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

% *Date of Decision: 11th September, 2025*

\+ O.M.P. (COMM) 204/2023 & I.A. 10700/2023

RAGHVENDRA SINGHANIA & ORS. .....Petitioners

Through: Mr. Anirudh Bakhru, Ms. Vasundhara Bakhru, Mr. Nikhil Palli, Ms. Niyati Razdan and Ms. Bhavya Sharma, Advocates.

versus

BAJAJ FINANCE LIMITED & ORS. .....Respondents

Through: Mr. Rajiv Nayar and Mr. Rajshekhar Rao, Senior Advocates with Ms. Shally Bhasin, Mr. Karan Luthra, Mr. Prateek Gupta and Ms. Rachna Dubey, Advocates.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J.

1. This petition is preferred on behalf of the Petitioners under Section 34 of the Arbitration and Conciliation Act, 1996 ('1996 Act') laying a challenge to the arbitral award dated 13.02.2023, passed by the learned Sole Arbitrator.

2. Factual matrix to the extent necessary and as set forth in the petition is that Petitioner No.1 is a high net worth individual with credit worthiness and is engaged in business of investment through advisory services in wealth management. Respondent No.1 is a Non-Banking Financial Institution incorporated under the Companies Act, 1956. Petitioner No.1 approached Respondent No.1 for obtaining a loan of Rs.3 crores which was sanctioned

vide letter dated 23.01.2020 against securities, making it a Loan Against Securities ('LAS').

3. Pursuant to the sanction letter dated 23.01.2020, Petitioner No.1 and Respondent No.1 entered into a Loan-cum-Pledge-cum-Guarantee Agreement ('Loan Agreement'), whereby Petitioners No.1 to 3 pledged securities owned by them as collaterals against the borrowings. Since the shares of Petitioners No. 2 and 3 were also pledged, they became co-borrowers to secure LAS facility and thereby provided security to the extent of Rs.3 crores. As per the agreed terms and conditions incorporated in the Loan Agreement, Petitioners were required to maintain Minimum Security Margin equivalent to twice the loan value.

4. In February, 2020, there was onset of COVID-19 and resultantly, stock markets fluctuated triggering sell offs. In this situation, value of securities pledged by the Petitioners started to plunge. On 29.02.2020, Respondent No.1 informed the Petitioners that Minimum Security Margin had fallen below the limit and three working days were provided to make good the margin shortfall. It was also stated in the e-mail that in case the margin fell below 85% of the loan value, Respondent No.1 will liquidate the pledged securities treating it to be an 'Event of Default'. Similar notices were sent on: (a) 05.03.2020 intimating fall of margin to 97.83%; (b) notice dated 07.03.2020 intimating fall to 95.93%; (c) notice dated 17.03.2020 intimating fall to 91.02%; (d) notice dated 20.03.2020 intimating that margin had fallen to 88.07%; and (e) notice dated 21.03.2020 intimating that margin had fallen to 88.25%.

5. In response to these notices, Petitioner No.1 informed the Respondents that they would furnish additional securities to prevent

liquidation/sale of pledged securities and sought extension of time to do so. In order to fulfil the obligations under the Loan Agreement and to honour the commitment to furnish additional security, Petitioner No.1's Wealth Manager, Sicomoro Advisors Pvt. Ltd. ('Sicomoro') informed the Respondents vide e-mail dated 18.03.2020 that some valuable shares belonging to one Ms. Aditi Singhania, daughter of Petitioner No. 2 and niece of Petitioners No.1 and 3, were in the process of being pledged in favour of Respondent No.1 with a value of Rs.41,78,987/-.

6. On 21.03.2020, Respondent No.1 sent an e-mail to the Petitioners intimating that due to prevailing COVID-19, Government of Maharashtra had ordered all offices to be closed till 31.03.2020 and therefore, its office will be working at a limited capacity, owing to which Petitioners might not be able to connect and there could be delay in responding. On 23.03.2020, the security margin fell to 82.68% i.e. below the threshold of 85% stipulated in the Loan Agreement and Respondent No.1 sent an e-mail dated 24.03.2020 at 07:40 AM to the Petitioners granting them one working day's time to replenish the margin shortfall, failing which the pledged securities would be liquidated. However, Respondents sold the pledged securities at around 10:30 AM on the same day and pledged shares were debited from the Dematerialized Account, as per final stock sale position for 24.03.2020 and this fact was intimated to the Petitioners vide e-mail dated 25.03.2020.

7. On 24.03.2020 itself, Petitioners made a fund transfer of Rs.25 lacs towards payment of cash margin money, to remedy the shortfall. This fact was communicated by Sicomoro to Respondent No.1 vide e-mail dated 24.03.2020 sent at 02:58 PM. Petitioners thereafter closed the loan account and sent a notice invoking arbitration dated 10.12.2020, there being an

arbitration clause in the Loan Agreement. By consent, parties appointed a sole Arbitrator and filed their respective Statement of Claim and Statement of Defence. Petitioners sought restoration of quantity of shares into their Demat Account along with damages of Rs.56,57,920.80 with interest @ 15% from 24.03.2020 till realisation and damages of Rs.1,05,97,000.75 with interest @ 15% from 24.03.2020 till realisation as also damages of Rs.50 lacs towards loss of opportunity along with costs.

8. Learned Arbitrator settled the following issues for determination:-

i. Whether the claimant is entitled to rely on the principle of 'force majeure' in support of its claim? ***OPC***

ii. Whether the Claimants were entitled to any concessions/ relaxations granted by the Reserve Bank of India during the COVID-19 pandemic? ***OPC***

iii. Whether the Claimants were provided sufficient and reasonable notice period in terms of the Loan Agreement read with the Sanction Letter read with the RBI Master Directions dated 01.09.2016? ***OPR***

iv. Whether Respondent No.1 was not entitled to invoke the pledge and sell the shares/ securities on March 24, 2020? ***OPC***

v. Whether Respondent No.1 could have accepted pledge of shares/securities by one Ms. Aditi Singhania? ***OPC***

vi. Whether or not the invocation of the pledged shares of the Claimant and the subsequent sale of the shares by Respondent No.1 was in terms of the Loan Agreement read with the Sanction Letter read with the RBI Master Directions dated 01.09.2016?

vii. Whether the Claimants are entitled to damages of Rs. 56,57,920.80/- along with interest at the rate of 15% from March 24, 2020, till realization? ***OPC***

viii. Whether the Claimants are entitled to damages of Rs.1,05,97,000.75/- (Rupees One Crore Five Ninety Seven Thousand and Seventy-Five Paise Only) along with interest at the rate of 15% from March 24,2020, till realization? ***OPC***

ix. Whether the Claimants are entitled to damages of Rs. 50,00,000/- (Rupees Fifty Lakhs Only) towards loss of opportunity? ***OPC***

x. Whether the Claimant is entitled to any interest on the amount sought as damages? ***OPC***

xi. Whether any party is entitled to costs, and if so, in what amount?

xii. What order?

9. By the impugned award, the learned Arbitrator decided all issues against the Petitioners and ex-consequenti, declined the reliefs of compensation and damages. Arbitrator also imposed cost of Rs.8,42,340/-, of which part was towards fee of the Arbitrator, payable by the Petitioners and the remaining was towards professional expenses incurred by the Respondents.

CONTENTIONS ON BEHALF OF THE PETITIONERS:

10. The arbitration agreement between the parties gave right to the Respondents to appoint the Arbitrator unilaterally, in teeth of the judgments of the Supreme Court in ***Voestalpine Schienen Gmbh v. Delhi Metro Rail Corporation Limited, (2017) 4 SCC 665; Perkins Eastman Architects DPC and Another v. HSCC (India) Limited, (2020) 20 SCC 760;*** and ***Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) A Joint Venture Company, (2025) 4 SCC 641***. Respondents wrote to the Petitioners on 11.01.2021 to appoint an Arbitrator from a panel of three Arbitrators, failing which Respondents would unilaterally appoint one of them. Having no option, Petitioners consented to the appointment from the narrow and restricted panel. Arbitrator was appointed by the Respondents unilaterally vide letter dated 27.01.2021 from the said panel of three persons, which fact is admitted in the affidavit filed on 11.09.2023. Every correspondence prior to appointment as also the pleadings in the replies before this Court indicate that the appointment was from a 'panel' maintained by the Respondents, which was a curated panel and far from being broad based. In ***Voestalpine Schienen Gmbh (supra),*** the Supreme

Court held that a narrow panel of Arbitrators curated by one party, from which the other party is forced to choose from, would fall foul of the proscription under Section 12(5) of the 1996 Act. In ***Sri Ganesh Engineering Works v. Northen Railway and Another, 2023 SCC OnLine Del 7574,*** this Court held that a four-member panel of Arbitrators is restrictive. In ***Taleda Square Private Limited v. Rail Land Development Authority, 2023 SCC OnLine Del 6321*** and ***Overnite Express Limited v. Delhi Metro Rail Corporation, 2022 SCC OnLine Del 2488,*** this Court reiterated that a narrow panel of five persons, would be restrictive and violative of principles of autonomy and independence, permitting a party to an arbitration agreement, to appoint an Arbitrator of its choice. In fact, after the decision of the Supreme Court in ***CORE (supra),*** even a broad-based panel may not meet the threshold of Section 12(5) of the 1996 Act in a given case. Therefore, the award rendered by an Arbitrator appointed unilaterally is without jurisdiction and a nullity and deserves to be set aside. ***[Ref: Kotak Mahindra Bank Ltd. v. Narendra Kumar Prajapat, 2023 SCC OnLine Del 3148].***

11. Proviso to Section 12(5) of the 1996 Act provides that parties may, subsequent to disputes having arisen between them, waive the applicability of sub-Section (5) by express agreement in writing. In the present case, there was no agreement in writing by the Petitioners waiving the proscription of Section 12(5) of the 1996 Act. Clearly, the said provision mandates an express agreement in writing and there is no scope to urge that the waiver could be oral or implied by the conduct of a party in a given case. ***[Ref.: Govind Singh v. Satya Group Pvt. Ltd. and Another, 2023 SCC OnLine Del 37].*** In ***Kerala State Electricity Board and Another v. Kurien E.***

Kalathil and Another, (2018) 4 SCC 793, the Supreme Court held that an observation by the Arbitrator in his order that the party waived its objection to his appointment, would not be construed as a waiver within the meaning of proviso to Section 12(5) of the 1996 Act. In the instant case, there was no waiver by the Petitioners in writing as envisaged in proviso to Section 12(5) of the 1996 Act and thus the appointment of the Arbitrator being unilateral, cannot withstand judicial scrutiny.

