IN THE HIGH COURT OF MADHYA PRADESH

AT INDORE

BEFORE

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

ARBITRATION APPEAL No. 76 of 2018

BETWEEN:-

TAJ HOTEL RESORTS AND TAJ MAHAL PALACE AND TOWERS THR. MR. SURUP RAY CHAUDHURI DIRECTOR GENERAL APOLLO BANDAR COLABA MUMAI (MAHARASHTRA)

.....APPELLANT

(BY SHRI VIJAYESH ATRE- ADVOCATE)

AND

1. **ANIL SHARMA S/O LATE GAURISHANKAR SHARMA REG. OFF. 26 DHARESHWAR MARG DHAR/ BRANCH OFF. 162, KANCHAN BAG INDORE (MADHYA PRADESH)**

2. **HOTEL TAJ RESIDENCY INTERNATIONAL AIRPORT CIRCLE, ANSOL, AHMEDABAD (GUJARAT)**

3. **G.S. CHAUHAN OCCUPATION: ADVOCATE SOLE ARBITRATOR 100, M.G. ROAD, NEAR RAJWADA CHOWK, DHAR (MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI ABHINAV MALHOTRA- ADVOCATE FOR RESPONDENT NO.1)

ARBITRATION APPEAL No. 77 of 2018

BETWEEN:-

HOTEL TAJ RESIDENCY A UNIT OF ROYAL MANOR HOTELS AND INDUSTRIES LIMITED

THR. SHRI KHUMANSINGH SOLANKI AUTHROZED PERSONEL RANMUKTESHWAR SOCIETY HANSOL SARDARNAGAR AHMEDABAG (GUJARAT)

.....APPELLANT

(BY SHRI VINAY GANDHI- ADVOCATE)

AND

1. **ANIL SHARMA S/O LATE GAURISHANKAR SHARMA REGD. OFF. 26, DHARESHWAR MARG DHAR DISTRICT DHAR/ BRANCH OFF 162 KANCHAN BHAG INDORE (MADHYA PRADESH)**

2. **TAJ HOTEL RESORTS AND TAJ MAHAL PLACE (PALACE) AND TOWER A UNIT OF THE INDIAN HOTELS COMPANY LIMITED WITH ITS REGISTERED OFFICE AT MANDIK HOUSE MANDIK ROAD, MUMBAI (MAHARASHTRA)**

3. **SHRI G.S. CHAUHAN ADVOCATE SOLE ARBITRATOR 100. M.G. ROAD NEAR RAJWADA CHOCK, DHAR (MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI ABHINAV MALHOTRA- ADVOCATE FOR RESPONDENT NO.1 AND SHRI VIJAYESH ATRE- ADVOCATE FOR RESPONDENT NO.2)

……..

Reserved on : 03.05.2024

Pronounced on : 06.05.2024

…….

These appeals having been heard and reserved for judgement, coming on for pronouncement this day, the court passed the following:

JUDGEMENT

1] Heard.

2] This order shall also govern the disposal of Arbitration Appeal No.77/2018, as both the appeals have arisen out of the same judgment dated 20.06.2018, passed in Arbitration MJC No.118/2015, by II Additional District Judge, Dhar, arising out of an application filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act of 1996').

3] In brief, the facts of the case are that that appellant **Taj Hotel Resorts and Taj Mahal Palace and Towers Limited (hereinafter referred to as the 'Taj Hotel Resorts')** is a unit of M/s. Indian Hotels Company Limited, having its registered office at Mandlik House, Mandlik Road, Mumbai, 400001, and is engaged in the business of running and operating hotels and resorts. Admittedly, the **Taj Hotel Resorts** had given its franchise to the respondent No.2 M/s Hotel Taj Residency, which is a unit of M/s. Royal Manor Hotels and Industries Limited at Ahmedabad. It is also an admitted fact that the respondent No.2 is a registered Company under the provisions of the Companies Act, 1956 and has its registered Office at Ahmedabad and thus, both the Companies i.e. the appellant and the respondent No.2 are two distinct companies having their registered offices at distinct places.

4] The case of the appellant is that the respondent No.1 Anil Sharma was engaged by the respondent No.2 for the purposes of providing car services to the respondent No.2 and for this purpose, an agreement dated 15.01.2001 was executed between them for three years, which was the first agreement between them, which came to an end on expiry of a period of three years from 15.01.2001, *i.e.*, on 14.01.2004. It is further the case of the appellant that on expiry of the

first agreement, another car service agreement was executed between the respondent Nos.1 and 2 on 03.02.2004, which was the second agreement between them and like the first agreement, the second agreement was also valid and subsisted for a period of three years and expired on 02.02.2007.

5] After expiry of the second agreement on ***02.02.2007***, an e-mail was sent by the respondent No.1 to the Managing Director of the appellant Company on 01.03.2007 expressing his gratitude for the support which he has received from the Managing Director, and also stated that he is ready to improve his fleet of cars to provide continued services and also sent a copy of the offer. In response to the aforesaid letter, the Managing Director of the appellant Company, vide his e-mail dated 02.03.2007, responded that he is pleased to hear that his contract has been continued. It is further the case of the appellant that apparently, the appellant was not a signatory to the agreement between the respondent Nos.1 and 2, and respondent No.2 continued to provide his services to the respondent No.1, without there being any agreement, and on ***16.05.2007***, the respondent No.2 informed the respondent No.1 through e-mail that he should wind up his activities by 31.05.2007 and in response to the same, the respondent No.1 vide his letters dated 31.05.2007, not only accepted the withdrawal of his services, but also conveyed his gratitude to the respondent No.2 herein. However, it transpired that on 28.05.2007, the respondent No.1 filed a civil suit No.72-A/2007 in the Court of Civil Judge Class-I, Dhar for declaration and permanent injunction against the appellant and the respondent no.2 seeking damages from them on account of

premature termination of agreement.

