IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	**14.10.2024**
Pronounced on	**30.10.2024**

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR

and

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI

O.S.A.(CAD).No.142 of 2023

N.Jayamurugan ... Appellant

Vs.

M/s.Saravana Global Holdings Ltd.
(Formerly known as Saravana Foundations Ltd.,)
No.15, New Giri Road, T.Nagar,
Chennai-600 017.

... Respondent

Original Side Appeal filed under Order XXXVI Rule 9 of the Original Side Rules read with Clause 15 of the Letters Patent and Section 37 of the Arbitration and Conciliation Act, 1996 read with Section 13 of the Commercial Courts Act, 2015 praying to set aside the judgment and decree dated 21.07.2023 made in O.P.No.595 of 2019 and to allow the appeal as prayed for.

For Appellant : Mr.AR.L.Sundaresan, Senior Counsel
for Mr.AR.Karthik Lakshmanan,

For Respondent : Mr.K.V.Babu
for Mr.Sashidhar Sivakumar

J U D G M E N T

K.GOVINDARAJAN THILAKAVADI,J.

This is an Appeal under Section 37 of the Arbitration and Conciliation Act, 1996, (hereinafter 'the Act') against the order dated 21.07.2023 passed by the learned Single Judge of this Court in O.P.No.595 of 2019, whereby the application preferred by the respondent herein under Section 34 of the Act for setting aside the award dated 20.02.2019 of the Sole Arbitrator was allowed.

2.The claimant before the Arbitral Tribunal is the appellant and the respondent herein is the counter claimant before the Arbitral Tribunal.

3.The present dispute arises out of a Memorandum of Understanding dated 18.05.2006 entered between the appellant and respondent for purchasing immovable properties measuring about 200 acres at Moosivakkam Village, Kancheepuram. As per the terms of agreement the appellant paid a sum of Rs.50,00,000/- as advance and thereafter, made payments on various dates to the respondent for the said purpose. Since the respondent failed to comply with the terms of agreement, the appellant initiated Arbitral proceeding for the following reliefs:

A. Directing the respondent to pay the sum of Rs.5,33,76,000/- (Rupees Five Crores Thirty Three Lakhs Seventy Six Thousand only)

B. Award interest at the rate of 24% per annum compounded annually from 01.04.2007 till the date of realization.

C. Directing the respondent to pay the compensation at Rs.1,00,000/-(Rupees One Lakh only) per acre of shortfall as envisaged under the MOU dated 18.05.2006.

4.The respondent herein resisted the claim as barred by limitation and sought for counter claim in the statement of the defence. The same is extracted as hereunder:

(i) Dismiss the claim filed by the claimant as time barred or otherwise;

(ii) Direct the claimant to pay a sum of Rs.1,42,89,000/- (Rupees One Crore Forty Two Lakhs Eighty Nine Thousand only) or such other sum as determined by this Hon'ble Tribunal to the respondent along with interest at 24% per annum from the due date till date of payment.

5.The Learned Arbitrator framed 9 issues. The Appellant had examined himself as C.W.1 and on behalf of the Respondent, Mr. Padam Challani was examined as R.W.1. On the side of the Appellant, 17 documents were marked as Exhibits C.1 to C.17 and on the side of the Respondent, 21 documents were marked as Exhibits R1 to R21.

6.The Sole Arbitrator after hearing the respective parties pronounced the award dated 20.02.2019 directing the respondent to pay

a sum of Rs.6,48,35,500/- with interest at the rate of 9% per annum from 27.04.2012 till the date of award and in the event of the said amount not being paid within a period of two months from the date of award, the respondent was directed to pay interest at the rate of 18% per annum on the sum of Rs.6,48,35,500/- from the date of award till the date of realization.

7.Under the Arbitral award 20.02.2019, the learned Arbitrator has decided the issue of limitation in favour of the appellant on the following premises.

(1) That the nature of the transaction between the parties is one of continuing accounts and was with reference to running accounts between the parties and not a loan or a concluded transaction of any debt, which alone will be governed by Section 18 of Limitation Act,1963, as both parties are bound by mutual accounting.

