* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 07 February 2024**
Judgment pronounced on: 17 May 2024

\+ FAO(OS) (COMM) 179/2023

AJAY SINGH ..... Appellant

Through: Mr. Amit Sibal, Sr. Adv. with Mr. K.R. Sasiprabhu, Mr. Goutham Shivshankar, Mr. Tushar Bhardwaj, Mr. Vinayak Maini, Mr. Kartikeya Asthana, Mr. Vishnu Sharma, Mr. Manan Sishodia and Md. Ilyas, Advs.

versus

KAL AIRWAYS PRIVATE LIMITED & ANR. ..... Respondents

Through: Mr. Maninder Singh, Sr. Adv. with Ms. Nandini Gore, Ms. Sonia Nigam, Mr. Prabhas Bajaj, Mr. Ajay Sabharwal, Mr. Rajat Dasgupta & Mr. Akarsh Sharma, Advs.

\+ FAO(OS) (COMM) 180/2023

SPICEJET LIMITED ..... Appellant

Through: Mr. Amit Sibal, Sr. Adv. with Mr. K.R. Sasiprabhu, Mr. Goutham Shivshankar, Mr. Tushar Bhardwaj, Mr. Vinayak Maini, Mr. Kartikeya Asthana, Mr. Vishnu Sharma, Mr. Manan Sishodia and Md. Ilyas, Advs.

versus

KAL AIRWAYS PRIVATE LIMITED & ANR. & ORS. ..... Respondents

Through: Mr. Maninder Singh, Sr. Adv. with Ms. Nandini Gore, Ms. Sonia Nigam, Mr. Prabhas Bajaj, Mr. Ajay Sabharwal, Mr. Rajat Dasgupta & Mr. Akarsh Sharma, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J.

S. No.	Particulars	Paragraph Nos.
A.	INTRODUCTION	1 - 2
B.	BROAD FACTUAL MATRIX	3 – 9
C.	SUBMISSIONS OF THE APPELLANTS	10 - 48
D.	SUBMISSIONS ON BEHALF OF THE RESPONDENTS – KAL AND KM	49 - 78
E.	EVALUATION OF THE RIVAL SUBMISSIONS	79 - 124

A. INTRODUCTION

1. The appellants question the correctness of the judgment rendered by a learned Single Judge of the Court dated 31 July 2023 and in terms of which the challenge to the Arbitral Award under Section 34 of the

Arbitration and Conciliation Act, 1996[1] as mounted has come to be dismissed. The petitions before the learned Single Judge had impugned the Arbitral Award dated 20 July 2018 as corrected vide order dated 20 September 2018 of the **Arbitral Tribunal**[2].

2. The claim before the AT had been brought by **KAL Airways Private Limited**[3] along with **Mr. Kalanithi Maran**[4], and in which the appellants - **SpiceJet Limited**[5] and Mr. Ajay Singh were named as the respondents. The AT had upon consideration of the claims as laid by KAL and KM as well as the counterclaims which had been filed by the appellants herein framed the following operative directions:-

> "**60.** ….. In conclusion, we hold as follows:-
>
> (1) The Claimants are entitled to refund of Rs.308,21,89,461 /- from the Respondents.
>
> (2) The parties shall explore the possibility of giving effect to and exercise the option as described in detail. In case the efforts do not fortify, the Respondents shall within a period of one month thereafter refund the amount in question i.e. Rs. 270,86,99,209/- to the Claimant No. 2 (which is arrived at after adjusting the counter claim of Rs. 100 Crores which has been allowed)
>
> (3) Since the amount covered by conclusion (1) was with the Respondents since November 2015, they would have become liable to pay interest on the same. Though, interest at the rate of 18% per annum has been claimed, we are of the view that since Respondent No.1 Company took over a huge liability and also paid interest on the tax amount payable by the Claimants, interest at the rate of 12% on Rs.308,21,89,461/- would be appropriate. The amount has to be accordingly calculated for about 30 months. Additionally, in view of the finding relating to the CRPS claim and the proved position that the Respondents have paid interest / servicing charges of around Rs.29 Crores, the counter claim to that extent is allowed.

[1] Act
[2] AT
[3] KAL
[4] KM
[5] SpiceJet

(4) So far as costs are concerned, in view of the factual scenario involved, both parties are directed to bear their respective costs. The Cost of Arbitration (fee of Arbitrators, expenses including travel , hotel expenses etc. of the Arbitrators, venue and Secretarial assistance) shall be borne equally by the parties.

(5) In case the payments, as directed, to be made by the Respondents are not so made within two months from the relevant date, the Claimants shall be entitled to interest @ 18% from the last date of the due date in terms of this Award.

(6) Claims / counter claims other than those dealt with above and specifically granted stand rejected.

(7) The parties have furnished stamp papers of Rs.500/- each with undertaking to pay the deficit, if any, as and when called upon to do so."

B. BROAD FACTUAL MATRIX

3. In order to appreciate the challenge which stands raised, we deem it apposite to notice the following essential facts. The case before the AT emanates from a transaction involving the takeover of SpiceJet by Ajay Singh from KAL and KM. The appellants contend that at the time when they took over SpiceJet, it was a company mired in debt to the extent of approximately INR 2200,00,00,000/- and the transaction essentially was aimed at taking over the debt-ridden company and absolving KM of the personal guarantees submitted as security for the repayment of loans taken with respect to SpiceJet.

4. It is submitted that in consideration of the aforesaid offer, the entire shareholding of KAL and KM in SpiceJet was to be transferred to the appellant – Ajay Singh for a consideration of INR 2/-. Additionally, KAL and KM were obligated to bring in "Committed Support" of INR 450 crores in SpiceJet. It is alleged by the appellants that KAL and KM failed to abide by their contractual obligations and ultimately infused only INR 350 crores. The takeover, which occurred

in February 2015 was founded upon a **Share Sale and Purchase Agreement**[6] dated 29 January 2015. The various steps liable to be undertaken in terms of the SSPA are explained by the appellants in the following terms:-

> "The SSPA broadly envisaged the following:
>
> a. **Step 1**: Transfer of entire shareholding held by KAL and KM in SJ to AS for a nominal consideration of Rs. 2.
>
> i. See Clause 2 of SSPA
>
> ii. Details of Sale Shares are at Schedule A of SSPA
>
> b. **Step 2:** Issuance of Warrants to KAL and KM as stipulated in Schedule D of the SSPA, subject to necessary approvals being obtained. As per Clause 3.1 of the SSPA, these Warrants could be converted into equity shares at a conversion price of Rs. 16.30 per equity share. Consideration for the Warrants was broken up into the following parts:
>
> i. The total consideration was Rs.308,21,89,461/- only. It is not in dispute that the entire sum was paid, but the warrants were not allotted. See **[See Paragraph 6 of the Award (pgs 170) (PDF pgs 174)]**
>
> ii. Part of the consideration had already been paid by KM even prior to entry of the SSPA by way of SSPA by way of adjustments towards loans that had been advanced by KM to SJ.
>
> iii. Thus, what was remaining to be paid was the "Balance Warrant Payments" as provided at Schedule D of the SSPA
>
> c. **Step 3**: Issuance of Tranche 1 and Tranche 2 CRPS
>
> i. The SSPA contemplated issuance of non-convertible redeemable preference shares **("CRPS")** of face value of Rs. 1000/- in two tranches.
>
> ii. The terms and conditions of the CRPS that were to be issued are at Schedule B of the SSPA. The CRPS were essentially conceived as debt-like instruments having a coupon rate of 6 % and were redeemable only after 8 years. The terms also made it clear that dividend would become payable only subject to availability of profits in the company.
>
> iii. The total consideration for CRPS of Rs. 370,86,99,209/- was broken up into:

[6] SSPA

1. Tranche 1 CRPS Amount Rs. 320,86,99,209/-
2. Tranche 2 CRPS Amount Rs. 50 crores

The said amounts are defined in Clause 1.1 of the SSPA"

5. As per the appellants, the issuance of **Share Warrants**[7] and **Non-Convertible Redeemable Preference Shares**[8] were to follow the adjustments made to loan amounts and unsecured advances amounting to INR 229 crores, a Committed Support of INR 450 crores being brought in by KAL and KM and the last part of the said Committed Support amounting to INR 100 crores being completed with the release of a fixed deposit of an equivalent amount standing in the personal name of KM into Designated Account 2. The appellants assert that disputes *inter partes* arose consequent to a failure on the part of KAL and KM to infuse INR 450 crores and as a result of a failure on the part of the **Bombay Stock Exchange**[9] to approve the issuance of Warrants.

6. It is their case that the Warrants could not be issued since the approval of BSE could not be obtained despite all bona fide efforts being made by SpiceJet and Mr. Ajay Singh. They would contend that the non-issuance of Warrants thus cannot possibly be viewed as a breach of the SSPA either by SpiceJet or Mr. Ajay Singh.

7. They additionally argue that the CRPS transaction could not be completed since KAL and KM failed to pay the full consideration as per the terms of the SSPA. According to the appellants, there was an admitted failure on the part of KAL and KM to effect a deposit of INR 100 crores and thus they being liable to be held in breach of the

[7] Warrants
[8] CRPS
[9] BSE

contract terms. The aforesaid aspect has been duly noted by the learned Single Judge who has found that out of a total consideration of INR 220,02,93,039, KAL and KM had failed to place INR 100 crores in the Designated Account 2. Before us, the challenge stood confined to the direction framed by the AT for a refund of an amount of INR 270,86,99,209/- paid by KAL and KM for issuance of CRPS, the imposition of 12% interest pendent lite on Warrants as well as post-award interest at the rate of 18% from the last date of the due dates in terms of the Arbitral Award.

8. The primary ground of attack to the Award appears to have been directed against the direction for refund with it being apparently contended that the same is violative of the provisions contained in Section 65 of the **Indian Contract Act, 1872**[10]. The appellants asserted that the aforesaid direction clearly amounted to a rewriting of the contract itself since the SSPA had not envisaged any refund of funds received in respect of CRPS. It was additionally urged that once the AT had found that it was KAL and KM who were guilty of breach, the refund was clearly unjustified. It was these submissions which appear to have been addressed before the learned Single Judge.

9. The learned Single Judge while dealing with the aforesaid issue, has essentially come to the following conclusions:-

> "**79.** The learned Tribunal, while referring to the claims of the respondents herein, observed that the respondents were required to make the payment of Rs. 220,02,93,039/-, which stood paid. While coming to conclusion the Arbitral Tribunal also noted that out of the total consideration of Rs. 220,02,93,093/- to be paid by the respondents. towards the Tranche-I CRPS amount, the respondents

[10] 1872 Act

had made a total payment of Rs. 120,02,83,038/-, leaving Rs. 100 Crores to be payable. The Arbitral Tribunal was of the view that since, the payment towards Tranche-1 was made by the respondents herein, but the supplementary obligation of issuance of the CRPS was not fulfilled by the petitioners, the petitioners were liable to pay back and refund the sum so deposited by the respondent after deducting the sum of the amount which remained uncredited, i.e., Rs. 100 Crores.

80. In accordance with the Agreement, the respondents herein were to make a fixed deposit of Rs. 100 Crores. However, it was observed that the said amount was never found to be deposited in the designated bank account in terms of the agreed mutual terms of the Agreement between the parties. The Counter-Claim pertaining to the said amount was, hence, decided in the favour of the petitioners herein and was deducted from their liability towards the respondents amounting to Rs. 370,86,99,209/- From a bare perusal of the aforesaid, it is evident that the learned Tribunal has provided adequate reasoning as to the issue of refund of Rs 270,86,99,209/-.

81. It has been further argued on behalf of the petitioners that all obligations were fulfilled by them in accordance with the Agreement, however, the Tribunal, upon appreciation of the entire circumstances as well as the material and record before it, found that the CRPS were not issued in terms of the Agreement.

82. The course of procedure taken by the Arbitral Tribunal as well as the findings as reproduced above are evidently not in contravention of any of the provisions under the Arbitration Act or even any substantive law. There is nothing in the observations in the impugned Award to suggest that the Tribunal contravened or went beyond the terms of Agreement executed between the parties. The Tribunal provided reasons for the findings delivered and there is no perversity which is either apparent on the face of the record or which goes to the root of the matter. Therefore, the impugned Award cannot said to be patently illegal.

83. To test the validity and legality of the impugned Award and the observations made therein the test of fundamental policy of law was also before this Court, however, upon a perusal of the Award, this Court does not find that the Award suffers from non-application of mind. Not only did the Tribunal go into elaborate details of the claims raised and submissions thereto made by the parties, it also appreciated the material on record and passed an Award which is supported by reasons. The inference drawn by the Tribunal based on the reasons provided by it do not constitute an interference which on the face of it is untenable or unreasonable. Under the scope of Section 34 of the Arbitration Act, this Court is to be concerned only about the aforementioned considerations to

> make an observation qua the impugned Award, without entering the merits of the case and the evidence in the matter, and in view of the findings of the Arbitral Tribunal with respect to the claims raised against refund of the amount, this Court is of the opinion that there is nothing perverse in the impugned Award to say that it is against the fundamental policy of law."

C. SUBMISSIONS OF THE APPELLANTS

10. Assailing the view so taken, Mr. Sibal, learned senior counsel appearing in support of the appeals, addressed the following submissions. It was firstly contended that the grant of refund is clearly contrary to the terms of the SSPA and amounts to the AT undertaking an exercise to reinvent and rewrite the terms of the SSPA which is clearly impermissible in law.

11. It was submitted that the CRPS was conceived to be a debt instrument carrying a coupon rate of 6% and redeemable only after eight years. The dividend on the CRPS, Mr. Sibal explained, would have become payable subject to availability of surplus profits in the hands of SpiceJet. According to learned senior counsel, the underlying construct of the issuance of the CRPS was based upon the infusion of funds in SpiceJet and which would be available for utilization for a period of eight years and thus facilitate its revival. It was Mr. Sibal's submission that no stipulation of the SSPA contemplated an expedited or premature refund of the amounts paid towards the CRPS.

12. The direction for refund, according to Mr. Sibal, is rendered even more untenable, when one bears in mind the fact that undisputedly KAL and KM had failed to comply with the requirement of ensuring the infusion of INR 450 crores into SpiceJet. It was further submitted that as per the SSPA, the interest burden relating to CRPS would not

have exceeded INR 130.10 crores when computed at the rate of 6% spread over a period of eight years. However, it was submitted that the Award has led to the appellants being placed under a liability to pay more than INR 184.64 crores as interest for CRPS alone.

13. It was Mr. Sibal's submission that the Award which stood impugned before the learned Single Judge and insofar as it unsettled the express stipulations of the contract between the parties falls foul of the well settled tenets as propounded by the Supreme Court in the decisions of **PSA SICAL Terminals Private Ltd v. Board of Trustees of V.O Chidambranar Port Trust Tuticorin & Ors**[11] and **Indian Oil Corporation Ltd v. Shree Ganesh Petroleum Rajgurunagar**[12].

14. In *PSA SICAL*, learned senior counsel submitted the Supreme Court had in unequivocal terms held that an AT is mandated to act within the terms of a contract and that it would tantamount to acting beyond its jurisdiction if it were to travel outside the contractually agreed stipulations. Relying on this principle, Mr. Sibal cited the following paragraphs of the said decision for our consideration:

> "**86.** After referring to various international treaties on arbitration and judgments of other jurisdictions, this Court in *Ssangyong Engineering and Construction Company Limited* (supra), observed thus:
>
> > **"76.** However, when it comes to the public policy of India, argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the agreement continued to be applied till February 2013 —

[11] 2021 SCC Online SC 508
[12] (2022) 4 SCC 463

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

[emphasis supplied]

87. As such, as held by this Court in *Ssangyong Engineering and Construction Company Limited* (supra), the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract has been foisted upon an unwilling party. This Court has further held that a party to the Agreement cannot be made liable to perform something for which it has not entered into a contract. In our view, re-writing a contract for the parties would be breach of fundamental principles of justice entitling a Court to interfere since such case would be one which shocks the conscience of the Court and as such, would fall in the exceptional category.

88. We may gainfully refer to the following observations of this

Court in *Bharat Coking Coal Ltd.* v. *Annapurna Construction.*

> **"22.** There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record."

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

90. It will also be apposite to refer to the following observations of this Court in the case of *Md. Army Welfare Housing Organization* v. *Sumangal Services (P) Ltd.*

> **"43.** An Arbitral Tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its power ex debito justitiae. The jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject-matter of reference."

91. It has been held that an Arbitral Tribunal is not a Court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its powers ex debito justitiae. It has been held that the jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject-matter of reference.

92. In that view of the matter, we are of the considered view, that the impugned Award would come under the realm of 'patent illegality' and therefore, has been rightly set aside by the High Court."

15. In *Indian Oil Corporation Ltd.*, the Supreme Court reiterated the said principle, namely that an AT is required to act within the terms of the contract and that an award would suffer from "*patent illegality*", if it either travels beyond the contractual arrangement or ignores specific terms of a contract. The relevant paragraphs of the said decision are set

out hereinbelow:

> "**43.** An Arbitral Tribunal being a creature of contract, is bound to act in terms of the contract under which it is constituted. An award can be said to be patently illegal where the Arbitral Tribunal has failed to act in terms of the contract or has ignored the specific terms of a contract.
>
> xxxx xxxx xxxx
>
> **46.** In *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , this Court held that an award ignoring the terms of a contract would not be in public interest. In the instant case, the award in respect of the lease rent and the lease term is in patent disregard of the terms and conditions of the lease agreement and thus against public policy. Furthermore, in *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] the jurisdiction of the Arbitral Tribunal to adjudicate a dispute itself was not in issue. The Court was dealing with the circumstances in which a court could look into the merits of an award.
>
> xxxx xxxx xxxx
>
> **50.** In *PSA Sical Terminals (P) Ltd.* v. *V.O. Chidambranar Port Trust* [*PSA Sical Terminals (P) Ltd.* v. *V.O. Chidambranar Port Trust*, 2021 SCC OnLine SC 508] this Court referred to and relied upon *Ssangyong Engg. & Construction* [*Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] and held : (*PSA Sical Terminals case* [*PSA Sical Terminals (P) Ltd.* v. *V.O. Chidambranar Port Trust*, 2021 SCC OnLine SC 508] , SCC para 85)
>
> > "*85*. As such, as held by this Court in *Ssangyong Engg. & Construction* [*Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract has been foisted upon an unwilling party. This Court has further held that a party to the agreement cannot be made liable to perform something for which it has not entered into a contract. In our view, re-writing a contract for the parties would be breach of fundamental principles of justice entitling a court to interfere since such case would be one which shocks the conscience of the Court and as such, would fall in the exceptional category."

51. In *PSA Sical Terminals* [*PSA Sical Terminals (P) Ltd.* v. *V.O. Chidambranar Port Trust*, 2021 SCC OnLine SC 508] this Court clearly held that the role of the arbitrator was to arbitrate within the terms of the contract. He had no power apart from what the parties had given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction.

52. In *PSA Sical Terminals* [*PSA Sical Terminals (P) Ltd.* v. *V.O. Chidambranar Port Trust*, 2021 SCC OnLine SC 508] this Court referred to and relied upon the earlier judgment of this Court in *Army Welfare Housing Organisation* v. *Sumangal Services (P) Ltd.* [*Army Welfare Housing Organisation* v. *Sumangal Services (P) Ltd.*, (2004) 9 SCC 619] and held that an Arbitral Tribunal is not a court of law. It cannot exercise its power ex debito justitiae.

