, payment of interest on delayed payment is a statutory liability which must be discharged. Applying ratio of aforesaid judgment, Court below concluded that a claim petition can be filed only for claiming interest also. As such, conclusion drawn by Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur is illegal. Court below strengthened its aforesaid conclusion by observing that supplies were made during the period 1990 to 1996. The payment in respect of aforesaid supplies were made with delay and therefore, claimant is entitled to seek payment of interest for period of delayed payment. Admittedly, claimant-opposite party had filed its claim under section 6 of Act 1993. IFC (Haryana) i.e. the body required to be constituted as per sections 7 (a) and 7 (b) of Act 1993 but was constituted only in the year 2001. Thereafter, claimant filed its claim before aforesaid council in the year 2002. During pendency of claim, Act 2006 came into force and thereafter, Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur was established on 11.6.2007 and claim was presented by claimant opposite party before aforesaid council on 19.6.2007. Thereafter, IFC (Haryana) vide order dated 2.4.2008 disposed of case of claimant-opposite party with direction to approach Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur. In view of aforesaid, Court below concluded that claim filed by claimant-opposite party is not barred by limitation and therefore maintainable.

36. As objections were filed under section 34 of Act 1996, it was obligatory upon Court below to examine, whether objections filed by claimant-opposite party fulfill any of the parameters provided for in section 34 of Act 1996 itself for challenging an award. Court below referred to judgements of Apex Court wherein the provisions of sections

34 of Act 1996 have been interpreted. Reference was made to the judgement in **Mcdermott International Inc. Vs. Burn Standard Co. Ltd. and Others, 2006 (11) SCC 181,** wherein following has been observed:

> *" The arbitral award can be set aside if if is contrary to (a) fundamental policy of Indian law; (b) the interests of India; (c) justice of morality; or (d) if it is patently illegal or arbitrary. Such patent illegality however, must go to the root of the matter. The public policy violation, indisputably should be so unfair and unreasonable as to shock the conscience of the court. Lastly, where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute, would come within the purview of section 34 of Act"*

37. Reference was also made to the case of **Bharat Cooking Coal Ltd. Vs. L.K. Ahuja Company Ltd. 2001 (4) SCC 86**, wherein Court has observed that where there is an error apparent on the face of award, same is liable to be set aside. Then reliance was placed upon **Maharashtra State Electricity Board Vs. Sterilite Industries (India) and Another, 2001 (8) SCC 482**, wherein it has been held that where an error of law is apparent on the face of award, the same is liable to be set aside. Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur while passing impugned award has recorded certain findings to conclude that claim filed by claimant-opposite party is not maintainable. Findings recorded by council are illegal and perverse and consequently, award dated 22.2.2010 rendered by council was set aside, vide judgement and order dated 08.09.2015.

38. Feeling aggrieved by aforesaid order dated 08.09.2015 passed by District Judge, Kanpur, Respondent-UHBVNL has now approached this Court by means of present First Appeal From Order preferred under Section 37 of Act, 1996.

39. Mr. H. N. Singh, learned Senior Counsel for Appellant in challenge to impugned judgement and order submits that impugned judgement and order passed by Court below is not only illegal but also without

jurisdiction, hence same is liable to be set aside by this Court. Elaborating his arguments, he contends that proceedings under section 34 of Act 1996 is not like an appeal. An award can be set aside only if any of the conditions enumerated in section 34 of Act 1996 which provide the grounds for setting aside an award are satisfied. As none of the grounds provided for in Section 34 of Act 1996 is attracted in present case therefore, Court below committed an illegality in setting aside award dated 22.2.2010, passed by Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur.

40. It is next contended that claim filed by claimant-opposite party was not maintainable as claimant-opposite party cannot be allowed to avail parallel remedies for the same relief. It is an undisputed fact that claimant-opposite party filed original suit in Civil Court at Panchkula, Haryana, which is still pending. During pendency of aforesaid suit, no claim petition under section 6 of Act 1993 was maintainable on behalf of claimant-opposite party.

41. Giving impetus to the challenge made, learned Senior Counsel further contends that claimant-opposite party has filed a time barred claim before Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur. Finding to the contrary recorded by Court below is not only illegal, but also perverse and erroneous.

42. He lastly contended that claimant-opposite party does not fall within the meaning of term 'Supplier' as defined under section 2 (n) of Act 2006 and hence no claim petition could be filed by claimant-opposite party under section 18 of Act 2006. On the aforesaid factual and legal premise, learned Senior Counsel vehemently urged before us that impugned judgement and order passed by Court below is liable to be set aside by this Court.

43. Mr. Alok Kumar Yadav, learned counsel for claimant-opposite party has supported the impugned judgement and order on the strength of the

submissions made by him in support of impugned judgement and order passed by Court below and also the observations/findings made in the impugned judgement and order. According to learned counsel for claimant-opposite party, impugned judgement and order passed by Court below is perfectly just and legal. Court below upon consideration of entire gamut of facts and circumstances and law as applicable has opined to remand the matter before Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur for decision afresh after giving notice and opportunity of hearing to the parties. Order of remand passed by Court below is an innocuous order and parties will have adequate opportunity to address Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur on the merits/ demerits of claim raised by claimant-opposite party. As such, present appeal is liable to be dismissed. It is then contended that learned Senior Counsel appearing for appellant could not point out any illegality in the order of remand. Law of remand has now been crystalized and no remand, which is vague, can be sustained. It is also well settled that remand cannot be made to fill up the lacuna in evidence or for the purpose of rehearing. No such situation could be pointed out in impugned order making the same illegal. He thus submits that impugned order of remand passed by Court below is not liable to be interfered with.

44. On the merits of claim submitted by claimant-opposite party, he submits that Court below has recorded a categorical finding that subject matter of original suit filed in civil Court at Panchkula, Haryana and the subject matter of claim filed by claimant-opposite party before IFC (Haryana), vide claim petition dated 31.7.2002 are different. The finding so recorded by Court below has not been specifically challenged as no ground challenging the said finding has been raised in the grounds of appeal nor a question of law to that effect has been framed. Apart from above, no factual foundation has been laid in the affidavit filed in support of stay application disputing correctness of the said finding.