6] On 03.06.2007, a reply was filed by the appellant and the respondent No. 2 in the aforesaid suit raising the objection that there was an arbitration clause in the agreement and the dispute could be decided only in arbitration proceedings. In the said suit, on 22.10.2007, the objection was rejected by the Civil Court and an order of temporary injunction was passed in favour of the petitioner, which was challenged by the appellant and the respondent No.2 in an appeal before the Additional District Judge, Dhar, which was also dismissed vide order dated 17.04.2008, against which the appellant preferred W.P.No.2829/2008, and vide order dated 14.07.2008, passed by this court, liberty was granted to the respondent No.1 to withdraw the suit and the subsequently, the trial court also permitted the respondent no.1 to withdraw the suit vide order dated 06.10.2008.

7] Subsequently, on 17.05.2009, the respondent No.1 filed A.C. No.15/2009 before this Court for appointment of arbitrator, in which, the notices were also served to the appellant and respondent No.2, however, they chose not to appear before this Court and thus, this Court vide its order dated 17.05.2010, appointed Shri G.S. Chouhan, Advocate as the sole arbitrator to adjudicate the dispute between the parties.

8] On 24.09.2010, the Arbitrator commenced proceedings of arbitration and also issued notice to the appellant and the respondent No.2. However, despite service of notice, again the appellant and the respondent No.2 did not appear before the Arbitrator and thus, were proceeded *ex-parte*.

9] The Arbitrator passed the final award on 14.01.2014, wherein, as many as three issues were framed:-

> "अ- क्याu प्रतिवादीगण द्वारा प्रार्थी के साथ हुए अनुबंध की अवधि जो दिनांक 02/02/2007 को समासव हो गयी थी उसके प्रतिप्रार्थी क्र.2 के प्रबंधक संचालक श्री रेमंड एन बिल्सपन के ई मेल दिनांक 02/03/2007 के द्वारा अनुबंध तीन वर्ष की अवधि के लिये दिनांक 03/02/2007 से 02/02/2010 तक की अवधि के लिये जारी रखकर अवधि बढाई गई थी?
>
> (English Translation- (i) Whether the non-applicant no.2 extended the period of agreement between them, which came to an end on 02.02.2007, vide e-mail dated 02.03.2007, sent by Shri Raymond Envilson, the Managing Director of the non-applicant No.2 for a further period of three years, *i.e.*, from 03.02.2007 to 02.02.2010.
>
> ब- क्याf प्रार्थी के द्वारा प्रतिप्रार्थीगण के यहां उक्त0 बढाई गई अवधि के पश्चा त किस दिनांक तक कार टेक्सीा सुविधा प्रतिप्रार्थीगण को उपलब्धच करायी गई?
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> English Translation- (ii) After the extension of the said period, up to which date the applicant provided the car services to the non-applicant and,
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> स- क्याe प्रतिपार्थीगण द्वारा 33 माह पूर्व अनुबंध समासग कर देने से प्रार्थी को क्षति हुई और यदि ऐसी क्षति हुई हैं, तो प्रार्थी कितनी क्षतिपूर्ती राशी प्रतिप्रार्थीगण से प्राप्ती करने का अधिकारी हैं? "
>
> English Translation- (iii) What are the damages which have accrued to the plaintiff/applicant on account of the termination of the contract prior to 33 months."

10] On such issues, the Arbitrator held that the agreement was extended by the Managing Director of the appellant by his e-mail dated 02.03.2007, from 03.02.2007 to 02.02.2010, for providing car services to the Hotel Taj Residency Ummed, Ahmedabad.

11] In respect of the issue No.(ii) it was held that as the agreement was terminated prematurely, hence the applicant would

be entitled to receive the damages for the entire period of 33 months.

12] So far as the issue No.(iii) is concerned, it was directed to the non-applicants (appellant and the respondent No.2 herein) to pay the damages to the tune of Rs.1,33,08,493/- with the arbitration charges of Rs.50,000/-, thus, in all Rs.1,33,58,493/-. The aforesaid award when came to the knowledge of the non-applications, they preferred two different appeals as aforesaid. The non-applicant No.2/appellant Taj Hotel Resorts and Palaces filed Arbitration Appeal No.78/2018 whereas, the Hotel Taj Residency, Ummed filed Arbitration Appeal No.77/2018.

13] Shri Vijayesh Atre, counsel for the appellant **Taj Hotel Resorts,** has submitted that even though the appellants could not file their reply before the Arbitrator, they were entitled to challenge the award under Section 34 of the Act of 1996 on the basis of the grounds as provided under the aforesaid section. It is submitted that the appointment of Shri G.S. Chouhan itself by this Court as Arbitrator could not have been ordered as this Court also had no jurisdiction to entertain an application at the instance of the respondent No.1 under Section 11(6) of the Arbitration and Conciliation Act as, according to the arbitration agreement between the respondent No.1 and the respondent No.2, it is clearly agreed by the parties that the Court at Ahmedabad alone shall have jurisdiction to entertain any civil action. Attention of this Court has also been drawn to Clause 24 of the agreement, in which arbitration has been provided. Thus, it is submitted that even though the

appellant was not a party to the aforesaid agreement between the respondent Nos.1 and 2, this objection can certainly be raised for the first time before this Court under Section 34 of the Act of 1996, which goes to the root of the matter and falls under Sub-section 2(a)(iv)of Section 34, and the same is also against the public policy of India as provided u/s.34(b)(ii).

14] In support of his submissions, Shri Atre has also relied upon the decision rendered by the Supreme Court in the case of ***Swastik Gas Private Limited Vs. Indian Oil Corporation Limited,*** reported as ***(2013) 9 SCC 32*** para 28, 29 and 32.

15] Shri Atre has also submitted that without prejudice to the aforesaid submissions, the appeal is also liable to be allowed simply on the ground that the present appellant M/s Taj Hotel Resorts and Taj Mahal Palace and Towers Ltd. is not a party to the arbitration agreement, as is also apparent from the agreement itself and the same is an undisputed fact.

16] Thirdly, counsel for the appellant has also drawn the attention of this Court to the e-mail sent by the Managing Director of the appellant on 02.03.2007, which simply acknowledges the e-mail sent by the respondent No.1 assuming that his contract has been continued and also informing that he is forwarding the request to Mr. Faisal Momen, the Chief Operating Officer of Taj Trade and Transport Limited, who is responsible for transportation etc. of the Taj Hotels.

17] Counsel has also drawn the attention of this Court to another e-mail dated 03.04.2007, wherein, the Executive Assistant Ms.