12. On merits also, the impugned award is clearly unsustainable, being contrary to the agreed terms of the Loan Agreement between the parties. Clause 1.1(ii) read with Clauses 2.1(iii) and 3.1 of Article V of the Loan Agreement made it clear that if any Event of Default occurred, the lender shall give notice of one (1) working day or any reasonable notice, as the lender may deem fit, to the Borrower/Obligator specifying such Event of Default and if the Event of Default was capable of being cured or remedied, the Borrower/Obligator shall cure or remedy the default or such event, before expiry of the notice period. On 24.03.2020, when the security margin fell below 85%, Respondents called upon the Petitioners by an e-mail sent at 07:40 AM to replenish the margin shortfall within one working day. However, without waiting for the said period to expire, at around 10:30 AM, the pledged shares were debited from the Dematerialized Account. Petitioners, on the other hand, fulfilled their obligation by making a fund transfer of Rs.25 lacs on the same day and intimated this fact to Respondent No.1 at 02:58 PM by an email.

13. Clauses 2.1 (iii) and 3.1 of Article V of the Loan Agreement stipulated that upon happening of an Event of Default, in this case, reduction of margin to below 85%, Lender shall give notice of one working day or any

reasonable notice to the Borrower so that the default could be cured or remedied, if capable of being cured. The Arbitrator completely overlooked the contractual terms and even after noting that it could not be refuted that Respondents had given one day time in the e-mail dated 24.03.2020 to make good the margin shortfall before selling off the pledged securities, which they did not adhere to, held that this alone could not be the basis to hold that the pledged securities were sold illegally. In coming to this erroneous conclusion, the Arbitrator was swayed by the 7 notices sent earlier to the Petitioners, between 29.02.2020 to 21.03.2020, intimating the fall of security margin, from time to time. This is a 'patent illegality' in the award as the Arbitrator was bound to act within the four corners of the terms of the contract, being a creature of the contract and ought not to have taken into account extraneous circumstances to dilute the contractual bargain between the parties. It is trite that if the Arbitrator does not act as per the express terms of the contract, governing the relationship between the parties and/or travels outside the agreed terms, the award rendered by him is a nullity and such an award cannot be enforced. ***[Ref.: PSA SICAL Terminals Private Limited v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Others, (2023) 15 SCC 781].*** Significantly, the award does not even deal with the effect and consequences of non-compliance of Clause 3.1, the main stake of the Petitioners.

14. Reliance on the 7 notices given to the Petitioners between 29.02.2020 to 21.03.2020 was wholly irrelevant. The crucial point for consideration before the Arbitrator was whether in terms of Clause 3.1 notice was given and if so whether the Respondents waited for expiry of the notice period for the Petitioners to cure and remedy the default by replenishing the security

margin short fall. Admittedly, it was only on 24.03.2020 that for the first time, security margin had fallen below 85%, giving a right to Respondent No.1 to liquidate the pledged securities and thus the earlier notices were inconsequential. Moreover, it was clearly mentioned in the sanction letter dated 23.01.2020 that the 'Sell Trigger' will initiate *inter alia* in case of shares, if percentage of Drawing Power to Loan falls below 85%. Having given one day's notice at 7.40 AM on 24.03.2020 to the Petitioners when the margin fell, Respondents were bound under the contract to wait for Petitioners to replenish within the said period, but instead the pledged securities were sold at 10.30 AM. Petitioners brought these facts to the notice of the Arbitrator and urged that acting on the notice, Petitioners had transferred funds in the sum of Rs.25 lacs on the same day and thus Respondents were estopped from liquidating the securities, however, even this contention was rejected on the ground that contents of communications are boilerplates and cannot be construed as estoppel. This observation is completely perverse and unknown to law since contents of communications are no exception to the Doctrine of Estoppel. In ***Paras Khuttan v. Gail (India) Limited and Another, 2021 SCC OnLine Del 1990,*** this Court has held that a party making a representation to the other party, on which the second party acts or omits to act, cannot thereafter take a position contrary to the representation.

CONTENTIONS ON BEHALF OF THE RESPONDENTS:

15. There is gross suppression by the Petitioners and they deserve to be non-suited on this ground alone. Petitioners having been unsuccessful before the Arbitrator, who was appointed with their unequivocal consent are dishonestly contending that the appointment of the Arbitrator was unilateral

having been made from the alleged panel of Arbitrators, maintained by Respondent No.1. In continuation of this plea, a false ground of challenge is raised that the Arbitrator did not give the necessary disclosure under Section 12 of the 1996 Act. Procedural order dated 27.03.2021, passed by the Arbitrator in the presence of the Petitioners, in light of their objection that the initial disclosure on 06.02.2021 did not disclose the relationship of the Arbitrator *qua* the Respondents, shows that the Arbitrator indeed declared that he had no past or present relationship with or interest in any of the parties in the arbitral proceedings or with the subject matter in the dispute, whether financial, business, professional or otherwise, which was likely to give justifiable doubts on his independence and impartiality. Despite being present when the order was passed, Petitioners endeavoured to misguide the Court that the Arbitrator had not given the required disclosure. When confronted with the order placed on record by Respondent No.1, along with additional affidavit dated 26.04.2025, Petitioners were unable to offer any explanation for the false submission and conveniently stated that they would not press this ground. This conduct is unpardonable and a mere statement to give up the argument cannot absolve them of wilful suppression of material facts. It is settled that a party guilty of wilful suppression cannot be heard in the Court of law. The Division Benches of this Court in ***Satish Khosla v. Eli Lilly Ranbaxy Ltd., 1997 SCC OnLine Del 935*** and ***Benara Bearings & Pistons Ltd. v. Mahle Engine Components India Pvt. Ltd., 2017 SCC OnLine Del 7226,*** as also the single Bench in ***Mukul Shyam v. Institute of Chartered Accountants of India, 2023 SCC OnLine Del 1083,*** have taken a view that a party who wilfully suppresses material from the Court or misrepresents, is ousted from seeking any relief.

16. The appointment of the Arbitrator cannot be termed as a unilateral appointment and was with the consent of the parties. Petitioners have deliberately omitted to refer to their legal notice dated 10.12.2020, whereby they invited Respondent No.1 to appoint the Arbitrator within 30 days to resolve the disputes arising out of the Loan Agreement, failing which they would initiate proceedings for appointment and while doing so, reference was made to arbitration clause 8 incorporated in Article VII of the LAS Agreement. Respondent No.1 responded to the notice vide its reply dated 11.01.2021 and while it could have appointed an Arbitrator on the request of the Petitioners, Respondent No.1 only proposed the names of three independent Arbitrators to ensure fairness. Petitioners were requested to select and nominate one of the three proposed Arbitrators. Thereafter, Petitioners acting through their Advocates, consented to the nomination of Sh. Vaibhav Mehra as the sole Arbitrator and requested Respondent No.1 to confirm the appointment. Pertinently, even without waiting for Respondent No.1 to act in terms of this request for confirmation, Petitioners themselves wrote to the Arbitrator vide letter dated 27.01.2021, intimating him of his appointment and requesting him to accept the same and call upon the parties to participate in the arbitral proceedings.

17. Consent of the Petitioners in the appointment of the Arbitrator is further evident from the second procedural order dated 27.03.2021, wherein the agreement of the parties to file the pleadings, conduct evidence only by referring to documents and/or oral evidence, if necessary, as also the mode and conduct of the proceedings, is recorded. There is not a whisper in the order that Petitioners objected to the appointment of Arbitrator. In fact, through the proceedings, they fully participated without any demur or

protest. No application was filed under Section 12 before the Arbitrator for termination of the mandate and/or before this Court under Section 14 of the 1996 Act.

18. The Division Bench of this Court in ***Bhadra International India Pvt. Ltd. and Others v. Airports Authority of India, 2025 SCC OnLine Del 698,*** wherein the Appellants had invited the Respondent to appoint an Arbitrator and had participated in the proceedings with no objection, held that the appointment of the Arbitrator could not be termed as unilateral at all since Respondent had proceeded to appoint the Arbitrator only on Appellants' request to do so, in writing. The present case is on a better footing inasmuch as despite invitation of the Petitioners to appoint an Arbitrator, Respondent No.1 did not do so and proposed three names for the Petitioners to choose from. In fact, as a matter of practice invariably in notices under Section 21 of the 1996 Act, the party invoking arbitration proposes the names of possible Arbitrators and many a times, the other party consents to such proposal. This cannot be termed as unilateral appointment and accepting the plea of the Petitioners would lead to a strange consequence where no party will propose a name and no party will consent to the proposed name in response to notice invoking arbitration.

19. Petitioners are not factually correct in their submission that the Arbitrator was on the panel of Respondent No.1, since Respondent No.1 never maintained a panel of Arbitrators. The use of the words *'from our panel of Arbitrators'* in the letter dated 11.01.2021 was an inadvertent error and in the additional affidavit dated 26.04.2025, Respondent No.1 has categorically taken this position. It is also clarified in the affidavit that the three names proposed were forwarded by a law firm and this is fortified by

the e-mail dated 15.07.2020 sent by the firm. Moreover, it was always open to the Petitioners to disagree and propose more names or approach the Court under Section 11 of 1996 Act, but they chose to do neither of the two. The Arbitrator in his disclosure unequivocally confirmed that he had no relationship with Respondent No.1 and was never appointed as an Arbitrator in any of its case.

20. The challenge to the award on merits is without any basis. The scope of interference in an arbitral award under Section 34 of the 1996 Act is extremely narrow and restricted. Reading of the petition does not make out any ground envisaged under Section 34 and the Petitioners are in fact calling upon the Court to enter into a fact-finding exercise and re-appreciation of evidence, so as to substitute the view of the Arbitrator, which is impermissible in law. Even during the hearing, Petitioners are unable to demonstrate contravention of '*public policy of India'* or *'patent illegality apparent on the face of the award'.* Be that as it may, there is no merit in the only argument that the Arbitrator did not consider the contractual clauses and/or that reasonable notice was not given to the Petitioners before liquidating the pledged securities.

21. It is an undisputed fact that there was a shortfall in the margin as the value of pledged securities had fallen drastically in February to March, 2020. It is equally undisputed that Respondent No.1 had issued 7 notices to the Petitioners, prior to 8th notice on 24.03.2020, calling upon them to replenish the shortfall in the margin. Despite 7 notices, Petitioners allowed the margin to fall below 85% as on 23.03.2020 and 24.03.2020. As per Clause 4.1 of Article III and Clause 4.8 of Article II of the LAS and Item No. 28 of Sanction Letter dated 23.01.2020, Respondent No.1 was entitled

to sell the pledged securities without any further notice to the Petitioners, if the percentage of margin fell below 85%. Further, in each of the eight notices, Respondent No.1 had categorically put the Petitioners to notice that if during the notice period, the margin fell below 85% of the Loan Value as on the date, after the issue of the notice, Respondent No.1 will be constrained to liquidate the available securities pledged, treating it to be an Event of Default. Therefore, Respondent No.1 acted in consonance with the terms of contract and the Arbitrator rightly decided this issue in favour of the said Respondents.

