REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6112 OF 2021
(Arising out of SLP(C) No.11267/2021)

RATNAM SUDESH IYER … Appellant

Versus

JACKIE KAKUBHAI SHROFF …Respondent

J U D G M E N T

SANJAY KISHAN KAUL, J.

1. Business associations can sour and that is what has happened in the present case. That the association was across the seas is another aspect. The two parties before us were shareholders in the investment holding company called Atlas Equifin Private Limited, India (for short 'Atlas') which held 11,05,829 equity shares of Rs.10 each in Multi Screen Media Pvt. Ltd. (for short 'MSM'). It appears that the appellant had been attempting to sell the shares in MSM since 2002. In furtherance of the said objective, a placement instruction dated

15.11.2005 was signed by the parties authorising Standard Chartered Bank (for short 'SCB') as their agent to identify the purchaser for the appellant's shares in Atlas. The dispute apparently commenced on account of the stand of the respondent that his signatures on the placement instructions had been forged. Accordingly, he lodged a complaint with the Economic Offences Wing, Mumbai Police (for short 'EOW') on 19.04.2010 against both the appellant and the SCB.

2. Better sense appears to have prevailed at that stage amongst the parties, or if one would say commercial sense; and they endeavoured to resolve their disputes by entering into a Deed of Settlement dated 03.01.2011. Since the present proceedings need to be adjudicated on aspects which emerge from the Deed of Settlement, it would be appropriate at this stage to set out the gist of its relevant clauses.

a. Clause 2 provided that the respondent would withdraw all complaints and proceedings filed against the appellant.

b. Clause 3 forbade the respondent from writing letters, communications, or complaints to any person about the subject matter of the Deed of Settlement. The latter part of the said clause reads as under:

> "3.....It is farther agreed that in future Jackie shall not write any letter or communication or complaint to any police authority/ies and/or any other judicial, quasi-judicial authority or statutory authority or any person or entity complaining about the subject matter of the present Deed." (sic)

c. As a monetary incentive to the respondent to bring the complaints to an end, an amount of US$ 1.5 million was to be paid to the respondent as per clause 4.1. This amount vide banker's cheque was to be held in an Escrow by M/s. D.M. Harish & Co., to be handed over to the respondent on confirmation by the EOW of the appellant having withdrawn his complaint dated 19.04.2010. The respondent was also required to give further assurance to ensure that if any quashing proceedings are initiated, he would cooperate in the same.

d. As per Clause 4.2, US$ 2 million was to be paid to the respondent within seven (7) days of the receipt of the proceeds from the sale of MSM's shares.

e. The respondent was put to terms for committing any breach of the Deed of Settlement in clause 6, the consequence of which would be the termination of the Deed of Settlement and the release of US$ 1.5 million kept in escrow back to the appellant.

f. The Deed of Settlement contained an arbitration clause for resolution of disputes in clause 9. The said clause reads as under:

> "9. If any dispute arises between the parties hereto in relation to any provision of this Deed, the dispute shall be referred to Arbitration by a single Arbitrator to be appointed by mutual consent. The Arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 of India or any amendment thereto. Courts in Mumbai shall have jurisdiction in relation to any legal action or proceeding arising out of or in connection with this Deed."

Trigger for arbitration:

3. The appellant claimed breach of the aforesaid Deed of Settlement by an e-mail dated 09.06.2011 from the wife of the respondent informing the appellant that "....*once again you are not being straight with us, and I'm concerned about this*." Copy of this e-mail was marked to some of their associates. This was alleged to be the first breach. The second breach was another e-mail dated 15.06.2011, once again, by the wife of the respondent. The email stated that "*I have no wish to continue to fraternise with a forger.*" Thereafter the e-mail sought to refer to the Deed of Settlement and the alleged failure of the appellant not to give

updates to the respondent. This e-mail was also circulated to their associates. On the respondent asking the appellant on 30.06.2011 to complete the sale of shares for release of the second escrow cheque of US$ 2 million, the appellant replied the same day stating that the respondent could not push him to sell. The appellant also alleged the breach of the Deed of Settlement by the false and defamatory e-mail on 15.06.2011. This triggered recourse to the arbitration clause.

