NEUTRAL CITATION
2024:GUJHC:61788-DB

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 3516 of 2024

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL

and
HONOURABLE MR. JUSTICE PRANAV TRIVEDI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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SHAILESH ANILKUMAR AMIN & ANR.
Versus
GUJARAT METRO RAIL CORPORATION (GMRC) LTD.

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Appearance:
MR PERCY KAVINA, SENIOR COUNSEL WITH MR ABHIJIT RATHOD(12976) for the Appellant(s) No. 1,2
MR ANUJ K TRIVEDI(6251) for the Defendant(s) No. 1

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CORAM: **HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL**
and
HONOURABLE MR. JUSTICE PRANAV TRIVEDI

Date : 14/10/2024

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ORAL JUDGMENT

(PER : HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL)

(1) The present appeal under Section 37 of the Arbitration and Conciliation Act' 1996 (for short, "the Act' 1996") is filed challenging the judgment and order dated 13.09.2024 passed by the Special Judge, Commercial Court and the 3rd Additional District Judge, Ahmedabad (Rural) at Navrangpura in Commercial Civil Application No.07 of 2022 under Section 34 of the Act' 1996 as also the arbitral award dated 26.11.2021 passed by the learned Arbitrator, adjudicating the dispute between the parties arising out of the alleged lease agreement dated 14.09.2012, entered into between the parties.

(2) The appellants herein namely the original claimants would contend that the subject property namely eight shops / showrooms, *viz.* Unit Nos. 201 to 208 (admeasuring 11,941 sq.ft., super built-up area) situated at the Second Floor of building known as Shri Rang Heights and Arcade, New PDPU Crossroads, Gandhinagar Airport Highway, Gandhinagar, Gujarat constructed upon Final Plot No.5, Sub-plot 3 of Moje Kudasan, Ta.Gandhinagar, Dist.Gandhinagar was given on lease to the respondent company namely Gujarat Metro Rail Corporation (GMRC) formally known as Metro Link Express for Gandhinagar and Ahmedabad (MEGA

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Company Ltd.), for the period of five years with effect from 01.09.2012 till 31.08.2017, vide lease agreement dated 14.09.2012 executed between the parties.

(3) It is contended that the possession of the subject property was taken by the respondent on 01.09.2012 and formally, a lease agreement was executed on 14.09.2012. It was agreed between the parties that the respondent shall pay monthly rent of Rs.5,37,345/- (Rs.45/- per sq.ft.) with effect from 01.09.2012 and there would be escalation in the rate of rent by 10% each year till the subsistence of the lease period till 31.08.2017.

(4) It was further agreed upon between the parties that the respondent shall handover the vacant possession of the subject property to the claimants on the expiry of the lease period, i.e. 31.08.2017 and in event of failure, the respondent shall be liable to pay penalty to the tune of 1.5 times of the lease rent amount as determined at the time of expiry of the contract, without prejudice to other remedies available to the appellants / lessor.

(5) It is contended by the learned Senior Counsel Mr. Percy Kavina appearing for the appellants that the execution of the lease agreement / contract was not disputed by the respondent and further, the respondent had occupied the subject property on the basis of the

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lease agreement executed on 14.09.2012. The rent, as agreed upon between the parties, however, had been paid only till December' 2013 and with effect to January' 2014, the respondent had stopped payment of monthly rent in breach of the agreement.

(6) Inspite of repeated reminders, neither rent had been paid nor the possession of the property was restored to the claimants and the respondent continued to use the property in question in breach of the conditions of the lease agreement. Even after expiry of the lease period on 31.08.2017, the possession of the property was not restored back and the respondent continued to use the tenament after the expiry of the lease period in total breach of the contract.

(7) The arbitration proceedings were initiated by the claimants by filing a petition under Section 11 of the Act' 1996 before the High Court, wherein dispute was referred to the arbitrator under the order dated 27.04.2018. It is contended that, at the fag end of the arbitral proceedings, the possession of the property in question was restored back to the claimants on 31.12.2020.

(8) The challenge to the arbitral award is on the ground that the arbitral tribunal is *ex facie*, illegal,

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unjust, unfair and unreasonable, suffering from patent illegality being beyond the scope of the arbitral reference and, thus, suffering from the jurisdictional error. It was argued that there was a broad consensus between the parties on the jurisdiction of the tribunal to adjudicate the dispute in connection with the lease agreement dated 14.09.2012 on the reference by this Court vide order dated 27.08.2018. The existence of the arbitration clause in the lease agreement dated 14.09.2012 was not disputed. The contract was ostensibly executed between the claimants and the respondent and the executant of the contract namely the Executive Chairperson was duly authorized by the Board of Directors to sign the contract. The respondent had remained in possession of the property in question for about eight and a half years and had paid rent for only two years since the inception of the lease agreement. Common ground between the parties is that no rent was paid for the six and a half years from January' 2011, inspite of occupation of property in question.

(9) The learned arbitrator has framed as many as 32 issues and issue Nos.15 and 16 were pertaining to the lease agreement, on the plea of the respondent that the lease agreement dated 14.09.2012 was unfair, unjust, unreasonable, against the tender process and opposed to public policy. The issue No.16 was framed on the

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contention of the respondent that the lease agreement is vitiated by fraud and / or collusion and hence, is unenforceable under Section 23 of the Contract Act' 1872.

(10) The issue Nos.1 to 3 framed on the claim put forth by the claimants that they have performed their part of the obligations under the lease agreement and the respondent has committed breach of the contract and further, the respondent continued to remain in an unauthorized possession of the property after the expiry of the lease period. None of these issues have been answered by the learned Arbitrator as is clear from the answers given to the issues framed in the award.

(11) From the findings returned by the learned Arbitrator, it can be seen that most of the issues from issue Nos. 1 and 2 and issue Nos. 5 to 28 were not decided finally whereas, with respect to issue Nos. 3 and 4 and issue Nos. 29 to 31, the finding is that they do not survive.

