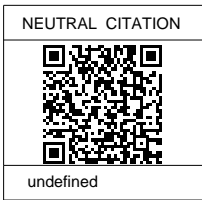


**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**R/FIRST APPEAL NO. 1639 of 2023**  
**With**  
**CIVIL APPLICATION (FOR STAY) NO. 1 of 2023**  
**In R/FIRST APPEAL NO. 1639 of 2023**  
**With**  
**R/FIRST APPEAL NO. 1624 of 2023**  
**With**  
**CIVIL APPLICATION (FOR STAY) NO. 1 of 2023**  
**In R/FIRST APPEAL NO. 1624 of 2023**  
**With**  
**R/FIRST APPEAL NO. 1626 of 2023**  
**With**  
**CIVIL APPLICATION (FOR STAY) NO. 1 of 2023**  
**In R/FIRST APPEAL NO. 1626 of 2023**  
**With**  
**R/FIRST APPEAL NO. 1627 of 2023**  
**With**  
**CIVIL APPLICATION (FOR STAY) NO. 1 of 2023**  
**In R/FIRST APPEAL NO. 1627 of 2023**  
**With**  
**R/FIRST APPEAL NO. 1629 of 2023**  
**With**  
**CIVIL APPLICATION (FOR STAY) NO. 1 of 2023**  
**In R/FIRST APPEAL NO. 1629 of 2023**  
**With**  
**R/FIRST APPEAL NO. 1630 of 2023**  
**With**  
**CIVIL APPLICATION (FOR STAY) NO. 1 of 2023**  
**In R/FIRST APPEAL NO. 1630 of 2023**  
**With**  
**R/FIRST APPEAL NO. 1631 of 2023**  
**With**  
**CIVIL APPLICATION (FOR STAY) NO. 1 of 2023**  
**In R/FIRST APPEAL NO. 1631 of 2023**  
**With**  
**R/FIRST APPEAL NO. 1632 of 2023**  
**With**  
**CIVIL APPLICATION (FOR STAY) NO. 1 of 2023**  
**In R/FIRST APPEAL NO. 1632 of 2023**  
**With**  
**R/FIRST APPEAL NO. 1617 of 2023**  
**With**  
**CIVIL APPLICATION (FOR STAY) NO. 1 of 2023**  
**In R/FIRST APPEAL NO. 1617 of 2023**



**With**  
**R/FIRST APPEAL NO. 1614 of 2023**  
**With**  
**CIVIL APPLICATION (FOR STAY) NO. 1 of 2023**  
**In R/FIRST APPEAL NO. 1614 of 2023**  
**With**  
**R/FIRST APPEAL NO. 1620 of 2023**  
**With**  
**CIVIL APPLICATION (FOR STAY) NO. 1 of 2023**  
**In R/FIRST APPEAL NO. 1620 of 2023**  
**With**  
**R/FIRST APPEAL NO. 1618 of 2023**  
**With**  
**CIVIL APPLICATION (FOR STAY) NO. 1 of 2023**  
**In R/FIRST APPEAL NO. 1618 of 2023**  
**With**  
**R/FIRST APPEAL NO. 1623 of 2023**  
**With**  
**CIVIL APPLICATION (FOR STAY) NO. 1 of 2023**  
**In R/FIRST APPEAL NO. 1623 of 2023**  
**With**  
**R/FIRST APPEAL NO. 1622 of 2023**  
**With**  
**CIVIL APPLICATION (FOR STAY) NO. 1 of 2023**  
**In R/FIRST APPEAL NO. 1622 of 2023**  
**With**  
**R/FIRST APPEAL NO. 1621 of 2023**  
**With**  
**CIVIL APPLICATION (FOR STAY) NO. 1 of 2023**  
**In R/FIRST APPEAL NO. 1621 of 2023**  
**With**  
**R/FIRST APPEAL NO. 1619 of 2023**  
**With**  
**CIVIL APPLICATION (FOR STAY) NO. 1 of 2023**  
**In R/FIRST APPEAL NO. 1619 of 2023**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA**  
**AGARWAL**  
**and**  
**HONOURABLE MR. JUSTICE PRANAV TRIVEDI**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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SENTINEL PROPERTIES PRIVATE LIMITED

Versus

LEGAL HEIR OF DECEASED ATUL DHIRAJLAL AMIN VIRAL  
ATULBHAI AMIN S/O LATE AUTLBHAI AMIN

=====

Appearance:

MR MIHIR JOSHI, SR ADVOCATE with MR VAIBHAV GOSWAMY,  
MR ANUJ K TRIVEDI(6251) for the Appellant(s) No. 1

MR DHRUV AGARWAL, SR ADVOCATE with MR VIBHORE  
VARDHAN, MR RUTUL P. DESAI AND MR PAVAN GODIAWALA for  
the Defendant(s) No. 1

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**CORAM: HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE  
SUNITA AGARWAL**

and

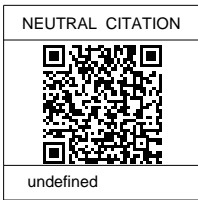
**HONOURABLE MR. JUSTICE PRANAV TRIVEDI**

**Date : 13/09/2024**

**CAV JUDGMENT**

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

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (in short as the "Arbitration Act' 1996") has been preferred by the original claimant in arbitration case, viz. CMA No. 05/2012 before the



arbitral tribunal, viz. the learned sole arbitrator who has declared the award dated 24.10.2016.

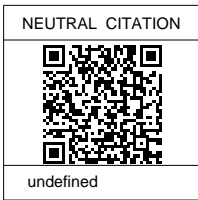
2. We may note, at the outset, that the order dated 20.10.2016 passed by the learned sole arbitrator in rejecting the applications Exhibit 44 and 15 others has also been subjected to challenge before the civil court under Section 34 of the Act, 1996 apart from the impugned award dated 24.10.2016. In all, 16 arbitration references being CMA Nos. 5 to 20 of 2012 were decided by the learned arbitrator vide common award dated 24.10.2016 and the award reads as under :-

"(1) It is hereby declared that the Power of Attorney dated August 31st 2007 Exh. 10 executed by respondent in favour of the claimant is irrevocable and cannot be revoked. It is declared that cancellation of Power of attorney by the respondent is bad in law and Power of attorney Exh. 10 remains in force.

(2) Claimant is directed to put in fixed deposit for a period of three months in any nationalized Bank in Ahmedabad an amount of Rs. 3,63,825/- (Rupees Three Lac Sixty Three Thousand Eight Hundred Twenty Five only) being balance of sale consideration of the land bearing Survey No. 802 admeasuring 6,374 Sq. mt. situate at Mouje Sachana, Taluka Viramgam, District Ahmedabad of this claim within two months from the date of receipt of this order.

(3) Claimant shall communicate the fact of such fixed deposit with a Xerox copy of such fixed deposit to the respondent by registered post A. D. and speed post.

(4) On receipt of the communication of Fixed



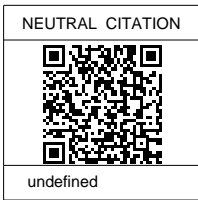
Deposit from the claimant, the respondent is directed to make an application to the competent authority for conversion of land to non-agricultural land from agricultural land within 15 days from the date of receipt of the communication of fixed deposit.

(5) On receipt of necessary requisite permission for change of Tenure and N. A. use, Respondent shall communicate the same to claimant in writing at the earliest by Registered Post A.D. and Speed Post and execute Registered Sale-deed.

(6) In case of default, parties may take legal action for the further implementation of Award.

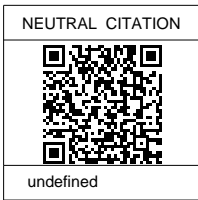
(7) Respondent shall pay cost of claimant and bear his own cost quantified at Rs. 14,10,000/- (Rupees Fourteen Lacs Ten Thousand only) (amount split up Rs 10.50,000/- Fees of sole arbitrator, Rs. 1,05,000/- remuneration of administrative assistant, Rs. 1,05,000/- Miscellaneous Expenses and Rs.1,50,000/- advocate's fees) for all the consolidated matters."

3. A perusal of the award indicates that the claimant, viz. the appellant herein, a Company incorporated under the provisions of the Companies Act, 1956 promoted by K. Raheja Corporation, Mumbai, is a major developer engaged in the business of group housing, commercial and industrial developments across India. The claimant claims to be the purchaser of lands from four respondents/owners of different survey numbers, who have been termed as vendors no.1, 2, 3 and 4 in the award. There were 16 claim petitions consolidated for 16 parcels of lands owned by four different owners and the dispute was with respect to the purchase of the said



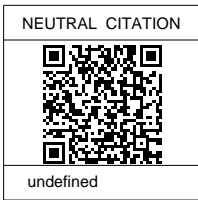
property after they were converted into Non-agricultural purposes by way of registered agreements to sell entered into by the claimant with the respondents on different dates over a period of one year between the years 2007-2008, as is evident from the table.

4. A perusal of the Deed of agreements to sell given in the table indicates that 16 agreements to sell were executed on different dates between 29.03.2007 to 25.03.2008. It was the case of the claimant-appellant herein before the learned arbitrator that the respondents executed in the form of agreements to sell, an irrevocable Power of Attorney, appointing the claimant as true and lawful person to transfer the said property. The respondents were required to get the properties converted from agricultural lands to non-agricultural lands at their own cost and expenses and sale consideration was to be paid only at the time of execution of the conveyance deed. However, till date, the respondents had not got the properties converted from agricultural lands to non-agricultural lands nor had obtained and produced the title clearance certificate from reputed solicitor nor they appear to have made attempt to do so and further for conversion of the lands from new tenure to old tenure.
5. It was submitted that the irrevocable Power of Attorney executed in the shape of agreements to sell were coupled with pecuniary interest in the property. The claimant had paid substantial amount towards sale consideration as per the terms and conditions of the



agreement and the agreements were to purchase the non-agricultural land and, therefore, they were not barred by law. It was further contended before the learned arbitrator that the claimant was always ready and willing to perform the terms and conditions of the agreements to sell and the application for conversion of the lands in question from agricultural lands to non-agricultural lands was required to be moved by the vendor and the claimant had no role to play. It was further argued that since the agreement to sell was for purchase of lands in question as non-agricultural lands after conversion, no invalidity can be attached to the agreements in view of Section 63(1)(c) of the Gujarat Tenancy and Agricultural Lands Act, 1948 (for short "Gujarat Tenancy Act' 1948"). It was argued that the provisions of the Gujarat Tenancy Act' 1948 would not be applicable to the facts and circumstances of the case.

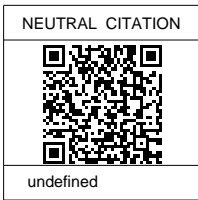
6. The stand of the claimant was that the irrevocable Power of Attorney executed in favour of the claimant being coupled with the pecuniary interest could not be revoked yet the respondents had issued public notices dated 29.06.2012 and 30.06.2012 to cancel or to revoke the Power of Attorney. The total payment of consideration made by the claimant to the owners with respect to the entire sale transaction of all the properties is approximately Rs. 51,08,04,634/- (Rs. Fifty One Crores Eight Lakhs Four Thousand Six Hundred and Thirty Four Only). After execution of the agreements to sell, the



claimant was in touch with the respondents throughout through their mediator/facilitator and the respondents gave a picture that they will soon get the property converted for non-agricultural purposes and shall execute a sale deed in favour of the claimant.

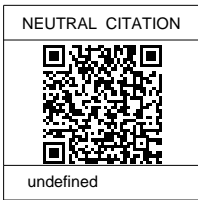
7. When nothing was done for a long time, the claimant inspected the records of the Revenue Department in the month of January 2011 and came to know that the respondents executed a sale deed in favour of third parties for some of the properties, which however, have not been included in the claim petition. It was, thereafter, agreed between the parties that the respondents shall not transfer, assign, mortgage the properties, subject matter of agreements to sell, to third parties and they will get the title clearance certificate for the property in question and would get it converted from agricultural to non-agricultural use before execution of the sale deed in favour of the claimant.
8. However, in the month of June 2012, the claimant came across a public notice in the newspapers "Gujarat Samachar" daily and "Times of India" daily stating that four respondents, viz. Mr. Ajay Patel, Mr. Atul Amin, Mr. Chirag Amin and Mr. Pragnesh Patel have revoked the Power of Attorney given by them to the claimant with respect to the properties in question and other properties which were part of Exhibit 16 with respect to which the sale deeds were executed by them in favour of the third party. The claimant replied to the said public





notice in the newspapers "Divya Bhaskar" and "Times of India" stating that the Power of Attorney was coupled with interest and could never be cancelled and does not stand cancelled accordingly. It was stated that the original documents pertaining to the title of the suit properties were delivered by the respondents to the claimant at the time of execution of understanding (Exhibit 9) and the said documents are in possession of the claimant even on that day.

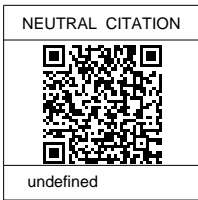
9. An application under Section 9 of the Act' 1996 for interim relief was then moved by the claimants and before the civil court at Viramgam, a consent term had been arrived at between the parties whereunder, they have submitted their consent/compromise purshis agreeing for appointment of the learned sole arbitrator who happened to be a retired Judge of the High Court of Gujarat. It was also agreed that both the parties shall maintain status quo as per the interim order passed by the civil court till the award is passed by the learned arbitrator. The proceedings under Section 9 of the Arbitration Act' 1996 was accordingly, disposed of.
10. Taking note of the above facts, the manner in which the proceedings were initiated and the dispute raised by the claimant before the learned arbitrator, at this juncture, we may refer to the common order dated 20.10.2016 passed by the learned sole arbitrator on applications Exhibit 44 and 15 others. It is noted in the order impugned dated 20.10.2016 passed by the learned sole



arbitrator that after exchange of pleadings and oral evidence adduced by the parties, oral arguments were completed on 12.08.2016. Both the learned advocates have filed written arguments on 29.09.2016. However, a day before the date of filing of the written arguments by the respondents, all the claimants have separately filed an application under Section 12(2) of the Arbitration Act' 1996, which was received by Speed Post on 26.09.2016. All the applications were disposed of by the learned arbitrator by common order dated 20.10.2016.

