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

Date of decision: 08th OCTOBER, 2025

IN THE MATTER OF:

\+ **O.M.P. (COMM) 178/2020**

UNION OF INDIA .....Petitioner

Through: Mr. Chetan Sharma, ASG with Mr. Kirtiman Singh, Sr. Advocate, Mr. Suman Jyoti Khaitan, Mr. Vikas Kumar, Mr. Ayush Kapur, Mr. Amit Gupta, Mr. RV Prabhat, Mr. Saurabh Tirpathi, Mr. Shubham Sharma, Mr. Vihaan Kumar, Mr. Maulik Khurana, Mr. Vinay Yadav, Ms. Laavanya Kaushik, GP, Mr. Anil Chawdhary, Advocates
Mr. Vivek Kumar Sharma, Director, Ministry of Mines.

versus

STERLITE INDUSTRIES(INDIA) LTD .....Respondent

Through: Mr. Gourab Banerji, Sr. Advocate with Ms. Saman Ahsan, Ms. Srijata Majumdar, Mr. Rahul Sangwan, Mr Rakesh Talukdar, Mr Sundaram, Advocates.

\+ **O.M.P. (COMM) 208/2020**

VEDANTA LIMITED .....Petitioner

Through: Mr. Gourab Banerji, Sr. Advocate with Ms. Saman Ahsan, Ms. Srijata Majumdar, Mr. Rahul Sangwan, Mr Rakesh Talukdar, Mr Sundaram, Advocates.

versus

THE UNION OF INDIA .....Respondent

Through: Mr. Chetan Sharma, ASG with Mr. Kirtiman Singh, Sr. Advocate, Mr. Suman Jyoti Khaitan, Mr. Vikas Kumar, Mr. Ayush Kapur, Mr. Amit Gupta, Mr. RV Prabhat, Mr. Saurabh Tirpathi, Mr. Shubham Sharma, Mr. Vihaan Kumar, Mr. Maulik Khurana, Mr. Vinay Yadav, Ms. Laavanya Kaushik, GP, Mr. Anil Chawdhary, Advocates
Mr. Vivek Kumar Sharma, Director, Ministry of Mines.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. Since the Award under challenge in both the petitions is common, O.M.P. (COMM) 208/2020 is being taken up as a lead matter. The parties are being referred to in accordance with the Memorandum of Parties in O.M.P. (COMM) 208/2020.

2. The Petitioner has chosen to challenge the Award dated 25.01.2011 passed by the Arbitral Tribunal. It is pertinent to mention that the Arbitral Tribunal consists of three Arbitrators, i.e., Retd. Judges of the Apex Court, i.e., Justice B.P. Jeevan Reddy (Retd.), Justice S.P. Bharucha (Retd.) and Justice V.N. Khare (Retd.). Two of the Arbitrators, i.e., Justice B.P. Jeevan Reddy (Retd.) and Justice V.N. Khare (Retd.), have passed the majority award and the minority award has been given by Justice S.P. Bharucha (Retd.), who has not agreed with the conclusion arrived at by the majority.

3. The history of the case relates back to the Disinvestment policy of the

Government of India. The Government of India took a policy decision to disinvest number of Public Sector Undertakings (PSU). One such PSU was Bharat Aluminium Company Limited (*hereinafter referred to as* 'Balco'). A decision was taken to disinvest Balco and a challenge to the same was made before the Apex Court by way of a Public Interest Litigation in Balco Employee's Union v. Union of India**, (2002) 2 SCC 333**, wherein the Apex Court rejected the challenge and dismissed the PIL.

4. Pursuant to the disinvestment, a bidding exercise was initiated and Sterlite Industries India Limited was the successful bidder. It is pertinent to mention that Sterlite Industries India Limited (*hereinafter referred to as* 'Sterlite') changed its name to Vedanta Limited in the year 2015.

5. Two agreements were entered into between Sterlite and Government of India through Balco and the President of India. The agreements were:

a) A Share Purchase Agreement (*hereinafter referred to as* 'SPA') under which the Sterlite acquired 51% stake in Balco.

b) Shareholders' Agreement (*hereinafter referred to as* 'SHA') wherein on the expiry of three years, various options were given to the Government and the Petitioner for transfer of the remaining shares to the BALCO.

6. One of the options in the shareholding Agreement was a Call Option under which after a lock-in period of three years from the execution of the SHA, Sterlite could request the Government of India to sell the remaining 49% shares held by the Government of India at a mutually agreeable price, pursuant to which the Government of India was under an obligation to sell those shares.

7. After the expiry of the three years from the closing date, which was

prescribed under the SHA, a notice was issued by Sterlite calling upon the Government of India to sell the balance 49% shares of the Balco in terms of the Call Option in the SHA. The valuation of the shares had to be completed within 30 days to enable the sale of the shares. Negotiations to fix the value of the shares were taking place for the said purpose. However, on 07.06.2006, Government of India took a stand that the Clause stipulating the option given to Sterlite to issue a notice for purchasing the shares and that the Government of India being bound to sell the shares is in teeth of Section 111A(2) of the Companies Act and hence is null, void and unenforceable.

8. Since disputes arose between the parties regarding the valuation and subsequent to the sale of shares, Sterlite invoked the arbitration clause as mentioned in Clause 11.1 of the SHA by filing a petition under Section 11 of the Arbitration & Conciliation Act, 1996, praying for appointment of an Arbitrator.

9. This Court referred the parties to mediation. Mediation failed. The Arbitral Tribunal was constituted comprising of three Retd. Judges of the Apex Court, i.e., Justice B.P. Jeevan Reddy (Retd.), Justice S.P. Bharucha (Retd.) and Justice V.N. Khare (Retd.), to adjudicate the disputes between the parties.

10. After pleadings were complete, the following issues were framed by the Arbitral Tribunal:-

> *"1. Whether the Shareholders' Agreement dated 2-3-2001 is void and illegal for the reason that it violates the provisions of Section 111-A of the Companies Act, 1956 read with Section 23 of the Indian Contract Act, 1872, as alleged by the Respondent?*
>
> *2. Whether the Claimant is entitled to any of the reliefs*

prayed for in the Claim Statement, in the facts and circumstances of the case?

3. Is the said Shareholders' Agreement not enforceable for any of the reasons including delay alleged by the Respondent?

4. Whether clause 5.4 of the said Shareholders'. Agreement renders the Agreement not maintainable, as alleged by the Respondent?

5. Whether the valuation of the shares ("Called Shares") made before the commencement of the present arbitration proceedings invalid or unacceptable?

6. If the Claimant succeeds in establishing that it is entitled to purchase the shares as per the said Shareholders' Agreement, what should be the price for each share at which the transfer of equity shares has to be directed to be effected by the Respondent to the Claimant?
7. To what relief / reliefs is the Claimant entitled?

8. Costs. "

11. It is pertinent to mention that Sterlite chose not to lead any oral evidence. The Government of India examined four witnesses. After examining various Clauses of the SHA, the Majority Award was passed by Justice B.P. Jeevan Reddy (Retd.) and Justice V.N. Khare (Retd.), who came to the conclusion that the purport of the SHA was to ensure that the remaining 49% of the shares which are with the Government, subject to 5% of shares being allotted to the employees of the company, was to be sold only to the Petitioner.

12. The Majority Award held that the various clauses of the SHA

imposed multiple layers of restrictions which makes the sale of shares of the Government to the third party impracticable and unreal. The Arbitral Tribunal was of the opinion that the purport of the agreement was that 49% of the shares of the Government were to be kept intact until the expiry of three years in accordance with Clause 5.1 of the SHA, when the Petitioner was to become entitled for demand of their sale at a price to be determined by an independent agency which is contrary to law.

13. The majority was therefore of the opinion that there is a clear bias in favour of the Petitioner herein for becoming the full owner of the company ultimately and there was no way round to sell the shares to any other party. The Arbitral Tribunal held that the bar in clause 5.1(a) read with Clause 5.8 of the agreement and further read in the context of Clauses 5.3 and 5.4, points out to only one conclusion i.e., the Government was being forced to sell the shares only to the Petitioner herein and to no one else. The Arbitral Tribunal stated that this is clearly in contravention with Section 111A(2) of the Companies Act, 1956 which mandates free transferability of shares. The majority was of the outlook that the said restrictions were not permissible. Reliance was placed by the majority on the judgments of the Apex Court in V.B. Rangaraj v. V.B. Gopalakrishnan, **(1992) 1 SCC 160,** M. S. Madhusudanan v. Kerala Kaumudi Pvt. Ltd., **(2004) 9 SCC 204** and the Judgment passed by the learned Single Judge of this Court in Smt. Pushpa Katoch v. Manu Maharani Hotel Ltd., **121 (2005) DLT 333**, Western Mahashtra Development Corporation Limited v. Bajaj Auto, **2010 (154) Com Cases 593**.

14. It is pertinent to mention that after the Award was reserved, the Petitioner/Claimant placed reliance on the Judgment dated 01.09.2010

passed by the Division Bench of the Bombay High Court in **Appeal No.855/2003** titled as Messer Holdings Limited v. Sham Madan Mohan Ruia, wherein it was submitted that in identical circumstances, the Division Bench of the Bombay High Court came to the conclusion that the restrictions imposed of transfer of shares in an agreement is not violative of Section 111A of the Companies Act.

15. The majority while delivering its Award stated that the decision is based only on the facts as presented before the Court and they have not relied on any generalizations or expressing any views on various legal consequences which may arise in different circumstances.

16. The Arbitral Tribunal also held that whenever a Call Notice was issued by the Petitioner, the Government was bound to sell all its shares to the Petitioner at the price determined by an independent agency as provided in the said clause. There is no right to issue a Call Notice by the Government which indicates that the object of the SHA was transfer of the shares of the company to the Petitioner and not the other way round. The clause also does not prescribe any outer limit for exercising such right and the Government is continued to be bound by the various clauses regarding the sale of its shares. The agreement also binds the Petitioner to sell its shares which are subject to the various clauses of the SHA.

17. The majority opinion therefore concluded that the layers of restrictions are of a very special nature and importantly since there are only two shareholders in this case i.e., the Government and the Petitioner; the restrictions disable each of the shareholder and more particularly the Government from transferring its shares. The majority award therefore was of the opinion that these restrictions directly impede upon Section 111A(2)

of the Companies Act, 1956, which talks about free transferability of shares.

18. The majority Award did not accept the contention of the Petitioner that Section 111A(2) of the Companies Act, 1956 is merely a restriction upon the Board of Directors of the company and it was of the opinion that Section 111A(2) defines the character of a public company which confers a right of free transferability of shares upon the shareholders which can be restricted only by law and not by an agreement between the shareholders. The majority was also of the opinion that the free transferability of shares is an integral characteristic of a public company for the shares should be freely transferred without any restriction whatsoever. It was held that the company as well as the shareholders in this case have entered into numerous restrictions on free transferability of shares which makes the SHA void in terms of Section 111A(2) of the Companies Act, 1956. Paragraph 32 to 36 of the award which summarizes the reasons, read as under:-

> *"**32**. **The restrictions imposed by clause 5 of SHA:***
> *(i) For the first three years from the date of SHA, there is a complete bar on sale of shares by the purchaser (Claimant); the shares, in fact, stand pledged to the Government;*
>
> *(ii) Though there is no direct bar on the sale of shares by the Government during the said period of three years from the date of SHA, the multiple layers of restrictions imposed by clauses 5(3) and 5(4) detailed hereinabove, make a transfer of these shares by the Government unrealistic and not a practicable proposition, which in effect means an effective bar to sale for the said period.*
>
> *(iii) Even after the expiry of the said three year'-period and till the Call Notice is issued by the*

Purchaser (Claimant) - the Government's, as well as the Purchaser's right to sell these shares is inhibited and made almost practically not possible, by the several restrictions provided by clauses 5 (3) and 5 (4).

(iv) under clause 5 (8), whenever a Call Notice is issued by the Purchaser (Claimant), the Government is bound to sell all its shares to the Purchaser at the price to be determined as provided in the said clause; no such right to issue a Call Notice is given to the Government which emphasises the over-riding object of the SHA to transfer all the shares of the Company to the Purchaser-and not the other way round.

(v) The Call Notice can be issued only after expiry of three years from the date of SHA. The SHA however does not prescribe the outer limit of time for exercising such right by the Purchaser. Nor is the Purchaser bound to issue such a Notice. But until such notice is issued - and in case it is not issued at all - the Government's right to transfer its shares is subject to and continue to remain subject to the several restrictions contained in clauses 5(3) and 5(4), for all time to come.

(vi) If the Call Notice is not issued by the Purchaser, even its own shares (already purchased) are, and remain, subject to the very same restrictions as are contained in clauses 5 (3) and 5 (4), for all time to come.

(vii) The restriction upon restriction and the nature of the restrictions contained in clauses 5 (3) and 5 (4) are of a special nature (as has been set out hereinabove) and cannot be equated to a mere right to refusal, as is found in the Agreement concerned in WESTERN MAHARASHTRA DEVELOPMENT CORPORATION, or for that matter, in MESSER HOLDINGS LTD

(decision of the Division Bench of the Bombay High Court). Clauses 5 (3) and 5 (4) create layer upon layer of restrictions in a unique way.

(viii) The very important circumstance relevant in this behalf is that the SHA is an Agreement between the Company and all its (namely the only two) shareholders, imposing several restrictions upon the free transferability of the shares. These restrictions disable each of the shareholders and particularly, the Government, from transferring or selling its shares to whomsoever it likes.