Jessica Rebello has also written to the respondent No.1 Anil Sharma that since Mr. Bickson is currently travelling overseas, she is taking the liberty of forwarding his (respondent No.1's) request to Mr. Faisal Momen, who is responsible for handling the entire operations of the Taj Trade and Transport Company. Thus, it is submitted that by no stretch of imagination can it be said that the aforesaid communication which took place between the appellant and the respondent No.1 can be interpreted to be a consent on the part of the appellant to extend the written contract between the respondent No.1 and respondent No.2. It is also submitted that the respondent No.2 is a separate entity and even assuming that its management is being controlled by the appellant No.1, the contract entered into by and between the respondent Nos.2 and respondent No.1, has no implication on the appellant.

18] In support of his submissions that the agreement cannot be invoked against a person who is not a party to the agreement Shri Atre has relied upon the decisions rendered by the Supreme Court in the case of ***Sandeep Kumar and Others Vs Master Ritesh and Others*** reported as ***(2006) 13 SCC 567, para 8, S.N. Prasad, Hitek Industries (Bihar) Limited Vs. Monnet Finance Limited and Others*** reported as ***(2011) 1 SCC 320, para 8, B.E. Simoese Von Staraburg Niedenthal Vs. Chhattisgarh Investment Limited*** reported as ***(2015) 12 SCC 225, para 10, State of West Bengal and Others Vs. Associated Contractors*** reported as ***(2015) 1 SCC 32, para 24 and 25(g); BGS SGS SOMA JV Vs. NHPC Limited reported as (2020) 4 SCC 234, para 59, 60, 61, 62 and 81*** and ***State***

of Chhattisgarh and Another Vs. SAL UDYOG Private Limited, reported as (2022) 2 SCC 275, para 24.

19] So far as the Arbitration Appeal No.77/2018, preferred by Hotel Taj Residency, which is a Unit of Royal Manor of Hotels and Industries Limited is concerned, Shri Vinay Gandhi, learned counsel appearing for the appellant has submitted that admittedly, there was no extension of agreement between the appellant and the respondent No.1 Mr. Anil Sharma, and the communication which took place between the respondent No.1 and respondent No.2 cannot be interpreted to hold that it had renewed the contract between the appellant and the respondent No.1. Whereas, vide letter dated 16.05.2007, the appellant informed the respondent No.1 to wound up his activities and in pursuance of which, respondent No.1 withdrew his vehicles on 31.05.2007, voluntarily, without raising any objections. It is submitted that even in the absence of any reply on the part of the appellant, the learned Arbitrator ought to have read the documents on record in their proper perspective to hold that the appellant's letter dated 16.05.2007, issued by its General Manager had concluded the temporary arrangement between the appellant and the respondent No.1, who had also withdrawn all the vehicles without any objection.

20] Shri Gandhi has also submitted that although he is also relying upon the submissions as advanced by the counsel for the appellant in A.A. No.76/2018 (Taj Hotel Resorts and Taj Mahal Palace and Towers), however, if by any chance this Court comes to a conclusion that there was an arbitration clause between the

parties, in that case, the contention of the present appellant is that the sole responsibility to honour the contract lay with the respondent No.2 **Taj Hotel Resorts** only, for the reason that the appellant Hotel Taj Residency though a unit of Royal Manor of Hotels, was strictly managed by the respondent No.2, Taj Hotel Resorts and Taj Mahal Palace and Tower and it was the discretion of the respondent No.2 only to appoint the transporter for the hotel and thus, even though the respondent No.2 is not a signatory to the arbitration agreement, it cannot shun its responsibility from complying with the arbitral award.

21] Counsel has also submitted that the terms of the agreement were negotiated and settled by the respondent No.2 only and the original agreement dated 15.01.2001, and thereafter, on 03.02.2004, were signed by the employees of respondent No.2 only and not by the appellant and even according to para 4 of the claim itself, the respondent No.1 continued services even after expiry of the agreement dated 03.02.2004 only at the instance of the e-mail sent by the Managing Director of respondent No.2, on 02.03.2007.

22] Shri Gandhi has stressed upon the fact that even assuming that the agreement was wrongly terminated by the appellant, still the Arbitrator could not have awarded the damages over and above the notice period of three months as provided under Clause 20 of the agreement. It is also submitted that even if unrebutted, the evidence of the claimant clearly reveals that the claimant has not proved the actual losses suffered by him due to the alleged breach of contract and what is pleaded is that the claimant could not earn

the profit which he could have, had the contract been continued.

23] Counsel has submitted that the claimant has relied upon the audit report of earlier year, and on the basis of the profit which he had earned in the earlier years, he has claimed the losses. It is also submitted that it was also the duty of the claimant to plead as to what steps he has taken to mitigate the alleged losses and in the absence of same, he cannot claim that he should be compensated for all the losses which he had suffered. In support of his submission Shri Gandhi has relied upon the decision rendered by the Delhi High Court in the case of ***Tower Vision (India) (P) Ltd. v. Procall (P) Ltd., 2012 SCC OnLine Del 4396 para 4, 13, 16.***

> **16.** The aforequoted reasoning demonstrates the following factors which influenced the Court not to treat the amount of unexpired lock-in period as debt or liquidated damages:
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> ……
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> (iii) The doctrine of mitigation of damages may also apply in such cases and even if the tenant had committed breach by leaving the premises before the expiry of lock-in period, it was for the landlord to prove that he had taken reasonable steps to minimize the loss, but could not award the loss to the extent mentioned in the clause and, therefore, the same is to be treated as genuine pre-estimation of the loss.
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> *(Emphasis Supplied)*

24] It is also submitted that even assuming that the contract was terminated, there is nothing on record to show that the entire fleet of the claimant was grounded and none of its cars and other vehicles operated during the entire period of three years, and in such circumstances, it is submitted that the award, as also the order passed by the District Court deserves to be set aside.

