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

Judgment reserved on: 07.09.2026
Judgment pronounced on: 03.11.2026

\# **CNR No. DLHC011066432017**

\+ O.M.P. (COMM) 188/2017 & I.A. 4464/2017

MMTC LTD. .....Petitioner

Through: Mr. Ravi Gupta, Mr. Tarang Narang, Ms. Muskan Mehra, Ms. S. Gupta, Advs.

versus

PAMP HOLDING MAURITIUS LTD. & ANR. .....Respondents

Through: Mr. Zorawar Singh, Mr. Jayant Rastogi, Mr. Shubham, Advs. for R1.
Mr. Jayant Mehta, Sr. Adv. with Mr. Abhishek Mishra, Ms. Mansvini Jain, Advs. for R-2.

CORAM:
HON'BLE MR. JUSTICE OM PRAKASH SHUKLA

JUDGMENT

% 03.11.2026

A. Introduction

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996[1], has been filed challenging the arbitral award rendered in disputes arising out of the Share Purchase and Shareholders Agreement[2] dated 22.10.2008 executed between MMTC

[1] "the Act" hereinafter
[2] "SPSHA" hereinafter

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Limited[3],PAMP SA[4]and MMTC-PAMP India Private Limited[5]for establishing and operating a gold and silver refinery in India.

2. The dispute also concerns the execution of a Dore Sourcing Agreement[6]dated 02.02.2012 between MPIPL and MKS Switzerland SA (PAMP's associated company), and a Process Know-How Licence Agreement dated 9/11.07.2012 between MPIPL and PAMP, pursuant to which MPIPL paid approximately Rs. 71.25 crore towards sourcing charges and licence fees.

B. Overview of the dispute

3. MMTC is a Government of India undertaking engaged in the trading of metals and other commodities, whereas PAMP is a Switzerland based company engaged in the refining and processing of precious metals, including gold and silver.

4. MMTC and PAMP entered into a SPSHA dated 22.10.2008 for establishing and operating a joint venture company, i.e. MPIPL, for refining and manufacturing gold and silver products in India.

5. Initially, MMTC held 26% shareholding in MPIPL, while PAMP held 72%, with the remaining 2% held by the MMTC Employees' Mutual Benefit Trust. Subsequently, PAMP's shareholding was transferred through its group companies to PAMP

[3]"MMTC" hereinafter
[4]"PAMP" hereinafter
[5] "MPIPL" hereinafter
[6]"DSA" hereinafter

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Holdings Mauritius Limited[7], which became the majority shareholder of MPIPL.

6. The present dispute arises out of the obligations of the parties under the SPSHA, particularly concerning the sourcing of raw materials and the clause of technical know-how to MPIPL.

C. Brief Facts

7. MPIPL, a joint venture was established to set up and operate a gold and silver refinery in India. Its primary business was to procure raw materials, including partially refined gold, thereafter process and refine that gold into high purity gold and silver. Additionally, its business was also to manufacture and sell finished products such as gold bars, coins and medallions.

8. Under the SPSHA, MMTC was required to assist MPIPL with matters related to government permissions, including regulatory approvals, acquisition etc. PAMP was required to provide technical expertise, refining knowledge, technical know-how and assistance in sourcing raw materials.

9. Thus, MPIPL was the company responsible for operating the refinery and conducting the business, with MMTC and PAMP contributing their respective expertise and assistance as delineated in the SPSHA.

[7] "PHML" hereinafter

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10. The prelude to the dispute began when MPIPL, which was established to operate a gold and silver refinery, entered into two separate agreements in 2012 with companies associated with the PAMP group itself.

11. First, on 02.02.2012, MPIPL entered into a DSA with MKS Switzerland SA (PAMP's associated company), for arranging the supply of partially refined raw material/gold required for its refinery. Under this agreement, as per MMTC, MPIPL was required to pay substantial sourcing charges to MKS Switzerland SA for procurement of raw material.

12. Second, in July 2012, MPIPL entered into a Process Know-How Licence Agreement with PAMP itself, for using its specialised gold and silver refining technology. Under this agreement also, as per MMTC, MPIPL was required to pay substantial licence fees directly to PAMP.

13. By 31.03.2015, MPIPL had paid approximately Rs.51.44 crore to MKS Switzerland towards sourcing charges and Rs.19.80 crore to PAMP itself towards licence fees, totalling Rs.71.25 crore.

14. MMTC objected to the payments being made to PAMP's associated company and PAMP itself. MMTC alleged that PAMP was misusing its majority shareholding and control over MPIPL to divert substantial funds from the joint venture to its own associated companies and alleged breach of the terms of SPSHA.

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15. According to MMTC, it had agreed to the majority shareholding of PAMP on the understanding that PAMP would provide these capabilities required to the joint venture without charging any extra fee. However, as per MMTC, instead of fulfilling these obligations as originally understood, PAMP allegedly used its majority control to arrange separate agreements through which its own group companies and PAMP itself received substantial payments for providing the same services they were expected to contribute, thereby profiteering itself singularly at the cost of JV MPIPL.

16. MMTC therefore alleged that PAMP was unjustly enriching itself by effectively obtaining a double financial benefit as by holding the majority ownership in the joint venture on the strength of its promised expertise, and second, by extracting additional payments from the joint venture for that same expertise.

17. In a nutshell, the case of MMTC is the alleged improper diversion of MPIPL's funds to the PAMP group, which in result substantially reduced the financial benefits available to MMTC as a 26% shareholder. According to MMTC, this alleged diversion of fund constituted a breach of the obligations under the SPSHA, particularly the requirement of good faith under Article 34.

D. <u>Impugned Award</u>

18. On 29.08.2014, MMTC formally raised its concerns and sought a review of these transactions by MPIPL's Board and Audit Committee. However, MPIPL rejected the allegations, and despite

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subsequent discussions between the parties, the dispute could not be resolved amicably.

19. Consequently, on 13.04.2015, MMTC invoked the arbitration clause contained in Article 26 of the SPSHA and initiated arbitration against PHML and MPIPL. In the arbitration, MMTC initially sought cancellation or modification of the two agreements and a direction for the return of approximately Rs. 71.25 crore paid by MPIPL to PAMP and MKS Switzerland, contending that these payments violated the obligations under the SPSHA.

20. The learned Arbitral Tribunal, by the impugned award, dismissed all the claims raised by MMTC, holding that SSPHA did not require PAMP to provide sourcing assistance and technical know-how without any charges.

21. The Tribunal observed that Articles 2.3 to 2.5 required PAMP to assist MPIPL but did not prohibit it from charging for such services.

22. It further held that Article 34 permitted transactions between MPIPL and companies associated with its shareholders on mutually agreed or arm's-length terms and found that the DSA and Licence Agreement were entered into on such terms.

23. Regarding MMTC's request to cancel or modify these agreements, the Tribunal observed that MMTC had given up those reliefs during arguments and, in any event, such orders could not be

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passed in the absence of MKS Switzerland and PAMP, which were not parties to the arbitration.

24. The Tribunal also rejected MMTC's claim for refund of approximately Rs.71.25 crore, holding that MPIPL gave those payments and MPIPL itself had not sought their recovery, and MMTC could not claim restitution on MPIPL's behalf without an appropriate derivative action.

25. The Tribunal further observed that MMTC should have claimed damages for the alleged breach of the SPSHA instead of seeking restitution, but had not done so. Accordingly, the Tribunal dismissed MMTC's claims and directed it to pay approximately Rs.1.77 crore in costs to PHML and Rs.1.24 crore to MPIPL, besides the Tribunal's fees and expenses.

E. Submissions before this Court

26. Mr. Ravi Gupta, learned Counsel for the Petitioner submit that the very purpose of giving PAMP a majority shareholding of 72% in MPIPL was to obtain its technical expertise, refining technology and assistance in sourcing raw materials without any additional payment.