53. In *Satyanarayana Construction Co.* v. *Union of India* [*Satyanarayana Construction Co.* v. *Union of India*, (2011) 15 SCC 101 : (2014) 2 SCC (Civ) 252] , a Bench of this Court of coordinate strength held that once a rate had been fixed in a contract, it was not open to the arbitrator to rewrite the terms of the contract and award a higher rate. Where an arbitrator had in effect rewritten the contract and awarded a rate, higher than that agreed in the contract, the High Court was held not to commit any error in setting aside the award."

16. The direction for refund was vehemently assailed and questioned with Mr. Sibal drawing our attention to the principle of restitution as embodied in Section 65 of the 1872 Act. It was at the outset pointed out that a direction for refund could not have been framed *de hors* the principles underlying Section 65. It was contended that unless a case for restitution had been duly made out, the AT would be wholly unjustified in framing a direction for refund. Emphasis was laid on the fact that Section 65 rests on it being found that the agreement between the parties is discovered to be or becomes void. Our attention was drawn to the findings as returned by the AT and which had specifically observed that the SSPA could not *stricto senso* be held to be void. Mr. Sibal specifically referred us to Para 26 of the Arbitral Award which is extracted hereinbelow:-

> "**26.** Nevertheless, the alternative plea of Claimants premised on Section 65 of the Contract Act is on *terra firma* (though contractual arrangements *stricto senso* cannot be termed as void). It would be relevant to note that in its proposal dated 20.11.2015, the Respondents had suggested that the consideration for warrants would be returned by the Company. Though by Annexure C-41 dated 20.11.2015, the Respondents had suggested that the consideration for warrants would be returned by the Company, the Claimants did not agree to the same. The amount involved is Rs.308,21,89,461 /-. This amount is to be refunded to the Claimants."

17. It was then submitted that curiously even though the AT had found KAL and KM to be in breach of the SSPA as a consequence of a failure to ensure the infusion of INR 100 crores, the appellants have been held liable to effect refunds. Mr. Sibal in this regard drew our attention to the following observations as appearing in the Award:-

> "**51.** The rival stands have been considered. As per amended structure of Schedule H of the SPA, second closing under Clause 7.1 was to be achieved by 15.02.2015 which was amended to 24.02.2015. Seller 2 was mandated to bring in Rs.100 Crores to Designated Account No. 2. The admitted position is that Rs.100 Crores did not come to Designated Account No. 2. Personal guarantees by way of mortgages given to CUB were to be released by 24.02.2015. The release of guarantees was to be back by fixed deposit of Rs.100 Crores with CUB. The same is claimed to have been done but Rs. 100 Crores as noted above did not come to Designated Account No. 2. If one looks at the requirements of Clause 6.3.2, they are as follows:
>
> (1) Fixed Deposit of Rs. 100 Crores;
>
> (2) Release of personal guarantees; and
>
> (3) Seller No. 2 to CUB in the matter of released to the Company.
>
> The first two steps appear to have been done, but not the third one. The Inflow of Rs.450 Crores included Rs.320 Crores for Tranche-1 shares. There was a requirement for deposit of Rs.220 Crores in to the Designated Account No 2. It is clear from a reading of Clause 6.3.2 (b) that two consents were required which depended on conditions relating to Clause 7.2.1 (b). As noted above, CUB had time from 15.04.2015 till 11.05.2015 when ED's order was received. The evidence of Mr Dorai of UCB was that the bank had knowledge about the attachment from media reports. Much stress had been led by the Claimants on the certificate of the Bank issued

> to the Claimants vide Exhibit C-63 relating toirrevocable security. Neither the bank official nor the Claimants could explain as to why this certificate was necessary if instructions claimed to have been given were already there.
>
> **52.** There are two options which are available to the parties (1) As noted supra, the Respondents have stated that they are still willing to issue the CRPS on the same terms subject to the Claimants fulfilling their part of obligations as detailed above. Let the Claimants take decision on the present offer made by the Respondents and such terms as may be mutually acceptable to them within two months. If no effective solution is found within a period of two months, thereafter, the Respondents shall return the amount of money received in the manner laid down in the SPA for issuance of CRPS. Since the Tranche-2 payment of Rs.100 Crores has not been made. the Respondent No.1 has raised a counter claim of Rs. 100 Crores. (2) In effect if the arrangement indicated above does not work out, the Respondents shall return the amount as may be worked out relating to the funds brought in by the Claimants within two months of the failure, if any, to work out the solution. To put it differently, the Claimants will be entitled to Rs 270,86.99,209/- after deduction of the counter claim amount of Rs.100Crores."

18. According to Mr. Sibal, the fact that the appellants could not have possibly been viewed to be in breach is evident from their counterclaim for INR 29 crores having itself been allowed. It was submitted that the grant of the counterclaim was liable to be countenanced as an award for damages for breach of contract as opposed to one for compensation. This, since according to Mr. Sibal, the grant of the counterclaim cannot possibly be understood as being a measure of restitution, since it did not restore any advantage that the appellants may have obtained from either KAL or KM. Mr. Sibal submitted that the findings as rendered by the AT would in fact establish that the counterclaim came to be allowed, consequent to the AT acknowledging the loss suffered by SpiceJet while servicing

interest on the loan of INR 100 crores extended by **City Union Bank**[13], which could not be liquidated consequent to the failure of KM to bring in the last tranche of payments as per the terms pertaining to Committed Support.

19. According to Mr. Sibal, the grant of the counterclaim is in fact tacit acknowledgement of the SSPA subsisting and it neither having been breached by the appellants nor being void in the eyes of law. In light of the aforesaid, it was Mr. Sibal's submission that the AT could have at best considered granting of relief of specific performance, subject of course to the requisite conditions underlying that relief having been met.

20. However, and Mr. Sibal laid emphasis on the fact, that KAL and KM had never sought specific performance, and had at no stage of the proceedings evinced any desire to provide the balance consideration of INR 100 crores in accordance with the Committed Support stipulations. Contrary to the above, Mr. Sibal highlighted the fact that the appellants had in all fairness offered to issue the CRPS subject of course to the outstanding amount of INR 100 crores being tendered by KAL and KM. Our attention in this respect was invited to the following recordal of submissions by the AT in the Award:-

> "**50.** In the counter claim, the Respondents have claimed Rs. 100 Crores in addition to the interest paid by the Respondents to CUB for the loan of Rs. 100 Crores. So far as the plea of specific performance is concerned, the foundation therefore is the readiness and willingness to do what was required to be done by the person who seeks the relief of specific performance. Nothing has been pleaded by the Claimants in this regard. Additionally, it is a fundamental requirement that one who seeks the relief of specific performance must come with clean hands. The admitted position

[13] CUB

> being that the interest was being credited to the personal account of Claimant No. 2, the conduct is not only suspicious but shows ulterior motives. Alternatively, it has been stated that the Respondents are still willing to issue the CRPS on the same terms subject to the Claimants fulfilling their part of the obligations. It is pointed out that there was a committed support undertaken by the Claimants to bring in Rs.450 Crores. That part of the arrangement has not been fulfilled by the Claimants. The question of any compensation, therefore, does not arise in the absence of the requisite conditions of specific performance of contract having been fulfilled."

21. Mr. Sibal submitted that restitution as a matter of principle and a direction for refund would have to be premised on the party having "*received an advantage*" under an agreement. According to Mr. Sibal, one must acknowledge the distinction which the law recognizes to exist between the words "*advantage*" and "*benefit*". Mr. Sibal in this regard drew our attention to the following passage as appearing in the treatise of **Pollock & Mulla** on the **Indian Contract and Specific Relief Acts**[14]:

> " 'Advantage' appears to suggest not the benefit derived by each party, but the relative benefit. The word 'advantage' is stated to be narrower in scope than benefit, since it suggests more strictly either a material benefit, or things won in competition against an opponent. The word 'benefit' means profit, gain, future good, whereas the advantage means a condition or circumstance that gives one superiority or success (especially when competing with others)."

22. It was then contended that the Arbitral Award also fails to quantify the value of the alleged "*advantage*" that may have been derived by the appellants. The imperatives of quantification were sought to be highlighted by relying upon the following observations as appearing in the decision of the Privy Council in **Govindram Seksaria**

[14] Pollock & Mulla, The Indian Contract and Specific Relief Acts, Nilima Bhadbhade, Volume I, Updated, 14th edition(2014)

(A Firm) and Anr v. Edward Radbone[15]:-

> "Apart from the terms of certain documents, which will be considered later, their Lordships feel no doubt that the decision of Blagden J. was correct. The result of section 65 of the Indian Contract Act was that, as from the September 3, 1939, each of the parties became bound to restore to the other any advantage which the restoring party had received under the contract of sale. In their Lordships' view, the Custodian could not recover any sum in his action, as pleaded, unless he proved that the value of the "advantage" which the appellants had received under the contract, i.e., of the machinery which had been delivered to them, was greater than the sum of 83,875 Reichmarks, that sum being admittedly an "advantage" which the Custodian had received under the contract. Moreover, in their Lordships' view, the value of the machinery which was delivered to the appellants, for the purposes of s. 65 of the Act, must be taken to be the value of that machinery in India immediately after the contract had become void by reason of section 65. In estimating that value, a Court would have to take into account the fact that the balance of the machinery contracted to be supplied could not be supplied from Germany, and the fact that the appellants could no longer have the services of a qualified erector sent from Germany and of the sellers' Chief Chemist. Further, the Court would have to consider the question whether or not the appellants were able to procure from other sources the balance of the machinery contracted to be sent from Germany, and, if so, at what price and within what period of time, and what quantity and quality of products could be produced by the plant so assembled.
>
> xxxx xxxx xxxx
>
> The appellants also called one witness, who gave evidence to the effect that the appellants bought the missing parts of the machinery, and that their factory "was made to run continuously on July 27, 1941". He offered to produce a statement showing how the machinery worked in 1941 and 1942, but the Advocate-Greneral, who appeared for the Custodian, objected to the production of this statement and it was never in fact produced. At the conclusion of his judgment Blagden J. said:—
>
> > "The fact is that I have no satisfactory evidence in the present case that the defendants-purchasers or either of them have received an advantage under the contract which became void by the start of this war. They might have or might not. For the price they paid they got a part of what they contracted for. Whether on the whole they put into their pockets more than

[15] 1947 SCC Online PC 61

> they paid of I think it is impossible to say. But if it were necessary for me to do so on this evidence I should be inclined to think that they did not, but it is sufficient to say that on the evidence in this case it is not proved that they have."
>
> Their Lordships read this passage as meaning that in the view of the trial Judge the Custodian had failed to prove that the advantage which the appellants had received under the contract of sale was of a greater value than 83,875 Reichmarks. With this view they agree."

23. It was then submitted that out of the total amount of INR 350 crores that was received by SpiceJet in terms of the SSPA, a substantial part thereof was utilized and deployed to the benefit of KM. Out of the aforesaid sum, Mr. Sibal pointed out INR 105 crores was utilized towards payment of taxes, overdue instalments owed to banks and creation of margins with financial institutions. It was submitted that it was the aforesaid utilisation of funds and for the purposes aforenoted which led to the release of personal guarantees and collaterals of KM.

24. In addition to the above, Mr. Sibal submitted that INR 245 crores was utilized towards meeting the operational expense requirements of SpiceJet. The aforesaid utilization of funds was explained in further detail as per **Annexure 2** to the Written Submissions which were tendered on 29 November 2023 and which is reproduced hereinbelow:-

"**Details of Amount paid by KM and KAL**

Date	**Amount (in Rs.)**	**Name of the Party who paid the Amount**	**How the amount was brought in**	**Utilization**		**Actual Utilization**
				CRPS	**Warrants**	
December, 2013	64,59,16,170.00	Mr. Kalanithi Maran	Loan Agreement dated December	64,59,16,170.00	-	Utilised by Spicejet Limited under the ownership,

			18, 2013 amended by Loan Amended Agreement dated November 7, 2014			management and control of Mr. Kalanithi Maran and KAL Airways Private Limited.
August 2014 to November 2014	50,49,72,500.00	KAL Airways Private Limited	Advance towards subscription of warrants	-	50,49,72,500.00	Utilised by Spice jet Limited under the ownership, management and control of Mr. Kalanithi Maran and KAL Airways Private Limited.
November, 2014	1,14,00,00,000.00	Mr. Kalanithi Maran	Loan Agreement dated November 21, 2014	36,24,90,000.00	77,75,10,000.00	Utilised by Spice jet Limited under the ownership, management and control of Mr. Kalanithi Maran and KAL Airways Private Limited.
February 24, 2015	94,79,64,450.66	Mr. Kalanithi Maran	Advance towards subscription of CRPS	94,79,64,450.66	-	Utilised by Spice jet for ordinary operations of the Company as per Schedule H of SSPA
February 24, 2015	1,00,00,00,000.00	KAL Airways Private Limited	Advance towards subscription of warrants	-	1,00,00,00,000.00	Utilised by the Respondent No. 1 for ordinary operations of the Company as per SSPA
February	79,97,06,961.00	KAL Airways	Advance towards	-	79,97,06,961.00	(a)Rs.89,16,82,799 utilised

24, 2015		Private Limited	subscription of warrants			towards payment of Income Tax liabilities (being the principal amount of Tax Deducted at source) as on January 31,2015 (b) Rs. 9,45,11,635.09 utilized towards overdue instalment of term loan facility availed from Yes Bank and (c) Rs. 6,58,41,115.25 utilized towards creation of margin with Yes Bank in form of fixed deposit to enable release of personal guarantee of Mr. Kalanithi Maran.
February 24, 2015	20,02,93,039.00	KAL Airways Private Limited	Advance towards subscription of CRPS	20,02,93,039.00	-	
February 24, 2015	5,20,35,549.34	Mr. Kalanithi Maran	Advance towards subscription of CRPS	5,20,35,549.34	-	
June 3, 2015	50,00,00,000.00	Mr. Kalanithi Maran	Advance towards subscription of CRPS	50,00,00,000.00	-	Utilised by Spice jet for ordinary operations of the Company as per SSPA
Total	**5,79,08,88,670.00**			**2,70,86,99,209.00**	**3,08,21,89,461.00**	

February 24, 2015	1,00,00,00,000.00	Mr. Kalanithi Maran	Not Paid	1,00,00,00,000.00	-	To be utilized towards repayment of the financing facility obtained by the

						Company from the City Union Bank”

25. The direction for refund, Mr. Sibal then submitted was further unmerited bearing in mind the AT itself having found the conduct of the appellants lacking in bona fide and alluding to the same as suspicious conduct. According to learned senior counsel, once the AT had come to such a conclusion, the same was sufficient to disentitle respondents to the relief of restitution. Mr. Sibal in this respect drew our attention to Paras 49 and 51 of the Arbitral Award which are reproduced hereinbelow:-

> “**49.** Certain peculiar features need to be noted at this stage is that there was a request for closing of the loan but there was no response from CUB. Interestingly, CUB closed the account of Make my trip and select cargo. If the ED's order was within its knowledge, no explanation is coming forthwith as to how the account was closed. Similarly, if there was no instruction in terms of Clause 6.3.2 as there is no reference as to who would get the interest. Another interesting feature is that the interest was being credited to the account of Claimant No. 2 and it was being automatically credited to the personal account Further, if the account was to be held as security and the interest was to be paid on maturity. It is quite suspicious that when instructions were already there as to the nature of the security of the deposit, what occasioned the certificate of the Bank, Exhibit C-63 to the Claimants.
>
> xxxx xxxx xxxx
>
> **51.** The rival stands have been considered. As per amended structure of Schedule H of the SPA, second closing under Clause 7.1 was to be achieved by 15.02.2015 which was amended to 24.02.2015. Seller 2 was mandated to bring in Rs.100 Crores to Designated Account No. 2. The admitted position is that Rs.100 Crores did not come to Designated Account No. 2. Personal guarantees by way of mortgages given to CUB were to be released by 24.02.2015. The release of guarantees was to be back by fixed deposit of Rs.100 Crores with CUB. The same is claimed to have been done but Rs. 100 Crores as noted above did not come to

> Designated Account No. 2. If one looks at the requirements of Clause 6.3.2, they are as follows:
>
> (1) Fixed Deposit of Rs. 100 Crores;
>
> (2) Release of personal guarantees; and
>
> (3) Seller No. 2 to CUB in the matter of released to the Company.
>
> The first two steps appear to have been done, but not the third one. The inflow of Rs.450 Crores included Rs.320 Crores for Tranche-1 shares. There was a requirement for deposit of Rs.220 Crores in to the Designated Account No 2. It is clear from a reading of Clause 6.3.2 (b) that two consents were required which depended on conditions relating to Clause 7.2.1 (b). As noted above, CUB had time from 15.04.2015 till 11.05.2015 when ED's order was received. The evidence of Mr. Dorai of UCB was that the bank had knowledge about the attachment from media reports. Much stress had been led by the Claimants on the certificate of the Bank issued to the Claimants vide Exhibit C-63 relating to irrevocable security. Neither the bank official nor the Claimants could explain as to why this certificate was necessary if instructions claimed to have been given were already there."

26. Mr. Sibal then proceeded to assail the grant of pendent lite interest at the rate of 12% on the refunded amount relating to Warrants and canvassed the following contentions. It was his submission that the award of interest at the rate of 12% was clearly unjustifiable bearing in mind the indubitable fact that neither SpiceJet nor Mr. Ajay Singh had breached the terms of the contract. It was submitted that the AT had itself found that the Warrants could not be issued in circumstances clearly beyond the control of the appellants.

27. Mr. Sibal submitted that the grant of pendent lite interest should have been guided by Clause 17.6 of the SSPA and which had while dealing with a contingency where a particular stipulation of the SSPA became impossible or incapable of performance, parties were obliged to negotiate in good faith and substitute it with a workable provision. It was submitted that although the appellants had proffered a solution and mooted a proposal for the cancellation of the prior issue of Warrants

and substitution by fresh alternative instruments, the same was declined by KAL and KM.

28. Mr. Sibal submitted that the AT also woefully failed to consider the fact that the amounts pertaining to the Warrants during the pendency of proceedings before the AT stood either deposited in Court or secured by way of bank guarantees. The sums, therefore, according to learned senior counsel, were not even available for use by SpiceJet for a substantial period and during the pendency of the arbitral proceedings. This was sought to be explained with reference to the following salient events which are reproduced in a tabular form hereinbelow:-

"Date	**Event**
29.01.2015	SSPA entered into by Parties.
24.02.2015	Pursuant to SSPA, a total of Rs. 300 Crores were brought in by KAL and KM as advance as advance to Warrant and CRPS subscription.
03.06.2015	Further Rs. 50 crores was brought in as advance towards CRPS subscription by KM.
29.07.2016	Order of Delhi High Court in OMP (1) 71/2016 and 72/2016 directing deposit of Rs. 579 crore with Court.
December 2016	Arbitral Tribunal was constituted to adjudicate upon the disputes between the Parties.
03.07.2017	Order of Division Bench disposing of FAO (OS) (Comm) 61/2016 and 62/2016 modifying above direction. The modified requirement required SJ and AS to furnish Bank Guarantee for INR 329 crores and make a cash deposit of Rs. 250 crores.
31.07.2017	The Order of the Ld. Division Bench was upheld by Supreme Court. Direction was given to comply with

	deposit and bank guarantee in 2weeks.
11.08.2017	Bank Guarantee for Rs. 329,00,00,000/- taken with ICICI Bank Limited. This was subsequently replaced by another BG issued on 12.09.2017 by Yes Bank Limited with the permission of the Court.
13.09.2017	Towards the direction to deposit Rs. 250 Crores, and FD was taken in the name of Spice Jet Limited for the said amount with Yes Bank Limited with lien marked in favour of Registrar, Delhi High Court. This meant that interest earned on the FD was credited to Spice Jet's account.
30.07.2018	Arbitral Award pronounced."