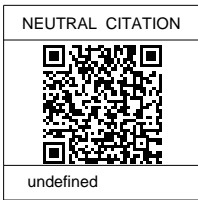
11. A perusal of the said order indicates that the respondents have taken a stand that it has come to their knowledge only a couple of days back that the sole arbitrator was not competent to proceed further with the present arbitral proceeding, as he has conducted the arbitration in utter violation of the provisions embodied in Sections 12(1) and 12(2) of the Arbitration Act' 1996 and a request had been made to the learned Arbitrator to withdraw from the proceedings. The reason given for the same as narrated by the applicants-respondents in the claim petitions were that the circumstances came to their notice are likely to give justifiable doubts as to the independence and impartiality of the learned arbitrator. It has come to the notice of the respondents-applicants that :-

- 1) One Mr. Mahendra G. Lodha is a Director in a company named Pinal Infrastructure Private Ltd. Pinal Infrastructure Private Ltd., a major share



holder of claimant Sentinel Properties Private Ltd. One Nitrex Logistics Private Ltd. has merged with Pinal Infrastructure Private Ltd. This Pinal Infrastructure Private Ltd. has 51% stake in Sentinel Properties Pvt. Ltd. Mr Mahendra G. Lodha is a Director and a share holder in both the Pinal Infrastructure Private Limited and Nitrix Logistics Private Ltd. On the merger of Pinal Infrastructure Private Ltd. with Nitrex Logistics Private Ltd. they are known as Nitrex Logistics Private Ltd. Mr Mahendra G. Lodha is interested in the outcome in the Sentinel Properties Pvt. Ltd.

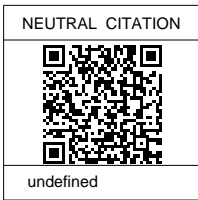
- (2) Mr. Mahendra G. Lodha is a founder trustee of one public trust 'Justice on Trial' ("Trust" for short). The sole arbitrator Justice Soni is also a founder member of the trust. Being co-trustee, Mr. Justice Soni is having a close association and contact with Mr. Mahendra G. Lodha. Mr. Justice Soni (sole arbitrator) is having a family relationship with family of Mr. Mahendra G. Lodha. Mr. Justice Soni and his family members are invitees in family function of Mr. Lodha.
- (3) These facts as alleged qualify a justifiable doubt in the mind of applicant as to independence and impartiality of sole arbitrator namely Mr. Justice Soni. The learned arbitrator ought to have declared these facts from the time of his appointment as an arbitrator and also during the proceedings.



(4) These facts have come to the notice of applicant only a couple of days back. The party's advocate Mr. Sanjay Thaker for the claimant and Mr. N. R. Patel had a meeting with the learned arbitrator at his residence in the afternoon of 12th May 2013. Then the arbitration proceeding commenced and on completion of the pleadings oral evidence of one witness was over. During this period, i.e. from 17th May 2013 to 8th May 2015 when Mr Rajesh Lodha second witness was cross examined when for the first time, the names of Mr. Mahendra G. Lodha, Pinal Infrastructure Pvt. Ltd., Nitrex Logistic Pvt. Ltd. had come on record.

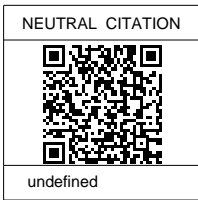
12. The respondents-applicants by means of the said application with the above-noted facts requested the learned arbitrator to withdraw from the proceedings. It was contended that the learned sole arbitrator was required to declare these facts at the time of his appointment as an arbitrator and also during the proceedings. When in the cross-examination of the second witness of the claimant, viz. Mr. Rajesh Lodha during the period from 17.05.2013 till 08.05.2015, the names of Mr. Mahendra G. Lodha, Pinal Infrastructure Pvt. Ltd. and Nitrex Logistics Pvt. Ltd. had surfaced.

13. From the extract of the cross-examination of Mr. Rajesh Lodha, as noted in the order impugned dated 20.10.2016, it can be noted that the names of Pinal



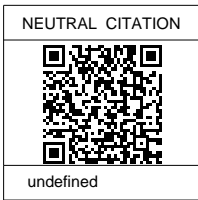
Infrastructure Pvt. Ltd and Mr. Mahendra G. Lodha appeared on record on 08.05.2016 during the cross-examination of Mr. Rajesh Lodha who had admitted that Mr. Mahendra G. Lodha was his cousin brother and Pinal Infrastructure Pvt. Ltd. has purchased 51% of the share holding of the claimant Company in the year 2011 and Mr. Rajesh Lodha became the Director in the claimant Company in the year 2011 itself. It has also come on record that Mr. Mahendra G. Lodha was a founder trustee of the Trust 'Justice on Trial' from 27.09.2004, though he had resigned on 13.08.2010 due to his pre-occupation in his professional work. The resignation of Mr. Mahendra G. Lodha as a founder trustee of the said Trust was accepted in the meeting held on 24.10.2010. It is observed by the learned sole arbitrator in the order impugned dated 20.10.2016 that during the period of six years of Mr. Mahendra G. Lodha being trustee of the said Public Trust, he had attended only 5 to 6 meetings and the trustees of the said Trust were not knowing each other prior to 27.09.2004, before inception of the trust.

14. The order dated 20.10.2016 records the statement of the learned sole arbitrator that since the resignation of Mr. Mahendra G. Lodha, the learned Arbitrator has no connection with him in any respect. However, it is admitted that Mr. Mahendra G. Lodha had organised a function to celebrate the birthday of his grandson on 08.11.2014 and the learned sole arbitrator along with his wife had attended the said function. It is recorded by



the learned arbitrator in the order impugned dated 20.10.2016 that Mr. Ajay Patel, one of the respondents was also an invitee in the said function and except the said function, the learned arbitrator was never invited in any other function by Mr. Mahendra G. Lodha.

15. Mr. Ajay Patel, one of the respondents before the learned arbitrator, in his application dated 24.09.2016, has clearly stated that because of the close relationship of Mr. Mahendra G. Lodha, the Director of Pinal Infrastructure Pvt. Ltd., which is having 51% stake in the claimant Company, viz. Sentinel Properties Pvt. Ltd., the respondents-applicants had justifiable doubts about the independence and impartiality of the learned arbitrator. However, the learned arbitrator has discarded this version on the ground that Mr. Ajay Patel was also an invitee in the birthday celebration of the grandson of Mr. Mahendra G. Lodha on 08.11.2014 and was aware of relationship of the learned sole arbitrator with Mr. Mahendra G. Lodha, at least since that date, but he had not raised this issue for about two years.
16. It was observed that the statement in the application dated 24.09.2016 submitted by the Mr. Ajay Patel that he learnt about the fact stated in the application only a couple of days back was vague and devoid of particulars with a view to bring in the application within time limit prescribed under Section 13(2) of the Arbitration Act, 1996 in a malafide manner. The applicants have not deliberately provided correct information and knowledge

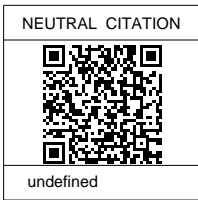


of the facts disclosed in the application filed under Section 13(2) and hence, an adverse inference is to be drawn that he had the knowledge and information of these facts for a long period.

17. It was admitted by the learned arbitrator that for the period from 27.09.2004 to 13.10.2010, the learned sole arbitrator and Mr. Mahendra G. Lodha were co-trustees. However, it was observed that there cannot be a presumption that the co-trustee must know about the personal, professional, social, business concerns and/or involvement of each other. The name of Nitrex Logistics Pvt. Ltd. came on record and to the knowledge of the learned Arbitrator only when Mr. Ajay Patel filed rejoinder affidavit dated 09.10.2016 before the Tribunal on 12.10.2016 with the list of documents like Annual statements and the Trust Deed, etc. filed by him.

18. In the cross-examination of Mr. Rajesh Lodha, there were simply suggestion that Mr. Mahendra G. Lodha had interest in Pinal Infrastructure Pvt. Ltd. and the document to show his interest was placed on record only on 12.10.2016 during the course of hearing of the application under Sections 12 and 13 of the Arbitration Act' 1996. During the arbitration proceedings, which commenced from 17.05.2013 with the arguments and completed on 12.08.2016, interest of Mr. Mahendra G. Lodha could not be found or had not been disclosed.

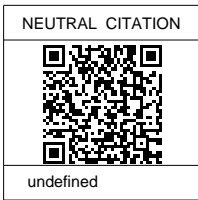
19. It is opined by the learned arbitrator that mere



reproduction of the words "justifiable doubts as to the independence or impartiality" in itself does not give rise to any justifiable doubt about the independence or impartiality of the learned arbitrator. Bias or impartiality has to be shown from the record with reference to the specific instances and there is no single direct or indirect remote or recent instance to show bias or impartiality of the learned arbitrator.

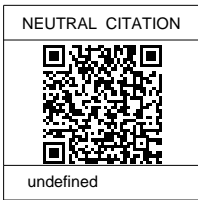
20. It was held that Mr. Ajay Patel knew that the learned sole arbitrator had attended the birthday celebration of the grandson of Mr. Mahendra G. Lodha as he was also one of the invitees, but till the affidavit in rejoinder filed on 12.10.2016, there was nothing on record to show the interest of Mr. Mahendra G. Lodha even in the claimant Company viz. Sentinal Properties Pvt. Ltd. There is nothing on record to show that Nitrex Logistics Pvt. Ltd. had any nexus with the claimant, viz. Sentinal Properties Pvt. Ltd. It was, thus, opined that all the imputation on the impartiality of the learned arbitrator are only the mental perceptions of the applicant.
21. From the time of appointment of the learned arbitrator and throughout the arbitral proceedings, there is no disclosure of any circumstances, which are likely to give rise to justifiable doubts as to the independence or impartiality of the learned arbitrator. There are no facts, information or particulars on record from which the learned sole arbitrator can have knowledge and was required to make a disclosure about his acquaintance





with Mr. Mahendra G. Lodha who is otherwise cousin brother of Mr. Rajesh Lodha, the Director of the claimant Company, viz. Sentinel Properties Pvt. Ltd. There does not exist any circumstance where a reasonable and fair minded person would think it probable or likely that the learned arbitrator would be prejudiced against the litigant. For the fact of simply being co-trustee of a Public Trust, it cannot be assumed that the learned arbitrator being co-trustee was having information about the occupation, business, social, professional status of the co-trustee.

22. It was, thus, held by the learned arbitrator that in absence of material particulars on record or evidence to show the knowledge, no inference can be drawn about the possibility of bias as a reasonable or fair mind. There is no incident on record which may create any doubt as to the independence or impartiality of the learned arbitrator and hence, the application is liable to be rejected. It was also noted that as the challenge has not been made in timely manner, the same must fail as having been waived off on the ground of acquiescence in holding of further proceedings of the application.
23. Coming on the challenge to the award, keeping in mind the limited scope of interference under Section 37 of the Arbitration Act' 1996, we may note the issues framed by the learned arbitrator for declaration of the award as under :-



(1) Whether the Claimant proves that the Respondent made out the title of the suit land clear and marketable free from encumbrances and handover the vacant and peaceful possession after converting the same into non-agricultural land?

(2) Whether the Claimant proves that the Respondent had given irrevocable Power of Attorney, coupled with pecuniary interest with the land, cannot be revoked?

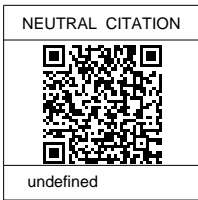
(3) Whether the Respondent proves that the Claim statement is not maintainable at law?

(4) Whether the Respondent proves that the Claim Agreement to sell in question is unenforceable at Law as the same is invalid under Sec. 64(1) (c) of the Gujarat Tenancy and Agricultural Lands Act?

(5) Whether the Respondent proves that the Claim Agreement to sell in question contains the clauses gives unilateral option to the Claimant to terminate the Agreement hence the nature of the Agreement is determinable and not enforceable?

(6) Whether the Respondent proves that the Arbitration proceedings based on Claim Agreement to sell is barred by period of limitation and is also unenforceable?

(7) Whether the Claimant proves that the Claimant



is entitled for declaration as prayed for in prayer clause Para-38(A) of the Claim Statement?

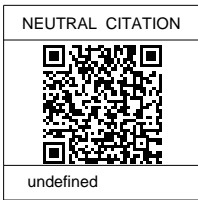
(8) Whether the claimant proves that the Claimant is entitled for direction to respondent as prayed in prayer clause para 38(B)?

(9) Whether the Claimant proves that the Claimant is entitled for a judgment and decree of specific performance of the understanding against the respondent as prayed for in prayer clause Para 38(C)?

(10) Whether the Claimant has been always ready and willing to perform its part of the claimant Agreement?

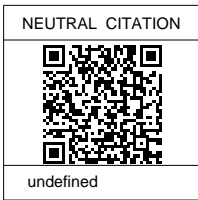
(11) What award?

24. Dealing with the above issues, the learned arbitrator has discarded the stand of the respondents that Exhibit 9 is not a concluded contract. The terms of Exhibit 9 are specific and clear and cannot be said to be uncertain. Clause 6 of the contract is a declaration that the parties have agreed to the terms mentioned therein. Simultaneously, with the execution of the Power of Attorney by the vendors, all the original title deeds as part performance of the Agreement had been given to the purchaser to verify as to the title of the property. As per the conditions in the Agreement, on the verification as to the title of the property, if the purchaser finds any



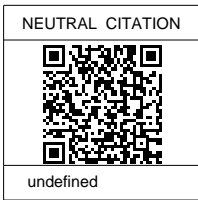
difficulty and asks the vendor to correct it and the vendor fails to do so, it was the purchaser who will get it corrected at the cost of the vendor. It was, thus, opined that in view of these conditions, it cannot be said that there was no concluded contract between the parties. The clauses in the contract like arbitration clause in the agreement cannot be modified, amended or supplemented, except by an agreement in writing, signed by both the parties thereto, is proof of the fact that there was no uncertainty and the agreements cannot be said to be inconclusive. Section 17 of the Specific Relief Act, thus, has no application. It was further noted that the arbitrator is competent to grant specific relief for part performance of the contract as it can equally grant specific relief for performance of the entire contract.