25] In support of his submissions, Shri Gandhi has relied upon certain decisions rendered in the cases of ***Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Ors.*** reported as ***(1991) 1 SCC 533; Indian Oil Corporation Limited and Ors. V. Govind Saraf Kisan Seva Kendra*** passed in ***W.A. No.72 of 2017 dated 09.03.2017; Tower Vision India Pvt. Ltd., Silvermoon Construction Pvt. Ltd., PVP Entertainment Ltd. and Anr. Vs. OMAXE LIMITED, Procall Private Limited, South Asian Hospitality Services Private Limited*** reported as ***ILR DLH – 2012-22-5368; Murlidhar Chiranjilal Vs. Harishchandra Dwarkadas*** reported as ***AIR 1962 SC 366;*** and ***National Highways Authority of India and Ors. Vs. Hindustan Construction Co. Ltd. and Ors.*** passed in ***FAO (OS) 192 and 195/2017 dated 23.03.2018***.

26] The prayer is vehemently opposed by Shri Abhinav Malhotra, learned counsel appearing for the respondent No.1 and it is submitted that no case for interference is made out. So far as the jurisdiction of the Court is concerned, it is submitted that when the civil suit was filed by the claimant in the Dhar Court, no such objection was raised by either of the non-applicants of he said case and instead, the only application filed by them was under Section 8 of the Act, stating that the suit is not maintainable on account of the arbitration agreement between the parties and thus, when no objection was raised by the appellant either before the Civil Court or, before the High Court under Section 11(6) and also before the Arbitrator in the arbitration proceedings, regarding the territorial jurisdiction, the appellants cannot raise this ground of jurisdiction

for the first time in the appeal under Section 37 of the Act of 1996.

27] In support of his submissions, Shri Malhotra has also relied upon the decision rendered by the Bombay High Court in the case of ***Azizur Rehman Gulam and Others Vs. Radio Restaurant and Others*** reported as ***2023 SCC OnLine Bom 2320.*** Reliance is also placed on various other decisions in the cases of ***Arjun Mall Retail Holdings Pvt. Ltd. and others Vs. Gunocen Inc.*** reported as ***2024 SCC OnLine Del 428; DCM Ltd. Vs. M/s. Aggarwal Developers Pvt. Ltd. and Ors.*** passed in ***FAO (OS) (COMM) 238/2023 & CM APPLs. 56000/2023, 56001/2023 & 56002/2023 dated 31.10.2023; Municipal Corporation of Delhi Vs. Narinder Kumar*** reported as ***2023 SCC OnLine Del 435; A. S. Motors Private Limited Vs. Union of India and others*** reported as ***(2013) 10 SCC 114; Project Director, National Highway No.45 E and 220 National Highways Authority of India Vs. M. Hakeem and another*** reported as ***(2021) 9 SCC 1; Jhang Cooperative Group Housing Society Ltd. Vs. Pt. Munshi Ram and Associates Pvt. Ltd.*** reported as ***ILR (2013) II DELHI 1632; Mahanagar Telephone Nigam Limited Vs. Fujitshu India Private Limited*** reported as ***2015 SCC OnLine Del 7437; and Kailash Nath Associates Vs. Delhi Development Authority and another*** reported as ***(2015) 4 SCC 136.***

28] Counsel has also submitted that the scope of Sections 34 and 37 of the Arbitration Act is limited in nature and the parties challenging the award cannot be allowed to raise the grounds outside the purview of Section 34. It is submitted that an application under Section 34 is not an appeal, which has also been held by the

Supreme Court in the case of ***Punjab State Civil Supplies Corporation Ltd. and Another Vs. Ramesh Kumar and Company and Others*** reported as ***2021 SCC OnLine SC 1056.*** It is also submitted that termination of contract by the appellant Taj Residency was without reasons and thus, was illegal for the reason that as per Clause 19/ clause 20(in subsequent agreement dated 03.02.2004) of the agreement, which refers to premature termination, it is clearly provided that the agreement may be terminated by the Hotel at any time by giving three months notice, if in the hotel's sole opinion, the operator is not performing in the spirit of the agreement and is not fulfilling his obligation. Thus, it is submitted that when the agreement itself was allowed to be continued by the appellant Hotel Taj Residency, it could not have been terminated prematurely except in the case where the grievance of the appellant was that the respondent was not performing its duties in the spirit of the agreement and is not fulfilling his obligations. Thus, it is submitted that no illegality has been committed by the Arbitrator in passing the award.

29] Counsel has also drawn the attention of this Court to the decision of the Supreme Court in the present case in Civil Appeal No.7039 and 7040 of 2021 dated 25.11.2021 wherein, the Supreme Court has already directed both the appellants herein to deposit Rs.67.50 lakhs each in the Executing Court within six weeks' time and since the aforesaid amount has already been deposited by the appellants, the respondent may be allowed to claim the same as there is no merits in the appeal.

30] Counsel has also submitted that so far as the objection raised by Shri Vinay Gandhi, learned counsel for the appellant in A.A. No.77/2018 that the Arbitrator could not have awarded the damages beyond the period of three months is concerned, again this objection has not even been raised by the appellant either under Section 34 of the Act, or in this appeal under Section 37 of the Act of 1996 and thus, the same cannot be raised by the appellant for the first time.

31] Heard counsel for the parties and perused the record.

32] On due consideration of submissions as advanced by the learned counsel for the rival parties and on perusal of the record, this Court finds that the questions which fall for consideration of this Court are:-

(i) Whether the award is liable to be set aside on the ground of want of territorial jurisdiction?

(ii) Whether the Taj Hotel Resorts and Taj Mahal Palace and Towers, the appellant in A.A. No.76/2018 can be saddled with the liability, despite the fact that the appellant was not a signatory to the agreement which was entered into between the respondent Nos.1 and 2.

(iii) Whether the communication between the appellant and the respondent No.1 would amount to extension of agreement dated 03.02.2004 which was entered into between the respondent No.1 with respondent No.2.

(iv) If this Court comes to a conclusion that there was a valid agreement between the respondent Nos.1 and 2, whether the damages can be awarded over and above the

three months' notice period as provided under Clause 19 of the agreement?

33] The findings recorded by this court are as under:-

Whether the award is liable to be set aside on the ground of want of territorial jurisdiction?