22. After considering the entire documentary and oral evidence including provisions of the LAS as also the contents of the 8 notices, admittedly received by the Petitioners, the Arbitrator arrived at a finding of fact that 7 notices were given to the Petitioners, prior to the 8th and final notice, and this was sufficient to hold that the pledged securities were not illegally sold by the Respondents. While arriving at this finding, based on evidence on record, the Arbitrator referred to and relied upon the observations of the Supreme Court in ***PTC India Financial Services Limited v. Venkateswarlu Kari and Another, (2022) 9 SCC 704,*** wherein it was held that the pawnee has the right to sell the pledged goods/securities to safeguard its interest, if a reasonable notice has been given *albeit* both under the common law and Contract Act, pawnee has the choice, even after issue of notice for sale, to sue for the debt due while retaining possession of the pledged goods. Sending 7 notices, prior to the 8th notice, after which the pledged securities were liquidated, would tantamount to reasonable notice. Moreover, there were at least 3 days between the second last notice issued on 21.03.2020 (Saturday) and last notice on 24.03.2020 (Tuesday) at 07:40 AM, but even

then, no steps were taken by the Petitioners to remedy the default. One cannot overlook that the award is in the context of shares and the volatile securities market was rendered even more volatile on the onset of Pandemic COVID-19, the period to which this case relates. As a lender, Respondent No.1 could not be expected to wait infinitely allowing the securities to deteriorate every minute. By no stretch of imagination, the finding of the Arbitrator that the sole ground taken by the Petitioners that having given one day's notice on 24.03.2020, Respondents did not wait to sell the securities, was not enough to hold that the securities were illegally sold, can be termed as perverse or against the fundamental policy of Indian law. This is a possible and plausible view of the Arbitrator and this Court cannot substitute the same in the present petition.

23. Rejection of the securities offered by Ms. Aditi Singhania was justified and the Arbitrator's finding on this warrants no interference. Ms. Singhania was neither a Borrower/co-Borrower or Guarantor under the LAS and there was no privity of contract between her and Respondent No.1. Arbitrator has comprehensively addressed this issue and rightly observed that addition of any party as co-Borrower would mean amendment of the LAS, which would require fresh offer and acceptance for a concluded contract. It was also rightly held that *albeit* the electronic exchange of documents was owing to the lockdown situation but the fact was that the documents sent by Ms. Singhania did not physically reach the Respondents and Respondent No.1 could not be compelled to accept her as a co-Borrower, through electronic communication unilaterally sent by her, in the absence of proper due diligence or verification of original documents, which was mandatory under the regulatory regime concerning loan facilities.

REJOINDER ARGUMENTS OF THE PETITIONERS:

24. There is no wilful or deliberate suppression by the Petitioners on the aspect that the Arbitrator did not give the necessary disclosure required under Section 12 of 1996 Act. This was only an oversight and once the order was brought to the notice by way of additional affidavit by Respondent No.1, the argument was instantly given up. The judgments cited by the Respondents in this regard are distinguishable. In ***Mukul Shyam (supra),*** Petitioner had approached this Court under Article 226 of Constitution of India, which is inherently a discretionary and equitable remedy and even there the Court had in fact analysed the merits of the case before dismissing the petition. Jurisdiction under Section 34 is distinct from a writ jurisdiction. In ***Satish Khosla (supra),*** Division Bench of this Court was dealing with a case where a party had filed a suit and obtained interim orders without disclosing that in a prior suit, interim injunction was denied to the Plaintiff and had failed to file the pleadings of the previous suit. The Court noted as a matter of fact that the relief claimed in the prior suit was identical to the suit before the Court and thus withholding information about filing another suit amounted to contempt of Court. In the instant case, there is no wilful suppression and it was inadvertently overlooked that the Arbitrator had given a disclosure. This cannot be a reason to dismiss this petition. In ***Benara Bearings and Pistons Ltd. (supra),*** the Court found that there was suppression of some agreements between the parties and the petition was also silent in respect of notice dated 24.06.2015, whereby Mahle had unequivocally communicated its decision to not continue the distributorship agreement. A few correspondences were also not disclosed and there was no explanation why the relevant documents were not mentioned. None of these

facts obtain in the present case and the judgment does not inure to the advantage of Respondent No.1.

ANALYSIS AND FINDINGS:

25. Respondent No.1 is a deposit taking NBFC registered with RBI and is engaged in lending and allied activities. On 23.01.2020, Respondent No.1 sanctioned loan for an amount of Rs.3 crores in favour of the Petitioners vide a Sanction Letter dated 23.01.2020 against LAS facility. As per the terms of the Sanction Letter, purpose of the Financial Facility was investments and the term was 24 months with rate of interest @ 10.50% per annum, to be paid monthly. Security cover was specified as 2x i.e. market value of the securities shall be two times the loan balance at all points of time. The drawing power of the Financial Facility was at minimum 100% during the entire term. It was provided that in case the drawing power of the loan fell below 100%, the Petitioners would provide top-up in the form of pledge of shares/make payment to bring the drawing power back to 100%. Importantly, Clause 28 of the Sanction Letter provided that '*Sell Trigger'* will initiate in the case of shares/mutual funds, if percentage of drawing power to loan fell below 85% or if the Petitioners fail to make payment/ top-up within 7 working days, whichever was earlier and in that event, Respondent No.1 would sell the securities to increase the percentage to 100%, without any further notice to the Borrower.

26. After the disbursal of the Financial Facility, there were defaults by the Petitioners and the security margins fell from time to time, starting from February, 2020, when the entire world was hit by COVID-19 Pandemic and stock markets were fluctuating globally including in India, triggering sell offs. Admittedly, Respondent No.1 issued 7 notices to the Petitioners and

illustratively, vide notice dated 29.02.2020, Petitioners were informed that they were required to maintain the margin at 100% at all times during the tenure of loan but it was observed that as on 28.02.2020, the LAS account was overdrawn and margin shortfall had fallen to 98.68%. Petitioners were called upon to maintain the margin at 100%. Petitioners were also warned that if the margin fell below 85% of the Loan Value, after issuance of the notice, Respondent No.1 will be constrained to liquidate the available securities pledged, treating it as an Event of Default. The other 6 notices were dated 05.03.2020 with the margin fall to 97.83%; 07.03.2020 with margin fall to 95.93%; 17.03.2020 with margin fall to 91.02%; 19.03.2020 with margin fall to 91.65%; 20.03.2020 with margin fall to 88.07%; and 21.03.2020 with margin fall to 88.25%. For the first time, the security margin fell to 82.68% on 23.03.2020 i.e. below the threshold of 85% and by e-mail dated 24.03.2020 sent at 07:40 AM by Respondent No.1 to the Petitioners, one (1) working day was granted to replenish the margin shortfall. However, before the Petitioners transferred the fund of Rs.25 lacs on the same day and intimated Respondent No.1 of this position vide e-mail sent at 02:58 PM, Respondent No.1 debited the pledged shares from the Dematerialized Account at 10:30 AM itself. This led to Petitioners invoking the mechanism of arbitration to settle the disputes.

27. As noted above, the Arbitrator settled as many as 12 issues on 27.11.2021 and decided them in favour of the Respondents. On the aspect of the benefit of the Circular titled '*COVID-19 Regulatory Package*' dated 27.03.2020 issued by RBI, the benefit of which was sought by the Petitioners, the Arbitrator held that the same applied to a moratorium on repayment of loan instalments and was inapplicable to security margins. On

force majeure, it was held that Petitioners could not take the advantage of this principle to argue that Ms. Singhania was unable to produce physical application for being added as co-Borrower and provide physical documents by way of additional securities, since she was not a party to the agreement and impossibility of her not being able to enter into a fresh agreement/ addendum did not help the parties in respect of a pre-existing agreement. On the contentious issue of reasonable notice being given by Respondent No.1 before liquidating the securities pledged, the Arbitrator held that the mere fact that Respondent No.1 had given one day's notice but did not adhere to the representation, was not enough to hold that the securities were illegally sold and to come to this conclusion relied heavily on the 7 notices sent earlier to the Petitioners between 29.02.2020 to 21.03.2020. Relevant passages from the award are as follows:-

> *"3. The main contentions raised by the ld. Counsel for the claimants are:*
>
> > ***I. Claimants are concessions/relaxations granted by*** *Respondents RBI during* ***the*** *Covid-19* ***pandemic***
> >
> > *a. The ld. Counsel for the Claimants argued that owing to the COVID-19 pandemic and the circular titled "COV1D-19 – Regulatory Package" dated March 27, 2020, bearing Reference No. RBI/2019-20/186DOR.No.BP.BC.47/21.04.048/2019-20, granting a moratorium on payments of loan instalments, the Claimants were absolved from the duty to replenish the security margin.*
> >
> > *b. It would be relevant to refer to the case of "K.L Enterprises v Bajaj Finance Limited; OMP (I) (Comm.) No.102/2020", relied on by the ld. Counsel for the respondents, where it was held as follows:*
> >
> > > *"69. Insofar as grant of benefit of moratorium under the RBI Circular dated 27.03.2020 is concerned, this argument also has no merit. Circular dated 27.03.2020, by its plain wording, is for a moratorium of three months on repayment of Loan instalments, falling due between 01.03.2020 and 31.05.2020. Circular dated 17.04.2020 provides that in respect of all*

accounts for which lending Institutions decide to .grant moratorium or deferment and which were standard as on 01.03.2020, the 90 day NPA norm shall exclude the moratorium period. In the counter affidavit filed by the RBI in WP.(C) 11127/2020, before the Supreme Court, the stand of the RBI is that the objective of the Circulars is to ease financial stress by relaxing repayment pressures/mitigating the burden of debt brought about by disruptions on account of Pandemic Covid-19. The moratorium period permits the lending Institutions to postpone the payments falling due during the moratorium period. The lending Institutions are required to frame Policies for providing relief to the eligible borrowers. The Circulars, as is evident, would not inure to the benefit of the Petitioners, as they are essentially with respect to a moratorium on repayment of Loan instalments that have fallen due from 01.03.2020. In the present case, the alleged breach is not with respect to repayment of loan instalments, but fall in the Security Margins and significantly, the fall in the margins is from December 2019 and not on account of Covid-19. In any case, the Circular itself gives the discretion to the lenders/Banks to frame Board approved Policies for providing the relief including applying an objective criteria for considering the said relief"

c. Thus, the circular titled "COVID-19 – Regulatory Package" dated March 27, 2020, bearing Reference No. RBI/2019-20/186DOR.No.BP.BC.47/21.04.048/2019-20 does not come to the aid of the claimants.