25. On the issue about revocation of the Power of Attorney executed by the vendors, it was held that the Power of Attorney given in favour of the claimant as the true and lawful attorney to do all or any of the acts, deeds, matters and things mentioned thereto, was irrevocable. Moreover, the claimant had paid more than 50% of the sale consideration and the said fact is not disputed. Under these circumstances, the Power of Attorney being coupled with pecuniary interest in the lands agreed to be purchased by the claimant cannot be revoked.
26. On the issue of applicability of Section 63 of the Gujarat Tenancy Act' 1948 and the agreement being hit by the

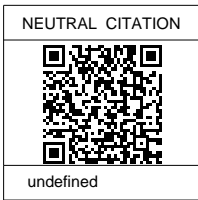


said provision and, as such, incapable of being specifically performed, it was held that Exhibit 9, which is a contract for sale with no interest or charge having been created over the property can be said to be a simple contract for sale and, as such, is not covered under the word "Agreement" referred to in clause (c) of sub-section (1) of Section 63 and, as such, is not hit by the provisions of the Gujarat Tenancy Act' 1948. There is no question of invalidity of the said agreement as such. As regards the provisions of Section 43 of the Gujarat Tenancy Act' 1948, it was opined that in Exhibit 9, there is a specific condition that after getting the lands converted into non-agricultural use and also getting the lands converted from old tenure to new tenure, the sale deed is to be executed. A conditional decree, as such, can be passed requiring the vendor to get the lands in question converted into non-agricultural use and new tenure and then execute the sale deed.

27. It was, thus, opined that a proper reading of Exhibit 9 makes it clear that the Sale Deed is to be executed only after the NA permission is obtained and, therefore, it can be said that the agreement is in two parts like reciprocal promises. The first part is of getting NA, title clearance and tenure changed, which was the obligation of the vendors to perform and on compliance of these conditions, second part for execution of the sale deed would arise and, thus, for payment of balance sale consideration.



28. The argument with regard to the invalidity of the agreements to sell being hit by Section 43(2) and Section 63(1)(c) was, thus, answered in negative. It was further held that there was no clause in Exhibit 9 (Agreement), which can be read over to give either party right to determine the agreement. Moreover, the vendors in the written arguments had admitted that they had neither repudiated nor renounced the agreement and hence, even according to the respondents, the Agreement Exhibit 9 is in force.
29. On the issue of limitation and the readiness and willingness of the claimant to perform its part of the Agreement, it was held that though in every agreement, the respondents vendors stated that the time of three months was given for obtaining NA, but no time was fixed or stipulated to complete the transaction, except in five claim petitions where six months' time was indicated. The contention of the vendors that the claimant was required to file the claim within three years on the expiry of the period of six months and in case, six months' time is not stipulated in the contract, they were required to file the claim within reasonable time, was rejected with the observation that the cause of action for filing the claim petition arose when the performance of contract was refused by the respondents. Reference has been made to Article 54 to the Schedule of the Limitation Act to hold that the period of three years begins to run either from the date of performance,

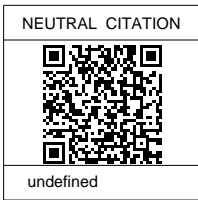


if it fixed, or if no such date is fixed, then when the claimant has noticed that the performance is refused. It was held that in five claims though time stipulated to complete the transaction is indicated as six months, but no date is fixed.

30. The claimant came to know about refusal of the vendors to perform its part of contract when public notice was published in the newspapers on 30.06.2012 and 29.06.2012. These notices were duly replied by the claimant and all the claim petitions have been filed within the period of limitation, which is to reckon from the date of the public notice to cancel the Power of Attorney, i.e., the date when the vendors refused performance. With these findings, the Tribunal has declared the award in the following manner :-

"(1) It is hereby declared that the power of Attorney dated August 31 2007 Exh. 10 executed by respondent in favour of the claimant is irrevocable and cannot be revoked. It is declared that cancellation of Power of Attorney by the respondent is bad in law and Power of Attorney Exh. 10 remains in force.

(2) Claimant is directed to put in Fixed Deposit for a period of three months in any Nationalized Bank in Ahmedabad an amount of Rs. 3,63,825/- (Rupees Three Lac Sixty Three Thousand Eight Hundred Twenty Five only) being balance of sale consideration of the land bearing Survey No. 802 admeasuring 6,374 sq. mt. situate at Mauje Sachana, Taluka Viramgam, District Ahmedabad of this claim within two months from the date of receipt of this order.



(3) Claimant shall communicate the fact of such fixed deposit with a Xerox copy of such Fixed Deposit to the Respondent by Registered Post A.D. and Speed Post

(4) On receipt of the communication of Fixed Deposit from the Claimant, the Respondent is directed to make an application to the Competent Authority for conversion of land to Non-agricultural Land from Agricultural land within 15 days from the date of receipt of the communication of fixed deposit.

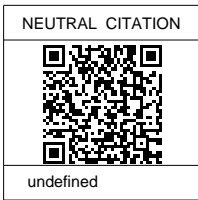
(5) On receipt of necessary requisite permission for change of Tenure and N. A. use, Respondent shall communicate the same to Claimant in writing at the earliest by Registered Post A.D. and Speed Post and execute Registered Sale-deed

(6) In case of default, parties may take legal action for the further implementation of Award.

(7) Respondent shall pay cost of claimant and bear his own. Cost quantified Rs. 14,10,000/- (Rupees Fourteen Lacs Ten Thousand only) (amount split up - Rs. 10,50,000/- Fees of Sole Arbitrator, Rs. 1,05,000/- Remuneration of Administrative Assistant, Rs. 1,05,000/- Miscellaneous Expenses and Rs. 1,50,000/- Advocate's fees) for all the consolidated matters."

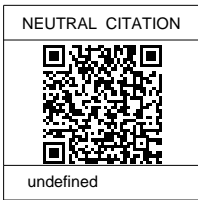
31. The civil court under Section 34 Application has proceeded to set aside the arbitral award being contrary to the statutory provisions and being against the public policy. It was held that Section 63 of the Gujarat Tenancy Act' 1948 prohibits agreement made by an instrument in writing for sale in favour of a person who is not an agriculturist by declaring such an agreement to be invalid. The execution of the Sale Deed was agreed





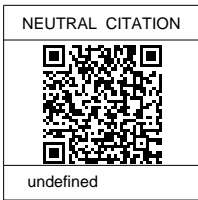
to be done after having obtained requisite sanction under Sections 43 and 63 of the Gujarat Tenancy Act' 1948, which prohibits execution of Agreements to Sell pertaining to agricultural land without prior sanction. Moreover, as per Rule 36 which provides condition on which the permission for sale, etc. of the land under Section 63 may be granted, the Collector or any officer authorised by him is prohibited from granting permission for sale, gift, exchange, lease or mortgage of any land in favour of a person who is not either an agriculturist or agricultural labourer or being an agriculturist, cultivates personally any land not less than the ceiling area or whether as owner or tenant or partly as owner or partly as tenant unless the conditions prescribed therein are satisfied.

32. It was further held that the specific performance of agreement is an equitable relief and the equity court does not enforce the performance of the contract, which involves continuous act and which require watching and supervision of the Court. The courts are not to enforce the specific performance of the contract on which sanction, assent or permission of the third person is needed. The principle in suits for specific performance of a contract for grant of decree for specific performance of contract is that the Court will not decree any claim for specific performance, which becomes impossible to perform nor will the Court grant such decree, which becomes impossible of execution. Instead of granting of



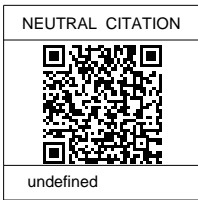
specific performance of the contract, the Court may grant appropriate relief of adequate damages to compensate the loss to the plaintiff. The Agreements for Sale being prohibited and forbidden by the provisions of Sections 43 and 63 of the Gujarat Tenancy Act' 1948, in contravention of the statutory provisions, cannot be put into execution by directing the respondents to execute the sale deed after seeking NA permission or conversion of the land in question from new tenure to old tenure.

33. The Court under Section 34 of the Arbitration Act' 1996 has further proceeded to examine the issue pertaining to the readiness and willingness on the part of the claimant and the delay in approaching the Tribunal for specific performance of the Agreements to Sell. It was held that as per Article 54 of the Limitation Act, the limitation for specific performance of an agreement is three years from the date fixed for the performance and if no such date is fixed, when the plaintiff has noticed that the performance is refused. Out of 16 agreements, 5 transactions stipulated time period of six months for completion of transaction from the date of the respective agreements. With reference to such contracts, which were executed in the year 2007, proceedings were initiated by filing application under Section 9 of the Arbitration Act' 1996 before the civil court only on 17.10.2012. There is no correspondence between the claimant and the original respondents for extending the time for completion of the sale transaction or for



conversion of the land into NA land. The claim for specific performance of the Agreements to Sell in five References Nos. 5/12, 6/12, 8/12, 15/12 and 18/12, therefore, was barred by limitation.

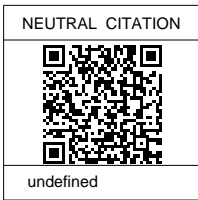
34. With respect to other agreements, the stipulated time is of three months for obtaining NA permission from the date of the agreement. The vendors had executed the Power of Attorney in favour of the claimant and hence, the claimant was required to take steps for obtaining the requisite permission within the specified time limit. No steps had been taken by the claimant for taking requisite permission till the Power of Attorney was cancelled and the claimant had approached the Arbitral Tribunal after five years, which itself shows that the claimant was not ready and willing to perform its part of the contract. This delay itself dis-entitles the claimant to seek specific performance of Agreements to Sell. The Arbitral Tribunal ought to have refused specific performance for this reason. On the contrary, if assumed for the moment that the vendors were required to obtain NA permission and the claimant was obliged to start any process for conversion of the lands into NA, then when the vendors did not initiate steps for conversion of lands within the stipulated period of three months, it would clearly suggest that the vendors had refused the performance of the agreement and the period of limitation of three years would start from the expiry of the stipulated period of three months from the date of the agreement. The



proceedings were initiated by the claimant only on 17.10.2012 and no steps had been taken in the meantime. Thus, from all angle, all the Arbitral References were time barred.

35. On the validity of the order dated 20.10.2016 rejecting the application moved by the respondents under Section 12/13 of the Arbitration Act' 1996, it was held that Section 12(1)(a) of the Arbitration Act' 1996 casts duty on the arbitrator at the time of his appointment to disclose in writing any circumstances such as existence of either direct or indirect, of any past or present relationship with or interest in any of the parties, whether financial, business, professional or any other kind which is likely to give rise to justifiable doubts as to his independence or impartiality. Section 12(2) of the Arbitration Act' 1996 casts duty on the arbitrator that he should during the arbitral proceedings disclose in writing the circumstances referred to in sub-section (1), if any. The disclosure has to be made in the form specified in the Sixth Schedule. Explanation 1 to Section 12(1) provides that the ground stated in Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubt of independence or impartiality of the arbitrator.

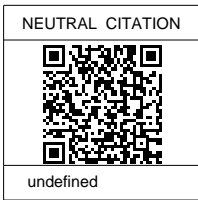
36. Section 12(3) provides that the appointment of an arbitrator can be challenged only on the ground mentioned in sub-section (1) (a) of Section 12 and Section 13(2) provides that a party who intends to



challenge the arbitrator shall within 15 days after becoming aware of any circumstances referred to in Section 12(3) send Written Statement of the reasons for the challenge to the Arbitral Tribunal. Section 13(4) gives remedy to the party challenging the arbitrator to make an application for setting aside of the arbitral award in accordance with Section 34 of the Act' 1996. Section 13(1) allows the party's freedom to agree on the procedure for challenging the arbitrator and in absence of and on failure of an agreement to the contrary, Section 13(4) permits the arbitrator to himself rule upon the challenge.

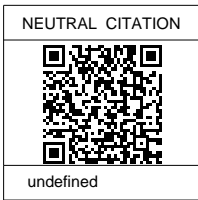
37. The effect of these provisions is that if the challenge is not successful, the arbitral proceedings must go on without any right to appeal. However, the only remedy is the last remedy of seeking relief to set aside the award under Section 34 of the Arbitration Act' 1996. It was, thus, opined that Section 12(1) of the Arbitration Act' 1996 cast an obligation upon the arbitrator to disclose existence of circumstances referred to in Section 12(1) of the Act' 1996.

38. In the instant case, as per the averments in the claimant's statement, Mr. Rajesh Lodha, Director of the claimant Company, was looking after the day to day affairs and management of the claimant Company. During the arbitral proceedings, the fact that Mr. Rajesh Lodha is the real cousin of Mr. Mahendra G. Lodha had came on surface. Admittedly, Mr. Mahendra G. Lodha



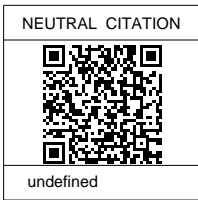
was co-trustee with the learned arbitrator in one public charitable trust. It was, thus, opined by the civil court that it cannot be believed that at the time of appointment of the learned arbitrator he might not be knowing that Mr. Mahendra G. Lodha was having stakes in the claimant Company because at that time, Mr. Rajesh Lodha was representing the claimant Company. However, before passing of the impugned award, an application in the form of Written Statement challenging the learned arbitrator was given by the respondents wherein it was brought on record that Mr. Mahendra G. Lodha along with the learned arbitrator were founder trustees of a Public Trust in the name of 'Justice on Trial' and were appointed as such on 27.09.2004 and continued, as such, till his resignation on 13.10.2010. During that span, Mr. Mahendra G. Lodha and the learned arbitrator worked together as co-trustee and attended at least 5-6 meetings of the Trust as per the record. Not only that, the learned arbitrator had attended the family function of birthday party of grandson of Mr. Mahendra G. Lodha along with his wife on 08.11.2014.

39. Admittedly, Mr. Mahendra G. Lodha, who is the Director of Pinal Infrastructure Private Limited holds 51% shares in the claimant Company, which was later merged with Nitrix Logistics Pvt. Ltd., which continues to be a major shareholder of the claimant Company. Mr. Mahendra G. Lodha, being the Director and shareholder of Nitrix



Logistics Pvt. Ltd., is in turn holding 51% shareholding in the claimant Company and as such would obviously be interested in the outcome of the arbitration proceedings. Mr. Mahendra G. Lodha was known to and having relationship with the learned sole arbitrator not only in the past, but even during the arbitration proceeding. The name of Mr. Mahendra G. Lodha had surfaced for the first time in the cross-examination of Mr. Rajesh Lodha, Director of the claimant Company, in the year 2015. It was, thus, incumbent upon the learned sole arbitrator to make a mandatory disclosure under Section 12 of the Arbitration Act' 1996 either at the time of his appointment or after the name of Mr. Mahendra G. Lodha surfaced in the cross-examination.