Arbitral proceedings and Court proceedings in relation to arbitral proceedings:

4. In July 2012, a share purchase agreement was executed for MSM's shares and the transfer was pending approval by the Foreign Investment Promotion Board. The appellant filed a petition under Section 9 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'said Act') seeking interim relief against the respondent, his wife, and the escrow agent. The appellant claimed that the amount should not be released to the respondent on account of the breach of the Deed of Settlement through the e-mail sent by the respondent's wife on 15.06.2011. In the said proceedings, being Petition No.853/2012, a consent order was passed on 06.08.2012 in terms whereof the

respondent's wife was dropped from the array of parties as she was not a party to the Deed of Settlement. The disputes were referred by consent to the sole arbitration of a former Judge of the Supreme Court of India. It was further directed that the escrow agent would hand over the cheque for US$ 1.5 million only after the direction of the arbitrator.

5. The appellant lodged a claim before the arbitrator seeking a refund of US$ 1.5 million (Rs.8.49 crore) with 18 per cent interest per annum w.e.f. 07.07.2011 till the date of payment. A statement of claim was filed before the arbitrator dated 2.11.2012 in the following terms:

> "52. The Claimant therefore prays:
>
> (a) that this Hon'ble Tribunal be pleased to hold and declare that the Respondent has breached the Deed of Settlement dated January 3, 2011 and severely harmed and damaged the hard-earned reputation of the Claimant.
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> (b) that this Hon'ble Tribunal be pleased to hold and declare that as a result of the breach of said Deed by the Respondent the Respondent has caused damage to the Claimant as stated in the Particulars of Claim or such amount as this Hon'ble Tribunal may deem just and reasonable;
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> (c) that this Hon'ble Tribunal be pleased to order and direct Respondent to compensate the Claimant and pay the damages as stated in the Particulars of Claim (Annexure "S") or such amount as this Hon'ble Tribunal may deem just and reasonable with interest thereupon as stated in the Particulars of Claim;
>
> (d) that this Hon'ble Tribunal be pleased to order and direct

that the Respondent forthwith refund the sum of US$ 1.5 Million or Indian Rupees 8 crores 49 lakhs to the Claimant with interest thereupon @ 18% per annum from July 7, 2011 till the date of payment by the Respondent to the Claimant.

(e) that this Hon'ble Tribunal be pleased to order and direct that the Respondent by himself his officers, servants, and agents be restrained by an order and permanent injunction of this Hon'ble Tribunal from seeking the release of, and/or encashing the Second Cheque from the Escrow Agent and that the Claimant be permitted to take custody of the Second Cheque from the Escrow Agent or the Escrow Agent be directed and ordered to hand-over the Second Cheque to the Claimant.

(f) that this Hon'ble Tribunal be pleased to order and direct that the Respondent by himself his officers, servants, and agents be restrained by an order and permanent injunction of this Hon'ble Tribunal from making any false, baseless and defamatory statements against the Claimant in breach of the express terms of the Deed of Settlement.

(g) For the costs of this Claim; and

(h) For such further and other reliefs as the nature and circumstances of the case may require and the Hon'ble Tribunal deems fit."

6. The respondent sought recourse to Section 16 of the said Act seeking to raise a jurisdictional challenge against the reference, however the arbitrator opined on 17.01.2013 that there could not be a threshold rejection of the appellant's claim. Thereafter the proceedings were contested by the respondent.

7. It may be noticed that MSM's shares were sold in March, 2013, and on 06.04.2013, Atlas declared and paid dividend to its shareholders from the proceeds. The appellant immediately thereafter filed an application under Section 17 of the said Act seeking to attach an amount of US$ 1.5 million which the respondent was to receive as his share of the said proceeds. That application was rejected and further proceedings in respect of the same also met the same fate in the High Court. That being the position, the respondent filed a petition under Section 9 of the said Act seeking directions to the escrow agent to hand over US$ 2 million on account of sale of MSM's shares. However, the same was dismissed on 02.04.2014 *inter alia* on the ground that the appellant was resisting the payment and seeking a refund, and the appeal against the same was dismissed as withdrawn.