29. Since the amount stood deposited in Court, Mr. Sibal relied upon the principles laid down in **H.P. Housing & Urban Development Authority vs. Ranjit Singh Rana**[16] that liability for post-award interest ceases once the amount is deposited in Court, and submitted that by applying the same yardstick, the grant of pendente lite interest by the AT was liable to be set aside by the learned Single Judge. Reliance in this regard was placed on the following paragraphs of the aforesaid decision:-

> **"11.** Whether 24-5-2001 when the entire award amount was deposited by the appellants into the High Court is the date of payment?
>
> **12.** "Payment" is not defined in the Act. *Concise Oxford English Dictionary* (10th Edn., Revised) defines "payment":
>
> "*Payment*.—(1) The action of paying or the process of being paid. (2) An amount paid or payable."
>
> **13.** *Webster Comprehensive Dictionary* (International Edn.) Vol. 2 defines "payment":
>
> "*Payment*.—(1) the act of paying.
>
> (2) Pay; requital; recompense."

[16] (2012) 4 SCC 505

> **14.** *The Law Lexicon* by P. Ramanatha Aiyar, 2nd Edn. Reprint, inter alia, states:
>
> > "payment is defined to be the act of paying, or that which is paid; discharge of a debt, obligation or duty; satisfaction of claim; recompense; the fulfilment of a promise or the performance of an agreement; the discharge in money of a sum due".
>
> **15.** The word "payment" may have different meaning in different context but in the context of Section 37(1)(*b*); it means extinguishment of the liability arising under the award. It signifies satisfaction of the award. The deposit of the award amount into the court is nothing but a payment to the credit of the decree-holder. In this view, once the award amount was deposited by the appellants before the High Court on 24-5-2001, the liability of post-award interest from 24-5-2001 ceased. The High Court, thus, was not right in directing the appellants to pay the interest @ 18% p.a. beyond 24-5-2001.
>
> **16.** The appeal is, accordingly, allowed in part. The impugned order of the High Court is modified and it is directed that the appellants shall be liable to pay interest @ 18% p.a. for the post-award period from the date of award until 24-5-2001. After 24-5-2001, the appellants are not liable to pay any interest on the award amount under Section 37(1)(*b*) of the Act."

30. Mr. Sibal submitted that not only is the award of pendente lite interest at the rate of 12% excessive, the AT has also failed to assign any reasoning in support of the said relief. It was submitted that it was incumbent upon the AT to assign reasons in support of a rate of interest being found to be reasonable and justified as was explained by the Supreme Court in **Executive Engineer (R and B) & Ors vs. Gokul Chandra Kanungo (Dead) Through his LRs[17]:-**

> **"10.** The provisions of Section 31(7)(a) of the 1996 Act fell for consideration before this Court in many cases including in the cases of *Hyder Consulting (UK) Limited* (supra) and *Delhi Airport Metro Express Private Limited* v. *Delhi Metro Rail Corporation*. A perusal of clause (a) of subsection (7) of Section 31 of the 1996 Act would reveal that, no doubt, a discretion is vested in the arbitral tribunal to include in the sum for which the

[17] 2022 SCC OnLine SC 1336

> award is made interest, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. However, it would reveal that the section itself requires interest to be at such rate as the arbitral tribunal deems reasonable. When a discretion is vested to an arbitral tribunal to award interest at a rate which it deems reasonable, then a duty would be cast upon the arbitral tribunal to give reasons as to how it deems the rate of interest to be reasonable. It could further be seen that the arbitral tribunal has also a discretion to award interest on the whole or any part of the money or for the whole or any part of the period between the date of cause of action and the date on which the award is made. When the arbitral tribunal is empowered with such a discretion, the arbitral tribunal would be required to apply its mind to the facts of the case and decide as to whether the interest is payable on whole or any part of the money and also as to whether it is to be awarded to the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.
>
> **11.** A perusal of the award as also the judgment and order of the District Judge as well as the High Court would reveal that no such exercise has been done. The learned Arbitrator, without assigning any reasons, has awarded the interest at the rate of 18% per annum for the period during which the proceedings were pending and also at the same rate after the award was made till the actual payment."

31. The Award was also assailed insofar as the grant of interest for the period post its pronouncement is concerned, with it being argued that interest at the rate of 18% was again granted without any reasons being assigned or recorded. Our attention in this respect was drawn to the significant statutory amendments introduced in Section 31 of the Act, and more particularly Section 31(7)(b) which came into effect from 23 October 2015 vide the **Arbitration and Conciliation (Amendment) Act, 2015**[18] and which reads as follows:-

> **"31. Form and contents of arbitral award**.
>
> **xxxx xxxx xxxx**

[18] 2015 Amending Act

> (7)(*a*) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.
>
> (*b*) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.
>
> *Explanation*.—The expression "current rate of interest" shall have the same meaning as assigned to it under clause (*b*) of Section 2 of the Interest Act, 1978 (14 of 1978)."

32. Mr. Sibal submitted that the aforesaid statutory provision obliged the AT to bear in mind the "*current rate of interest*" and which was prevalent on the date of the Award. Our attention was also drawn to the definition of the expression "*current rate of interest*" in the Interest **Act, 1978**[19] and which reads as follows:-

> "**2**. **Definitions**. —In this Act, unless the context otherwise requires,—
>
> **xxxx xxxx xxxx**
>
> "(b) "current rate of interest" means the highest of the maximum rates at which interest may be paid on different classes of deposits (other than those maintained in savings account or those maintained by charitable or religious institutions) by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the Banking Regulation Act, 1949 (10 of 1949)."

33. It was vehemently argued that the Arbitral Award fails to assign any reason or refer to any cogent material in support of an interest rate of 18% being accepted as correctly representing the "*current rate of interest*".

34. Mr. Sibal, in support of the aforesaid submission also placed for

[19] 1978 Act

our consideration details gleaned from the official web portal of the State Bank of India and which stands encapsulated in the shape of the following chart:-

Duration-Revised Buckets w.e.f. 05/03/2018	w.e.f 28/05/2018	w.e.f. 30/07/2018
7 days to 45 days	5.75	5.75
46 days to 179 days	6.25	6.25
180 days to 210 days	6.35	6.35
211 days to less than 1 year	6.40	6.40
1 year to less than 2 years	6.65	6.70
2 years to less than 3 years	6.65	6.75
3 years to less than 5 years	6.70	6.80
5 years and up to 10 years	6.75	6.85

35. The judgment of affirmance as rendered by the learned Single Judge was questioned with Mr. Sibal submitting that although it elaborately takes note of the various contentions which were urged by the appellants, it fails to either deal with the same or assign any reasons for negation of the challenge as it stood raised and thus causing irreparable prejudice to the appellants.

36. Mr. Sibal in this respect took us through the impugned judgment and highlighted the following aspects. In order to appreciate the breadth of the submissions which were addressed for the consideration of the learned Single Judge, Mr. Sibal firstly referred to Para 7 and which represents the recordal of the appellants' contention with respect to CRPS amounts being repayable only at the end of eight years. Para 7 is extracted hereinbelow:-

> "**7.** The learned senior counsel submitted that in terms of Schedule B of the Agreement, the CRPS is a debt instrument issued at a nominal coupon rate of 6%, repayable at the end of 8 years. The refund was awarded in favour of the respondents without

> considering that in accordance with the terms of the Agreement, CRPS is essentially a debt instrument, which could have been redeemed only after the expiry of a period of eight years from the date of subscription and is an amount which is not payable *in praesenti*. Moreover, in terms of the Schedule B, the dividend on the CRPS becomes payable only subject to the availability of profits of the Company. Therefore, on the face of the record, the Arbitral Tribunal failed to consider and appreciate that CRPS could have only been redeemed by the respondents after the expiry of a period of 8 years from the date of allotment of such CRPS in accordance with the terms of the SSPA."

37. Mr. Sibal further argued that before the learned Single Judge, the appellants had also urged that the direction for refund came to be granted despite the AT finding that it was KAL and KM who were in breach of the SSPA. This, according to learned senior counsel, is manifest from a reading of Para 8 which is reproduced hereinbelow:-

> "**8**. It is further submitted that the said refund was awarded in favour of the respondents despite the finding that they were in breach of the Agreement having failed to bring in Rs. 100 Crores, i.e., the Tranche-I of the total amount, in terms of Clause 6.3.1. and also, the petitioner Company's claim to the extent of Rs. 129 Crores was allowed on account of such breach. Therefore, now the respondents cannot take undue advantage of their breach."

38. The fact that the grant of reliefs as ultimately framed would amount to a rewriting of the contractual terms also was a contention which was specifically raised before the learned Single Judge, as would be evident from the reading of Paras 11 and 12 of the impugned judgment and which are reproduced below:-

> "**11**. It is submitted that the entire amount of Rs. 370 Crores, which was to be brought into the petitioner Company as part of the committed support, was to stay with the airline for a period of 8 years as per the terms of the Agreement and therefore, the Arbitral Tribunal could not have rewritten the terms of the contract by awarding return of Rs. 270 Crores, modifying the nature of the transaction in the Agreement.
>
> **12.** Relying upon the judgments passed in ***Indian Oil Corporation Limited vs. Shree Ganesh Petroleum Rajgurunagar, (2022) 4***

SCC 463 and ***Union of India vs. Jindal Rail Infrastructure Ltd., 2022 SCC OnLine Del 1540***, it is submitted on behalf of the petitioners that the Arbitral Tribunal rewrote the terms of the contract between the parties by converting the petitioner Company's offer into an arbitral award. The Hon'ble Supreme Court in ***Shree Ganesh Petroleum Rajgurunagar*** (***Supra***) observed that:

> *"45. The Court does not sit in appeal over the award made by an Arbitral Tribunal. The Court does not ordinarily interfere with interpretation made by the Arbitral Tribunal of a contractual provision, unless such interpretation is patently unreasonable or perverse. Where a contractual provision is ambiguous or is capable of being interpreted in more ways than one, the Court cannot interfere with the arbitral award, only because the Court is of the opinion that another possible interpretation would have been a better one.*
>
> *46. In Associate Builders [Associate Builders v. DDA. (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204], this Court held that an award ignoring the terms of a contract would not be in public interest. In the instant case, the award in respect of the lease rent and the lease term is in patent disregard of the terms and conditions of the lease agreement and thus against public policy. Furthermore, in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204] the jurisdiction of the Arbitral Tribunal to adjudicate a dispute itself was not in issue. The Court was dealing with the circumstances in which a court could look into the merits of an award.*
>
> *****
>
> *49. In Ssangyong Engg. & Construction Co Ltd. v. NHAI [Ssangyong Engg. & Construction Co. Ltd. v. NHAI. (2019) 15 SCC 131: (2020) 2 SCC (Civ) 213], this Court held: (SCC pp. 199-200, para 76)*
>
> > *"76. However, when it comes to the public policy of India, argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can beseen 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- 1994 to 2004-2005. Further, in order to apply a linking factor, a circular, unilaterally issued by oneparty, cannot possibly bind the other party to the agreement without that other party's consent. Indeed, the circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority award has created a new contract for the parties by applying the said unilateral circular and by substituting a workable formula under the agreement by another formula dehors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment."

50. In PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust [PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, (2021) 18 SCC 716 2021 SCC OnLine SC 508) this Court referred to and relied upon Ssangyong Engg. & Construction [Ssangyong Engg& Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131: (2020) 2 SCC (Civ) 213] and held (PSA Sical Terminals case [PSASical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, (2021) 18 SCC 716: 2021 SCC OnLine SC 508], SCC para85)

"85. As such, as held by this Court in SsangyongEngg. & Construction [SsangyongEngg.

& Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 (2020) 2 SCC (Civ) 213], the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract has been foisted upon an unwilling party. This Court has further held that a party to the agreement cannot be made liable to perform something for which it has not entered into a contract. In our view, re-writing a contract for the parties would be breach of fundamental principles of justice entitling a court to interfere since such case would be one which shocks the conscience of the Court and as such, would fall in the exceptional category"

51. In PSA Sical Terminals (PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, (2021) 18 SCC 716: 2021 SCC OnLine SC 508] this Court clearly held that the role of the arbitrator was to arbitrate within the terms of the contract. He had no power apart from what the parties had given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction.

52. In PSA Sical Terminals (PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, (2021) 18 SCC 716: 2021 SCC OnLine SC 508) this Court referred to and relied upon the earlier judgment of this Court in Army Welfare Housing Organisation v. Sumangal Services (P) Ltd. [Army Welfare Housing Organisation v Sumangal Services (P) Ltd. (2004) 9 SCC 619) and held that an Arbitral Tribunal is not a court of law. It cannot exercise its power ex debito justitiae

53. In Satyanarayana Construction Co v. Union of India (Satyanarayana Construction Co. v. Union of India, (2011) 15 SCC 101: (2014) 2 SCC (Civ) 252) a Bench of this Court of coordinate strength held that once a rate hadbeen fixed in a contract, it was not open to the arbitrator to rewrite the terms of the contract and award a higher rate. Where an arbitrator had in effect rewritten the contract and awarded a rate, higher than that agreed in the contract, the High Court was held not to commit any error in setting aside the award."

39. Mr. Sibal then submitted that the appellants had additionally argued that penal interest could not have been awarded in the absence of a finding of breach, and more so when the amounts had been utilized for the purposes of resurrection of a debt-ridden airline. This, according

to Mr. Sibal is evidenced from Paras 13, 14 and 18 of the impugned judgment which are extracted below:-

> "**13.** The learned senior counsel for the petitioners submitted that the Arbitral Tribunal wrongly awarded interest of 12% on the aforesaid refund amount. It is submitted that Agreement between the parties does not entitle the respondents to claim any interest in case of refund of amount for non-issuance of Warrants and CRPS. Moreover, the interest has been awarded despite the specific finding that the petitioners were not in breach of any of the terms of the Agreement. Referring to Paragraph 25 and 51 of the impugned Award, the learned senior counsel submitted that since there is no breach on the part of the petitioner Company for issuance of Warrants or CRPS as also held by the Arbitral Tribunal, the interest awarded on the refund of Warrants amounting to Rs. 308 Crores is incorrect and ought to be set aside.
>
> **14.** It is further submitted that the Arbitral Tribunal awarded interest of 12% on refund of Rs. 308 Crores, in total disregard of the proposal made by the petitioners and the fact that Ajay Singh took over the liabilities of Rs. 2200 Crores and ensured that the infused amount of Rs. 350 Crores was utilized towards discharge of liabilities of the Company and release of personal guarantees of the respondent no. 2.
>
> **xxxx xxxx xxxx**
>
> **18.** It is further submitted that the petitioner company and Ajay Singh are not in breach of their obligations under the SSPA including obtaining discharge of the personal guarantees and mortgages of the respondents, which was a condition precedent for the infusion of 'committed support' in terms of the Offer. The Arbitral Tribunal despite holding that respondents liable for the breach of their obligations under SSPA awarded refund of the sums towards CRPS in favour of the respondents."

40. Mr. Sibal then submitted that the appellants had specifically argued before the learned Single Judge that the rate of interest as granted was clearly exorbitant and in violation of the Act and which submission stands noticed in Paras 15 and 17 of the judgment impugned before us. Those paragraphs are reproduced hereinbelow:-

> "**15.** It is further submitted that the interest of 12% awarded by the Arbitral Tribunal on the amounts refunded towards Warrants

and 18% thereon is not only in violation of Section 28 (3) and Section 34 (2)(b)(ii)of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Arbitration Act") but also is exorbitant and unreasonable.

xxxx xxxx xxxx

17. It is further submitted that interest rate of 12% imposed by arbitral award on the amount of Rs. 308,21,89,461/- towards Warrants and 18% if the sums are not paid within stipulated time are exorbitant, and unreasonable. It is further submitted that such interest rate is in contradiction to the terms of the SSPA which does not provide for any such understanding. Further, this interest rate is in violation of Sections 28(3) and 34(2)(b)(ii) of the Arbitration Act, 1996."

41. Mr. Sibal also relied upon various decisions of the Supreme Court to contend that the grant of interest at the rate of 18% by an AT is excessive and unjustified and that such a prescription has been repeatedly set aside by courts. Reliance in this regard was firstly placed on **Vedanta Limited v. Shenzhen Shandong Nuclear power Construction Company Ltd**[20], and where it was observed:-

"**7**. Section 31(7) is in two parts: clause (a) pertains to the award of interest for the pre-reference and pendente lite period, which is subject to the agreement between the parties. This would be evident from the opening words of Section 31(7)(a) — "unless otherwise agreed by the parties". Absent an agreement between the parties, the Arbitral Tribunal has the discretion to award interest; as it deems reasonable. Interest may be awarded either on the whole, or any part of the sum awarded.

8. Section 31(7)((b) pertains to the post-award period i.e. from the date of the award to the date of realisation, and is not subject to party autonomy or an agreement between the parties. This would be apparent from the manner in which clause (b) of Section 31(7) is framed. The phrase "unless otherwise agreed by the parties" is absent from this provision. The statutory rate of interest is 2% higher than the current rate of interest prevalent on the date of the award.

9. The discretion of the arbitrator to award interest must be

[20] (2019) 11 SCC 465

exercised reasonably. An Arbitral Tribunal while making an award for interest must take into consideration a host of factors, such as : (*i*) the "*loss of use*" of the principal sum; (*ii*) the types of sums to which the interest must apply; (*iii*) the time period over which interest should be awarded; (*iv*) the internationally prevailing rates of interest; (*v*) whether simple or compound rate of interest is to be applied; (*vi*) whether the rate of interest awarded is commercially prudent from an economic standpoint; (*vii*) the rates of inflation; (*viii*) proportionality of the count awarded as interest to the principal sums awarded.

10. On the one hand, the rate of interest must be compensatory as it is a form of reparation granted to the award-holder; while on the other it must not be punitive, unconscionable or usurious in nature.

xxxx xxxx xxxx

14. In the present case, the Arbitral Tribunal has adopted a dual rate of interest in the award. The award directs payment of interest @ 9% for 120 days post award; if the amount awarded is not paid within 120 days', the rate of interest is scaled up to 15% on the sum awarded.

15. The dual rate of interest awarded seems to be unjustified. The award of a much higher rate of interest after 120 days' is arbitrary, since the award-debtor is entitled to challenge the award within a maximum period of 120 days' as provided by Section 34(3) of the 1996 Act ["34. (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."] . If the award-debtor is made liable to pay a higher rate of interest after 120 days, it would foreclose or seriously affect his statutory right to challenge the award by filing objections under Section 34 of the said Act.

16. The imposition of a high rate of interest @ 15% post-120 days is exorbitant, from an economic standpoint, and has no co-relation with the prevailing contemporary international rates of interest. The award-debtor cannot be subjected to a penal rate of interest, either during the period when he is entitled to exercise the statutory right to challenge the award, before a court of law, or later. Furthermore,

the Arbitral Tribunal has not given any reason for imposing a 15% rate of interest post 120-days.

xxxx xxxx xxxx

19. The respondent/claimant has, in fact been awarded 105% of the costs incurred under the EPC contracts by the Arbitral Tribunal. The award of interest @ 9% on the Euro component of the claim is unjustified and unwarranted. The levy of such a high rate of interest on a claim made in a foreign currency, would result in the claimant being awarded compensation, contrary to the conditions stipulated in the contract.