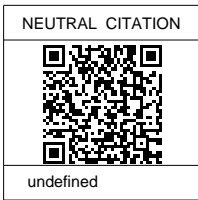
40. With these findings, the civil court has opined that once in the cross-examination of Mr. Rajesh Lodha, it was revealed that Mr. Mahendra G. Lodha had interest in Pinal Infrastructure Pvt. Ltd., the totality of the circumstances gave rise to justifiable doubts as to the independence and impartiality of the learned sole arbitrator in the mind of a reasonable man. The expression used in the provision is "justifiable doubts and not conclusive evidence" to suggest that the Arbitral Tribunal is unfair and bias.
41. As regards the time period prescribed under Section 13(2) of the Arbitration Act' 1996 for a party challenging the arbitrator within a period of 15 days after becoming aware of the constitution of the Arbitral Tribunal or after



becoming aware of the circumstances referred to in Section 12(3), in view of the categorical statement made by the applicants (original respondents) that they came to know about the circumstances referred to in Section 12(3) only a couple of days back, there was no reason to draw any adverse inference more so when the original claimant could not refute the said applications.

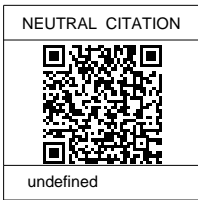
42. The reasoning given by the Arbitral Tribunal that as Mr. Ajay Patel, one of the applicants, was also an invitee to the birthday party of grandson of Mr. Mahendra G. Lodha, he would have known of the relationship of the learned arbitrator with Mr. Mahendra G. Lodha long before is wholly misconceived, inasmuch as, Mr. Ajay Patel had categorically stated that he had not attended the birthday party though he was an invitee. Even if it is assumed that in the birthday party thrown by Mr. Mahendra G. Lodha, Mr. Ajay Patel was present, it could not give rise to an inference that he was aware of all the circumstances such as the learned arbitrator being the co-founder trustee of the Trust along with Mr. Lodha.
43. The applicant-original respondent had produced a copy of the Trust Deed before the learned arbitrator to reveal that the learned arbitrator along with Mr. Mahendra G. Lodha was founder trustee of the Trust 'Justice on Trial' for the period from 2004 to 2010. Moreover, the time limit of 15 days prescribed by the Act is directory in nature to introduce the principle of waiver by the parties. There is no evidence that the applicants-original





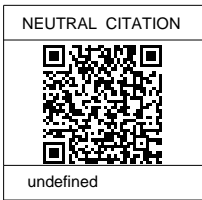
respondents had waived their right to file an application under Section 13(2), rather the applicants categorically averred that they came to know about the circumstances a couple of days back and the said averment could not have been disbelieved or discarded by drawing adverse inference.

44. It was, thus, held that the impugned order dated 20.10.2016 passed by the learned arbitrator is unjust and improper and is liable to be quashed. On account of the failure on the part of the learned arbitrator to make the mandatory disclosure, as contemplated by Section 12(1) of the Arbitration Act' 1996, the award is liable to be set aside in view of the ratio laid down by the Apex Court in **Vinodbhaiyalal Jain and Ors. vs. Wadhvani Parmeshwari Cold Storate Pvt. Ltd. [(2020) 15 SCC 726]**.
45. Mr. Mihir Joshi, learned Senior advocate assisted by Mr. Vaibhav Goswamy and Mr. Anuj K. Trivedi, learned advocates for the appellant would submit that the civil court while exercising its jurisdiction under the Arbitration Act, 1996 cannot act as a Court of appeal. Section 34 of the Arbitration Act' 1996 confers power upon the civil court for setting aside the arbitral award on very limited grounds. The Arbitration Act' 1996 contained in Sub-section (2) of Section 34 proceedings does not empower the Court to examine on the merits of the award as if dealing with the appeal or revision. The Court cannot examine the merits of the award on the



findings of facts as a court of appeal to correct the errors of the learned arbitrator. Limited judicial interference on extremely limited grounds is available giving no opportunity to the Court to deal with the merits of the award. Reliance is placed on the decision of the Apex Court in **National Highways Authority of India vs. M. Hameem [(2021) 9 SCC 1]**.

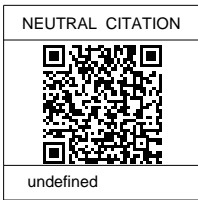
46. Reliance is further placed on the decision of the Apex Court in **Reliance Infrastructure Ltd. Vs. State of Goa [(2024) 1 SCC 479]** to submit that the settled legal position is that in an application under Section 34, the court is not expected to act as an appellate court to re-appreciate the evidence. The limited scope of interference would be so warranted when the award is in violation of the public policy of India, which has been held to be fundamental policy of Indian law. A judicial intervention on account of interfering on the merits of the award would not be permissible. The ground for interference on the basis that the award is in conflict with justice or morality is to be understood as a conflict with the "most basic notions of morality or justice". It is only when the arbitral award shocks the conscience of the court, it can be set aside on the aforesaid ground. The third ground to set aside the award on account of patent illegality appearing on the face of the record cannot be made out except where illegality is such which goes to the root of the matter. However, an illegality with regard to mere erroneous application of law would



not be a ground for interference. In any case, re-appreciation of evidence would not be permissible on the plea of patent illegality apparent on the face of the record. However, the finding based on no evidence at all or an award which ignores the vital evidence in arriving at a decision would be perverse and can be set aside on the ground of patent illegality.

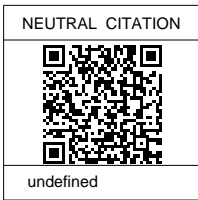
47. It was with these assertion, the learned counsel for the appellant vehemently argued that the civil court in exercise of jurisdiction under Section 34 of the Arbitration Act' 1996 has committed an illegality in re-appreciating the evidence on record so as to arrive at an alternative view than what has been taken by the learned Arbitrator. While acting as a court of appeal, it has gone through each and every clauses of the agreement to record a finding as to whether the relief of specific performance of agreement could have been granted by the learned arbitrator. The manner in which the court has dealt with the application under Section 34 shows that the court was confused to have the power of a court of appeal to examine the evidence on record and to substitute the opinion of the learned arbitrator.

48. It is not a case where it can be said that the learned arbitrator's award was wholly perverse and/or against the public policy or suffers from patent illegality, which goes to the root of the matter. The learned arbitrator upon appreciation of the evidence on record by reading the terms and conditions of the agreement, reached at



the conclusion that the time was not the essence and there may be reciprocal obligations upon the parties for the purposes of execution of the sale deeds. The agreements to sell were for aggregation of land and some part of the land was non-agricultural with respect to which there was an obligation of the vendors to obtain permission of the competent authority to clear his title and execute the sale deed. In any case, the appellant was not handed over possession of the lands in question and there was no transfer, which can be said to be hit by Section 43 or Section 63 of the Gujarat Tenancy Act' 1948.

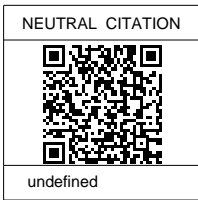
49. Reliance is placed on the decision of the Full Bench of this Court in **Deceased Shaikh Ismailbhai Hushainbhai vs. Vankar Ambalal Dhanabhai [2024(1) GLH 222]** to submit that Section 63 of the Gujarat Tenancy Act' 1948 bars transfer to a non-agriculturist sans permission of the Collector or an officer authorised by the State Government in that behalf by sale, gift, etc. as an instrument for transfer including agreement. Section 43 of the Gujarat Tenancy Act' 1948 puts a restriction on transfer of the land purchased by a tenant under certain provisions of the Tenancy Act or sold to any person under the Tenancy Act, as stated in Sub-section (1) to Section 43, by an instrument in writing, without previous sanction of the Collector. The Full Bench of this Court in the aforesaid decision, after reading the aforesaid two provisions, has



observed that there is a radical difference between the language of the two statutes. Section 63(1) though makes an agreement made by an instrument in writing for sale, lease, etc. by a non-agriculturist invalid, but the first proviso to Sub-section (1) of Section 63 attaches validity to such transfer on the ground of permission by the Collector or an officer authorised by the State Government in this behalf on such conditions as may be prescribed.

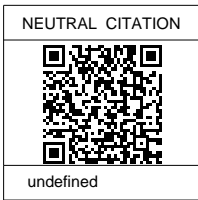
50. It was, thus, held by the full bench that an instrument of transfer or an agreement made by an instrument in writing for transfer in favour of a non-agriculturist become valid on the permission being granted by the Collector or an officer authorised by the State Government on the condition as may be prescribed in the order of permission. Such transfer as such can be validated. It was, thus, held that there is no absolute bar in Section 63 about the transfer of a land though there is a restriction like Section 63, which contemplates absolute bar by making transfer of a land of restricted nature illegal without previous permission of the Collector.

51. In the instant case, there was an agreement for transfer of the land in question to a non-agriculturist and the agreement which was put into execution seeking decree of specific performance by the appellant does not create any right or title in favour of the appellant transferee. The possession of the lands in question was never



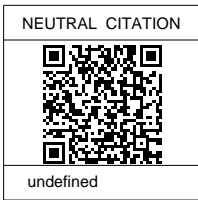
handed over and, as such, it cannot be said to be a case where the agreement is *ipso facto* void the requirement that the vendors were to take appropriate steps to seek permission of the Collector or any other officer authorised by the State Government before affecting transfer. The agreement itself puts an obligation upon the vendors to move application before the Collector or authorised officer to seek permission. The vendors having not moved any application, cannot take benefit of their own wrong so as to contest the claim of the appellant that the appellant is entitled for a decree of specific performance of an agreement with the condition that the vendors have to apply to the Collector or to the authorised officer seeking permission and then execute the Sale Deed on such permission being granted on the conditions prescribed in the order of permission.

52. The arbitral award issued direction to the respondents to make an application to the competent authority for conversion of land to non-agricultural land from agricultural land on the deposit of the balance sale consideration in a fixed deposit by the appellant-claimant and execute the sale deed on receipt of the necessary permission for change of tenure and the NA use cannot be said to suffer from any illegality, much less patently illegal by any stretch of imagination. The civil court has committed a grave error of law in setting aside the arbitral award on the ground that the agreement was hit by Section 43 and Section 63 of the



Gujarat Tenancy Act' 1948.

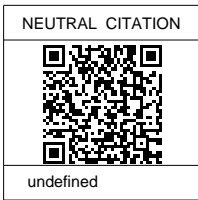
53. On the second issue about the learned Arbitrator's obligation to disclose his relationship with the parties to the dispute, as highlighted by the civil court in setting aside the order dated 20.10.2016 in rejection the application under Section 13(2) of the Arbitration Act' 1996, reliance is placed on the decisions of the Apex Court and Delhi High Court in **State of Haryana vs. G.F. Toll Road (P) Ltd. [(2019) 3 SCC 505]** and **Himanshu Shekhar vs. Prabhat Shekhar [2022 SCC Online Del 1651]**; respectively, to submit that it must be demonstrated by the party objecting to the independence and impartiality of the learned arbitrator that there exists justifiable doubts as to the fairness of the learned arbitrator. Mere apprehension of the party pleading bias against the learned arbitrator would not be sufficient to raise any doubt so as to accept its claim of disqualification of the learned arbitrator by virtue of provisions of Section 12(5) of the Arbitration Act' 1996. The test to be applied for bias is whether the circumstances are such as would lead to a fair-minded and informed person to conclude that the learned arbitrator was in fact biased. Mere allegations of bias are not a ground for removal of an arbitrator. The submission is that the award passed by the learned arbitrator cannot be said to fall within the grounds stated in Sub-section (2) of Section 34 of the Arbitration Act' 1996 and on both the above noted counts, the order



passed by the civil court under Section 34 of the Arbitration Act' 1996 is liable to be set aside and the award is to be upheld.

54. Lastly, reliance is placed on the decision of the Apex Court in **Gaddipati Divija vs. Pathuri Samrajyam and Ors. [2023 SCC Online SC 442]** to submit that the performance of the purchaser's obligation to pay the balance sale consideration within the time prescribed in the agreements in question shall be dependent upon the fulfilment of the vendors' obligation and hence, when the vendors have failed to fulfill their obligation, the question of time being an essence does not arise as the specific performance of the terms of the contract has not been done.
55. Mr. Dhruv Agarwal, learned Senior counsel assisted by Mr. Vibhore Vardhan, Mr. Rutul P. Desai and Mr. Pavan Godiawala, learned advocates appearing for the respondents vendors, in rebuttal, would argue that the award itself is opposed to public policy, inasmuch as, it has been brought on record by the respondents vendors by means of the application moved before the learned arbitrator under Section 13(2) that the learned arbitrator was having close family relationship with Mr. Mahendra G. Lodha, Director of the Company who was having 51% stake in the claimant Company. Section 12(5), Fifth Schedule talks of any circumstances, direct or indirect, past or present relationship, which may give rise to justifiable doubts about the independence and

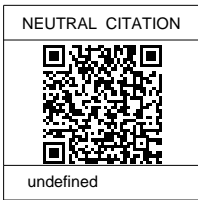




impartiality of the arbitrator.

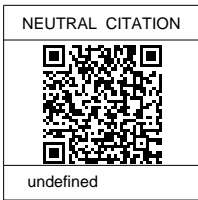
56. Clause 9 of the Fifth Schedule is a guideline enumerating possible circumstances giving rise to justifiable doubts as to the independence or impartiality of the arbitrator. Clause 9 contained in Fifth Schedule talks of "the arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company". Mr. Mahendra G. Lodha has filed an affidavit-in-reply to Section 12 application filed by the vendors before the learned arbitrator and admitted that he possess 51% shareholding in the claimant Company as Director of Pinal Infrastructure Private Limited. Once this set of evidence was brought before the learned arbitrator, it was required to keep its hands off by withdrawing from the arbitration. Rather, it was the duty of the learned arbitrator to disclose his acquaintance with Mr. Mahendra G. Lodha when his name had surfaced during the examination of Mr. Rajesh Lodha, his cousin brother, the Director of the claimant Company.

57. With reference to the decision of the Apex Court in **Voestalpine Schienen BMBH vs. Delhi Metro Rail Corporation Limited [(2017) 4 SCC 665]**, it was argued that the independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice, which apply to all judicial



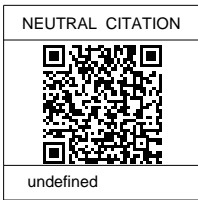
and quasi judicial proceedings. The arbitrator who has adjudicatory role to perform, functions and duties, require him to rise above the partisan interest of the parties impartially. Section 12 has been amended with the objective to induce neutrality of the arbitrator and the Seventh Schedule is based on IBA Guidelines. The amended provision is enacted to identify the circumstances which give rise to justifiable doubts about the independence and impartiality of the arbitrator. If any of those circumstances as mentioned therein exist, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. The Seventh Schedule mentions those circumstances, which would attract the provisions of Sub-section (5) of Section 12 and nullify any prior agreement to the contrary. A comprehensive list is enumerated in Fifth Schedule, which has to be looked into as a guideline when the issue of independence and impartiality of the arbitrator is raised.