45. He also submits that finding recorded by Court below that claim filed

by claimant-opposite party is not barred by limitation is perfectly just and legal. In justification of aforesaid finding, he submits that Claimant-Opposite party had initially filed C.MW.P. No. 7916 of 1997 for payment of interest on principal amount for the period of delayed payment. In the aforesaid writ petition, an application was filed with the prayer that directions be issued to Government of Haryana for establishing Industrial Facilitation Council (IFC) Haryana as per sections 7 (A) and 7 (B) of Act 1993. Aforesaid writ petition was disposed of finally vide order dated 13.2.2002, on the undertaking submitted by the Counsel for Government of Haryana that IFC shall be established. Pursuant to order dated 13.2.2002, IFC (Haryana) was constituted in the year 2002 and consequently claim was filed before IFC (Haryana), vide claim petition dated 31.7.2002. During pendency of aforesaid claim petition, Act, 2006 came into force on 2.10.2006. By reason of Section 32 of aforesaid Act, old Act of 1993 stood repealed. Consequently, Claimant-Opposite Party filed an application dated 21.03.2007 before Director of Industries, Haryana-Cum-Chairman Industries Facilitation Council Haryana praying therein that original file pertaining to claim submitted by claimant-opposite party be sent to U.P. Industry Facilitation Council, Directorate of Industries (U.P.) Kanpur. Thereafter, Claimant-Opposite Party filed reminders dated 27.11.2006, 08.12.2006, 22.12.2006, 07.02.2007 and 07.04.2007 in continuation of transfer application dated 21.3.2007 earlier filed by him. As no action was taken claimant-opposite party submitted its claim dated 19.6.2007 under section 18 of Act 2006 before Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur. It may be noted that Act 2006 came into force on 02.10.2006. Thereafter, under the Act 2006 Haryana Micro and Small Industrial Facilitation Council, Chandigarh was established on 5.9.2007. The Council disposed of claim petition filed by claimant-opposite party vide order dated 2.4.2008 and the record was sent by Haryana Council on 16.4.2008. On the aforesaid facts, he submits that reliance placed by Court below upon Section 14 of

Limitation Act to extend benefit of limitation to claimant-opposite party, cannot be said to be illegal. Claimant opposite party was bonafide perusing its remedy and therefore, clearly entitled to benefit of section 14 of Limitation Act. It is not the case of appellant that claimant opposite party was not bonafidely pursuing its remedy. As such Court below has not concluded any illegality in granting benefit of Section 14 of Limitation Act of claimant-opposite party.

46. The impugned order was further defended on the submission that Court below has rightly concluded that claim petition filed by claimant-opposite party was maintainable. Referring to section 32 of Act 2006, it was urged that as per mandate of aforesaid section any proceedings initiated under Act 1993 or pending under Act 1993, would be deemed to be initiated under new Act and also pending under new Act. Secondly, he submits that inspite of provisions of Section 32 of Act 2006, Director of Industries/Chairman, Haryana Micro and Small Industrial Facilitation Council passed order dated 2.4.2008, whereby the claim petition filed by claimant-opposite party was disposed of with liberty to approach Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur as claimant-opposite party is registed in State of U.P. and therefore, Haryana Council has no jurisdiction to adjudicate upon its claim. As no orders transferring pending claim petition were being passed on earlier claim petition dated 31.7.2002 filed by claimant opposite party and further to avoid delay claim petition dated 19.6.2007 was filed before Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur. In view of above, conclusion drawn by Court below holding claim petition filed by claimant-opposite party to be maintainable is perfectly just and legal.

47. Mr. Alok Yadav, in support of impugned judgement and order dated 8.9.2015, passed by Court below further submits that finding recorded by Court below that claimant-opposite party is covered within the meaning of term 'Supplier' as defined in section 2 (A) read with section 8 of Act 1996 is perfectly justified. He contends that Uttar Pradesh Micro and

Small Industrial Facilitation Council, Kanpur while considering the aforesaid issue had concluded that since there is nothing on record to show that claimant has filed its Industrial Entrepreneur's Memorandum within a period of 180 days from the date Act 1996 came into force as per mandate of section 8 (1) proviso, it cannot be treated as 'Supplier'. However, before Court below notification No. 2/311123007-MSNE POL (PL) Government of India was brought on record, whereby filing of Industrial Entrepreneur's Memorandum has been made discretionary. It is on the strength of aforesaid document that Court below has held claimant-opposite party to be a 'Supplier'.

48. From the arguments/counter arguments raised by learned counsel for parties, following issues arise for determination.

**Points of Determination**

(i) Whether the objection filed by Claimant-opposite party satisfied the parameters of Section 34 of Act, 1996.

(ii) Whether the Claimant-opposite party has availed paralled remedies in asmuch as it has filed Original Suit at District Court-Panchuula Haryana and also raised an arbitral dispute.

(iii) Whether the claim of Claimant-opposite party is barred by limitation.

(iv) Whether Claimant-opposite party is covered within the meaning of term "supplier" as defined in Section 2 (n) of Act, 2006.

49. We take up the first point first. An award rendered by arbitral Tribunal can be set aside under section 34 of Act 1996. However, Section 34 of Act 1996 itself provides that award can be set aside only on the grounds enumerated under section 34 of Act 1996. Therefore, what has to be examined by us is, whether any of the parameters provided in section 34 of Act 1996 for setting aside an award are satisfied in the present case and on that account the award dated 22.2.2020 passed by Uttar Pradesh Micro and Small Industrial Facilitation Council could be set aside.

50. Before we take up the aforesaid exercise, it would be prudent to note that Act, 1996 was amended vide Act No. 3 of 2016 with retrospective effect from 23.10.2015. Accordingly, unamended section 34 of Act, 1996 as well as amended section 34 of Act 1996 are reproduced herein-under:

**Unamended**

"Section 34 *Application for setting aside arbitral award. —*
*(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*

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

*(a) the party making the application furnishes proof that—*

*(i) a party was under some incapacity, or*

*(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or*

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

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

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

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

*(b) the Court finds that—*

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

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

*Explanation. —Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.*

*(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.*"

**Amended**

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

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

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

*(a) the party making the application furnishes proof that—*

*(i) a party was under some incapacity, or*

*(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or*

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

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

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

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

*(b) the Court finds that—*

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

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

*Explanation1.- 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 re-appreciation 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.]*

51. The term "Public Policy" of India was considered in relation to execution of Foreign Award, for the first time in **Renusagar Power Co. Ltd. Vs. General Electric Company, 1994 SCC Supl. (1) 644** wherein following has been observed in paragraph 66:

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

52. Act, 1996 came into force on 22.08.1996 and old Arbitration Act, 1940 was repealed. Scope of Section 34 of Act, 1996 which deals with challenge to award came to be considered exhaustively in **Oil and Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd., 2003 (5) SCC 705**, and Court observed as follows in paragraph 31:

> *"**31.** Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice.* ***Hence, in our view in addition to narrower meaning given to the term***

> *"public policy" in Renusagar case [1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be — award could be set aside if it is contrary to:*
>
> *(a) fundamental policy of Indian law; or*
> *(b) the interest of India; or*
> *(c) justice or morality, or*
> *(d) in addition, if it is patently illegal.*
>
> *Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."*