***33**. So far as the meaning and scope of Section l11-A is concerned, this too has been dealt with hereinabove. To wit, what distinguishes a 'public company' from a 'private company' - at any rate, on and after September 20, 1995 - is the free transferability of shares in a public company vis-a-vis the restrictions imposed by the Articles of association, upon transfer of shares in a private company. If, as held in V.B.RANGARAJ, even in a private company, an agreement between the shareholders inconsistent with the Articles of association of the Company, is bad, it should follow by the same logic that any agreement between the shareholders of a public company, opposed to and inconsistent - with the statutory provision is equally bad. Indeed, if the ratio of the decisions in PUSHPA KATOCH, WESTERN MAHARASHTRA DEVELOPMENT CORPORATION and MAFATLAL INDUSTRIES aforesaid is applied, any and every restriction upon the right of free transfer is bad. The restrictions contemplated in these decisions are not unilateral decisions of the particular shareholder but a restriction flowing from an agreement or contract with another party, which the particular shareholder cannot ignore or override of his own volition or at his discretion.*

***34**. In our opinion, it may not be right to read sub-section (2) of Section 111A as merely a restriction upon the Board of Directors of a company; it is undoubtedly that; but it is much more. It defines the character of a public company; it confers a right of free transferability of shares upon the shareholders which can be restricted only by law; it also declares the free transferability a necessary concomitant and an integral characteristic of the shares of a public company; these shares should be freely transferable. If, as has happened here, the company as well as all its shareholders enter into a written agreement placing numerous restrictions upon the right of transferability of the shareholders, such an agreement falls foul of the free transferability of these shares. In such a case, the agreement is undoubtedly invalid so far as the company is concerned by virtue of Section 111A(2), read with Section 9 of the Companies Act. Can it be said - as indeed was suggested by Mr Shanti Bhushan - that even if the agreement is void so far as the company is concerned, it is yet valid as between the shareholders? We think not, for the reasons mentioned in this and succeeding paragraphs and also for the reason that in case the specific performance is granted in this case, as prayed for by the Claimant, it has to approach the company for registering the transfer of shares, and any such registering of the transfer of shares would amount to acting upon the Agreement on the part of the company.*

***35.** Free transferability contemplated by Section 111-A (2) does not mean that a shareholder can be compelled by anybody and / or everybody to sell / transfer his shares. All that it means is that if the shareholder wishes to transfer them, he should be free to do so. It is open to a shareholder to decide for himself that he will not sell his shares; he can keep them with him as long*

as he likes; he can will away or gift or otherwise transfer them to whomsoever he likes. The question, however, is - does it follow from the above that it is equally open to one or both of the only two shareholders of a public company to voluntarily subject his / their right of transfer to several restrictions of the kind concerned herein, which restrictions seriously impinge upon the right of free transfer? In our opinion, there is a qualitative difference between the situations visualised above. If the shareholder gifts, wills away or otherwise transfers the shares, it is a case of transfer and not an instance of placing a restriction upon transfer. Similarly, if a shareholder pledges the shares, it too is a form of transfer of special property, no doubt of limited kind; the restriction, if any, arising from such pledging is incidental to the act of pledge; similarly, if a shareholder agrees to sell his shares, the restriction on the seller is incidental to the act of transfer - indeed an agreement of sale is a step in the direction of transfer and not a restriction upon transfer. On the other hand, if all the shareholders of the company and the company enter into a written agreement placing several restrictions upon the transfer of shares, as has happened in this case, it is a clear case of restricting the free transferability of the shares of this public company. Neither shareholder, in this case, can freely transfer his shares. The transferability is hedged in restricted and curtailed in various ways described hereinabove. According to the learned Single Judges of the Delhi, Bombay and Gujarat High Courts, even creating a right of preemption or a right of first refusal is not permissible in the case of a public company whereas according to the Division Bench of the Bombay High Court, such a course is permissible. In this case, however - we must emphasize - we are concerned with a peculiar situation, which is unlike the one obtaining in any of the decisions considered

herein. This is not even a case where some of the several shareholders have entered into an agreement of 'first refusal'. In this case, all the shareholders of a public company and the public company have joined together, and entered into a written agreement, creating and imposing numerous restrictions upon the sale of shares (enumerated hereinbefore) making their sale, let alone a free sale, an impractical and unrealistic proposition - not only for a period of three years but even thereafter till the happening of an uncertain event viz., issuance of a Call Notice by the Purchaser (Claimant). So far as the company is concerned, such an Agreement is, without a doubt, bad by virtue of Section 9 of the Companies Act, the question is whether it is good vis-a-vis shareholders? In our considered opinion, it is not, for the reasons stated in the preceding paragraph.

36. *Indeed, the matter may be, and has to be, looked at from another stand point: Can it be said that notwithstanding the SHA, the company concerned herein yet remains and continues to be a "public" company? Can there be a public company, where the company and all its shareholders agree in writing to place several restrictions upon the transferability of its shares. Right of free transferability and the various restrictions in clause 5 cannot go together. These restrictions rob the company of its 'public' character. It is no answer to say that these restrictions are freely agreed to or voluntarily entered into by the shareholders. May be so, but what is the sum total, what is the result of the SHA, read as a whole. The SHA, and clause 5 in particular, make this public company, a closed entity – closed inwardly. It is as good as a private company. (Indeed, as pointed out earlier, all the three parties i.e.., the Company and its only two shareholders, had expressly agreed under the SHA that they shall "amend the Articles of association*

of the company to conform to this Agreement and cause the company to adopt such amended Articles of association through the passage of appropriate Board and shareholders' resolutions and take other actions as required under law in this regard"). This was not the situation dealt with in MESSER HOLDING by the Division Bench of the Bombay High Court. In this view of the matter, the ratio of the Division Bench, assuming that it is correct, on which aspect we express no opinion, is not applicable to the facts of the case before us. "

19. Even though the majority was of the opinion that the Arbitral Tribunal can pass an order of performance but since the SHA was hit by Section 111A(2) of the Companies Act, the SHA is inoperative and void and even though the Arbitral Tribunal had powers to grant specific performance it has not passed any such an order.

20. It is this award which is under challenge in the present petitions. Therefore, this Court proceeds to analyse the rival contentions of the parties.

21. For understanding the contentions of the parties and the analysis of the award, it is necessary to reproduce Clause 5 of the SHA which is the heart of the dispute. Clause 5 of the SHA reads as under:-

"ARTICLE 5
DEALING WITH SHARES

5.1 Restrictions on Transfer of Shares

(a) Except as expressly provided in this Agreement, or as may otherwise be unanimously agreed the SP shall not, for a period of 3 (three) years from Closing, directly or indirectly, sell, transfer, assign, pledge, charge, mortgage or in any other way dispose of or encumber (any such, a "Transfer") any Purchase

Shares or the legal or beneficial ownership of Purchase Shares or any of its rights or obligations under this Agreement, to any Person without first complying with all of the provisions of this Agreement.

(b) Subject to Clause 5.3(a), the SP may pledge, charge or mortgage any Purchase Shares provided it gives a written notice to the Government, at least 15 (fifteen) days prior to the creation of any such pledge, charge or mortgage, specifying the identity of the Person in whose favour the SP proposes to pledge, charge or mortgage any Purchase Shares and the material terms and conditions concerning pledge, charge or mortgage. Similarly, the Government may pledge, charge or mortgage any equity shares of the Company held by it provided it gives a written notice to the SP, at least 15 (fifteen) days prior to the creation of any such pledge, charge or, mortgage, specifying the identity of the Person in whose favour the Government proposes to pledge, charge or mortgage any equity shares of the Company held by it and the material terms and conditions concerning the creation of such pledge, charge or mortgage.

(c) The Parties agree that in the event that any share transfer committee is constituted pursuant to Clause 4.1(e), no Transfer of any Shares held by any Shareholder shall be approved by such share transfer committee without an affirmative vote of the nominees of both the SP and the Government on the share transfer committee. Provided however, that the SP and the Government nominee on the share transfer committee shall not withhold their approval to any transfer of Share if such transfer is in accordance with the terms of the Agreement.

Notice of Restrictions

a) For a period of 3 (three) years from the Closing Date, the SP hereby pledges the Purchase Shares and undertakes that it shall pledge any additional Shares that it may acquire pursuant to this Agreement prior to the expiry of 3 (years) (collectively referred to as the "Pledged Shares"), to the benefit of the Government as a continuing security to secure its performance and adherence to the prohibition on transfer of the Pledged Shares for 3 (three) years as provided in sub-clause 5.1(a).

b) The Government hereby agrees that upon the expiry of 3 years from the Closing Date, the Government shall issue a pledge closure confirmation form in respect of all the Pledged Shares to the Depository Participant of the Government.

c) Notwithstanding anything to the contrary in this Clause 5.2, the SP shall be entitled to exercise any and all voting and other consequential rights pertaining to the Pledged Shares in a manner that is consistent with the terms of this Agreement.

d) Notwithstanding what is provided hereinabove in sub-clause 5.2(a), the SP may with the prior written approval of the Government, pledge the Shares held by it to a financial institution, a scheduled bank or a recognized lender as security for any loan or advances made by such financial institution, scheduled bank or recognized lender, provided however that the identity of the proposed pledgee is disclosed to the Government and such pledge confirms that the pledge shall be bound by the restrictions on transfer of Shares and the contractual obligations and covenants as provided in this Agreement. The Government agrees that it shall not unreasonably withhold its consent to a proposal by the SP to pledge the Shares held by the SP in accordance with this sub- clause.

e) For a period of 3 (three) years from Closing, all share certificates with respect to the Shares held by the Government and in the event that at any time prior to the expiry of 3 (three) years from Closing, the SP holds any of its Shares in the form of physical share certificates, then the share certificates for such of the SP's Shares shall bear the following legend either as an endorsement or on the face of such share certificate:

"THIS CERTIFICATE AND THE SHARES REPRESENTED BY THIS CERTIFICATE ARE SUBJECT IN ALL RESPECTS TO THE PROVISIONS OF THE SHAREHOLDERS AGREEMENT AND THE SHARE PURCHASE AGREEMENT BOTH OF WIDCH ARE DATED MARCH 2, 2001, BY AND AMONG THE PRESIDENT OF INDIA, STERLITE INDUSTRIES (INDIA) LTD AND BHARAT ALUMINIUM COMPANY LIMITED, COPIES OF WIDCH ARE ON FILE AT THE CORPORATE OFFICE OF THE COMPANY. SUCH SHA, AMONG OTHER THINGS, IMPOSES VARIOUS RESTRICTIONS ON THE TRANSFER, SALE, ASSIGNMENT, PLEDGE, HYPOTHECATION, GIFT, PLACEMENT IN TRUST (VOTING OR OTHERWISE), OR OTHER ENCUMBRANCE OR DISPOSAL OF AN INTEREST IN, DIRECTLY OR INDIRECTLY AND WHETHER OR NOT VOLUNTARILY, BY OPERATION OF LAW OR OTHERWISE, THE COMPANY'S EQUITY SHARES, PAR VALUE Rs. 10 PER SHARE (THE "EQUITY SHARES"), AND GRANTS TO CERTAIN SHAREHOLBERS OF THE COMPANY CERTAIN OPTIONS TO PURCHASE AND SELL THE EQUITY SHARES."

THE ABOVE LEGEND SHALL BE VALID FOR A PERIOD COMMENCING FROM MARCH 2, 2001

TILL MARCH 1, 2004 AND SHALL BE DEEMED TO HAVE AUTOMATICALLY LAPSED UPON THE EXPIRY OF THREE YEARS FROM THE DATE OF THE ENDORSEMENT OR THE EXPIRY OF THE SHA WHICHEVER IS EARLIER.

f) Upon the expiry of three (3) years from Closing, both the SP and the Government shall have the right to submit the share certificates bearing the legend to the Company and seek the substitution by a new share certificate without the legend.

5.3 Right of First Refusal

(a) Subject to Clause 5.1(a), if the Government desires to sell all or any of the voting equity shares of the Company held by it, or if the SP desires to sell all or any of the Purchase Shares, or any other voting equity shares of the Company acquired pursuant to this Agreement, the Government or the SP, as the case may be, (the "Offeror") shall first offer (the "Offer") to sell such voting equity shares of the Company to the other Shareholder (the "Other Shareholder"). The Offeror shall send a notice of the offer (the "Sale Notice") to the Other Shareholder irrevocably offering to sell the Offeror Shares, for cash, to the Other Shareholder.

b) The Sale Notice shall clearly stipulate among other things, the number of such voting equity shares of the Company that the Offeror desires to sell (the "Offer Shares"), the price at which it wishes to sell the Offer Shares (the "Offer Price"), and details of any willing third party buyer, if any.

(c) Upon the Sale Notice being given, the Other Shareholder shall have the right, exercisable at its sole discretion, to purchase all, but not less than all, of the Offer Shares.

(d) Within 30 Business Days of the Sale Notice (the "Offer Period"), the Other Shareholder may give to the Offeror a notice in writing (an "Acceptance Notice") accepting the offer contained in the Sale Notice. If the Acceptance Notice is given by the Other Shareholder, the transaction of purchase and sale shall be completed within 60 Business Days of expiry of the Offer period.

(e) If the Other Shareholder does not give Acceptance Notice in accordance with the provisions of Clause 5.3(d), the rights of the Other Shareholder, subject to the terms provided in this Clause 5.3, to purchase the Offer Shares shall cease and the Offeror may sell the Offer Shares to any Person or Persons within 60 Business Days after the expiry of the Offer Period, for a price and on terms no more favourable to such Persons than those set out in the Sale Notice. If the Offer Shares are not sold within such 60 Business Day period on such terms, the rights of the Other Shareholder pursuant to this Clause 5.3 shall again take effect with respect to any sale of voting equity shares of the Company held by the Offeror, and so on from time to time. For the avoidance of doubt, if the Offeror proposes to sell the Offer Shares at a price lower than the Offer Price stipulated in the Sale Notice, the Offeror shall be bound to offer the Offer Shares at such lower price to the Other Shareholder in accordance with Clause 5.3(a) and such lower price shall then be deemed to be the 'Offer Price' for the purposes of this Clause 5.3.

(f) In the event that the Offeror is the Government and the Other Shareholder, being the SP, does not give the Acceptance Notice in accordance with the provisions of Clause 5.3(d), the Government may decide, in exercise of rights of an Offeror provided in Clause

5.3(e), to offer the Offer Shares to the public and the Government shall promptly inform the SP of such decision to offer the Offer Shares to the public.

(g) Within 15 (fifteen) days of the Government informing the SP as provided under sub-clause 5.3(f), the SP shall have the option to issue a notice (the "Public Offer Call Notice") to the Government requiring the Government to sell such part of the Offer Shares to the SP that would make the entire SP's shareholding in the Company equal to the number of shares as are equal to one share more than 75% of the then entire issued and paid up equity share capital of the Company ("Re-offered Shares").

(h) The Government shall be under an obligation to sell and the SP shall be under an obligation to purchase the Re-offered Shares within 15 (fifteen) days of the date of Public Offer Call Notice at the Offer Price.

(i) Upon the completion of the sale and purchase of the Re-offered Shares or if the SP does not give the Public Offer Call Notice within the period specified in sub-clause 5.3(g), the Government shall be entitled to sell the Offer Shares or such part of the Offer Shares as are remaining after the exercise of the Public Offer Call Notice by the SP at a price not lower than the Offer Price.