58. Reliance is placed on the decision of the Apex Court in **Bharat Broad Band Network Ltd. vs. United Telecoms Ltd. [(2019) 5 SCC 755]** to assert that the only way in which the ineligibility can be removed, in law, is that the parties may after the disputes having arisen between them, waive the applicability of Sub-section (5) of Section 12, by an express agreement in writing. The express agreement in writing must have



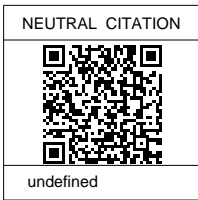
reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule. The submission is that the ineligibility of the arbitrator is not removed or obliterated by any other circumstances except there is an express agreement in writing of the parties reposing faith in the learned arbitrator removing ineligibility on any of the circumstances mentioned in the Seventh Schedule.

59. Reliance is further placed on the decisions of the Apex Court in **Vinodbhaiyalal Jain (supra), V. K. Dewan and Co. vs. Delhi Jal Board [(2010) 15 SCC 717]** and the Delhi High Court in **M/s. Lanco-Rani (JV) vs. National Highways Authority of India [2016 SCC Online Del 6267]** to argue that the statutory requirement of disclosure under Sub-section (1) of Section 12 is not only at the beginning of the arbitration proceeding, but also during the course of the proceedings and the requirement to make a disclosure under Section 12(1) of the Act being mandatory, the failure to do so would vitiate the award. Reference has been made to the findings of the Trial Court to submit that it was a case of real likelihood of bias or lack of independence of the learned arbitrator on account of close family relationship of the learned arbitrator with Mr. Mahendra G. Lodha, the cousin brother of Mr.



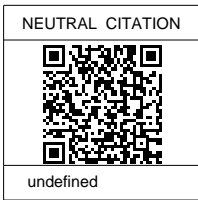
Rajesh Lodha, the Director of the claimant Company, who is also having 51% stake in the claimant Company.

60. It was further argued that the decree for specific performance of the contract could not have been awarded by the learned arbitrator, inasmuch as, the claim was barred by limitation. The agreements to sell were executed between March 2007 to March 2008 over a period of one year and as against total sale consideration of Rs. 6,91,72,700/-, an amount of Rs.2,93,37,961/- had been paid as against the outstanding of Rs. 3,98,34,749/-. There has been no expression of readiness and willingness on the part of the claimant for more than three years, the limitation prescribed for seeking a decree of specific performance of agreement. The Power of Attorney executed by the vendors was coterminous with the agreement which prescribe that all formalities for seeking NA permission and clearing the title of the vendors would be completed within a period of six months from the date of the agreement. The Power of Attorney executed on 31.08.2007 had given the power to the claimant to seek permission under Section 63. After expiry of outer limit from the last of six months of such agreement executed on 25.03.2008, limitation period of three years would expire on 24.09.2011, which would be the cut-off date for institution of the proceedings seeking for decree of specific performance of agreement. Till the year 2012, when for the first time the application under Section 9



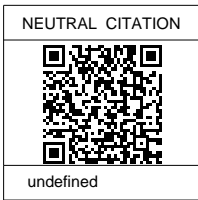
dated 17.10.2012 nothing had been done by the claimant. There was complete silence and the claimant, in fact have themselves abandoned the project. The cancellation of the Power of Attorney in the year 2012 cannot be taken as a refusal of the vendors of the performance of the contract on its part, inasmuch as, the Power of Attorney was cancelled much after the expiry of the time period of six months for completion of the formalities provided under the contract when the limitation under Article 54 of the Limitation Act, 1963 of three years from the date fixed for the performance or if no such date is fixed when the plaintiff has noticed that the performance is refused, had expired. Further, when there was no readiness and willingness expressed by the vendors, viz. the complainant throughout the period of more than three years of the contract, there was no question of grant of decree for specific performance of contract on the premise that the time was not the essence of the contract. The submission is that the learned arbitrator has committed a patent illegality in holding that the limitation under Article 54 would run from the date of the cancellation of the Power of Attorney and the claim was within the prescribed period of limitation of three years.

61. Lastly, it was argued that Section 63 of the Gujarat Tenancy Act' 1948 prohibits transfer to a non-agriculturist except without the permission of the Collector. The provision states that the agreement made



by an instrument in writing for sale in favour of a person who is not an agriculturist shall not be valid. However, the Collector or an authorised officer may grant permission for such sale on such conditions as may be prescribed. Keeping in mind this provision, six months time period was prescribed in the agreement to complete the process of seeking permission from the Collector, which has not been adhered to by the claimant/vendee who had been given power on the basis of the Power of Attorney dated 31.08.2007 to apply and seek permission of the competent authority. There has been failure on the part of the vendee to adhere to the said condition of the agreement. The agreements which are invalid under Section 63(1)(c) of the Gujarat Tenancy Act' 1948 are in their nature determinable. Section 14(1)(c) of the Specific Relief Act, 1963 provides inter alia that a contract which is in its nature determinable cannot be specifically enforced. Simultaneously, Section 43 of the Indian Contract Act makes the agreements in question unlawful, inasmuch as, the agreement in writing for transfer in favour of a person who is not an agriculturist is forbidden by law.

62. The question of *ex post facto* permission of the Collector to attach validity to such an agreement is not of relevance in the instant case, inasmuch as, performance of the contract was not possible after six months. The reason being that the contracts or the agreements expired on their own. After expiry of the period of three



years plus six months, the claims for specific performance of the agreements were barred. No infirmity can be attached to the findings of the Trial Court on the issue of limitation, i.e. the applicability of Article 54 of the Limitation Act in the facts and circumstances of the instant case.

63. Having heard the learned counsels for the parties and perused the record, we find that four issues have arisen for consideration before us :-

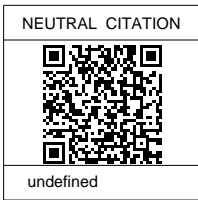
(1) The first issue is about the restraint on transfer of the lands in question to the appellant-original claimant who is admittedly a non-agriculturist in view of the provisions of the Tenancy Act and the effect of such transfer when the decree of specific performance is sought.

(2) The second issue is about the limitation prescribed in Article 54 of the Limitation Act seeking decree of specific performance of agreement.

(3) The third issue is about independence and impartiality of the arbitrator.

(4) The last one is about the scope of interference under Sections 34 and 37 of the Arbitration Act' 1996.

64. In order to appreciate the arguments of the learned Senior counsel for the appellant about the validity of the order passed by the civil court under Section 34 of the



Arbitration Act' 1996 in setting aside the arbitral award and to set out the scope of inquiry into the matter in the instant appeal under Section 37 of the Arbitration Act' 1996, we find it apt to deal with the last issue first, i.e. the scope of interference in the arbitral award in exercise of powers under Sections 34 and 37 of the Arbitration Act' 1996.

65. At the outset, we may set out the provisions of Sections 34 and 37 of the Arbitration Act' 1996 for ready reference :-

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

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

(a) the party making the application establishes on the basis of the record of the arbitral tribunal that—

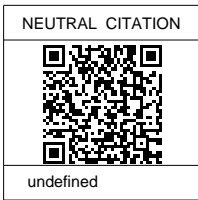
(i) a party was under some incapacity, or

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

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

(iv) the arbitral award deals with a dispute not





contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

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

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

(b) the Court finds that—

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

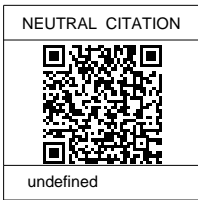
(ii) the arbitral award is in conflict with the public policy of India.

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

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

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

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



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

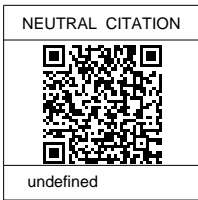
(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

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

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

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

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



award.

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

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

**"37. Appealable orders.—**(1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders and from no others to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—

(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

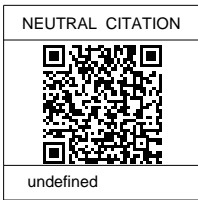
(c) setting aside or refusing to set aside an arbitral award under section 34.

(2) Appeal shall also lie to a court from an order of the arbitral tribunal—

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away

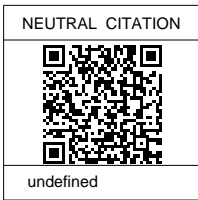


any right to appeal to the Supreme Court."

66. The law pertaining to the scope of challenge to the arbitral award under Section 34 and and the scope of appeal under Section 37 of the Arbitration Act' 1996 is fairly well settled in a recent decision of the Apex Court in **Reliance Infrastructure Ltd. (supra)** cited by the learned Senior counsel for the appellant, wherein the Apex Court has reiterated the principles enunciated in some of its relevant previous decisions on the issue. Relevant operative paragraphs 26, 27, 28, 28, 29, 30 and 31 are to be extracted hereinunder :-

"26. In *MMTC [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293]*, this Court took note of various decisions including that in *Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]* and exposted on the limited scope of interference under Section 34 and further narrower scope of appeal under Section 37 of the 1996 Act, particularly when dealing with the concurrent findings (of the arbitrator and then of the Court). This Court, inter alia, held as under : (*MMTC case [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293]* , *SCC pp. 166-67, paras 11-14*)

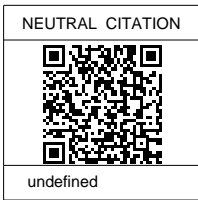
"11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn,



includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the “fundamental policy of Indian law” would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and *Wednesbury* [*Associated Provincial Picture Houses v. Wednesbury Corpn.*, (1948) 1 KB 223 (CA)] reasonableness. Furthermore, “patent illegality” itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See *Associate Builders v. DDA* [*Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] Also see *ONGC Ltd. v. Saw Pipes Ltd.* [*ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705] ; *Hindustan Zinc Ltd. v. Friends Coal Carbonisation* [*Hindustan Zinc Ltd. v. Friends Coal Carbonisation*, (2006) 4 SCC 445] ; and *McDermott International Inc. v. Burn Standard Co. Ltd.* [*McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181] )

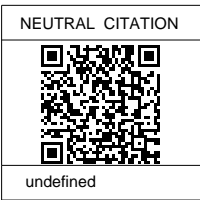
13. It is relevant to note that after the 2015



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

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

27. In *Ssangyong Engg. [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213]*, this Court has set out the scope of challenge under Section 34 of the 1996 Act in further details in the following words : (SCC pp. 170-71, paras 37-41)

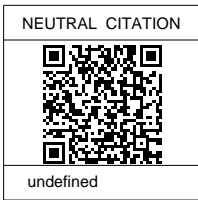


“37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of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

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

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

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in *Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]* , namely, that the



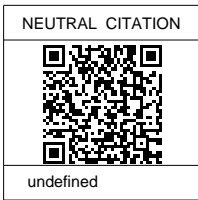
construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of *Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]*, while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.”

28. The limited scope of challenge under Section 34 of the Act was once again highlighted by this Court in *PSA Sical Terminals [PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, (2023) 15 SCC 781 : 2021 SCC OnLine SC 508]* and this Court particularly explained the relevant tests as under : (SCC paras 40 to 42)

“40. It will thus appear to be a more than settled legal position, that in an application under Section 34, the Court is not expected to

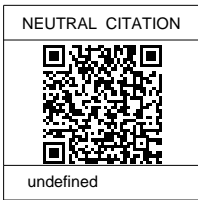




act as an appellate court and reappraise the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act. The interference would be so warranted when the award is in violation of “public policy of India”, which has been held to mean “the fundamental policy of Indian law”. A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Sections 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. The ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. It is only such arbitral awards that shock the conscience of the Court, that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, reappraisal of evidence would not be permissible on the ground of patent illegality appearing on the face of the award.

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

42. To understand the test of perversity, it will also be appropriate to refer to paras 31 and 32 from the judgment of this Court in



*Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204],* which read thus : (SCC pp. 75-76)

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

- (i) a finding is based on no evidence, or
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In *CCE & Sales v. Gopi Nath & Sons [CCE & Sales v. Gopi Nath & Sons, 1992 Supp (2) SCC 312]*, it was held : (SCC p. 317, para 7)

"7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law." ' ' "

29. In *Delhi Airport Metro Express [Delhi Airport Metro Express (P) Ltd. v. DMRC, (2022) 1 SCC 131 : (2022) 1 SCC (Civ) 330]*, this Court again surveyed the case law and explained the contours of the Courts' power to review the arbitral awards.



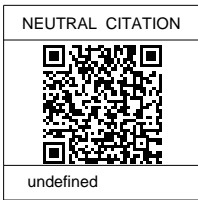
Therein, this Court not only reaffirmed the principles aforesaid but also highlighted an area of serious concern while pointing out “a disturbing tendency” of the Courts in setting aside arbitral awards after dissecting and reassessing factual aspects. This Court also underscored the pertinent features and scope of the expression “patent illegality” while reiterating that the Courts do not sit in appeal over the arbitral award. The relevant and significant passages of this judgment could be usefully extracted as under : (*Delhi Airport Metro Express case [Delhi Airport Metro Express (P) Ltd. v. DMRC, (2022) 1 SCC 131 : (2022) 1 SCC (Civ) 330] , SCC pp. 147-48, 150-51 & 155-56, paras 26, 28-30 & 42)*)

“26. A cumulative reading of the Uncitral Model Law and Rules, the legislative intent with which the 1996 Act is made, Section 5 and Section 34 of the 1996 Act would make it clear that judicial interference with the arbitral awards is limited to the grounds in Section 34. While deciding applications filed under Section 34 of the Act, Courts are mandated to strictly act in accordance with and within the confines of Section 34, refraining from appreciation or reappraisal of matters of fact as well as law. (See *Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd. [Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455 : (2020) 1 SCC (Civ) 570] , Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd. [Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd., (2022) 1 SCC 75 : (2022) 1 SCC (Civ) 374] and Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306].)*

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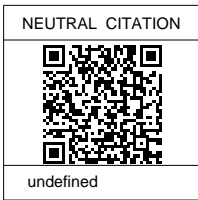
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28. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by Courts while examining the validity of the arbitral awards. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, *the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the Courts. There is a disturbing tendency of Courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.*

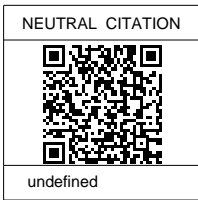
29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression “patent illegality”. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression “patent illegality”. *What is prohibited is for Courts to reappraise evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award.*



The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression “patent illegality”.