53. Law laid down by Apex Court in Oil and Natural Gas Corporation Ltd. (Supra) was consistently followed and came to be reiterated in **Mcdermott International Incorporation Vs. Burn Standard Co. Ltd. and Others, 2006 (11) SCC 181,** wherein Court considered previous judgements on the ambit and scope of Section 34 and held in paragraphs 58, 59, 60, 62 and 63 as follows:

> *"58. In Renusagar Power Co. Ltd. v. General Electric Co. [1994 Supp (1) SCC 644] this Court laid down that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression "public policy" was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can, however, be noticed from the decision of this Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705] (for short "ONGC"). This Court therein referred to an earlier decision of this Court in Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly[(1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103] wherein the applicability of the expression "public policy" on the touchstone of Section 23 of the Indian Contract Act and Article 14 of the Constitution of India came to be considered. This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Indian Contract Act. In ONGC [(2003) 5 SCC 705] this Court, apart from the three grounds stated inRenusagar [1994 Supp (1) SCC 644] , added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.*

> ***59. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merits of the matter.***
>
> ***60. What would constitute public policy is a matter dependant upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government.*** *(See State of Rajasthan v. Basant Nahata [(2005) 12 SCC 77] .)*
>
> ***62.*** *We are not unmindful that the decision of this Court in ONGC [(2003) 5 SCC 705] had invited considerable adverse comments but the correctness or otherwise of the said decision is not in question before us. It is only for a larger Bench to consider the correctness or otherwise of the said decision. The said decision is binding on us.* ***The said decision has been followed in a large number of cases.*** *(See The Law and Practice of Arbitration and Conciliation by O.P. Malhotra, 2nd Edn., p. 1174.)*
>
> ***63. Before us, the correctness or otherwise of the aforesaid decision of this Court is not in question. The learned counsel for both the parties referred to the said decision in extenso."***

54. However, Law commission in its 246th Report made suggestions so as to make the application for setting aside an arbitral award restricted on the ground of public policy and to apply only when award was persuaded or affected by fraud or corruption, or was against the fundamental policy of Indian law or in contravention with the most basic notions of morality.

55. It is in the light of above that Section 34 of Act, 1996 came to be amended by Act, No. 3 of 2016 with retrospective effect from 23.10.2015. We have already referred to the amended provisions of Section 34 of Act, 1996.

56. Subsequently Section 34 of Act, 1996 again came up for consideration in **Associate Builders Vs. Delhi Development Authority, 2015 (3) SCC 49,** wherein Court again elaborately considered the ambit and scope of Section 34 of Act, 1996 and further crystallized law on the subject after

considering **Renusagar (Supra), ONGC (supra), Mcdermott International Incorporation (supra)** and other judgements which occupied the field. For ready reference paragraphs 13,15,16,17,18,19,20,21,22,23,24,25,26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, which are relevant for the controversy in hand, are reproduced herein below:

> *"**13.** Inasmuch as serious objections have been taken to the Division Bench judgment [DDA v. Associate Builders, 2012 SCC OnLine Del 769] on the ground that it has ignored the parameters laid down in a series of judgments by this Court as to the limitations which a Judge hearing objections to an arbitral award under Section 34 is subject to, we deem it necessary to state the law on the subject.*
>
> *15. This section in conjunction with Section 5 makes it clear that an arbitration award that is governed by Part I of the Arbitration and Conciliation Act, 1996 can be set aside only on grounds mentioned under Sections 34(2) and (3), and not otherwise. Section 5 reads as follows:*
>
> > *"**5. Extent of judicial intervention**.—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."*
>
> ***16.** It is important to note that the 1996 Act was enacted to replace the 1940 Arbitration Act in order to provide for an arbitral procedure which is fair, efficient and capable of meeting the needs of arbitration; also to provide that the tribunal gives reasons for an arbitral award; to ensure that the tribunal remains within the limits of its jurisdiction; and to minimise the supervisory roles of courts in the arbitral process.*
>
> ***17.** It will be seen that none of the grounds contained in sub-section (2)(a) of Section 34 deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances.*
>
> ***18.** In Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , the Supreme Court construed Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961:*
>
> *"**7. Conditions for enforcement of foreign awards**.—(1) A foreign award may not be enforced under this Act—*
>
> *(b) if the Court dealing with the case is satisfied that--*
>
> *(ii) the enforcement of the award will be contrary to the public policy."*
>
> *In construing the expression "public policy" in the context of a foreign award, the Court held that an award contrary to*
>
> *(i) The fundamental policy of Indian law,*
>
> *(ii) The interest of India,*
>
> *(iii) Justice or morality,*
>
> *would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the*

*Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (see SCC p. 685, para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law (see SCC pp. 689 & 693, paras 85 & 95).*

*19. When it came to construing the expression "the public policy of India" contained in Section 34(2)(b)(ii) of the Arbitration Act, 1996, this Court inONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705 : AIR 2003 SC 2629] held: (SCC pp. 727-28 & 744-45, paras 31 & 74)*

> *"31. Therefore, in our view, the phrase 'public policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar case [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be—award could be set aside if it is contrary to:*
>
> > *(a) fundamental policy of Indian law; or*
> >
> > *(b) the interest of India; or*
> >
> > *(c) justice or morality, or*
> >
> > *(d) in addition, if it is patently illegal.*
>
> *Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.*
>
> *74. In the result, it is held that:*
>
> > *(A)(1) The court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:*
> >
> > *(i) a party was under some incapacity, or*
> >
> > *(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or*
> >
> > *(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*
> >
> > *(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.*
>
> *(2) The court may set aside the award:*
>
> > *(i)(a) if the composition of the Arbitral Tribunal was not in*

*accordance with the agreement of the parties,*

*(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act,*

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

*(a) the agreement of the parties, or*

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

*However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.*

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

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

*(a) fundamental policy of Indian law; or*

*(b) the interest of India; or*

*(c) justice or morality; or*

*(d) if it is patently illegal.*

*(4) It could be challenged:*

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

*(b) Section 16(6) of the Act.*

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

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

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

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

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

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

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

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

***20. The judgment in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705 : AIR 2003 SC 2629] has been consistently followed till date.***

*21. In Hindustan Zinc Ltd. v. Friends Coal Carbonisation [(2006) 4 SCC 445] , this Court held: (SCC p. 451, para 14)*

*"14. The High Court did not have the benefit of the principles laid down in Saw Pipes [(2003) 5 SCC 705 : AIR 2003 SC 2629] , and had proceeded on the assumption that award cannot be interfered with even if it was contrary to the terms of the contract. It went to the extent of holding that contract terms cannot even be looked into for examining the correctness of the award. This Court in Saw Pipes [(2003) 5 SCC 705 : AIR 2003 SC 2629] has made it clear that it is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India."*