(12) We may note that while deciding issue Nos. 1, 2, 5 to 28 collectively, the learned Arbitrator had noted the claims and the contentions of the respondent to the extent that the action of taking the office property on lease by then Executive Chairperson of the respondent

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was illegal, mala fide and fraudulent. The learned Arbitrator noted the allegations of the respondent that there was collusion between the then Executive Chairperson and the claimants and before taking the property on lease, requisite process under the guidelines / policies has not been followed and undue advantage had been extended to the claimants. There was no Board Resolution: approval process was not followed and when the lease deed was executed and the property was taken on rent, building use permission was not there and the title of the property was also not clear, No-objection certificate was obtained and the rent fixed under the deed was excessively high and exorbitant. Though the advertisement was for taking lease of the proposed area of 5000 sq.ft., but the lease deed was executed for about 12000 sq.ft., and no indication has been given as to why other offers were not found suitable.

(13) It was noted by the learned Arbitrator that the respondent, which is a Public Sector Undertaking, alleged that there was no transparency, competitiveness and healthy selection process in the transaction, which is a *sina qua non* in a public dealing.

(14) It was further noted that the serious irregularities and mismanagement committed by the old managing body and the then Executive Chairperson of

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the respondent came into light in September' 2013 when the then Executive Chairman, the signatory of the lease agreement dated 14.09.2012 had resigned and the new management took over the administration of the project. It was noted that after execution of the lease deed, substantial amount of Rs.3 Crore had been spent by the respondent for interior, furniture and fixtures and even letters were sent to the claimants forsettlement of the matter, but the claimants had refused to reduce the amount of rent and all attempts for negotiations failed. Even criminal proceedings had been initiated against the then Executive Chairperson of the respondent company, for the illegal and unlawful act in granting undue and undeserving advantages to the claimants. The counter claim was put forth by the respondent that they are entitled for the recovery of substantial loss suffered by the company to the Public Exchequer.

(15) The claimants, on the other hand, disputed all allegations levelled by the respondent being false, fabricated and ill-founded and submitted that there was no substance in the allegations and they have been made only with the view to avoid liability to pay rent to which the claimants are entitled.

(16) We may record that noticing the contentions of the claimants and the respondents, the learned Arbitrator

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has returned the findings on the status of the respondent being a company registered under the Companies Act and the State of Gujarat having holding of 100% share capital of the erstwhile company incorporated with the objective of expeditious execution of "Metro Link Express" from Gandhinagar to Ahmedabad. It was noted that the company was re-structured with effect from 20.03.2015 and in a joint venture between the Government of India and Government of Gujarat, both the Governments hold 50% of the share capital of the Company.

(17) There is a reference in the award of the resolution dated 07.05.2009 issued by the Industries and Mines Department, Government of Gujarat, Gandhinagar, which *interalia* stated that Special Purpose Vehicle (SPV), a wholly owned Government company (erstwhile Metro Link Express) had been formed to implement the project. The Board of Director consists of Government officials as also the officials of local bodies for successful implementation of the project. The resolution have been issued "by order and in the name of the Government of Gujarat".

(18) Before the learned Arbitrator, it was contended by the respondent that the State Government had issued a resolution on 20.03.1976 for fixation of reasonable rent when Government was required to hire a private property

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and the procedure for fixation of reasonable rent has been laid down therein to ensure that the rent fixed is not reasonable and not excessive. This resolution was partially modified by the subsequent resolution dated 15.10.1981 and both the resolutions were, as noted by the learned Arbitrator, produced by the respondent along with the written statement.

(19) It is further noted that the claimants had contended that the Government Resolutions have no bearing in the facts of the case, inasmuch as, in the advertisement issued by the respondent for inviting offer to hire the property on lease, there was no such condition that the rent would be fixed as per the aforesaid Government Resolutions. The contract was executed out of free will by the parties to the lease deed and the difference of the rent being fixed as per the Government Resolution dated 20.03.1976 and 15.10.1981 is nothing but an after thought. There was a breach on the part of the respondent and they are liable to pay the rent.

(20) Noticing the above, the learned Arbitrator has proceeded to note and record as under:-

> *"It cannot be ignored that it is alleged by the Respondent that the erstwhile management including the then Executive Chairman was in collusion with the Claimants and had extended undue and undeserved benefits to the Claimants and their friends and relatives.*

I will deal with this aspect little later. Suffice it to say that after the new management took over the administration, it realised that irregularities had been committed in past and informed the Claimants about such irregularities. The new management also tried to settle the dispute but it could not be settled.

Thus, on the facts of the case, it cannot be said that there was delay on the part of the Respondent in raising the point or this is an afterthought as suggested by the Claimants."

(21) It is further noted that:-

"It was alleged by the Respondent that the then Executive Chairman obliged the Claimants by awarding several works either singly, jointly or in favour of their family members. It was also alleged that all the works were awarded in total defiance of prevalent policies and were result of nepotism, favouritism, illegality and fraud."

(22) Further, noticing that various works were awarded to the claimants in total defiance of the prevalent policies and the actions of the Executive Chairman were the results of nepotism, favoritism, illegality and fraud, the learned Arbitrator had proceeded to note that the allegations of fraud, favoritism and nepotism had been denied and it was contended by the claimants that no proceedings had been initiated by the respondent for the alleged fraud and collusion. The contention of the learned counsel for the claimants was noted to the effect that the criminal proceedings

instituted against the then Executive Chairperson did not relate to the property in question, leased out by the claimants to the respondent, subject matter of the arbitral proceedings.