27. According to learned Counsel for the Petitioner, this understanding was reflected in the MOU dated 03.01.2008, and the SPSHA dated 22.10.2008 and the original project report, which did not contemplate separate sourcing charges or licence fees. However, PAMP allegedly misused its majority control to cause MPIPL to enter

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into separate agreements with its own group companies, resulting in payments of approximately Rs. 71.25 crore for services that PAMP was already obligated to provide under Articles 2.4 and 2.5 of the SPSHA.

28. Learned Counsel further submits that the DSA was executed without its prior knowledge or approval, while the Licence Agreement was entered into despite its objections. It is alleged that these arrangements improperly diverted funds from the joint venture to the PAMP group, which is in violation to the obligation of "Good faith" under Article 34 of the SPSHA.

29. It is contended that the Tribunal wrongly interpreted the agreement as permitting these additional charges and failed to properly examine the alleged abuse of majority control and breach of good faith. It is further submitted that although it had withdrawn its prayers for cancellation and modification of the agreements, its independent claim for restitution against PHML remained maintainable and ought not to have been rejected.

30. The Learned Counsel impugns the Tribunal's finding regarding the arm's-length nature of the transaction, contending that the conclusion is *ex-facie* perverse and suffers from patent illegality. It is further submitted that the impugned findings run contrary to the fundamental policy of Indian law and are so perverse as to shock the judicial conscience.

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31. *Per contra*, Mr. Jayant Mehta, learned Senior Counsel for Respondent No. 1, submitted that the learned Arbitral Tribunal rightly dismissed MMTC's claims, as the SPSHA never required PAMP to provide its assistance and obligations free of charge.

32. Mr. Mehta contended that PAMP acquired its 72% shareholding by investing money in the joint venture, and not in exchange for any promise to provide free services, whereas MMTC's decision to hold only 26% was based on government policy.

33. According to Mr. Mehta, Articles 2.3 to 2.5 merely required PAMP to assist MPIPL, while Article 34 permitted separate commercial agreements with associated companies on mutually agreed or arm's-length terms. He further submitted that MKS Switzerland did not merely help MPIPL find gold suppliers but also arranged financing, provided guarantees and undertook commercial risks, while PAMP permitted MPIPL to use its specialised refining technology under a separate licence.

34. Mr. Mehta submits both agreements were commercially beneficial to MPIPL and that MMTC failed to prove that the charges were excessive or unfair. He further contended that PHML cannot be directed to refund approximately Rs. 71.25 crore because it did not receive those payments and was never a party to the two agreements, and that MMTC could not seek restitution on behalf of MPIPL, which had itself made no claim for recovery.

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35. Mr. Mehta submitted that, MMTC should have claimed damages for breach of SPSHA if it believed that PHML had violated its contractual obligations, but it failed to do so.

36. Lastly, it was submitted that the Tribunal's interpretation of the SPSHA and its findings regarding the commercial fairness of the transactions are supported by evidence and cannot be reconsidered by the Court under the limited scope of Section 34, particularly since the arbitration is an international commercial arbitration.

F. Reasoning

37. I have heard both the parties at length and perused the record in its entirety.

38. Under Section 2(1)(f)(ii) of the Act, an arbitration qualifies as an international commercial arbitration when at least one party is a body incorporated outside India.

39. In the present case, MMTC is an Indian company. However, PHML is incorporated in Mauritius. The presence of PHML as a party to the arbitration in the present case is sufficient in itself to satisfy that the present matter qualifies as an international commercial arbitration.

40. Thus, before diving deep into the merits of the case, it is significant to first identify the extent to which this Court can interfere with an award rendered in an international commercial arbitration.

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41. The scope of interference under Section 34 is, in itself, extremely limited. Furthermore, it is settled law that patent illegality is not an available ground for challenging an award arising out of an international commercial arbitration. This position is settled by the Hon'ble Supreme Court in ***Ssangyong*** **(supra) and** ***Patel Engineering Ltd. v. North Eastern Electric Power Corporation Ltd***[8].

42. With patent illegality not being available as a ground for interference, the question which warrants an answer is then what grounds are actually available to this Court under Section 34.

43. To examine this closely, let us look at Section 34 of the Act.

44. An arbitral award can be set aside under Section 34(2) of the Act, on seven statutory grounds. With patent illegality under Section 34(2A) in an ICAbeing not one of them, the other grounds fall into two categories i.e. five under Section 34(2)(a) and two under Section 34(2)(b).In this regard, it would be beneficial to go through Section 34, the same reads as follows:

> ***"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 1[establishes on the basis of the record of the arbitral tribunal that]—*

[8] **(2020) 7 SCC 16Af7.**

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(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.

2[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.]

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3[(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:

(i) a party was under some incapacity, or

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

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

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

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

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

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

45. It is made out that Section 34(2)(a) contains five grounds, numbered (i) to (v) and Section 34(2)(b) contains two grounds, numbered (i) and (ii). Section 34(2A) contains only one additional ground i.e. patent illegality. This ground is available only for arbitrations other than international commercial arbitrations.

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46. Therefore, in an international commercial arbitration, seven statutory grounds are available under Section 34(2), and none under Section 34(2A).

47. Under Section 34(2)(b)(i) of the Act, an arbitral award may be set aside if the Court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force.

48. Further, under Section 34(2)(b)(ii), an arbitral award may be set aside if it is in conflict with the public policy of India.

49. Explanation 1 to the said provision restricts the scope of public policy to three circumstances, i.e. (i) where the making of the award was induced or affected by fraud or corruption, or was in violation of Sections 75 or 81 of the Act; (ii) where the award is in contravention of the fundamental policy of Indian law or (iii) where the award is in conflict with the most basic notions of morality or justice.

50. Explanation 2 expressly clarifies that while examining whether an award contravenes the fundamental policy of Indian law, the Court cannot undertake a review of the merits of the dispute. Thus, the Court cannot reappreciate the evidence or interfere with the findings of the Arbitral Tribunal merely because a different interpretation or conclusion is possible.

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51. Having read the Section 34 (2) (b) (ii), an important question arises in the mind of this Court as to what actually constitutes the "*public policy of India*", and how can a Section 34 Court determine when it has been violated.

52. To reappreciate and understand this concept and the circumstances in which a section 34 court can interfere, let us understand the relevant precedent laid down by the Hon'ble Supreme Court.

53. The Hon'ble Supreme Court in ***OPG Power Generation Pvt. Ltd. v. Enexio Power Cooling Solutions India Pvt. Ltd*** [9], has observed the following on Section 34 (2) (b) (ii), the same reads as follows:

> *"48. Before undertaking the aforesaid exercise, it would be apposite to consider as to how the expressions (a) "in contravention with the fundamental policy of Indian law"; (b) "in conflict with the most basic notions of morality or justice"; and (c) "patent illegality" have been construed.*
>
> ***In contravention with the fundamental policy of Indian law***
>
> *49. As discussed above, till the Amendment, 2015 the expression "in contravention with the fundamental policy of Indian law" was not found in the 1996 Act. Yet, in Renusagar (supra), in the context of enforcement of a foreign award, while construing the phrase "contrary to the public policy", this Court held that for a foreign award to be contrary to public policy mere contravention of law would not be enough rather it should be contrary to: (a) the fundamental policy of Indian law; and /or (b) the interest of India; and/ or (c) justice or morality.*
>
> *50. In the judicial pronouncements that followed Renusagar (supra), already discussed above, the domain of what could be*

[9] **(2025) 2 SCC 417**

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considered contrary to the 'public policy of India'/ 'fundamental policy of Indian law' expanded, resulting in much greater interference with arbitral awards than what the lawmakers intended. This led to the Amendment, 2015 in the 1996 Act.