*22. In McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] , this Court held: (SCC pp. 209-10, paras 58-60)*

*"58. In Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] this Court laid down that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression 'public policy' was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can, however, be noticed from the decision of this Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705 : AIR 2003 SC 2629] (for short 'ONGC'). This Court therein referred to an earlier decision of this Court in Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly [(1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103] wherein the applicability of the expression 'public policy' on the touchstone of Section 23 of the Contract Act, 1872 and Article 14 of the Constitution of India came to be considered. This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Contract Act, 1872. In ONGC [(2003) 5 SCC 705 : AIR 2003 SC 2629] this Court, apart from the three grounds stated inRenusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.*

*59. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merits of the matter.*

*60. 60. What would constitute public policy is a matter dependent upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government. (See State of Rajasthan v. Basant Nahata.)"*

**23.** *In Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd. [(2006) 11 SCC 245] , Sinha, J., held: (SCC p. 284, paras 103-04)*

*"103. Such patent illegality, however, must go to the root of the matter. The public policy, indisputably, should be unfair and unreasonable so as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act.*

*104. What would be a public policy would be a matter which would again depend upon the nature of transaction and the nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant so as to enable the court to judge the concept of what was a public good or public interest or what would otherwise be injurious to the public good at the relevant point as contradistinguished by the policy of a particular Government. (See State of Rajasthan v. Basant Nahata.)"*

**24.** *In DDA v. R.S. Sharma and Co. [(2008) 13 SCC 80] , the Court summarised the law thus: (SCC pp. 91-92, para 21)*

*"21. From the above decisions, the following principles emerge:*

*(a) An award, which is*

*(i) contrary to substantive provisions of law; or*

*(ii) the provisions of the Arbitration and Conciliation Act, 1996; or*

*(iii) against the terms of the respective contract; or*

*(iv) patently illegal; or*

*(v) prejudicial to the rights of the parties;*

*is open to interference by the court under Section 34(2) of the Act.*

*(b) The award could be set aside if it is contrary to:*

*(a) fundamental policy of Indian law; or*

*(b) the interest of India; or*

*(c) justice or morality.*

*(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.*

*(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.*

*With these principles and statutory provisions, particularly, Section 34(2) of the Act, let us consider whether the arbitrator as well as the Division Bench of the High Court were justified in granting the award in respect of Claims 1 to 3 and Additional Claims 1 to 3 of the claimant or the appellant DDA has made out a case for setting aside the award in respect of those claims with reference to the terms of the agreement duly executed by both parties."*

**25.** *J.G. Engineers (P) Ltd. v. Union of India [(2011) 5 SCC 758 : (2011) 3 SCC (Civ) 128] held: (SCC p. 775, para 27)*

*"27. Interpreting the said provisions, this Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705 : AIR 2003 SC 2629] held that a court can set aside an award under Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also*

*observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy."*

**26.** *Union of India v. Col. L.S.N. Murthy [(2012) 1 SCC 718 : (2012) 1 SCC (Civ) 368] held: (SCC p. 724, para 22)*

*"22. In ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705 : AIR 2003 SC 2629] this Court after examining the grounds on which an award of the arbitrator can be set aside under Section 34 of the Act has said: (SCC p. 727, para 31)*

*'31. … However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal'."*

***Fundamental Policy of Indian Law***

**27.** *Coming to each of the heads contained in Saw Pipes [(2003) 5 SCC 705 : AIR 2003 SC 2629] judgment, we will first deal with the head "fundamental policy of Indian law". It has already been seen from Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.*

**28.** *In a recent judgment, ONGC Ltd. v. Western Geco International Ltd. [(2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held: (SCC pp. 278-80, paras 35 & 38-40)*

*"35. What then would constitute the 'fundamental policy of Indian law' is the question. The decision in ONGC [(2003) 5 SCC 705 : AIR 2003 SC 2629] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression 'fundamental policy of Indian law', we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures*

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

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

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

*40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."*

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

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

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

***34. Application for setting aside arbitral award**.—(1)*

*(2) An arbitral award may be set aside by the court only if—*

*(a) the party making the application furnishes proof that—*

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

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

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

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

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

*such decision would necessarily be perverse.*

**32.** *A good working test of perversity is contained in two judgments. InExcise 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 logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."*

*In Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 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."*

**33.** *It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [ Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:"General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong".It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)*

*"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only*

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

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

***Interest of India***

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

**36.** *The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice"*

***Morality***

**37.** *The other ground is of "morality". Just as the expression "public policy" also occurs in Section 23 of the Contract Act, 1872 so does the expression "morality". Two illustrations to the said section are interesting for they explain to us the scope of the expression "morality":*

> *"(j) A, who is B's Mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1000 rupees to A. The agreement is void, because it is immoral.*
>
> *(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Penal Code, 1860."*

**38.** *In Gherulal Parakh v. Mahadeodas Maiya [1959 Supp (2) SCR 406 : AIR 1959 SC 781] , this Court explained the concept of "morality" thus: (SCR pp. 445-46 : AIR pp. 797-98)*

> *"Re. Point 3 — Immorality: The argument under this head is rather broadly stated by the learned counsel for the appellant. The learned counsel attempts to draw an analogy from the Hindu law relating to the doctrine of pious obligation of sons to discharge their father's debts and contends that what the Hindu law considers to be immoral in that context may appropriately be applied to a case under Section 23 of the Contract Act. Neither any authority is cited nor any legal basis is suggested for importing the doctrine of Hindu law into the domain of contracts. Section*

*23 of the Contract Act is inspired by the common law of England and it would be more useful to refer to the English law than to the Hindu law texts dealing with a different matter. Anson in his Law of Contracts states at p. 222 thus:*

> *'The only aspect of immorality with which courts of law have dealt is sexual immorality….'*

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

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

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

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

*In the book on the Indian Contract Act by Pollock and Mulla it is stated at p. 157:*

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

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

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

***39.*** *This Court has confined morality to sexual morality so far as Section 23 of the Contract Act, 1872 is concerned, which in the context of an arbitral*

*award would mean the enforcement of an award say for specific performance of a contract involving prostitution. "Morality" would, if it is to go beyond sexual morality necessarily cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. However, interference on this ground would also be only if something shocks the court's conscience.*