(2) The claim is not barred by limitation and that it would be covered under Section 25(3) of the Indian Contract Act, 1872.

8.Aggrieved against the award dated 20.02.2019 of the learned Sole Arbitrator, the respondent herein preferred an application under Section 34 of the Act before the Commercial Division of this Court, which was registered as O.P.No.595 of 2019.

9.The proceedings under Section 34 of Arbitration and Conciliation Act of 1996 was initiated assailing the Arbitral award dated 20.02.2019 broadly on two grounds, namely:

1.The claims are ex facie time barred; and

2.The learned Arbitral Tribunal has exceeded the scope of its reference as well as the MOU and allowed the claim.

10.The said petition in O.P.No.595 of 2019 on contest came to be allowed on 21.07.2023.

11. The learned Single Judge in the order dated 21.07.2023 in O.P.No.595 of 2019 has set aside the Arbitral award. The relevant portion of the impugned order is reproduced as under:

43. By an absolutely perverse finding and without there being any evidence to prove that there was a promise to pay a time barred debt by the petitioner in accordance with Section 25 (3) of the Indian Contract Act, the arbitrator has passed the impugned award against the petitioner which has to be necessarily set aside by this Court. Apart from determining the amount payable towards refund of the unutilized sums of money, allegedly retained by the petitioner which was meant for purchase of properties for and on behalf of the respondent, the arbitrator has also passed an erroneous award for compensation at the rate of Rs.1,00,000/- per acre for the alleged 187 acres of land not procured by the petitioner for and on behalf of the respondent without any iota of evidence and that too when the alleged promise to pay in Exs.C6 to C8 admittedly does not cover the said claim.

44. For the foregoing reasons, the Arbitral award dated 20.02.2019 passed by the sole arbitrator in O.P.No.752 of 2016 has to be set aside by this Court and the petition will have to be allowed"

12.Questioning the order dated 21.07.2023 passed by the

learned Single Judge of this Court, the present appeal has been preferred.

13.Mr.AR.L.Sundaresan, learned Senior Counsel instructed/assisted by Mr.AR.Karthik Lakshmanan, learned counsel for the claimant/Appellant sought to argue that the award passed by the sole Arbitrator on 20.02.2019, needs no interference as the scope under Section 34 of the Act is limited and it cannot in any manner whatsoever be akin to the Appellate Jurisdiction against the orders of the Trial Courts. He submits that in view of the language employed in Section 34 of the Act, the respondent has to draw its case within the parameters earmarked under Section 34 of the Act and the respondent cannot insist the Court to rehear and reappreciate the facts.

14.Thus, it was urged that, the learned Arbitrator has passed the award on a detailed scrutiny of facts, appreciating the evidence and in the context of the contemporary legal situation, which is not in contravention to the settled position of law or the principles of interpretation/appreciation of evidence. Therefore, the challenge to the

Arbitral award is impermissible and there is no ground to state that the award is against the public policy of Indian law or the award suffers patent illegality. Therefore, the award requires no interference.

15.Countering the said submissions, Mr.K.V.Babu, learned counsel for the respondent submitted that the learned Arbitrator has completely misread the documents available on record and travelled beyond the scope of reference. The claims are ex facie time barred and would not be covered under Section 25 (3) of the Indian Contract Act. It is thus urged that in view of Sections 34 (2-A) and 34 (2) (b) (ii) of the Arbitration and Conciliation Act, 1996 the award is vitiated by "patent illegality" appearing on the face of the award based upon no evidence or perverse finding. It is further submitted that the findings rendered by the learned Arbitrator that the claim of the appellant would be covered under Section 25 (3) of the Contract Act and that the claim is not barred by limitation is in contravention of the public policy of the Indian law.

16.Therefore, it is argued that findings of an Arbitrator which

would be perverse and liable to be set aside, the ambit of interference with respect to the award under Sub Section 2-A of Section 34 and Sub Section 2 (b)(ii) of Section 34 is wide enough once patent illegality and in conflict with public policy of India is writ large. Hence, the order passed by the learned Single Judge in O.P.No.595 of 2019 needs no interference.