51. In Ssangyong Engineering (supra), this Court dealt with the effect of the Amendment, 2015. While doing so, it took note of a supplementary report of February 2015 of the Law Commission of India made in the context of the proposed 2015 amendments. The said supplementary report has been extracted in paragraph 30 of that judgment. The key features of it are summarized below:

> *(a)* ***Mere violation of law of India would not be a violation of public policy in cases of international commercial arbitrations held in India.***
>
> *(b) The proposed 2015 amendments in 1996 Act (i.e., in Sections 34(2)(b)(ii) and 48(2)(b) including insertion of sub-section (2-A) in Section 34) were on the assumption that the terms, such as, "fundamental policy of Indian law" or conflict with "most basic notions of morality or justice" would not be widely construed.*
>
> *(c) The power to review an award on merits is contrary to the object of the Act and international practice.*
>
> *(d) The judgment in Western Geco (supra) would expand the court's power, contrary to international practice. Hence, a clarification needs to be incorporated to ensure that the term 'fundamental policy of Indian law' is narrowly construed. The applicability of Wednesbury principles to public policy will open the floodgates. Hence, Explanation 2 to Section 34(2)(b)(ii) has been proposed.*

After taking note of the supplementary report, the statement of objects and reasons of the Amendment Act, 2015, and the amended provisions of Sections 28, 34 and 48, this Court held:

> *"34. What is clear, therefore, is that the expression public policy of India, whether contained in section 34 or in section 48, would now mean the fundamental policy of Indian law as explained in paras 18 and 27 of Associate Builders i.e. the fundamental policy of Indian law would be relegated to Renusagar's understanding of this expression. This would necessarily mean that Western Geco expansion has been done away with. In short, Western Geco, as explained in Paras 28 and 29 of Associate Builders, would no longer obtain, as under the guise of interfering with an*

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award on the ground that the arbitrator has not adopted a judicial approach the court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, in so far as principles of natural justice are concerned, as contained in sections 18 and 34(2)(a) (iii) of the 1996 Act, these continue to be the grounds of challenge of an award, as is contained in para 30 of Associate Builders.

*35.******

*36*******

37. In so far 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 back door when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that reappreciation 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, 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, 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, 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 the matters not allotted to him, he commits

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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, 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 characterized as perverse.

********* ******* *******

69. We therefore hold, following the aforesaid authorities, that in the guise of misinterpretation of the contract, and consequent errors of jurisdiction, it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise the aforesaid misinterpretation [which would include going beyond the terms of the contract], could be said to have been fairly comprehended as disputes within the arbitration agreement or which were referred to the decision of the arbitrators as understood by the authorities above. If an arbitrator is alleged to have wandered outside the contract and dealt with matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of patent illegality, which, as we have seen, would not apply to international commercial arbitrations that are decided under Part II of the 1996 Act. To bring in by the back door grounds relatable to Section 28 (3) of the 1996 Act to be matters beyond the scope of submission to arbitration under section 34(2)(a)(iv) would not be permissible as this ground must be construed narrowly and so construed, must refer only to matters which are beyond the arbitration agreement or beyond the reference to the arbitral tribunal."

52. ***The legal position which emerges from the aforesaid discussion is that after the '2015 amendments' in Section 34 (2)(b)(ii) and Section 48(2)(b) of the 1996 Act, the phrase "in conflict with the public policy of India" must be accorded a***

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restricted meaning in terms of Explanation 1. The expression "in contravention with the fundamental policy of Indian law" by use of the word 'fundamental' before the phrase 'policy of Indian law' makes the expression narrower in its application than the phrase "in contravention with the policy of Indian law", which means mere contravention of law is not enough to make an award vulnerable. To bring the contravention within the fold of fundamental policy of Indian law, the award must contravene all or any of such fundamental principles that provide a basis for administration of justice and enforcement of law in this country. Without intending to exhaustively enumerate instances of such contravention, by way of illustration, it could be said that (a) violation of the principles of natural justice; (b) disregarding orders of superior courts in India or the binding effect of the judgment of a superior court; and (c) violating law of India linked to public good or public interest, are considered contravention of the fundamental policy of Indian law. However, while assessing whether there has been a contravention of the fundamental policy of Indian law, the extent of judicial scrutiny must not exceed the limit as set out in Explanation 2 to Section 34(2)(b)(ii).

Most basic notions of morality and justice

53. In Renusagar (supra) this Court held that an arbitral award is in conflict with the public policy of India if it is, inter alia, contrary to "justice and morality". Explanation 1, inserted by 2015 Amendment, makes it clear that an award is in conflict with the public policy of India, inter alia, if it conflicts with the 'most basic notions of morality or justice'.

Justice

54. Justice is the virtue by which the society/ court / tribunal gives a man his due, opposed to injury or wrong. Justice is an act of rendering what is right and equitable towards one who has suffered a wrong. Therefore, while tempering justice with mercy, the court must be very conscious, that it has to do justice in exact conformity with some obligatory law, for the reason that human actions are found to be just or unjust on the basis of whether the same are in conformity with, or in opposition to, the law42. Therefore, in 'judicial sense', justice is nothing more nor less than exact conformity to some obligatory law; and all human actions are either just or unjust as they are in conformity with, or in opposition to, the law43.

55. But, importantly, the term 'legal justice' is not used in Explanation 1, therefore simple conformity or nonconformity with

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the law is not the test to determine whether an award is in conflict with the public policy of India in terms of Explanation 1. The test is that it must conflict with the most basic notions of justice. For lack of any objective criteria, it is difficult to enumerate the 'most basic notions of justice'. More so, justice to one may be injustice to another. This difficulty has been acknowledged by many renowned jurists, as is reflected in the observations of this Court in Delhi Administration v. Gurdip Singh Uban[10], extracted below:

> *"23. The words 'justice' and 'injustice', in our view, are sometimes loosely used and have different meanings to different persons particularly to those arrayed on opposite sides. One man's justice is another's injustice [Raplph Waldo Emerson: Essays (1803-82), First Series, 1841, "Circles]. Justice Cardozo said: "The web is entangled and obscure, shot through with a multitude of shades and colors, the skeins irregular and broken. Many hues that seem to be simple, are found, when analyzed, to be a complex and uncertain blend. Justice itself, which we are wont to appeal to what as a test as well as an ideal, may mean different things to different minds and at different times. Attempts to objectify its standards or even to describe them have never wholly succeeded (Selected Writings of Cardozo, pp 223-224, Falcon Publications, 1947)."*

56. In Associate Builders (supra), while this Court was dealing with the concept "public policy of India", in the context of a Section 34 challenge prior to 2015 amendment, it was held that an award can be said to be against justice only when it shocks the conscience of the court. The Court illustrated by stating that where an arbitral award, without recording reasons, awards an amount much more than what the claim is restricted to, it would certainly shock the conscience of the court and render the award vulnerable and liable to be set aside on the ground that it is contrary to justice.

57. In Ssyangyong (supra), which dealt with post 2015 amendment scenario, it was observed that an argument to set aside an award on the ground of being in conflict with 'most basic notions of justice', can be raised only in very exceptional circumstances, that is, when the conscience of the court is shocked by infraction of some fundamental principle of justice. Notably, in that case the majority award created a new contract for the parties by applying a unilateral circular, and by substituting a workable formula under the agreement by another, dehors the agreement.

[10] **(2000) 7 SCC 296**

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This, in the view of the Court, breached the fundamental principles of justice, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered with the other party. However, a note of caution was expressed in the judgment by observing that this ground is available only in very exceptional circumstances and under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the court because that would be an entry into the merits of the dispute.