20. The award has granted a uniform rate of 9% SI on both the INR and the EUR component. However, when the parties do not operate in the same currency, it is necessary to take into account the complications caused by differential interest rates. Interest rates differ depending upon the currency. It is necessary for the Arbitral Tribunal to coordinate the choice of currency with the interest rate. A uniform rate of interest for INR and EUR would therefore not be justified. The rate of 9% interest on the INR component awarded by the Arbitral Tribunal will remain undisturbed. However, with respect to the EUR component, the award-debtor will be liable to pay interest at the Libor rate + 3 percentage points, prevailing on the date of the award.

21. In light of the abovementioned discussion, the interest awarded by the Arbitral Tribunal is modified only to the extent mentioned hereinbelow:

21.1. The interest rate of 15% post 120 days granted on the entire sum awarded stands deleted.

21.2. A uniform rate of interest @9% will be applicable for the INR component in entirety till the date of realisation.

21.3. The interest payable on the EUR component of the award will be as per LlBOR + 3 percentage points on the date of award, till the date of realisation."

42. Mr. Sibal then submitted that in **Indian Railway Construction Company Limited v. National Buildings Construction Corporation**

Limited[21] the Supreme Court had held that the grant of interest at the rate of 18% was excessive and the interest rate was ultimately modified to 12%, being found to be a reasonable rate of interest. The relevant extracts of the said decision are reproduced hereinbelow:

> "**24.** Now, so far as quashing and setting aside the award passed by the Arbitral Tribunal awarding interest @18% on advance for the hypothecation of equipment, by the learned Single Judge confirmed by the Division Bench is concerned, at the outset, it is required to be noted that the Division Bench of the High Court has upheld the order passed by the learned Single Judge quashing and setting aside the interest awarded by the learned Arbitral Tribunal on advance for the hypothecation of equipment on the ground that there is no such stipulation in the agreement/contract. However, the High Court has not at all considered Section 31(7)(*a*) of the Arbitration Act, which permits the arbitrator that unless otherwise agreed by the parties, where and insofar as an arbitral award is for the payment of money, the Arbitral Tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. Thus, unless there is a specific bar under the contract, it is always open for the arbitrator/Arbitral Tribunal to award pendente lite interest.
>
> **25.** Identical question came to be considered by this Court in *Raveechee* [*Raveechee & Co.* v. *Union of India*, (2018) 7 SCC 664 : (2018) 3 SCC (Civ) 711] . In the said decision, it is observed and held by this Court that an arbitrator has the power to award interest unless specifically barred from awarding it and the bar must be clear and specific. In the said decision, it is observed and held that the liability to pay interest pendente lite arises because the claimant has been found entitled to the same and had been kept out from those dues due to the pendency of the arbitration i.e. pendente lite.
>
> **26**. Aplying the law laid down by this Court in the aforesaid decision in *Raveechee and Co.* [*Raveechee & Co.* v. *Union of India*, (2018) 7 SCC 664 : (2018) 3 SCC (Civ) 711] to the facts of the case on hand, once it was found that the advance amount was paid for hypothecation of equipment and thereafter when the Arbitral Tribunal awarded the interest on advance for

[21] (2023) 7 SCC 390

> hypothecation of equipment, the same was not required to be interfered with by the learned Single Judge in exercise of the powers under Section 34 of the Arbitration Act and even by the Division Bench of the High Court while exercising the powers under Section 37 of the Arbitration Act. However, at the same time to award the interest @18% can be said to be on a higher side. In the facts and circumstances of the case, if the interest is awarded @ 12% on advance for the hypothecation of equipment, the same can be said to be reasonable interest."

43. According to Mr. Sibal, even though the appellants had assailed the validity of the Award insofar as the grant of interest was concerned on the basis of an abject failure on the part of the AT to assign reasons, no findings or conclusions have come to be rendered by the learned Single Judge while dismissing the petition under Section 34. Mr. Sibal in this respect referred to Para 16 which reads thus:-

> "**16**. It is submitted that the Arbitral Tribunal failed to provide any reasons for the grant of interest and the same in itself is a substantial ground for setting aside the impugned Award to this extent. It is submitted on behalf of the petitioner that the arbitral award suffers from patent illegality as it directed the refund of Rs. 270,86,99,209/- towards the amount paid for CRPS despite holding that the respondents are in breach of their obligation to bring committed support of Rs. 450,00,00,000/-. It is further submitted that the amounts paid by petitioner towards CRPS have been directed to be refunded to the respondents without considering the fact that CRPS is a debt instrument which can be redeemed only after the expiry of 8 years from the date of subscription and the amount is not payable *in praesenti*."

44. The submission in essence was that although the impugned judgment faithfully records various submissions, the learned Single Judge has clearly failed to either evaluate the same or assign any reasons which may be viewed as a conclusion drawn upon a just evaluation of the contention. It was submitted that the learned Single Judge has proceeded to dismiss and reject the challenge by merely alluding to the broad contours of the Section 34 jurisdiction. According

to Mr. Sibal, the learned Single Judge has thus clearly failed to deal with the pointed submissions pertaining to "*patent illegality*" and perversity which were raised by the appellants.

45. Mr. Sibal submitted that while the narrow contours of the Section 34 jurisdiction are well recognized, the same cannot absolve the court from adjudging and ruling on arguments pertaining to "*patent illegality*" and manifest perversities. Learned senior counsel submitted that the appellants had elaborately chronicled the manifest and patent illegalities which beset the Award and that the learned Single Judge had clearly erred in failing to consider its setting aside under Section 34.

46. Learned senior counsel submitted that the impugned judgment fails to accord any consideration on the fundamental flaws which were highlighted and assailed. It was in the aforesaid backdrop that Mr. Sibal submitted that not only do the appeals merit being allowed and the impugned judgment being set aside, the Arbitral Award itself and to the extent noted above must be quashed.

47. The last aspect which the learned senior counsel highlighted was of the financial impact which the challenge as mounted by way of the instant appeals would have insofar as the Award is concerned. It was pointed out that as on 29 November 2023 (the date on which the Written Submissions were drawn), the appellants had paid the principal amount of INR 579,08,88,670 in its entirety along with an additional sum of INR 100 crores towards interest. It was submitted that if the appellants were to succeed in the present appeals and the Court were to ultimately set aside the direction for refund of the CRPS amount as well as the entirety of interest awarded, they would in turn become entitled

to a refund of approximately INR 400 crores. It was submitted that even if the appellants were to find success on the question of interest alone, the appellants would become entitled to a refund of INR 129 crores. It was in the aforesaid light that Mr. Sibal submitted that grave and manifest injustice has been caused to the appellants on account of the perfunctory dismissal of the Section 34 petition by the learned Single Judge.

48. The solitary additional ground which was urged in the Ajay Singh appeal [FAO(OS) COMM 179/2023] pertained to the personal liability of the appellant – Mr. Ajay Singh under the Award. It was submitted by Mr. Sibal that the AT has manifestly erred in holding Mr. Ajay Singh personally liable for the liabilities arising from the impugned Award, even though and undisputedly the individual appellant was neither the recipient of funds nor did any stipulation of the SSPA attach a personal liability upon him. It was submitted that the directions ultimately framed and insofar as the AT proceeded to hold Mr. Ajay Singh as personally liable is wholly perverse and consequently liable to be set aside to the aforesaid extent.

D. SUBMISSIONS ON BEHALF OF THE RESPONDENTS – KAL AND KM

49. Appearing for KAL and KM – the respondents herein, Mr. Maninder Singh, learned senior counsel at the outset raised a preliminary objection with respect to the right of the appellants to pursue the instant appeals on the ground that they had failed to abide by the directions issued by the Executing Court as well as the Supreme Court from time to time. It was submitted that despite peremptory

orders passed by this Court in the course of execution as well as by the Supreme Court, the appellants had failed to deposit the entire awarded amount along with interest. We were apprised of the admitted fact that this Court had in terms of its order of 24 August 2023 declined the prayer for grant of interim relief of staying the execution of the Award. The Supreme Court, Mr. Singh pointed out, had in terms of its two orders dated 13 February 2023 and 07 July 2023 in unambiguous terms provided that in case the appellants were to fail to comply with the terms and conditions of deposit, the entire amount payable under the Award would become executable.

50. Mr. Singh submitted that since and undisputedly the appellants had failed to abide by those directions, the instant appeals under Section 37 itself should not be heard till such time as the appellants remain in default. Mr. Singh submitted that Articles 141 and 144 of the Constitution would warrant this Court declining to examine the challenge on merits.

51. Mr. Singh submitted that the appellants had not only failed to comply with the repeated directions for deposit of the entire awarded amount, they had also failed to file their affidavit of assets. This, according to Mr. Singh, would constitute an additional ground for the appellants being deprived of the indulgence of this Court and a hearing on the instant appeals.

52. Without prejudice to the above, Mr. Singh firstly highlighted the limited contours of Section 37 of the Act to submit that the Court would clearly not have the jurisdiction to consider the merits of the Award. It was Mr. Singh's submission that undisputedly the

jurisdiction which is exercised by a Court while considering a challenge referable to Section 34 stands limited to aspects of "*patent illegality*" and perversity. However, and it was so contended, when the matter reaches the stage of an appeal under Section 37, the scope of scrutiny becomes further circumscribed and the appellate court being confined to considering whether the court trying the Section 34 petition had examined the validity of the Award in accordance with the grounds of challenge as permissible in law. The aforesaid aspects were highlighted with Mr. Singh firstly referring to the decision in **MMTC Limited vs Vedanta Limited**[22] where the Supreme Court had observed as under:

> **"14.** As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."

53. Mr. Singh then drew our attention to the judgment in **UHL Power Company Limited vs. State of Himachal Pradesh**[23] where the Supreme Court while examining the scope of Section 37 made the following pertinent observations:

> **"16.** As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. In *MMTC Ltd.* v. *Vedanta Ltd.* [*MMTC Ltd.* v. *Vedanta Ltd.*, (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293] ,

[22] (2019) 4 SCC 163
[23] (2022) 4 SCC 116

the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act have been explained in the following words : (SCC pp. 166-67, para 11)

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

17. A similar view, as stated above, has been taken by this Court in *K.Sugumar* v. *Hindustan Petroleum Corpn. Ltd.* [*K. Sugumar* v. *Hindustan Petroleum Corpn. Ltd.*, (2020) 12 SCC 539], wherein it has been observed as follows: (SCC p. 540, para 2)

> "*2*. The contours of the power of the Court under Section 34 of the Act are too well established to require any reiteration. Even a bare reading of Section 34 of the Act indicates the highly constricted power of the civil court to interfere with an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator."

18. It has also been held time and again by this Court that if there are two plausible interpretations of the terms and conditions of the contract, then no fault can be found, if the learned arbitrator

proceeds to accept one interpretation as against the other. In *Dyna Technologies (P) Ltd.* v. *Crompton Greaves Ltd.* [*Dyna Technologies (P) Ltd.* v. *Crompton Greaves Ltd.*, (2019) 20 SCC 1], the limitations on the Court while exercising powers under Section 34 of the Arbitration Act has been highlighted thus: (SCC p. 12, para 24)

> "*24.* There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated."

54. Proceeding along these lines, Mr. Singh also drew our attention to the judgment in **Konkan Railway Corporation Limited vs. Chenab Bridge Project Undertaking**[24] and more particularly to the following passages of that decision:

> **"18.** At the outset, we may state that the jurisdiction of the court under Section 37 of the Act, as clarified by this Court in *MMTC Ltd.* v. *Vedanta Ltd.* [*MMTC Ltd.* v. *Vedanta Ltd.*, (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293] , is akin to the jurisdiction of the court under Section 34 of the Act. [*Id*, SCC p. 167, para 14:"*14.* As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision."] Scope of interference by a court in an appeal under Section 37 of the Act, in examining an order, setting aside or refusing to set aside

[24] (2023) 9 SCC 85

an award, is restricted and subject to the same grounds as the challenge under Section 34 of the Act.

19. Therefore, the scope of jurisdiction under Section 34 and Section 37 of the Act is not akin to normal appellate jurisdiction. [*UHL Power Co. Ltd.* v. *State of H.P.*, (2022) 4 SCC 116, para 15: (2022) 2 SCC (Civ) 401. See also: *Dyna Technologies (P) Ltd.* v. *Crompton Greaves Ltd.*, (2019) 20 SCC 1, paras 24, 25.] It is well-settled that courts ought not to interfere with the arbitral award in a casual and cavalier manner. The mere possibility of an alternative view on facts or interpretation of the contract does not entitle courts to reverse the findings of the Arbitral Tribunal. [*Ibid*; *Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI,* (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213; *Parsa Kente Collieries Ltd.* v. *Rajasthan Rajya Vidyut Utpadan Nigam Ltd.*, (2019) 7 SCC 236, para 11.1 : (2019) 3 SCC (Civ) 552] In *Dyna Technologies (P) Ltd.* v. *Crompton Greaves Ltd.* [*Dyna Technologies (P) Ltd.* v. *Crompton Greaves Ltd.*, (2019) 20 SCC 1], this Court held : (*Dyna Technologies case* [*Dyna Technologies (P) Ltd.* v. *Crompton Greaves Ltd.*, (2019) 20 SCC 1] , SCC p. 12, paras 24-25)

> "*24*. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.
>
> *25*. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act."

xxxx xxxx xxxx

> **25.** The principle of interpretation of contracts adopted by the Division Bench of the High Court that when *two constructions are possible, then courts must prefer the one which gives effect and voice to all clauses*, does not have absolute application. The said interpretation is subject to the jurisdiction which a court is called upon to exercise. While exercising jurisdiction under Section 37 of the Act, the Court is concerned about the jurisdiction that the Section 34 Court exercised while considering the challenge to the arbitral award. The jurisdiction under Section 34 of the Act is exercised only to see if the Arbitral Tribunal's view is perverse or manifestly arbitrary. Accordingly, the question of reinterpreting the contract on an alternative view does not arise. If this is the principle applicable to exercise of jurisdiction under Section 34 of the Act, a Division Bench exercising jurisdiction under Section 37 of the Act cannot reverse an award, much less the decision of a Single Judge, on the ground that they have not *given effect and voice to all clauses* of the contract. This is where the Division Bench of the High Court committed an error, in re-interpreting a contractual clause while exercising jurisdiction under Section 37 of the Act. In any event, the decision in *Radha Sundar Dutta* [*Radha Sundar Dutta* v. *Mohd. Jahadur Rahim*, 1958 SCC OnLine SC 38 : AIR 1959 SC 24] , relied on by the High Court was decided in 1959, and it pertains to proceedings arising under the Village Chaukidari Act, 1870 and Bengal Patni Taluks Regulation of 1819. Reliance on this judgment particularly for interfering with the concurrent interpretations of the contractual clause by the Arbitral Tribunal and Single Judge under Section 34 of the Act is not justified."

55. The aforesaid position in law also finds resonance in the following observations as were rendered recently by the Supreme Court in **Larsen Air Conditioning and Refrigeration Company vs. UOI & Ors.**[25] as would be evident from Para 15 thereof:

> **"15.** The limited and extremely circumscribed jurisdiction of the court under Section 34 of the Act, permits the court to interfere with an award, *sans* the grounds of patent illegality, i.e., that "*illegality must go to the root of the matter and cannot be of a trivial nature*"; and that the 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*" [ref : *Associate Builders* (supra)]. The other ground would be denial of natural

[25] (2023) SCC OnLine SC 982

justice. In appeal, Section 37 of the Act grants narrower scope to the appellate court to review the findings in an award, if it has been upheld, or substantially upheld under Section 34. It is important to notice that the old Act contained a provision which enabled the court to modify an award. However, that power has been consciously *omitted* by Parliament, while enacting the Act of 1996. This means that the Parliamentary intent was to exclude power to modify an award, *in any manner*, to the court. This position has been iterated decisively by this court in *Project Director, National Highways No. 45E and 220 National Highways Authority of India* v. *M. Hakeem*:

> *"42. It can therefore be said that this question has now been settled finally by at least 3 decisions* [McDermott International Inc. *v.* Burn Standard Co. Ltd., *(2006) 11 SCC 181],* [Kinnari Mullick *v.* Ghanshyam Das Damani, *(2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106]*, [Dakshin Haryana Bijli Vitran Nigam Ltd. *v.* Navigant Technologies (P) Ltd., *(2021) 7 SCC 657] of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the Uncitral Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the "limited remedy" under Section 34 is coterminous with the "limited right", namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996."*

56. In view of the aforesaid, it was Mr. Singh's submission that since the validity of the Arbitral Award has been elaborately examined by the learned Single Judge, there is neither any scope nor justification for interference with the impugned judgement. According to learned senior counsel, the various contentions which were addressed before us essentially require us to undertake an exercise of re-appreciation of the Award and to delve into the merits of the case and which would clearly be beyond the scope of Section 37 of the Act.

57. Mr. Singh then submitted that undisputedly the appellants have not challenged the direction of the AT for the amount of INR 308.21 crores being refunded and which pertained to the issuance of Warrants. It was pointed out that the dispute stands confined to the refund of INR 270,86,99,209/- in relation to CRPS and the grant of pendente lite interest at the rate of 12% on Warrants and future interest at the rate of 18% from the last of the due dates in terms of the Award.

58. On the issue of refund of INR 270,86,99,209/- relating to CRPS, it was submitted that the said finding clearly merits no interference bearing in mind the fact that both KAL and KM had complied with all obligations as flowing from the SSPA. It was in this respect submitted that apart from depositing the amount of INR 270,86,99,209/-, KAL and KM had also created a fixed deposit of INR 100 crores with CUB and issued irrevocable instructions for creation of a lien. According to learned senior counsel, once that deposit came to be created and appropriate instructions were issued to CUB, the control over the aforesaid deposit on 24 February 2015 came to be placed absolutely and without any fetter with the appellants. It was pointed out that upon completion of the aforesaid steps, the collateral securities which stood created came to be released.

59. Mr. Singh submitted that although a no-objection from **Export Development Canada**[26] was received by the appellants on 11 March 2015, they omitted to instruct CUB to transfer the amount of INR 100 crores to Designated Account 2. In view of the above, it was his contention that KAL and KM cannot possibly be held to be in breach of

[26] EDC

the SSPA. According to Mr. Singh, it is the aforesaid undisputed facts which informed the decision of the AT to direct refund of INR 270,86,99,209/-.

60. Mr. Singh then submitted that the contention that the AT had found KAL and KM to be in breach of the contract is misconceived and untenable since no finding or part of the Arbitral Award can possibly be read as evidencing the AT having reached such a conclusion. In fact, according to Mr. Singh, it becomes apparent from a reading of Paras 51 and 52 of the Award that the AT had taken due notice of the fixed deposit of INR 100 crores having been made and consequently KAL and KM having fully discharged their contractual obligations. According to Mr. Singh, the failure to transfer the fixed deposit to Designated Account 2 was on account of the omission on the part of the appellants and thus no wrongdoing or a failure to perform can be attributed to either KAL and KM.