8. The learned arbitrator made the final award on 10.11.2014, awarding a claim for liquidated damages of US$ 1.5 million in favour of the appellant, as set out in clause 6 of the Deed of Settlement. The award also held that the respondent would not be entitled to the second cheque of US$ 2 million held in escrow, on account of the respondent's breach of the Deed of Settlement.

9. The respondent moved a petition under Section 34 of the said Act on 24.01.2015 before the Bombay High Court as Arbitration Petition No.167/2015, while the appellant filed for execution of the award. Consequently, the respondent also filed for stay of the enforcement of the award. Interim stay was granted on 06.04.2018 and the SLP against the same was dismissed, being SLP No.27085 of 2018. The learned Single Judge of the High Court set aside the award in terms of the judgment dated 19.05.2020. The appeal filed by the respondent under Section 37 of the said Act was dismissed by the Division Bench in terms of the impugned judgment dated 20.04.2021. The High Court also granted interim protection against withdrawal of the amount specified under the Deed of Settlement for a limited period of time.

10. In the Special Leave Petition while issuing notice on 02.08.2021, the interim arrangement by the High Court was extended and after grant of leave, arguments were concluded on 28.09.2021.

11. In the conspectus of these facts, we feel the need for setting forth certain legal principles within the contours of which the present dispute needs to be adjudicated.

The nature of arbitral proceedings:

12. One of the issues raised before us is the nature of the award. The appellant claims that it is an award arising out of an international commercial arbitration. To appreciate this contention we turn to Section 2(1)(f) of the said Act, which reads as under:

> "2. Definitions. —
> (1) In this Part, unless the context otherwise requires,—
>
> xxxx xxxx xxxx xxxx
> (f) "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—
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> (i) an individual who is a national of, or habitually resident in, any country other than India; or
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> (ii) a body corporate which is incorporated in any country other than India; or
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> (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or
>
> (iv) the Government of a foreign country;"

The admitted position is that the appellant is a party based in Singapore and thus, in terms of the aforesaid definition the arbitration although carried out a within the country, would be an "international commercial arbitration". We may notice at this stage that it is

nobody's case that the award in question is a foreign award within the meaning of Part II Section 44 of the said Act. For domestic awards, Chapter 7 of the said Act provides recourse against the arbitral award. Section 34 of the said Chapter provides for application for setting aside an arbitral award and specifies the ground available for the same. The Arbitration and Conciliation (Amendment) Act, 2015 (for short '2015 Amendment Act') amended the said Act w.e.f. 23.10.2015; *inter alia* by inserting Explanations to Section 34(2) of the said Act as well as by inserting Sub-Section 2A to Section 34. There is no doubt that the scope of interference by the Court became more restrictive with the amendments coming into force. The pre-amendment position with respect to expression "in conflict with public policy of India" was enunciated by this Court in ***Ssangyong Engineering and Construction Company Ltd. v. National Highways Authority of India (NHAI)***[1]**,** which referred to the judgment of this Court in ***Associated Builders v. Delhi Development Authority***[2].

13. A distinction is sought to be carved out between a domestic award arising from an international commercial arbitration and a purely

1(2019) 15 SCC 131.
2(2015) 3 SCC 49.

domestic award. The test for interference was sought to be made more stringent by the amendment in respect of a domestic award arising from an international commercial arbitration.

14. We may note that Explanation 1 sought to elucidate what is meant by "in conflict with the public policy of India" by narrowing it to the three aspects therein as under:

> "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."

15. The further elucidation is by Explanation 2, which reads as under:

> "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."

16. A distinction is sought to be made between purely domestic awards and awards arising out of arbitrations other than international

commercial arbitrations, as set out in sub-section 2A to Section 34 of the said Act, which reads as under:

> "(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."