II. 'Force Majeure' operated and it was impossible for Ms. Aditi Singhania to produce physical application for being added as co-borrower and to provide physical documents of creation of additional pledge and the law does not punish a party for failing to perform an 'impossible act'.

a. On this point, an argument was raised by the Ld. Counsel for the claimants, stating that it had become 'impossible' for Ms. Aditi Singhania to deliver physical documents to the respondents and thus, the fact that she performed the 'next best act' by delivering a scanned copy of the said documents to the respondents should be enough to land a finding in favour of the claimants. Ld. Counsel for claimants relied upon the judgment of "Faizabad Ayodhya Development Authority vs Dr. Rajesh Kumar Pandey; 2022 SCC Online 679" wherein it was held in para 46 as follows:

"(xvi) The law does not expect the performance of the impossible;

(xvii) An act of the court shall prejudice no man;

(xviii) A party prevented from doing an act by certain circumstances beyond his control can do so at the first subsequent opportunity;

(xix) When there is a disability to perform a part of the law, such a charge has to be excused. When performance of the formalities prescribed by a statute is rendered impossible by circumstances over which the persons concerned have no control, it has to be taken as a valid excuse;"

b. In my opinion, this does not come to the rescue of the claimants as Ms. Aditi Singhania was not a party to the agreement and impossibility of not being able to enter into a fresh agreement/ addendum agreement does not help the parties to a pre-existing agreement. Had it been impossible for the parties to the existing agreement to make good the shortfall in security margin, the argument of 'impossibility' : would have held true. However, it is apparent from the fact that the security margin was made good by depositing a sum of Rs.25,00,000/- on 25.03.2022, thus making it clear that the said act was very much possible. If the margin shortfall was made good on 25.03.2020, the same could also have possibly been done a week prior. The act might have been difficult and cumbersome, but certainly not 'impossible' for the claimants. Thus, the argument of 'impossibility of performance' also fails."

xxx *xxx* *xxx*

*"**III.** Respondents failed to exercise the discretion afforded to them under the contract in good faith by not accepting the additional pledged shares of Ms. Aditi Singhania and by illegally selling part of the existing pledged securities on 24.03.2020.*

……

f. From a perusal of the relevant paragraphs of the PTC India Judgement above, it is clear that there is no standard format of a contract of pledge, specially when it comes to pledge of securities under the Depositories Act. It.ls also clear that a pledgee cannot invoke the sale of pledged goods/securities without-affording a reasonable notice of sale to the pledger.

g. It was argued by the ld. Counsel for the claimants that respondent no.1 in the present case had specifically agreed to acceptance of documents by email as is apparent from a perusal of the email dated 27.01.2020 (filed along with affidavit of evidence of CW-1 and taken on record) written by the respondent no.3 to the claimants, whereby the respondent no.3 has specifically sought for a signed and scanned copy of a 'Demat Promissory Note' by email, thereby clearly demonstrating that scanned copies of documents were acceptable in

the transactions between the parties. Thus, there was no reason why the documents regarding additional of Ms Aditi Singhania as a co-borrower, and intimation of creation of additional pledge of securities by her should not have been accepted by the respondents, when scanned copies thereof were similarly shared by email.

h. It was also argued by the ld. Counsel for the claimants that no reasonable notice of sale of pledged securities had been given by the respondents to the claimants. Ld. Counsel has placed great emphasis on the fact that even vide notice by email dated 24.03.2020, sent at 07:40AM, written by the respondents to the claimants, it was stated that the claimants had one working day to make good the security margin shortfall, failing which the pledged securities would be sold. It was further argued that the claimants had made good the margin shortfall within the stipulated period of one day, by depositing an amount of Rs.25,00,000/- with the respondents; however, despite the fact that the security margin was rectified, the respondents went ahead and sold the pledged securities of the claimants even before the expiry of the one-day period as stipulated by the email dated 24.03.2020. Ld. Counsel submitted that thus, it was clear that the respondents had wrongfully and illegally sold the pledged securities.

i. On the contrary, the ld. Counsel for the respondents also relied upon the PTC India judgment and relied upon certain portions thereof, which are reproduced as follows:

> *"**32.** …….A pawn or pledge is an intermediate between a simple lien and a mortgage, which wholly passes the property. A pawnor has an absolute right to redeem the pledged property upon tendering the amount advanced but that right would be lost if the pawnee in the meantime has lawfully sold the pledged property. If the pawnee sells, he must appropriate the proceeds of the sale towards the pawnor's debt, for the sale proceeds are the pawnor's monies to be so applied and the pawnee must pay the pawnor any surplus after satisfying the debt."*
>
> *"**40.** A Division Bench of the Calcutta High Court in Hulas Kunwar v. Allahabad Bank Ltd. has held that law does not require that the pawnee arrange for a sale beforehand and then give notice to the pawnor as to the date, time and place of sale. Notice under Section 176 has to be given of the pawnee's intention to sell in default of payment by the pawnor within the specified time. This notice does not require specification of the date, time and place of sale."*
>
> *"**81.** As per the 1996 Regulations, the pledgor/pawnor is not entitled to sell the pledged/pawned securities. The special rights of the pledgee/pawnee in the pawn remain intact under the Depositories Act and the 1996 Regulation. However, the right to*

sell dematerialized securities is conferred and given to the 'beneficial owner', who exercises this right through the participants. Consequently, if a pawnee wants to exercise his right to sell dematerialized security it is mandatory for the pawnee first to get himself recorded as a 'beneficial owner' in the depository's records. Without the said exercise, the pawnee cannot exercise its rights to sell the pledge and retrieve the monies due by taking recourse to its rights under Section 176 of the Contract Act. Right to sell the pledge after reasonable notice is one of the options, albeit, both under the common law and under the Contract Act, the pawnee has the choice even after issue of notice for sale to sue for the debt due while retaining possession of the pledged goods. Similarly, the pawnor under the Contract Act and the common law has the right to redeem the pledged goods till 'actual sale'. Sale by the pawnee to self does not defeat the right of redemption of the pawnor. It may amount to conversion in law. Other provisions of the Contract Act enumerated in Chapter IX may well apply."

*"**93.** Our attention was also drawn to a Single Judge Bench judgment of the Delhi High Court in Tendril Financial Services Pvt. Ltd. v. Namedi Leasing& Finance Ltd., which supports the MHPL's case. However, a careful reading of the judgment would show that it was passed in peculiar facts therein as there was an ad interim order which had remained in force for twelve years, consequent to which the pawnee was unable to sell the shares. We agree that normally a court would not grant interim injunction on the prayer of the pawnor alleging non-compliance of Section 176 of the Contract Act. The object and purpose requiring the pawnee to issue notice to the pawnor before selling the pawn is to give an opportunity to the pawnor to redeem the pledged goods before the 'actual sale'. The requirement of issue of reasonable notice under Section 176 would be satisfied once the pawnor is made aware and has knowledge of the pawnee's desire/intent to sell. Continuation of interim orders predicated on the ground of lack of reasonable notice under Section 176 would not be a justification when the pawnee in his written statement clarifies and takes a clear position. The written statement itself can be treated as reasonable notice. We have made these observations as we have come across cases where such injunctions have been granted and confirmed even after the pawnee has entered appearance."*

(Emphasis Supplied)

j. Ld. Counsel for the respondents has argued that even as in the PTC India judgement, it has been made crystal clear that the pledgee has the right to sell the pledged goods/securities to safeguard its interest if a reasonable notice had been provided. He places emphasis on the

fact that as many as 7 notices by way of email were sent by the respondents to the claimants, before the final notice dated 24.03.2020 was sent and thus, it cannot be disputed that a notice of sale of pledged goods in the present case was more than reasonable.

k. On being questioned as to why after stipulating a period of one working day to make good the shortfall margin vide notice email dated 24.03.2020, the securities were sold on the very same day; the ld. counsel for the respondents candidly submitted that the drafts of email are boilerplates and the content thereof should not be construed to form an estoppel, especially when 7 previous notices of sale had already been served to the claimants.

l. In the opinion of this tribunal, it has been proved by the claimants that creation of additional pledge had in fact been created by one Ms. Aditi Singhania in favour of the respondent no.1 and that this fact had been duly intimated to the respondents. However, this tribunal is not satisfied that the respondents were duty bound to accept the additional pledged securities in the mode and manner provided to them by, the claimants.

m. On this point, it was argued by the ld. Counsel for the claimants that it is clear from a perusal of the agreement that other than the borrowers and co-borrowers, the agreement stipulates fora 'Guarantor' and a 'Security provider' as separate parties. It was also argued that in view of Article I, clause 1.38 of the agreement, 'Security Provider' is defined to "mean and include any party creating pledge of Securities in favour of the Lender or the Share Pledge Trustee as Security repayment of the Loan Balance in the manner provided in this Agreement Schedulers) of Terms and the relevant Security Documents. ". Ld. Counsel for the claimant has argued that in view of clause 1.38, 'Any party' could become a security provider and the respondents were duty bound to accept the creation of the securities by such security provider.

n. In my opinion, this argument is flawed on two counts. Firstly, a perusal of the agreement clearly indicates that a separate space has been earmarked in the agreement for signature of the Security Provider, indicating thereby, that the Security Provider Could not be 'any person' or any third party not privy to the agreement, rather, the said security provider had to-be a party to the agreement. Secondly, assuming arguendo, even if the Security Provider could be any third person not privy to the agreement, the claimants in the present case would not have been in a position to take advantage of the same as in their pleadings the claimants have themselves admitted that Ms. Aditi Singhania had applied to be added as a 'co-borrower' seeking to

pledge additional securities in the Loan agreement and nota 'security provider'.