***Patent Illegality***

***40.*** *We now come to the fourth head of public policy, namely, patent illegality. It must be remembered that under the Explanation to Section 34(2)(b), an award is said to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption. This ground is perhaps the earliest ground on which courts in England set aside awards under English law. Added to this ground (in 1802) is the ground that an arbitral award would be set aside if there were an error of law by the arbitrator. This is explained by Denning, L.J. in R. v. Northumberland Compensation Appeal Tribunal, ex p Shaw [(1952) 1 All ER 122 : (1952) 1 KB 338 (CA)] : (All ER p. 130 D-E : KB p. 351)*

> *"Leaving now the statutory tribunals, I turn to the awards of the arbitrators. The Court of King's Bench never interfered by certiorari with the award of an arbitrator, because it was a private tribunal and not subject to the prerogative writs. If the award was not made a rule of court, the only course available to an aggrieved party was to resist an action on the award or to file a bill in equity. If the award was made a rule of court, a motion could be made to the court to set it aside for misconduct of the arbitrator on the ground that it was procured by corruption or other undue means (see Statutes 9 and 10 Will. III, C. 15). At one time an award could not be upset on the ground of error of law by the arbitrator because that could not be said to be misconduct or undue means, but ultimately it was held in Kent v. Elstob [(1802) 3 East 18 : 102 ER 502] , that an award could be set aside for error of law on the face of it. This was regretted by Williams, J., in Hodgkinson v. Fernie [(1857) 3 CB (NS) 189 : 140 ER 712] , but is now well established."*

***41.*** *This, in turn, led to the famous principle laid down in Champsey Bhara Co. v. Jivraj Balloo Spg. and Wvg. Co. Ltd. [AIR 1923 PC 66 : (1922-23) 50 IA 324 : 1923 AC 480 : 1923 All ER Rep 235 (PC)] , where the Privy Council referred to Hodgkinson [(1857) 3 CB (NS) 189 : 140 ER 712] and then laid down: (IA pp. 330-32)*

> *"The law on the subject has never been more clearly stated than by Williams, J. in Hodgkinson v. Fernie [(1857) 3 CB (NS) 189 : 140 ER 712] : [CB(NS) p. 202 : ER p. 717]*
>
> *'The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final Judge of all questions both of law and of fact. … The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think firmly established viz. where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established.'*
>
> *Now the regret expressed by Williams, J. in Hodgkinson v. Fernie [(1857) 3 CB (NS) 189 : 140 ER 712] has been repeated by more than one learned Judge, and it is certainly not to be desired that the exception should be in any way extended. An error in law*

*on the face of the award means, in Their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned Judges have arrived at finding what the mistake was is by saying: 'Inasmuch as the arbitrators awarded so and so, and inasmuch as the letter shows that the buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting Rule 52.' But they were entitled to give their own interpretation to Rule 52 or any other article, and the award will stand unless, on the face of it they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. Upon this point, therefore, Their Lordships think that the judgment of Pratt, J. was right and the conclusion of the learned Judges of the Court of Appeal [Jivraj Baloo Spg. and Wvg. Co. Ltd. v. Champsey Bhara and Co., ILR (1920) 44 Bom 780. The judgment of Pratt, J. may be referred to at ILR p. 787.] erroneous."*

*This judgment has been consistently followed in India to test awards under Section 30 of the Arbitration Act, 1940.*

**42.** *In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:*

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

> *"**28. Rules applicable to substance of dispute**.—(1) Where the place of arbitration is situated in India—*
>
> *(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"*

**42.2.** *(b) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.*

**42.3.** *(c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:*

> *"**28. Rules applicable to substance of dispute**.—(1)-(2)*
>
> *(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."*
>
> *This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it*

*could be said to be something that no fair-minded or reasonable person could do.*

**43.** *In McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] , this Court held as under: (SCC pp. 225-26, paras 112-13)*

> *"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission[(2003) 8 SCC 593 : 2003 Supp (4) SCR 561] and D.D. Sharma v. Union of India [(2004) 5 SCC 325] .]*
>
> *113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."*

**44.** *In MSK Projects (I) (JV) Ltd. v. State of Rajasthan [(2011) 10 SCC 573 : (2012) 3 SCC (Civ) 818] , the Court held: (SCC pp. 581-82, para 17)*

> *"17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See Gobardhan Das v. Lachhmi Ram [AIR 1954 SC 689] , Thawardas Pherumal v. Union of India [AIR 1955 SC 468] ,Union of India v. Kishorilal Gupta & Bros. [AIR 1959 SC 1362] , Alopi Parshad & Sons Ltd. v. Union of India [AIR 1960 SC 588] , Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji [AIR 1965 SC 214] and Renusagar Power Co. Ltd. v. General Electric Co. [(1984) 4 SCC 679 : AIR 1985 SC 1156] )"*

**45.** *In Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [(2012) 5 SCC 306] , the Court held: (SCC pp. 320-21, paras 43-45)*

> *"43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.*

*44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in SAIL v. Gupta Brother Steel Tubes Ltd. [(2009) 10*

*SCC 63 : (2009) 4 SCC (Civ) 16] and which has been referred to above. Similar view has been taken later in Sumitomo Heavy Industries Ltd. v.ONGC Ltd. [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.*

*45. This para 43 reads as follows: (Sumitomo case [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] , SCC p. 313)*

> *'43. … The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwality Mfg. Corpn. v. Central Warehousing Corpn. [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.'"*

***46.** Applying the tests laid down by this Court, we have to examine whether the Division Bench has exceeded its jurisdiction in setting aside the arbitral award impugned before it."*

57. Recently in **Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI)**, **2019 SCC Online SCC 677,** Court has considered effect of Section 2A incorporated in Section 34 of Act 1996 and held as under in paragraphs 35, 36, 37, 38, 39, 40, 41, 42, 70 and 76:

> *"35. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the "Renusagar" understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra).*
>
> *36. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference*

*on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paragraphs 36 to 39 of Associate Builders (supra), as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.*

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

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

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

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

*41. The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 inAssociate Builders (supra), 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 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(2A).*

*42. What is important to note is that a decision which is perverse,*

*as understood in paragraphs 31 and 32 of Associate Builders (supra), 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 characterised as perverse.*

*70. The expression "most basic notions of … justice" finds mention in Explanation 1 to sub-clause (iii) to Section 34(2)(b). Here again, what is referred to is, substantively or procedurally, some fundamental principle of justice which has been breached, and which shocks the conscience of the Court. Thus, in Parsons (supra), it was held:*