61. It was in this regard further submitted that from 11 March 2015 onwards, the amount remained under the control of the appellants who omitted to take further steps and thus the breakdown of the SSPA being attributable solely to a failure on the part of the appellants to issue appropriate instructions to CUB. It was submitted that on 24 February 2015 itself, KAL and KM had created the fixed deposit and thereby complied with the obligations flowing from Clauses 6.3.2, 7.2.1(b) and 7.2.3 of the SSPA. Our attention was also drawn to the communication dated 25 February 2015 and which had acknowledged the discharge of the obligations by KAL and KM and SpiceJet consequently releasing the collaterals to KAL and KM. It was further pointed out that EDC had

given its no-objection to SpiceJet for the closure of credit facilities on 11 March 2015 itself. The amount deposited came to be clouded by virtue of a provisional attachment order passed by the Enforcement Directorate only on 11 May 2015. It was in the aforesaid backdrop that Mr. Singh submitted that at least between 11 March 2015 up to 11 May 2015, no constraint or fetter operated upon the appellants from taking further steps in accordance with the stipulations contained in the SSPA.

62. Mr. Singh submitted that the AT has duly taken into consideration the aforesaid aspects and ultimately rendered the Award based on a plausible consideration of the terms of the SSPA and the obligations of respective parties flowing therefrom. Those conclusions, according to Mr. Singh, can neither be viewed as perverse nor can they be said to suffer from any "*patent illegality*" so as to have warranted interference under Section 34 of the Act.

63. Mr. Singh then submitted that the reliance placed on Section 65 of the 1872 Act is not only misplaced but clearly misconceived since the aforesaid submission proceeds on the basis that a direction for refund must be based upon a particular provision of that statute. It was submitted that the reliance on Section 65 fails to bear in mind that the 1872 Act is a consolidating statute and thus need not be viewed as being the sole repository of a power to frame a direction for refund. It was submitted that the 1872 Act is neither an exhaustive code nor does it attempt to provide for all types or nature of rights that may be asserted or reliefs that may be claimed. It was Mr. Singh's submission that courts have consistently held that where statutory provisions including those which may be enshrined in the 1872 Act fail to deal

with a particular contingency, it would be the principles of the common law which should be applied.

64. Mr. Singh submitted that the fact that the 1872 Act does not exhaustively codify the entire law in relation to contracts is a proposition which is well settled and came to be enunciated by the Privy Council way back in 1891 in **Irrawaddy Flotilla Company Limited vs. Bugwandass**[27]. Our attention in this respect was drawn to the following passages of that decision:

> "The Act of 1872 does not profess to be a complete code dealing with the law relating to contracts. It purports to do no more than to define and amend certain parts of that law. No doubt it treats of bailments in a separate chapter. But there is nothing to show that the Legislature intended to deal exhaustively with any particular chapter or sub-division of the law relating to contracts. On the other hand, it is to be borne in mind that at the time of the passing of the Act of 1872, there was in force a statute relating to common carriers, which, in connection with the common law of England, formed a code at once simple, intelligible, and complete. Had it been intended to codify the law of common carriers by the Act of 1872, the more usual course would have been to have repealed the Act of 1865 and to reenact its provisions, with such alterations or modifications as the case might seem to require. It is scarcely conceivable that it could have been intended to sweep away the common law by a side wind, and by way of codifying the law to leave the law to be gathered from two Acts which proceed on different principles, and approach the subject, if the subject be the same, from different points of view.
>
> At the date of the Act of 1872, the law relating to common carriers was partly written, partly unwritten, law. The written law is untouched by the Act of 1872. The unwritten law was hardly within the scope of an Act intended to define and amend the law relating to contracts. The obligation imposed by law on common carriers has nothing to do with contract in its origin. It is a duty cast upon common carriers by reason of their exercising a public employment for reward. "A breach of this duty," says *Dallas, C.J., Bretherton* v. *Wood*[7], "is a breach of the law, and for this breach an action lies founded on the common law which action wants not the

[27] 1891 SCC OnLine PC 11

aid of a contract to support it." If in codifying the law of contract the Legislature had found occasion to deal with tort or with a branch of the law common to both contract and tort, there was all the more reason for making its meaning clear. Passing from these general considerations to the language of the Act of 1872, its is to be observed that the Act of 1865 is not merely left unrepealed by the later Act. As it is not "expressly repealed" nothing in the Act of 1872 is to "affect" its "provisions." It seems a strong thing to say that the provisions of an Act are not affected, when the whole foundation upon which the Act rests is displaced, and almost every section assumes a different meaning, or comes to have a different application. Moreover, there is certainly one provision in the Act of 1865 which is deprived of much of its original significance, and, so far, at least, is rendered nugatory, if the Appellants' view is correct. The combined effect of sects. 6 and 8 of the Act of 1865 is that, in respect of property not of the description contained in the schedule, common carriers may limit their liability by special contract, but not so as to get rid of liability for negligence. On the Appellants 'construction the Act of 1872 reduces the liability of common carriers to responsibility for negligence, and consequently there is no longer any room for limitation of liability in that direction. The measure of their liability has been reduced to the minimum permissible by the Act of 1865.

xxxx xxxx xxxx

When the Act of 1872 was passed, the Act of 1865 had been in operation for seven years, and it may be presumed that common carriers, in some cases, at least, had taken advantage of the Act of 1865 in settling their rates. It seems hardly fair that common carriers should be relieved from the liability of insurers, without any provision pointing to a re-adjustment of their charges, and without distinct notice of a change affecting so materially the interests of the public.

Then the Act of 1872 provides that nothing in the Act contained shall affect any usage or custom of trade. It was said that the liability of common carriers as insurers was not a usage or custom of trade. That may be conceded. But it is certainly singular that, according to the Appellants' arguments, usages and customs of trade, which are local and partial, are not to be affected, while a custom so universal as to be a custom of the realm, or, in other words, part of the common law, is not treated with the same respect"

65. Mr. Singh submitted that in **Jwaladutt R. Pillani vs. Bansilal**

Motilal[28], the Privy Council again recognized the position of the 1872 Act being merely a consolidating statute as opposed to being an exhaustive code dealing with all aspects pertaining to contracts. This, Mr. Singh submitted, would be evident from the following observations as appearing in that decision:

> "Also the Indian Contract Act is not a code. The preamble so states "Whereas it is expedient to define and amend certain parts of the law relating to contracts"; and Lord Macnaghten in the case of Irrawaddy Flotilla Company v. Bugwandas, [(1891) 18 Cal. 620, at p. 628; L.R. 18 I.A. 121 at p. 129.] says (p. 628):—
>
> > "The Act of 1872 does not profess to be a complete code dealing with the law relating to contracts. It purports to do no more than to define and amend certain parts of that law. No doubt it treats of bailments in a separate chapter. But there is nothing to show that the Legislature intended to deal exhaustively with any particular chapter or sub-division of the law relating to contracts."
>
> And although the section does occur in a fasciculus of sections devoted to partnership, it is clear that the fasciculus is not exhaustive of all questions which can be raised in connection with partnership.
>
> Taking into account all these considerations their Lordships do not think they would be justified, in view of the ambiguity of the expression used, to give effect to a view which would upset what has been considered by the commercial community as the law for such a long period

66. Reliance was then placed on a judgement rendered by the Punjab and Haryana High Court in **Punjab National Bank Ltd. vs. Arura Mal Durga Das & Ors**[29], where the aforesaid position came to be reiterated in the following terms:

> "The question which arises is, whether the Bank can claim to exercise the Banker's lien in these circumstances. Section 170 of the Indian Contract Act refers to general lien of Bankers and other in respect of goods bailed to them which runs as under:-

[28] (1929) SCC OnLine PC 18
[29] (1960) SCC OnLine Punj 126

> The language of this section limits its scope to goods bailed. There are other sections in the Contract Act which deal with other kinds of lien such as that of the finder of the goods (see section 168), bailee's particular lien under section 170; the lien of pawnee under sections 173 and 174 and lastly the lien of agents on principal's property under section 221.
>
> The statutory law in India does not expressly refer to the Banker's lien in respect of cash deposits, but the cases of different kinds of liens dealt within the Contract Act are not all inclusive. The Indian Contract Act does not profess to be a complete code dealing with the law relating to contracts. It only defines and amends certain branches of that law. This Act is not exhaustive of the entire law relating to contracts. The preamble of the Indian Contract Act clearly provides "whereas it is expedient to define and amend certain parts of the law relating to contracts; it is hereby enacted as follows:—Where the statutory provisions do not cover a particular matter, the principles of English law, in so far as they embody the rules of justice, equity and good conscience may be applied, —vide The Irrawaddy Flotilla Company v. Bugwandas [l.L.R. 18 Cal. 620 (628)] and Jwaladutt R. Pillani v. Bansilal Motila[l l .L.R. 53 Bom. 414 B.C. 418]"

67. Mr. Singh then contended that our Courts have adopted and applied various precepts known to exist in the common law, including the principle of promissory estoppel. According to Mr. Singh, if the contention of the appellants were to be accepted, the precept of promissory estoppel would also not apply to contracts. It is in the aforesaid light that Mr. Singh contended that the arguments addressed on this score are wholly misconceived and liable to be negatived. The submission of learned senior counsel was that fundamental principles existing in the common law including those which represent the principles of promissory estoppel and forfeiture would apply, notwithstanding specific provisions in that respect not being found to be explicitly present in the 1872 Act. Viewed in that light, it was Mr. Singh's submission that a direction for refund could be justifiably

framed irrespective of the restrictions and pre-conditions pertaining to restitution which are found in Section 65. It was thus submitted that KAL and KM would be entitled to an order of refund even though no breach of contract may have been found or the contract having been held to have become void.

68. It was further submitted that directions for refund have been framed by courts even in situations where it be found that the contract could not be performed. In support of the aforesaid proposition, Mr. Singh relied upon the judgment rendered by the Patna High Court in **Jagdishpur Metal Industries vs. Vijay Oil Industries Ltd.**[30] and to the following paragraphs of the report:

> **"22.** Then remains the question as to the refund of money that had been paid in advance by the-plaintiff to the defendants in two instalments as part payment of the total consideration—the first a sum of Rs. 5,000/-, which was paid on the 17th July, 1949, when the agreement of sale was executed and the other a sum of Rs. 3,000/-, which was paid on the 27th of July, 1949, thus, in all, a sum of Rs. 8000/-. The case of the plaintiff is that even if it be held that the contract had been broken by reason of any default on its part, it is still entitled to get back this total advance of Rs. 8,000/- which it had paid to the defendants in part satisfaction of the entire consideration.
>
> **23.** The trial court has accepted its case and has found:
>
> > "Therefore in conclusion I hold that there was no breach of contract on the part of the defendants but in spite of that the plaintiff is entitled to a refund of the advance and his advance is not liable to be forfeited."
>
> xxxx xxxx xxxx
>
> **26.** In my opinion, this finding is based on a fallacy. It presupposes that money paid in advance, may it be by way of earnest money or may it be in the nature of part satisfaction of the total consideration, is, as a rule, refundable by the vendor as contemplated under Sections 64 and 65 of the Indian Contract Act unless it is proved and established that he is entitled to certain damages as

[30] 1958 SCC OnLine Pat 97

contemplated under Section 73 of the Contract Act or to liquidated damages as contemplated under Section 74 of the Indian Contract Act or unless there is any specific stipulation between the parties as to the forfeiture of such money paid in advance.

27. In other words, it assumes that as a rule any sum named in a contract as money paid in advance is penal and, therefore, it by Section 74 of the Contract Act. I think either on principle or on law such an assumption is not justified. Section 64 deals with the consequences of rescission of voidable contract and lays down that

> "the party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be to the person from whom it was received."

28. This section, therefore, on the very face of it, is not applicable to the present case as the breach of contract here, as found above, was committed not by the defendants but by the plaintiff itself.

29. Therefore, at least under this section the plaintiff cannot claim any refund of the money which it may have paid in advance by way of part satisfaction of the total consideration. Section 65 deals with the obligation of a person who has received advantage under void agreement or contract that becomes void. It is true that their Lordships of the Privy Council in *Satgur Prasad* v. *Hamarain Das*, AIR 1932 P.C. 89 & *Mohan Manucha* v. *Manzoor Ahmad*, AIR 1943 P.C. 29 have held that the words "when a contract becomes void" are wide enough to cover the case of a voidable contract which has been avoided.

30. But in the case of an agreement, such as the one before us, it cannot be said either that it was ab initio void or that though it was possible of performance at the time it was entered into, it became impossible of performance subsequently or that at its inception it was a voidable contract which was subsequently avoided by any party thereto. On the contrary, the case admitted here is that the agreement was a valid agreement and that it continued to remain valid to the last until the plaintiff had broken it and at no stage it was a voidable agreement which had been subsequently avoided by the defendants.

31. That being so, Section 65 of the Indian Contract Act also does not come into play here. Further it has to be remembered in the case of an earnest money the doctrine of forfeiture is not based either on the principle of penalty or on the principle of recompense for the loss incurred by one party to a contract as a result of any breach of it by the other. In my opinion, the doctrine of forfeiture in the case of an earnest money is based on a principle completely

independent of the considerations that are laid down in Sections 64, 65, 73 or 74 of the Indian Contract Act.

32. In fact, an earnest money, belonging as it does to a class of its own, namely, that of deposit, is regulated and controlled by considerations which are peculiar to that class alone. Therefore where the agreement is unequivocal and it is specifically agreed upon thereunder that what has been paid in advance towards a contract is nothing but an earnest money, as understood in law, then it has to be dealt with in the light of the principles which apply to such deposits and not in the light of those that generally apply to restitution, penalty or liquidated damages.

33. But in most cases difficulty arises due to the fact that though payments are made in advance as a part of the total consideration of the contract of sale, there is no specification made thereunder as to whether the payment so made is an earnest money or is penalty named therein for any breach of contract or is an advance simpliciter paid to suit the convenience of the vendor. In such cases, apart from surrounding circumstances, reliance has to be placed on the main characteristic that as a rule constitutes an earnest money or a deposit. Now in order that a sum paid under a contract may be deposit, it has to fulfil two requirements.

xxxx xxxx xxxx

50. In my opinion, the mere absence of such a description in the agreement is neither decisive nor crucial. On the contrary, it is immaterial whether the deposit so made is or is not described in the agreement which it bears to the sum contracted for is rather large. In other words, what in fact constitutes an earnest money is the inherent character of the deposit made and not the name given to it though it is true that while the matter is still under investigation these factors may be usefully relied upon as proper guide. In the present case, however, as already found above, there is no doubt that Rs. 5,000/- was paid as earnest money.

51. Then comes the second item, namely, that of Rs. 3,000/-, which was paid on 27-7-1949. As to this amount. I think, it has to be conceded that it does not stand on the same footing as the one which was paid on the first occasion. On the contrary I find that in the case of this item there are certain considerations which not only distinguish it from the former but also takes it out completely from that class of payments which are known in law as earnest money.

52. The one broad feature is that it was paid long after the agreement had been finalised and executed & the second is that there is no material or circumstances on the record to suggest that this amount also was paid as a part of the earnest money or as a guarantee for the fulfilment of the agreement, rather it appears to

me, which is more likely on the facts of the case, that it was paid in response to the needs of the vendor who was then hard pressed for money or it may be which is also not quite improbable, that the vendee thought it advisable that he should go on advancing as much money towards the total price as he may find it convenient to do, so that at the final stage the contract might not fail for the paucity of fund.

53. That being so, the probabilities are more in favour of the conclusion that this latter amount of Rs. 3,000/- was not paid as a guarantee for the fulfilment of the contract but merely as a part payment of the price which had been agreed upon to be paid for the property. That being so, the position of that amount is that of a sum received by the defendants for the use of the plaintiff and had the contract been completed it would have been rightly appropriated by them towards the purchase price.

54. But the contract having failed there is no justification left either in law or in fact for the defendants to retain that money even thereafter.

55. Therefore, I think, the plaintiff's claim for the refund of Rs. 3,000/- is fully justified in law and to that extent the decisions in 38 Ind Cas 915: (AIR 1916 Nag 104); AIR 1929 Nag 30 (2); *Krishna Chandra* v. *Mamud Bepari*, AIR 1936 Cal 51 : *Madan Mohan* v. *Jawala Prasad*, AIR 1950 EP 278 and *Mohd. Zafar* v. *Hamida Khatoon*, AIR 1945 All 70, give full support to the claim of the plaintiff."

69. It was submitted that the principles enunciated in the aforenoted decision were reiterated and followed by the Allahabad High Court as would be evident from the observations appearing in **De-Smet (India) Private Ltd. vs. B.P. Industrial Corporation (P.) Ltd.**[31]:

"7. Sri Rajeshwari Prasad, learned counsel for the plaintiff respondent supported the findings recorded by the trial court and contended that the plaintiff had paid Rs. 100,000 to the defendant as part payment for the plant which was to be supplied by the defendant in advance. It was not paid as earnest money and was not liable to be forfeited. Accordingly, when the contract was not being performed the defendant was not entitled, even if there was breach of contract on plaintiff's part to retain the amount paid to it as advance.

8. In this case it is not disputed that the plaintiff had paid a sum of Rupees 100,000 to the defendant as part payment of the price of the

[31] [1979 SCC OnLine All 940(DB)]

plant agreed to be supplied by the defendant in advance and that it was not paid as earnest money. In the case of *Chiranjit Singh* v. *Har Swarup*, AIR 1926 PC 1 the purchaser had paid Rs. 20,000 as earnest money and he also paid a further sum of Rs. 1,45,000 towards part payment of the purchase price. Thereafter he failed to meet his commitment of paying the balance of purchase price. It was held that as the purchaser was guilty of committing breach of contract the earnest money amounting to Rs. 20,000 paid by him was liable to be forfeited, but, notwithstanding the breach committed by him the purchaser was entitled to repayment of Rs. 1,45,000.

9. The decision in the cases of *Ballabhdas* v. *Paikaji*, AIR 1916 Nag 104. *Abas Ali* v. *Kodhu Sao*, AIR 1929 Nag 30 (2) (FB). *Krishna Chandra* v. *Khan Mahmud Bepari*, AIR 1936 Cal 51. *Madan Mohan* v. *Jawala Prasad*, AIR 1950 East Punj 278. *Mohd. Jafar* v. *Hamida Khatoon*, AIR 1945 All 70. *J. Metal Industries Ltd.* v. *V. Oil Industries*, AIR 1959 Pat 176. *Dasu Rattamma* v. *Krishnamurthi*, AIR 1928 Mad 326, show that the view taken by various High Courts in this country is that where the advance payment is not made by the purchaser as guarantee for fulfilment of the contract but is made merely as part payment of the purchase price agreed upon between the parties, it has to be, when the transaction falls through, refunded to the purchaser even though the purchaser himself may be responsible for committing breach of contract.

10. In the instant case, as the contract between the parties has admittedly fallen through and the defendant did not receive the sum of Rs. 100,000 as earnest money, the defendant is, notwithstanding the fact that the breach of contract might have been committed by the plaintiff, is liable to refund the money received by him.

xxxx xxxx xxxx

17. In this view of the matter it is not necessary for us to go into the question as to which of the two parties was guilty of committing breach of the contract this case. As the sum of Rs. 1,00,000 paid by the plaintiff to the defendant was not earnest money, and as admittedly the transaction between the parties had fallen through the defendant has been rightly held to be liable to refund the said amount to the plaintiff."