58. In the light of the discussion above, in our view, when we talk about justice being done, it is about rendering, in accord with law, what is right and equitable to one who has suffered a wrong. Justice is the virtue by which the society/ court / tribunal gives a man his due, opposed to injury or wrong. Dispensation of justice in its quality may vary, dependent on person who dispenses it. A trained judicial mind may dispense justice in a manner different from what a person of ordinary prudence would do. This is so, because a trained judicial mind is likely to figure out even minor infractions of law/ norms which may escape the attention of a person with ordinary prudence. Therefore, the placement of words "most basic notions" before "of justice" in Explanation 1 has its significance. Notably, at the time when the 2015 Amendment was brought, the existing law with regard to grounds for setting aside an arbitral award, as interpreted by this Court, was that an arbitral award would be in conflict with public policy of India, if it is contrary to: (a) the fundamental policy of Indian law; (b) the interest of India; (c) justice or morality; and /or is (d) patently illegal. As we have already noticed, the object of inserting Explanations 1 and 2 in place of earlier explanation to Section 34(2)(b)(ii) was to limit the scope of interference with an arbitral award, therefore the amendment consciously qualified the term 'justice' with 'most basic notions' of it. In such circumstances, giving a broad dimension to this category[11] would be deviating from the legislative intent. In our view, therefore, considering that the concept of justice is open-textured, and notions of justice could evolve with changing needs of the society, it would not be prudent to cull out "the most basic notions of justice". Suffice it to observe, they[12] ought to be such elementary principles of justice that their violation could be figured out by a prudent member of the public who may, or may not, be judicially trained, which means, that their violation would shock the conscience of a legally trained mind. In other words, this ground would be available to set aside an arbitral award, if the award conflicts with such elementary/

[11] In conflict with most basic notions of justice
[12] Most basic notions of justice

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> *fundamental principles of justice that it shocks the conscience of the Court.*
>
> ***Morality***
>
> *59. The other ground is of morality. On the question of morality, in Associate Builders (supra), this Court, after referring to the provisions of Section 23 of the Contract Act, 1872; earlier decision of this Court in Gherulal (supra); and Indian Contract Act by Pollock and Mulla, held that judicial precedents have confined morality to sexual morality. And if 'morality' were to go beyond sexual morality, it would cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. The court also clarified that interference on this ground would be only if something shocks the court's conscience".*

54. A plain reading of the above, makes it easy to understand that an arbitral award cannot be set aside simply because the arbitrator has committed an error of law, or interpreted a contract incorrectly. The Hon'ble Supreme Court held that the error must cross a significatory high statutory threshold, so as to be amenable to the Court under section 34 of the Act. The Hon'ble Supreme Court explained that the 2015 Amendment deliberately narrowed the meaning of "*public policy of India*" to prevent Courts from effectively hearing arbitration disputes all over again.

55. The Hon'ble Supreme Court clarified,that "fundamental policy of Indian law" does not mean every provision of law, instead, it refers to the foundational principles on which the system operates. The Court gave three such example such as (i) natural justice, (ii) obedience to binding judgments of superior Courts, and (iii) compliance with laws protecting public interest. Therefore, any statutory violation is insufficient unless it undermines such a fundamental principle.

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56. Further, the Hon'ble Supreme Court explained that the, "most basic notions of morality or justice" does not permit interference merely because the Court believes the award is unfair. The injustice must be so fundamental that it shocks the conscience of the Court.

57. Thus, having understood the principles governing Section 34 Court for interference with international commercial arbitral awards, let us now turn to the question that falls for determination in the present case.

58. After going through the submission on both sides and having gone through the arbitral award, the issue which arises for consideration in the present matter is whether the learned Arbitral Tribunal, while interpreting Articles 2.5 and 34 of the SPSHA and rejecting MMTC's claim for restitution, contravened the fundamental policy of Indian law or conflicted with the most basic notions of morality or justice, as understood in the preceding paragraphs.

59. Before adverting to the question as to whether any interference is warranted in the present matter, it would be profitable to refer to Articles 2.5 and 34, which are extracted hereinbelow:

> *"2.5 Further to Article 2.4 and without limitation or prejudice to the generality of Article 2.3, MMTC and PAMP shall therefore have the following obligations:*
>
> ***(a) Responsibilities of MMTC:***
>
> *1. Make its timely contribution to the capitalization of MPIPL as detailed in Article 4.3 hereunder.*

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2. Assist MPIPL in the marketing, selling and distribution of the products manufactured by MPIPL on the domestic and export markets.
3. Interact with various agencies / departments of the Central / relevant State Government with a view to obtain timely allocation of the total land requirements of MPIPL on most favourable terms.
4. Interact with various agencies / departments of the Central / relevant State Government with a view to obtain most favourable terms for all matters related to the smooth functioning of MPIPL.
5. Interact with the Central Government Ministries / Departments with a view to rectify the current inverse import duty on import of gold dore (import duty on the raw material is higher than the import duty on the finished product). For the avoidance of doubt any duty or reimbursement of the same will be for the account of MPIPL.
6. As a Nominated Agency, make available to MPIPL continuous and adequate supply of gold and silver of the quality and quantity required by MPIPL on mutually agreed terms that are not less favourable than those that may otherwise be available to MPIPL.
7. Assist MPIPL in its dealings with various vendors in India relating to the continuous supply and acquisition of all materials and products used by it during both the construction phase as well as the regular operating phase of the Manufacturing Plant.
8. Assist the project consultants in India, in any matter concerning the timely delivery of the construction of the Manufacturing Plant building and related facilities in accordance with the equipment and technology designs for the project.
9. Assist MPIPL in obtaining necessary approvals for any overseas personnel deployed for the project.
10. Assist MPIPL in structuring and implementing a competitive financial package for the funding of the project, including working capital, and to obtain approval of the financial package by concerned financial institutions.

(b) Responsibilities of PAMP:

1. Make its timely contribution to the capitalization of MPIPL as detailed in Article 4.3 hereunder.
2. Assist MPIPL with specifications, setting forth the design and technology required for achieving the objectives. The Manufacturing Plant shall be implemented accordingly, within the scope of the total investment.
3. Assist MPIPL in sourcing, procuring and purchasing equipment, raw materials and other products in accordance with the specifications of the Manufacturing Plant and in the delivery of the same to the Indian Ports as so designated.
4. Assist MPIPL in locating, accessing, recruiting and hiring experienced personnel, including managerial personnel on acceptable terms.

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5. Assist MPIPL in marketing, selling and distributing its products in the domestic and export markets.
6. Assist MPIPL in its dealings with the project consultants in India on all matters relating to the timely delivery of the Engineering, procurement, construction, installation and commissioning phases of the project.
7. Provide, under licence, MPIPL with the process know-how to facilitate the operation of the Manufacturing Plant.
8. Assist MPIPL for the installation, testing, commissioning and operation of the Project.
(c) Responsibilities of MPIPL:
1. Issue and allot Shares of MPIPL to MMTC up to 26% at par value after getting all due approvals.
2. Issue and allot Shares of MPIPL to MMTC Employees Entity up to 2% at par value after getting all due approvals.
3. Issue and allot Shares of MPIPL to PAMP / its nominees up to 72% at par value after getting all due approvals.
4. Provide assistance for such other matters as may be agreed in writing between PAMP, MMTC and MPIPL from time to time.
5. Subject to qualifications and suitability, give preference to recruitment of MMTC's employee for operations at various levels as per requirement.
6. Procurement of all equipment / products shall be transparent especially where the value exceeds Rs.50,00,000.00 (Rupees Fifty Lacs Only).
7. Project Team:
a. During the implementation phase of the Project, set up a Project Team consisting of representatives of the Parties from various disciplines including technical and financial and project management / monitoring.
b. The Project Team will function as a professional subcommittee and be headed by and to report to the Managing Director / CEO or such other official authorized by him. The Project Team will dissolve following commissioning of the project. The remuneration of the Project Team will be considered as preliminary and pre-operative expenses included in the total cost of the project.
c. The Project Team will be responsible for:

- *Detailed checking of the design*
- *Signing contracts*
- *Controlling the purchasing and inspection of the equipment and all materials for the Project.*
- *General schedule of Project implementation.*
- *Financial planning*
- *Control, disbursement and final approval of expenses*
- *Complying with all regulations*
- *Keeping and maintaining the documentation, drawings, files and information of the Project during the project implementation period"*

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Article 34
Good Faith
34.1 All transactions entered into between either Party [or any company Controlled by it] and MPIPL shall be conducted in good faith and on the basis set out or referred to in this Agreement or, if not provided for in this Agreement, as may be agreed by the Parties and, in the absence of such agreement, on an arm's length basis.
34.2 Each party shall at all times act in good faith towards the other and shall use all reasonable endeavours to ensure that this Agreement is observed.
34.3 Each party shall do all things necessary and desirable to give effect to the spirit and intention of this Agreement."