*"7. Article V(2)(b) of the Convention allows the court in which enforcement of a foreign arbitral award is sought to refuse enforcement, on the defendant's motion or sua sponte, if 'enforcement of the award would be contrary to the public policy of (the forum) country.' The legislative history of the provision offers no certain guidelines to its construction. Its precursors in the Geneva Convention and the 1958 Convention's ad hoc committee draft extended the public policy exception to, respectively, awards contrary to 'principles of the law' and awards violative of 'fundamental principles of the law.' In one commentator's view, the Convention's failure to include similar language signifies a narrowing of the defense [Contini, International Commercial Arbitration, 8 Am.J.Comp.L. 283, 304]. On the other hand, another noted authority in the field has seized upon this omission as indicative of an intention to broaden the defense [Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049, 1070-71 (1961)].*

*8. Perhaps more probative, however, are the inferences to be drawn from the history of the Convention as a whole. The general pro-enforcement bias informing the Convention and explaining its supersession of the Geneva Convention points toward a narrow reading of the public policy defense. An expansive construction of this defense would vitiate the Convention's basic effort to remove preexisting obstacles to enforcement. [See Straus, Arbitration of Disputes between Multinational Corporations, in New Strategies for Peaceful Resolution of International Business Disputes 114-15 (1971); Digest of Proceedings of International Business Disputes Conference, April 14, 1971, at 191 (remarks of Professor W. Reese)]. Additionally, considerations of reciprocity – considerations given express recognition in the Convention itself – counsel courts to invoke the public policy defense with caution lest*

*foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States.*

*9. We conclude, therefore, that the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice.[Restatement Second of the Conflict of Laws 117, comment c, at 340 (1971); Loucks v. Standard Oil Co., 224 N.Y. 99, 111, 120 N.E. 198 (1918)]."*

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

58. Having referred to the ambit and scope of Section 34 of Act, 1996 as crystallized by Apex Court, we proceed to examine first point of consideration i.e. whether in the facts and circumstances of case

objections under section 34 of Act, 1996 filed by claimant-opposite party satisfied any of the parameters of Section 34 of Act, 1996 as noted herein above for setting aside the impugned award.

59. Admittedly, claim of claimant-opposite party was rejected by U.P. Micro and Small Industrial Facilitation Council, Kanpur, vide award dated 22.2.2010. Council concluded that claimant opposite party does not fall within the meaning of the term 'Supplier' as defined in section 2(n) of Act, 2006 and secondly, claim filed by opposite party No.2 was barred by limitation. We fail to understand how Council could on the one hand reject claim being barred by limitation and simultaneously hold that claim filed by opposite party is not maintainable as claimant opposite party is not covered within the meaning of the term 'Supplier' as defined in Section 2(n) of Act, 1996. It is well settled that if claim is barred by limitation, then merits cannot be looked into.

60. Consequently, in view of contradictory findings recorded by Council in support of it's conclusion to reject claim of opposite party No. 2, issues which emerge for consideration before Court below were on the merits of the claim i.e. whether the claimant-opposite party No. 2 falls within the meaning of term 'Supplier' as defined under section 2(n) of Act, 1996 and secondly, whether Council was correct in concluding that claim raised by opposite party No.2 is barred by limitation.

61. We shall separately deal with the issue, whether claimant-opposite party No.2 falls within the meaning of term 'Supplier' as defined under section 2(n) of Act, 1996 in the later part of this judgement. At this stage, we are only concerned, whether the question referred to above, relating to the status of claimant-opposite party No.2 was an issue which went to the root of the matter or not. Similarly, question of limitation raised by appellant before council was a substantial issue or not as it is by now well settled that if a claim is barred by limitation then it cannot be considered.

62. We have already referred to the entire gamut of case law regarding the

ambit and scope of Section 34 of Act, 1996 and we are of the view that both the aforesaid issues were substantial issues which went to the root of the matter and therefore, claimant-opposite party was clearly justified in approaching the District Judge, under Section 34 of Act, 1996. Thus, we conclude by observing that in the facts and circumstances of the case, Court below was justified in entertaining objections filed by opposite party as the same were in conformity with the law laid down in **Associate Builders (Supra).**

63. **S**econd issue arises for consideration is whether claimant-opposite has availed parallel remedy by approaching the Civil Court at Panchkula Haryana and also raised an earlier dispute. The maintainability of claim filed by claimant-opposite party was challenged before Court below also on the aforesaid ground. However, Court below upon consideration of record observed that the cause of action pleaded in original suit and in the claim petition are different.

64. Learned Senior Counsel, Mr. H.N. Singh has again raised this issue before us by submitting that once claimant-opposite party had already approached Civil Court at Panchkula, District Haryana for redressal of its grievance, it cannot simultaneously raise an arbitral dispute.

65. Countering the submissions urged by learned Senior Counsel, Mr. Alok Kumar Yadav, learned counsel representing claimant-opposite party submits that Court below after considering the record has recorded a specific finding that subject matter of original suit filed before Civil Court, Panchukla, Haryana, and the subject matter of claim raised by claimant-opposite party are different. The findings so recorded by Court below has not been specifically challenged as neither any ground to that effect has been raised in the memo of present appeal nor a question of law to that effect has been framed. He further submits that apart from above, no factual foundation has been laid for challenging aforesaid finding recorded by Court below. The affidavit filed in support of stay application appended along with memo of appeal is completely silent on this point.

Extending his arguments, he further contends that the appellants have not brought on record even the copy of the plaint of origianl suit filed by claimant-opposite party before Civil Court at Panchkula on the basis of which a parallel could be drawn regarding the cause of action pleaded and the relief claimed in Original Suit and the claim raised before the Council at Kanpur.

66. We find force in the arguments raised by learned counsel for claimant-opposite party. It is true that no ground has been formulated in the grounds of appeal nor any question of law to that effect has been framed regarding correctness of findings recorded by Court below on the issue of parallel remedies. We further find that no factual foundation has been laid in the affidavit filed in support of Stay Application appended along with memo of appeal regarding illegality/perversity in the findings recorded by Court below on the aforesaid issue. Moreover, neither the plaint nor any other document has been brought on record along with the memo of appeal or by means of additional evidence to plead and establish that the cause of action pleaded in the plaint as well as the relief claimed by means of above noted claim petition are similar. Thus, we have no hesitation to conclude that aforesaid objection raised by the learned counsel for appellant to the claim raised by claimant-opposite party is an half hearted attempt to challenge impugned judgement and order. Accordingly, we reject the aforesaid contentions.

67. On the issue of limitation, we find that appellant raised an objection regarding maintainability of claim filed by opposite party No. 2 before the Council on the ground of limitation. Objections so raised by appellant before Council were accepted and Council concluded that claim raised by opposite party No. 2 is barred by limitation.