34] So far as the agreement is concerned, it has been executed at Ahmadabad, between the respondent no.1 and respondent no.2. In respect of the transport services which were to be provided to the respondent no.2 at Ahmedabad. So far as the territorial jurisdiction as provided in the agreement itself is concerned, Clause 24, which refers to arbitration, reads as under:-

> **"24) ARBITRATION**
> All dispute, dues, claims and questions that may arise during the subsistence of this agreement shall be mutually settled between the parties herein and _y. unsolved disputes shall be stated in writing and shall be referred to a sole arbitrator mutually agreed in writing , whose decision shall be binding on the parties. In case of any civil legal action by the parties herein, Ahmedabad court alone shall have jurisdiction to entertain, try and decide the same."
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> *(Emphasis Supplied)*

35] A perusal of the aforesaid clause clearly reveals that the parties have agreed that in case of any civil legal action by the parties herein, the Court at Ahmadabad alone shall have jurisdiction to entertain, try and decide the same. Thus, for all the practical purposes, the jurisdiction of the Court for arbitration proceedings was at Ahmadabad only. At this juncture, it would be fruitful to refer to the decision rendered by the Supreme Court in the case of ***BGS SGS SOMA (Supra)*** has held as under:-

> **59.** Equally incorrect is the finding in *Antrix Corpn. Ltd.* [*Antrix Corpn. Ltd.* v. *Devas Multimedia (P) Ltd.*, 2018 SCC OnLine Del 9338]

that Section 42 of the Arbitration Act, 1996 would be rendered ineffective and useless. Section 42 is meant to avoid conflicts in jurisdiction of courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with the arbitration in one court exclusively. This is why the section begins with a *non obstante* clause, and then goes on to state "…*where with respect to an arbitration agreement any application under this part has been made in a court*…" It is obvious that the application made under this part to a court must be a court which has jurisdiction to decide such application. The subsequent holdings of this court, that where a seat is designated in an agreement, the courts of the seat alone have jurisdiction, would require that all applications under Part I be made only in the court where the seat is located, and that court alone then has jurisdiction over the arbitral proceedings and all subsequent applications arising out of the arbitral agreement. So read, Section 42 is not rendered ineffective or useless. Also, where it is found on the facts of a particular case that either no "seat" is designated by agreement, or the so-called "seat" is only a convenient "venue", then there may be several courts where a part of the cause of action arises that may have jurisdiction. Again, an application under Section 9 of the Arbitration Act, 1996 may be preferred before a court in which part of the cause of action arises in a case where parties have not agreed on the "seat" of arbitration, and before such "seat" may have been determined, on the facts of a particular case, by the Arbitral Tribunal under Section 20(2) of the Arbitration Act, 1996. In both these situations, the earliest application having been made to a court in which a part of the cause of action arises would then be the exclusive court under Section 42, which would have control over the arbitral proceedings. For all these reasons, the law stated by the Bombay and Delhi High Courts in this regard is incorrect and is overruled.

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61. It will thus be seen that wherever there is an express designation of a "venue", and no designation of any alternative place as the "seat", combined with a supranational body of rules governing the arbitration, and no other significant contrary indicia, the inexorable conclusion is that the stated venue is actually the juridical seat of the arbitral proceeding.

62. In *Enercon GmbH* v. *Enercon (India) Ltd.* [*Enercon GmbH* v. *Enercon (India) Ltd.*, 2012 EWHC 689 (Comm) : (2012) 1 Lloyd's Rep 519] , the arbitration clause between the parties read as follows:

> "*18.3.* All proceedings in such arbitration shall be conducted in English. The venue of the arbitration proceedings shall be London. The arbitrators may (but shall not be obliged to) award costs and reasonable expenses (including reasonable fees of counsel) to the party(ies) that substantially prevail on merit. The provisions of the Indian Arbitration and Conciliation Act, 1996 shall apply."

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> **81.** Most recently, in *Brahmani River Pellets* [*Brahmani River Pellets Ltd.* v. *Kamachi Industries Ltd.*, (2020) 5 SCC 462 : 2019 SCC OnLine SC 929 at para 15] , this Court in a domestic arbitration considered Clause 18 — which was the arbitration agreement between the parties — and which stated that arbitration shall be under Indian Arbitration and Conciliation Act, 1996, and the venue of arbitration shall be Bhubaneswar. After citing several judgments of this Court and then referring to *Indus Mobile Distribution* [*Indus Mobile Distribution (P) Ltd.* v. *Datawind Innovations (P) Ltd.*, (2017) 7 SCC 678 : (2017) 3 SCC (Civ) 760] , the Court held : (*Brahmani River Pellets case* [*Brahmani River Pellets Ltd.* v. *Kamachi Industries Ltd.*, (2020) 5 SCC 462 : 2019 SCC OnLine SC 929 at para 15] , SCC pp. 472-73, paras 18-19)
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> > "*18.* Where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter and parties intended to exclude all other courts. In the present case, the parties have agreed that the "venue" of arbitration shall be at Bhubaneswar. Considering the agreement of the parties having Bhubaneswar as the venue of arbitration, the intention of the parties is to exclude all other courts. As held in *Swastik* [*Swastik Gases (P) Ltd.* v. *Indian Oil Corpn. Ltd.*, (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157] , non-use of words like "exclusive jurisdiction", "only", "exclusive", "alone" is not decisive and does not make any material difference.
> >
> > *19.* When the parties have agreed to the have the "venue" of arbitration at Bhubaneshwar, the Madras High Court erred [*Kamchi Industries Ltd.* v. *Brahmin River Pellets Ltd.*, 2018 SCC OnLine Mad 13127*] in assuming the jurisdiction under Section 11(6) of the Act. Since only the Orissa High Court will have the jurisdiction to entertain the petition filed under Section 11(6) of the Act, the impugned order [Kamchi Industries Ltd. v. Brahmin River Pellets Ltd., 2018 SCC OnLine Mad 13127] is liable to be set aside*."
>
> *(Emphasis Supplied)*

as also, para 4 of the decision rendered by the Supreme Court in the case of ***Hindustan Construction Company Limited Vs. NHPC Limited and Another,*** reported as ***(2020) 4 SCC 310,*** reads as under:-

> **"4.** This was made in the backdrop of explaining para 96 of *BALCO* [*BALCO* v. *Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] , which judgment read as a whole declares that once the seat of arbitration is designated, such clause then becomes an exclusive jurisdiction