17.We have heard learned counsel for the parties and perused the records carefully.

18.In view of the arguments advanced by the rival parties the following issues falls for consideration:

1.Whether Section 25 (3) of the Contract Act will have no operation in the instant case to save the claimant from the statute of limitation?

2.Whether the alleged promise under Ex.C.8 will amount to novation of contract?

3.Whether the Arbitral Tribunal committed patent illegality by travelling beyond the scope of reference and the Arbitral award suffers patent illegality?

4.Whether it is permissible for a Court to

examine the correctness of the findings of the Arbitral Tribunal under Section 34 of the Act of 1996?

5.Whether this appeal can be allowed or not?

19.Before delving into the tenability of the arguments of the rival parties it would be apposite to have a quick survey of the scope, ambit and the parameters under which the appeal under Section 37 of the Act, is to be decided.

20.To begin with it would be appropriate to quote the provisions contained under Sections 34 and 37 of the Arbitration and Conciliation Act in extenso:

> ***"34. Application for setting aside arbitral award*** *(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*
>
> *(2) An arbitral award may be set aside by the Court only if*
>
> *(a) the party making the application 1 [establishes on the basis of the record of*

the arbitral tribunal that]-

(1) 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 re-appreciation 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"

"37. Appealable orders-*(1) [Notwithstanding anything contained in any other line for the time being in force, an appeal] shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-*

(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.

(2) Appeal shall also lie to a Court from an

order of the arbitral tribunal-

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or takeaway any right to appeal to the Supreme Court."

Based on the submissions and provisions of law, the issues for determination are dealt with.

Issues No.1 to 5

21.Since the Issues No.1 to 5 are interwoven, thus, they are being decided compositely. Hereinafter the appellant is referred to as claimant and the respondent herein is referred to as respondent for the sake of convenience.

22.In order to address the said issues it would be appropriate to

briefly set out the case of the parties as apparent from the record. The claimant in his claim petition had pleaded that the respondent having received a huge sum of money from the claimant for purchasing lands for the claimant, committed breach of trust and failed to repay the money entrusted to him. As such the respondent is liable to pay a sum of Rs.5,33,76,000/- with interest and also a sum of Rs.1,00,000/- as compensation. The same is resisted by the respondent in the statement of defence stating that the claim made by the claimant is time barred and also made a counter claim for a sum of Rs.1,42,89,000/- together with interest at 24% per annum.

23.The learned Senior Counsel for the claimant submits that, a perusal of Exs.C.6, C.7 & C.8 would reveal that the claim made by the claimant is well within the period of limitation as per Section 25 (3) of the Indian Contract Act.

24.On the other hand, the learned counsel for the respondent would contend that, the claims are hopelessly barred by time and Section 25(3) will not be attracted to revive the alleged claims made by the

claimant. He would further contend that under Ex.C8 there is no express promise to pay. According to Section 25 (3) of the Contract Act, the promise must be made in writing and Section 9 of the Indian Contract Act states that, where proposal or acceptance of any promise is made in words, the promise is said to be expressed. But if it is made otherwise than in words, the promise is implied. Therefore, on a conjoint reading of Section 25 (3) along with Section 9 of the Contract Act, a promise to pay must be expressed. Unless the promise is made in writing signed by the person or by his duly appointed agent, Section 25 (3) of the Contract Act will have no operation. His further submission is that, even assuming that Section 25 (3) would be attracted, the arbitration Clause under the MOU cannot be invoked to adjudicate the claim under Section 25 (3) of the Contract Act, as alleged promise to pay either under Ex.C.7 or Ex.C.8 will amount to a fresh promise, creating a fresh liability in respect of an existing debt. Hence, the express promise under Section 25 (3) is a fresh contract, enforcible independently which amounts to novation of original contract and not arbitrable under the MOU. The learned Arbitrator erroneously rendered a finding that the transaction between the parties is

that of accounts, which was continuing one and further the said accounts were running, continuous and mutual in nature. But from Exs.C.2 and C.4 it is evident that the transaction was unilateral in nature. His further contention is that in an application under Section 34 of the Act, the question of limitation can be decided.