(23) Noticing the above, the learned Arbitrator has returned the findings in the following manner:-

> *"In my opinion, however, considering totality of facts and circumstances including the fact that Board of Directors was reconstituted in 2016 and thereafter thorough enquiry was conducted wherein several illegalities came to light and proceedings were initiated to correct them, it cannot be contended that such action was illegal or unlawful.*
>
> *At the time of hearing of the matter, the learned Counsel for the Respondent contended that the lease in question relates to immovable property for five years which required registration. If the lease is not registered, the same is not admissible in evidence. It was also contended that the Lease - Deed also required payment of stamp duty under the relevant law relating to payment of such duty. Since requisite stamp duty is not paid, the Lease Deed cannot be looked into.*
>
> *In reply to these contentions, the learned Counsel for the Claimants submitted that the above contentions as to non-registration of Lease - Deed and non payment of stamp duty have not been taken by the Respondent in the Written Statement nor an Issue is framed by the Tribunal on such defects. It may also be stated that Lease Deed contains a Clause whereunder Registration and Stamp Duty charges were to be borne by Lessee (i.e. Respondent).*
>
> *In view of above factual position, I do not wish to enter into those questions.*

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In my opinion, however, the Respondent is right in submitting that while taking immovable property on lease from a private party, Government Guidelines/Circulars / Policy Decisions were required to be followed. It is only on the basis of such exercise that private property can be taken on lease and the amount of rent can be fixed.

Competent Authority of the Government is, therefore, directed to take up for consideration Issue for fixation of rent of Unit Nos. 201 to 204 and 205 to 208, admeasuring 11,941 sq. ft. super built-up area, situated on 2nd Floor, Shree Rang Heights and Arcade, New PDPU Crossroads, Gandhinagar, constructed upon Final Plot No.5, Sub Plot No.3 of Village Kudasan, Taluka Gandhinagar, District Gandhinagar, from 01-09-2012 to 31-12-2020 keeping in view various Government Resolutions/Circulars / Policy Decisions in force at the relevant point of time.

Since, according to the Claimants, no payment of rent has been made by the Respondent to the Claimants from January 2014 till restoration of possession on 31-12-2020 (seven years), the Authority shall undertake the aforesaid exercise as expeditiously as possible and take consequential action in accordance with law after hearing the parties.

All contentions of all parties have been kept open. It is open to the Claimants to claim all benefits for which Statement of Claim is filed by them. Likewise, it is open to the Respondent to raise all Counter-claims.

I may make it clear that in view of Final Award proposed to be passed, it may not be understood that the Tribunal has expressed any opinion on the merits of the matter one way or the other. It is further clarified that all contentions raised, arguments advanced and submissions made by both the parties have not been adjudicated one way or the other except with a direction

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to the Competent Authority of the Government to consider and decide the matter afresh in light of Government Resolutions/Circulars/Policy Decisions in force at the relevant point of time.

As and when final decision is taken one way or the other by the Competent Authority, it is open to either party to take an appropriate proceeding in accordance with law and the Award passed in the present proceedings would not come in the way of the parties for obtaining any relief to which they are otherwise entitled.

Issue Nos. 5 to 28 are decided accordingly."

(24) We may further note the final award passed by the learned Arbitrator on Issue No.32 as under:-

*"**ISSUE NO.32: FINAL AWARD***

For the reasons aforesaid, direction is issued to the Competent Authority having power to decide reasonable rent under Government Resolutions / Circulars/Policy Decisions as in force at the relevant time and to decide the case of the Claimants for fixation of Rent of leased property bearing Unit Nos. 201 to 204 and 205 to 208, admeasuring 11,941 sq. ft. super built-up area, situated on 2nd Floor, Shree Rang Heights and Arcade, New PDPU Crossroads, Gandhinagar, constructed upon Final Plot No.5, Sub Plot No.3 of Village Kudasan, Taluka Gandhinagar, District Gandhinagar, from 01-09-2012 to 31-12-2020, in accordance with Government Resolutions / Circulars / Policy Decisions as in force at the relevant time, and to pass appropriate order in accordance with law.

Statement of Claim filed by the Claimants is partly allowed to the extent indicated above.

Counter-claim filed by the Respondent is not decided."

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(25) Placing these findings returned by the learned Arbitrator, it was vehemently argued by the learned Senior Counsel for the appellants that the learned Arbitrator has committed patent illegality in referring the dispute to an unnamed authority, stated to be competent authority having power to decide reasonable rent under Government resolution / circulars / policy decisions as in force at the relevant point of time, to decide the case of the claimants for fixation of rent of the leased property and to pass an appropriate order thereon.

(26) The contention is that this approach of the learned Arbitrator is a result of complete failure of jurisdiction on his part. It is absolutely beyond the jurisdiction of the learned Arbitrator to refer the dispute to any third party, inasmuch as, the learned Arbitrator is mandated by the Referral order passed by this Court dated 27.04.2018 for adjudication of the disputes between the parties arising out of the lease agreement dated 14.09.2012. The conduct of the proceedings by the learned Arbitrator by not answering the issues framed saying that in view of the factual position, he did not wish to enter into the disputed questions raised by the parties, makes the award patently illegal and being opposed to public policy. The learned Arbitrator has exceeded in his jurisdiction in issuing directions beyond the terms of the

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reference and in not answering the issues raised before it.

(27) It was vehemently argued that once the allegations of collusion in signing the lease agreement dated 14.09.2012 were not adjudicated by the learned Arbitrator, it could not have taken exception to the terms and conditions of the lease deed, which bind the parties, who had signed or on whose behalf the lease deed had been signed by the authorized signatory. Even when the lease agreement is not registered or allegations were of the agreement not being valid in law or being outcome of fraud and collusion, no issue had been raised with regard to arbitrability of the dispute.

(28) The result is that the lease agreement could not have been ignored by the learned Arbitrator when it was undisputed that the possession of the lease property was taken on 01.09.2012 even prior to the execution of the lease deed dated 14.09.2012. The learned Arbitrator could not have ignored the lease agreement dated 14.09.2012 relegating the matter for decision by the competent authority, inasmuch as, the directions contained in the final award are completely beyond the scope of reference and thus, beyond the scope of the jurisdiction exercised by the learned Arbitrator.