o. Argument of the claimants that the respondents were duty bound to accept scanned copies of documents pertaining to creation of additional securities submitted by email and not doing so means that respondent have failed to exercise the discretion afforded to them by the agreement in good faith, also fails. When the respondent no.3 had expressly sought for scanned copy of a certain document, it was with respect to an existing party to the agreement, physical paperwork of whom had already been received and accepted by the respondents. In case of Ms. Aditi Singhania, she was a third-party to the agreement, who wanted to file an application to be added as a co-borrower. Addition of any party as a co-borrower would mean the amendment of the agreement or creation of an addendum to the agreement, which would require fresh offer and acceptance by the parties. The respondent may have had more confidence in accepting a scanned copy of a document by email in an already subsisting agreement, however, simply because the respondent desisted from using the same yardstick while entering into an addendum agreement, would not imply that there was lack of good faith in exercising their discretion in an already subsisting agreement. It has to be kept in mind that Ms. Aditi Singhania was not a party to the existing agreement and the respondents cannot be expected to not perform fresh due diligence after receiving original documents while entering into an addendum agreement. It is correct that in view of section 10A of Information Technology Act, 2000, agreements can now be entered into by electronic means, but it does not imply that one of the parties can be forced to enter into an agreement by electronic means. Thus, it cannot be held that the respondents were duty bound to accept the scanned copies of documents of addition of Ms. Aditi Singhania as a co-borrower or to accept scanned copies of documents whereby additional securities were being pledged by her in favour of the respondents. This finding might have been different in case any of the existing borrowers or co-borrowers had submitted documents pertaining to creation of additional pledge.

p. The fact that Ms. Aditi Singhania had also sent the documents by courier but the same could not be delivered to the respondents due to the lockdown situation is surely enough to make one sympathize with the claimants, but legally speaking, the said documents did not reach the respondents, and they cannot be held liable for not entertaining the same.

q. Further, although it cannot be refuted that respondents had mentioned in email dated 24.03.2020 that one-day time was being provided to the claimants to make good the margin shortfall and then

the pledged securities were sold off within a matter of merely 3 hours. This alone cannot be the sole basis to hold that the pledged securities were sold illegally by the respondents. In my considered view, the entirety of facts and circumstances have to be kept in mind while deciding whether the sale of pledged securities was valid or not. In the present case, the respondent had sent 7 notices to the claimants from 29.02.2020 to 21.03.2020, intimating that the security margin had fallen below the stipulated 100% and that in case the same was to fall below 85%, the right to liquidate the pledged securities would be exercised by the respondent no.1. the notice/email dated 24.03.2020 sent at around 07:40AM was the 8th notice on the said subject and merely because one day time was stated to be provided in the said email, does not take away the fact that on seven previous instances, the claimants had already been given notice of sale of pledged securities. In view of para 93 of the PTC India judgement, where it was held that ".....The object and purpose requiring the pawnee to issue notice to the pawnor before selling the pawn is to give an opportunity to the pawnor to redeem the pledged goods before the 'actual sale'. The requirement of issue of reasonable notice under Section 176 would be satisfied once the pawnor is made aware and has knowledge of the pawnee's desire/intent to sell. ..... .,it can be said that the respondents more than complied with the requirement of giving reasonable notice of sale of pledged securities, as stipulated by law and thus, the fact that one day time was provided in·· the notice dated 24.03.2020 sent around 07:40AM, would not act as an estoppel against the respondents and the sale of pledged securities was a legally valid exercise on parts of the respondents:

r. It has been brought to light by way of pleadings, documents, and oral evidence that the claimant no.1 is a high net-worth individual and that he has good knowledge about the securities market. It has also been admitted by the claimant in his cross examination that he agrees that the securities market, by its very nature, is volatile. This tribunal sympathises with the claimants, as they were made to face losses because of no fault of their own, as the market value of their securities shrank substantially due to the plunge in the securities market owing to a negative market sentiment that developed because of the ongoing covid-19 situation and the uncertainties that the world was facing at the said time. However, the claimant No.1 knew that pledging securities as security against the loan was a risk, which he willingly took, knowing fully well that the market value of those securities may dwindle at any time, as so often happens with the securities market. Thus, now that the worst case scenario has come to pass for the claimants, they cannot cry foul and allege wrong-doing on part of the respondents for exercising their right to sell the pledged securities

which were given as security against the loan, and which was an act well within the powers conferred on the respondents by the agreement.

xxx *xxx* *xxx*

6. Thus, it is hereby held that the respondents had validly sold the pledged shares of the claimants, to make good the shortfall in security margin, in view of the common law, statutory law and the agreement entered into the parties. Issues No.iii), iv), v) and vi) are decided in favour of the respondents and against the claimants.

ISSUES No. vii), viii), ix) and x)

6. Since all of the above issues have been decided in favour of the respondents and against the claimants, the question of granting any compensation/damages does not arise and the said issues are also decided against the claimants.

7. Resultantly, the present arbitration proceedings are dismissed with cost of Rs. 8,42,340/- (Rupees Eight Lakh Forty-Two Thousand Three-Hundred Forty Only), out of which an amount of Rs. 67,090/- is towards the half fees of the arbitrator paid by the respondents and Rs. 7,75,250/- is on account of professional expenses incurred by the respondents (As detailed in annexure B of the Written arguments filed by the respondents).”

28. The first issue that arises for consideration is whether this petition deserves to be dismissed on the ground that Petitioners allegedly suppressed that the Arbitrator had given disclosure as required under Section 12 of 1996 Act. It is true that during the course of hearing, this argument was raised on behalf of the Petitioners, however, when the order passed by the Arbitrator on 27.03.2021 was shown by the Respondents, the argument was not pressed. While it needs no emphasis that a party must be careful in making submissions in the Court, however in my view, in the instant case, the mere fact that an argument was raised during the hearing that the Arbitrator had not given a disclosure, which was instantly given up when the order was pointed out by the Respondents, does not amount to wilful suppression and the fact that Petitioners did not intend to misrepresent or suppress any

information, is evident from the fact that there is no pleading to this effect in the petition. In the context of Section 12 of the 1996 Act, all that is stated is that appointment of the Arbitrator was in violation of the said provision. The judgments cited by learned Senior Counsel for the Respondents are distinguishable as those were cases where there were serious and deliberate omissions and misrepresentations and documents/previous orders of the Court were concealed. This contention is therefore rejected.

29. The next bone of contention between the parties is with respect to the appointment of the Arbitrator. Petitioners contend that the appointment was unilateral since Petitioners were called upon to make a choice from a restricted panel of three names. A controversy also arose as to whether Respondent No.1 maintained a panel of Arbitrators from which these three names were proposed. Respondents, on the other hand, countered this position by pointing out that it was at the invitation of the Petitioners that the three names were randomly proposed and while Respondent No.1 could have appointed the Arbitrator since Petitioners had called upon to do so, however, in keeping with the provisions of the 1996 Act and the settled law on unilateral appointment, Respondent No.1 proposed the names and called upon the Petitioners to appoint any one of the three, which they did.

30. Having carefully examined the respective submissions and looking into the sequence of events as also the correspondence exchanged between the parties at the time of appointment of the Arbitrator, this Court is unable to agree with the Petitioners that the appointment of the Arbitrator was unilateral. The starting point of the process of appointment was a legal notice dated 10.12.2020 sent by the Petitioners to Respondent No.1 referring

to arbitration clause 8 in Article VII of the LAS, wherein they requested Respondent No.1 to confirm the appointment of a sole Arbitrator to resolve the disputes within 30 days from the date of receipt of the notice, failing which they shall initiate appropriate proceedings for appointment. On receipt of this notice, Respondent No.1 sent an e-mail dated 11.01.2021 proposing three names and significantly, it was stated in the said communication that *albeit* as per paragraph 8 of Petitioners' notice invoking arbitration, Respondent No.1 was entitled to appoint a sole Arbitrator, however, to ensure fairness and compliance with provisions of 1996 Act, they were only proposing the names, for the Petitioners to choose from. It is true that in the said communication, Respondent No.1 had referred to a panel but through an additional affidavit filed in this Court, it was stated on oath that no panel was ever formulated or maintained by Respondent No.1 and communication of the law firm which had furnished the three names was also given to support this plea. Nothing was placed on record by the Petitioners to traverse this position and therefore, it cannot be held that the three names proposed by Respondent No.1 were from a panel.

31. Significantly, after the Petitioners received the e-mail dated 11.01.2021, they consented to the appointment of the Arbitrator, who has rendered the impugned award and vide letter dated 20.01.2021 requested Respondent No.1 to confirm the appointment and approach the Arbitrator. Petitioners also directly communicated with the Arbitrator vide letter dated 27.01.2021, requesting him to accept his appointment and enter upon reference and this was even before Respondent No.1 confirmed the appointment of the Arbitrator. Another important fact that emerges in this case is that the Arbitrator gave a disclosure on 06.02.2021 but Petitioners

insisted that he should give another disclosure with respect to his relationship with Respondent No.1, which the Arbitrator did on 27.03.2021 in terms of Section 12 of the 1996 Act. No application was filed by the Petitioners challenging the appointment of the Arbitrator either under Section 12 or Section 14 of the 1996 Act and they continued to participate in the arbitral proceedings without any protest or demur. Significantly, second procedural order dated 27.03.2021 is replete with the consent of the Petitioners with regard to filing of the pleadings, mode of hearing as also leading evidence. Even in this petition, there is a vague and bald assertion that the appointment is contrary to Section 12 of the 1996 Act but no ground or details have been spelt out. Looking at all these facts and circumstances holistically, I am of the view that the appointment of the Arbitrator cannot be termed as unilateral.