(j) The SP and the Government shall cause such resolutions to be passed at the shareholders meeting and Board meeting as may be required for the listing of the Company's Shares at the stock exchange(s), under applicable Law, including without limitation, Securities Exchange ,Board of India guidelines and listing conditions. Further, the SP and the Government shall cause the Company to comply with all Securities Exchange Board of India guidelines, issue norms and

listing guidelines and all other conditions for listing under applicable law.

(k) Notwithstanding the provisions of Clause 5.3(e), the Other Shareholder shall be entitled to require proof that the purchase and sale of the Offer Shares was completed at a price and on terms no more favourable than those that would have been applicable had the Other Shareholder agreed to purchase the Offer Shares.

(l) All Sale Notices, Acceptance Notices or any other notices given under this Clause shall be given concurrently to the Company.

(m) Notwithstanding anything to the contrary in this Article 5, the Government, shall at its sole discretion, have the option of selling from its shares representing not more than 5% (five percent) of the equity share capital existing as of date of this Agreement, to the employees of the Company. In the event that the Government exercises its option to sell part of its shares to the employees, the employees shall be issued fresh share certificate for the shares transferred to the employees, without the endorsement of the legend provided in Clause 5.2(e). The Parties agree that, upon the completion of transfer, the shares transferred to the employees pursuant to this sub-clause (m) shall not be subject to any restrictions in this Agreement, whether by way of a voting arrangement or a right of first refusal.

5.4 Tag Along Right

a) Notwithstanding anything to the contrary in Clause 5.3, but subject to the restrictions in Clauses 5.1 and 5.3, in the event that the Other Shareholder (as defined in Clause 5.3(a) decides not to exercise its right of

first refusal pursuant to a Sale Notice (as defined in Clause 5.3(a), the Other Shareholder at any time before the expiry of the Offer Period (as defined in Clause 5.3(d), may instead of exercising its right to purchase the Offer Shares (as defined in Clause 5.3(b), send a tag along notice (the "Tag Along Notice") to the Offeror (as defined in Clause 5.3(a) requiring the Offeror to ensure that the proposed third party purchaser of the Offer Shares also purchases all or some of the Other Shareholders equity shares in the Company at the same price and on the same terms as the Offer Shares, Provided that if the Offeror is the Government and the Government proposes to offer the Offer Shares to the public in accordance with sub-clauses 5.3(f)-(h), the SP shall not have the right to issue the Tag Along Notice and the provisions of this Clause 5.4 shall not apply.

b) In the event that the Other Shareholder delivers a Tag Along Notice to the Offeror, the Offeror shall ensure that along with the Offer Shares, the proposed third party purchaser also acquires the shares specified in the Tag Along Notice for the same consideration and upon the same terms and conditions as applicable to the Offer Shares.

c) In the event that the proposed third party purchaser is unwilling or unable to acquire all of the Offer Shares and the Other Shareholder's equity shares mentioned in the Tag Along Notice, upon such terms then the Offeror may elect either to cancel such proposed transfer or to allocate the maximum number of equity shares of the Company which the proposed third party purchaser is willing to purchase among the Sale Shares and the shares mentioned in the Tag Along Notice pro- rata in the ratio of equity shareholding in the Company at such time of the Offeror and the Other Shareholder and to complete such transfer on such

terms.

d) Notwithstanding anything to the contrary in this Agreement, the Offeror shall not be entitled to sell or transfer any of the Offer Shares to any proposed purchaser / transferee unless the proposed purchaser /transferee simultaneously purchases and pays for the required number of equity shares mentioned in the Tag Along Notice in accordance with the provisions of this Clause 5.4.

5.5 Insolvency of a Shareholder

(a) If an Event of Bankruptcy occurs in relation to the SP, the SP shall give notice of such Event of Bankruptcy ("Insolvency Offer Notice") to the Government within 15 Business Days of such Event of Bankruptcy, offering to sell all, but not less than all, of the voting equity shares of the Company beneficially then owned by the SP (the "SP's Shares") to the Government or its nominee at a price determined pursuant to Clause 6.1.

(b) Within 60 Business Days of the purchase price being determined in accordance with Clause 6.1 (for the purposes of this Clause the "Offer Period") the Government may give to the SP, with a copy to the Company, a notice in writing exercising its right to purchase the SP's Shares under this Clause 5.5 (an "Insolvency Acceptance Notice"). If the Insolvency Acceptance Notice is given by the Government, the transaction of purchase and sale shall be completed within 60 Business Days of the expiry of the Offer Period.

(c) Upon the completion of the purchase of the SP shares by the Government pursuant to this Clause 5.5, the Government shall be constituted as successors in

interest of the SP to the extent of the equity shares of the Company held by the SP and the Government shall be entitled to succeed to and be transmitted as the successor Shareholders on the register of members of the Company.

5.6 Permitted Transfers

(a) Any Securities held by the SP may be Transferred to a Person who is an Affiliate of the SP provided that, in connection with any such Transfer (i) the transferee shall, in writing, assume all rights and obligations of the transferor under this Agreement, and (ii) effective provision is made whereby the transferee and the transferor ate bound, prior-to the transferee ceasing to be an Affiliate of SP to effect the Transfer back to the SP, of all (but not less than all) such Securities held by the transferee.

(b) Notwithstanding the completion of any Transfer of Securities by the SP to an Affiliate pursuant to this Clause 5.6, the SP shall continue to be bound by all the obligations under this Agreement as the principal obligator.

5.7 Consequences of Breach by a Shareholder

(a) If either of the SP or the Government commits any breach or default of the terms of this Agreement (the "Defaulting Party") which if capable of being remedied is not remedied within 30 days of receipt of notice of such breach, the other Party (the "Non Defaulting Party") shall have the right, exercisable at its sole discretion, at any time within 90 days of the day it became aware of such breach or default, to give notice (such notice being referred to in this Clause 5.7 as the "Notice") to the Defaulting Party containing an offer by the Non-Defaulting Party, at the option of the Non-

Defaulting Party to either:

(i) sell all or any of the voting equity shares of the Company held by the Non- Defaulting Party to the Defaulting Party (such offer being referred to in this Clause 5.7 as an "Offer to Sell") at a price that is equivalent to 125% of the price of such equity shares determined in accordance with Clause 6.1. Provided however, that in the event that the Defaulting Party is the SP and the event of breach committed by the SP is under the terms of sub-clauses 7.2 (e) and (f), Clause 4.5 read with item 20 of Schedule 4.5 or this Article 5, the price at which the Government (the Non-Defaulting Party) may make the Offer to Sell shall be 150% of the price of such equity shares determined in accordance with Clause 6.1; or

(ii) purchase, directly or indirectly, through a designated nominee, all or any of the voting equity shares of the Company held by the Defaulting Party (such offer being referred to in this Clause 5.7 as, an "Offer to Purchase") at a price that is equivalent to 75% of the price of such equity shares determined in accordance with Clause 6.1. Provided however, that in the event that the Defaulting Party is the SP and the event of breach committed by the SP is under the terms of sub-clauses 7.2 (e) and (f), Clause 4.5 read with item 20 of Schedule 4.5 or this Article 5, the price at which the Government (the Non-Defaulting Party) may make the Offer to Purchase shall be 50% of the price of such equity shares determined in accordance with Clause 6.1.

(b) Within 30 Business Days of the Notice being given containing the Offer to Sell or the Offer to Purchase,

as the case may be, the Defaulting Party shall complete the transaction of the purchase and sale.

(c) The Defaulting Party shall be liable for all costs and expenses (including reasonable legal fees) including, but not limited to, those that the Non-Defaulting Party or its nominee may incur to complete the transaction of sale and purchase pursuant to this Clause 5.7 and comply with the applicable rules and regulations of the Securities and Exchange Board of India, if applicable.

5.8 Call Option

a) The Parties hereby agree that upon the expiry of the third anniversary of the Closing Date, and at any time thereafter, the SP shall have the option to issue a notice ("Call Notice") to the Government, thereby requiring the Government to sell to the SP within a period of 60 (sixty) days from the date of receipt of the Call Notice (the "Call Period"), all but not less than all the voting equity shares in the Company then held by the Government, (the "Called Shares") and the Government in that event shall be under mandatory obligation to sell the Called Shares as aforesaid. The price for the sale and purchase of the Called Shares pursuant to this Clause shall be the higher of:

i) Fair Value of the Called Shares; or

ii) The unit sale price (as provided in Clause 2.1 of the Share Purchase Agreement at which the SP, has purchased the Purchase Shares pursuant to the Share Purchase Agreement) together with interest at the rate of 14% per annum compounded with half yearly rests and calculated from the Closing Date after giving credit for the dividend received by the Government as a Shareholder of the Company

during the period from the Closing till the date of the completion of the sale and purchase of the Called Shares.

b) The Parties shall cause the Fair Value of the Called Shares to be determined within 30 days of the date of receipt of the Call Notice.

c) Upon receiving a Call Notice from the SP, the Government shall not be entitled to sell, transfer. assign, pledge, charge, mortgage or in any other way dispose of or encumber its Shares during the Call Period. If the purchase, pursuant to the Call Notice is not completed by the SP, the Government shall be relieved of its obligations to sell the Called Shares specified in Clause 5.8 herein. For the avoidance of doubt, other than the right of first refusal provided in Clause 5.3 and the tag along rights provided in Clause 5.4, there shall be no restriction on the right of the Government to Transfer any or all of its Shares till such time that the Call Notice is received by the Government.

d) Upon the issuance of the Call Notice by the SP, the SP shall be under an, obligation to complete the purchase of the Called Shares within the Call Period.

e) The sale and purchase of the Called Shares pursuant to this Clause 5.8 shall be subject to the procurement of all Approvals. "

22. Learned Senior Counsel for the Petitioner contends that the majority award is contrary to the substantive law of India. Specifically, he states that the interpretation given to Section 111A(2) of the Companies Act by the majority is opposed to the public policy inasmuch as the majority award did

not take into consideration the development of law.

23. Learned Senior Counsel for the Petitioner vehemently contended that Section 111A(2) of the Companies Act does not deal with law relating to contractual relationships that exists between the specific shareholders of the company or a shareholder of the company and a third party. He contends that the fact that the shares of company are freely transferable does not mean that a shareholder of company could not agree to transfer his shares to another shareholder or an outsider on the terms and conditions that may be agreed upon between any buyer and seller of the shares, which are goods within the meaning of the Sale of Goods Act, 1930. He states that *free transferability of shares* simply means "company would have no power to refuse transfer of shares and the persons who are or become shareholders in future are not automatically restricted in their right to transfer the shares". He states that the parties can voluntarily impose restrictions on its shareholding in a public limited company. Reliance is placed on Section 111A(2) of the Companies Act for this purpose.

24. Learned Senior Counsel for the Petitioner fortifies his contention by stating that in other cases, the company will have to make a reference to the Company Law Board and act according to the directions of the Board. It is further states that the Bill for inserting Section 111A seeks to achieve the above objective of ensuring free transferability and registration of securities of listed companies; stringent provisions have been made in Section 22A to ensure that objective. In addition, Section 20 of the SCRA was omitted by the Securities Laws Amendment Act, 1955 with effect from 25 January, 1955. Thus, in a security, i.e., a contract for the purchase or sale of a right to buy or sell a security in future became permissible which necessarily meant

that a contract to sell or purchase shares in future was valid.

25. He states that the Depositories Act, 1996 came into effect retrospectively on 20.09.1995 and by Section 30, thereof which amended certain enactments as specified in the Schedule. By reason of the same, Section 22A of SCRA was omitted and Section 111 of the Companies Act was amended by insertion of sub-section 14 and, after Section 111 of the Companies Act, and under Part IV under the head "*Transfer of Shares and Debentures"***,** a new provision, i.e., Section 111A was inserted. Section 28 of the Depositories Act provided that the Act would be in addition to and not in derogation of any other law for the time being in force relating to the holding and transfer of securities. By way of the amendment pursuant to the Depositories Related Laws Amendments Act, 1997, the proviso to Section 111A(2) of the Companies Act was added and sub section 3 of Section 111A of the Companies Act was substituted. He states that Section 20 of the SCRA however, was not re-enacted. As such options in securities were permitted and continued to be permitted and therefore, a contract providing a right to buy or sell a security in future would be necessary be legally permissible. He states that had the majority opinion taken into account the legislative intent of Section 111A of the Companies Act, it would not have come to the said conclusion.

26. He contends that the conclusion arrived at by the majority that Clause 5 of the SHA rendered the company functionally equivalent to a private company and thereby stripped it of its legal character is legally flawed. He states that the majority award failed to appreciate that a company's classification as a 'public company' is governed by statutory criteria under the Companies Act and this status is not dependent on the internal

arrangements of the shareholders but on the objective statutory requirements such as minimum paid-up-share capital and the absence of restrictions on public subscription. He states that the majority:

(i) disregarded the legislative evolution and the context in which Section 111A(2) of the Companies Act was enacted and its placement under Part IV of the Companies Act,

(ii) conflated the statutory classification of a public company with the internal contractual conduct of its shareholders, wrongly assuming that voluntary restrictions on transferability necessarily undermines its public character,

(iii) erroneously concluded that consensual contractual restrictions between shareholders transform the Company into a private entity-an assumption that finds no basis in law or precedent,

(iv) interpreted "free transferability" in a manner inconsistent with both statutory language and commercial reality,

(v) ignored the express recognition in Section 111A(5) of the Companies Act that shareholders retain the right to transfer their shares voluntarily and finally,

(vi) disregarded the express limitations placed only on the company's power to refuse registration of transfers and improperly extended this to invalidate legitimate, negotiated arrangements between shareholders and,

(vii) interpreted Section 111A of the Companies Act *dehors* the provisions of SCRA (which contemplate contracts for or relating to purchase or sale of securities), thereby rendering the provisions of SCRA nugatory and *otiose*.