> clause as a result of which only the courts where the seat is located would then have jurisdiction to the exclusion of all other courts."
>
> *(Emphasis Supplied)*

36] So far as the contention of Shri Malhotra that the objections which have been raised by the appellants were never raised either before the Arbitral Tribunal or the District Court under Section 34 of the Act of 1996, this Court finds that the aforesaid objection has also been dealt with by the Supreme Court in the case of ***SAL Udyog (Supra),*** in para 24 of the same, it is held as under:-

> "**24.** We are afraid, the plea of waiver taken against the appellant State on the ground that it did not raise such an objection in the grounds spelt out in the Section 34 petition and is, therefore, estopped from taking the same in the appeal preferred under Section 37 or before this Court, would also not be available to the respondent Company having regard to the language used in Section 34(2-A) of the 1996 Act that empowers the Court to set aside an award if it finds that the same is vitiated by patent illegality appearing on the face of the same. Once the appellant State had taken such a ground in the Section 37 petition and it was duly noted in the impugned judgment, the High Court ought to have interfered by resorting to Section 34(2-A) of the 1996 Act, a provision which would be equally available for application to an appealable order under Section 37 as it is to a petition filed under Section 34 of the 1996 Act. In other words, the respondent Company cannot be heard to state that the grounds available for setting aside an award under sub-section (2-A) of Section 34 of the 1996 Act could not have been invoked by the Court on its own, in exercise of the jurisdiction vested in it under Section 37 of the 1996 Act. Notably, the expression used in the sub-section is "*the Court finds that*". Therefore, it does not stand to reason that a provision that enables a Court acting on its own in deciding a petition under Section 34 for setting aside an award, would not be available in an appeal preferred under Section 37 of the 1996 Act."
>
> *(Emphasis Supplied)*

and in the case of ***Associated Contractors (Supra)***, it is held as under:-

> **"24.** If an application were to be preferred to a court which is not a Principal Civil Court of original jurisdiction in a district or a High Court exercising original jurisdiction to decide questions forming the subject matter of an arbitration if the same had been the subject matter of a suit, then obviously such application would be outside the four corners of Section 42. If, for example, an application were to be filed in a court inferior to a Principal Civil Court, or to a High Court which has no original jurisdiction, or if an application were to be made to a court which has no subject-matter jurisdiction, such application would be outside Section 42 and would not debar subsequent applications from being filed in a court other than such court.
>
> **25.** Our conclusions therefore on Section 2(1)(*e*) and Section 42 of the Arbitration Act, 1996 are as follows:
>
> (*a*) xxxxxxxx
>
> xxxxxx
>
> (*g*) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject-matter jurisdiction would be outside Section 42.
>
> The reference is answered accordingly."
>
> *(Emphasis Supplied)*

37] A perusal of the aforesaid decisions would reveal that the application under Section 11(6) of the Act of 1996 which was entertained by this Court in A.C. No.15/2009, ought not to have been entertained as admittedly, the parties had already agreed to the jurisdiction of the Court at Ahmadabad for settlement of their dispute. So far as the question of territorial jurisdiction is concerned, no doubt it is cardinal to a *lis* and even if the objection regarding jurisdiction is not raised by a party in the initial stages of the dispute, there is no stopping of the same in challenging the jurisdiction for the first time even in the High Court, as has been held by the Supreme Court in the case of ***SAL Udyog (Supra).***

38] Thus, on this ground of lack of jurisdiction only, the arbitral

award is liable to be set aside and the appeals deserve to be allowed.

Whether the Taj Hotel Resorts and Taj Mahal Palace and Towers, the appellant in A.A. No.76/2018 can be saddled with the liability, despite the fact that the appellant was not a signatory to the agreement which was entered into between the respondent Nos.1 and 2.

39] On the other hand, it is also found that the appellant Taj Hotel Resorts and Taj Mahal Palace and Towers is a separate entity whose registered office is at Mumbai whereas, the respondent No.2 Hotel Taj Residency is also a separate company registered under the Companies Act and admittedly, the agreement was executed by and between the respondent No.1 Anil Sharma and the respondent No.2 Hotel Taj Residency. Thus, when the appellant Taj Hotel Resorts and Taj Mahal Palace and Towers itself was not a signatory to the agreement between the respondents, it cannot be pulled into the agreement by way of any reference. It may be that the appellant may have been instrumental in managing and arranging the hotel activities including the logistics, but, that itself would not be sufficient to hold that the appellant was also a party to the aforesaid agreement. Thus, even though the appellant could not raise this objection before the Arbitrator, this ground was available to it under Section 34(2)(a)(iv) of the Act of 1996, as the arbitration award was beyond the scope of the submission to the arbitration on account of the appellant being not a party to the arbitration agreement.

40] In this regard, reference may be had to the decision rendered by the Supreme Court in the case of ***Sandeep Kumar and Others***

(Supra)

> 8. It may be true that the appellant-plaintiffs had been representing a group, but admittedly all the parties to the suit were not parties to the arbitration agreement. If some of the defendants were not parties to the arbitration agreement, the question of invoking the arbitration clause as against those defendants would not arise. As noticed hereinbefore, in the earlier round of litigation, the appellants categorically stated that the suit would be confined only as against those who were not parties to the arbitration agreement.
>
> *(Emphasis Supplied)*

S.N. Prasad, Hitek Industries (Bihar) Limited (Supra)

> 8. Thus there can be reference to arbitration only if there is an arbitration agreement between the parties. The Act makes it clear that an arbitrator can be appointed under the Act at the instance of a party to an arbitration agreement only in respect of disputes with another party to the arbitration agreement. If there is a dispute between a party to an arbitration agreement, with other parties to the arbitration agreement as also non-parties to the arbitration agreement, reference to arbitration or appointment of arbitrator can be only with respect to the parties to the arbitration agreement and not the non-parties.
>
> *(Emphasis Supplied)*

B.E. Simoese Von Staraburg Niedenthal (Supra)