17. The crux of the aforesaid is that while the plea of the award being vitiated by patent illegality is available for an arbitral award, such an award has to be a purely domestic award, i.e. the plea of patent illegality is not available for an award which arises from international commercial arbitration post the amendment.

18. We are noticing the aforesaid distinction as it appears that the judgments of the learned Single Judge and the Division Bench decide the challenge to the award on the plea of patent illegality without noticing this distinction. No doubt both judgments proceed on the basis that in either situation, i.e., within the test available for a purely domestic award or a domestic award arising from an international commercial arbitration; the award cannot be sustained. Thus far as to the nature of the award.

Whether the amendment would apply in the facts of the present case:

19. It is the say of the appellant that the award has to be scrutinised in the post amendment scenario and, thus, both the forums below fell into error by applying the test applicable in the pre-amendment scenario. It is, thus, the appellant's say that patent illegality has no application as a test to the award in question.

20. It is not in dispute that the Section 34 proceedings commenced prior to 23.10.2015, which is the crucial date. As to when the amendment would apply is an aspect that is no longer *res integra*. We may refer to relevant judicial pronouncements in this regard.

21. In ***Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. & Ors.***[3] a reference was made to Section 26 of the 2015 Amendment Act which had bifurcated proceedings into arbitral proceedings and court proceedings. The said provision reads as under:

> "26. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act, unless the parties, otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

3(2018) 6 SCC 287.

22. It was clearly elucidated in para 39 of the judgment that the reason behind the first part of Section 26 of the 2015 Amendment Act being couched in the negative was only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if the parties otherwise agree. This is not so in the second part. The judgment derived that the intention of the legislature was to mean that the 2015 Amendment Act is prospective in nature and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the said Act, on or after the 2015 Amendment Act, and to court proceedings which had commenced on or after the 2015 Amendment Act came into force.

23. The applicability of Section 34(2A) was further elucidated in ***Ssangyong Engineering and Construction Company Ltd. v. National Highways Authority of India***[4], where the SC categorically opined that Section 34 as amended will apply only to Section 34 applications that have been made to the Court on or after 23.10.2015, irrespective of the fact that the arbitration proceedings may have commenced prior to that date.

24. In the subsequent judgment of ***Hindustan Construction Company***

4 (2019) 15 SCC 131.

Ltd. and Anr. v. Union of India & Ors.[5],it was observed in para 60 that the result of the *BCCI* judgment was that salutary amendments made by the 2015 Amendment Act would apply to all court proceedings initiated after 23.10.2015.

25. The contention of the appellant, faced with the aforesaid judicial pronouncements, solely rests on the wording of clause 9 of the Deed of Settlement, which provides that "the Arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 of India **or any amendment thereto**."(Emphasis supplied). The submission thus was that this phraseology of clause 9 included the possibility of any future amendments to the said Act being made applicable to the arbitration in question.

26. We have to thus examine the effect of such phraseology used in the arbitration clause.

27. In the context of the Arbitration Act, 1940 (hereinafter referred to as the 'Old Act') and the said Act, there are some observations in ***Thyssen Stahlunion Gmbh v. Steel Authority of India Limited***[6], which are relevant for the purposes of this discussion. While opining that the

52019 SCC OnLine 1520.
6(1999) 9 SCC 334.

provisions of the Old Act would apply in relation to arbitral proceedings which had commenced before the coming into force of the said Act, this Court referred to the 'Repeal and savings' provision in Section 85(2)(a) of the said Act. It was observed that the phrase "in relation to arbitral proceedings" cannot be given a narrow meaning so as to mean only pendency of arbitration proceedings before the arbitrator, but would also cover proceedings before the court. The appellants cited two judgments of the Bombay High Court in support of their case, i.e**.,** ***Padmini Chandran Menon*** **v.** ***Vijay Chandran Menon***[7] and ***Board of Trustees of the Pot of Mumbai v. Afcons Infrastructure Limited,***[8] which in turn rely on ***Thyssen Stahlunion Gmbh***(supra).