30. Section 34(2)(b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict with public policy of India, the award is liable to be set aside. Explanation (1), amended by the 2015 Amendment Act, clarified the expression “public policy of India” and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice.

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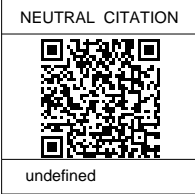


42. The Division Bench referred to various factors leading to the termination notice, to conclude that the award shocks the conscience of the Court. The discussion in SCC OnLine Del para 103 of the impugned judgment [DMRC v. Delhi Airport Metro Express (P) Ltd., 2019 SCC OnLine Del 6562] amounts to appreciation or reappraisal of the facts which is not permissible under Section 34 of the 1996 Act. The Division Bench further held [DMRC v. Delhi Airport Metro Express (P) Ltd., 2019 SCC OnLine Del 6562] that the fact of AMEL being operated without any adverse event for a period of more than four years since the date of issuance of the CMRS certificate, was not given due importance by the Arbitral Tribunal. As the arbitrator is the sole Judge of the quality as well as the quantity of the evidence, the task of being a Judge on the evidence before the Tribunal does not fall upon the Court in exercise of its jurisdiction under Section 34. [State of Rajasthan v. Puri Construction Co. Ltd., (1994) 6 SCC 485] On the basis of the issues submitted by the parties, the Arbitral Tribunal framed issues for consideration and answered the said issues. Subsequent events need not be taken into account.”

(emphasis supplied)

30. In *Haryana Tourism [Haryana Tourism Ltd. v. Kandhari Beverages Ltd., (2022) 3 SCC 237 : (2022) 2 SCC (Civ) 87]*, this Court yet again pointed out the limited scope of interference under Sections 34 and 37 of the Act; and disapproved interference by the High Court under Section 37 of the Act while entering into merits of the claim in the following words : (SCC p. 240, paras 8-9)

“8. So far as the impugned judgment and order [*Kandhari Beverages Ltd. v. Haryana Tourism Ltd., 2018 SCC OnLine P&H 3233*]

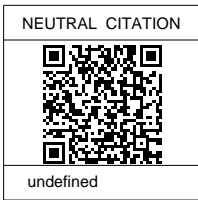


passed by the High Court quashing and setting aside the award and the order passed by the Additional District Judge under Section 34 of the Arbitration Act are concerned, it is required to be noted that in an appeal under Section 37 of the Arbitration Act, the High Court has entered into the merits of the claim, which is not permissible in exercise of powers under Section 37 of the Arbitration Act.

9. As per settled position of law laid down by this Court in a catena of decisions, an award can be set aside only if the award is against the public policy of India. The award can be set aside under Sections 34/37 of the Arbitration Act, if the award is found to be contrary to : (a) fundamental policy of Indian Law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal. None of the aforesaid exceptions shall be applicable to the facts of the case on hand. The High Court has entered into the merits of the claim and has decided the appeal under Section 37 of the Arbitration Act as if the High Court was deciding the appeal against the judgment and decree passed by the learned trial court. Thus, the High Court has exercised the jurisdiction not vested in it under Section 37 of the Arbitration Act. The impugned judgment and order [*Kandhari Beverages Ltd. v. Haryana Tourism Ltd.*, 2018 SCC OnLine P&H 3233] passed by the High Court is hence not sustainable.”

31. As regards the limited scope of interference under Sections 34/37 of the Act, we may also usefully refer to the following observations of a three-Judge Bench of this Court in *UHL Power Co. Ltd. v. State of H.P.* [*UHL Power Co. Ltd. v. State of H.P.*, (2022) 4 SCC 116 : (2022) 2 SCC (Civ) 401] : (SCC p. 124, paras 15-16)

“15. This Court also accepts as correct, the



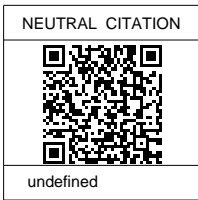
view expressed by the appellate court that the learned Single Judge committed a gross error in reappreciating the findings returned by the Arbitral Tribunal and taking an entirely different view in respect of the interpretation of the relevant clauses of the implementation agreement governing the parties inasmuch as it was not open to the said court to do so in proceedings under Section 34 of the Arbitration Act, by virtually acting as a court of appeal.

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.”

67. From a careful reading of the aforesaid paragraphs and the decisions of the Apex Court referred therein, the principles about the limited jurisdiction conferred on the Court under Section 34 and even more limited or narrower scope of appeal under Section 37 of the Arbitration Act' 1996 can be culled out and summarised as under :-

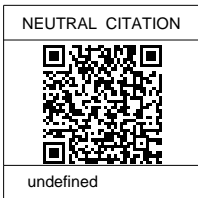
- (a) The Court does not sit in appeal over the arbitral award and may interfere on merits on the limited grounds provided under sections 34(2)(b)(ii), i.e. if the award is against the public policy of India.
- (b) As per the clarification in Explanation 1 to Clause (b) (ii) of Sub-section (1) of Section 34, the instances of award being in conflict with the public



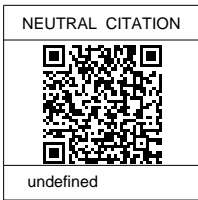


policy of India would mean, if -

- i. the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or
  - ii. it is in contravention of the fundamental policy of the Indian law; or
  - iii. it is in conflict with the most basic notions of justice or morality
- (c) With the 2015 amendment to Section 34, Sub-section (2A) has been inserted in Section 34, which provides that in case of domestic arbitration, the Court may also set aside the award if it is found to be vitiated by patent illegality appearing on the face of the award. However, proviso to Sub-section (2A) states that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.
- (d) It is, thus, settled that it is only if one of the conditions mentioned above is met that the Court may interfere with the arbitral award in terms of Section 34(2)(b)(ii) or Section 34 (2A), but such interference does not entail a review of the merits of the dispute by re-appreciation of evidence or on the premise that the award is a result of an erroneous application of the law.

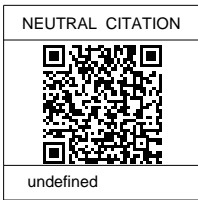


- (e) The interference is limited to situations when the findings of the arbitrator is arbitrary, capricious or perverse so as to shock the conscience of the court. Meaning thereby, the illegality is not trivial, but goes to the root of the matter. An arbitral award cannot be interfered with if the view taken by the arbitrator is a possible view based on the facts.
- (f) The contravention of a Statute not linked to public policy or public interest cannot be brought in to set aside the award on the ground of patent illegality. A mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award.
- (g) However, if an arbitrator gives no reason for an award and contravenes Section 31(3) of the Arbitration Act' 1996, that would certainly amount to a patent illegality on the face of the award. Also if the arbitrator wanders outside the contract and deals with the matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will fall within the ground of award vitiated by patent illegality under Section 34(2A). The interference is limited when the arbitrator construes the contract in a manner that no fair minded or reasonable person would, i.e. where the arbitrator's view is not even a possible view to take.
- (h) Similarly, when the finding is based on no evidence at all or an award which ignores vital evidence in



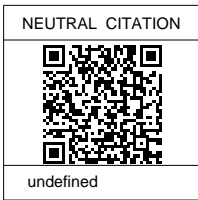
arriving at its finding would be perverse and liable to be set aside on the ground of patent illegality.

- (i) Additional finding based on the documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence, inasmuch as, such decision is not based on evidence led by the parties and, therefore, would also have to be characterised as perverse. A decision which is perverse though would not be a ground for challenge under "public policy of India", but would certainly be liable to be set aside on the ground of patent illegality appearing on the face of the record.
- (j) A good working test of perversity as noted by the Apex Court is that if a finding of fact is arrived at by ignoring or excluding the relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in law.
- (Emphasis supplied - para 33 in *Associate Builders* (supra))
- (k) As reiterated by the Apex Court, what is prohibited for the courts is to re-appreciate the evidence to conclude that the award suffers from patent illegality appearing on the face of the award as



courts do not sit in appeal against the arbitral award.

- (l) Section 34(2)(b)(i) refers to other grounds on which a Court can set aside an arbitral award, if a dispute which is not capable of settlement by arbitration under law for the time being in force is the subject matter of the award.
- (m) In **Haryana Tourism (supra)**, the Apex Court has further set out the scope of interference by the High Court under Section 37 of the Arbitration Act' 1996 and held that it is not permissible for the High Court in exercise of powers under Section 37 of the Arbitration Act' 1996 to enter into the merits of the claim. It was held that the award can be set aside under Section 34/37 of the Arbitration Act, if the award is found to be contrary to (a) fundamental policy of Indian Law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal. If none of the aforesaid exceptions are applicable in the facts of the case, the High Court would be erred in entering into the merits of the claim and decide the appeal under Section 37 of the Arbitration Act, as if deciding appeal against the judgement and decree passed by the Trial Court.
- (n) In **UHL Power Co. Ltd (supra)**, it was held that when it comes to the scope of appeal under Section 37 of the Arbitration Act, the jurisdiction of an



appellate court in examining the order setting aside or refusing to set aside an award passed under Section 34 of the Arbitration Act' 1996, is all the more circumscribed. With regard to the limited scope of interference in the arbitral award by a court in exercise of its jurisdiction under Section 34 of the Act, the scope is all the more circumscribed in an appeal under Section 37.

68. With these principles in mind, we may examine the rival submissions of the parties in relation to the matter before us.

69. In the facts of the instant case, there is no dispute about the fact that the agreements, performance of which had been sought in the claim petitions before the arbitral tribunal were hit by Section 63 of the Gujarat Tenancy Act' 1948, inasmuch as, the transfer of agricultural land to a non-agriculturist is barred. Section 63(1) (c) and the proviso to Sub-section (1) of Section 63 reads as under:-

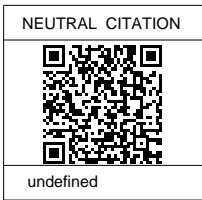
**"63. Transfers to non-agriculturists barred.- (1)**  
Save as provided in this Act,—

(a) x x x x x

(b) x x x x x

(c) no agreement made by an instrument in writing for the sale, gift, exchange, lease or mortgage of any land or interest therein.

shall be valid in favour of a person who is not

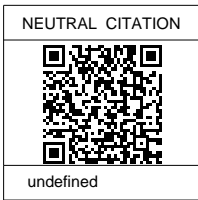


an agriculturist or who being an agriculturist cultivates personally land not less than the ceiling area whether as an owner or tenant or partly as owner and partly as tanant or who is not an agricultural labourer:

Provided that the Collector or an officer authorised by the State Government in this behalf may grant permission for such sale, gift, exchange, lease or mortgage, or for such agreement on such conditions as may be prescribed:

Provided further that no such permission shall be granted, where land is being sold to a person who is not an agriculturist for agricultural purpose, if the annual income of such person from other sources exceeds five thousand rupees."

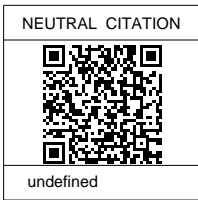
70. A bare reading of the said provision indicates that an agreement for sale in writing shall not be valid if it is executed in favour of a person who is a non-agriculturist. However, the Collector has been empowered to grant permission for such agreement on such conditions as may be prescribed. There is no dispute about the fact that the agreements to sell, in the instant case, are merely agreements signifying the intention of the transferor to sell the property in question for a specified consideration on some specified date on the happening of certain acts to be performed by the transferor or transferee. They can be termed to be Memorandums of Understanding recorded in writing in relation to a sale which could have been given effect to after the conditions of the Memorandum of Understanding has



been fulfilled and parties have performed their obligation of such agreements.

71. On the question as to whether the agreements were contingent contract or contract creating absolute liabilities between the parties without contemplating any contingency, it is clear that the agreements clearly contemplated that the sale deeds were to be executed after the requisite permission was obtained from the Collector for transfer of the lands in question to a non-agriculturist and that without permission, the land was not to be sold. The question is whether the Court or the arbitrator has jurisdiction to pass a contingent or conditional decree of specific performance directing the vendor to seek necessary permission and execute sale deed.

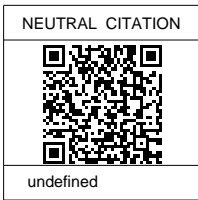
72. In **Rojasara Ramjibhai Dahyabhai vs Jani Narottamdas Lallubhai [1986 (3) SCC 300]**, the appellant had entered into an agreement to purchase plots recorded as Girasdar agricultural land of which he was a tenant from Girasdari. The agreement stipulated that the appellant was to apply for permission from the Collector to convert the agricultural land into village site, i.e., for non-agricultural use. The sale deed was executed by the appellant after he had obtained the requisite permission from the Collector within one month from the agreement with the Girasdar, by a contract covenanted to sell the property to another person. The agreement provided that the appellant as a



vendor was to get the land converted into village site at his own expenses. The appellant applied to the Collector for grant of permission to convert the land into village site, but his application was rejected. In the meantime, the Saurashtra Land Reforms Act, 1951 came into force with effect from 01.09.1951 and the appellant was recognised to be an occupant thereof under the provisions of the Bombay Land Revenue Code, 1898. The appellant thereafter, obtained permission for converting the land both as plots for non-agricultural use. The respondent then called upon the appellant to execute the conveyance of the property in accordance with the agreement to sell between the parties and on his failure to comply, the suit for specific performance was instituted.

73. The appellant therein contested the suit on two grounds, firstly that he had an imperfect title and secondly that the contract with the respondent was contingent contract dependent on appellant's vendor (Girasdar) obtaining permission for conversion of land. The civil judge dismissed the suit holding that the same was barred by limitation and further that the contract between the parties being a contingent contract, the agreement in view of the events that had happened made it unenforceable. On an appeal, the High Court reversed the decree and held that the agreement between the parties had not been cancelled by mutual consent. On the question whether the agreement was a

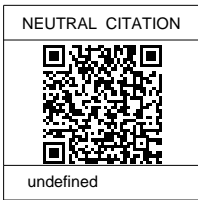




contingent contract, it was held by the Apex Court that there is always in such a contract implied covenant on the part of the vendor to do all things necessary to give effect to the agreement including obtaining of the permission for the transfer of the property.