70. It was then contended by Mr. Singh that even our Court in **Uma Kapoor & Anr. vs. Kapil Aggarwal**[32] had pertinently observed that unless a statute creates a bar or a prohibition against the grant of any

[32] 2014 SCC OnLine Del 4413

relief, the arbitrator would be entitled to frame directions bearing in mind the facts and circumstances of the case. Mr. Singh submitted that our Court in *Uma Kapoor* had on due consideration of the legal position held that notwithstanding the bar in respect of refund of earnest money, a direction for refund of part payments made under a contract would be justified. Mr. Singh relied upon Paras 18, 19 and 20 of the report, which are reproduced hereinbelow:

> "**18.** In our view the legal position would be that sub Section (2) of Section 22 of the Specific Relief Act recognizes a rule of procedure that Courts should not grant a relief unless it has been specifically prayed for. It is trite that a rule of procedure cannot defeat a right which may flow from a statute or even in equity. Law draws a distinction between a relief which requires additional pleadings and some more facts to be proved vis-a-vis a relief which is subsumed or can be granted without proof of any other fact. Law recognizes that though not specifically asked for, a lesser relief would be included in a main relief prayed for. Thus, in a suit seeking specific performance, it would be open for a Court to order refund of earnest money if equity demands so even in the absence of a specific prayer made. In this context we would only refer to a decision of the Supreme Court reported as (1982) 1 SCC 525 *Babu Lal* v. *Hazari Lal Kishore Lal* wherein the Supreme Court referred to sub Section (2) of Section 22 of the Specific Relief Act and interpreted the same concerning a suit for specific performance where there was no prayer made for the defendant to put the plaintiff in possession of the suit property. The Supreme Court held that notwithstanding a prayer made for possession to be granted, it was permissible to direct possession to be handed over.
>
> **19.** In the facts of the instant case, the issue can be looked at very differently. The words used in clause (b) of sub Section (1) of Section 22 are '*earnest money or deposit paid*'. The prohibition under sub Section (2) to the reliefs under clauses (a) or (b) of sub Section (1) of Section 22 would obviously relate to earnest money or deposit paid.
>
> **20.** As we have noted above, the agreement in question has not made a reference to any sum as earnest money or deposit paid. The learned Arbitrator has treated Rs. 25,00,000/- (Rupees Twenty Five Lacs only) paid at the time of execution as earnest money and has directed forfeiture thereof. Rs. 75,00,000/- (Rupees Seventy Five Lacs only) paid in instalments thereafter which has been directed to

> be refunded is ex-facie neither earnest money or deposit paid. We draw a distinction between a deposit paid and money tendered in part payment of an amount payable under an agreement to sell. The later would not be deposit paid. Thus, the bar of sub-Section (2) of Section 22 of the Specific Relief Act, 1963 in the facts of the instant case would not come into play."

71. Mr. Singh then contended that the law would abhor a position where a person may claim to retain money received and seek to unjustly enrich oneself. In support of the aforesaid proposition, Mr. Singh sought to draw sustenance from the following principles as enunciated in **Fibrosa Spolka Akcyjna vs. Fairbairn Lawson Combe Barbour Ltd.**[33]:

> "[A]ny civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution."

72. Proceeding then to deal with the challenge to the grant of post-award interest at the rate of 18%, Mr. Singh submitted that regard must be had to the fact that the AT desisted from awarding any interest for the pre-reference or pendent lite period on the sum of INR 270,86,99,209/-. It was his submission that the AT had, in all fairness, required the parties to firstly explore the possibility of an option being exercised with respect to CRPS and in case no mutual agreement be arrived at, accorded a further period of two months to the appellants to refund the money. Even up to this stage, Mr. Singh highlighted, no interest liability stood imposed upon the appellants.

73. It was contended that in terms of Section 31(7)(b) of the Act, the

[33] [1943] A.C. 32

award of interest is an aspect which falls clearly within the jurisdiction and discretion of the AT. These aspects, according to Mr. Singh, have been elaborately dealt with by the learned Single Judge as would be evident from a reading of Paras 87 to 91 of the impugned judgment.

74. Notwithstanding the above, Mr. Singh submitted that the appellants themselves had prayed for award of interest at the rate of 18%, and thus consequently they cannot now turn around and assail the correctness of the decision of the AT to award interest at the rate of 18%. Reliance in this respect was placed on the following observations as appearing in Para 29 of the judgment of this Court in **WAPCOS Ltd. vs C&C Energy Pvt. Ltd.**[34]:

> " **29.** Insofar as the award of interest is concerned, it is now well settled that the Arbitral Tribunal has wide discretion in awarding interest (See : Punjab State Civil Supplies Corporation Limited (PUNSUP) v. Ganpati Rice Mills : SLP (C) 36655 'of 2016, decided on 20.10.2021). In the present case, Wapcos had also claimed interest at the rate of 18% per annum and therefore, it is not open for Wapcos now to contend that the said rate is exorbitant and onerous. This Court also finds no fault with the learned Commercial Court in declining to interfere with the impugned award."

75. Similarly, learned senior counsel submitted that this Court in **Morgan Securities and Credits Pvt. Ltd. Vs. Videocon Industries Ltd.**[35] had also affirmed the grant of post-award interest @ 18% as would be evident from Para 26:

> "**26.** When the Award has specifically granted interest @ 18% per annum for the post-award period on a sum of Rs. 5,00,32,656/- and has confined the rate of interest to 21% per annum for the pre-reference period, prior to the date of the demand notice, it shall have to be assumed that the learned Sole Arbitrator did so with full intent and while doing so, was mindful of the respective claims of the parties, the relevant merits/ demerits of the pleas taken before

[34] 2022 SCC OnLine Del 3498
[35] 2020 SCC OnLine Del 2555

> him, the equities required to be balanced between the parties and all other relevant factors for granting the rate of interest, as awarded. Even otherwise, the present appeal is not merited as only questions of law are required to be determined by the court at this stage. Under the garb of questioning the decision of the learned Single Judge upholding the quantum of interest awarded under the impugned Award, the appellant/Morgan is actually expecting this court to re-appreciate the evidence, which is impermissible. The view taken by the Sole Arbitrator for granting interest at a particular rate for different periods cannot be treated as patently illegal or perverse so as to go to the root of the matter."

76. It was submitted that the decision of this Court in *Morgan Securities and Credits Pvt. Ltd* was ultimately affirmed by the Supreme Court and thus vindicating the directions as framed by the AT. In justification of the award of interest at the rate of 18%, Mr. Singh also relied upon the following decisions:

(a) B. Radhakrishna vs. Maharashtra Apex Corporation Ltd.[36]

(b) *UHL Power Company Ltd*.

(c) *Larsen Air Conditioning*;

(d) M/s Pradeep Vinod Construction Company vs. Union of India[37]

77. It was lastly submitted that the award of interest and the validity thereof must be tested bearing in mind the significant principles propounded by the Supreme Court in **Secretary, Irrigation Department, Government of Orissa and Ors vs. G.C. Roy[38]**, and where it was held that a person who has been deprived of monies to which he was legitimately entitled to would have a corresponding right

[36] 2017 SCC OnLine SC 2181
[37] Neutral Citation - 2022:DHC:3616-DB
[38] (1992) 1 SCC 508

to be compensated for deprivation. Mr. Singh drew our attention to the following observations as appearing in that judgment:

> "**43.** The question still remains whether arbitrator has the power to award interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are dealing with a case where the agreement is silent as to award of interest. (On a conspectus of aforementioned decisions, the following principles emerge:
>
> (i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator."

78. Insofar as arguments with respect to the personal liability of Ajay Singh is concerned, Mr. Singh submitted that it would clearly be impermissible for the appellants to address submissions on that score since that is not a ground which has been either pleaded or taken in the appeals. It was, and without prejudice to the above, submitted that Ajay Singh had in his personal capacity signed the agreement and had been duly identified therein as the "*acquirer*". According to Mr. Singh, the fact that Ajay Singh had unequivocally signed the agreement and become a party thereto would lead one to the irresistible conclusion that he was bound in his personal capacity.

E. EVALUATION OF THE RIVAL SUBMISSIONS

79. While elaborate submissions were addressed by learned senior counsels appearing for respective sides, for the purposes of evaluating the challenge which stands raised, we propose to restrict our discussion to two fundamental questions which appear to arise, namely the validity

of the direction for refund of the sum of INR 270,86,99,209/- and the prescriptions with respect to pendente lite and future interest payable on the amount awarded.

80. However, before delving into the aforesaid issues, we propose to deal with the preliminary objection which was raised by Mr. Singh. It becomes pertinent to note that KAL and KM had urged that a right of hearing and consideration itself should be denied to the appellants bearing in mind their failure to abide by the orders dated 13 February 2023 and 07 July 2023 passed by the Supreme Court as well as various directions passed in execution proceedings. Mr. Singh had contended that since the appellants had failed to comply with the conditions imposed in terms of the orders of the Supreme Court noted above and had also failed to abide by the directions issued in the interim in the execution proceedings, they should be denied the right of hearing in the instant appeals.

81. Having conferred due consideration on the aforesaid objection as raised, we find ourselves unable to sustain the same for the following reasons. It is pertinent to note that both the execution proceedings as well as the orders passed by the Supreme Court were concerned solely with the execution of the Award. The Award which stood impugned was undoubtedly in the nature of a money decree and thus subject to the rigors of Section 36 as it stands in its amended avatar. However, notwithstanding the statutory obligation of the Executing Court to treat the Award as any other decree awarding a sum of money, the same does not detract from the right of a person aggrieved by an Award to assail it in accordance with law. The enforcement remedy as provided

by Section 36 is not liable to be construed as rendering the Section 34 remedy wholly otiose and illusory. While the party which has suffered an Award is indisputably liable to securitize or even make deposits as may be considered just and appropriate, the same is clearly intended to be without prejudice to its right to challenge the Award.

82. As we read the orders passed by the Executing Court as also those issued by the Supreme Court, we find ourselves unable to discern any observation or direction contained therein which may be possibly read or interpreted as denuding the appellant the right to pursue the remedy otherwise provided for by Section 34. In fact, a reading of the orders passed by the Supreme Court would indicate that it was conscious of the pendency of the challenge under Section 34 being pending before this Court. Neither the Court in execution nor the Supreme Court had deprived the appellants of the right to assail the judgment rendered by the learned Single Judge. We, thus and for reasons aforenoted find ourselves unable to sustain the preliminary objection as raised.

83. It becomes pertinent to note that the appellants before us have principally contended that the direction for refund of the aforenoted amounts would have to stand the test of Section 65 of the 1872 Act. The direction for repayment of the aforesaid sum was also assailed and questioned as being in clear violation of the SSPA and under which the amount was neither stipulated to be returned, nor was there any other express provision which could be read as compelling the appellants to make over the part payments which were made. It was further contended that the direction for the aforenoted sums being refunded

would also amount to a rewriting of the contractual terms bearing in mind the undisputed fact that the appellants would have been placed under a liability to repay only after eight years.

84. Significantly, KAL and KM before the AT while seeking to argue restitution had themselves alluded to Section 65 of the 1872 Act. This becomes evident from a reading of paragraph 7 of the Award which is extracted hereinbelow: -

> "**7.** The Respondents, contrary to their stand, have clearly failed to prove that they made any effort for obtaining approval of BSE. There is no evidence led and significantly no witness has been produced from BSE in order to prove such correspondences or any other purported efforts made by them to pursue the matter. The stand that the application for in-principle approval was closed by the BSE on account of failure to submit requisite undertakings is factually incorrect. The two emails dated 11.06.2015 and 15.06.2015 on which the Respondents placed strong reliance have been denied by the Claimants. The conclusion was that the Company was not forthcoming to satisfy the requirements as the first application filed by the Company seeking in-principle approval was treated as closed. Therefore, it has been clearly established that SpiceJet headed by Mr Ajay Singh failed to pursue the application which resulted in its closure on 10.07.2015. The Respondents cannot be allowed to attribute the non-grant of in-principle approval by BSE to non-issuance of no objection certificates from the Banks. The actual reason for closure of the application was deliberate inaction on the part of the Respondents. In terms of Clause 17.11 of the SSPA, the Respondents were under obligation to take all possible requisite steps expeditiously for issuance of warrants and CRPS to the Claimants. They were obligated to take all requisite steps for issuance of warrants and CRPS expeditiously as time was specifically stipulated to be the essence in the SSPA. The breach which was voluntary and was resultant of inaction cannot now be styled as impossibility in law to get out of the obligation to issue warrants and to pay damages for the inaction. The SSPA did not get frustrated or rendered impossibility by way of operation of law but because of in-action of the Respondents in pursuing the application as highlighted above. What is presently being styled as frustration or impossibility in law is a voluntary breach of contract which is self-induced by the Respondents and they cannot be allowed to take advantage of their own wrong. Even if it is conceded for the sake of argument, as is

submitted that it is a case of impossibility, the principle of restitution needs to be respected and the Respondents cannot be allowed to unjustly enrich themselves by retaining the entire consideration paid / provided by the Claimants in terms of the SSPA without performing its own side of the bargain i.e. issuance of warrants. Therefore, in terms of Section 65 of the Indian Contract Act, 1872 (in short "the Contract Act"), all payments made by the Claimants towards consideration for the warrants has to be directed to be refunded to the Claimants along with interest, upon restitution of 58.46% shareholding sold by the Claimants to Mr Ajay Singh. To justify its claim of damages, it is submitted that on account of breach of contract by the Respondents, the Claimants have suffered huge losses and had SpiceJet pursued the in-principle application and proceeded to issue the warrants to the Claimants, they would have acquired 14,13,91,378 and 4,77,00,000 warrants respectively convertible at the agreed price of Rs.16.30 which is an admitted payment and this could have given the Claimants an equity of around 24% in SpiceJet with attendant rights under the Companies Act, 2013 (in short "the Companies Act"). Had the Respondents obtained no objection certificates from the Banks as required by BSE or had the Respondents assailed the decision of the BSE regarding closure of the application seeking in-principle approval of BSE, the Claimants would have been entitled to warrants convertible into equity shares of SpiceJet in the financial years 2015-16 and 2016-17. Further, in terms of the Resolution passed by the Board of Directors of SpiceJet and the applicable law, had the warrants been allotted to the Claimants they would have been legally entitled to convert them to equity shares at any time within 18 months from the date of allotment. On account of non-allotment of warrants to the Claimants due to closure of the in-principle application, they have been denied their right to hold 24% of the issued capital of SpiceJet as on 01.04.2016. With reference to the well accepted principle of "Restitution in integrum", it is submitted that the Claimants have suffered loss and they should be placed in the same position as far as compensation in money can do it, as if the party in breach had performed his contract or fulfilled his duty. As regards the stand of the Respondents that even if the equity shares were allotted to the Claimants upon conversion of warrants such equity shares would have remained under a lock-in for three years and the Claimants would have been barred from alienating whole or part of such equity shares, it is submitted that under law it is not necessary to actually suffer a loss in order to claim damages. Therefore, the logical corollary to this principle is that had equity shares been allotted to the Claimants, it was not mandatory for the Claimants to incur a loss by way of selling / transferring / alienating any or whole of such shareholding for claiming damages from the Respondents. Non-allotment of locked-

> in equity shares also gives the Claimants the right to claim damages from Respondents. Strong reliance is placed on several decisions of the Hon'ble Supreme Court and Delhi High Court, Maula Bux v. Union of India (1969) 2 SCC 554; Union of India v. Commercial Metal Corporation (1981) SCC Online Del 230; Saraya Distillery v. Union of India (1984) SCC Online Del 60) to contend that it is not necessary to actually prove loss caused due to breach of contract and that the innocent party is still entitled to a reasonable compensation. The stand is that in order to be entitled to compensation it has to be ascertained as to what is the date of breach. It is not in dispute that the general / ordinary principle with respect to damages for breach of contract is that damages are required to be calculated from the date of breach. There are also cases where there is no readily available market in which an innocent party could have approached immediately in order to mitigate the damages. In such cases when there is no readily available market a later date may become applicable. Reliance is also placed on the Expert Report to substantiate the claim for damages."

85. It is in the aforesaid backdrop that the appellants assert that KAL and KM have fundamentally altered their stand and now seek to justify the award of refund based on principles of unjust enrichment and common law principles, and which undoubtedly fall outside the ambit of the 1872 Act.

86. The fact that the appellants had consistently taken the position that in the absence of a breach, they could not have been compelled to repay the amounts received becomes starkly evident from the recordal of submissions by the learned Single Judge itself. As is evident from a reading of paragraph 6 of the impugned judgment, the appellants appear to have asserted that the refund of INR 270,86,99,209/- was clearly unjustified when viewed in light of the AT itself having come to the conclusion that it was KAL and KM who were in breach of their contractual obligations. This was again reiterated in the submissions which stand reflected in Paragraph 8. Paragraphs 6 and 8 of the

judgment assailed before us are reproduced hereinbelow: -

> "**6.** It is submitted that the Arbitral Tribunal erred in awarding the refund of the sum of Rs. 270,86,99,209/- towards amounts paid for Non-Convertible Cumulative Redeemable Preference Shares (hereinafter referred to as "CRPS") despite coming to the finding that the respondents are in breach of their obligation to bring in the entire committed support of Rs. 450,00,00,000/- which amount was to be used towards payment of liabilities including statutory dues and to support the turnaround plan of the petitioner Company, in terms of the Offer Letter dated 13th January 2015 and the Scheme dated 15th January 2015.
>
> xxxx xxxx xxxx
>
> **8**. It is further submitted that the said refund was awarded in favour of the respondents despite the finding that they were in breach of the Agreement having failed to bring in Rs. 100 Crores, i.e., the Tranche-I of the total amount, in terms of Clause 6.3.1. and also, the petitioner Company's claim to the extent of Rs. 129 Crores was allowed on account of such breach. Therefore, now the respondents cannot take undue advantage of their breach."

87. The argument of the AT having essentially reworked the terms of the contract is noted in Paragraph 7 and which reads thus: -

> "**7.** The learned senior counsel submitted that in terms of Schedule B of the Agreement, the CRPS is a debt instrument issued at a nominal coupon rate of 6%, repayable at the end of 8 years. The refund was awarded in favour of the respondents without considering that in accordance with the terms of the Agreement, CRPS is essentially a debt instrument, which could have been redeemed only after the expiry of a period of eight years from the date of subscription and is an amount which is not payable in praesenti. Moreover, in terms of the Schedule B, the dividend on the CRPS becomes payable only subject to the availability of profits of the Company. Therefore, on the face of the record, the Arbitral Tribunal failed to consider and appreciate that CRPS could have only been redeemed by the respondents after the expiry of a period of 8 years from the date of allotment of such CRPS in accordance with the terms of the SSPA."

88. The aspect of the CRPS being a debt instrument and thus being redeemable only upon the expiry of 8 years from the date of subscription was noted by the learned Single Judge in paragraph 16

which is reproduced hereinbelow: -

> "**16**. It is submitted that the Arbitral Tribunal failed to provide any reasons for the grant of interest and the same in itself is a substantial ground for setting aside the impugned Award to this extent. It is submitted on behalf of the petitioner that the arbitral award suffers from patent illegality as it directed the refund of Rs. 270,86,99,209/- towards the amount paid for CRPS despite holding that the respondents are in breach of their obligation to bring committed support of Rs. 450,00,00,000/-. It is further submitted that the amounts paid by petitioner towards CRPS have been directed to be refunded to the respondents without considering the fact that CRPS is a debt instrument which can be redeemed only after the expiry of 8 years from the date of subscription and the amount is not payable in praesenti."

89. The issue of Section 65 and its applicability was one which was noticed by the learned Single Judge itself, albeit with respect to Warrants as opposed to the CRPS, as would be evident from a reading of paragraph 73: -

> "**73**. The Arbitral Tribunal very categorically dealt with the fact that the failure to obtain in-principle approval by the petitioner Company and Ajay Singh would not amount to a breach of the Agreement even though the issuance of Warrants was pursued by the petitioners. Tribunal provided reasons for the same observing that the issuance of Warrants as part of obligations were conditional upon the approval by the BSE but the same could not be granted by the BSE as granting in-principle approval would have resulted in breach of ICDR Regulations. However, the Tribunal also observed that the parties were to act in accordance with Section 65 of the Contract Act, which the petitioners failed to, and accordingly, the petitioners were to pay back and refund the consideration of Warrants to the respondent."