28. However, the general observations aforesaid cannot come to the aid of the appellant in view of a number of judicial pronouncements by this Court which deal with a similar issue.

29. In ***S.P. Singla Constructions Pvt. Ltd. v. State of Himachal Pradesh & Anr.***[9], the arbitration clause provided that the arbitration would be subject to the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof. A plea was raised that the

7 (2018) 2 AIR Bom R 108.
8 2016 SCC Online Bom 10037.
9(2019) 2 SCC 488.

amended provisions would apply in accordance with Section 26 of the 2015 Amendment Act. This contention was repelled by the Court which opined that such general conditions of the contract cannot be taken to be an agreement between the parties to apply the provisions of the 2015 Amendment Act. As a result, the provisions of the 2015 Amendment Act would apply only in relation to arbitral proceedings commenced on or after the date of commencement of the 2015 amendment.

30. In a similar vein, the arbitration clause in ***Union of India v. Parmar Construction Company***[10]provided that "subject to the provisions of the aforesaid Arbitration and Conciliation Act, 1996 and the Rules thereunder and any statutory modifications thereof shall apply to the arbitration proceedings under this Clause."

Relying on this clause, a contention was sought to be raised that the 2015 Amendment Act would apply to the arbitral proceedings which had been pending on 23.10.2015.It was opined by this Court that a conjoint reading of Section 21 of the said Act and Section 26 of the 2015 Amendment Act left no manner of doubt that the provisions of the 2015

10(2019) 15 SCC 682.

Amendment Act shall not apply to arbitral proceedings which had commenced in terms of the provisions of Section 21 of the said Act unless the parties otherwise agree. Whether the application was pending for appointment of an arbitrator or in the case of rejection because of no claim as in that case for appointment of an arbitrator including change/substitution of the arbitrator was held not to be of any legal effect for invoking the provision of the 2015 amendment. While ***S.P. Singla***[11] and ***Parmar Construction Company***[12] opined on the topic of arbitral proceedings, we may note here that the matter concerns Section 34 proceedings for setting aside the award. In this case, the Section 34 proceedings had already commenced when the 2015 Amendment Act came into effect. The court proceedings were already subject to the pre-2015 legal position. In a conspectus of the aforesaid, a generally worded clause such as Clause 9 of the Deed of Settlement cannot be said to constitute an agreement to change the course of law that the Section 34 proceedings were subject to. We may also note that a learned single Judge of the Delhi High Court in ***ABB India Ltd. v. Bharat Heavy***

11 supra
12supra

Electricals Ltd.[13], while referring to the judgment in ***Parmar Construction Company***[14] case, has proceeded in accordance with this Court's observations while distinguishing the judgment in ***Thyssen Stahlunion Gmbh***[15].In the context of anticipating new enactments that may come into operation, it was opined that while ***Thyssen Stahlunion Gmbh***[16] dealt with Section 85(2)(a) of the said Act, this provision is dissimilar to Section 26 of the 2015 Amendment Act. Section 26 starts with a negative covenant which is subject to an exception in the case of an agreement between the parties, whereas the observations in ***Thyssen Stahlunion Gmbh***[17]were coloured by Section 85(2)(a) of the said Act which is structured differently. We refer to the same only to give our imprimatur. The relevant portion of *ABB India Ltd.* (supra) reads as follows:

> "71. Besides, in Thyssen Stahlunion GMBH, there was no provision, similar to Section 26 of the 2015 Amendment Act, which is crucial to adjudication of the dispute in the present case. In this context, it is necessary to distinguish the structure of Section 85(2)(a) of the 1996 Act, with Section 26 of the 2015 Amendment Act. Whereas Section 85 (2)(a) of the 1996 Act made, inter alia, the 1940 Act applicable to arbitral proceedings which commenced before the coming into force of the 1996 Act, unless