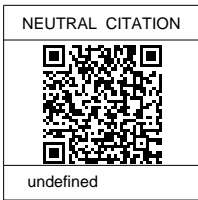
74. The decision of the Privy Council in **Motilal v. Nanhelal Ghasiram [AIR 1930 PC 287]** was relied therein to observe that it is an authority for the proposition that if the vendor agrees to sell the property which can be transferred only with the sanction of some Government authority, the Court has jurisdiction to order the vendor to apply to the authority within a specified period, and if the sanction is forthcoming to convey to the purchaser within a certain time. The law is well settled in this regard. (Ref: **Motilal v. Nanhelal Ghasiram [AIR 1930 PC 287]**, **Chandnee Widya Vati Madden Vs C.L.Katial & Others [AIR 1964 SC 978]**, **Rojasara Ramjibhai Dahyabhai Vs Jani Narottamdas Lallubhai (dead) by L.Rs., & others [(1986) 3 SCC 300]** and **R. C. Chandiok & Anr vs Chuni Lal Sabharwal [1971 AIR 1238]**).

75. It is settled that in the agreement to sell, when the vendor had agreed to do certain acts and things, there is an implied covenant on the part of the vendor to do all things necessary to give effect to the agreement, including the obtaining of permission or clearance for the transfer of the property.



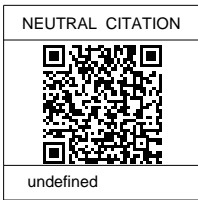
76. In **Govindbhai Gordhanbhai Patel & Ors vs Gulam Abbas Mulla Allibhai [1977 3 SCC 179 1977]**, while dealing with Section 63 of the Bombay Tenancy Act, the Apex Court had considered the question as to whether the performance of the contract therein became impossible, rather it became impracticable on the refusal of the Prant Officer to grant the permission under Section 63 of the Act. It was argued before the Apex Court that the contract was contingent upon the grant of permission by the Prant Officer and on refusal thereof, the parties would be governed by Section 56 of the Contract Act, according to which, a contract becomes void if something supervenes after its execution which renders it impracticable. While answering the question whether the order of the Prant Officer rendered the contract impracticable, it was noted by the Apex Court that the said order was not of such a catastrophic character as can be said to have struck at the very root of the whole object and purpose for which the parties had entered into the bargain in question or to have rendered the contract impracticable or impossible of performance.

77. It was held therein that a careful perusal of the order of the Prant Officer indicated that it was not conclusive nor was based on the merits of the application seeking permission, rather refusal was on technical ground which do not prohibit the appellant from making a fresh application to the Collector in view of Section 63 of the



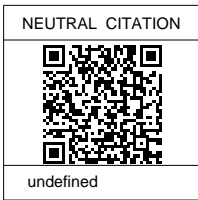
Tenancy Act. It was, thus, concluded that since the order of the Prant Officer therein did not put any fetter on the appellant to apply to the Collector or the Additional Collector for grant of the requisite permission for sale and purchase of the land after obtaining the aforesaid certificate, no untoward event or change of circumstances supervened to make the agreement factually or legally impossible of performance so as to attract Section 56 of the Contract Act.

78. In **Mrs. Chandnee Widya Vati Madden (supra)**, the Apex Court had discussed Section 12 and Section 21 of the Specific Relief Act, 1877. In the said case, one of the terms of the contract of sale of a house on the plot granted by the Government was that the vendor shall obtain necessary permission of the Government for sale within two months of the agreement and if the permission was not forthcoming within that time, it was open to the vendor to extend the date or to treat the agreement as cancelled. The vendor made an application, but for the reasons of her own withdrew the same. In the suit filed by the vendees for specific performance of the contract or in the alternative for damages, it was found that the vendees were always ready and willing to perform their part of the contract and that it was the vendor who willfully refused to perform her part of contract and that the time was not of the essence of the contract. The Supreme Court, thus, has held that the High Court was correct in decreeing



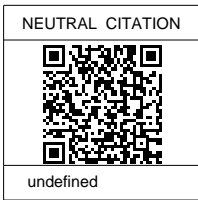
the suit for specific performance of the contract and has held that the main ground of attack in the appeal was that the contract was not enforceable being of a contingent nature and the contingency having not been fulfilled, was without substance.

79. It was observed therein that so far as the parties to the contract are concerned, they have agreed to bind themselves by the terms of the documents executed between them. Under that document, it was for the defendant vendor to make necessary application for the permission to the Chief Commissioner. For the reason best known to the defendant vendor, though such an application was made, but the vendor decided to withdraw the same. On the finding that the plaintiffs have always been ready and willing to perform their part of the contract and that it was the defendant who willfully refused to perform her part of the contract and that the time was not of the essence of the contract, the Court has directed to enforce the terms of the contract and to enjoin upon the defendant-appellant to make the necessary application to the Chief Commissioner or such other competent authority as may have been empowered to grant the necessary sanction to transfer within the time prescribed therein. It was further held that the High Court was entirely correct in decreeing the suit for specific performance of contract with the above direction and further that in the event of the sanction being refused, the plaintiff shall be entitled to the



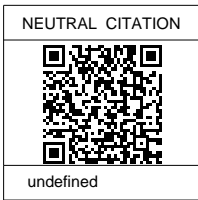
damages as decreed by the High Court.

80. The general principle is that if a condition is laid down that the transferor is bound to do everything to give effect to the contract, specific performance can be obtained with a direction to the transferor to obtain the requisite consent or permission. The principle is that unless and until the transaction itself is unlawful, it may be enforced directing the defendant/transferor to take such steps as are necessary for affecting the contract. The principle is that if the vendor has agreed to sell the property, which can be transferred only with the sanction of some Government authority, the Court has jurisdiction to order the vendor to apply to the authority and if the sanction is not forthcoming, to convey to the purchaser the same, but on the ground that the sanction is not available, decree for specific performance cannot be refused. It is settled that when permission from some authority is required to be obtained, prior obtaining of the same is not a condition precedent for grant of decree for specific performance, if after grant of the decree permission can be obtained. The conditional decree for specific performance can be granted making it subject to obtaining permission or exemption, as contemplated in the Statute. The relief can be moulded to such an extent that the vendor is required to obtain permission or consent. It has been the consistent view that on the ground of non-availability of consent or permission, the vendor cannot avoid such an agreement. There are



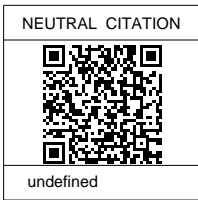
series of judgments of various High Courts, following the principles laid down in **Mrs. Chandnee Widya Vati Madden (supra)**. Reference may be made to **Khan Bhadur C.B. Taraporwala vs. Kazim Ali Pasha [AIR 1966 AP 361]**, **Indra Prasad Saxena vs. Chaman Lal Malik [AIR 1994 ALL 105]**, **Shri Rajesh Aggarwal vs. Shri Balbir Singh [AIR 1994 Del 345]**, **Rameshwarlal vs. Dattatraya [AIR 2010 MP 187]**.

81. Insofar as the decision in **Hasvantbhai Chhanubhai Dalal vs. Adesinh Manshin Raval [2019(2) GLH 357]**, where the Court has refused to grant a relief of specific performance of agreement, the transaction between the parties was held to be hit by Section 43 of the Tenancy Act and being opposed to public policy noticing the language of the statutory provision where prior permission was required for entering into an agreement for sale of the property. It was held that the agreement entered into without previous permission of the Collector was invalid being hit by Section 43 of the Tenancy Act and was unenforceable in law, as explained under Section 23 of the Contract Act. This Court in **Hasvantbhai Chhanubhai Dalal (supra)** has held that there is a clear bar for entering into an agreement to sell of the granted lands without previous permission of the Government and if an agreement is entered into in respect of such land, the same is in violation of Section 43 and is invalid. Section 23 of the Indian Contract Act, 1872 bars the enforcement of a contract, which is



forbidden by law. The agreement offending a statute or public policy or forbidden by law is not merely void but it is invalid from nativity. The term "law" in Section 23 must be understood in the sense of the term explained in Article 13(3) of the Constitution. Thus, what is done in contravention of the provisions of any law cannot be made the subject matter of an action. If the contract is expressly prohibited by law, it is *void ab initio* and cannot be enforced. In the circumstances, Courts cannot grant a decree for specific performance subject to the permission, which may be obtained by one of the parties from the Collector. The suit filed by the plaintiff for enforcement of the invalid agreement cannot be entertained by the civil court.

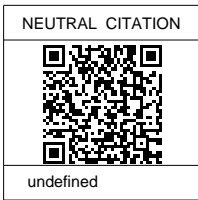
82. The principle that the courts will refuse to enforce an illegal agreement at the instance of a person who is himself a party to an illegality of fraud, as explained by the Apex Court in **Sita Ram vs. Radha Bai [AIR 1968 SC 534]**, relied by the learned Single Judge in **Hasvantbhai Chhanubhai Dalal (supra)**, will not be attracted in the instant case, inasmuch as, this case falls in the exceptional circumstances classified therein that *maxim "In pari causa potior est conditio possidentis"* does not apply, inasmuch as, the claimant does not have to carry on the illegality to make out his claim. The transaction herein though is invalid in view of Section 63 of the Tenancy Act, but can be validated with the permission of the Collector for transfer to non-



agriculturist before executing the deed of transfer.

83. The distinction between two statutory provisions under Sections 43 and 63 of the Gujarat Tenancy Act' 1948 has been noticed by the Full Bench of this Court in **Shaikh Ismailbhai Hushainbhai (supra)**, wherein it was held that there is a radical difference between the language of two statutes. The provisions of Section 43 of the Gujarat Tenancy Act puts complete prohibition in execution of even an agreement in writing to transfer a land of restricted tenure without the previous sanction of the Collector. In view of the negative language of the statute, the two conditions of transfer in Sub-section (1) of Section 43 are of mandatory character. Section 43, thus, not only prohibits transfer by sale, lease, etc, but it expressly prohibits execution of agreement in writing to transfer a land by sale, lease, etc. without complying with the conditions in Sub-section (1) of Section 43.
84. On the other hand, Section 63 (1) though couched in negative language, but the first proviso attached to Sub-section (1) qualifies the negative language employed in the main sub-section, which makes an agreement made by an instrument in writing for sale, lease etc. to a non-agriculturist invalid. The first proviso to Sub-section (1) of Section 63 attaches validity to such transfer on the permission being granted by the Collector or an authorised officer, on such conditions as may be prescribed. Sub-section (1) of Section 63 along with the first proviso attached to the same, thus, gives a clear

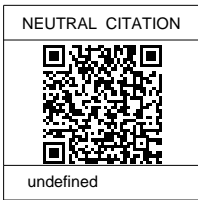




indication that though the instrument of transfer or agreement made by an instrument in writing for the transfer in favour of a non-agriculturist shall not be valid, but on the permission being granted by the Collector or an authorised officer on such conditions as may be prescribed in the order of permission, such a transfer can be validated. It was, thus, observed by the Full bench that though there is a restriction on transfer to a non-agriculturist, but there is no absolute bar under Section 63 for transfer, as contemplated in Section 43 about transfer of land of restricted tenure without the previous permission of the Collector.

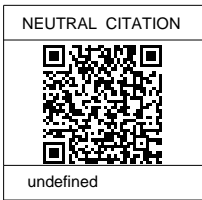
85. In light of the above the submission of the learned Senior counsel appearing for the respondents on the findings of the Court under Section 34 that the judgment of the Division Bench of this Court in **Vijaybhai Shambhubhai Patel vs. Sushilaben Dayalbhai** in **First Appeal No. 1556 of 2021**, which is in respect of Section 43 of the Tenancy Act and wherein it has held that there could not be specific performance of agreement to sell, which was hit by Section 43 of the Tenancy Act would apply with equal force to the Agreements for Sale hit by Section 63 of the Tenancy Act, inasmuch as, both the Sections are almost *pari materia*, has no substance and is liable to be turned down.

86. The conclusion drawn by the court under Section 34 about the transaction being hit by Section 63 and as



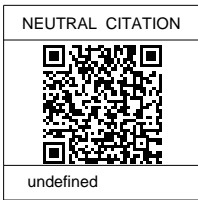
such incapable of being specifically enforced are, thus, in ignorance of the law laid down by this Court in a catena of decisions about the impact of Section 63 of the Gujarat Tenancy Act, beginning from **Govindbhai Gordhanbhai Patel (supra)** and the Full bench judgment in **Shaikh Ismailbhai (supra)** clarifying the legal position about the scheme of Section 43 and Section 63 of the Gujarat Tenancy Act. It cannot be said that since the agreements to sell were executed in favour of a non-agriculturist, no conditional decree for specific performance of the agreement could be passed by the learned arbitrator, inasmuch as, the agreements being invalid are in their nature determinable, cannot be enforced in view of Section 14(1)(d) of the Specific Relief Act.

87. It would not be a circumstance where the original claimant/appellant has to rely upon the illegal contract to make out his claim so as to draw the court's refusal to give effect to an illegal agreement at the instance of a person who is himself a party to the illegality, as held in the case of **Sita Ram (supra)**. The original claimant/appellant could have insisted upon the performance of the agreements by execution of sale deeds after grant of permission by the Collector.
88. Proceeding further, in the facts of the instant case, admittedly, it is noteworthy that a Power of Attorney dated 31.08.2007 was executed simultaneously with the execution of the agreements to sell giving power to the



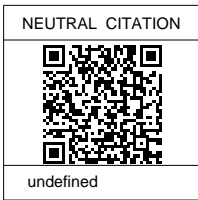
vendee/appellant/original claimant to apply and seek permission under Section 63 of the Gujarat Tenancy Act. The agreement for sale further provided period of six months for obtaining of such permission. However, the claimant had not taken any step by applying for obtaining requisite permission in the specified time limit until the Power of Attorney was cancelled in the year 2012. The claimant had approached the arbitral tribunal after 5 years, which resulted in the claim being held time barred under Section 54 of the Limitation Act, which provided the limitation for specific performance of an agreement being three years from the date fixed for the performance and if no such date is fixed, when the plaintiff has noticed that performance is refused. The present is a case where the original claimant-vendee himself had abandoned the contract and never shown his readiness and willingness to perform his part of the contract. There was no obligation on the part of the vendors-respondents herein to obtain NA permission, inasmuch as, the claimant-vendee had taken upon himself to initiate the process for conversion of land within the stipulated period in the agreement by getting a Power of Attorney. It would not be a case where the vendors had refused the performance of the agreement and the period of limitation would start from the date of cancellation of the Power of Attorney signifying refusal on the part of the vendors.