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(29) It was contended that the non-registration or non-stamping of the agreement does not affect the arbitrability of the claim however, even in such a case, the learned Arbitrator has committed patent illegality in not answering the issues raised by the parties by saying that he did not wish to enter into the controversy and then relegating the claimants to an unknown competent authority to decide on the question of rent considering the Government resolutions / circulars / policy decisions, which were not subject matter of contract. The award is, thus, liable to be set aside being opposed of public policy.

(30) Reliance is placed upon the decision of Calcutta High Court in the case of ***M/s Usha Martin Limited Vs. M/s Eastern Gases Limited*** **[AP 483/2017]** and in the case of ***Eastern Gases Limited Vs. Usha Martin Limited*** **[EC/330/2017]** to submit that the principles, when it comes to delegation of power by an Arbitrator, are settled to the extent that the Arbitrator cannot delegate his power to make an award, inasmuch as, when people go to arbitration, they bind themselves to abide by the decision of the arbitrator of their choice. They do not bargain for a decision of their dispute by a stranger in whom they have no confidence. The delegation by the arbitrator to a stranger is entirely invalid. An arbitrator is not justified to delegate his powers practically to another person. The decision must, ultimately, be his own

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judgment in the matter. It was argued that an arbitrator cannot shun away with his responsibilities and leave the work of quantification on some other person though it is open for the arbitrator to take assistance of an expert. It was further argued that an arbitrator must include the basis on which, it has arrived at the conclusion on the set of facts, inasmuch as, Section 31 of the Act' 1996 mandates that every award should give reasons in support thereof and reasons are the links between the facts and the conclusion. The mere conclusion on the basis of arbitrator's subjective opinion without indicating the objective links between the facts and the opinion, would not suffice for the reasons that are mandated by the statute to be furnished. The mandate under Section 31 (3) of the Act' 1996 is to have reasoning, which is intelligible and adequate and, which can, in appropriate cases, be even implied by the Courts for a fair reading of the award on the documents referred to thereunder, if the need be. Based on the said decision, it was contended that Section 31 (3), though does not require an elaborate judgment to be passed by the Arbitrator having regard to the speedy resolution of the dispute, but the requirement of a reasoned order which is proper, intelligible and adequate cannot be undermined. If the challenge to the award is passed on the ground that the same is unintelligible, the same would be equivalent to providing no reasons at all.

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(31) It was contended that the present award does not fall within the category of inadequacy of reasons in the award but in the category of an unintelligible award, which is liable to be set aside by relegating the claimants to approach an unnamed authority, while issuing directions as a Court of law in the public fora. The learned Arbitrator has conducted the arbitral proceedings against the fundamental principle of arbitration, where party autonomy is a *grund norm*.

(32) With these submissions, it was vehemently argued that the award is liable to be set aside being contrary to public policy and suffering from patent illegality.

(33) Mr. Anuj K. Trivedi, learned counsel for the respondent company, on the other hand, argued that the arbitral award has not been interfered by the Court under Section 34 of the Act' 1996 with the findings that the award passed by the learned Arbitrator, in no manner, can be said to be contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) patently illegal.

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(34) It was held that patent illegality would constitute contravention of the substantive law of India, contravention of the Arbitration and Conciliation Act' 1996 and contravention of the terms of the contract. The interference by Courts in an arbitral award will not entail review on the merits of the dispute and has to be limited only to the situations, where it is found that the findings of the learned Arbitrator are arbitrary, perverse, shocking the conscience of the Court and where the illegality goes to the root of the matter.

(35) It was argued that the commercial court having gone through the award of the learned Arbitrator has found that the issue Nos. 5 to 28 have been decided by the learned Arbitrator as per the discussion on the internal Page '33' of the arbitral award and, as such, it cannot be said that the issues framed by the learned Arbitrator have not been decided. It was further noted by the commercial court that the learned Arbitrator was not competent to decide the question of fixation of rent and hence, the necessary order has been passed to examine the claim of the claimants about fixation of the rent, in a just and proper manner.

(36) The submission is that there is no material to show any patent illegality, which goes to the root of the award and the award, in no manner, can be said to be

against the public policy, being contrary to the fundamental policy of Indian law. No interference has, thus, been made by the Commercial Court in exercise of Section 34 of the Act' 1996.

(37) This Court, while exercising the jurisdiction under Section 37, will not sit as a 'court of appeal' over the findings returned by the learned Arbitrator or the decision of the Commercial Court under Section 34 of the Arbitration Act' 1996. Reliance is placed on the decision of the Apex Court in the case of ***OPG Power Generation (P) Ltd. v. Enexio Power Cooling Solutions India (P) Ltd.***, **[2024 SCC OnLine SC 2600]**, to submit that the fact that the tribunal has given some reasons on the issue before it, is sufficient to draw the conclusion given by it. The tribunal is not expected to decide at great length the facts before it. It is sufficient that the tribunal should explain what its findings are on the material before it. While stating reasons upon which an arbitral award is passed, no particular form is required so as to term it as a reasoned order. Insufficiency of reasons cannot be a ground to set aside the award as a court of appeal. If the conclusion of the learned Arbitrator is based on a possible view of the matter, the court should not interfere.