27. Learned Senior Counsel further contends that the majority award is contrary to the fundamental policy of Indian law and the conclusions arrived at by the majority are unsupported by law and are unreasonable, perverse and irrational, warranting interference under Section 34 of the Arbitration & Conciliation Act. He further states that the majority award accepted that a shareholder can gift, will, pledge or sell shares and that any incidental limitations arising from such acts cannot amount to restriction on transferability. Even that being so, then if the same shareholder voluntarily enters into a contractual agreement with another shareholder and the company to impose structured transfer mechanism, then that cannot constitute a restriction on free transferability. He states that right to transfer shares encompasses right to voluntarily structure, restrict or condition such transfers through binding commercial arrangements. He states that one cannot hold pledges or gifts as non-restrictive and on the other hand hold consensual contractual clauses entered into freely for commercial certainty as impermissible. He contends that the majority award is patently illegal, contrary to the law declared, and contravenes the public policy of India and requires to be interfered with under Section 34 of the Arbitration Act for the following reasons:-

i. Section 111A cannot be said to be applicable in the instant case and the reliance on the same is misplaced, as the provision only prevents the company/board of directors from imposing any kind of fetter on the right of the shareholder to deal with or dispose of the share. It safeguards the shareholders' right to freely deal with and dispose of their shares and prohibits the company from restricting or curtailing the right to transfer such shares.

ii. The interpretation of Section 111A of the Companies Act, 1956 as given by the majority in itself is akin to a restriction being placed on free transferability of shares. The Tribunal in its majority view has construed Clause 5.8 of the SHA in a manner that would render a call option clause otiose for all purposes and would effectively mean that no SHA or SPA could have ever included a clause pertaining to call option (or for that matter, any clause with pre-emptive rights) through which the parties could consensually decide how to deal and transact in the respective shares that they hold. Similarly, if the interpretation adopted by the majority is accepted, then there could never have been an agreement to sell shares of a public company which are not spot delivery contracts. It would also become impossible to create any pledge(s) or lien(s) on shares and shares can never be used as a valid security in commercial transactions. In effect, the ramifications of the majority view would be an anathema to everyday modern commercial transactions that have been entered into, by bringing all trade and commerce to a grinding halt. Such findings by the Arbitral Tribunal are therefore patently illegal, and are also contrary to the fundamental policy of Indian law (particularly, Indian mercantile law);

iii. In a scenario as in the present case where the parties (and in particular Union of India) had mutually agreed to include the stipulations as provided for under Clause 5 of the SHA (including the Call Option and Right to First Refusal), the Tribunal overlooks that it was upon the Union of India as a

shareholder to choose when to sell and who to sell its shares to, which is exactly what the share transfer restrictions in the SHA envisaged.

iv. Moreover, the Tribunal completely failed to consider that the ground of free transferability had not been taken at any point during the various stages of discussions and even post execution of the two agreements, prior to the letter dated 07.06.2006. A contract consensually entered into between the parties cannot be substituted unilaterally without the consent of the parties. The intention of the parties could be gathered from the documents on record as also the conduct of the parties until the exercise of the call option by the Petitioner and thereafter as well. The majority itself recognised that the intention of the parties was always for the remaining 49% shareholding to vest with the Petitioner.

v. The majority award has, despite discussing and rendering observations on various findings in favour of the Petitioner taken a complete *volte-face* and read the clauses under Clause 5 of the SHA to such restrictions, that the same cannot be regarded as a possible view, when read in consonance with the statutory object as also the rules of statutory interpretation, which would govern and be applicable in the instant case.

vi. Crucially, the proviso to Section 58(2) of the Companies Act, 2013 stipulates that any contract between two or more persons in respect of transfer of securities shall be enforceable as a contract. Section 58 clarifies and codifies the existing legal position regarding such pre-emption agreements. Therefore, what was

inherent in the provisions of Section 111A of the Companies Act, 1956 has now been made clear in Section 58 of the Companies Act, 2013.

vii. The agreement consensually entered into between the parties is a binding agreement and the reasoning of the Arbitral Tribunal to deny relief to the Petitioner is perverse and contrary to the admitted position emerging from the documents and law laid down by the Courts. The award is patently illegal and is against the public policy.

28. He further states that the award places reliance on the Judgment of the Apex Court in V.B. Rangaraj (supra), which has been overruled by the Apex Court in Vodafone International Holdings BV v. Union of India, **(2012) 6 SCC 613**. He states that since the law declared by the Apex Court is retrospective in nature, it cannot be ignored on the ground that on the day the award was passed, Vodafone (supra) was not passed by the Apex Court. He further states that the SHA has been entered into with the consent of the President of India and that the Government cannot after entering into an agreement with the consent of the President of India turn around and say that the agreement is contrary to law.

29. Learned Senior Counsel for the Petitioner states that the minority Award is the correct view regarding the applicability of Section 111A of the Companies Act, 1956. He states that the minority view is correct in holding the Division Bench Judgment of the Bombay High Court in Messer Holdings Limited (supra) is the correct law. He contends that the interpretation of Section 111A must be considered in the light of its impact on the shares of public companies which, ordinarily, have hundreds if not

hundreds of thousands, of shareholders and not in the light of its impact on the shares of that very phenomenon, a public company with only two shareholders. The notion that all the hundreds, or hundreds of thousands, of shareholders of the ordinary public company, or most of them, would enter into agreements which would place upon themselves restrictions that prevented them from selling their shares for a specified period of time, thus bringing to a standstill all trade in those shares. He also contends that the majority opinion is actually contrary to the Disinvestment Policy of the country and therefore the award is against the public policy of the country.

30. Learned Senior Counsel for the Petitioner places strong reliance on a check-list of shareholders and SPA which was issued by the Department of Disinvestment. Attention is drawn to the Article 14 i.e., the Exit Mechanism as provided in the cheque list.

31. Learned Senior Counsel for the Petitioner states that it was the Government which had made the policy to facilitate its phased exit from the balance holding after the lock-in period, as the general idea was that the strategic partner i.e., the Petitioner herein, is there to stay and, depending upon the situation, Government would exit. After some time, the strategic partner should have the freedom to go it alone and buy out the Government share because in any case it is the policy of the Government to ultimately quit from the commercial venture. He states that the stand taken by the Government is completely contrary to the Check List which has been published and which is like a promise given to the Petitioner by the Government. It is stated that the Government could not back out from the promise given to the Petitioner that too when the agreement has got the approval and seal of the President of India.

32. *Per contra*, learned ASG and the learned Senior Counsel for the Union of India, state that the award is well reasoned and there is a very painstaking analysis of the various provisions and it does not warrant any interference under the parameters given under Section 34 of the Arbitration & Conciliation Act.

33. It is contended that a reading of the award shows that the Arbitral Tribunal has undertaken a thorough and painstaking analysis of the SHA. It is stated that a reading of the agreement would show that the SHA is built in such a way that no third party would come to purchase the shares especially when there is a Right of First Refusal and a Tag Along option. The attention of this Court is drawn to Clause 5.3 and 5.4 of the SHA to show that the Government can identify a third party only after the Petitioner had refused to purchase the shares as offered by the Government while exercising Clause 5.3. He states that the a perusal of the said clauses shows that the Government has to first identify a third party, then offer the shares to the Petitioner and after the Petitioner refuses the offer, the shares had to be sold within 60 days after the expiry of 30 days from the date of offer to the Petitioner. He therefore states that no third party would be interested to purchase the shares when first offer is made to the Petitioner. He also states that the Arbitral Tribunal is correct to state that only the Petitioner has the power to issue Call Notice without an upper ceiling under Clause 5.8 of the SHA. He further states that there is no time limit prescribed and the Petitioner can at any point of time issue a call notice after the lock-in period i.e., three years, which clearly brings bias in favour of the Petitioner. He therefore states that the conclusion by the majority that the transferability is hedged, restricted and curtailed in various ways cannot be found fault with

and the Tribunal, is therefore, correct in relying on the judgment of this Court and the Gujarat High Court.

34. He further states that the Public Check List was issued by the Government much after the SPA was executed, and thus, it cannot govern the relationship between the parties. It is also stated that a mere announcement cannot be considered as a part of the agreement between the parties. He states that the agreement has to be tested on the basis of the prevailing law. He further contends that the Judgment of Vodafone (supra) is inapplicable to consider the correctness or otherwise of the award since it has come much after the award was passed and the correctness of the award can only be tested on the law prevailing at the time when the award was made. He states that reliance is placed only on the observation of one of the Judges and not a Bench of three Judges, a point which had not been touched by the majority of the Judges. He further states that even the issue which arises in the present petition did not arise in the Judgment passed in Vodafone (supra). He states that a stray sentence in the judgment of Vodafone (supra) stating that the decision in V.B. Rangaraj (supra) might not help cannot be held to be the ratio of the judgment and binding on the Arbitral Tribunal and the parties.

35. Learned Senior Counsel for the Union of India relies on the Judgment of this Court in HTA Employees Union v. Hindustan Thompson Associates Ltd., **2013 SCC OnLine Del 3000** to state that the observations made in Paragraph No. 262 is only an *obiter dicta* of Vodafone (supra) that the Judgment in V.B. Rangaraj (supra) might not be the correct law does not amount to overruling the Judgment of the Vodafone (supra). He contends that a perusal of the Vodafone (supra) clearly establishes that said Judgment

has nothing to do with the transferability of the shares of the company by way an agreement. He further states that the aforementioned Judgment deals with offshore transfers. He also draws the attention of this Court to the subsequent portions of Vodafone (supra) holding that transfer of shares which are not part of the Articles of Association of the company are invalid.

36. He further states that the Judgment of the Apex Court in V.B. Rangaraj (supra) deals squarely with the issue raised in this case and therefore another Judgment of the Apex Court which did not deal with the said issue cannot overrule another Judgment especially when the issue was not in consideration. He places reliance on *Wambaugh's Test* or the *Inversion Test* to contend that in order to test whether a particular proposition of law is to be treated as *ratio decidendi* of the case, the proposition is to be inversed, i.e., to remove the text of the judgment as if it did not exist and if the conclusion of the case would still have been the same even without examining the proposition, then it cannot be regarded as the *ratio decidendi* of the case. He therefore states that the observations made in Paragraph No. 262 of the Judgment passed by the Apex Court in Vodafone (supra) cannot be said to be *ratio decidendi*. He further states that a direct pronouncement on the question by the Apex Court would be held to be binding under Article 141 of the Constitution of India.

37. Learned Senior Counsel for the Union of India states that the restrictions in Clause 5.3 of the agreement is that when the Government is to sell equity shares of Balco, the Government has to first send a sale notice of the offered shares and the offered price to the Petitioner herein. If the Government wants to sell the shares to the third party, details of proposed buyers should be disclosed to the Petitioner. It is stated that the moment

such offer is put, any third party would be wary of disclosing the amount which makes it impracticable.

38. He states that the strategic partner i.e., the Petitioner herein, has to decide within 30 days of such offer (Offer Period) and either give his consent or his refusal, after which, the entire transaction has to be completed within 60 days from the expiry of the Offer Period. If the Government is able to sell the shares within 60 days, then the initial restriction of right of first offer kicks in action. Even the option given to the public, the Government has to first offer shares to the strategic partner. If the strategic partner fails to give his acceptance, then the Government can decide it to sell to the public in which case within 15 days of the said decision, the Government has to inform the strategic partner to make the purchase of such number of shares equal to 75% of the entire paid-up-share capital and the Government is under an obligation to sell strategic partner under obligation to sell or purchase within 15 days of the offer notice which makes it compulsory for both sides to purchase the shares at that price and thereby severely affecting the transferability of shares on both sides.

39. Whereas, if the strategic partner decides to sell the shares, the same procedure has to be followed which makes a major dent in the free transferability of shares.

40. Heard the learned Counsels for the parties and perused the material on record.

41. The primary question that arises for consideration is as to whether the SHA dated 02.03.2001 and more particularly Clauses 5.3, 5.4 and, 5.8 of the said Agreement are hit by Section 111A of the Companies Act, 1956 and thereby rendering those Clauses void or not. Section 111A (2) as stood at the

time of entering into the Contract, reads as under:-

> *"(1) In this section, unless the context otherwise requires, "company" means a company other than a company referred to in sub-section (14) of section 111 of this Act.*
>
> *(2) Subject to the provisions of this section, the shares or debentures and any interest therein of a company shall be freely transferable: [Provided that if a company without sufficient cause refuses to register transfer of shares within two months from the date on which the instrument of transfer or the intimation of transfer, as the case may be, is delivered to the company, the transferee may appeal to the [Tribunal] and it shall direct such company to register the transfer of shares.]"*

42. As stated by the learned Senior Counsel for the Petitioner, Section 20 of the Securities Contracts (Regulation) Act, 1956 rendered all options in securities illegal and void. By way of an amendment in Securities Contracts (Regulation) Amendment Act, 1985, Section 22A was introduced. The Statement of Objects and Reasons of the Securities Contracts (Regulation) Act, 1956, reads as under:-

> *"**STATEMENT OF OBJECTS AND REASONS***
>
> *1. The object of this Bill is to provide for the regulation of stock exchanges and of transactions in securities dealt in on them with a view to preventing undesirable speculation in them. The Bill also seeks to regulate the buying and selling of securities outside the limits of stock exchanges, through the licensing of security dealers.*
>
> *2. The post-war boom in the stock exchanges between 1945 and 1946 and its aftermath emphasised the urgency of stock exchange reform on all-India basis. Accordingly, the Government of India asked the then Economic Adviser to the Ministry of Finance to*

undertake a comprehensive study on the subject in 1948. Later in the year, an official committee consisting of representatives of the Ministry of Finance and Law, the Reserve Bank of India and the Government of Bombay was appointed to consider the recommendations contained in this report and to submit detailed proposals for legislation. The report of this Committee indicates the broad lines on which such legislation should be framed, while another Informal Committee went into the details of these proposals and prepared a draft Bill for consideration of Government. As the representatives of the business community and stock exchanges were not associated with either the official Committee or the Informal Committee the Government of India considered it necessary, at this stage, to appoint another Committee with a predominantly non-official membership, under the Chairmanship of Shri A.D. Gorwala. The terms of reference of this Committee were-

(i) to consider the draft proposals of Government on the subject of stock exchange regulation;

(ii) to submit a revised draft Bill; and

(iii) to make any other recommendations on the subject.

This Committee submitted its report in August, 1951 and enclosed with a revised draft Bill. The report and the draft Bill prepared by this Committee were circulated to all principal stock exchanges in this country, chambers of commerce and other interested associations and individuals. The comments from all these bodies and individuals were received in course of 1952 and were aftermath studied and analysed in this Department. The present Bill is based on the results of this study and analysis.