32. In this context, I may allude to a judgment of the Division Bench of this Court in ***Bhadra International (supra),*** which is close on facts to this case. The Division Bench was examining a case where the Appellants first invited the opposite party to appoint the Arbitrator, whereupon the opposite party did so. No objection was taken before the Arbitrator at any stage to his appointment and Appellants participated without any protest or demur to the jurisdiction of the Arbitrator. No application was filed under Section 12 to challenge the appointment. In these facts, the Division Bench observed that the appointment was not unilateral at all as Respondent had proceeded to appoint the Arbitrator only on Appellants' requesting it do so, in writing. There was, therefore, written consent on the part of the Appellants to the appointment of the Arbitrator by the Respondent. Relevant passages are as follows:-

*"**5.** We have to decide cases based on the facts before us. The law cannot be applied academically or mechanically. We are afraid that if we were to permit a party who*

(i) first invites the opposite party to appoint the arbitrator, as permitted by the contract, whereupon the opposite party does so,

(ii) thereafter states, before the learned Arbitrator, that it had no objection to his arbitrating on the disputes,

(iii) thereafter participates, without a whisper of any objection to the jurisdiction of the learned Arbitrator, to his jurisdiction or competence, even after Section 12(5) was introduced in the 1996 Act in the interregnum,

(iv) thereafter does not choose to raise any ground of incompetence of the learned Arbitrator in view of his appointment having been "unilateral" (as the appellant would seek to contend) even in the Section 34 petition filed challenging the arbitral award that results, and

(v) thereafter, introduces a ground of the learned Arbitrator having been incompetent to arbitrate in a subsequent Miscellaneous Application filed in the Section 34 proceedings,

(vi) suppressing, in the said application, the Procedural Order passed by the learned Arbitrator recording the fact that neither party had any objection to his proceeding with the arbitration,

to have the entire arbitral proceedings set at naught and, thereby, have the arbitral award - which is obviously unpalatable to the appellant - declared a nullity, the entire integrity of the arbitral process would be irremediably eroded. We are, decidedly, not inclined to permit this to happen.

xxx *xxx* *xxx*

Submissions of the Appellant

***17.** Mr. Mohan submits that the appointment of the learned Arbitrator was completely violative of Section 12(5) of the 1996 Act, read with the judgments of the Supreme Court in Bharat Broadband Network Limited, Perkins Eastman Architects and TRF Limited. Waiver of the application of Section 12(5) of the 1996 Act under the proviso thereto, he submits, can only be by an agreement in writing. He submits that there was no agreement in writing by the appellant at any point of time, waiving the application of Section 12(5) of the 1996 Act.*

***18.** Mr. Mohan draws inspiration from the decision of one of us (C. Hari Shankar J) in JMC Projects (India) Ltd. as well as the judgment of the Supreme Court in Bharat Broadband. He submits that the facts in Bharat Broadband are starkly similar to those at the case in hand. In that case*

too, the appointment of the learned Arbitrator was ad invitum. As in this case, the appointment took place prior to insertion in Section 11 of the 1996 Act, of sub-Section (5) by Section 8(ii) of the Arbitration and Conciliation (Amendment) Act, 2016, with effect from 23 October 2015. At the time when the appellants called upon the AAI to appoint the Arbitrator in terms of Clause 78 of the Licence Agreement, therefore, the appellants could not have foreseen the subsequent amendment of Section 12 by insertion of sub-Section (5) therein, which would render the appointment of the learned Arbitrator invalid.

19. *In these circumstances, Mr. Mohan has also sought to contend that mere recording in the first Procedural Order dated 22 March 2016, of the fact that the parties had no objection to the learned Sole Arbitrator arbitrating on the dispute, could not constitute an express waiver, in writing, of Section 12(5) of the 1996 Act. He has also relied in this context on para 20 of the judgment of this Court in Bharat Broadband Network and on para 6 of the judgment of a Division Bench of this Court in Kotak Mahindra Bank Ltd. v. Narendra Kumar Prajapat, which read thus:*

> *Extracts of Bharat Broadband Network Ltd.*
>
> *"20. This then brings us to the applicability of the proviso to Section 12(5) on the facts of this case. Unlike Section 4 of the Act which deals with deemed waiver of the right to object by conduct, the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of sub-section (5) of Section 12 by an express agreement in writing. For this reason, the argument based on the analogy of Section 7 of the Act must also be rejected. Section 7 deals with arbitration agreements that must be in writing, and then explains that such agreements may be contained in documents which provide a record of such agreements. On the other hand, Section 12(5) refers to an "express agreement in writing". The expression "express agreement in writing" refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct. Here, Section 9 of the Indian Contract Act, 1872 becomes important. It states:*
>
> > *"9. Promises, express and implied. — Insofar as the proposal or acceptance of any promise is made in words, the promise is said to be express. Insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."*
>
> *It is thus necessary that there be an "express" agreement in writing. This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such. The facts of the present case*

disclose no such express agreement. The appointment letter which is relied upon by the High Court as indicating an express agreement on the facts of the case is dated 17-01-2017. On this date, the Managing Director of the appellant was certainly not aware that Shri Khan could not be appointed by him as Section 12(5) read with the Seventh Schedule only went to the invalidity of the appointment of the Managing Director himself as an arbitrator. Shri Khan's invalid appointment only became clear after the declaration of the law by the Supreme Court in TRF Ltd. (supra) which, as we have seen hereinabove, was only on 3-07-2017. After this date, far from there being an express agreement between the parties as to the validity of Shri Khan's appointment, the appellant filed an application on 7-10-2017 before the sole arbitrator, bringing the arbitrator's attention to the judgment in TRF Ltd. (supra) and asking him to declare that he has become de jure incapable of acting as an arbitrator. Equally, the fact that a statement of claim may have been filed before the arbitrator, would not mean that there is an express agreement in words which would make it clear that both parties wish Shri Khan to continue as arbitrator despite being ineligible to act as such. This being the case, the impugned judgment is not correct when it applies Section 4, Section 7, Section 12(4), Section 13(2), and Section 16(2) of the Act to the facts of the present case, and goes on to state that the appellant cannot be allowed to raise the issue of eligibility of an arbitrator, having itself appointed the arbitrator. The judgment under appeal is also incorrect in stating that there is an express waiver in writing from the fact that an appointment letter has been issued by the appellant, and a statement of claim has been filed by the respondent before the arbitrator. The moment the appellant came to know that Shri Khan's appointment itself would be invalid, it filed an application before the sole arbitrator for termination of his mandate."

(emphasis supplied)

Extracts of Kotak Mahindra Bank Ltd.

"6. The learned counsel appearing for the appellant does not seriously dispute that the arbitrator unilaterally appointed by the claimant was ineligible to be appointed as an arbitrator by virtue of Section 12(5) of the Act. He has largely focused his contentions on assailing the decision of the learned Commercial Court to award costs. It was also contended that the respondent was aware of the appointment of the arbitrator and had not raised any objection to such appointment; therefore the respondent is now precluded from challenging the impugned award."

20. *Mr. Mohan finally submits that "waiver" within the meaning of the proviso of Section 12(5) of the 1996 Act necessarily implies intentional*

relinquishment of a known right. At the time when Section 21 notice had been addressed by the appellants to AAI, sub-section (5) was yet to be introduced in Section 12 of the 1996 Act. As such, knowledge of the fact that the appointment of the learned Sole Arbitrator in terms of the notice issued by them to AAI would be invalid as unilateral, was unknown to the appellants at that time. This factor, he submits, also weighed with the Supreme Court while rendering Bharat Broadband and with this Court while passing judgment in JMC Projects.

xxx *xxx* *xxx*

25. *There can be no doubt about the fact that if as the law applies, the Arbitrator was incompetent to arbitrate, he cannot be regarded as competent merely on account of acquiescence by the appellants. At the same time, while examining whether in fact the arbitral award is liable to be set aside wholesale on the ground that the appointment of the learned Arbitrator was itself illegal, the Court has to keep in mind all the facts in the backdrop of the prevailing philosophy of fostering arbitration as a preferred mode of dispute resolution.*

26. *Viewed in this light, we find ourselves unable to agree with Mr. Mohan that the arbitral award was a nullity as the appointment of the Arbitrator was itself illegal being unilateral. In fact, it cannot be said that the appointment of the learned Arbitrator was unilateral at all, as AAI proceeded to appoint the learned Arbitrator only on the appellant requesting AAI to do so, in writing. There was, therefore, written consent, on the part of the appellant, to the appointment of the learned arbitrator by AAI.*

27. *The learned Arbitrator expressly obtained the consent of the parties to his continuing to arbitrate in the matter. This consent was reduced to writing, as recorded in the Procedural Order dated 22 March 2016. Mr. Ashish Mohan fairly acknowledges that this Procedural Order was in fact communicated to his client by the learned Arbitrator. The appellants never chose to contend that their consent, to the learned Arbitrator continuing to arbitrate in the matter, had been wrongly recorded, or that they - or AAI - had not given any such consent.*

28. *Thereafter, the appellants continued to participate in the proceedings without demur. Mr. Ashish Mohan has repeatedly emphasized that, at the time when the above events took place, Section 12(5) had yet to be introduced in the statute. This argument begs the issue as the fact that the appellants conceded to appointment of the arbitrator by AAI and, in fact, invited AAI to do so, and went on, during the arbitration, to unequivocally consent to arbitration by the learned Arbitrator, are facts, which cannot change depending on whether sub-section (5) had, or had not, been introduced in Section 12 of the 1996 Act.*

29. *Besides, even after sub-section (5) was introduced in Section 12 on 23 October 2015, the arbitral proceedings continued for over 2 years, till the arbitral award came to be rendered on 30 July 2018. At no stage did the appellants seek to invoke Section 12(5), or protest against the jurisdiction of the learned Arbitrator. No application to that effect was moved, either before the learned Arbitrator or before this Court.*

30. *Rather, the appellant participated, without even the whisper of a demur, in the arbitral proceedings throughout, and even filed applications under Section 17 of the 1996 Act before the learned Arbitrator.*

xxx *xxx* *xxx*

32*. It was only thereafter, that by fortuitous hindsight, that the appellants decided to challenge the very jurisdiction of the learned Arbitrator to arbitrate on the dispute.*

33*. Consensus ad idem is the very raison d'être of any arbitral appointment. Till the filing of the IA 1842/2022, to amend OMP (COMM) 415/2018, the appellants never raised a whisper regarding the competence of the learned Arbitrator to arbitrate. This case is, therefore, unique in that respect, and cannot be equated with cases in which, at one stage or the other, an objection to the appointment of the Arbitrator was voiced.*

34*. The decisions cited by Mr. Ashish Mohan are cases in which, at one stage or another, an objection to the jurisdiction of the learned Arbitrator was raised. We must be aware that the proscription under Section 12(5) of the 1996 Act is not absolute. It is subject to the proviso thereto, which envisages conscious waiver of Section 12(5). In the facts of this case, which need not be repeated, but particularly in view of the fact that*

(i) the appellants had themselves invited AAI to appoint the arbitrator,

(ii) before the learned Arbitrator, too, the appellants consented to the learned Arbitrator proceeding with the matter,

(iii) even after Section 12(5) was introduced in the statute book, the appellants never chose to move any application before the learned Arbitrator under Section 16 of the 1996 Act, or before this Court under Section 14(1) thereof, challenging the jurisdiction of the learned Arbitrator but, rather, participated in the proceedings without demur,

we are not inclined to interfere with the decision of the learned Single Judge. If, in such circumstances, the appellants is to be permitted to wish away the arbitral award which, for obvious reasons, is not palatable to the appellants, it would do complete disservice to the entire arbitral institution. Such a decision, we are seriously afraid, would erode, to a

substantial degree, the faith of the public in the very institution of arbitration.