(38) It was argued that the Apex Court in the case of ***OPG Power Generations Ltd. (supra)*** has observed

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that while exercising jurisdiction under Section 34, the court does not sit in appeal over the award, and it cannot substitute the reasoning in the award with its own. In the like manner, the appellate court, exercising power, under Section 37 cannot have greater power than what a court possesses under Section 34. It is not possible for the appellate court, under Section 37, to provide its own reasons to find fault in the award, in absence of lack of reasons in the award. A distinction would have to be drawn between an arbitral award, where reasons are either lacking/unintelligible or perverse and an arbitral award where reasons are said to be inadequate or insufficient. In a case where reasons appear insufficient or inadequate, if, on a careful reading of the entire award coupled with documents recited/relied therein, the underlying reason, factual or legal, that forms the basis of the award, is discernible/intelligible, and the same exhibits no perversity, the award need not be set aside the award while exercising powers under Section 34 or Section 37 of the Act' 1996, rather it may explain the existence of that underlying reason while dealing with the challenge laid to the award. In doing so, the Court does not supplant the reasons of the arbitral tribunal but only explains it for a better and clearer understanding of the award. Where the omission on the part of the arbitral tribunal are trivial and did not travel to the root of the award, the appellate court would be well within its

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jurisdiction to explain the underlying legal principle which the arbitral tribunal had applied.

(39) The submission, thus, is that, howsoever, short or little the reasons given by the arbitral tribunal, the Court, under Section 34 or the appellate Court under Section 31 of the Act' 1996 are empowered to supplement the reasons of the arbitral tribunal by explaining the existence of the underlying reasons, where omission on the part of the arbitral tribunal was trivial and did not travel to the root of the award, but it cannot supplant the reasons provided in the award.

(40) Reliance was placed upon another decision of the Apex Court in the case of ***Punjab State Civil Supplies Corpn. Ltd. v. Sanman Rice Mills***, **[2024 SCC OnLine SC 2632]**, to argued that it is held by the Apex Court therein that even an award which may not be reasonable or is non-speaking to some extent cannot ordinarily be interfered with by the courts. The law is that if two views are possible therein, there is no scope for the court to reappraise the evidence and to take a different view other than that has been taken by the arbitrator. The view taken by the arbitrator is normally acceptable and ought to be allowed to prevail.

(41) The Apex Court has said therein that a plain

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reading of Section 34 reveals that the scope of interference by the court with the arbitral award under Section 34 is very limited and the court is not supposed to travel beyond the aforesaid scope to find out if the award is good or bad. Section 37 of the Act provides for a forum of appeal *inter-alia* against the order setting aside or refusing to set aside an arbitral award under Section 34 of the Act. The scope of appeal is naturally akin to and limited to the grounds enumerated under Section 34 of the Act. It is equally well settled that the appellate power under Section 37 of the Act is not akin to the normal appellate jurisdiction vested in the civil courts for the reason that the scope of interference of the courts with arbitral proceedings or award is very limited, confined to the ambit of Section 34 of the Act only and even that power cannot be exercised in a casual and a cavalier manner. It was reiterated by the Apex Court that the scope of interference in an appeal under Section 37 of the Act is restricted and subject to the same grounds on which an award can be challenged under Section 34 of the Act. The powers under Section 37 vested in the court of appeal are not beyond the scope of interference provided under Section 34 of the Act.

(42) It was, thus, argued that once the commercial Court, exercising jurisdiction under Section 34 of the Act' 1996 finds that the award contains reasoning given by the

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arbitrator for issuing directions therein, there left no further scope of interference within the limited jurisdiction under Section 34. This Court, while exercising the power of appellate court under Section 37, would be find fault in the said reasoning given by the court under Section 34 of the Act' 1996.

(43) Placing the judgment of the Apex Court in the case of ***Punjab State Civil Supplies Corporation (supra)***, it was vehemently argued that the Apex Court has held therein for intervention of the Court in arbitral matters as virtually prohibited, if not absolutely barred and that the interference is confined only to the extent envisaged under Section 34 of the Act. The appellate power under Section 37 of the Act is limited within the domain of Section 34 of the Act. It is exercisable only to find out if the court, exercising power under Section 34 of the Act, has acted within its limits as prescribed thereunder or has exceeded or failed to exercise the power so conferred. The Appellate Court, under Section 37, has no authority of law to consider the matter in dispute before the arbitral tribunal on merits so as to find out as to whether the decision of the arbitral tribunal is right or wrong upon reappraisal of evidence as if it is sitting as an ordinary court of appeal. It is only where the court exercising power under Section 34 has failed to exercise its jurisdiction vested in it by Section 34 or has

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travelled beyond its jurisdiction that the appellate court can step in and set aside the order passed under Section 34 of the Act. It's power is more akin to that of superintendence as is vested in civil courts while exercising revisionary powers. The arbitral award is not liable to be interfered unless a case for interference is made out within the scope of Section 34. It cannot be disturbed, only for the reason that instead of the view taken by the arbitral tribunal, the other view which is also a possible view is a better view according to the appellate court. The proceedings under Section 34 of the Act are summary in nature and are not like a full-fledged regular civil suit. The scope of Section 37 of the Act, therefore, is much more summary in nature and not like an ordinary civil appeal. The award, as such, cannot be touched unless it is contrary to the substantive provision of law; any provision of the Act or the terms of the agreement.

(44) With the aid of the above legal position stated by the Apex Court in the aforesaid two decisions, it was vehemently argued by the learned counsel for the respondent that the arbitral award can be interfered only on four grounds stated in Section 34, which were not found to be existing in the instant case by the Court under Section 34. The commercial court, under Section 34, has categorically recorded that for the reasons given by the learned Arbitrator in the Award at Page '33' of the

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paper-book, no interference can be called for. Moreover, the fact that the learned Arbitrator has relegated the matter for fixation of rent by the competent authority under relevant Government resolutions cannot be a reasons to set aside the arbitral award on the premise that it is against the public policy or is bereft of reasons. Infact, the conclusion in the findings arrived at by the learned Arbitrator, are based upon the detailed discussion and weighing the evidence on record. The view taken by the learned Arbitrator cannot be said to be such that any prudent person cannot arrive at or which cannot be said to be possible or plausible view.