3. The Bill, as now drafted, broadly followed the recommendations contained in the report of the

Gorwala Committee. The scheme of regulation contemplated in the Bill provides for (a) the prior recognition of the stock exchanges, subject to the fulfilment by them of certain conditions relating to their membership and their rules and bye-laws (clauses 3, 4 and 5); and (b) a general control over their trading methods and practices, to be exercised through the powers proposed to be conferred on the Central Government to approve of their rules, regulations and bye-laws and to make or amend them (clauses 8, 9 and 10). Powers are taken in clauses 11 and 12 to deal with abnormal situations or emergencies, which may gravely affect the working of the stock exchanges and call for urgent and drastic action by the Central Government.

The Central Government is also empowered to call for such information as they may require in respect of the affairs of a stock exchange or of any of its members and also to direct investigations to be made into the affairs of a stock exchange, if they consider that it is in the interest of trade or in the public interest to do so (clause 6).

Clauses 13 and 14 of the Bill impose certain restrictions on transactions in securities carried on in or outside the recognised stock exchanges, while clause 19 specifically prohibits dealing in options in securities. Power is also taken in clause 17 to prohibit transactions in specified securities, after consultation with the exchanges concerned, in order to prevent undesirable speculation in them.

In order to regulate the buying and selling of securities outside stock exchanges, the Bill provides for the licensing of all dealers in securities who are not members of a recognised stock exchange or are otherwise exempted from the licensing requirements (clause 18). The provisions of the Bill on this subject broadly follow the pattern of control underlying the

Prevention of Fraud (Investments) Act in the U.K. which was passed in 1939, and are intended to protect small and ill-informed investors against unscrupulous share brokers and dealers."

43. Section 22A of the Securities Contracts (Regulation) Act, 1956, which was introduced by way of the amendment with effect from 17.01.1986, reads as under:-

> *"**22A. Right of appeal to Securities Appellate Tribunal against refusal of stock exchange to list securities of public companies.**—*
>
> *(1) Where a recognised stock exchange, acting in pursuance of any power given to it by its bye-laws, refuses to list the securities of any company, the company shall be entitled to be furnished with reasons for such refusal, and may,—*
>
> *(a) within fifteen days from the date on which the reasons for such refusal are furnished to it, or*
>
> *(b) where the stock exchange has omitted or failed to dispose of, within the time specified in sub-section (1-A) of Section 73 of the Companies Act, 1956 (1 of 1956) (hereafter in this section referred to as the "specified time"), the application for permission for the shares or debentures to be dealt with on the stock exchange, within fifteen days from the date of expiry of the specified time or within such further period, not exceeding one month, as the Securities Appellate Tribunal may, on sufficient cause being shown, allow,*
>
> *appeal to the Securities Appellate Tribunal having jurisdiction in the matter against such refusal, omission or failure, as the case may be, and thereupon the Securities Appellate Tribunal may, after giving the stock exchange, an opportunity of being heard,—*

> *(i) vary or set aside the decision of the stock exchange; or*
>
> *(ii) where the stock exchange has omitted or failed to dispose of the application within the specified time, grant or refuse the permission,*
>
> *and where the Securities Appellate Tribunal sets aside the decision of the recognised stock exchange or grants the permission, the stock exchange shall act in conformity with the orders of the Securities Appellate Tribunal.*
>
> *(2) Every appeal under sub-section (1) shall be in such form and be accompanied by such fee as may be prescribed.*
>
> *(3) The Securities Appellate Tribunal shall send a copy of every order made by it to the Board and parties to the appeal.*
>
> *(4) The appeal filed before the Securities Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal."*

Section 111A was thus introduced to provide for free transferability of shares.

44. In 17th Edition of A Ramaiya, the historical background that as to how Section 111A was introduced, has been discussed, which reads as under:-

> *"A new section 22A was inserted in the Securities Contracts (Regulation) Act, 1956 (w.e.f. 17.01.1986) to provide that shares of a listed company shall be freely transferable and it may refuse transfer of its securities*

only on four specified grounds. It was also provided that while the company could refuse by itself if the instrument of transfer was not properly executed or stamped; before refusing transfer on other grounds it had to seek confirmation of CLB within 2 months from the date of lodgement of instrument of transfer.

Depositories Act, 1996

Substantial changes have been made in the Companies Act, 1956 by the Depositories Act, 1996 (w.e.f. 20.09.1995, being the date of promulgation of Ordinance). As per sub-section (14) inserted in section 111 by that Act, it is provided that 'company' means a private company and also a private company which has become a public company under section 43A. Further, section 111A has been inserted to provide for free transferability of shares of debentures of a public company [sub-section (2)], other than a private company or section 43A company [sub-section (1)]. CLB has been empowered to direct rectification of register of members or records of a depository in case a transfer has been made in contravention of the provisions of SEBI Act, 1992 or Sick Industrial Companies (Special Provisions) Act, 1985, on an application made by a depository, company, participant, investor or SEBI [Sub-section (3)]. These changes have been made with a view to deal with transfers through depositories and to ensure free transferability of shares and debentures. Simultaneously, section 22A of SCR Act was omitted.

Depositories Related Laws (Amendment) Act, 1997

Although section 111A(2) provided that "subject to the provisions of this section, the shares or debentures or any interest therein of a company shall be freely transferable", yet there was no provision to apply to the CLB in a case of refusal or delay in registration of transfer or rectification of register of members. This

omission was corrected by the Depositories Related Laws (Amendment) Act, 1997 by which a proviso was added to sub-section (2) of section 111A to the effect that in case a public company, without sufficient cause, refuses to register a transfer, the transferee may move CLB for relief. Changes have also been made in sub-section (3) of section 111A by the Amendment Act, 1997 by addition of the words "or any other law for the time being in force" so as to include contravention of the provisions of the Companies Act, 1956, Securities Contracts (Regulation) Act, 1956 and other applicable laws.

The Depositories Act, 1996 provides for establishment of one or more depositories, entrusted with the responsibility of maintaining ownership records of securities in a book entry form. The said Act provides for dematerialisation of shares in the depository mode under which the securities held in a depository shall be reflected through book entry through computerised electronic data, without physical delivery of share certificates transfer deeds, etc. Consequential changes have been made in the Companies Act, in this regard. The provisions of section 108 shall not apply to transfers effected through a depository. These provisions will, however, apply to transfers made outside the depository mode in case of non-listed public companies and such listed public companies which opts out of the depository mode."

45. Section 111A of the Companies Act, 1956 deals with transfer of shares or debentures and any interest therein of a company shall be freely transferable. Viewed in this manner, this Court cannot agree with the submission of the learned Senior Counsel for the Petitioner that Section 111A of the Companies Act, 1956 is restricted only to provide for a remedy to a decision by the company not to register shares. The purport of Section

111A is to ensure that shares are freely transferable. Viewed in this background, this Court therefore proceeds to analyse Clause 5 of the SHA and the question as to whether it is hit by Section 111A(2) of the Companies Act, 1956 or not. Another question that arises for consideration is that though the shares are freely transferable can parties by contract agree to restrict their free transferability and whereas such waiver by a party can be permitted to be enforced or not.

46. The restrictions on transfer of shares under the SHA are contained in Clause 5.3, 5.4 and, Clause 5.8 of the SHA. Clause 5.3 of the SHA gives a right of first refusal to the Claimant. Clause 5.3 is subject to Clause 5.1(a) which provides for a three year lock-in period whereunder the Petitioner/Claimant was prohibited to directly or indirectly sell, transfer, assign, pledge, charge, mortgage or in any other way dispose of or encumber the shares purchased by the Petitioner under the SPA. It is pertinent to mention here that Clause 5.1(b) of the SHA which is subject to Clause 5.3(a) permitted the Petitioner to pledge charge or mortgage any purchase share provided it gives a written notice to the Government at least 15 days prior to the creation of any such pledge, charge or mortgage, specifying the identity of the person in whose favour the Petitioner proposes to pledge, charge or create a mortgage. Clause 5.1(b) also permitted the Government to pledge, charge or mortgage any equity shares of the Company held by it by giving a special notice to the Petitioner. Clause 5.3(a) gives the right to the Government to sell all or any of the pledge share of the Company held by it by giving a notice of the offer to the Petitioner. Similarly, the Petitioner could also sell the shares after the period of three years as provided in

Clause 5.1(a) of the SHA to the third party after offering it to the Government first.

47. Clause 5.3(d) of the SHA provides an outer time limit within which the offer ought to be accepted or rejected which was specified as 30 days and is termed as the offer period. If the offer is accepted then the transaction of sale had to be completed within a period of 60 days from the acceptance of the offer. Clause 5.3(e) of the SHA provides that if the other party to whom the offer is made refuses to accept the offer, it is open for Offering Party to offer it to a third party and, the deal with the third party had to be completed within 60 days from the date of the refusal or expiration of offer period prescribed under Clause 5.3(d) of the SHA. Coupled with Clause 5.3 of the SHA, there is second stipulation under Clause 5.4 of the SHA called as Tag Along Right which provides that in case one party is able to get a third party to agree for the purchase of the shares then it was always open to the other party to sell its shares also to the third party and the third party so obliged to purchase the shares of the other party and the transaction under Clause 5.4 of the SHA cannot be completed if the third party refuses to purchase the other parties' share offered. If a transaction fails then Clause 5.3(a) does kicks in. There are several layers within layers of restriction in the sale. The layers which are discernible are:-

i. no permission to sell within three years

ii. After the period of three years either party can offer to sell to the other party which has to be accepted within 30 days and acted upon within 60 days

iii. If the offer is not accepted a third party had to be identified either or before or after the original offer and that transaction has to be go within 60 days after the refusal or after the period of 30 days mentioned in Clause 5.3(d) of the SHA

iv. Even if the third party accepts to purchase the shares then it would necessarily have to purchase those shares which the other party wants to sell to the other party which cannot be refused by the third party purchaser failing which the entire transaction fails.

v. That in case the Government is the offeror and the other party does not give its acceptance then the Government can offer the shares to the public after informing the Petitioner the decision to offer to the public and within 15 days of the Government informing the Petitioner, the Petitioner has an option to issue a notice to the Government requiring the Government to sell such part of the offered shares to the Petitioner that would make the entire Petitioner's shareholding in the Company equal to the number of shares as are equal to one share more than 75% of the entire paid-up equity capital and if such a call offer is made, the Government is duty bound to sell to the Petitioner and the Petitioner is duty bound to accept it within 15 days. The Government thereafter cannot sell the shares to the public at a price lower than the sale price to the Petitioner.

48. These layers of restriction go behind the ethos of Section 111-A(2) of the Companies Act, 1956 and affects the purpose of introducing Section 111-A of the Companies Act, 1956 which is free transferability of shares.

The view taken by the Tribunal that such a right cannot be waived as it is opposed to a public purpose is a plausible view.

49. That takes us to the third Clause in contention being Clause 5.8 of the SHA. Clause 5.8 of the SHA gives a right to the Claimant to issue a notice after the expiry of three years requiring the Government to sell to the Petitioner the entire balance shares held by the Government and the Government was under a mandatory obligation to sell the shares at a value as stipulated under Clause 5.8(a) of the SHA. Clause 5.8(c) of the SHA provides that on receiving the call notice, the Government is not entitled to sell, transfer, assign, pledge, charge, mortgage or in any other way dispose of or encumber its shares during the Call Period which was 60 days and if the transaction does not go through then Clause 5.3 and Clause 5.4 of the SHA again becomes operational.

50. As pointed out by the Tribunal, the call option under Clause 5.8 of the SHA is available only to the Petitioner and not to the Government. The Government cannot insist on the Petitioner to purchase the remaining shares. The Petitioner can exercise its option at any point of time it wants to thereby restricting the Government only for the option given under Clause 5.3 of the SHA which is saddled with the Tag Along and Clause 5.4 of the SHA.

51. It is well-settled that a shareholder has a *prima facie* right to transfer the shares when and to whom he wants to, this can however be restricted in a private limited company but fetters cannot be there in a public limited company. Free transferability of shares actually contemplates absence of any restrictions which will be imposed by third party and the party also cannot bind each other in a manner which would be opposed to a public interest. In

any event, the company cannot bound by such agreement and the company may refuse to accept the transfer under Clause 111-A(2) of the Companies Act, 1956.

52. The contention of the learned Senior Counsel for the Petitioner is that free transferability of shares does not mean that shareholder cannot, by way of a private agreement, restrict his right of sale of shares. The Company in question is a public limited company though not listed. There are only two shareholders and one shareholder has decided that he will sell the shares only to the second shareholder. Clause 5.8 of the SHA binds one of the two shareholders to sell the share only to the other shareholder and that too as and when the other shareholder desires for the sale of shares. Such a restriction in the opinion of this Court and as has been held by the Tribunal would be hit by Section 111-A(2) of the Companies Act, 1956. It cannot be said that the Government has waived its right to sell its shares to any other person and that too in a Company, in which 100% shares were owned by the Government. Though the policy under which this Agreement was entered into was a discernible policy and 51% shares have been sold even then it cannot be said that the Government has to sell its 49% shares (less 5% shares which it has to sell to its own employees) only to the Petitioner and not to any third party.

53. The issue regarding waiver has been settled by the Apex Court by holding that if any element of public interest is involved, then waiver will not be given effect to.

54. In Krishna Bahadur v. Purna Theatre and Others, **(2004) 8 SCC 229**, the Apex Court has observed as under:-

> *"**10**. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct."*

55. Similarly in Indra Bai v. Nand Kishore, **(1990) 4 SCC 668**, the Apex Court has held as under:-

> ***"5.....The test to determine the nature of interest, namely, private or public is whether the right which is renunciated is the right of party alone or of the public also in the sense that the general welfare of the society is involved. If the answer is latter then it may be difficult to put estoppel as a defence. But if it is right of party alone then it is capable of being abnegated either in writing or by conduct....."***
>
> (emphasis supplied)

56. In All India Power Engineer Federation and Others v. Sasan Power Limited and Others, **(2017) 1 SCC 487**, the Apex Court has held as under:

> *"**21**. Regard being had to the aforesaid decisions, it is clear that when waiver is spoken of in the realm of contract, Section 63 of the Contract Act, 1872 governs. But it is important to note that waiver is an intentional relinquishment of a known right, and that, therefore, unless there is a clear intention to relinquish a right that is fully known to a party, a party cannot be said to waive it. But the matter does not end here. **It is also clear that if any element of public interest is involved and a waiver takes place by one of the parties to an***

agreement, such waiver will not be given effect to if it is contrary to such public interest. This is clear from a reading of the following authorities."