60. It is clear from the above reading that Article 2.5 stipulates how MMTC, PAMP and MPIPL are expected to work together to establish and operate the manufacturing plant. These articles makes it clear that while both MMTC and PAMP must contribute capital and support the business, however, their roles are different.

61. As per Article 2.5, MMTC is mainly expected to help MPIPL with government matters, and ensure the availability of gold and silver, and assist in arranging funding and developing the business in India. On the other hand, PAMP, is expected to bring the technical expertise needed to establish the plant and support its operations through technology, and process know-how.

62. On a reading of Article 34, it makes it clear that the parties must carry out these responsibilities honestly and in good faith, and with a genuine intention to fulfil the purpose of the agreement. Further, any transactions involving MPIPL and either party or its controlled companies must follow the agreed terms or, where no terms have been agreed, be conducted on a fair, arm's-length basis.

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63. Having understood the relevant contractual mechanism governing the present issue, let us go through the findings of the arbitral tribunal on the issue in consideration:

> *"276 In its SOC, MMTC pleads that for the purpose of operating MPIPL's refining and minting plant set up under the SPSHA, PAMP/PHML assumed the obligation under Art 2.5 to source Dore for and to provide process knowhow to MPIPL free of charge for the following reasons:*
>
> > *(a) MMTC agreed to enter into the joint venture on PAMP's representations that it would supply the necessary process know-how and commercial expertise to establish and operate a refinery, free of cost to MPIPL in consideration of PAMP being allotted a 72% shareholding in MPIPL.*
> >
> > *(b) MMTC's consent to the framework of the transaction was obtained on the express representation that without any monetary consideration, the brand, the commercial expertise and the technology of PAMP would be made available to MPIPL.*
> >
> > *(c) The SPSHA did not recognise or permit any consideration being paid to either shareholder for making available any technology, expertise or other assistance to MPIPL.*
> >
> > *(d) It was on this basis that MMTC agreed to a 26% stake in MPIPL.*
>
> *277 Accordingly, MMTC's case against PHML is that that MPIPL has been wrongfully charged the Dore charges under the DSA and the process know-how fee under the Licence Agreement. MMTC alleges that MPIPL was compelled to enter into the two agreements by PHML using the majority votes of its nominee directors in violation of Art 2.5.*
>
> *278 On this basis, MMTC seeks the following reliefs under [7.1] of the SOC, inter alia:*
>
> > *(a) A declaration to the effect that the DSA was illegal and as also being violative of the SPSHA and/or contrary to the representations made, and hence the DSA is void.*

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(b) A declaration to the effect that the Licence Agreement was illegal as also being violative of the SPSHA and/or contrary to the representations made, and hence the Licence Agreement is void.;

(c) A direction to PHML to secure the modification of the DSA and the Licence Agreement or their cancellation or substitution with new agreements by deleting the obligation of MPIPL to pay the Dore charges and licence fees to MKS Swiss and PAMP.

(d) A direction to PHML to restitute MPIPL by paying an amount equal to the sums received by MKS Swiss and PAMP under the DSA and the Licence Agreement, respectively, being Rs 71,25,10,588 up to 31 March 2015 and any further sums paid thereafter;

(e) A direction to PHML to direct its directors to pass a resolution to repatriate and disgorge the amounts already remitted under the DSA and Licence Agreement to MKS Swiss and PAMP.

(f) In the alternative, direct PHML to take steps to recover the amounts remitted to MKS Swiss and PAMP.

MMTC's claims for declarations, cancellation and modification of the DSA and the Licence Agreement

277 In the course of the proceedings, counsel for MMTC appears to have conceded that MMTC is not entitled to the reliefs sought at (a), (b) and (c) at [3] above (see [224] above). In the event that this is not the case, the Tribunal agrees with the submissions of PHML and MPIPL that MMTC is not entitled to those reliefs for the following reasons:

(a) MKS Swiss and PAMP are not parties to this arbitration. Accordingly, the Tribunal has no power to grant any of the orders or directions sought by MMTC to declare the DSA or the Licence Agreement void on the ground of illegality or being in violation of Art 2.5.

(b) For the same reason, the Tribunal has no jurisdiction/power to direct to PHML to secure the modification of the DSA and the Licence Agreement or their cancellation or substitution with new agreements by deleting the obligation of MPIPL to pay the Dore charges and licence fees to MKS Swiss and PAMP.

278 For these reasons, the Tribunal has no jurisdiction/power to grant any orders or directions with respect to the rights and

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interests ofMKS Swiss and PAMP under the DSA and the Licence Agreement, respectively, unless they are parties to the arbitration.

279 The Tribunal, having considered the rival arguments of the Parties, agree with the submissions of PHML and MPIPL that MMTC's claims for these reliefs are misconceived and should be dismissed.

MMTC's claim against PHML for restitution

280 MMTC seeks an order of restitution against PHML of the Dore charges and licence fees paid by MPIPL to MKS Swiss and PAMP under the DSA and the Licence Agreement respectively. Since PHML is not a party to either agreement and has not received any of these payments from MPIPL, there is no legal basis for the Tribunal to grant an order for restitution against PHML. MMTC has cited no statutory or case authority in support of its claim.

281 Secondly, since MPIPL has not made any claim against either MKS Swiss or PAMP for the return of these payments, there is no legal basis upon which MMTC can make a claim, so to speak, on behalf of MPIPL. MMTC is only entitled to do so by way of a derivative action which it has not mounted, and which is, in any case, outside the scope of the arbitration agreement in Art 26.

282 The Tribunal, having considered the rival arguments of the Parties, agree with the submissions of PHML and MPIPL that MMTC's claim for an order of restitution against PHML is groundless and should be dismissed

283 In its written Closing Submissions, MMTC limited its claim for restitution against PHML on the following grounds:

> *(a) Under Art 2.5, PHML (as PAMP's successor in interest) agreed to source Dore and provide process know-how to MPIPL free of charge. To avoid its contractual obligations, PHML used its control over MPIPL, i.e., compelled MPIPL, to wrongly commit MPIPL to paying the Dore charges and the licence fees to MKS Swiss and PAMP under the DSA and the Licence Agreement respectively.*
>
> *(b) In contrast, in its oral submission, MMTC submitted that PHML was in breach of Art 2.5 because it had arranged for its parent company PAMP to charge MPIPL under the Licence Agreement. MMTC has a claim for damages. Restitution is a form of damages. As punitive and exemplary damages are not allowed under Indian law, the only damages are those that will restore the claimant to its*

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original position. MMTC cannot ask PHML for 26% of the fee, but it could get it through dividends, for which it has to pay tax. MMTC has asked for a more reasonable relief which is: Put it in the same position as if the agreement had been performed.

(c) PHML's action was in violation of Art 2.5 and resulted in MPIPL having to incur payments it would not have had to pay if PHML had performed its obligations under Art 2.5. MPIPL has accordingly suffered financial loss equivalent to the fees paid to MKS Swiss and PAMP, and is entitled to be restored to its financial position on the basis that no breach had occurred.

(d) PHML is therefore liable to restore or restitute these payments as "restitutionary damages"

284 In essence, MMTC's claim is that PHML was in breach of Art 2.5 in failing to assist MPIPL to procure Dore and to obtain process know-how to mint gold medallions free of cost or to provide both Dore and/or process know-how free of any service charge. However, to sustain this claim, MMTC should have made a claim against PHML for damages for breach of contract. MMTC has not done so.