68. It is an undisputed fact that Appellant awarded various purchase orders to Claimant-Opposite Party during the period 1991 to 2000. Things were going on smoothly and bills of Claimant-Opposite Party were being paid regularly. However, in 1997, some delay occurred in payment of

principal amount. Accordingly Claimant-Opposite Party filed CMWP No. 7916 of 1997 before Punjab and Haryana High Court claiming payment of interest on principal amount for the period of delayed payment. During pendency of above mentioned writ petition Claimant-Opposite Party filed a Civil Misc. Application in the aforesaid writ petition praying therein that directions be issued to Government of Haryana to establish Industrial Facilitation Council (hereinafter referred to as 'IFC') as contemplated under Sections 7A and 7B of Act, 1993 within a period of three months.

69. Punjab and Haryana High Court did not examine merits of claim raised by petitioner i.e. Claimant-Opposite Party herein in CMWP No. 7916 of 1997 but disposed of said writ petition finally, vide order dated 13.02.2002 on the undertaking scheduled by counsel for State of Haryana. For ready reference order dated 13.02.2002 is reproduced herein-below:

> *" In pursuant to order dated December 20, 2001, Mrs. Meenaxi Anand Chaudhary, Principal Secretary, to government of Haryana, Department of Power is present in Court. She has stated that the Government shall constitute the requisite council as provided under Section 7A of the Interest on Delayed Payment to Small Scale and Ancillary Industrial Undertakes (Amendment) Act, 1958. She has further stated that infact is the Small Scale Industries Department, which is directly concerned with this matter. However, she has stated for and on behalf of the Government of Haryana that Council shall be constituted within a period of three months from today.*
>
> *In this view of the matter, the application has been rendered instructions and the same is disposed of accordingly.*
>
> *Dasti on payment."*

70. Pursuant to aforesaid order dated 13.2.2002, Government of Haryana, constituted Industrial Facilitation Council Haryana at Chandigarh in the year 2002. Thereafter, claimant-opposite party filed it's claim before IFC, Haryana, vide claim dated 31.7.2002, claiming a sum of Rs. 12,70,89,049/- alongwith pendente-lite and future interest as well as cost of claim petition.

71. During pendency of aforesaid Claim Petition dated 31.07.2002 filed by claimant-opposite party before IFC, Haryana Micro Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as

Act, 2006) came into force on 02.10.2006. By reason of Section 32 of Act 2006, old Act of 1993 stood repealed.

72. Consequently, after coming into force of Act, 2006, IFC (Haryana) losts its existence. As a result of aforesaid, dispute of parties pending before IFC Haryana came to be stayed and thereafter adjourned as IFC (Haryana) now had no jurisdiction to decide claim of Claimant-Opposite Party. Under the new Act 2006, Jurisdiction to decide claim of Claimant-Opposite Party now vested with Micro and Small Industrial Facilitation Council Haryana or Micro and Small Industrial Facilitation Council, Uttar Pradesh which were established at Chandigarh and Kanpur, respectively, as per Section 20 read with Section 21 of Act, 2006.

73. Claimant-Opposite Party filed an application dated 21.03.2007 before Director of Industries, Haryana-Cum-Chairman Industries Facilitation Council, Haryana, praying therein that original file pertaining to claim submitted by claimant-opposite party be sent to U.P. State Micro & Small Industrial Facilitation Council, Directorate of Industries (U.P.) Kanpur. Thereafter, Claimant-Opposite Party filed reminders dated 27.11.2006, 08.12.2006, 22.12.2006, 07.02.2007 and 07.04.2007 in continuation of transfer application dated 21.3.2007 earlier filed by him.

74. However, as no consequential action was taken on the aforesaid applications/representations submitted by claimant-opposite party, it submitted a new claim dated 19.06.2007 before U.P. State Micro and Small Industrial Facilitation Council which was constituted under Act, 2006. Claimant-Opposite Party now revised its claim to Rs.42,19,02,100/-. The break up of same is as follows:

> *"Interest due as per Section 16 and 17 of Act i.e. Rs. 40,74,54,079/-*
>
> *Cost of goods supplied Rs. 43,50,817/-*
>
> *Cost of recoveries made illegally through encahsment of Bank Guarantee and the cost of material supplied Rs.1,00,97,204/-"*

75. Subsequently, Haryana State Micro and Small Industrial Facilitation

Council passed an order dated 02.04.2008 directing Claimant-Opposite Party to approach Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur as Claimant-Opposite Party is registered in Uttar Pradesh. For ready reference order dated 02.04.2008 is reporduced herein-below:-

*" Regd. No. TS/IFC/22/2006-07*

*From*

*The Director of Industries & Commerce, Haryana-cum-Chairman-Haryana Micro and Small Enterprises Facilitation Council 30 Bays Building, Ist Floor, Section 17, Chandigarh.*

*To*

*M/s P.M. Electronics Ltd.,*

*B-10 & 11, Surajpur Site-C, Greater Noida,*

*Distt. Gautam Budh Nagar,*

*Dated Chandigarh, the*

*Subject: Ist Meeting of Haryana Micro and Small Enterprises Facilitation Council fixed for 22.01.2008 at 11-00 AM under the Chairmanship of Shri D.R.Dhingra, IAS, Director of Industries & Commerce, Haryana-Cum-Chairman , HMSEFC.*

*Sir,*

*Reference this office letter No. TS/HMSEFC/Ist meeting/392-A dated 8.1.2008 on the subject cited above.*

*2. The Ist meeting of Ist Meeting of Haryana Micro and Small Enterprises Facilitation Council fixed for 22.01.2008 at 11-00 AM under the Chairmanship of the undersigned. The decision of the Council is reproduced below:*

*"M/s P.M. Electronics Pvt. Ltd. Noida has submitted an applicati0on for transfer of their case to Micro & Small Enterprises Facilitation Council set up by the U.P. State, since HMSEFC under the Micro, Small & Medium Development Act, 2006 does not have jurisdiction to proceed further in their case. To this effect the claimant has submitted various representations dated 21.3.07,7.4.07, 29.10.07 and 22.1.2008 respectively.*

***On the request of the Claimant, the Council decided to dispose of the case since the unit of the claimant is registered in U.P. Sate with the direction to claimant to approach MSEFC set up by the U.P. Govt. if they so desire"***

*This is for your kind information.*

*(D.R. Dhingra)*

*Director of Industries & Commerce, Haryana-*

*Cum-Chairman, HMSEFC"*

76. It is pursuant to aforesaid order that claim of Claimant-Opposite Party submitted on 19.6.2007, came to be considered by Uttar Pradesh Micro and Small Industrial Facilitation Council, Kanpur. The Council rejected the claim of claimant-opposite party, vide award dated 22.2.2010.