(emphasis supplied)

57. When this Court posed a question to the learned ASG and to the learned Senior Counsel for the Respondent that the Government with its open eyes had entered into a contract to sell its shares only to the other shareholder and now can the Government back out, the learned ASG and the learned Senior Counsel appearing for the Respondent unabashedly state that there cannot be estoppel against a Statute and even though the Government had willingly entered into the Agreement but since that Agreement is hit by Clause 111A(2) of the Companies Act, 1956, Government cannot enter into a contract contrary to law and that will be against the public interest, it is not enforceable in the eyes of law. The Government is emphatic that the principles of estoppel is inapplicable in the present case.

58. Learned Senior Counsel for the Petitioner has also contended that since the Agreement enjoins a special sanctity as it is entered in the name of the President, however this argument has no merit because under Article 299 of the Constitution of India all Agreements have to be entered in the name of the President of India and therefore just because the Agreement is entered in the name of the President of India it does not enjoin any special status. The Apex Court in Glock Asia-Pacific Limited v. Union of India, **(2023) 8 SCC 226**, the Apex Court has observed as under:-

"Re : Submission regarding contracts expressed in the name of the President of India

> ***12***. *We will first deal with the submission of the learned ASG, Ms Bhati that the contract in the present case stands on a different footing as it is entered into in the name of the President of India. Article 299 of the Constitution of India ["299. Contracts.—(1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.(2) Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof."(emphasis supplied)] provides that all contracts made in exercise of the executive power of the Union shall be expressed to be made in the name of the President. The phrase "expressed to be made" and the word "executed" are intended to mean that there must be a deed or contract, in writing, and executed by a person duly authorised by the President or the Governor in that behalf."*

59. If the Company cannot be bound to sell the share to one party only then it can be said that one of the parties to the Agreement, who has supposedly waived his right under the contract, be asked to enforce the contract. In the opinion of this Court, the answer should be in emphatic "No" especially when the Arbitrators have taken a plausible view, interpreting Section 111A of the Companies Act, 1956. This Court while exercising its jurisdiction under Section 34 of the Arbitration and

Conciliation Act, 1996 is not sitting as a Court of Appeal. Whether the Agreement entered into between the two shareholders of BALCO evades a public right or not, the Tribunal has taken a view that it is plausible and this Court while dealing with the Petition filed under Section 34 of the Arbitration and Conciliation Act, cannot interfere with the award unless it is so capricious or fallacious warranting interference under Section 34 of the Arbitration and Conciliation Act, 1996.

60. The same position was prevalent even before the Arbitration and Conciliation Act, 1996 was amended by the Arbitration and Conciliation Act, 2015. Section 34 of the Arbitration and Conciliation Act, 1996 pre-2015 reads as under:-

> *"**34. Application for setting aside arbitral award**.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*
>
> *(2) An arbitral award may be set aside by the Court only if—*
>
> *(a) the party making the application [establishes on the basis of the record of the arbitral tribunal that]—*
>
> *(i) a party was under some incapacity, or*
>
> *(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or*
>
> *(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

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

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

(b) the Court finds that—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

61. Even under the pre-amended law, an Award could be set aside if it was contrary to:-

a. fundamental policy of Indian Law

b. Interest of India

c. Justice or morality; or

d. where it is patently illegal

62. In Delhi Development Authority v. R. S. Sharma and Company, New Delhi, (**2008) 13 SCC 80** the parameters have been defined in paragraph No.21, which reads as under:-

"21. From the above decisions, the following principles emerge:

(a) An award, which is

(i) contrary to substantive provisions of law; or

(ii) the provisions of the Arbitration and Conciliation Act, 1996; or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or

(v) prejudicial to the rights of the parties;

is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

With these principles and statutory provisions, particularly, Section 34(2) of the Act, let us consider whether the arbitrator as well as the Division Bench of the High Court were justified in granting the award in respect of Claims 1 to 3 and Additional Claims 1 to 3 of the claimant or the Petitioner DDA has made out a case for setting aside the award in respect of those claims with reference to the terms of the agreement duly executed by both parties."

63. Similarly in Oil and Natural Gas Corporation Limited v. Western GECO International Limited, **2014 9 SCC 263**, the Apex Court has observed as under:-

*"**35**. What then would constitute the "fundamental policy of Indian law" is the question. The decision in ONGC [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the*

principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the for a concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

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***38**. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording*

reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

***39**. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.*"

64. The Court, while deciding the issue regarding the interpretation of a contract which exclusively lies within the domain of the Arbitrator, interferes only when the contract has been interpreted in a manner that no fair-minded or reasonable person would interpret it. The Apex Court in Associate Builders v. DDA, **(2015) 3 SCC 49**, has observed as under:-

*"**27.** Coming to each of the heads contained in Saw Pipes [(2003) 5 SCC 705 : AIR 2003 SC 2629] judgment, we will first deal with the head "fundamental policy of Indian law". It has already been seen from Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the*

fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.

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29. *It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.*

30. *The audi alteram partem principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act. These sections read as follows:*

> *"**18.Equal treatment of parties**.—The parties shall be treated with equality and each party shall be given a full opportunity to present his case.*
>
> ***
>
> ***34.Application for setting aside arbitral award**.—(1)****
>
> *(2) An arbitral award may be set aside by the court only if—*
>
> *(a) the party making the application furnishes proof that—*
>
> ***
>
> *(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;"*

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

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

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

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

such decision would necessarily be perverse.

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33. *It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:"General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons,*

since your determination may be substantially right, although your reasons may be very bad, or essentially wrong".It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held : (SCC pp. 601-02, para 21)

> *"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."*

65. The upshot of the decision in Associate Builders (supra) is that Award is rendered perverse and irrational where findings are: (i) based on no evidence; (ii) based on irrelevant material and; (iii) ignores vital evidence. In the opinion of this Court, the Award which is under consideration is neither against the Public Policy of India, interest of the country, justice, morality and also there is no patent illegality i.e., contravention of substantive law of India or contravention of Arbitration and Conciliation Act, 1996. The challenge, therefore, fails.

66. The contention of the learned Senior Counsel for the Petitioner that the Judgment of Apex Court in V.B. Rangaraj (supra) has been overruled by the Judgment of the Apex Court in Vodafone (supra), and therefore, the Tribunal could not have relied on V.B. Rangaraj (supra), also cannot be accepted. Unlike an appeal, which is a continuation of the proceedings before the Trial Court, a petition under Section 34 of the Arbitration & Conciliation Act is not a continuation of the proceedings before the Tribunal. While exercising its jurisdiction under Section 34 of the Arbitration & Conciliation Act, the Court only sees whether the award is hit by any of the provisions of Section 34 of the Arbitration & Conciliation Act. The award has therefore to be tested at the prevailing law at that time. In any event, this Court is of the opinion that the decision of the Apex Court in Vodafone (supra) does not emphatically overrule V. B. Rangaraj (supra). The Judgment of the Apex Court in Vodafone (supra), read as a whole, does not have the effect of overruling V. B. Rangaraj (supra) on this aspect and more particularly since Vodafone (supra) was not dealing with the transferability of shares of a public limited company by way of an

agreement. Even if V. B. Rangaraj (supra) has been overruled by Vodafone (supra), that is of no consequence. As stated earlier, the award has to be tested on the basis of the law as prevailing then and subsequent change in law will not affect the correctness of the award which is passed on the basis of the law as it stood at the time of passing of the award.

67. Resultantly, O.M.P. (COMM) 208/2020 is dismissed, along with pending application(s), if any.

68. O.M.P. (COMM) 178/2020 has been filed by the Union of India seeking to set aside certain observations/findings of the Arbitral Tribunal at paragraphs No.39, 52 & 59 of the award dated 25.01.2011. Though prayer (b) of the Petition is that in the event this Court is of the view that the Petition in respect of Prayer (a) is not maintainable, at this stage, the Union of India may be given liberty to challenge these observations/findings if and when a question arises as to whether these observations are operative, in view of the Claimant having successfully challenged the award on the principal issue. However, the Union of India has pressed the O.M.P. (COMM) 178/2020 and parties have been heard.

69. Paragraphs No.39 to 59 of the Award dated 25.01.2011, which are relevant in deciding the present Petition, reads as under:

> "*39. Mr Ganguly sought to point out that certain aspects of law were not considered by the said decision and for that reason the said decision cannot be treated as a binding decision. We decline to entertain this plea. It is not open to this Tribunal to enter into any such enquiry which would be a fruitless exercise. Mr Ganguly then brought to our notice the decision of the Supreme Court in HARYANA TELECOM*

INDUSTRIES LTD V STERLITE INDUSTRIES (INDIA) LTD [(1995) 5 SCC 688] and HUNGERFORD INVESTMENT TRUST LIMITED v HARIDAS MUNDRA [(1972) 3 SCC 684]. None of the said decisions takes a view contrary to the decision in OLYMPUS SUPER STRUCRTURES; they deal with different aspects altogether. Accordingly, we hold that this Tribunal has jurisdiction to grant the relief of specific performance of the contract as provided by the Specific Relief Act.

Valuation:

40. Clause 5 (8) of SHA provides inter alia that the price for the sale and purchase of the Called Shares pursuant to this clat1se shall be the higher of:

> *"(1) fair value of the Called Shares; or*
>
> *(ii) the unit sale price (as provided in clause 2.1 of the share purchase agreement at which the SP has purchased the purchase shares pursuant to the share purchase agreement together with interest @ 14% pa compounded with half yearly rests and calculated from the Closing date after tiving credit for the dividend received by the Government as a shareholder of the Company during the period from the Closing Date till the date of the completion of the sale and purchase of the Called Shares.*
>
> *(b) The parties shall cause the fair value of the Called Shares to be determined within 30 days of the receipt of the Call Notice."*

41. Article/ Clause 6.1 of the SHA provides for valuation date. The said provision reads as follows:

> *"6.1: Valuation:*
>
> *The purchase price payable for any voting equity shares of the company to be transferred hereunder at a price determined pursuant to this clause 6.1 shall be equal to the fair value determined as at the date of the event which gives the right of purchase or sale (the valuation date') in accordance with the principles of valuation set forth in schedule 6.1",*

42. Schedule 6.1 of the SHA sets outs the principles of valuation. Clause (a) of this schedule is relevant which reads as follows (at pages 239 and 240 of Volume 1):

> *"(a) Valuation Procedure*
>
> *Upon the provisions of this Schedule becoming applicable (but subject to sub-clause (b)), the non-defaulting party/selling Party (if not a Defaulting Party) shall, unless otherwise agreed to between the Parties, appoint an independent valuer of international repute from among the entities mentioned in sub-clause (c) of this Schedule to determine the fair Value of the relevant voting equity shares of the Company as at the Valuation Date.*
>
> *In determining the Fair Value of the relevant voting equity shares of the Company, the independent valuer shall take into account*

various factors, including, but not limited to the following:

i) Discounted cash flow principles;

ii) Commonly used valuation multiples of comparable transactions;

iii) If the Company is listed, the current price of the voting equity shares of the Company as quoted on the stock exchange(s) where they are primarily traded;

iv) The Securities and Exchange Board of India's guidelines and principles of valuation, if applicable;

v) Whether such voting equity shares of the Company which are subject to the transaction of purchase and sale constitue a minority block or a majority block of all of the issued and outstanding voting equity shares of the Company: I

vi) Whether such equity shares have any contractual rights with respect to the Company attached to them and appropriate discount or premium shall be applied to its valuation on the basis thereof;

vii) Discounting principles, if the selling party is insolvent, for assuming any restriction and obligations attached to the shares.

The valuation arrived at by the independent valuer is made as an expert and not as an umpire or arbitrator shall be final and binding on the parties and no appeal shall lie from such valuation." Clause (c) of the schedule mentions the entities one of which was to be appointed for determining the valuation. As per clause (a) of schedule 6.1, these entities are:

"1. Arthur Andersen & Associates

2. KPMG Peat Marwick

3. Ernst & Young

4. Price Waterhouse Coopers

5. A.F.Ferguson & Co"

43. On March 19, 2004, i.e., after the expiry of three years from the date of the SHA, the Claimant issued a notice to the Respondent calling upon it to sell the balance 49% of the shareholding in the company to the Claimant in accordance with clause 5.8 (annexure C3 at page 248 of Volume I). This notice was replied to by

the Government on April 13, 2004 (annexure C4 at. page 250 of Volume 1) stating that:

> *"due to certain administrative exigencies, thee would be some unavoidable delay in processing the call option notice for balance 49% of equity capital held by the Government of India in Balco. Accordingly, as per clause 11.6 of SHA, it is requested that time for implementation of the Call Option for balance 49% of equity capital in Balco may be extended upto 30.7.2004".*

44. The Claimant agreed to this extension by their letter dated April 21, 2004 (annexure C5 at page 251 of Volume 1). Thereafter there was a good amount of correspondence between the parties to which it is really not necessary to refer. Suffice it to say that by their letter dated November 10, 2004 (annexure C15 at page 269 of Volume II) the Respondent requested the Claimant to change the valuation date from March 2, 2004 to March 31, 2004 to which the Claimant agreed by their letter dated November 15, 2004 (annexure C15 at page 270 of Volume II). It appears that the Respondent repeatedly asked for extension of time for completing the sale transaction and ultimately on February 16, 2005 appointed M/s Price Waterhouse Coopers (PWC) to determine the fair value of the Called Shares (annexure C 25 at page 282 of Volume II).