> **10.** In *Swastik Gases (P) Ltd.* [*Swastik Gases (P) Ltd.* v. *Indian Oil Corpn. Ltd.*, (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157] , in the lead judgment, one of us (R.M. Lodha, J., as he then was) referred to the earlier decisions of this Court in *Hakam Singh* v. *Gammon (India) Ltd.* [*Hakam Singh* v. *Gammon (India) Ltd.*, (1971) 1 SCC 286] ; *Globe Transport Corpn.* v. *Triveni Engg. Works* [*Globe Transport Corpn.* v. *Triveni Engg. Works*, (1983) 4 SCC 707] ; *Angile Insulations* v. *Davy Ashmore India Ltd.* [*Angile Insulations* v. *Davy Ashmore India Ltd.*, (1995) 4 SCC 153] ; *New Moga Transport Co.* v. *United India Insurance Co. Ltd.* [*New Moga Transport Co.* v. *United India Insurance Co. Ltd.*, (2004) 4 SCC 677] ; *Shree Subhlaxmi Fabrics (P) Ltd.* v. *Chand Mal Baradia* [*Shree Subhlaxmi Fabrics (P) Ltd.* v. *Chand Mal Baradia*, (2005) 10 SCC 704] ; *Rajasthan SEB* v. *Universal Petrol Chemicals Ltd.* [*Rajasthan SEB* v. *Universal Petrol Chemicals Ltd.*, (2009) 3 SCC 107 : (2009) 1 SCC (Civ) 770] ; *Balaji Coke Industry (P) Ltd.* v. *Maa Bhagwati Coke Gujarat (P) Ltd.* [*Balaji Coke Industry (P) Ltd.* v. *Maa Bhagwati Coke Gujarat (P) Ltd.*, (2009) 9 SCC 403 : (2009) 3 SCC (Civ) 770] ; *A.V.M. Sales Corpn.* v. *Anuradha*

Chemicals (P) Ltd. [*A.V.M. Sales Corpn.* v. *Anuradha Chemicals (P) Ltd.*, (2012) 2 SCC 315 : (2012) 1 SCC (Civ) 809] and culled out the legal position in para 32 of the Report as under: [*Swastik Gases (P) Ltd. case* [*Swastik Gases (P) Ltd.* v. *Indian Oil Corpn. Ltd.*, (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157] , SCC pp. 47-48]

> "*32*. … It is a fact that whilst providing for jurisdiction clause in the agreement the words like 'alone', 'only', 'exclusive' or 'exclusive jurisdiction' have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties—by having Clause 18 in the agreement—is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like Clause 18 in the agreement, the maxim *expressio unius est exclusio alterius* comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor is it against the public policy. It does not offend Section 28 of the Contract Act in any manner."

Madan B. Lokur, J., while writing a separate judgment, concurred with the above legal position.

(Emphasis Supplied)

41] Having held so, it would also be necessary for this Court to refer to the merits of the case and it is also necessary to refer to the communication between the parties to decide if there was an agreement between the appellant and the respondent No.1 to extend the contract between the respondent no.1 and no.2.

Whether the communication between the appellant and

the respondent No.1 would amount to extension of agreement dated 03.02.2004 which was entered into between the respondent No.1 with respondent No.2.

42] To answer the question whether the Managing Director of the appellant extended the agreement between the respondent Nos.1 and 2, it is necessary to refer to the e-mail sent by the parties to each other, as it would be necessary to refer to the same to arrive at a conclusion if there was an extension of agreement, which can be culled out from the aforesaid communication. The initial e-mail in this regard was sent by the respondent No.1, who is the proprietor of Impact Travels, on 01.03.2007, which reads as under:-

> "Email sent from Impact Travels
>
> From: Impact Travels (impactravels@gmail.com)
> Sent: Thursday, March 01, 2007 3:16 PM
> To: Raymond Bickson
> Subject: Letter of thanks
>
> DATE:1/3/07
>
> To
> Mr RAYMOND BICKSON
> M.D.,
> TAJ HOTELS
> MUMBAI
>
> Dear Sir,
>
> I take this opportunity to sincerely thank you very much for extending your helping hand to my organization when I was obliged with an appointment with you on 30/8/05. The matter was related with my car service agreement with Taj Residency Ummed, Ahmedabad. Your assurance to me in presence of Mr. Fazal Momin & Madam Jyoti Narang had helped me to continue with the

contract till today.

I have no words or rather I feel short of words to express my thanks & gratitude to you for being so kind to listen and solve problem of my very small organization. Your good deed has saved my tiny company from heavy loss, not even me but my family will also bless you for this helping hand. I hope you will understand our feelings, although emotional in nature.

5/30/2007
Sir, I am once again sending an offer to upgrade out fleet at Taj Residency Ummed, Ahmedabad and sending a copy of my offer to you, just for your reference & record.

Once again thanking you & assuring you of our best, prompt & sincere services for your esteemed organization. We would like to take any opportunity provided to us in future to serve the best hotel chain, off course "Taj Hotels" anywhere on the globe.

With warm regards,
For IMPACT,

(A. SHARMA)
Date: 27/02/07"

xxxxxxxxxxxxxx

Reply by Raymond Bickson:

From: Raymond Bickson
Sent: Friday, March 02, 2007 3:25 PM
To: Impact Travels'
Cc: faisal.momen@tajhotels.com
Subject: RE: Letter of thanks

Dear Mr. Sharma,

Thank you for your e-mail dated March 1, 2007 and I am pleased to hear that you contract has been continued.

With respect to upgradation of the fleet at Taj Ummed, Ahmedabad, I am forwarding your request to Mr. Faisal Momen – Chief Operating Officer – Taj Trade & Transport Ltd., who is responsible for this portfolio. Mr. Momen will review your proposal and revert to you directly.

Kindest regards,
Raymond

RAYMOND N. BICKSON
MANAGING DIRECTOR
TAJ HOTELS RESORTS & PALACES
THE TAJ MAHAL PALACE & TOWER
1, APOLLO BUNDER, COLABA,
MUMBAI 400001, INDIA
TEL. BOARD + 91 22 6665 3366
TEL. DIRECT + 91 22 6665 3551
WEBSITE : www.tajhotels.com:www.tata.com"

xxxxxxxxxxxxxx

From: Taj Hotels Resorts and Palaces

"THE INDIAN HOTELS COMPANY LIMITED
The Taj Mahal Palace & Tower Apollo Bunder Mumbai 400 001
India Tel 91 22 6665 3366 Fax 91 22 22880864
E-mail raymond.bickson@tajhotels.com www.tajhotels.com

Managing Director's Office

April 3, 2007

Mr. A. Sharma
Impact
Rent a Car Service
Indore
Fax No. 0731, 251 6907/08

Dear Mr. Sharma,

Thank you for your letter dated March 1, 2007 addressed to Mr. Bickson.