25.To support his contention, the learned counsel for the respondent has relied upon the following judgments:

1. ***Ethirajulu Naidu Vs.ChinnikrishnanChettiyar*** reported in ***[AIR 1975 Mad 333]***,

2.Kotak Mahindra Bank Ltd. V. Kew Precision Parts Private Limited reported in ***(2022) 9 SCC 364***

3.***K.M.Suresh Babu V. Sundaram Finance Limited*** reported ***[AIR 2020 Mad 249].***

26.Essentially, the dispute is two fold:

Firstly, whether the claims made by the claimant would be covered under Section 25 (3) of the Indian Contract Act.

Secondly, whether the acknowledgement/promise to pay is

clearly established.

27.The claimant has relied upon the following documents in support of his contention that his claim before the Arbitrator is within the period of limitation as per the provisions of Section 25 (3) of the Indian Contract Act.

a.Letter dated 26.02.2015 (Ex.C.6) issued by the respondent to the claimant/appellant to provide confirmation of balance in the claimant/appellant's books of account.

b. Confirmation of balance letter dated (Ex.C.7) issued by the claimant/appellant to the respondent, the receipt of which is acknowledged by an employee of the respondent.

c. Letter issued by the respondent to the claimant/appellant dated 05.03.2015 (Ex.C.8) requesting for a copy of the notice issued by the claimant/appellant in respect of his dues recoverable from the respondent as on 31.03.2008 for settlement.

28.The Arbitral Tribunal while passing the award on

20.03.2019 came to the conclusion that, the transaction between the parties is one of continuing accounts and not a concluded transaction; that the Claims would be covered under Section 25 (3) of the Contract Act and that only in a concluded transaction of any debt, Section 18 of Limitation Act, 1963, comes into play.

29.The relevant portion of the Arbitral award is extracted as under:

> *25. The following judgment relied upon by the Claimant have to be kept in mind before analyzing the facts which bring out the distinction between acknowledgement of a debt and a promise to pay which can be either specific or implied. The following observations in the judgment of Delhi High Court bring out the distinction between the two:*
>
> ***1. State Bank of India -v- Kanniaha Lal in RSA 248 of 2015 dated 2.5.2016.***
>
> ***"24: No doubt there is***

distinction between an acknowledgement under Section 18 of the Limitation Act and a promise under Section 25(3) of Indian Contract Act in as much as though both have the effect of fresh lease of space to the creditor to sue the debtor, but for an acknowledgement under Section 18 of the Limitation Act should be applicable, the same must be made on or before the date of expiry of the period of limitation, whereas such a condition is non existent so far as promise under Section 25(3) of Indian Contract Act is concerned. A promise under Clause 3 of Section 25 of the Indian Contract Act even made after the expiry of the period of limitation would be applicable and would cause revival of the claim, notwithstanding the limitation. Under Section 25(3) of the Contract Act, a promise in writing to pay in whole or in part, a time barred debt is not void.

25. For ascertaining whether the nature of the aforesaid letter (Ex. PW2/2 and Ex. PW2/3) are of 'promise to pay' it would be necessary to examine the definition of the word promise under Section 2(b) of the Indian Contract Act.

26. Section 2(b) of Indian Contract Act reads as under: (b) when the person to whom a proposal is made signifies his assent thereto the proposal is said to be accepted. proposal, when accepted, becomes a promise'.

27. Section 9 of the Indian Contract Act provides that if the proposal of acceptance is made in word, the promise is said to be expressed but under other circumstances it remains an implied promise.

'9. Promises, express and implied in so far as the proposal or acceptance of

any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in word, the promise is said to be implied.'

28. Thus implied promise is not unknown under Indian Contract Act."

26. As early as in the year 1934, the Privy Council had occasion to deal with this issue in AIR 1934 (PC) 147 - Bishan Chand Giridharilal and held that the appellants were entitled to recover the amount under Section 25(3) of the Contract Act.