285 If it had done so, PHML would be entitled to plead that MMTC has suffered no loss, and put MMTC to prove its loss, if any. Furthermore, PHML would be entitled to plead that MMTC's claim for damages, with respect to the Dore charges, is barred by limitation as the Notice of Arbitration was issued more than three (3) years after the execution of the DSA.

286 The Tribunal, having considered the rival arguments of the Parties, agree with the submissions of PHML and MPIPL that MMTC in failing to claim against PHML for damages for breach of contract has no legal basis to claim damages as "restitutionary damages" which in essence are damages and not restitution of ill-gotten gains or under or subject to the relevant provisions of the ICA.

Other Issues

287 In the light of the above conclusions on MMTC's misconceived claims for the reliefs set out in its SOC, it is, strictly speaking, not necessary for the Tribunal to address the other issues of fact and law raised by MMTC. However, since MMTC has pleaded them and cross-examined the witnesses of PHML and

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MPIPL on their testimonies, the Tribunal considers it desirable to make findings of these issues.

(1) Scope of Art 2.5.2(h) and Art 2.5(7)

288 Having considered the evidence and the arguments of counsel which have been extensively set out earlier in this Award, the Tribunal finds that as a matter of documentary construction, Art 2.5(b) does not provide or intended to provide that PAMP or its permitted assigns are under an obligation to discharge their obligations thereunder free of charge, whether it is to assist in sourcing Dore or in providing know-how to MPIPL for the following reasons:

> *(a) Article 2.5(b) does not expressly or impliedly provide that for such obligations to be performed free of charge. It is a neutral statement in the context of a commercial agreement. When parties enter into a joint venture, they either subscribe to the required capital by infusion of cash or assets in exchange for equity capital or they raise the capital for its operations by loans from commercial lenders or the company issues bonds or preference shares. Where the capital is raised in cash, the capital will be used to acquire the materials and/or services to build the plant, and to operate the business.*
>
> *(b) The capital provided by the shareholders is deployed for these purposes. In the present case, both MMTC and PAMP subscribed for their equity shares in cash.*
>
> *(c) That is why in joint ventures project reports and business plans have to be prepared and agreed upon by the joint investors to determine what has to be done and how much capital is necessary to bring the joint venture into operation and to sustain its business. All services and equipment have to be purchased by the joint venture, whether from the joint venture parties or third parties. Unless the joint venture agreement provides otherwise, all services and things provided by either joint venture party has to be paid for.*
>
> *(d) These principles accord with business practice in all commercial ventures.*
>
> *(e) Based on these common-sense commercial considerations, Art 2.5(b) 2,3,4, 5, 6, 7 and 8 cannot be interpreted to mean that PAMP will provide services and know-how to MPIPL free of charge. Neither can Art 2.5(a) with reference to the services to be provided by MMTC. Services rendered have to be paid for. That this is what Art*

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2.5 means is confirmed by the fact that MMTC itself charged for services it had rendered to MPIPL in providing exhibition space for MPIPL's products, and also in sourcing gold for MPIPL.

(f) For these reasons, the Tribunal holds that the Parties to the SPSHA are entitled to charge for services and things to be provided by them to MPIPL.

(g) The Tribunal's interpretation of Art 2.5 is also supported by Art 34. If services and intellectual property rights are to be provided free of charge, Art 34 would be otiose. It would serve no purpose. The scope of Art 34 is discussed below.

(2) Scope of Art 34 - Party-related transactions

289 The DSA and the Licence Agreement are transactions falling within Art 34.1 because MPIPL is a Party to both agreements. Article 34.1 provides for party-related transactions. It reads: "All transactions entered into between either Party [or any company controlled by it] shall be conducted in good faith and on the basis set out in this Agreement or, if not provided for in this Agreement, as may be agreed by the Parties and, in the absence of such agreement, on an arm's length basis."

290 MMTC interprets Art 34.1 to consist of three limbs: (1) all transactions have to be on the basis set out or referred to in the SPSHA; (2) transactions not provided for in the SPSHA as may be agreed by the Parties; and (3) in the absence of such agreement (including as to the terms), on an arm's length basis. MMTC argues that since the DSA and the Licence Agreement are covered by the SPSHA, limbs (b) and (c) are not applicable.

291 On this basis, MMTC argues that the DSA and the Licence Agreement were not executed in good faith because MMTC was not consulted on its need and its terms. The DSA was disclosed to MMTC only a few months later its execution. MMTC also suggested that the DSA was executed just before the Indian Government removed the inverted tax on Dore to facilitate the import of Dore into India for refining and minting of gold medallions by MPIPL. Similarly, the Licence Agreement was also not executed in good faith. Both agreements were executed in violation of Art 2.5 as PHML compelled MPIPL to execute them through the votes of its majority directors on the Board of MPIPL

292 PHML's argues that both the DSA and the Licence Agreement were entered in good faith. The nature of the business is such that MPIPL needed Dore for its plant on a continuous basis.

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It was not able to import Dore on its own as the gold mining companies would not supply Dore to MPIPL direct. The evidence shows that MMTC was also not in a position to supply Dore to MPIPL. If MKS Swiss had not agreed to supply Dore to MPIPL, the joint venture would have collapsed. MPIPL also needed PAMP's process knowhow, without which it could not mint any gold coins for the Indian market.

293 PHML further argues that the second and third limbs are applicable and that the amount of Dore charges and licence fees for the process knowhow were negotiated at arm's length as they were below market rates.

294 Having considered the arguments of the Parties, the Tribunal is of the view that all the three limbs apply to the DSA and the Licence Agreement. Although the DSA and the Licence Agreement are "transactions entered into" under the SPSHA, there was no agreement on their terms. The Parties had to agree on the terms of the Dore sourcing and the provision of knowhow. The Parties have agreed to the terms. However, since, and on the basis of, MMTC's arguments that the terms were unfavourable to MPIPL and should not be sanctioned, the Parties will have to fall back on the test of arm's length. In this respect, the Tribunal is fully satisfied that the terms were at arm's length. MMTC has produced no evidence whatever to show otherwise.

295 In any event, even if the DSA and the Licence Agreement fall foul of Art 34.1, it has no legal consequences in this arbitration. The Tribunal has no jurisdiction/power to modify their terms or set them.

Position of MPIPL

296 Although MPIPL is a "Party" to the SPSHA, and therefore is a "Party" for the purpose of Art 26 (the arbitration agreement), it has no substantive rights or obligations vis-a-vis MMTC or PHML. Furthermore, there is no claim dispute, question or controversy arising out of or in connection with the SPSHA involving MPIPL. Accordingly, MPIPL should not have been made a party to these proceedings.

297 Furthermore, Art 26 does not permit either MMTC or PHML to claim any relief against MPIPL. Article 26.2.3 provides that the arbitration award is final and binding on the Shareholders", viz, MMTC and PHML. MPIPL, as the joint venture company, is not, and cannot be a party to any arbitration award. It follows that the Tribunal has no jurisdiction to order or direct MPIPL to do or omit to do anything in relation to the

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dispute between MMTC and PHML in relation to the DSA and the Licence Agreement.

298 For these reasons, MPIPL has been wrongly joined as a party to these proceedings.

D Costs of arbitration

299 The Indian law on costs of arbitration is set out in s 31 of the Arbitration Act. Xiv

300 MMTC, PHML and MPIPL have made submissions on their respective liability to pay the costs of arbitration as defined in s 31. The Tribunal has the discretion to determine whether costs are payable, and which party should pay the costs and in what proportions. The general rule is that costs follow the event, i.e., the unsuccessful party pays the costs of the successful party. The successful parties in this arbitration are PHML and MPIPL.