Since Mr. Bickson is currently travelling overseas, I am taking the liberty of forwarding your request to Mr. Faisal Momen, who is responsible for handling the entire operations of the Taj Trade & Transport Company.

Mr. Momen will review your proposal and revert to you directly.

Kindest regards,

Sincerely

Jessica Rebello
Executive Assistant to Mr. Bickson

Cc: Mr. Faisal Momen”

xxxxxxxxxxxxxx

From: Taj Residency Ummed Ahmedabad

“TAJ
Business Hotels

Taj Residency Ummed Ahmedabad

Date: May 16, 2007

To
Mr. Anil Sharma
IMPACT
Kuber’s House, 162
Kanchan Bagh
Indore 452 001

Sub : Car Hire Services Contract Termination

Dear Mr. Sharma

This is with reference to the contract for Car Hire Services dated : 3rd February 2004 which expired 2nd February 2007 and further to our meeting had on 30.03.2007 at out Hotel on the same.

We would like to inform you that as per our Corporate guidelines we have been instructed to go for the Car Hire Services of Inditravel Pvt. Ltd.

Hence you are requested to kindly conclude your operation on or before the 31st May 2007 and complete the process of settlement of account within a month thereafter.

We would like to thank you for your kind co-operation and support during your operational tenure with Raj Residency Ummed, Ahmedabad.

Thanking you,

Warm Regards,

For Taj Residency Ummed"

Shekhar Walavalkar
General Manager

XXXXXXXXXXXXXX

From: Ramkumar Sahoo, Travel Desk Supervisor

"Original Sent with
Writ Petition on 28.04.2008
to be filed on 24/4 at Indore

May 31, 2007

To,
General Manager
Taj Residency Ummed
International Airport Circle,
Ahmedabad – 382 475

Sub : <u>Intimation for withdrawal and wound-up of Car and Taxi Contract Services at your unit viz. Taj Residency Ummed, Ahmedabad.</u>

Dear Sir,

With reference to Car Hire Service Agreement dated 3rd February, 2004 and as per your letter dated May 16, 2007, we hereby inform you that as per telephonic instruction received from Mr. Anil Sharma, Proprietor of Impact, Indore we are withdrawing our services for providing Car and Taxi Services at your unit viz. Taj Residency Ummed, Ahmedabad w.e.f. May 31, 2007.

Further, we would like to thank you for your kind co-operation and support during operational tenure with Taj Residency Ummed, Ahmedabad and please make your alternative arrangement.

Kindly acknowledge receipt of the same.

Thanking you,

Yours truly,

For, **IMPACT and on behalf of Proprietor Mr. Anil Sharma,**

Ramkumar Sahoo
Travel Desk Supervisor

31.05.07
18:30
Ram Kumar Sahoo"

43] So far as the appreciation of the evidence in an appeal u/s.37 is concerned, the same is permissible as also provided in the case of SAL Udyog (Supra), the relevant paras of the same read as under:-

> **15.** In *Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI* [*Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , speaking for the Bench, R.F. Nariman, J. has spelt out the contours of the limited scope of judicial interference in reviewing the arbitral awards under the 1996 Act and observed thus : (SCC pp. 169-71, paras 34-41)
>
> > "*34*. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that *Western Geco* [*ONGC* v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, *Western Geco* [*ONGC* v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as

under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(*a*)(*iii*) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .

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

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

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which

refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

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

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

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

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which

> ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse."
>
> *(Emphasis Supplied)*

16. In *Delhi Airport Metro Express (P) Ltd.* [*Delhi Airport Metro Express (P) Ltd.* v. *DMRC*, (2022) 1 SCC 131] referring to the facets of patent illegality, this Court has held as under : (SCC p. 150, para 29)

> "*29.* Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality"."
>
> ***(Emphasis Supplied)***

44] Thus, if the aforesaid emails of the prties tested on the anvil

of the decision of the Supreme Court, it is found that the arbitrator has concluded that the emails, extends the period of contract for a further period of three years, and this court is totally at loss to comprehend as to what prompted the arbitrator to arrive at the said conclusion. In the considered opinion of this court the finding recorded by the arbitrator is such as no fair-minded or reasonable person would ever arrive at and the view taken by the arbitrator is not even a possible one. In such circumstances also, the impugned order having suffered from patent illegality, is liable to be set aside.

If this Court comes to a conclusion that there was a valid agreement between the respondent Nos.1 and 2, whether the damages can be awarded over and above the three months' notice period as provided under Clause 19 of the agreement?

45] So far as the question No.4 framed by this Court regarding the entitlement of the damages to the respondent No.1 is concerned, the same is not required to be dealt with as the appeal has already been allowed on other grounds, which goes to the root of the matter.

46] So far as the contentions of the counsel for the appellant in A.A. No.77/2018 that it was the primary responsibility of the appellant Taj Hotel Resorts and Taj Mahal Palace and Towers to comply with the agreement between the respondents is concerned, the same cannot be countenanced in the light of the fact that the agreement itself was executed between the appellant and the respondent no.1 only, to the exclusion of the respondent No.2.

47] In view of the aforesaid discussion, the aforesaid decisions

relied upon by Shri Malhotra, counsel for the respondent No.1, are distinguishable on facts and are of no avail.

48] Resultantly, this Court is of the considered opinion that the appellants have made out a ground for interference and accordingly, the appeals stand ***allowed*** and the impugned judgment dated 20.06.2018 passed in Arbitration MJC No.118/2015 is hereby set aside. Consequently, the appellants shall be entitled to seek refund of the amount they have deposited in terms of the order passed by the Supreme Court in Civil Appeal Nos.7039 and 7040 of 2021 dated 25.11.2021.

49] With the aforesaid directions, the appeals stand ***allowed*** and ***disposed of.***

(SUBODH ABHYANKAR)
JUDGE

Bahar