(45) Taking note of the rival contentions of the learned counsels for the parties, we may record, at the outset, that the claim of the claimants for alleged breach of the lease agreement committed by the respondent was based on the assertion that the lease agreement was executed between the parties, i.e. the claimants and the respondents herein on 14.09.2012 whereunder, the claimants are shown as lessors and the respondent MEGA (Metro Link Express for Gandhinagar and Ahmedabad) Company Ltd. is the lessee. As per the claim of the claimants, the property in question admeasuring 11,941 sq.mts (super built-up area) along with common parking plot for vehicles was let out to the appellants herein for the period of five years from 01.09.2012, subject to

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payment of monthly rent of Rs.5,37,345/- to be paid in advance on or before seventh date of each month. Other terms and conditions of the lease deed such as increase of rent by 10% every year and other charges as specified therein are binding on the parties.

(46) It was also the claim of the claimants that the lease period under the lease agreement dated 14.09.2012 was over on 31.08.2017, after expiry of five years and the respondent was bound to restore the possession of the leased property to the claimants (owners thereof). The respondent had failed to restore the possession to the claimant and even the rent for the above occupation had not been paid with effect from Janurary' 2014. It was the contention of the claimants before the learned Arbitrator that continued possession of the leased property by the respondent is illegal and unauthorized and the claimants are entitled to get back the clear, vacant and peaceful possession of the leased property from the respondent.

(47) We may note that during the pendency of the arbitral proceedings, the possession of the leased property was restored by the respondent to the claimanst on 31.12.2020, but the question remained of determination as to whether the possession of the respondent over the disputed property was contrary to the terms and conditions of the lease deed and the

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claimants are entitled for the relief claimed for, the alleged breach of the contract.

(48) Taking note of the said facts as recorded by the learned Arbitrator in the arbitral award, we find that the dispute before the learned Arbitrator revolved around the lease agreement dated 14.09.2012 executed between the parties namely the claimants and the respondent (MEGA) Company.

(49) However, the respondent MEGA Company came out with a categorical stand before the learned Arbitrator that the claim of the claimants were not maintanable, inasmuch as, the purported lease agreement dated 14.09.2012 is a fraudulent document, inasmuch as, the same was an outcome of collusion between the then Executive Chairman of the respondent Company and the claimants. The respondent Company is a Public Sector Undertaking and for the requirement of office premises on rental basis, an advertisement was issued on 19.07.2012 inviting offer of lease of 5000 sq.ft of commercial place. Upon the said advertisement, vide letter dated 21.07.2012, offer was given by one Prafulbhai Pramukhbhai Patel of commercial premise belonging to him admeasuring 10,000 sq.ft. On Gandhinagar – Ahmedabad Airport Highway Road. The then Executive Chairman of the respondent Company

decided to take the property in question on lease and the lease agreement purported to have been executed on 14.09.2012.

(50) The lease agreement is an unregistered document and moreover, while taking the property on lease, the requisite process of seeking approval from the Board of Directors of the Company had not been followed. The rent fixed under the deal was a result of collusion between the then Executive Chairman and the claimants and it was excessively high and exorbitant. Other offers were not evaluated and there is no intimation as to why they were not suitable. Though advertisement was for 5000 sq.ft to be taken on lease, but the lease deed was executed for about 12,000 sq.ft. The respondent being a Public Sector Undertaking, the process of taking of the property in question on lease was required to be undertaken in a transparent manner through a competitive and healthy selection process, which is a *sina qua non* in a public dealing.

(51) The manner in which the property was taken on lease came into light after the Executive Chairman of the respondent company had resigned in the month of September' 2013 and new management took over the administration of the project. Several irregularities and mismanagement committed by the old managing body

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was addressed with corrective actions taken by the new body including stoppage of payment of rent in view of the fact that after execution of the lease deed, substantial amount of Rs.3 crore, approximately, had been spent by the respondent company for interior and fixtures. It was also brought on record that in view of several illegal actions of the precious management, criminal proceeding was initiated against the erstwhile Executive Chairman and others for various offences punishable under the provisions of the Indian Penal Code, 1860 and the Prevention of Corruption Act, 1988.

(52) The learned Arbitrator has also noted that undue and undeserving advantages have been granted to the claimants and their friends and relatives by the erstwhile management of the respondent company including the then Executive Chairman in collusion with the claimants, reference of which, had been extracted from the averments in the written statement. The allegations of the respondent that the Executive Chairman obliged the claimants by awarding several works, either singly or jointly or in favour of the family members and all the works were awarded in total defiance of the prevalent policy and were a result of nepotism, favoritism, illegality and fraud were noted by the learned Arbitrator.

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(53) It was further recorded that the allegations of the respondent had been denied by the claimants in toto in the affidavit in rejoinder. However, the fact of awarding of certain works, as indicated in Para '2' of the written statement, had not been denied. On the contrary, it was stated that the said works were awarded after following due procedure.

(54) Regarding the above, the learned Arbitrator had formed his opinion as follows:-

> *"In my opinion, however, considering totality of facts and circumstances including the fact that Board of Directors was reconstituted in 2016 and thereafter thorough enquiry was conducted wherein several illegalities came to light and proceedings were initiated to correct them, it cannot be contended that such action was illegal or unlawful."*

(55) The rival contentions of the learned counsel for the respondent on the question of registration of the lease deed and the administrability thereof in evidence, were further noted in the following manner:-

> *"At the time of hearing of the matter, the learned Counsel for the Respondent contended that the lease in question relates to immovable property for five years which required registration. If the lease is not registered, the same is not admissible in evidence. It was also contended that the Lease - Deed also required payment of stamp duty under the relevant law relating to payment of such duty. Since requisite stamp duty is not paid, the Lease Deed cannot be looked into.*

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In reply to these contentions, the learned Counsel for the Claimants submitted that the above contentions as to non-registration of Lease Deed and non payment of stamp duty have not been taken by the Respondent in the Written Statement nor an Issue is framed by the Tribunal on such defects. It may also be stated that Lease Deed contains a Clause whereunder Registration and Stamp Duty charges were to be borne by Lessee (i.e. Respondent)."