13OMP (T) (Comm) No.48/2020
14supra
15supra
16supra
17supra

> otherwise agreed by the parties. Section 26 of the 2015 Amendment Act starts with a negative covenant, to the effect that nothing contained in the 2015 Amendment Act – which would include the insertion of Section 12(5) of the 1996 Act – would apply to arbitral proceedings, commenced before the 2015 Amendment Act came into force, i.e. before 23rd October, 2015. This negative covenant was subject to an exception in the case of agreement, otherwise, by the parties. Structurally and conceptually, therefore, Section 26 of the 2015 Amendment Act is fundamentally different from Section 85(2)(a) of the 1996 Act, and requires, therefore, to be interpreted, keeping this distinction in mind."

31. We may note that the line of reasoning in ***Ssangyong Engineering and Construction Company Ltd.***[18] itself shows that to prevent any uncertainty in law, while seeking to fine tune the law to restrict the scope of interference in awards the legislature took a conscious decision to make applicable the amendments only from the date it came into force. Thus, the general phraseology of a clause which seeks to include any amendment to the Act would not be able to be availed of to expand the scope of scrutiny as it would appear to run contrary to the legislative intent of Section 26 of the Amendment Act. In this regard it may be appropriate to refer to the Supreme Court's observations in ***Ssyangong Engineering and Construction Company Ltd.***[19] (supra) relating to the

18 supra
19 supra

scope of 'public policy' as a ground to set aside arbitral awards before the 2015 Amendment Act:

> **24.** Yet another expansion of the phrase "public policy of India" contained in Section 34 of the 1996 Act was by another judgment of this Court in *Western Geco* [*ONGC* v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , which was explained in *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] as follows : (SCC pp. 73-77, paras 28-34)
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> "*28.* In a recent judgment, *ONGC* v. *Western Geco International Ltd.* [*ONGC* v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held : (SCC pp. 278-80, paras 35 & 38-40)
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> […]
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> *29.* It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.
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> *30.* The *audi alteram partem* principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(*a*)(*iii*) of the Arbitration and Conciliation Act. These sections read as follows:
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> '**18.** ***Equal treatment of parties***.—The parties shall be treated with equality and each party shall be given a full opportunity to present his case.
>
> ***
>
> **34.** ***Application for setting aside arbitral award***.—(1) * * *

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

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

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

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

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

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

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

such decision would necessarily be perverse."

Factual Analysis:

32. We have considered the aforesaid two legal issues which would govern the present case and have come to the conclusion that it would be the pre-2015 legal position which would prevail. That being the position, we would have to examine whether in the conspectus of that legal position it can be said that the learned Single Judge and the Division Bench erred in setting aside the award.

33. It is no doubt true that the arbitrator has the first hand benefit of recording evidence and examining the factual scenario. The present case is one which is solely based on an interpretation of a clause against the background of a dispute which gave rise to the Deed of Settlement. We

have reproduced the relevant clauses which would emphasise that the respondent was required to take a couple of steps back from the position they had reached in the dispute, in order to avail the financial benefit under the Deed of Settlement.

34. The first such step was to withdraw all complaints and proceedings against appellant and all other named and unnamed persons before the EOW. The respondent complied with the same and all such proceedings were brought to an end. US $ 1.5 million was kept in escrow to ensure that those proceedings came to an end, and on achieving the said objective the escrow amount had to be released to the respondent.

35. The second stage was of the sale of shares and the escrow amount of US$ 2 million was to be paid to the respondent when the shares were sold. It appears that there was some delay in the sale of shares which is what was objected to by the wife of the respondent and the appellant claimed that he could not be pushed into an early sale. Be that as it may, the sale did take place. Thus, the necessary conditions of the Deed of Settlement stood satisfied. It is in this context that we have to consider whether clause 6 would come into play, so as to deprive the respondent of the benefits which were two fold, i.e., monetary benefit to cease and

desist on complaints and litigations, and the proceeds from the sale of shares that were owned by him. Clause 6 provided for the return of the amount of US$ 1.5 million in case the representations/assurances of the respondent turn out to be false or incorrect. That was not the case. The only aspect emphasised by the appellant as a cause for denying the respondent his dues are the two e-mails sent by his wife. We may note here that though the wife was initially impleaded in the proceedings under Section 9 of the said Act, she was later dropped from the arbitration proceedings as she was not a party to the agreement vide consent order dated 06.08.2012. In a sense the agreement accepted that the wife of the respondent had no role to play and the respondent could not be penalised for her conduct.