27. During the same year the Privy Council while dealing with the case of Siqueira -v- Noronha - AIR 1934(EC)144 had occasion to deal with a similar contention and after making a distinction between 'acknowledgement' as would arise under Section 25(3) of the Contract Act, on facts it was made clear that it was a plain case of promise made to pay the balance and cannot be

stated that there was no promise to pay. This judgment would be relevant mainly for the purpose of concluding that the principle of limitation varies between acknowledgement under Section 18 of the Limitation Act in contrast with promise' under Section 25(3) of the Contract Act.

3) AIR 1929(Lahore) 263 - Kalian Chand Thularam -v- Dayarum Amirtial. In this case what is the requirement of 'accounts stated' has been considered. Art 64 of Limitation Act has been referred to which is as follows:

"For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated by them".

4) AIR 1953(SC) 225 - Hiralal and others -v- Badkulal and others. In this case the Supreme Court approved the judgment of Lahore High Court mentioned above and held that the acknowledgement which forms the basis of the suit was made in the ledger of the plaintiff in which the mutual account has been entered and the suit was not based merely on this acknowledgement, but

was based on mutual dealing on the accounts with them and was thus clearly maintainable. The Supreme Court did not stop with those observations alone. A judgment of Allahabad High Court (AIR 1935-All 129)) which was cited for the contra proposition that even if an acknowledgement implied a promise to pay, it cannot be made the basis of a suit and be treated as giving right to a fresh cause of action, the Supreme Court held that the said judgment did not lay down good law.

5) To the same effect is the judgment of Bombay High Court in R. Kumar and Co. -v- Chemicals Unlimited - AIR 2001(Bom) 216.

28. Therefore on analysis of the above judgments, the principle of limitation in the context of Section 18 of the Limitation Act and that of 25(3) of the Indian Contract Act are distinct and different. I had already pointed out that none of the judgments relied upon by the learned counsel for the Respondent have taken a view that notwithstanding Section 25 (3) of the Indian

Contract Act, Section 18 of the Limitation Act would prevail."

30. Thus, the learned Arbitrator referring to the above judgments concluded that the principle of acknowledgement under Section 18 of the Limitation Act and "promise" under Section 25 (3) of the Contract Act are different. Further, the learned Arbitrator on careful consideration of the oral evidence of C.W.1 and Exs.C.3, C.6, C.7 & C.8 held that the claim of the claimant is not barred by limitation. The learned Arbitrator has given cogent reasons and categorically held that the claim would be covered by Section 25 (3) of the Contract Act 1872 and that there is clear acknowledgement of debt and promise to pay.

31.The relevant portion of the Arbitral award is reproduced as under:

31. The above features disclose that the Respondent was always giving out and treating Rajasekar as their representative and cannot wriggle out of it now. Even while filing the claim statement, Ex. C7 has been filed along with the claim statement

and in para 11 of the claim statement, the Claimant has specifically contended that the balance was duly confirmed by the Respondent on 26.2.2015. While dealing with the said averment the Respondent has not specifically denied the same in para 24 of the defence statement. The said averment by the Claimant is a very crucial one. In para 4 of the defence statement the Respondent has only taken the stand that a letter dated 26.2.2015 was served on an employee of the Respondent and that acknowledging a time barred debt will not revive the claim. The Respondent has not denied the actual endorsement made in Ex. C7. Rajasekar may be only an employee but he has been representing the Respondent and the Respondent did nothing to disown his endorsement immediately thereafter, except for stating so after the legal notices had been sent that he is only an employee and that the acknowledgement was with reference to time barred debt and hence cannot revive the time barred debt. The fact that the endorsement was within the knowledge of the Respondent cannot be and is not denied by the Respondent and hence the fact that

Rajasekar was only an employee cannot out do the entire sequence of events and the facts well known to the Respondent.