45. At this stage it transpired that all the five entities mentioned in the schedule to SFIA have some or the other dealings with the Claimant and for that reason it was thought that appointment of any of them would not be fair and proper. Accordingly, at a meeting of the

representatives of the Claimant and the Respondent held on October 14, 2005, SBI Capital Market Limited (SBI Caps) was included in the list of entities mentioned in schedule 6.1 of the SHA and accordingly SBI Caps was appointed for the said purpose by the Respondent by their letter dated December 26, 2005 (annexure C28 at page 288 of Volume II). SBI Caps submitted their report determining the fair value of the Called Shares, as on March 31, 2004, at Rs.77.93 ps per share. On March 1, 2006, the Respondent intimated the Claimant about the said determination by SBI Caps to which the Respondent proposed to add interest @ 14% pa, compounded on half yearly as on March 31, 2006, thereby arriving at the value of Rs.101.65 ps per share and further calling upon the Claimant to indicate thier willingness to buy the Called Shares @ Rs.101.65 ps per share. In response to the said letter the Claimant objected to the adding of interest as also to the rate of interest applied by the Respondent. After some more correspondence, the Claimant addressed a letter dated March 30, 2006 stating inter alia "in the interest of completing the transaction by March 31, 2006 as requested by you and in the interest of Balco and its employees, we propose that we make payment of the Called Shares Rs.101.65 ps per share as calculated by you, without prejudice and subject to final determination by arbitration and the Called Shares are transferred to us against the said payment". A cheque dated March 30, 2006 drawn on ICICI Bank in a sum of Rs. 1098,89,75,408.20 ps was sent along with the said letter. Subsequently on May 9, 2006, the Claimant sent another notice under and with reference to clause 5.7 of the SHA calling upon the Respondent to sell the Called Shares at the reduced price in terms of the said clause 5.7.

46. On June 7, 2006, the Respondent wrote to the Claimant contending, for the first time, that the provision in clause 5.8 of the SHA "constitute restrictions on the right of the Government of India to transfer its shares and the agreement containing restrictions on transferability is violative of Section 111A of the Companies Act". Certain other contentions were also raised including the contention that the Claimant's acceptance of the Respondent's offer was not unconditional and therefore does not merit any consideration. The Respondent concluded its letter stating "15. Government of India terminates the dialogue with you on acquisition of shares of Balco".

47. Thereupon, the Claimant says, it invoked the arbitration clause and sought to refer the dispute to arbitration. However, the Respondent objected to the same on the ground that according to clause 11 read with schedule 11 of the SHA, there must first be an effort to arrive at an amicable negotiation and conciliation through an informal mediation and that unless the dispute is referred to such mediation, the reference to arbitration is not maintainable. Accordingly, panel was appointed by the parties to mediate the dispute which, however, did not succeed. It, however, appears that during the course of mediation proceedings, the mediators requested SBI Caps to determine the fair valuation of the said shares as on and with reference to June 30, 2007. SBI Caps submitted the revised / updated report in December, 2007. In para 2.7 of the report under the heading "Conclusion", the second report stated:

> *"2.7 Conclusion:*
>
> *As mentioned earlier we have been appointed as independent valuaters to update our valuation in an effort to facilitate the mediation process. We*

have not conducted a detailed due diligence, whether it be from the legal, accounting, tax or the technical point of view. Considering the above we believe that the fair value of the voting equity shares of the company as on 30.6.2007 is Rs.115.05 per share.....

48, The contention of Mr Shanti Bhushan, the learned senior advocate for the Claimant is that the Respondent is not entitled to question the valuation made by SBI Caps in their first report in view of the provision in article / clause 11.1(b) which states expressly that "(b) Notwithstanding anything to the contrary in sub-clause (a) hereinabove, the parties agree that any valuation pursuant to clause 6.1 is an expert opinion and shall be final and binding on the parties and shall not be the subject matter of dispute between the parties". The learned counsel submits that the said clause bars any dispute being raised by the Respondent with respect to the correctness of the valuation made by SBI Caps in thier first report. The learned counsel also submits that the second report of the SBI Caps made during the course of mediation proceedings cannot be looked into being inadmissible by virtue of Section 75 read with Section 81 of the Arbitration & Conciliation Act.

49. On the other hand, the contention of Mr A.K.Ganguly, the learned senior advocate for the Respondent is that the first report suffers from several patent errors and that it also omitted to take into, consideration several assets of the company in arriving at a..... fair value and hence the valuation made in the first report is neither final nor binding upon the parties. The learned counsel relied upon several portions of the second report in support of his

contention that the first report failed to take into consideration several valuable assets of the company. Mr Ganguly also placed reliance upon the oral evidence adduced by the Respondent on the question of errors in valuation in the first report of SBI Caps. The learned counsel submits that in any event it would be just and proper, in the event this Tribunal is inclined to grant the relief of specific performance, that this Tribunal should direct to arrive at a true and fair market value of the shares which should form the basis of any such relief.

50. Sections 75 and 81 of the Arbitration and Conciliation Act read as follows:

> *"75. Confidentiality.- Notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentialilty shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement."*

> *"81. Admissibility of evidence in other proceedings. The parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings, -*
>
> *(a) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;*

(b) admissions made by the other party in the course of the conciliation proceedings;

(c) proposals made by the conciliator;

(d) the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator."

The difference in the language employed in the above two sections is quite evident. Section 75 begins with a non-obstante clause "notwithstanding anything contained in any other law for the time being in force" and then says that the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Whereas Section 81 is in more positive and emphatic terms. It says that the parties shall not rely on or introduce as evidence any arbitral or judicial proceedings in all the matters referred to in clauses (a), (b), (c) and (d) in the said section. In this case the second report of SBI Caps has been produced by the Claimant themselves. The said report does not fall under any of the clauses (a), (b), (c) and (d) mentioned in Section 81. Of course, it falls under Section 75 but it is only a direction to the conciliator and the parties to keep all matters relating to conciliation proceedings confidential. But when the Claimant themselves have produced the said report they cannot now turn round and say that the said report is inadmissible in evidence by virtue of Section 75. The said second report of SBI Caps, therefore, cannot be held to be inadmissible in evidence.

The question then arises whether the said second report establishes that the first report of SBI Caps suffers from any patent or demonstrable errors so as to treat the said first report as not binding. In G.L.SULTANIA v SECURITY AND EXCHANGE BOARD OF INDIA [(2005) 7 SCC 133] the Supreme Court held that valuation of shares is not only a question of fact but also raised technical and complex issues which may appropriately be left to the wisdom of the experts, having regard to the many imponderables which enter the valuation of shares. The Court held further that unles it is shown that the valuation was made on a fundamentally erroneous basis or that a patent mistake had been committed or the valuation adopted on demonstrably wrong approach or a fundamental error going to the root of the matter, the valuation made by an expert cannot be ignored. Supreme Court after a review of the several earlier decisions of the Court on the subject. It is this test which we have to apply in deciding the question at issue. This proposition. was enunciated by the

51. So far as the second report is concerned, the first aspect to be kept in mind is that the said valuation was made not with respect to the valuation date agreed between the parties viz., March 31, 2004, but with reference to a subsequent date viz., June 30, 2007. There is nothing on record to show that the parties had agreed to change the valuation date from March 31, 2004 to June 30, 2007. Mr Gunguly invited our attention to certain parts of the second report including the paragraphs 2.2 'methodology', 2.3 'aluminium industry', 2.6 'valuation' and the three tables mentioned in the said para 2.6 as also to the conclusion in para 2.7. Our attention has also been drawn to paras 7.2.5 and 7.2.6 at pages 415 and 416 (of the second report). On the basis of the said

paragraphs, Mr Gunguly contended that the first report omits to take into consideration two mines mentioned in para 7.2.5 as well as the other assets mentioned in the tables contained in para 7.2.6. The learned counsel also invited our attention to the oral evidence led by the Respondent, in particular, the evidence of Mr Bajranglal Bhagra and Mr S.C.Chhetwal. Both the said witnesses are in the nature of experts whose assistance was sought by the Union of India to depose on the question of valuation of the assets of the Balco. The said witnesses painted out certain mistakes allegedly committed in the first report and submitted that the first report suffers from various infirmities pointed out by Mr Bajranglal Bhagra in para 25 of his examination-in-chief and by Mr. S.C.Chhetwal, in paras 14 to 17 of his examination-in-chief.

52. We have perused the evidence of these two witnesses and the paragraphs pointed out by Mr Ganguly in the second Report of SBI Caps, carefully, but are unable to say that the said material establishes that the first report of SBI Caps suffers from a fundamentally erroneous basis or a patent mistake or has adopted a demonstrably wrong approach so as to ignore or reject the said first report. (Of course, this issue is gone into for the sake of completion, though it does not really arise for our consideration in the light of our finding on the validity of clause 5.8 of the SHA).

Whether the Claimant is entitled to purchase at a lesser price as provided in clause 5.7 of SHA?

53. The Claimant's case is that on the failure of the Respondent Union of India to comply with the Call Notice dated March 19, 2004, issued under clause 5.8 of SHA, the Claimant issued another notice dated May

9, 2006, under and as provided by clause 5.7 calling upon the Respondent to sell the Call Shares at a price equivalent to 75% of the price of such shares determined in accordance with clause 6.1. The Respondent failed to comply with this notice as well. The Claimant asserts its right to purchase the Call Shares at the said reduced rate.

54. The contention of the Respondent is that the notice dated May 9, 2006, issued by the Claimant is not in accordance with clause 5.7 of SHA. The contention is that clause 5.7 contemplates two notices viz., one intimating the other shareholder of the breach committed by it and the second notice containing the offer to purchase at the reduced price whereas in this case there was only one notice viz., the notice dated May 9, 2006. It is submitted that the Claimant not having complied with the terms of clause 5.7, is not entitled to purchase at the reduced rate.

55. It is obvious that this question arises only if this Tribunal holds that clause 5.8 of SHA is valid, effective and enforceable. We have found hereinbefore that clause 5.8 is not valid, effective or enforceable. This question, therefore, does not really arise, but, for the sake of completion, we proceed to deal with this submission.

56. Clause 5.7, in so far as is relevant, reads as follows (at page 217 of Volume 1):

"5.7 Consequences of Breach by a Shareholder

(a) If either of the SP or the Government commits any breach or default of the terms of this Agreement, (the "Defaulting Party") which, if. capable of being remedied, is not remedied within 30 days of receipt of notice of such breach, the other Party (the "Non-Defaulting Party") shall have the right, exercisable at its sole discretion, at any time within 90 days of the day it became aware of such breach or default, to give notice (such notice being referred to in this Clause 5.7 as the 'Notice') to the Defaulting Party containing an offer by the Non-Defaulting Party, at the option of the Non-Defaulting Party to either

(i) omitted as not relevant.

(ii) purchase, directly or indirectly, through a designated nominee, all or any of the voting equity shares of the Company held by the Defaulting Party (such offer being referred to in this Clause 5.7 as an "Offer to Purchase") at a price that is equivalent to 75% of the price of such equity shares determined in accordance with Clause 6.1. Provided, however, that in the event that the Defaulting Party is the SP and the event of breach committed by the SP is under the terms of sub-clauses 7.2 (e) and (f), Clause 4.5 read with item 20 of Schedule 4:5 or this Article 5, the price at which the Government (the Non-Defaulting Party) may make the Offer to Purchase shall be 50% of the price of such equity shares determined in accordance with Clause 6.1.

(b) Within 30 Business Days of the Notice being given containing the Offer to Sell or the Offer to Purchase, as the case may be, the Defaulting Party shall complete the transaction of the purchase and sale."

57. The notice dated May 9, 2006, issued by the Claimant is at pages 355 to 357 in volume II of the documents filed by the Claimant. It first refers to the issuance of the notice dated March 19, 2004, and its contents and then states:

"Despite this you have failed and neglected to take any steps to sell and transfer the Called Shares in our name which constitue a breach of the SHA

We hereby call upon you to remedy this breach committed by you within 30 days from the date of receipt of this notice. In case this breach is not remedied in the time specified, we shall be entitled to purchase the said Called Shares at the price equivalent to 75% of the price of such shares determined in accordance with clause 6.1 as is provided in clause 5.7 (a) & (b) of the SHA and we would no longer be liable to pay you the fair value.

Please treat this as notice under clause 5.7 of SHA. Please further note that if you fail to remedy the breach within the time period specified, we shall be entitled to pursue the remedy provided under the schedule 6.2(f) of SHA for transfer of the shares in accordance with clause 5.7 of SHA".

58. The notice is a composite notice intimating the Respondent of the breach and also exercising the option and the right conferred upon the Claimant by clause 5.7 to purchase the Called Shares at a reduced price and calling upon the Respondent to sell the said shares at the reduced price.

59. We are of the opinion that the objection raised by the Respondent is technical in nature and that the notice dated May 9, 2006, issued by the Claimant substantially satisfies and complies with clause 5.7. It is not the case of the Respondent that had the notice of breach been given in the first instance, they would have had or availed of the opportunity, to repair the breach nor has this ground been made a reason for refusing to sell the shares. Inasmuch as, the notice refers to sub-clauses (a) and (b) of clause 5.7 and also puts the Respondent on notice about the breach as well as the exercise by the Claimant of their right and option under clause 5.7, the objection raised by the Respondent must be deemed to be technical in nature. This objection of the Respondent is accordingly rejected."

70. The three issues which are being canvassed by the Union of India are as under:

(i) Whether the Arbitral Tribunal has the power and to grant the relief of specific performance of contract;

(ii) Whether the first and second report given by the SBI Caps can be countenanced to determine the true and fair market value of the shares which formed the basis of the relief of specific performance of contract;

(iii) Whether the Petitioner, i.e. the Claimant, is entitled to purchase the shares at a lesser price as provided in Clause 5.7 of the SHA.

71. As far as the first issue is concerned, it is the case of the Union of India that the Arbitral Tribunal has no power or authority to grant specific performance of contract, as provided for in the Specific Relief Act. The Tribunal, after placing reliance on the Judgment of the Apex Court in Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan, **(1999) 5 SCC 651,** has held that the disputes relating to the specific performance of contract can be decided in arbitration proceedings. Point No.3 in the case of Olympus (supra) dealt with the specific issue as to whether an arbitrator is not entitled to pass an award directing specific performance of an agreement of sale and the subject-matter of the dispute is not capable of arbitration under Section 34(2)(b)(i) of the Act? On the said issue, the Apex Court has specifically held that disputes relating to specific performance of contract can be referred to Arbitration and Section 34(2)(b)(i) of the Arbitration Act is not attracted. The Apex Court also over-ruled the Judgment of this Court on this aspect.