301 The Tribunal is unable to find any reason why the general rule should not apply to this arbitration. Indeed, the Tribunal finds, that having regard to the delay of MMTC in invoking this arbitration against PHML, and the fact that its claims and reliefs against PHML were non-starters, and its joinder of MPIPL as a party to the arbitration was also wholly misconceived, the application of the general rule is more than justified."

64. Having gone through the analysis of the learned arbitral tribunal, it can be made out that although, the learned Arbitral Tribunal considered the requirement of good faith under Article 34.1 of the SPSHA of the Award. However, it did not return any finding pertaining to it.

65. MMTC specifically contended that the DSA and Licence Agreement were not entered into in "Good faith", as MMTC was not consulted regarding their necessity and terms and was not informed of the DSA until several months after its execution, and PHML allegedly used its majority control over MPIPL's Board to procure their execution.

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66. In this regard, although the Tribunal acknowledged these contentions and reproduced Article 34.1, which expressly required transactions to be conducted in good faith, in view of this Court, however, the analysis of the learned arbitral tribunal focused primarily on whether the transactions were conducted on an arm's-length basis or not.

67. The learned Arbitral Tribunal concluded that the agreements were entered into on arm's-length terms and that MMTC had failed to produce evidence to the contrary. However, the learned Arbitral Tribunal failed to determine whether the alleged conduct of MPIPL satisfied the explicit contractual requirement of "Good faith". Thus, while the Tribunal superficially considered Article 34.1, but it did not return a definitive finding on the alleged breach of the "Good faith" contractual obligation. According to this Court, the requirement and/or compliance with the "Good Faith" was a mandatory condition precedent to adjudication on the arm's length nature of the transaction, which was conspicuously ignored by the Ld. Tribunal.

68. Upon a consideration of the findings returned by the Arbitral Tribunal and the reasoning underlying the same, it emerges that fulfilment or adherence to contractual obligation of "Good faith" was not independently adjudicated upon.

69. In light of the above, this Court is now brought to the next pivotal question as to whether the learned Arbitral Tribunal's failure to

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address such a contractual obligation under Article 34 constitutes a ground for interference with the award.

70. At this juncture, the judgment rendered by the Division Bench in ***Ssangyong Engineering & Construction Co. Ltd. v. NHAI***[13], would serve as a guiding light to determine whether the non-consideration of the contractual obligation of "Good faith" would trigger any ground for interference or not. The relevant paras for the same are reproduced below.

> *"36.* ***The distinction between an erroneous adjudication of an issue, by the Arbitral Tribunal, and a failure to adjudicate an issue submitted to arbitration is material. The failure to adjudicate the matters that have been submitted to the Arbitral Tribunal would make the impugned Award vulnerable to challenge under Section 34(2)(a)(iv) of the Act of 1996 if it results in prejudice to the parties to the dispute.*** *In* ***Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India*** *((2019) 15 SCC 131), while considering Article 34(2)(a)(iii) of the UNCITRAL Model Law which corresponds to Section 34(2)(a)(iv) of the Act of 1996, the Supreme Court cited with affirmation the judgment of Court of Appeal of Singapore, in* ***CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK*** *(2011 SGCA 33), which held that the said provision of UNCITRAL Model Law applies not only where an arbitral tribunal improperly decides matters which had not been submitted to it, but also where it 'failed to decide matters that had been submitted to it', since in either situation the tribunal has exceeded or failed to exercise the authority conferred upon it by the parties. The Court of Appeal at Singapore clarified that failure to deal with every issue referred to the tribunal would not, by itself, warrant setting aside an award; the crucial consideration is whether such failure has resulted in real or actual prejudice to a party. The relevant portion of the judgment reads as under: - "61. The Court of Appeal of Singapore, in* ***CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK****, held as follows: "25. The court's power to set aside an arbitral award is limited to setting aside based on the grounds provided under Article 34 of the Model Law and Section 24 of the IAA. As declared by this court in* ***Soh Beng Tee & Co. (Pte) Ltd. v. Fairmount Development (Pte) Ltd. [Soh Beng Tee &***

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Co. (Pte) Ltd. v. Fairmount Development (Pte) Ltd. *((2007) 3 SLR (R) 86), SLR(R) para 59 ("Soh Beng Tee"), the current legal framework prescribes that the courts should not without good reason interfere in the arbitral process. This policy of minimal curial intervention by respecting finality in the arbitral process acknowledges the primacy which ought to be given to the dispute resolution mechanism that the parties have expressly chosen.*

26. However, it has also been said (correctly) that no State will permit a binding arbitral award to be given or enforced within its territory without being able to review the award, or, at least, without allowing the parties an opportunity to address the court if there has been a violation of due process or other irregularities in the arbitral proceedings [see Peter Binder, International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions (Sweet & Maxwell, 3rd Edn., 2010) at para 7-001].

27. While the Singapore courts infrequently exercise their power to set aside arbitral awards, they will unhesitatingly do so if a statutorily prescribed ground for setting aside an arbitral award is clearly established. The relevant grounds in this regard can be classified into three broad categories [see generally Nigel Blackaby et al, Redfern and Hunter on International Arbitration (Oxford University Press, 5th Edn., 2009) ("Redfern and Hunter") at paras 10.30-10.86]. First, an award may be challenged on jurisdictional grounds (i.e. the non-existence of a valid and binding arbitration clause, or other grounds that go to the adjudicability of the claim determined by the Arbitral Tribunal). Second, an award may be challenged on procedural grounds (e.g. failure to give proper notice of the appointment of an arbitrator), and, third, the award may be challenged on substantive grounds (e.g. breach of the public policy of the place of arbitration)."

* * *

31. It is useful, at this juncture, to set out some of the legal principles underlying the application of Article 34(2)(a)(iii) of the Model Law. First, Article 34(2)(a)(iii) is not concerned with the situation where an Arbitral Tribunal did not have jurisdiction to deal with the dispute which it purported to determine. Rather, it applies where the Arbitral Tribunal improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to it. In other words, Article 34(2)(a)(iii) addresses the situation where the Arbitral Tribunal exceeded (or failed to exercise) the authority that the parties granted to it (see Gary B. Born, International Commercial Arbitration (Wolters Kluwer, 2009) at Vol. 2, pp. 2606-07 and 2798-99). This ground for setting aside an arbitral award covers only an Arbitral

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Tribunal's substantive jurisdiction and does not extend to procedural matters [see Robert Merkin& Johanna Hjalmarsson, Singapore Arbitration Legislation Annotated (Informa, 2009) ("Singapore Arbitration Legislation") at p. 117].

32. Second, it must be noted that a failure by an Arbitral Tribunal to deal with every issue referred to it will not ordinarily render its arbitral award liable to be set aside. The crucial question in every case is whether there has been real or actual prejudice to either (or both) of the parties to the dispute. In this regard, the following passage in Redfern and Hunter ([27] supra at para 10.40) correctly summarises the position: The significance of the issues that were not dealt with has to be considered in relation to the award as a whole. For example, it is not difficult to envisage a situation in which the issues that were overlooked were of such importance that, if they had been dealt with, the whole balance of the award would have been altered and its effect would have been different. (emphasis added)

33. Third, it is trite that mere errors of law or even fact are not sufficient to warrant setting aside an arbitral award under Article 34(2)(a)(iii) of the Model Law [see ***Sui Southern Gas Co. Ltd. v. Habibullah Coastal Power Co. (Pte) Ltd. [Sui Southern Gas Co. Ltd. v. Habibullah Coastal Power Co. (Pte) Ltd.*** *((2010) 3 SLR 1), (2010) 3 SLR 1], SLR paras 19-22]. In the House of Lords decision of* ***Lesotho Highlands Development Authority v. ImpregiloSpA*** *((2006) 1 AC 221: (2005) 3 WLR 129: 3 AII ER 789 (HL)), which concerned an application to set aside an arbitral award on the ground of the Arbitral Tribunal's "exceeding its powers" [see Section 68(2)(b) of the Arbitration Act, 1996 (c 23) (UK) ("the UK Arbitration Act")], Lord Steyn made clear (at [24]-[25]) the vital distinction between the erroneous exercise by an Arbitral Tribunal of an available power vested in it (which would amount to no more than a mere error of law) and the purported exercise by the Arbitral Tribunal of a power which it did not possess. Only in the latter situation, his Lordship stated, would an arbitral award be liable to be set aside under Section 68(2)(b) of the UK Arbitration Act on the ground that the Arbitral Tribunal had exceeded its powers. In a similar vein, Article 34(2)(a)(iii) of the Model Law applies where an Arbitral Tribunal exceeds its authority by deciding matters beyond its ambit of reference or fails to exercise the authority conferred on it by failing to decide the matters submitted to it, which in turn prejudices either or both of the parties to the dispute (see above at [31]).*"