(56) Having noted the above, the learned Arbitrator has reached at the following conclusion:-

"In view of above factual position, I do not wish to enter into those questions.

In my opinion, however, the Respondent is right in submitting that while taking immovable property on lease from a private party, Government Guidelines / Circulars / Policy Decisions were required to be followed. It is only on the basis of such exercise that private property can be taken on lease and the amount of rent can be fixed. Competent Authority of the Government is, therefore, directed to take up for consideration issue for fixation of rent of Unit Nos. 201 to 204 and 205 to 208, admeasuring 11,941 sq. ft. super built-up area, situated on 2nd Floor, Shree Rang Heights and Arcade, New PDPU Crossroads, Gandhinagar, constructed upon Final Plot No.5, Sub Plot No.3 of Village Kudasan, Taluka Gandhinagar, District Gandhinagar, from 01-09-2012 to 31-12-2020 keeping in view various Government Resolutions/Circulars/ Policy Decisions in force at the relevant point of time.

Since, according to the Claimants, no payment of rent has been made by the Respondent to the Claimants from January 2014 till restoration of possession on 31-12-2020 (seven years), the Authority shall undertake

the aforesaid exercise as expeditiously as possible and take consequential action In accordance with law after hearing the parties.

All contentions of all parties have been kept open. It is open to the Claimants to claim all benefits for which Statement of Claim is filed by them. Likewise, it is open to the Respondent to raise all Counter-claims.

I may make it clear that in view of Final Award proposed to be passed, it may not be understood that the Tribunal has expressed any opinion on the merits of the matter one way or the other. It is further clarified that all contentions raised, arguments advanced and submissions made by both the parties have not been adjudicated one way or the other except with a direction to the Competent Authority of the Government to consider and decide the matter afresh in light of Government Resolutions/Circulars/Policy Decisions in force at the relevant point of time.

As and when final decision is taken one way or the other by the Competent Authority, it is open to either party to take an appropriate proceeding in accordance with law and the Award passed in the present proceedings would not come in the way of the parties for obtaining any relief to which they are otherwise entitled.

Issue Nos. 5 to 28 are decided accordingly."

(57) From the above, we may note that the learned Arbitrator has refused to enter into the questions as to whether the lease agreement dated 14.09.2012 is vitiated by fraud and / or collusion and whether it can be said to be unenforceable under Section 23 of the Contract Act' 1872. The learned Arbitrator has refused to enter into the

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questions framed on the plea of the respondent that the lease agreement dated 14.09.2012 is unfair, unjust, unreasonable, against the tender process and opposed to public policy. The learned Arbitrator has also refused to answer the pertinent questions raised by the claimants with regard to the obligations of the respondent to perform their part under the lease agreement and that the respondents have committed breach of the lease agreement. No finding, whatsoever, has been returned by the learned Arbitrator as to whether the lease agreement can be said to be a void document being an outcome of fraud or the terms and conditions of the lease agreement can be ignored to examine the claim of the claimants for breach of contract on the part of the respondent. All such issues arising out of the contract namely the lease agreement dated 14.09.2012, which was subject matter of the arbitration proceedings remained unanswered.

(58) The learned Arbitrator has, then, proceeded to record that the Government guidelines / circulars / policy decisions were required to be followed while taking an immovable property on lease from a private party and it is only on that basis that the private property can be taken on lease and the amount of rent can be fixed. This finding returned by the learned Arbitrator is in avoidance of the pertinent questions raised before the learned Arbitrator and the issues framed about the

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maintainability of the claim of the claimants.

(59) The rival contentions of the parties pertaining to the lease agreement in question have not been dealt with to return any finding on the issues raised by the parties before the learned Arbitrator. The view taken by the learned Arbitrator or the opinion drawn that the action of the new Board of Directors reconstituted in 2016 to conduct thorough inquiry into several illegalities, which came into light and proceedings initiated to correct the same cannot be said to be illegal or unlawful, is not an apt answer to the contentious issues before the learned Arbitrator revolving around the lease agreement dated 14.09.2012. The learned Arbitrator, in our considered opinion, was required to address the issue of the legality / validity of the lease agreement while dealing with the contentions of the respondent Company that it was an outcome of fraud and collusion between the claimants and the then Executive Chairperson of the Company.

(60) In light of the above discussion, we find that the learned Arbitrator has digressed itself from the scope of dispute before it revolving around the alleged lease agreement dated 14.09.2012, in forming the opinion that the competent authority having power to decide reasonable rent under the Government resolutions /

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circulars / policy decisions is required to take the decision in the case of the claimants for fixation of rent of the leased property, thus, straightway jumping to the conclusion that the respondent is right in submitting that while taking immovable property on lease from private property, Government resolutions / circulars / policy decisions were required to be followed, without adjudicating the questions of validity of the lease agreement.

(61) In our considered opinion, the present is not a case where it can be said that the reasons given by the learned Arbitrator are inadequate or insufficient, which can be discerned from the careful reading of the entire award coupled with the documents recited/relied therein. To arrive at the conclusion on the questions of breach of contract namely the lease agreement dated 14.09.2012 raised by the claimant, the question that the lease agreement was an outcome of fraud and collusion between the claimants and the then Executive Chairman could have been ignored. A full-fledged inquiry was required to be conducted. It is, thus, not possible for this Court to supplement the reasons given by the arbitral tribunal in the arbitral award so as to explain it for a better and clearer understanding of the award. The ratio laid down by the Apex Court in the case of ***OPG Power Generation (supra)*** in Paragraphs '147 to 149' to

upheld the judgment of the Division Bench therein, is not attracted in the present case. The present is a case, where omission on the part of the arbitral tribunal is not trivial rather it travels to the root of the award and the reasons are found to be absolutely lacking in the arbitral award.