72. Learned Counsel appearing for the Union of India states that even if the relief of specific performance could be granted but in the facts of the present case, specific performance ought not have been granted by the Arbitral Tribunal in view of the conduct of the Petitioner. He states that the relief of specific performance of the contract is an equitable relief and the conduct of the Petitioner is such that the relief ought not have been granted to the Petitioner. Attention of this Court has also been drawn to the Order

dated 05.01.2010 wherein an affidavit of one Mr. Gaurav Kumar was sought to be introduced by the Union of India before the Arbitral Tribunal. In the said affidavit, Mr. Gaurav Kumar had stated a number of facts highlighting the actions of the Claimant herein contrary to its obligations under the SHA. The said Affidavit stated that the SHA provided that the Claimant shall ensure Job opportunities for the members of the Scheduled Castes/Scheduled Tribes, physically handicapped persons and other socially disadvantaged categories of the society and that in case retrenchment was called for, the physically handicapped persons were to be retrenched last. The Affidavit also highlighted that soon after the SHA, there was resentment among the employees of the company (BALCO) over certain actions of the management viz., transfer of employees from one place to another, pressurizing the employees to accept voluntary retirement scheme, pressurizing the employees to vacate company quarters allotted to them and further to reduce the age of retirement of officers from 60 years to 58 year and, therefore, in these circumstances, the Government appointed a committee. The committee opined that the payment of VRS dues in five instalments was a departure from the standard procedure which was a violation of the spirit of the SHA. The Affidavit also highlighted that on 23.09.2009, between 3.30 pm and 4.00 pm, a chimney of the power plant in BALCO plant at Korba collapsed and about 40 labourers lost their lives while 4 others were seriously injured on account of the said collapse. It was stated in the Affidavit that the chimney collapsed because the sub-contractor, in connivance with the employees of the top management had used sub-standard material and that there was complete negligence on the part of the management in taking remedial steps. After the incident, a case

under Section 304II has been registered and chargesheet has been filed in the said case. To look into the matter, a Committee was appointed by the Union of India which, after inspecting the site, has opined that correct technology had not been adopted in the construction of the chimney. The Affidavit filed by the Union of India was objected to by the Claimant as there was no foundation of the same in the pleadings and that the affidavit was filed only two days prior to the arguments. The Union of India took a stance that they would move an application for amendment of the Defence Statement. The Tribunal vide Order dated 05.01.2010 rejected the introduction of the Affidavit by the Union of India and also the prayer of the Union of India to amend the Defence Statement. Relevant portions of the Order dated 05.01.2010 reads as under:

> "*Having heard the learned counsel for both the parties at some length, we are of the opinion that the application for amendment filed at this stage cannot be granted. While it is true that amendments should be liberally granted, it is not an absolute or invariable rule and that every amendment has to be examined in the light of the relevant facts and circumstances.*
>
> *Firstly, the alleged unfair labour practices, even according to supplementary affidavit, took place soon after the entering into of SHA.*
>
> *Though the affidavit or the proposed amendment does not mention the year or years during which the said practices are said to have taken place, Mr Ganguly submitted that they happened somewhere around 2002-04. It is not shown that the SHA contains any provision stating that in case of any such unfair labour practice,*

the respondent would be entitled to decline to sell the balance 49% shares in the company to the claimant. Moreover, these events have taken place sometime during 2002-2004 and it is an admitted fact that sometime in 2006 the respondent had indeed made an offer to the claimant to sell to the respondent its 49% of shareholding for a consideration of Rs. 1098,89,75,408/-. This circumstance, coupled with the fact that at no point of time after the SHA these grounds have been urged, clearly goes to show that these allegations (regarding unfair labour practices) would be of no consequence or relevance, even if allowed to be brought on record.

Secondly, coming to the chimney incident: If it is an accident, nothing follows from it. It might, however, have been a different situation if it had been found that the claimant had knowingly used defective material and made defective construction of chimney. May be that in such a case, it may not be a proper exercise of this Tribunal's discretion to grant specific performance compelling the respondent to sell its 49% share to the claimant. As it is, there are several hurdles in the way of drawing this inference of deliberate use of defective material and defective construction:(a) the claimant was itself a 51% shareholder in the company (Balco) and it appears unlikely that they would have knowingly constructed a huge chimney with defective material or with defective design. (b) the F.I.R.cannot be taken as proof of the facts stated therein. The reports of the committees (said to have been appointed by the Government and the respondent) have not even been placed before the Tribunal. What are placed before us are: (i) a report of the committee submitted in September, 2004 with respect to the alleged unfair labour practices of the claimant; (ii) a copy of the F.I.R. (in Hindi) dated 25th September, 2005, along

with English translation; (iii) "Report on the mishap of chimney under construction at Balco power plant, Korba, Chattisgarh on 23-9-2009"; and (iv) a letter of the Chief Secretary, Government of Chattisgarh dated 1-10-2005 addressed to Ms Shanti Sheela Nair, Secretary to Government of India, Ministry of Mines. The Report at serial No. (iii) is not signed by any one.

It may be mentioned that the report at serial No.(iii) and the letter at serial No.(iv) do not state that the construction of the chimney was deliberately made with defective material or that the claimant had knowingly constructed it in such a manner that it may fall down. In other words, there is no evidence in support of the said plea. Except the ipsi dixit of Mr Gaurav Kumar, who does not claim to have personal knowledge of any of the facts stated in the supplementary affidavit, there is no material in support of the said averment. As a matter of fact, Mr Ganguly made it clear in response to the Tribunal's question that he has no other evidence to adduce except that of Mr Gaurav Kumar. (The other two witnesses, R.W.2 and 3, have already been examined and they do not speak a word about these fresh averments). In such a situation, granting the amendment and receiving the supplementary affidavit of Mr Gaurav Kumar, at this stage. would be an unnecessary exercise.

Certain decisions were brought to our notice, none of which have any relevance on the question of amendment in question.

It is true that at the stage of grant of amendment, the truth or otherwise of facts sought to be brought on record ought not be gone into. But the fact here is that the only witness on whose, testimony the allegations made in the proposed amendment are to be established

has no personal knowledge thereof. The Tribunal cannot shut its eyes to this and to the serious and unexplained delay in filing the application for amendment.

For the above reasons, we declined to grant the application for amendment."

73. The Tribunal has given very cogent reasons as to why it did not accept the application of the Union of India for amendment of the Petition. As rightly pointed out by the Tribunal, the basis of the amendment was a report of the Committee regarding unfair trade practice; unsigned Report on the mishap of chimney under construction at BALCO power plant, Korba, Chattisgarh; and a letter of the Chief Secretary, Government of Chattisgarh dated 01.10.2005 addressed to the Secretary to Government of India, Ministry of Mines. The Tribunal, after looking into the material on record came to the conclusion that there is nothing to show that the material used in the construction of the chimney was defective or that the company had knowingly constructed the chimney in such a manner that it will fall down. The Tribunal further held that other than the affidavit, the Union of India had no one to examine and two out of four witnesses, who have been examined, have not stated anything about the construction of the chimney.

74. In view of the above, this Court is of the opinion that the finding of the Arbitral Tribunal that it has the power to grant relief of specific performance of the contract, does not warrant any interference from this Court. The additional reasons given by the Union of India to demonstrate that in the facts of this case, an equitable remedy of specific performance

ought not have been granted by the Tribunal also cannot be accepted by this Court. In the opinion of this Court, the Order of the Tribunal does not suffer from any of the vices enumerated under Section 34 of the Arbitration Act.

75. As far as the second issue as to whether the first and second report given by the SBI Caps can be countenanced to determine the true and fair market value of the shares which formed the basis of the relief of specific performance of contract is concerned, the Tribunal has observed that Clause 5.8 of the SHA read with Clause 6.1 of the SHA provides for a mechanism for calculating the fair price of the shares. Clause 6.1 of the SHA also mentions the entities who would value the shares. Since all the five entities mentioned in the schedule to SHA had some or the other dealings with the Claimant, SBI Capital Market Limited (SBI Caps) was included in the list of entities mentioned in schedule 6.1 of the SHA and accordingly SBI Caps was appointed for the purpose of valuation of shares. SBI Caps submitted a report determining the value of shares at Rs.77.93 per share. The Union of India offered a value of Rs.101.65 per share calling upon the Claimant to indicate their willingness to buy the Called Shares @ Rs.101.65 ps per share which was ultimately agreed to by the Claimant and a cheque of Rs.1098,89,75,408.20/- was given. During the period of negotiations on 07.06.2006, the Union of India took a stand that Clause 5.8 of the SHA is itself violative of Section 111A of the Companies Act. Material on record indicates that two reports were given by the SBI Caps and according to the Union of India both the reports could not have been looked into. According to the Union of India, the first report suffered from patent errors as the SBI Caps had overlooked several assets of the company while arriving at the

value of shares and both the reports being confidential in nature could not have been taken into account. The Arbitral Tribunal rejected the argument of the Union of India by stating that as far as the first report is concerned, the Claimant have themselves produced the report and now they cannot turn around and say that it is inadmissible. In any event, as the Tribunal has correctly found that Clause 5.8 of the SHA has been struck down, the entire discussion on this issue becomes academic in nature. In the opinion of this Court, the SBI Caps as given a valuation, the Tribunal has gone into the issue and has found no errors in the valuation. In the absence of anything contrary before this Court that the valuation was wrong, this Court is not going into the issue as to whether the valuation of shares is wrong or not as it has become academic in nature.

76. As far as the third issue as to whether the Petitioner, i.e. the Claimant, is entitled to purchase the shares at a lesser price as provided in Clause 5.7 of the SHA, is concerned, the short issue which this Court has to see is as to whether the Notice dated 09.05.2006, issued by the Claimant is contrary to the mode as prescribed in Clause 5.7 of the SHA or not. According to the Union of India as per Clause 5.7 of the SHA issuance of notice is a two step procedure which includes one step of intimating the shareholders of the breach and the other step involves issuance of notice offering to purchase the shares at a reduced price. As per the Union of India only a composite Notice has been issued by the Claimant on 09.05.2006 calling upon the Respondent to sell the Call Shares at a price equivalent to 75% of the price. The Tribunal in its Order has taken a view that the objection taken by the Union of India is only technical in nature and the purpose of Clause 5.7 of

the SHA has been satisfied. In the opinion of this Court, the reasoning given by the Tribunal is not so perverse that it warrants any interference by this Court. It is not a case where there is power coupled with duty which mandates one side to follow the procedures and other means are forbidden. In the opinion of this Court the spirit of Clause 5.7 in its entirety has been followed by the Claimant in its notice dated 09.05.2006.

77. At this juncture, it is apposite to notice the decision taken by the five Judges Bench of the Apex Court in DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd., **(2024) 6 SCC 357**, wherein the Apex Court has succinctly brought out various grounds for interference in the award which reads as under:

> "*34. The contours of the power of the competent court to set aside an award under Section 34 has been explored in several decisions of this Court. In addition to the grounds on which an arbitral award can be assailed laid down in Section 34(2), there is another ground for challenge against domestic awards, such as the award in the present case. Under Section 34(2-A) of the Arbitration Act, a domestic award may be set aside if the Court finds that it is vitiated by "patent illegality" appearing on the face of the award.*
>
> *35. In Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , a two-Judge Bench of this Court held that although the interpretation of a contract is exclusively within the domain of the arbitrator, construction of a contract in a manner that no fair-minded or reasonable person would take, is impermissible. A patent illegality arises where the arbitrator adopts a view which is not a possible view. A view can be regarded as not even a*

possible view where no reasonable body of persons could possibly have taken it. This Court held with reference to Sections 28(1)(a) and 28(3), that the arbitrator must take into account the terms of the contract and the usages of trade applicable to the transaction. The decision or award should not be perverse or irrational. An award is rendered perverse or irrational where the findings are:

(i) based on no evidence;

(ii) based on irrelevant material; or

(iii) ignores vital evidence.

36. Patent illegality may also arise where the award is in breach of the provisions of the arbitration statute, as when for instance the award contains no reasons at all, so as to be described as unreasoned.

37. A fundamental breach of the principles of natural justice will result in a patent illegality, where for instance the arbitrator has let in evidence behind the back of a party. In the above decision, this Court in Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] observed : (SCC pp. 75 & 81, paras 31 & 42)

> *"31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same*

is important and requires some degree of explanation. It is settled law that where:

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

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

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

***

42.1. ... 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." (emphasis supplied)

38. In Ssangyong Engg. & Construction Co. Ltd. v. NHAI [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , a two-Judge Bench of this Court endorsed the position in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , on the scope for interference with domestic awards, even after the 2015 Amendment : (Ssangyong Engg. & Construction Co. case [Ssangyong Engg. &

Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , SCC p. 171, paras 40-41)

> *"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. ... 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." (emphasis supplied)*

39. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have

arrived at it; or the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view. [Patel Engg. Ltd. v. North Eastern Electric Power Corpn. Ltd., (2020) 7 SCC 167 : (2020) 4 SCC (Civ) 149.] 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 under the head of "patent illegality". An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within his jurisdiction or violating a fundamental principle of natural justice.

40. A judgment setting aside or refusing to set aside an arbitral award under Section 34 is appealable in the exercise of the jurisdiction of the court under Section 37 of the Arbitration Act. It has been clarified by this Court, in a line of precedent, that the jurisdiction under Section 37 of the Arbitration Act is akin to the jurisdiction of the Court under Section 34 and restricted to the same grounds of challenge as Section 34. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163, para 14 : (2019) 2 SCC (Civ) 293; Konkan Railway Corpn. Ltd. v. Chenab Bridge Project Undertaking, (2023) 9 SCC 85, para 18 : (2023) 4 SCC (Civ) 458 : 2023 INSC 742, para 14.]

41. In the statutory scheme of the Arbitration Act, a recourse to Section 37 is the only appellate remedy available against a decision under Section 34. The Constitution, however, provides the parties with a remedy under Article 136 against a decision rendered in appeal under Section 37. This is the discretionary and exceptional jurisdiction of this Court to grant special leave to appeal. In fact, Section 37(3) of the

Arbitration Act expressly clarifies that no second appeal shall lie from an order passed under Section 37, but nothing in the section takes away the constitutional right under Article 136. Therefore, in a sense, there is a third stage at which this Court tests the exercise of jurisdiction by the courts acting under Section 34 and Section 37 of the Arbitration Act."

78. The objections raised by the Union of India to the various findings of the Arbitral Tribunal are devoid of merits and does not fall within the parameters of Section 34 of the Arbitration Act and applying the law laid down by the Apex Court to the facts of this case, this Court is of the opinion that the findings of the Tribunal does not warrant any interference from this Court. In any event, when this Court has came to the conclusion that Clauses 5(8), 5(3), 5(4) and 5(1)(a) of the SHA were itself inoperable, as also found by the Tribunal, the issues raised by the Union of India are only academic in nature.

79. Resultantly, O.M.P. (COMM) 178/2020 is also dismissed, along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

OCTOBER 08, 2025
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