89. The communications between the vendor and one Mr.



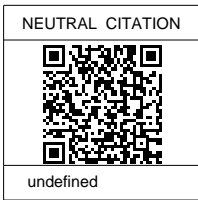
Dharmendra Gandhi or any Memorandum of Understanding executed between them, relied by the learned Arbitrator are irrelevant. The claimant though has simply stated that he was ready and willing to perform the terms and conditions of the contract and also admitted that a Power of Attorney was given to him on 31.08.2007, but have simply laid the burden upon the vendors, viz. the respondents herein that they have not got the property converted from agricultural to non-agricultural. It is the case of the claimant that all throughout, they were requesting the respondents and the mediator/facilitator Mr. Dharmendra Gandhi to inform as to the current status and progress of converting the land from agricultural to non-agricultural and every time, assurance was given to have personal discussion. The claimant, however, when inspected the records of the Revenue Department on 20.01.2011, he came to know that the respondents had executed sale deed in favour of a third party for some of the properties which have been kept out of the claim petition.

90. A Memorandum of Understanding dated 29.03.2007 Exhibit 16 was arrived between the mediator Mr. Dharmendra Gandhi and the vendee, whereunder it was agreed that the respondents shall not transfer, assign, mortgage the suit property to a third party and the respondents will get title clearance certificate for the suit property and would get the property converted from agricultural to non-agricultural use before execution of



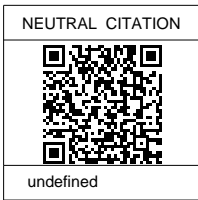
the sale deed in favour of the claimant. It is the case of the claimant that in the month of June 2012, they came across a public notice in the newspapers that the vendors have revoked the Power of Attorney given to them with respect to the suit properties and other properties, which were part of Exhibit 16. The claimant then moved the civil court under Section 9 of the Arbitration Act' 1996 seeking to restrain the respondents (vendors) from alienating or creating third party right over the property, subject matter of the agreement. The learned arbitrator was appointed in the proceedings under Section 9 with the consent of the parties.

91. However, the fact remains that on account of silence on the part of the claimant or inaction in proceeding with the application to seek permission of the Collector for a period of five years from the date of execution of the contract in-spite of having a Power of Attorney in his favour, the agreement became impossible to perform. The circumstances supervened after execution of the agreement struck the agreement at the very root of the whole object and purpose of the agreement and rendered the contract impracticable or impossible of performance, inasmuch as, the suit for specific performance of the agreements became time barred by virtue of Article 54 of the Limitation Act. This aspect of the matter has been conveniently ignored by the learned arbitrator while holding that there was no time fixed or stipulated to complete the transaction and filing the suit



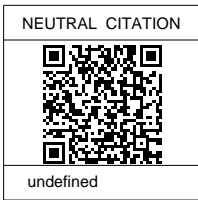
for specific performance of agreement would run from the date the public notices were issued in the month of June 2012 in the newspapers revoking the Power of Attorney executed in favour of the vendee.

92. The learned arbitrator committed a patent illegality in holding that the claimant came to know only from the public notice that the vendors were not inclined to execute the document of transfer after converting the lands from agricultural to non-agricultural and complying other conditions when the notices were published in the newspapers in the month of June 2012 and, thus, the performance of the agreement was refused and the suit, as such, cannot be said to be barred by limitation.
93. Apart from the above, there is one more aspect of the matter where the learned arbitrator had faced with an application under Section 13(2) of the Arbitration Act' 1996 wherein doubt had been raised about the independence and impartiality of the learned arbitrator. Admittedly, the said application was filed during the course of the arbitration proceeding by the respondents-vendors and the record indicated that the learned sole arbitrator had a close relationship with Mr. Mahendra G. Lodha even prior and during the course of the arbitral proceedings. During the period from the year 2004 to 2010, the learned arbitrator was a founder trustee of the Trust 'Justice on Trial' of which Mr. Mahendra G. Lodha was also one of the trustees. Moreover, during



continuance of the arbitration proceeding, learned arbitrator had attended the birth day party of the grandson of Mr. Mahendra G. Lodha in the year 2014 along with his family, which further suggested that the relationship between the learned arbitrator and Mr. Mahendra G. Lodha were personal and had continued even during the course of the arbitral proceedings.

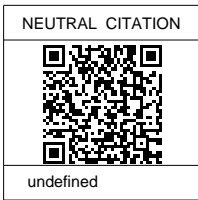
94. The record also proves and it is undisputed that Mr. Mahendra G. Lodha had pecuniary interest in the claimant Company and this fact had surfaced during the course of cross-examination of Mr. Rajesh Lodha, the Director of the claimant Company, in the year 2015. The fact of Mr. Mahendra G. Lodha having 51% share in the claimant Company, being the Director of Pinal Infrastructure Pvt. Ltd., had come to the knowledge of the respondents while arbitral proceedings were going on and on 26.09.2016, when the oral arguments were completed in the matter, an application under Section 12(2) of the Arbitration Act' 1996 was filed. The applicants-respondents had categorically stated therein that the fact that Mr. Mahendra G. Lodha was cousin brother of Mr. Rajesh Lodha and had purchased 51% shareholding of the claimant Company in the year 2012 of which Mr. Mahendra G. Lodha became Director, had surfaced in the arbitral proceeding for the first time on 08.03.2015 during the course of cross-examination of Mr. Rajesh Lodha. However, the fact that the learned arbitrator and Mr. Mahendra G. Lodha were trustees of



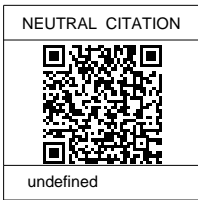
the Trust 'Justice on Trial' from 2004 to 2010 recently came to the knowledge of the respondents after which they moved application under Section 12(2) on 26.09.2016.

95. The said fact was further supported by means of a rejoinder affidavit filed on 09.10.2016 by the vendors before the tribunal along with the list of documents like Annual statement and Trust Deed etc. It was the case of the respondents/vendors that during the arbitration proceedings, which commenced from 17.05.2013 and when the arguments were completed on 12.08.2016, interest of Mr. Mahendra G. Lodha and the relationship of the learned arbitrator with Mr. Mahendra G. Lodha could be found which had not been disclosed.
96. In these facts and circumstances, when such facts were surfaced during the course of arbitration proceedings, we are of the considered view that the learned arbitrator ought to have recused himself from forming any opinion on the claim of the parties by rejecting the application under Section 12(2) vide order dated 20.10.2016. While rejecting the application, the learned arbitrator did not contradict the aforesaid facts brought before him and the stand of the applicants in the application under Section 12(2) of the Arbitration Act' 1996, rather had proceeded to hold that there was not a single, direct or indirect, remote or recent instance to show bias or partiality by the learned arbitrator.





97. The learned arbitrator has proceeded to hold that apart from the the material brought with the affidavit-in-rejoinder filed on 12.10.2016, there was nothing on record to show the interest of Mr. Mahendra G. Lodha in the claimant Company, viz. Sentinel Properties Private Limited, and further the subsequently acquired Company, viz. Nitrix Logistics Pvt. Ltd. had no nexus with the claimant Sentinel Properties Pvt. Ltd. and all imputation on the learned arbitrator was only mental perception of the applicants, inasmuch as, the applicants knew that the learned arbitrator had attended the birthday celebration of the grandson of Mr. Mahendra G. Lodha, wherein one of the the applicants, viz. Mr. Ajay Patel himself was also an invitee.
98. In the order impugned dated 20.10.2016, the learned Arbitrator had admitted that he was co-trustee with Mr. Mahendra G. Lodha for few years in a public trust and they had attended the meetings together. It was also admitted that the learned arbitrator had attended the family function of the birthday party of the grandson of Mr. Mahendra G. Lodha alongwith his wife on 08.11.2014, when the arbitral proceedings were going on. Mr. Mahendra G. Lodha was the Director of Pinal Infrastructure Pvt. Ltd, which holds major 51% share of the claimant Company was also not disputed. The said Pinal Infrastructure Pvt. Ltd. was merged with Nitrix Logistics Pvt. Ltd and thereby Nitrix Logistics Pvt. Ltd. became major shareholder of the claimant Company,

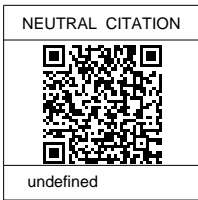


which in turn holds major 51% shareholding in the claimant Company, was not disputed.

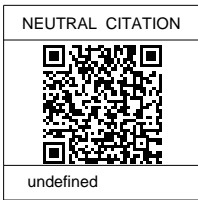
99. The name of Mr. Mahendra G. Lodha had surfaced for the first time in the cross-examination of Mr. Rajesh Lodha in the year 2015, who is the Director of the claimant Company is a fact admitted on the record. It was admitted by Mr. Rajesh Lodha in his cross-examination that Pinal Infrastructure Pvt. Ltd. had purchased 51% share of the claimant Company in the year 2011. Mr. Mahendra G. Lodha filed an affidavit in the arbitral proceedings in support of the claimant Company stating that he is the shareholder of the claimant Company and is familiar with the arbitral proceedings.

100. In light of the above fact, we find that the court under Section 34 has rightly reached at the conclusion of existence of circumstances referred to in Section 12(1) (a) of the Arbitration Act' 1996. It was rightly concluded that when in the cross-examination of Mr. Rajesh Lodha, it was revealed that Mr. Mahendra G. Lodha had interest in Pinal Infrastructure Pvt. Ltd., the learned arbitrator ought to have made the disclosure of the circumstances referred to in Section 12(1) of the Arbitration Act, 1996.

101. In the totality of the facts and circumstances of the instant case, the manner in which the learned arbitrator has dealt with the whole issue, it cannot be said that it does not give rise to a justifiable doubt as to the



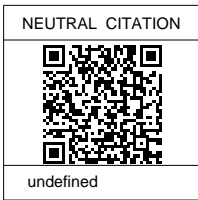
independence and impartiality of the learned arbitrator in the mind of a reasonable man. Independence and impartiality of the arbitrator are hallmark of the arbitral proceedings. Section 12 has been amended by the Amendment Act, 2015 and it is manifest that the main purpose for amending the provision was to provide for neutrality of the arbitrator, i.e. their independence and impartiality. The amended provision is enacted to identify the circumstances "which give rise to justifiable doubts about the intention or impartiality of the arbitrator". If any of these circumstances as mentioned in the Fifth Schedule exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule enumerates the grounds as guidance in determining whether circumstances exist, which give rise to justifiable doubts of this nature. Likewise, the Seventh Schedule mentions those circumstances which would attract the provisions of Sub-section (5) of Section 12 and nullify any prior agreement of the contrary. A comprehensive list is enumerated in the Fifth Schedule and Seventh Schedule and it was the bounden duty of the learned arbitrator to make a disclosure if any of the circumstances enumerated in the Fifth Schedule exist or surfaced during the course of arbitration proceedings. Section 12(2) mandates the learned arbitrator to disclose to the parties in writing any circumstances referred to in Sub-section (1) of Section 12, from the time of his appointment and throughout the arbitration proceedings, unless the parties have already been



informed of them by him.

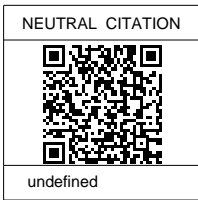
102. As observed by the Apex Court in **Voestalpine Schienen GmbH (supra)**, the judgment relied by the learned counsel for the respondents, independence and impartiality are two different concepts. An arbitrator may be independent and yet, lacks impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept may thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while impartiality will more likely surface during the arbitration proceedings.

103. In our considered opinion, once the circumstances enumerated in Clause 9 of the Fifth Schedule to the Arbitration Act' 1996 has surfaced during the course of arbitration proceedings and it was brought on record that the learned arbitrator has a close family relationship with one of the persons controlling the claimant Company having 51% share of the claimant Company, it was incumbent for the learned arbitrator to keep his hands off, inasmuch as, there has been no disclosure on the part of the learned arbitrator when the said fact came on record for the first time in the year 2015 during the course of the cross-examination of Mr. Rajesh Lodha. We are also inclined to give benefit of doubt to the learned arbitrator that he was not aware of



the stakes of Mr. Mahendra G. Lodha in the Claimant Company, but when this fact was brought to his knowledge even after the completion of the argument by means of the application under Section 12(2) of the Arbitration Act' 1996 filed on 26.09.2016 prior to filing of the written statement, in order to maintain the independence and impartiality of the arbitral proceedings, the learned arbitrator ought to have recused himself as the circumstances existed has an effect giving rise to justifiable doubts as to the independence and impartiality of the learned arbitrator.

104. For the above discussion, we are of the view that the award of the learned arbitrator is found to be vitiated by patent illegality appearing on the face of the record being in conflict with the basic notions of justice and morality and, thus, being in conflict with the public policy of India. The illegality found in the award is not trivial, but goes to the very root of the matter and, thus, the interference made by the court in setting aside the award in terms of Section 34(2) (b)(iii) and Sub-section (2A) cannot be said to suffer from any error of law. This is not a case where the award has been found to be bad on review of the case of the parties on merits by re-appreciation of the evidence or on the premise that the award is a result of erroneous application of the statutory provision. The claim was found to be hit by Article 54 of the Limitation Act on the face of the record and as such could not have been awarded and further,



justifiable doubts about the independence and impartiality of the learned arbitrator have been expressed even before making of the award in view of the circumstances as narrated in the Fifth Schedule to Arbitration Act' 1996, brought on record.

105. For the above discussion the challenge to the order passed by the civil court under Section 34 of the Arbitration and Conciliation Act, 1996 is hereby turned down. The appeals under Section 37 of the Arbitration and Conciliation Act, 1996 are accordingly, dismissed being devoid of merits. No order as to costs.

Connected Civil Applications would not survive and shall stand disposed of, accordingly.

**(SUNITA AGARWAL, CJ )**

**(PRANAV TRIVEDI,J)**

### **FURTHER ORDER**

At the time of delivering the judgment the prayer made by Mr.Mihir Joshi, learned Senior Advocate appearing for the appellant to pass an order of status quo is hereby turned down.

**(SUNITA AGARWAL, CJ )**

**(PRANAV TRIVEDI,J)**

BIJOY B. PILLAI