It thus appears to have been specifically urged that in the absence of the appellants having been held to be in breach of the SSPA, the direction for refund of INR 270,86,99,209/- was rendered unsustainable and thus constitutes a "*patent illegality*". In this regard, Mr. Sibal also drew our attention to Para 27 of the Arbitral Award, where it was held that the appellants would not be liable to pay damages to KAL and KM, in light

of there being no finding of breach against the appellants. Para 27 of the Award is reproduced hereinbelow:

> "**27.** Coming to the question of damages which is linked to the issue of breach, the basic concept of damages has to be noted. The underlying principles relating to levy of damages have been highlighted supra.
>
> As defined by McGregor damage is the pecuniary compensation, obtainable by success in an inaction, for a wrong which is either a tort or a breach of contract, the compensation being in the form of a lump sum which is awarded unconditionally, (See Common Cause, a Registered Society v. Union of India (1999) 6 SCC 667).
>
> A plurality of variants stemming out of a core concept is seen in such words as actual damages, civil damages, compensatory damages, consequential damages, contingent damages, continuing damages, double damages, excessive damages, exemplary damages, general damages, irreparable damages, pecuniary damages, prospective damages, special damages, speculative damages, substantial damages, unliquidated damages. But the essentials are (a) detriment to one by the wrong doing of another, (b) reparation awarded to the injured through legal remedies and (c) its quantum being determined by the dual components of pecuniary compensation for the loss suffered and often not always a punitive addition as a deterrent-cum-denunciation by the law, (See Organo Chemical Industries v. Union of India, A1R 1979 SC 1803). Damages constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained, the value estimated in money, of something lost or withheld, (See Divisional Controller K.S.R.T.C. v Mahadeva Shetty, (2003) 7 sec 197).
>
> The expression "damages" - is neither vague nor over wide. It has more than one signification of the precise importance in a given context is riot difficult to discern. Damages fall under two heads; (1) General damages i.e. such damage as the law will presume to flow from that Which forms the subject matter of the action; and (2) Special damage i.e. such other damage as can be recovered only if it is specially alleged and specifically proved. When an action cannot be sustained unless there is special damage, the subject-matter is described as not being actionable per se.
>
> Damages are either liquidated or unliquidated. Whenever the amount to which the plaintiff is entitled can be ascertained by calculation or fixed by any scale or other positive data, it is

said to be 'liquidated' or made clear'. But when the amount to be recovered depends on all the circumstances of the case and on the conduct of the parties and is fixed by opinion or by an estimate, the damages are said to be 'unliquidated'; (See Odgers on the Common Law).

Damages, may be further classified as -

(1) Contemptuous Damages, e.g. a farthing verdict in an action for libel, usually indicating that in the opinion of the jury the action ought never to have been brought.

(2) Normal Damages, e.g. 40s where no actual damage has been proved and usually indicating that though the action was a proper one to bring, its object was not so much the recovering of damages as the establishing a right, (See Nicholls v EIy Beet Sugar Factory, (1936) 1 Ch 343.)

(3) Substantial Damages, i.e. the fair and adequate compensation which reasonable men would award in respect of the matters which formed the basis of the action.

(4) Vindictive, Retributory or Exemplary Damages, i.e. damages in excess of What would have been adequate compensation, a n d usually awarded by a jury to mark their sense of a defendant's conduct; e.g. the character of a libel, or the mode in which the subject-matter of.the action arose, e.g. time and place of an assault or trespass, or the peculiar nature of the wrong or the distress of mind reduced in the plaintiff, e.g. actions of seduction, false imprisonment breach of promise of marriage.

(See Hadley v Baxendale, (1954) 32 KH Ex. 179;)

Damages that are remote and contingent cannot be recovered (See Sapwell v Bass, (1910) 2 KB 486) and as to the measure of damages for prospective loss in the case of personal injury, (See Johnston v G.W. Ry., (1904) 2 KB 250),

In view of the conclusions arrived at on the question of breach or otherwise of the Respondents, the damages, as claimed, are not accepted."

90. Mr. Sibal had vehemently argued that although the AT in Para 52 of the Award had held that if no effective solution were to be found in two months, the appellants would return the money received in respect of CRPS in accordance with the SSPA, it proceeded to direct refund of the amount brought in by the respondents within two months of a failure on the part of parties to arrive at a workable solution. This,

according to learned senior counsel, too was a "*patent illegality*" since this not only accelerated the repayment of the CRPS amount contrary to the eight year holding period, it also burdened the appellants with an interest liability at a rate far in excess of 6% as envisaged therein.

91. However, upon a reading of the impugned judgment, we note that while the learned Single Judge has undoubtedly undertaken an exhaustive review of the scope and contours of the Section 34 power, the concepts of "*patent illegality*" as well as when an award could be said to be opposed to fundamental "*public policy*", the judgment clearly fails to deal with specific contentions raised on behalf of the appellants with respect to the award of refund. We note that the learned Single Judge has chosen to copiously extract passages from the Award and which had made significant observations in this respect in paragraphs 23 to 26 and the same have also been reproduced in paragraph 71 of the impugned judgment.

92. It would, in this regard, be pertinent to recall that the AT had significantly chosen to observe that the alternative plea of KAL and KM "*premised on Section 65*" merited consideration, even though strictly speaking the contractual arrangements could not be termed as void. The aforesaid findings and observations as rendered by the AT, in our considered opinion, clearly warranted further evaluation bearing in mind the indubitable position of Section 65 of the 1872 Act speaking of the restoration of advantages derived only in a situation where either an agreement is discovered to be void or has become void.

93. The learned Single Judge also took note of the significant findings which came to be recorded by the AT in Para 51 of the Award.

As was noticed hereinabove, the AT had come to conclude that although KAL and KM had complied with Clause 6.3.2 of the SSPA in part, they had clearly defaulted in ensuring the placement of the sum of INR 100 crores in Designated Account 2 and that the said sum of INR 100 crores was allowed as a counter claim in favour of the appellants. In fact, before the AT, elaborate submissions were addressed at the behest of the appellants doubting the bona fides of the respondents in abiding by the terms of the SSPA. This would be evident from a conjoint reading of Paras 37, 38, 42, 46, 47, 49 and 50 of the Award which are reproduced hereunder: -

> "**37.** The fixed deposit could not be released into the account of the Company as Claimant No. 2 has failed to issue irrevocable instructions to City Union Bank. The fact that the only instruction in relation to the fixed deposit of Rs. 100 crores was the request letter dated 24.02.2015 has been admitted by CW-3. Therefore, the requirement under the SSPA was not fulfilled as no irrevocable instruction in respect of the fixed deposit to be adjusted against the facility granted by City Union Bank to the Company. The said letter merely instructed the Bank to create a fixed deposit of Rs. 100 Crores in the name of Claimant No. 2 for a period of three months and that a lien be marked towards the overdraft account of the company as collateral in place of the property documents of M/s KAL COMM PRIVATE LIMITED and the personal guarantee of Claimant No. 2. The said lien was only in the nature of a security and was not in the line mandated by the SSPA.
>
> **38.** Significantly the Claimant No. 2 had consented to adjust the sums due for principal and interest of the fixed deposit towards the satisfaction of the credit facility allowed to the Company on maturity of the fixed deposit. Strangely in complete disregard of the instruction, despite the attachment of the fixed deposit by the ED on 01.04.2015, the Bank credited the interest on the fixed deposit into the account of Claimant No. 2 stated to be on the basis of oral instructions of Claimant No.2. Even after the release of the attachment on 02.02.2017 Claimant No. 2 did not instruct City Union Bank to release the amount of fixed deposit into the Designated Account No. 2 as clearly obligated under the SSPA.
>
> The Claimant No. 2, as CW-2, stated that there was no obligation to do so.

xxxx xxxx xxxx

42. The Claimants are taking contradictory stands on the question whether issuance of CRPS was sequential to and was independent of the issuance of warrants. Presently, the Claimants have stated that issuance of CRPS was not a sequential step under the SSPA in relation to Clause 4.1.4 of the SSPA, the Claimants have clearly stated in their letter dated 18.02.2016 addressed to BSE that though they had subscribed to the preferential shares of the Company, but are yet to receive the share certificates due to pending warrant matter.

xxxx xxxx xxxx

46. In the aforesaid background, it is clear that the Claimant No. 2 failed to pay the Respondents the amount of Rs. 100 Crores and, therefore, is in breach of Clause 6.3.2 of the SSPA and, therefore, obligated to compensate the Counter claimants for the breach . The undertaking of Claimants was to bring in Rs.450 Crores as committed support was conditional upon discharge from Yes Bank and CUB. That both these Banks have discharged is not in dispute.

47. The original structure was that as per Clause 7.2.1, Rs.320 Crores was to be brought in by the Claimants (minus Rs. 100 Crores in cash for Tranche-1) and the Respondents were required to seek discharges from the Banks. The original understanding as per Schedule H, therefore, was that the amount was to be deposited to Designated Account No. 1. The amended position was that the second closure was to be under Clause 7.1 on 24.02.2015 instead of 15.02.2015 and within two days, consent of E DC was to be obtained. Seller No. 2 was mandated to bring in Rs.100 Crores and deposit the same in Designated Account No. 2. The admitted position is that the sum of Rs. 100 Crores did not come to the Designated Account No. 2. As per Clause 6.3.2, personal guarantees given to CUB were to be released by 24.02.2015. The Claimants state that release of guarantees for an amount of Rs. 100 Crores was done with the CUB. According to Respondents, two conditions are envisaged on the basis of Clause 7.2.1 (6).

xxxx xxxx xxxx

49. Certain peculiar features need to be noted at this stage is that there was a request for closing of the loan but there was no response from CUB. Interestingly, CUB closed the account of Makemytrip and select cargo. If the ED's order was within its knowledge, no explanation is coming forthwith as to how the account was closed. Similarly, if there was no instruction in terms of Clause 6.3.2 as there is no reference as to who would get the

> interest. Another interesting feature is that the interest was being credited to the account of Claimant No. 2 and it was being automatically credited to the personal account. Further, if the account was to be held as security and the interest was to be paid on maturity. It is quite suspicious that when instructions were already there as to the nature of the security of the deposit, what occasioned the certificate of the Bank, Exhibit C-63 to the Claimants.
>
> **50.** In the counter claim, the Respondents have claimed Rs. 100 Crores in addition to the interest paid by the Respondents to CUB for the loan of Rs. 100 Crores. So far as the plea of specific performance is concerned, the foundation therefore is the readiness and willingness to do what was required to be done by the person who seeks the relief of specific performance. Nothing has been pleaded by the Claimants in this regard. Additionally, it is a fundamental requirement that one who seeks the relief of specific performance must come with clean hands. The admitted position being that the interest was being credited to the personal account of Claimant No. 2, the conduct is not only suspicious but shows ulterior motives. Alternatively, it has been stated that the Respondents are still willing to issue the CRPS on the same terms subject to the Claimants fulfilling their part of the obligations. It is pointed out that there was a committed support undertaken by the Claimants to bring in Rs.450 Crores. That part of the arrangement has not been fulfilled by the Claimants. The question of any compensation, therefore, does not arise in the absence of the requisite conditions of specific performance of contract having been fulfilled."

94. The AT, on a consideration of the aforesaid, ultimately observed that there was a clear and apparent failure on the part of the respondents to abide by the terms of Clause 6.3.2. It then proceeded to notice the requirement of the sum of INR 220 crores being placed in Designated Account No. 2. It also doubted the requirement of the certificate from CUB with respect to irrevocable security. The AT observed that neither CUB nor KAL and KM could explain the necessity of that certificate if instructions as claimed had already been issued.

95. The stand of the appellants, however, stands answered by the

learned Single Judge in the following terms: -

> "**79**. The learned Tribunal, while referring to the claims of the respondents herein, observed that the respondents were required to make the payment of Rs. 220,02,93,039, which stood paid. While coming to conclusion the Arbitral Tribunal also noted that out of the total consideration of Rs. 220,02,93,093/- to be paid by the respondents towards the Tranche-I CRPS amount, the respondents had made a total payment of Rs. 120,02,83,038, leaving Rs. 100 Crores to be payable. The Arbitral Tribunal was of the view that since, the payment towards Tranche-I was made by the respondents herein, but the supplementary obligation of issuance of the CRPS was not fulfilled by the petitioners, the petitioners were liable to pay back and refund the sum so deposited by the respondent after deducting the sum of the amount which remained uncredited, i.e., Rs. 100 Crores.
>
> **80**. In accordance with the Agreement, the respondents herein were to make a fixed deposit of Rs. 100 Crores. However, it was observed that the said amount was never found to be deposited in the designated bank account in terms of the agreed mutual terms of the Agreement between the parties. The Counter-Claim pertaining to the said amount was, hence, decided in the favour of the petitioners herein and was deducted from their liability towards the respondents amounting to Rs. 370,86,99,209 From a bare perusal of the aforesaid, it is evident that the learned Tribunal has provided adequate reasoning as to the issue of refund of Rs. 270,86,99,209.
>
> **81**. It has been further argued on behalf of the petitioners that all obligations were fulfilled by them in accordance with the Agreement, however, the Tribunal, upon appreciation of the entire circumstances as well as the material and record before it, found that the CRPS were not issued in terms of the Agreement.
>
> **82**. The course of procedure taken by the Arbitral Tribunal as well as the findings as reproduced above are evidently not in contravention of any of the provisions under the Arbitration Act or even any substantive law. There is nothing in the observations in the impugned Award to suggest that the Tribunal contravened or went beyond the terms of Agreement executed between the parties. The Tribunal provided reasons for the findings delivered and there is no perversity which is either apparent on the face of the record or which goes to the root of the matter. Therefore, the impugned Award cannot said to be patently illegal."

96. As is manifest from a reading of the aforesaid passages as appearing in the impugned judgment, it becomes evident that the

learned Single Judge has correctly recorded what the AT had found in this respect. In fact, the learned Single Judge has taken note of the failure on the part of KAL and KM to effect placement of INR 100 crores in the Designed Account 2 in Para 80 of the judgment. The learned Single Judge also bore in consideration the fact that the counterclaim of the appellants had also come to be granted by the AT. However, the argument of inapplicability of Section 65, the accelerated refund of the amounts payable in respect of CRPS and the penultimate directions framed by the AT amounting to a rewriting of the contract itself have neither been examined nor any conclusions in that respect rendered. All that the learned Single Judge has chosen to observe in this regard is that the AT had provided *"adequate reasoning"* to justify the refund of INR 270,86,99,209. The aforesaid observation is clearly erroneous bearing in mind the undisputed position of the AT, at least on a prima facie evaluation, having failed to assign or render any reasons dealing with these aspects.

97. An Award would be liable to be termed as a perversity if it were to fail to deal with contentions which may potentially impact its very foundation. If a party were to assert that a direction of the AT is contrary to the terms and conditions constituting the bargain between the parties, the same would be an aspect which would clearly merit a deeper scrutiny unless, of course, the Section 34 Court were to find the same to be ex facie fallacious or unsustainable. However, even if that were the conclusion which the court were to arrive at, it would be the judgment which must speak and reflect due consideration of such challenges.

98. We are constrained to observe that the arguments which were addressed in challenge to the award of refund have been summarily and abruptly brushed aside with the learned Single Judge merely observing that the *"course of procedure"* as adopted by the AT cannot be said to in contravention of the provisions of the Act or any other substantive law. As is ex facie evident, the applicability of Section 65 was neither examined nor evaluated. More fundamentally, the argument on that score was never answered.

99. We have extensively gone through the judgment impugned in the instant appeals. However, we have been unable to discern any reasoning that may have weighed upon the learned Single Judge to reject the contentions which were addressed on the anvil of Section 65 and the finding of the AT that KAL and KM had failed to abide by their contractual obligations. We take note of the undisputed position which emerges from the record and which would evidence the appellants having vehemently urged that it was KAL and KM who had breached the terms of the SSPA and which aspect had also been duly noticed by the AT. However, the learned Single Judge has clearly failed to take the aforesaid aspects into consideration. The challenge to the award of refund has thus clearly gone unanswered.

100. While the scope and ambit of Section 34 and the limited scrutiny to which an Award must be subjected to cannot possibly be doubted, the same in our considered opinion does not absolve a court while examining a challenge to an Award to evaluate and consider arguments based on the assertion of a patent or manifest illegality. The arguments which were raised by the appellants on this score clearly merited due

consideration, and even if the learned Single Judge were to be of the opinion that no interference with the Award was warranted, reasons should have clearly been assigned and which would have been indicative of the learned Single Judge having come to the conclusion that the arguments based on Section 65 coupled with the fact of the SSPA having not been found to have been invalidated or that the contractual terms had been reworked did not amount to a "*patent illegality*".

101. It becomes pertinent to state that while the challenge to an Award has been universally accepted to fall within a narrow confine, the power to correct and set right, cannot be reduced to a mere step in aid of rendering finality. While reticence and reservation would clearly guide, it would have to be coupled with due examination of the challenge that may be raised. A challenge, whenever raised, would have to necessarily be examined on principles of manifest and "*patent illegality*". It cannot possibly be guided by a principle of heedless affirmation or a blinded predilection to approve.

102. While it is true that a possible view taken by the AT would not warrant interference, the same would have to be based on the Section 34 court finding in fact, that the Award has been duly appreciated and the challenge falling short of a "*patent illegality*". The resistance to interfere cannot override the requirement of an empirical evaluation of the correctness of the view expressed by the AT. The correctness of the Award would undoubtedly have to be tested on the principle of perversity and it being tenable.

103. Of equal significance would be the requirement of the decision

upholding the Award being reasoned and cogent. "*Patent illegality*" or violation of "*public policy*" are not mere incantations. The Award would have to be objectively found to be validly made, not being contrary to the aforesaid precepts and the judgment being reflective of due application of mind and a just consideration of the challenge.

104. An Award is not liable to be upheld or affirmed based on a mere or unreasoned reluctance to intervene or a disinclination to interfere. Viewed in any other light, the remedy of correction would itself be rendered meaningless. Unless the decision on a challenge to an Award is found to have been persuasively and convincingly answered, the very purpose of the remedy would be lost. The decision on a Section 34 petition would have to, thus, answer to the aforesaid precepts and be found to be reflective of a meaningful consideration and evaluation of the Award itself. With respect, we find that the judgment impugned before us clearly fails to meet those tests.

105. As we read the impugned judgment, we find that all that the learned Single Judge chose to observe was that the AT had provided adequate reasons for its findings and the same did not appear to suffer from any perversity. The aforesaid conclusions clearly fail to evaluate the correctness of those findings and which were questioned by the appellants on the principle of "*patent illegality*". The appellants thus clearly appear to have been deprived of the salutary remedy of an appellate forum having examined the correctness of the Award on lines suggested in support of the challenge. There is an apparent disarticulation between the grounds of challenge and the reasons recorded in support of affirmation.

106. Similar is the position which emerges when one considers the issue of award for interest. One of the principal grounds of challenge to the stipulation of interest as addressed before the learned Single Judge was that the AT had failed to assign even rudimentary reasons while prescribing interest to be paid at the rate of 12% pendente lite for Warrants and at the rate of 18% for post-award interest. The appellants appear to have vehemently contended that the AT had abjectly failed to bear in mind the changed statutory position which came to hold the field consequent to the amendments introduced in Section 31(7).