[Emphasis Supplied]

37. The obligation of the Arbitral Tribunal under the Act of 1996 to adjudicate upon the defence raised by the Respondent is enshrined

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in Section 18 and Section 34(2)(a)(iii) of the Act of 1996. The Supreme Court in ***Associate Builders v. Delhi Development Authority*** *((2015) 3 SCC 49 [Paragraph No. 30].) held that the said provisions enshrine the fundamental juristic principles of natural justice.*

38. In our considered opinion, the jurisdiction of the Arbitral Tribunal under Clause 2.6 of GCC to review the Certificate dated 31.08.2014 for its correctness had been invoked by the Appellant itself in the SoC. The Respondent consented to this reference to arbitration and submitted its SoD disputing the correctness of the said Certificate and filing its objections to the said Certificate. The Arbitral Tribunal was therefore obliged to decide the issue of the correctness [or otherwise] of the Certificate dated 31.08.2014, on the basis of the pleadings in the SoC and SoD as well as the documents, even excluding the counter-claim. The absence of a formal claim by the Respondent challenging the Certificate dated 31.08.2014 cannot be a justification for not adjudicating this issue, as the challenge by the Respondent to the Certificate dated 31.08.2014 was unambiguous and clear in the notice dated 07.11.2016 issued by the Appellant invoking arbitration, and the pleadings. Assuming a formal claim was required, since all necessary pleadings and evidence were on record, the Arbitral Tribunal ought to have permitted the Respondent to amend the pleading to include such a formal claim. However, at the culmination of the arbitral proceedings which spanned over 50 hearings, where arguments were addressed by parties on the correctness [or otherwise] of the Certificate dated 31.08.2014, the Arbitral Tribunal could not have declined to adjudicate this issue on a thin premise of lack of a formal claim.

39. ***In our considered opinion, the Arbitral Tribunal's conscious omission to adjudicate upon the correctness [or otherwise] of the Certificate dated 31.08.2014 not only violated the principles of natural justice, as the Tribunal failed to adjudicate upon the defense of the Respondent, but the impugned Award also violated Section 34(2)(a)(iv) of the Act of 1996 read with Article 34(2)(a)(iii) of the UNCITRAL Model Law as the Tribunal had abjectly failed to decide the dispute with respect to the correctness [or otherwise] of the Certificate dated 31.08.2014 referred to it by the parties****.*

40. The Respondent's challenge to the correctness of the Certificate dated 31.08.2014 questioned and disputed that the Appellant was entitled to the balance amount claimed on the basis of the said Certificate. ***By proceeding on the erroneous premise that the said Certificate had not been challenged, the Arbitral Tribunal failed to exercise the authority conferred upon it by the parties, in respect of a material dispute submitted to it, thereby***

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causing prejudice to the Respondent. The impugned Award, to that extent, is therefore unsustainable under Section 34(2)(a)(iii) and Section 34(2)(a)(iv) of the Act of 1996. The non-adjudication of a material defence also violates the basic requirement of a fair adjudicatory process, and the impugned Award is in conflict with the public policy of India under Section 34(2)(b)(ii) Explanation (iii) of the Act of 1996*".*"

71. A plain reading of the above, indicates that an Arbitral Tribunal is obligated to adjudicate material disputes and defences submitted to it, and a complete failure to decide such an issue, resulting in actual prejudice to a party, may constitute a violation of natural justice and the most basic notions of justice, warranting interference under Section 34(2) of the Act.

72. The Division Bench of this Court drew a clear distinction between incorrect adjudication and non-adjudication. It was held that while an incorrect finding ordinarily cannot be reopened under Section 34, however, a failure to decide material issue amounts to a failure to exercise the jurisdiction entrusted to the Tribunal and may attract Sections 34(2)(a)(iii), 34(2)(a)(iv) and 34(2)(b)(ii), read with Explanation 1(iii).

73. Adverting to the facts of the present case, as it is understood above that the material question or defence of "Good faith" left unadjudicated. This Court puts a word of caution that, it is aware that the mere absence of an express finding on "Good faith" would not be sufficient if the Tribunal's reasoning, read as a whole, effectively dealt with that allegation. However, upon reading the award as a whole, it is

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made out that the defence of the petitioner pertaining to "Good faith" under Article 34 was completely left unadjudicated.

74. In ***OPG Power Generation v. Enexio***[14], the Hon'ble Supreme Court drew a distinction between inadequate reasoning and a complete absence of intelligible reasoning on a material issue. MMTC's challenge is believable as the omission fell into the latter category, which, in turn, further resulted in material prejudice. Thus, it can be said that the same could be brought within the ground for interference under Section 34.

75. MMTC had specifically alleged and raised a clear defence that PHML abused its majority shareholding and caused MPIPL to enter into associated party transactions in violation of Article 34. Against this background, evaluating the defence of "Good Faith" became all the more imperative for the Tribunal before characterizing the transaction to be at arm's length.Shockingly, the Arbitral Tribunal completely failed to adjudicate the said vital issue. A holistic reading of the impugned award, reveals a total failure to determine this material allegation.

76. Furthermore, the aforesaid omission has resulted in material prejudice, as the failure to adjudicate upon the "Goodfaith" defence directly vitiated the tribunal's final decision. *Dehors* any expression of opinion on whether PAMP was contractually entitled to levy the disputed fees or not, the quintessential issue that the learned arbitral tribunal was bound to determine was whether PHML's deployment of

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its majority control to orchestrate agreements benefiting PAMP's associated companies conformed to the touchstone of good faith.

77. In the considered view of this Court, this constituted a standalone and independent defence that imperatively required adjudication. MMTC had expressly raised this plea before the learned Arbitral Tribunal, anchoring it upon specific, material circumstances, namely(i) the execution of the DSA behind its back (ii) the explicit objections raised by its nominee directors regarding the licence fees, and (iii) the transfer and restructuring of shareholdings within the PAMP group alongside the alleged diversion of funds.

78. These specific circumstances bound the Tribunal to evaluate and adjudicate them through the prism of Article 34, which explicitly stipulated the standard of, "Good faith".

79. MMTC's clear plea regarding the breach of "Good faith" was never independently adjudicated. Even if one were to accept the Tribunal's view that the services in question were not intended to be gratuitous, the total non-adjudication of his independent contractual breach has caused grave material prejudice to MMTC, thereby rendering the findings of the tribunal unsustainable.

G. Conclusion

80. Accordingly, the Impugned Award dated 11.12.2016 is set aside to the extent that it dismisses MMTC's surviving claims for breach of

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the SPSHA and the related monetary relief, and consequently directs MMTC to pay costs and expenses based on that dismissal.

81. The portions of the Award concerning prayers (a), (b) and (c), which MMTC did not pursue before the Tribunal, shall remain undisturbed.

82. The petition is partly allowed in the aforesaid terms. Pending applications, if any, are accordingly disposed.

83. Needless to state, the parties are free to pursue any contractual remedies or any remedy as available in law, concerning the surviving dispute.

OM PRAKASH SHUKLA, J

NOVEMBER 03, 2026*/pa/gunn*

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