***35**. We are unwilling to be party to such a decision.*

***36**. We, therefore, are in agreement with the learned Single Judge that the preliminary submission raised by the appellants to the impugned arbitral award, as being nullity as the appointment of the learned Arbitrator was ab initio illegal, is completely devoid of merit. In fact, we are of the considered opinion that the objection constitutes not merely an ingenious, but an ingenuous, method adopted by the appellants, to wish away an adverse arbitral award, at a grossly belated stage."*

33. Coming to the merits of the award, the question that arises for consideration is whether the Arbitrator acted contrary to the terms of the contract, more particularly, Clause 3.1 of Article V of the Loan Agreement, by rejecting the contention of the Petitioners that Respondent No.1 ought to have waited for 1 day before liquidating the pledged securities since it did give 1 day notice by an e-mail sent on 24.03.2020 at 07:40 AM. Before proceeding to examine this issue, it will be useful and relevant to look at the scope of interference in an arbitral award in a petition under Section 34 of the 1996 Act. It is trite that in a petition under Section 34, the powers of the Court are circumscribed and restricted and there can be no review of the merits of the dispute. ***[Ref: OPG Power Generation Private Limited v. Enexio Power Cooling Solutions India Private Limited and Another, 2024 SCC OnLine SC 2600; MMTC Ltd. v. Vedanta Ltd. (2019) 4 SCC 163; Bharat Coking Coal Limited v. Annapurna Construction, (2023) 8 SCC 154; Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI), (2019) 15 SCC 131;*** and ***MD, Army Welfare Housing Organization v. Sumangal Services (P) Ltd., (2004) 9 SCC 619].***

34. Under the unamended Section 34(2) of the 1996 Act, as it stood prior to Amendment Act, 2016, *inter alia* interference in an Arbitral Award was envisaged if it was in conflict with Public Policy of India and the Supreme Court in ***Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705*** and ***Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49***, held that an award will be contrary to Public Policy of India if it was: (a) contrary to fundamental policy of Indian law; or (b) contrary to interest of India; or (c) contrary to justice or morality; or (d) patently illegal. 'Patent illegality' was recognized as a ground to interfere in Arbitral Award in several judgments of the Supreme Court including ***McDermott International Inc. v. Burn Standard Co. Ltd. and Others, (2006) 11 SCC 181.***

35. Arbitration and Conciliation (Amendment) Act, 2016 was introduced with effect from 23.10.2015 and the expression 'Public Policy of India' was by Explanation I, restricted to cases where the award was: (i) induced or affected by fraud or coercion; (ii) violative of Section 75; (iii) violative of Section 81; (iv) in contravention with Public Policy of Indian Law; or (v) in conflict with most basic notions of morality and justice. This, however, did not entail review of the award on merits of the dispute. In ***Ssangyong (supra),*** the Supreme Court held as follows:-

> ***"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 [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as*

explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .

***35.** It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.*

***36.** Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as understood in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , and paras 28 and 29 in particular, is now done away with.*

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

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

40. *The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).*

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

42. *Given the fact that the amended Act will now apply, and that the "patent illegality" ground for setting aside arbitral awards in international commercial arbitrations will not apply, it is necessary to advert to the grounds contained in Sections 34(2)(a)(iii) and (iv) as applicable to the facts of the present case."*

36. In ***PSA SICAL (supra)***, the Supreme Court referring to the earlier judgments on the issue, including in ***Associate Builders (supra), Ssangyong (supra), MMTC Limited (supra),*** etc. held that it is more than settled legal

position that in an application under Section 34, Court is not expected to sit as an Appellate Court and re-appreciate evidence. Scope of interference will be limited to grounds provided under the said provision and interference will be warranted if the award is in violation of 'public policy of India', which has been held to be 'fundamental policy of Indian law'. Judicial intervention on account of interfering on merits in the award would not be permissible *albeit* principles of natural justice contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act would continue to be grounds of challenge. A decision which is perverse, though would not be a ground for challenge under public policy of India, would certainly amount to patent illegality and 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 ground of patent illegality.

37. It would also be useful to refer to the judgment of the Supreme Court in ***State of Jharkhand and Others v. HSS Integrated SDN and Another, (2019) 9 SCC 798,*** where the Supreme Court held that Arbitral Tribunal is the master of evidence and findings of fact arrived at, based on appreciation of evidence, are not to be scrutinized as if the Court was sitting in appeal. To the same effect is the judgment of the Supreme Court in ***Maharashtra State Electricity Distribution Company Limited v. Datar Switchgear Limited and Others, (2018) 3 SCC 133***. Recently, in ***Hindustan Construction Company Limited v. National Highways Authority of India, (2024) 2 SCC 613***, the Supreme Court re-stated that Courts should not customarily interfere with the Arbitral Award which is well-reasoned and view of the Arbitrator is a plausible view. Relevant passages from the judgment are as follows:-

"26. *The prevailing view about the standard of scrutiny — not judicial review, of an award, by persons of the disputants' choice being that of their decisions to stand — and not interfered with, (save a small area where it is established that such a view is premised on patent illegality or their interpretation of the facts or terms, perverse, as to qualify for interference, courts have to necessarily choose the path of least interference, except when absolutely necessary). By training, inclination and experience, Judges tend to adopt a corrective lens; usually, commended for appellate review. However, that lens is unavailable when exercising jurisdiction under Section 34 of the Act. Courts cannot, through process of primary contract interpretation, thus, create pathways to the kind of review which is forbidden under Section 34. So viewed, the Division Bench's approach, of appellate review, twice removed, so to say (under Section 37), and conclusions drawn by it, resulted in displacing the majority view of the tribunal, and in many cases, the unanimous view, of other tribunals, and substitution of another view. As long as the view adopted by the majority was plausible — and this Court finds no reason to hold otherwise (because concededly the work was completed and the finished embankment was made of composite, compacted matter, comprising both soil and fly ash), such a substitution was impermissible.*

27. For a long time, it is the settled jurisprudence of the courts in the country that awards which contain reasons, especially when they interpret contractual terms, ought not to be interfered with, lightly. The proposition was placed in State of U.P. v. Allied Constructions [State of U.P. v. Allied Constructions, (2003) 7 SCC 396] : (SCC p. 398, para 4)

> *"4. ... It was within his jurisdiction to interpret Clause 47 of the Agreement having regard to the fact-situation obtaining therein. It is submitted that an award made by an arbitrator may be wrong either on law or on fact and error of law on the face of it could not nullify an award. The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof. Interpretation of a contract, it is trite, is a matter for the arbitrator to determine (see Sudarsan Trading Co. v. State of Kerala [Sudarsan Trading Co. v. State of Kerala, (1989) 2 SCC 38]). Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law.""*

38. It is equally settled that re-writing of the contractual covenant by the Arbitrator is against the law of the land and enough to vitiate the Arbitral Award. Starting from one of the earlier judgments of the Supreme Court in ***Union Territory of Pondicherry and Others v. P.V. Suresh and Others, (1994) 2 SCC 70,*** to ***Maharashtra State Electricity Distribution Company Limited v. Maharashtra Electricity Regulatory Commission and Others, (2022) 4 SCC 657***, to refer to a few to avoid prolixity, it has been held that neither a Court nor an Arbitrator can re-write clauses of a commercial contract. In a recent judgment ***OPG Power Generation (supra)***, the Supreme Court reiterated and re-affirmed that Arbitral Tribunal must decide in accordance with terms of the contract and where the Arbitral Award is against the contractual terms, the award would be patently illegal *albeit* the Arbitral Tribunal has the jurisdiction to interpret a contract having regard to terms and conditions of the contract, conduct of the parties, including correspondences exchanged etc. If the conclusion of the Arbitrator is based on a possible view of the matter, Court should not interfere, however, where on full reading of the contract, the view is not a possible view, the award will be perverse and as such amenable to interference. Importantly, it was also held that ordinarily terms of the contract are to be understood in the way the parties intended. An unexpressed term cannot be read into a contract except where the term was always obviously intended by the parties to give business efficacy to the contract and although tacit, forms part of the contract.

39. It is trite that an Arbitrator is creature of contract and is bound to act in terms thereof. There is a clear distinction between failure to act in terms of contract or act contrary to the contractual terms on one hand and

interpretation of the terms of contract. Arbitrator is certainly entitled to interpret the terms of contract but it cannot act outside the terms of a contractual bargain between the parties or contrary thereto. In ***Associate Builders (supra),*** the Supreme Court held as follows:-

> *"42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:*
>
> *42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:*
>
> > *"28.Rules applicable to substance of dispute.—(1) Where the place of arbitration is situated in India—*
> >
> > *(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"*
>
> *42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.*
>
> *42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:*
>
> > *"28.Rules applicable to substance of dispute.—(1)-(2)****
> >
> > *(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."*
>
> *This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do."*

40. In ***PSA SICAL (supra),*** the Supreme Court held as follows:-

> ***"85.*** *As such, as held by this Court in Ssangyong Engg. & Construction Co. Ltd. [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract has been foisted upon an unwilling party. This Court has further held that a party to the agreement cannot be made liable to perform something for which it has not entered into a contract. In our view, rewriting a contract for the parties would be breach of fundamental principles of justice entitling a court to interfere since such case would be one which shocks the conscience of the court and as such, would fall in the exceptional category."*

41. In the said judgment, it was observed that the role of the Arbitrator was to arbitrate within the terms of the contract and if he travelled beyond it, the award will be without jurisdiction. In essence, the ground of patent illegality is available for setting aside a domestic award if the Court finds that the Arbitrator has acted contrary to the terms of the contract. Section 28 of the 1996 Act provides that while deciding and making the award the Arbitral Tribunal shall in all cases, take into account the terms of the contract. Use of the words 'shall' and 'in all cases' is indicative of the legislative intent to bind an Arbitrator to the terms of the contract. The Supreme Court in ***Provash Chandra Dalui and Another v. Biswanath Banerjee and Another, 1989 Supp (1) SCC 487,*** held as follows:-

> ***"10.*** *'Ex praecedentibus et consequentibus optima fit interpretatio.' The best interpretation is made from the context. Every contract is to be construed with reference to its object and the whole of its terms. The whole context must be considered to ascertain the intention of the parties. It is an accepted principle of construction that the sense and meaning of the parties in any particular part of instrument may be collected 'ex antecedentibus et consequentibus;' every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that is possible. As Lord Davey said in N.E. Railway Co. v. Hastings [1900 AC 260, 267] :*
>
> > *"... the deed must be read as a whole in order to ascertain the true meaning of its several clauses, and... the words of each clause should*

> *be so interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible....”*
>
> *In construing a contract the court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, there is very little the court can do about it. In the construction of a written instrument it is legitimate in order to ascertain the true meaning of the words used and if that be doubtful it is legitimate to have regard to the circumstances surrounding their creation and the subject-matter to which it was designed and intended they should apply.”*