107. It becomes pertinent to note that undisputedly 18% represented the default rate of post-award interest prior to the amendments which came to be ushered in by virtue of the 2015 Amending Act. The aforesaid position came to be fundamentally altered with Section 31(7) now prescribing the grant of post-award interest to be at the rate of 2% above the "*current rate of interest*" prevailing as on the date of the Award. The phrase "*current rate of interest*" was ascribed the same meaning as it appears in Section 2(b) of the Interest Act, 1978. As we, prima facie, read the award rendered by the AT, there does not appear to be a discussion pertaining to the identification of the "*current rate of interest*" which was prevailing on the date of the Award. Whether this would be fatal is an issue which clearly does not appear to have been examined by the learned Single Judge.

108. The asserted failure of the AT to provide any reasons for the grant of interest appears to have been directly addressed before the learned Single Judge as would be evident from a reading of paragraph 16 thereof. However, while dealing with the aforesaid aspect, the

learned Single Judge has observed as follows: -

> "**86.** The petitioners also raised an objection on the interest levied by the Arbitral Tribunal submitting to the effect that the interest @12% per annum on the amount to be refunded towards Warrants and @18% per annum in case of non-payment within the stipulated time period is erroneous. The Tribunal awarded interest in favour of the respondents herein as under:
>
> *"(3) Since the amount covered by conclusion (1) was with the Respondents since November 2015, they would have become liable to pay interest on the same. Though, interest at the rate of 18% per annum has been claimed, we are of the view that since Respondent No.1 Company took over a huge liability and also paid interest on the tax amount payable by the Claimants, interest at the rate of 12% on Rs.308,21,89,461/- would be appropriate. The amount has to be accordingly calculated for about 30 months. Additionally, in view of the finding relating to the CRPS claim and the proved position that the Respondents have paid interest/servicing charges of around Rs.29 Crores, the counter claim to that extent is allowed.*
>
> *(5) In case the payments, as directed, to be made by the Respondents are not so made within two months from the relevant date, the Claimants shall be entitled to interest @ 18% from the last date of the due date in terms of this Award."*

109. After noticing the conclusions and the penultimate directions framed by the AT in respect of the award of interest, the learned Single Judge took note of the various legal precedents which had recognized the power of an arbitrator to make an award of interest, pendente lite and post-award. The learned Single Judge thereafter proceeded to observe as follows: -

> "**87**. There is no dispute to the fact that an Arbitral Tribunal has the jurisdiction and power to make an award pertaining to interest. The Hon'ble Supreme Court has time and again reiterated that an Arbitrator has sufficient powers to pass an Award on the question of interest…..
>
> **88.** Therefore, it is apparent that the Arbitral Tribunal had the jurisdiction and the power to grant and award an interest while

passing the Award, since there existed no prior agreement between the parties pertaining to such interest. Along with such power and jurisdiction, there is a vast degree of discretion which is vested with the Arbitral Tribunal. The Hon'ble Supreme Court explicitly stated in the aforesaid judgment that "*It has a discretion to award the interest or not to award*". Hence, there is not dispute to this effect that since there were no explicit terms pertaining to the issue of interest decided and agreed between the parties before this Court, the Arbitral Tribunal was free to exercise its discretion and grant or not grant an award of interest to the best of its judgment, upon looking into the entirety of the material before it, while also ensuring that such an award does not render the Award patently illegal.

89. In the instant case, the discretionary power of awarding interest was exercised by the Arbitral Tribunal and the award of interest was made while keeping in view that there was a default on the part of the petitioners herein. It was also observed that the interest on the amount would have been accruable in the month of November in the year 2015, and hence, it was found just to allow an award of interest @12% per annum, as opposed to the original claim of 18% raised on behalf of the respondents herein.

90. This observation of the Tribunal also does not invite the vigours of the principles set out above that warrant an intervention under Section 34 of the Arbitration Act. While passing the Award, on merits as well as on the issue of interest, Arbitral Tribunal has taken a judicial approach while passing the Award and has given sufficient reasoning, backed by the facts and material. There is also nothing to show that the principles of natural justice were not observed by the Tribunal since the parties were given sufficient opportunity to put forth their case and further the Arbitral Tribunal has also considered and appreciated the entirety of the matter while passing the impugned Award, which is backed by reasons. Such an interest was granted by the Arbitral Tribunal, in its wisdom being the master of evidence, after appreciation of the objections, claims and material adduced by the parties."

110. We are compelled to observe that the authority and jurisdiction of the AT to award interest was not an aspect which could have possibly been contested. Similarly, the conferment of a discretionary power in the AT to award interest also cannot possibly be doubted. That is a position which would emerge from a plain reading of Section 31(7) of the Act itself. The power of the AT to award interest stands

conferred by virtue of Section 31(7) and is available to be exercised "*unless otherwise agreed by the parties*". The statute itself enables the AT to include in the award a sum representing interest and which is to be computed "*at such rate as it deems reasonable*". The AT stands conferred with further discretion to examine whether interest is to be awarded on the whole or part of the awarded amount as well as for the period for which it would run. This is evident from Section 31(7)(a) employing the phrase "*on the whole or any part of the money*" as well as "*for the whole or any part of the period*....".

111. Similar is the position which emerges upon a reading of Section 31(7)(b) of the Act. The statutorily prescribed interest of 2% above the "*current rate of interest*" operates in the absence of a decision being taken by the AT to the contrary. Clause (b) of Section 31(7) thus enables an AT to consider whether to grant post-award interest or to desist from doing so at all. While therefore the existence of discretion cannot possibly be questioned, the issue which still merited consideration was whether the AT had exercised the same in accordance with law.

112. We note that the Supreme Court in *Gokul Chandra Kanungo* had rendered the following pertinent observations while underscoring the necessity of the AT to assign reasons in the course of the exercise of its discretion to award interest. This is evident from a reading of paras 10, 11 and 17 of the report which are reproduced hereinbelow: -

> "**10.** The provisions of Section 31(7)(a) of the 1996 Act fell for consideration before this Court in many cases including in the cases of *Hyder Consulting (UK) Limited* (supra) and *Delhi Airport Metro Express Private Limited* v. *Delhi Metro Rail Corporation*. A perusal of clause (a) of subsection (7) of Section 31 of the 1996 Act

would reveal that, no doubt, a discretion is vested in the arbitral tribunal to include in the sum for which the award is made interest, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. However, it would reveal that the section itself requires interest to be at such rate as the arbitral tribunal deems reasonable. When a discretion is vested to an arbitral tribunal to award interest at a rate which it deems reasonable, then a duty would be cast upon the arbitral tribunal to give reasons as to how it deems the rate of interest to be reasonable. It could further be seen that the arbitral tribunal has also a discretion to award interest on the whole or any part of the money or for the whole or any part of the period between the date of cause of action and the date on which the award is made. When the arbitral tribunal is empowered with such a discretion, the arbitral tribunal would be required to apply its mind to the facts of the case and decide as to whether the interest is payable on whole or any part of the money and also as to whether it is to be awarded to the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

11. A perusal of the award as also the judgment and order of the District Judge as well as the High Court would reveal that no such exercise has been done. The learned Arbitrator, without assigning any reasons, has awarded the interest at the rate of 18% per annum for the period during which the proceedings were pending and also at the same rate after the award was made till the actual payment.

xxxx xxxx xxxx

17. This Court, in the case of *Mcdermott International Inc.*, has observed thus:

> "154. The power of the arbitrator to award interest for pre-award period, interest pendente lite and interest post-award period is not in dispute. Section 31(7)(a) provides that the Arbitral Tribunal may award interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which award is made i.e. pre-award period. This, however, is subject to the agreement as regards the rate of interest on unpaid sums between the parties. The question as to whether interest would be paid on the whole or part of the amount or whether it should be awarded in the pre-award period would depend upon the facts and circumstances of each case. The Arbitral Tribunal in this behalf will have to exercise its discretion as regards *(i)* at what rate interest should be

awarded; *(ii)* whether interest should be awarded on the whole or part of the award money; and *(iii)* whether interest should be awarded for the whole or any part of the pre-award period.

155. The 1996 Act provides for award of 18% interest. The arbitrator in his wisdom has granted 10% interest both for the principal amount as also for the interim. By reason of the award, interest was awarded on the principal amount. An interest thereon was up to the date of award as also the future interest at the rate of 18% per annum.

156. However, in some cases, this Court has resorted to exercise of its jurisdiction under Article 142 in order to do complete justice between the parties.

157. In *Pure Helium India (P) Ltd.* [(2003) 8 SCC 593] this Court upheld the arbitration award for payment of money with interest at the rate of 18% p.a. by the respondent to the appellant. However, having regard to the long lapse of time, if award is satisfied in entirety, the respondent would have to pay a huge amount by way of interest. With a view to do complete justice to the parties, in exercise of jurisdiction under Article 142 of the Constitution of India, it was directed that the award shall carry interest at the rate of 6% p.a. instead and in place of 18% p.a.

158. Similarly in *Mukand Ltd.* v. *Hindustan Petroleum Corpn. Ltd.* [(2006) 9 SCC 383: (2006) 4 Scale 453], while this Court confirmed the decision of the Division Bench upholding the modified award made by the learned Single Judge, the Court reduced the interest awarded by the learned Single Judge subsequent to the decree from 11% per annum to 7½ % per annum observing that 7½ % per annum would be the reasonable rate of interest that could be directed to be paid by the appellant to the respondent for the period subsequent to the decree.

159. In this case, given the long lapse of time, it will be in furtherance of justice to reduce the rate of interest to 7½ %."

113. As would be evident from the above, the Supreme Court had deprecated the procedure adopted by the AT in the facts of that case in failing to assign reasons in support of the award of interest at the rate of 18%. It had also affirmed the pertinent observations made in

Mcdermott International Inc vs. Burn Standard Co.[39] and which had while identifying the factors which an AT would have to bear in mind while awarding interest alluded to aspects such as rate of interest, whether the same was liable to be awarded on the whole or any part of the awarded amount as well as the period for which interest was liable to be awarded.

114. The legal position in this respect stands reiterated in the judgment of the Supreme Court in **Morgan Securities and Credits Private Limited vs. Videocon Industries Limited**[40] and where it observed as under: -

> "**24**. The issue before us is whether the phrase "unless the award otherwise directs" in Section 31(7)(*b*) of the Act only provides the arbitrator the discretion to determine the rate of interest or both the rate of interest and the "sum" it must be paid against. At this juncture, it is crucial to note that both clauses (*a*) and (*b*) are qualified. While, clause (*a*) is qualified by the arbitration agreement, clause (*b*) is qualified by the arbitration award. However, the placement of the phrases is crucial to their interpretation. The words, "unless otherwise agreed by the parties" occur at the beginning of clause (*a*) qualifying the entire provision. However, in clause (*b*), the words, "unless the award otherwise directs" occur after the words "a sum directed to be paid by an arbitral award shall" and before the words "carry interest at the rate of eighteen per cent". Thereby, those words only qualify the rate of post-award interest.
>
> xxxx xxxx xxxx
>
> **27**. The purpose of granting post-award interest is to ensure that the award-debtor does not delay the payment of the award. With the proliferation of arbitration, issues involving both high and low financial implications are referred to arbitration. The arbitrator takes note of various factors such as the financial standing of the award-debtor and the circumstances of the parties in dispute before awarding interest. The discretion of the arbitrator can only be restricted by an express provision to that effect. Clause (*a*) subjects

[39] (2006) 11 SCC 181
[40] (2023) 1 SCC 602

> the exercise of discretion by the arbitrator on the grant of pre-award interest to the arbitral award. However, there is no provision in the Act which restricts the exercise of discretion to grant post-award interest by the arbitrator. The arbitrator must exercise the discretion in good faith, must take into account relevant and not irrelevant considerations, and must act reasonably and rationally taking cognizance of the surrounding circumstances."

115. While recognizing the jurisdiction of the AT to award interest, the Supreme Court in *Morgan Securities* significantly observed that the exercise of that discretion must be informed by *"good faith"* resting on *"relevant considerations"* and the obligation of the AT to act *"reasonably and rationally"*.

116. In *Vedanta Limited* as well, the Supreme Court categorically observed that an AT is bound to exercise its discretion reasonably and take into consideration various relevant factors before granting interest. The relevant extracts of the aforesaid decision are set out hereinbelow:

> "**7**. Section 31(7) is in two parts: clause (a) pertains to the award of interest for the pre-reference and pendente lite period, which is subject to the agreement between the parties. This would be evident from the opening words of Section 31(7)(a) — "unless otherwise agreed by the parties". Absent an agreement between the parties, the Arbitral Tribunal has the discretion to award interest; as it deems reasonable. Interest may be awarded either on the whole, or any part of the sum awarded.
>
> **8**. Section 31(7)((b) pertains to the post-award period i.e. from the date of the award to the date of realisation, and is not subject to party autonomy or an agreement between the parties. This would be apparent from the manner in which clause (b) of Section 31(7) is framed. The phrase "unless otherwise agreed by the parties" is absent from this provision. The statutory rate of interest is 2% higher than the current rate of interest prevalent on the date of the award.
>
> **9.** The discretion of the arbitrator to award interest must be exercised reasonably. An Arbitral Tribunal while making an award for interest must take into consideration a host of factors, such as : (*i*) the "*loss of use*" of the principal sum; (*ii*) the types of sums to which the interest must apply; (*iii*) the time period over which

interest should be awarded; (*iv*) the internationally prevailing rates of interest; (*v*) whether simple or compound rate of interest is to be applied; (*vi*) whether the rate of interest awarded is commercially prudent from an economic standpoint; (*vii*) the rates of inflation; (*viii*) proportionality of the count awarded as interest to the principal sums awarded.

10. On the one hand, the rate of interest must be compensatory as it is a form of reparation granted to the award-holder; while on the other it must not be punitive, unconscionable or usurious in nature.

xxxx xxxx xxxx

14. In the present case, the Arbitral Tribunal has adopted a dual rate of interest in the award. The award directs payment of interest @ 9% for 120 days post award; if the amount awarded is not paid within 120 days', the rate of interest is scaled up to 15% on the sum awarded.

15. The dual rate of interest awarded seems to be unjustified. The award of a much higher rate of interest after 120 days' is arbitrary, since the award-debtor is entitled to challenge the award within a maximum period of 120 days' as provided by Section 34(3) of the 1996 Act ["**34. (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."] . If the award-debtor is made liable to pay a higher rate of interest after 120 days, it would foreclose or seriously affect his statutory right to challenge the award by filing objections under Section 34 of the said Act.

16. The imposition of a high rate of interest @ 15% post-120 days is exorbitant, from an economic standpoint, and has no co-relation with the prevailing contemporary international rates of interest. The award-debtor cannot be subjected to a penal rate of interest, either during the period when he is entitled to exercise the statutory right to challenge the award, before a court of law, or later. Furthermore, the Arbitral Tribunal has not given any reason for imposing a 15% rate of interest post 120-days.

xxxx xxxx xxxx

19. The respondent/claimant has, in fact been awarded 105% of the costs incurred under the EPC contracts by the Arbitral Tribunal. The award of interest @ 9% on the Euro component of the claim is unjustified and unwarranted. The levy of such a high rate of interest on a claim made in a foreign currency, would result in the claimant being awarded compensation, contrary to the conditions stipulated in the contract.

20. The award has granted a uniform rate of 9% SI on both the INR and the EUR component. However, when the parties do not operate in the same currency, it is necessary to take into account the complications caused by differential interest rates. Interest rates differ depending upon the currency. It is necessary for the Arbitral Tribunal to coordinate the choice of currency with the interest rate. A uniform rate of interest for INR and EUR would therefore not be justified. The rate of 9% interest on the INR component awarded by the Arbitral Tribunal will remain undisturbed. However, with respect to the EUR component, the award-debtor will be liable to pay interest at the Libor rate + 3 percentage points, prevailing on the date of the award.

21. In light of the abovementioned discussion, the interest awarded by the Arbitral Tribunal is modified only to the extent mentioned hereinbelow:

21.1. <u>The interest rate of 15% post 120 days granted on the entire sum awarded stands deleted.</u>

21.2. A uniform rate of interest @9% will be applicable for the INR
component in entirety till the date of realisation.

21.3. The interest payable on the EUR component of the award will be as Per LlBOR + 3 percentage points on the date of award, till the date of realisation."

117. It becomes pertinent to observe that the existence of a power and the discretion conferred on an AT was never doubted. However, and what the aforesaid decisions bid us to bear in consideration is the obligation and the duty of the AT to formulate its award of interest based on a sound, reasoned and informed judgment. The obligation to assign reasons flows contemporaneously with the exercise of discretion

itself. This too was an aspect which commended due consideration of the learned Single Judge.

118. We, however desist from rendering any further observations bearing in mind the fact that the Section 37 jurisdiction constricts us from undertaking a wholehearted review of the award on its merits. The appellate power conferred by Section 37 is essentially confined to whether, and while examining a challenge under Section 34, the Court had applied its mind to aspects of "*patent illegality*", of the Award being asserted to be contrary to "*public policy*" and the various other grounds which stand statutorily constructed as warranting interference with an award rendered by the AT. In the instant appeals, however, we find ourselves handicapped since the learned Single Judge clearly appears to have failed to accord adequate and due consideration to some of the principal challenges that appear to have been raised before it and were reiterated in these proceedings.

119. We are thus left with a situation where we have been deprived of the benefit of an opinion duly rendered by the Section 34 Court and which may have answered the challenge on merits. While, and in such a situation, a Section 37 Court may, in an appropriate case, deem it expedient and appropriate to examine a challenge on the merits of the Award itself and notwithstanding a Section 34 Court having failed to render any opinion, we find ourselves unable to tread down that path since any findings that we may independently record or render may also have the effect of depriving a particular party of an appellate remedy of first instance. We had, in this context, accorded our anxious consideration on whether to examine the validity of the Award on

merits itself. However, on balance, we find that the ends of justice would merit a fresh innings being provided to parties

120. In light of the aforesaid and in order to avoid any prejudice, the facts and circumstances of the instant appeals would, in our considered opinion, merit the matter being remanded for the Section 34 petitions being directed to be considered afresh. This would not only enable respective sides to address submissions on some of the salient issues which have been noticed by us hereinabove but also preserve the right of an aggrieved party to assail any judgment that may be rendered consequent to remit and upon due consideration of the issues pertaining to the award of refund of the CRPS amount as well as the justification of grant of interest, both pendente lite and post-award.

121. We, additionally and out of abundant caution, deem it appropriate to observe that the discussion appearing in the preceding parts of this judgment and concerning the validity of the award of refund and the grant of interest, appears in the context of examining the correctness of the judgment rendered by the learned Single Judge alone. None of those are liable to be viewed or accepted as being determinative of some of the submissions which were addressed on this appeal.

122. We only deem it appropriate to observe that while the aspect of personal liability of Ajay Singh was canvassed before us, the same was neither specifically raised nor assailed in these appeals. We, therefore, do not find any justification to render any finding in that respect.

123. We are consequently compelled to dispose of these appeals in terms which follow principally since the learned Single Judge has erred

in dismissing the Section 34 petitions without according due consideration to the challenge which was raised and an apparent absence of reasoning in support of the decision arrived at.

124. The appeals shall consequently stand allowed. The impugned judgment dated 31 July 2023 is hereby set aside. The Section 34 petitions shall in consequence stand restored upon the Board of the appropriate Court for being considered afresh and bearing in mind the observations rendered hereinabove.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

MAY 17, 2024/neha/kk/RW