31. (5) RW1 who is the Director of the Respondent's company admits having received Ex. C9 legal notice on behalf of the Claimant. In answer to Q.No.54 he would state that no reply was given but were discussed orally. There can be nothing to be discussed orally if the claim was barred by limitation. In answer to Q.No.63 as to whether he had given any statement of accounts to the Claimant, the witness would state that for the first two years it was written in a note book, but after I.T. raid it was not continued and that for the last 8 years everything was discussed only orally. These statements undoubtedly amount to admission was that the entire transaction what with reference to running accounts between the parties and not a matter of loan or a concluded transaction of any debt which alone will be governed by Section 18 of Limitation Act.

34.Therefore for all the aforesaid reasons,

it is very clear that (1) this is a case which would be covered under Section 25(3) of the Contract Act and (2) that the acknowledgement/ promise to pay is clearly established. Hence the claim is not barred by limitation. Issue No.1 is answered accordingly."

32.Whether such findings rendered by the learned Arbitrator is patently illegal and in conflict of public policy under Indian law. Before proceeding further a reference shall be made to the provisions of Section 25 (3) of the Indian Contract Act.

Section 25 (3)of the Indian Contract Act reads as under:

"25.Agreement without consideration, void, unless it is in writing and registered, or is a promise to compensate for something done, or is a promise to pay a debt barred by limitation law. An agreement made without consideration is void, unless-

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay

wholly or in part a debt of which the creditor might have enforced creditor payment but for the law for the limitation of suits."

33.Therefore, in order to invoke the provisions of Section 25(3) of the Indian Contract Act, the following conditions must be satisfied:

(i) It must refer to a debt of which the creditor but for the period of limitation, might have enforced creditor payment;

(ii) There must be a distinct promise to pay wholly or in part such debt;

(iii) The promise must be in writing signed by the person or by his duly appointed agent.

34.Under Section 25(3) a debtor can enter into an agreement in writing to pay the whole or part of a debt, which the creditor might have enforced but for the law of limitation, and suit can lie on a written promise to pay the barred debt as it is a valid contract. The reason for this provision is that the debt is not extinguished; only the remedy gets barred by passage of time, and this provision does not revive a dead right

but merely resuscitates the remedy to enforce the right, which already exists.

35.For ascertaining whether the nature of the aforesaid documents marked as Exs.C.6 to C.8 are of a "promise to pay", it would be necessary to examine the defenition of the word promise under Section 2(b) of the Indian Contract Act, which reads as follows:

> *"(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;"*

36.Section 9 of the Indian Contract Act provides that if the proposal of acceptance is made in words, the promise is said to be express but under other circumstances it remains an implied promise. Section 9 reads as follows:

> *"9. Promises, express and implied.--In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."*

37.Thus implied promise is not unknown under the

Indian Contract Act.

38.Therefore, the word 'promise' defined in Sections 2(b) besides 9 of the Indian Contract Act are kept in mind, an admission could be 'express' or 'implied', 'promise' covered by Section 25 (3) of the Indian Contract Act need not be 'express'. If the legislature had intended that such promise should be an 'express promise' only, it would have indicated so but the word 'express' is not found in Section 25(3) of the Indian Contract Act. So it would not be proper to read so and restrict the scope of Section 25(3) of the Indian Contract Act to express 'promise' only.

39.Therefore a conjoint reading of Sections 25(3), 2(b) and 9 of the Indian Contract Act, would show that a promise to pay need not be express and can be implied or inferred as well. Any acknowledgement of liability is necessarily an admission of the fact that the maker owes money to the creditor. The only corollary of such an acknowledgement is that the same is payable and that the person making the acknowledgement would pay such amount or else there would be no requirement of making any such acknowledgement. For judging the nature and quality of the acknowledgement as to whether it is a promise

in future, the whole of the acknowledgement and the surrounding circumstances have to be taken into consideration. Referring to the aforesaid Exhibits C.6 to C.8, the learned Arbitrator has categorically observed that the contents of the aforesaid documents are nothing short of an acknowledgement of the dues as also a promise to pay. The learned Arbitrator has passed the award on a detailed scrutiny of facts appreciating the evidence and in the context of the contemporary legal situation which is not obnoxious to the settled position of law or the principles of interpretation/appreciation of evidence.