42. In a decision by the Supreme Court of Appeal of South Africa in ***Iveco South Africa (Pty) Ltd v. Centurion Bus Manufacturers (Pty) Ltd., (183/2019) [2020] ZASCA 58 (3 June 2020),*** it was held as under:-

> *“It is trite law that the provisions of an agreement must be read and understood in the context within, and having regard to the purpose for which, the agreement was concluded. The point of departure is the language employed by the document. But the words must not be considered in isolation. A restrictive examination of words, without regard to the context or factual matrix, has to be avoided. Evidence of prior' negotiations is inadmissible, but evidence relating to the surrounding circumstances and the meaning to be given to special words and phrases used by the parties, is admissible. No distinction is drawn between context and background circumstances. Words have to be interpreted sensibly so as to avoid unbusinesslike results.”*

43. I would now examine whether the Arbitrator acted in consonance with the terms of the Loan Agreement. Admittedly, the Loan Agreement contains Clause 3.1 under Article V which reads as follows:-

> *“3. **Notice of Event of Default***
>
> *3.1 If any Event of Default or any event which after a lapse of time is capable of becoming an Event of Default takes place, the Lender shall give notice of one (1) Working Day or any reasonable notice as the Lender may deem fit to the Borrower/Obligor specifying the nature of such Event of Default or of such event which the Borrower and Security Provider acknowledge and agree to be reasonable under applicable law. If the Event of Default is capable of being cured or remedied, the Borrower/Obligor shall cure or remedy the default or such event before the expiry of the notice.”*

44. Plain reading of the Clause shows that parties had agreed that if an Event of Default occurred, lender shall give notice of 1 working day or any reasonable notice as the lender may deem fit to the borrower, specifying the nature of Event of Default and if the Event of Default was capable of being cured or remedied, the borrower shall do the needful. This was clearly a commercial bargain between the parties and it is nobody's case that the procedure provided for was not required to be adhered to. In fact, acting in consonance with Clause 3.1, Respondent No.1 sent an e-mail to the Petitioners on 24.03.2020 at 07:40 AM, since the security margin had fallen to 82.68% i.e. below the threshold of 85% stipulated in the Loan Agreement read with the Sanction Letter. By this e-mail, Respondent No.1 called upon the Petitioners to replenish the margin immediately by pledging the requisite value of securities in the form and manner acceptable to Respondent No.1, on or before 1 working day from the date of this letter. Relevant part of the e-mail is extracted hereunder, for ready reference:-

> *"**From**: Las Risk<las.risk@bajajfinserv.in>*
> ***Sent**: Tuesday, **March 24, 2020 7:40 AM***
> ***To**: rgsdevraj@gmail.com*
> ***Subject**: Overutilization of your LAS account as on 23 March 2020*
> ***Importance**: High*
>
> *Date :24th March 2020*
> *To,*
> *Name : RAGHVENDRA SINGHANIA*
> *Dear Sir/Madam,*
> ***Sub:** Urgent – Replenish shortfall in margin.*
> ***Ref:** LAS (Loan Against Securities) Account No.107344*
> *This is in reference to the shortfall in Margin in the above referred LAS Account No.1**07344***

*You are aware that, your goodself is supposed to maintain **Margin at 100%** at all the times during the tenure of the loan. Further, as a process, Bajaj Finance Limited ("**BFL**") reviews/monitors your LAS account on an ongoing basis.*

*In pursuance of the said process, it is observed that, as on **23-March-2020** the said LAS account stands overdrawn by an amount of Rs. 2338181 Thereby, this communication is to bring to your notice that there is a shortfall of Margin in the above referred LAS account.*

ln view of the above, in accordance with Clause 4.5 under Article II of the Loan-cum-Pledge-cum-Guarantee agreement the terms & conditions of the Loan-cum-Pledge-cum-Guarantee agreement executed by your goodself, we hereby call upon you to replenish the Margin immediately by pledging the requisite value of Securities in the form and manner acceptable to BFL on or before 1 working days from the date of this letter.

During the Notice period:

If there is further increase in Margin Shortfall amount, you are obliged to pay the Margin Shortfall amount or replenish the securities in order to maintain the Margin at 100%, without requirement of any further notice; OR

You are unable to replenish the Margin Shortfall amount by offering the Securities as mentioned above, we urge you to bring down the Loan Balance by ensuring immediate repayment of the said Margin Shortfall amount to the below designated BFL's Bank account; OR

*if the Margin falls **below 85% of the Loan value as on the Date** after issue of this notice,*

BFL will be constrained to liquidate the available Securities pledged with BFL treating it to be as an Event of Default under the Loan Cum Pledge cum Guarantee agreement executed with BFL.

Following is the designated Bank account details:

A/c Holder Name	*:*	*Baia] Finance Ltd*
Bank Name	*:*	*HDFC Bank Ltd*
A/c No.	*:*	*00070350007680*
IFSC Code	*:*	*HDFC0000007*
Branch Name	*:*	*Law College Road, Bhandarkar Road, Pune.*

Should there be any surplus balance after realizing the loan dues together with applicable interest and other charges, the balance surplus amount if any, shall be refunded by BFL. However, if the realized value of securities is found to be insufficient to recover the entire Loan dues including the interest, dues, charges, if any, you are obliged to immediately pay the balance amount so informed by BFL.

For any further clarification or information, you may call your relationship manager.

Assuring you of our best services always.

For Bajaj Finance Limited,
Payal Mehta
Manager.”

45. This was a clear representation to the Petitioners that from 07:40 AM, they had 1 day to replenish the security and in fact by 02:58 PM on the same date, Petitioners had intimated Respondent No.1 by an e-mail that they had transferred Rs.25 lacs in the fund. However, admittedly, Respondent No.1 had by this time liquidated the pledged securities at 10:30 AM. This was clearly contrary to Clause 3.1 i.e. the term of the contract between the parties. This issue was raised and highlighted by the Petitioners in their Statement of Claim by referring to as also extracting Clause 3.1. Strangely, the Arbitrator has not even adverted to the said Clause, leave alone dealing with the same. The argument has been rejected by holding that though it cannot be refuted that Respondents had in their e-mail dated 24.03.2020 given 1 day’s time to make good the margin but this alone could not be the sole basis to hold that the pledged securities were sold illegally.

46. To my mind, this is an oversimplification of a contentious issue raised by the Petitioners and which had its roots in a contractual clause. The Arbitrator has not even cared to render a single reason why Petitioners were not entitled to the benefit of Clause 3.1. The award to this extent is patently illegal and without findings/reasons on a crucial point arising for adjudication.

47. Plain reading of the award shows that the Arbitrator was completely overawed by the 7 notices sent to the Petitioners prior to the notice of

24.03.2020. As rightly flagged by the Petitioners, the 7 notices were inconsequential for determination of the question whether the pledged securities were correctly sold. As the notices would reflect, the security margins had never fallen below the threshold of 85% till 23.03.2020 and therefore, Sell Trigger was not attracted. It is for the first time that the margin had fallen below 85% on 23.03.2020 and it is here that Respondents ought to have waited for one working day to enable the Petitioners to replenish the margin, before selling the pledged securities and in not doing so, they have acted contrary to Clause 3.1. Reliance by the Arbitrator on the judgment of the Supreme Court in ***PTC India (supra),*** was misconceived in the context of the issue that was arising for consideration. The proposition of law laid down by the Supreme Court that pawnee has a right to sell the pledge after reasonable notice, is not open any debate. The question, however, which the Arbitrator was called upon to decide was whether Respondent No.1 was right in liquidating the pledged securities contrary to Clause 3.1 as also their own e-mail dated 24.03.2020 granting 1 working day to the Petitioners to replenish the security margin. Right of Respondent No.1 to sell the pledged securities was not even questioned by the Petitioners.

48. In my view, the Arbitrator was also wrong in agreeing with the Respondents that drafts of e-mail are boilerplates and the content thereof should not be construed to form an estoppel, especially when 7 notices had been served earlier on the Petitioner. Estoppel is a doctrine based on fairness and equity, that prevents a person from asserting something contrary to what he has previously stated or agreed to, when the other party has relied on that representation and would be harmed if the original position is retracted. In this context, I may allude to a judgment of the Supreme Court in ***B.L.***

Sreedhar and Others v. K.M. Munireddy (Dead) and Others, (2003) 2 SCC 355, where it was held as follows:-

> ***"13.*** *Estoppel is a rule of evidence and the general rule is enacted in Section 115 of the Indian Evidence Act, 1872 (in short "the Evidence Act") which lays down that when one person has by his declaration, act or omission caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing. (See Sunderabai v. Devaji Shankar Deshpande [(1952) 2 SCC 92 : AIR 1954 SC 82] .)*
>
> *xxx* *xxx* *xxx*
>
> ***30.*** *If a man either by words or by conduct has intimated that he consents to an act which has been done and that he will not offer any opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that which they otherwise might have abstained from, he cannot question the legality of the act he had sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct."*

49. In the instant case, Respondent No.1 vide its e-mail dated 24.03.2020 led the Petitioners to believe that they had one working day's time to replenish the security margin, acting on which Petitioners transferred Rs.25 lacs and informed Respondent No.1 of this fact well before the period ended. Therefore, Respondent No.1 cannot take a stand that it had a right to sell the pledged securities under the Loan Agreement only because seven notices were issued in the past. In this backdrop, Arbitrator's findings that email communications are boilerplates and exception to rule of estoppel is completely perverse. Boilerplates refer to standardized clauses usually pre-drafted, commonly included in agreements to address routine matters and more often than not are the back-end provisions that govern how a contract operates such as prices, scope of work etc. The email dated 24.03.2020, sent

by Respondent No.1 to the Petitioners to replenish the security margin by a defined period cannot be termed as a boilerplate.

50. The award clearly suffers from 'patent illegality' on both counts: arbitrator acted contrary to the terms of the Loan Agreement and ignored the Doctrine of Estoppel, leading to a perverse conclusion, which was fundamental to the dispute and goes to the root of the matter.

51. In view of the aforesaid, this petition is allowed and the impugned award dated 13.02.2023, whereby the claims of the Petitioners were rejected, is set aside. Direction of the Arbitrator to pay cost is also set aside, save and except, the component of Arbitrator's fee, payable by the Petitioners.

52. Parties are left to take recourse to appropriate remedies in accordance with law, if so advised.

53. Pending application also stands disposed of.

JYOTI SINGH, J

SEPTEMBER 11, 2025/*S.Sharma/Shivam*