36. We may note that what has weighed with the Courts below is the fact that the respondent did nothing to ratify the e-mails of his wife. The effect of the award would be to deprive the respondent of the due valuation of the shares and what was paid to him to bring his complaints to an end.

37. Even if we turn to the complaints of the wife, at best they would fall in the category of some indiscreet language. The e-mail dated

09.06.2011 makes a grievance to the appellant about not being informed about the deal term sheet having been signed and uses the expression that the appellant was not being "straight with us." This can hardly be objected to. Of course, this was circulated to their associates but the e-mail itself can hardly be called damaging. If we turn to the e-mail dated 15.06.2011, once again, a grievance about updates not being given is made. Certainly, the sentence "I have no wish to fraternise with a forger." must be called wholly inappropriate. But then, that by itself cannot deny the respondent of his dues merely because of such an indiscreet e-mail by his wife, who was not even party to the proceedings nor party to the Deed of Settlement which contained the arbitration clause. It is in the aforesaid context that the impugned orders have been delivered and we consider it appropriate to extract para 23 of the learned Single Judge's order which succinctly set forth what would be the consequences of the result of the award.

> "23. When we see the bizarre outcome it has brought about in the matter, the extent of the fallacy can be realised better. The Respondent got practically everything that he wanted from the Petitioner in return for payment of USD 3,500,000 to the latter. He got the EOW complaint withdrawn; he got the Petitioner to ratify the original Placement Instruction to SCB for sale of Atlas shares and for making over of the consideration to Grandway; he got an irrevocable power of attorney in his name for sale of shares of

> Atlas from the Petitioner; he got all the Petitioner's claims against him, his wife and Atlas and Grandway and their shareholders released; he got the Petitioner's resignation from the Board of Atlas; he got an agreement and irrevocable consent from the Petitioner for sale and transfer of Atlas shares; he got an agreement or consent from the Petitioner for dividend distribution and winding up of Atlas in a manner as the Board and the other shareholders might deem fit; and he got a confirmation of no claim against him or his family member or Atlas or Grandway of their shareholders by the Petitioner. And after all that is done, he even gets back his entire money of USD 3,500,000. And that because the Petitioner's wife calls him a 'forger' in a private communication made to a couple of acquaintances or associates. Can such award be ever sustained as something a fair and judiciously minded person could have made. In my humble opinion, it is the very opposite of justice; it would be a travesty of justice to uphold such award."

38. The aforesaid scenario cannot be countenanced and this is what has been responsible for interference with the award of the learned arbitrator in the context of the legal position applicable to the award pre the amendment. We find that the arbitrator's conclusions are not in accordance with the fundamental policy of Indian law, and can thus be set aside under the pre-2015 interpretation of S. 34 of the said Act. We may also note that clause 6 of the Deed of Settlement could not have been relied on to award liquidated damages in favour of the appellant, we agree with the observations of the Single Judge and the Division Bench in this regard. In fact, the consequences are so inappropriate that the

same appears to be the reason that both the learned Single Judge and the Division Bench have opined that whatever be the position that is applicable - pre or post amendment, in these facts the award would not stand, something with which we agree.

Conclusion:

39. In the conspectus of the aforesaid discussion we are not able to find fault with the judgment of the learned Single Judge and the Division Bench to the extent it interferes with the award and sets aside the award. Consequently, the appeal is dismissed with costs.

....……J.
[Sanjay Kishan Kaul]

....……J.
[M.M. Sundresh]

New Delhi.
November 10, 2021.