40. The next point for consideration is that whether the promise under Ex.C.8, amounts to novation of contract. The learned Senior Counsel for the claimant would contend that the plea of novation was never raised before the learned Arbitrator and therefore, it is impermissible to raise the same in an application under Section 34 of the Act. There is no quarrel to the proposition of law that a legal issue going into the root of the matter can be raised for the very first time in the

appellate proceedings. However, the question is dependent upon the facts of a particular case. Here, we find that the said principle would not apply to the case on hand for the following reasons:

> *"Novation of Contract" refers to the legal process of replacing an existing contract with a new one, essentially substituting one party or the terms of the original agreement with new ones, while Section 25 (3) of the "Indian Contract Act, 1872" is a provision that allows a promise to pay a debt that would be considered time barred under the Limitation Act to be enforceable if it made in writing and signed by the debtor; essentially, it creates an exception to the general rule that agreements without consideration are void, specifically for situations involving time barred debts. Section 62 of the Indian Contract Act, recognizes novation, stating that if parties agree to substitute, cancel, or amend a contract, the original contract need not be performed. The basic requirement of Section 62 of the Contract Act was discussed by the Hon'ble Supreme Court in the case of* ***Lata Construction & Ors. Vs. Dr.Rameshchandra Ramniklal Shah*** *reported in* ***(2000) 1 SCC 596,*** *novation requires complete substitute of new contract in place of*

new contract and only under the condition that the original contract is not fulfilled. The new replacement contract will cancel or completely modify the terms of the original contract. In the case of ***Juggilal Kamlapat V. NV Internationale*** *reported in* ***AIR 1955 Cal 65*** *the Court observed that for novation to take effect, modification to the Contract must go to the root of the original contract and change its essential character"*

In the present case, neither the terms of original contract was cancelled nor modified. The promise under Ex.C.8 only resuscitates the remedy to enforce the right, which already existed under the original contract. Therefore, the contention of the learned counsel for the respondent that the promise under Ex.C.8 amounts to novation of contract and that the Arbitration Clause under the MOU cannot be invoked is unsustainable.

41.For the reasons discussed above, the views taken by the learned Single Judge on the question of limitation and novation of contract cannot be accepted.

42.The learned Arbitrator in the award dated 20.02.2019

observed that the documents relied upon by the claimant/appellant would be covered under Section 25 (3) of the Contract Act and that the acknowledgement/promise to pay is clearly established. Thus, there is no inherent infirmity committed by the learned Arbitrator in allowing the claim petition of the claimant/appellant. It is settled law that even otherwise the award is not open to challenge on the ground that the Arbitral Tribunal has reached a wrong conclusion. The Hon'ble Apex Court in the case of ***Ssangyong Engineering & Construction Vs. National Highways Authority of India*** reported in ***AIR 2019 SC 5041*** observed that the Courts could not substitute its view over that of the arbitrators and that it is not permissible for a Court to examine the correctness of the findings of the Arbitral Tribunal, as if it were sitting in appeal over the findings. It was further held that each Arbitrator is legitimately entitled to take the view which he holds correct.

43.Section 34 of the Act was deliberately engrafted and couched in a particular manner bearing in mind the fact that there should be limited intervention of Courts in Arbitral proceedings especially after the proceedings have been concluded and the award has been pronounced

by the Arbitral Tribunal.

44.Notably, the yardsticks and the parameters under which intervention by the courts of law in the proceedings against the award stands bracketed in Section 34 of the Act which obviously starts with caveat that the Arbitral award may only be set aside by the Court if the party making the application establishes on the basis of the record of the Arbitral Tribunal:

> *(i) was under some incapacity;*
> *(ii)the Arbitral agreement is not valid under the law for the time being in force;*
> *(iii) a party making the application was not given proper notice of appointment of arbitrator or he was unable to present his case;*
>
> *(iv) the Arbitral award deals with a dispute not contemplated or not falling within the terms of the submission of the arbitrator;*
>
> *(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 the provisions;*
>
> *(vi) the subject matter of dispute is not capable of settlement by arbitration under law for the time being in force;*

(vii) the Arbitral award is in conflict with the public policy of India..