73. Mr. Alok Yadav, learned counsel for claimant-opposite party submits that from the facts as noted above, it cannot be said that claimant-opposite party was not conscious of its rights. Right from inception, claimant-opposite party has been agitating its claim before the forum as available. Apart from above, Section 32 of Act, 2006 clearly provides that an action taken under the Act so repealed, shall be deemed to have been done or taken under the corresponding provision of this Act. Therefore, what is sought to be urged is that by virtue of Section 32 of Act, 2006, claim of claimant-opposite party shall be deemed to have been filed under Act, 1993 and therefore, same cannot be rejected on the ground of limitation.

77. He further contents that in case the objections raised by appellant is accepted then claimant-opposite party shall be rendered remedy less as claim presented under the Act, 1993 has been disposed of on the ground that the counsel at Haryana has no jurisdiction on account of Act, 2006, and the claim cannot be considered under Act, 2006 on account of it being barred by limitation.

78. It was in order to avoid aforesaid anomaly that Section 32 has been incorporated in Act, 2006. Therefore, claim of claimant-opposite party shall be deemed to have been filed under Act, 1993 and therefore, the same cannot be rejected on the ground of limitation.

79. We find considerable force in the submissions urged by Mr. Alok Yadav, learned counsel for claimant-opposite party. It is an undisputed fact that claimant-opposite party had first approached High Court of Punjab and Haryana by means of a writ petition. Thereafter, pursuant to

an order passed in the writ petition filed by claimant-opposite party, IFC Haryana was constituted in the year 2002. Accordingly, claimant-opposite party filed a claim petition dated 31.7.2002 before IFC Haryana. During pendency of aforesaid claim petition, Act, 2006 came into force. Consequently, IFC Haryana, had no jurisdiction to decide the claim of claimant-opposite party. It was in aforesaid circumstances that claimant-opposite party submitted an application dated 21.3.2007 to transfer claim petition filed by claimant-opposite party to U.P. State Micro and Small Industrial Facilitation Council, Directorate of Industries (U.P) Kanpour. As no consequential action was taken on aforesaid transfer application, claimant-opposite party filed reminders dated 27.11.2006, 8.12.2006, 22.12.2006, 7.2.2007 and 7.4.2007. However, in spite of aforesaid, no action was taken by IFC, Haryana to transfer claim petitions filed by claimant-opposite party to U.P., Claimant-Opposite Party filed its new claim dated 19.6.2007 before U.P. State Micro and Small Industrial Facilitation Council, Directorate of Industries (U.P) Kanpur. It is, thereafter, IFC Haryana passed the order dated 2.4.2008 whereby claim filed by claimant-opposite party was disposed of with direction to claimant opposite party to approach N.E.F.C. set up by Government of U.P. Therefore, on the facts as noted above, it cannot be said that claimant-opposite party has raised its claim for the first time in the year 2007. Consequently, in the facts and circumstances of case, we do not find that the claim filed by claimant-opposite party can be said to be barred by limitation. However, this conclusion arrived at by us, will not preclude the appellant herein to raise an objection with regard to validity of amended claim filed by claimant-opposite party in the year 2007.

80. This brings us to the last question involved in the present appeal, whether claimant-opposite party is covered within the meaning of term 'Supplier' as defined under Section 2 (n) of Act, 2006. As already noted above, according to Mr. H.N. Singh, learned Senior Counsel appearing for the appellant, claimant-opposite party is not covered within the meaning

of term 'Supplier' as defined in Section 2 (n) of Act, 2006. Since the claimant-opposite party is not covered within the meaning of term 'Supplier', therefore, claimant-opposite party could not have filed any claim petition in terms of Section 18 of Act, 2006.

81. Submission urged by learned Senior Counsel is founded on the proposition that claimant-opposite party did not submit memorandum which is required to be filed within 180 days from the date of enforcement of Act, 2006. Since there is nothing on record to show that claimant-opposite party ever filed its memorandum before competent authority as per Section 8 of Act, 2006, it cannot be treated as 'Supplier' within the meaning of section 2(n) of Act, 2006.

82. Mr. Alok Kumar Yadav on the other hand submits that at the time of presentation of claim in October, 2006, Act, 2006 relied upon by Uttar Pradesh State Micro and Small Industrial Facilitation Council, Kanpur, was not in existence. Furthermore, company is not under a legal obligation to submit memorandum before competent authority as per section 8 (i)(a) of Act, 2006. Thus, Section 8 of Act, 2006 has wrongly been relied upon in case of Claimant-Opposite Party. It was next submitted that Section 8 of Act, 2006 grants freedom to Small Scale Industries to present or not to present their memorandum. Therefore, Section 2(n) of Act, 2006 is not to be read alongwith Section 8 of Act, 2006 but independent of the same. Apart from above, Government of India has issued notification bearing No. 2/311123007-MSNE POL (PL), whereby filing of Industrial Entrepreneur’s Memorandum has been made discretionary. Therefore, in veiw of above, it cannot be said that claimant-opposite party was not under a legal obligation to file Industrial Enterpreneur's Memorandum before the Competent Authority as per mandate of Section 8 of Act, 2006. Consequently, claimant-opposite party is a supplier within the meaning of section 2 (n) of Act, 2006.

83. We have carefully analyzed the submissions urged by learned counsel for parties. It is an undisputed fact that Court below has relied

upon the notification bearing No. 2/311123007-MSNE POL (PL) to arrive at conclusion that it is not mandatory for an Industrial undertaking to file its Industrial Entrepreneur's Memorandum. Since this was the only ground relied upon by Uttar Pradesh State Micro and Small Industrial Facilitation Council, Kanpur, the finding so recorded by Council was rightly set aside by Court below. In the absence of any such materials to establish that filing of Industrial Entrepreneur's Memorandum is mandatory, we uphold the finding recorded by the Court below.

84. For all the reasons given herein above, we do not find any good ground to interfere with the judgement and order impugned in present First Appeal from Order. Court below by means of impugned judgement and award has set aside award and remitted the matter before Arbitral Tribunal for adjudication afresh, which is perfectly in accordance with law. Court while deciding objections under section 34 of Act, 1996, cannot substitute the award by its own judgement. Since the matter has been remanded to Micro and Small Industrial Facilitation Council, Uttar Pradesh for decision afresh, we have it open to appellant to raise all objections regarding merits of claim raised by claimant-opposite party, except the plea of limitation that the claim as a whole is barred by limitation and secondly, that claimant-opposite party is not covered within the meaning of term 'Supplier' as defined under section 2 (n) of Act, 2006.

85. In view of above, present appeal fails and is liable to be dismissed . It is, accordingly, dismissed with cost which we quantify at Rs. 50,000/- payable by appellant to claimant-opposite party within a period of one month from today.

**Order Date :-** 26.2.2020
YK