45.Nonetheless, while assailing the order passed under Section 34 of the Act either setting aside the award or upholding the award an appeal is provided under Section 37 of the Act, however, the contours of the proceedings under Section 37 also is limited to the scope and the ambit of challenge under Section 34 of the Act.

46.The aforesaid proposition of law stands culled out in umpteen number of decisions of the Hon'ble Apex Court, also in the case of ***Associate Builders (supra), Ssangyong Engineering & Construction Co. Ltd. (supra), Sal Udyog Private Limited (supra), PSA Sical Terminals Pvt. Ltd. (supra), Batliboi Environmental Engineers Vs. Hindustan Petroleum Corporation Limited & Another AIR (2024) SCC 375***. The Apex Court in the case of ***Ssangyong Engineering & Construction Co. Ltd. Vs. National Highways Authority of India (NHAI) (AIR 2019 SC 5041)*** has held that the additional ground made available for setting aside a domestic arbitral award under Sub-section

(2A), added by the Amendment Act, 2015, to Section 34, refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. For the sake of clarity, the Court has held that the contravention of a statute not linked to public policy or public interest, which is not subsumed within the fundamental policy of Indian law cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality. It is clear from the amendment of 2015 that re-appreciation of evidence, which is what an Appellate Court is permitted to do, is not permitted under the ground of patent illegality appearing on the face of the award.

47.In the present case, a judicial appreciation of the Arbitral award goes to show that the learned Arbitrator has properly appreciated the facts of the case and has done a due analysis of the evidence led by the parties and has rendered his findings after due consideration, application of mind and on the touchstone of the law.

48.The learned Arbitrator has drawn inferences and conclusions after the factual appreciation in the light of the legal

principles. The views of the learned Sole Arbitrator cannot be found fault with only for the reason that some other views can emerge by appreciating the same set of facts and evidence, until and unless it is shown that such a view is totally obnoxious and unsupported by the sound legal principles.

49.The Section 34 Court cannot substitute its own views or the views of the parties in place of the view taken by the learned Arbitral Tribunal, if the view taken by the learned Arbitrator is not in conflict with the settled legal position. There is nothing to suggest that the findings and conclusions rendered by the learned Arbitrator are *per se* perverse, illegal or non-sustainable. There is no ground to state that the award suffers "patent illegality" and the award is against the public policy of Indian Law.

50.By the amendment of 2015, Explanation as appearing in clause (b) in sub-section (2) of Section 34 of the said Act has been substituted by the new Explanations and Sub-Section 2-A has been inserted in Section 34 of the said Act. Amended clause (b) (ii) of Section

34 (2) reads as follow:

"(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."

Newly inserted sub-Section 2A read as follow;

"(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 reappreciating evidence."

51.Viewing the case from four corners of law, we are of the firm opinion that the respondent herein has miserably failed to show any patent illegality in the Arbitral award warranting interference by the learned Single Judge under Section 34 application. More so, when the scope of interference under Section 34 is limited and within the contours of the ground specified under Section 34 of the Act. To put it otherwise, the award is not required to be set aside on the ground of mere erroneous application of law or by reappreciation of the evidence until and unless it suffers from patent illegality. We find the award is based on pleadings and available documents on record and that the award is a reasoned one and it is clearly a plausible view taking into account each and every aspect of the matter.

52.Resultantly, the appeal is allowed. The order passed by the

learned Single Judge in O.P.No.595 of 2019 is set aside. No costs.

[M.S.J.,] [K.G.T.J.,]

30.10.2024

vsn

Index:Yes/No
Neutral Citation: Yes/No
Speaking/Non-speaking order

M.SUNDAR, J.,
and
K.GOVINDARAJAN THILAKAVADI, J.

vsn

O.S.A.(CAD).No.142 of 2023

30.10.2024