(62) There is one more aspect of the matter. The respondent has come out with a categorical case before the learned Arbitrator that the lease agreement dated 14.09.2012, the basis of the claim putforth by the claimants, was an outcome of fraud and no claim can be set-forth on the same. In essence, the respondent Company had come out with a categorical case that the lease agreement dated 14.09.2012 itself was an outcome of fraud and is unenforceable in law being hit by Section 23 of the Indian Contract Act. The entire transaction between the claimants and the erstwhile Executive Chairperson of the Respondent company was fraudulent as no tender process or exercise, worth its name, was undertaken by the then Executive Chairperson to select the premises of the claimants and execute the lease agreement with the claimants. The respondents have given detailed instances on the factual aspect as to how and in what manner the purported lease agreement can be said to be fraudulent and against the public policy, which included the modus operandi with which the

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claimants and the erstwhile management / Executive Chairperson of the respondent Company had perpetrated the fraud.

(63) All these questions, when placed before the learned Arbitrator, would give rise to the question of arbitrability or non-arbitrability of the dispute on the plea of fraud, which as per the claim of the respondent, permeate the entire contract and render the contract as also the agreement of arbitration as void.

(64) The allegations of fraud and corruption on the part of the then Executive Chairperson of the company and collusion between the claimants and the then Executive Chairperson of the company are clear and categorical with the instances narrated by the respondent company in the written statement itself so as to impress upon the learned Arbitrator that the lease agreement dated 14.09.2012 is liable to be ignored so as to refute the claims of the claimants. The allegations of the act of fraud and collusion made in the instant case are complicated questions, which would give rise to a serious question of law as to the non-arbitrability of the dispute, which has not been adverted to by the learned Arbitrator. It was not the case where the allegations of fraud in arriving at the agreement dated 14.09.2012 were vague, rather they are categorical and permeate the entire

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contract, which may render the agreement of arbitration itself void.

(65) We may further note the observations of the Apex Court in the case of ***Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd.***, **[(2021) 4 SCC 713]** in Paragraph '33' as under:

> **"33.** The judgment in *Ayyasamy* was then applied in *Ameet Lalchand Shah* v. *Rishabh Enterprises*. After extracting para 25 from Sikri, J.'s judgment and para 48 of Chandrachud, J.'s judgment in *Ayyasamy*, the Court held:
>
> > *"37.* It is only where serious questions of fraud are involved, the arbitration can be refused. In this case, as contended by the appellants there were no serious allegations of fraud; the allegations levelled against Astonfield is that Appellant 1 Ameet Lalchand Shah misrepresented by inducing the respondents to pay higher price for the purchase of the equipments. There is, of course, a criminal case registered against the appellants in FIR No. 30 of 2015 dated 5-3-2015 before the Economic Offences Wing, Delhi. Appellant 1 Ameet Lalchand Shah has filed Criminal Writ Petition No. 619 of 2016 before the High Court of Delhi for quashing the said FIR. The said writ petition is stated to be pending and therefore, we do not propose to express any views in this regard, lest, it would prejudice the parties. Suffice to say that the allegations cannot be said to be so serious to refuse to refer the parties to arbitration.

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> In any event, the arbitrator appointed can very well examine the allegations regarding fraud."

(66) The two tests laid down in ***A. Ayyasamy v. A. Paramasivam***, **[(2016) 10 SCC 386]** referred in ***Rashid Raza v. Sadaf Akhtar***, **[(2019) 8 SCC 710]** have been noted by the Apex Court in the recent decision in ***Avitel (supra)*** in the following manner:-

> ***"34.*** *In a recent judgment reported as Rashid Raza, this Court referred to Sikri, J.'s judgment in Ayyasamy and then held: (Rashid Raza case [Rashid Raza v. Sadaf Akhtar, (2019) 8 SCC 710 : (2019) 4 SCC (Civ) 503] , SCC p. 712, para 4)*
>
> > *"4. The principles of law laid down in this appeal make a distinction between serious allegations of forgery/fabrication in support of the plea of fraud as opposed to "simple allegations". Two working tests laid down in para 25 are : (1) does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or (2) whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain."*
>
> ***35****. After these judgments, it is clear that "serious allegations of fraud" arise only if either of the two tests laid down are satisfied, and not otherwise. The first test is satisfied only when it can be said that the arbitration clause or agreement itself cannot be said to exist in a clear case in which the court finds that the party against whom breach is alleged cannot be said to have entered into the agreement relating to arbitration at all. The second test can be said to have been met in cases*

in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or mala fide conduct, thus necessitating the hearing of the case by a writ court in which questions are raised which are not predominantly questions arising from the contract itself or breach thereof, but questions arising in the public law domain."

(67) The Apex Court in the case of ***Avitel (supra)***, while considering the question of fraud within the meaning of Section 17 of the Contract Act, has noted that Section 17 of the Contract Act applies if the contract itself is obtained by fraud or cheating. However, the distinction has been made between the contract being obtained by fraud and and performance of a contract (which is perfectly valid) being vitiated by fraud or cheating. The latter would fall outside Section 17 of the Contract Act, in which the remedy for damages would be available, but not the remedy for treating the contract itself being void. This is for the reason that the words "with intent to deceive another party thereto or his agent" must be read with the words "or to induce him to enter into the contract", both sets of expressions speaking in relation to the formation of the contract itself. It was emphasized that this is further made clear by Sections 10, 14 and 19 of the Contract Act, all of which deal with "fraud" at the stage of entering into the contract. Even Section 17(5) which speaks of "any such act or omission as the law specially deals to be

fraudulent" must mean such act or omission under such law at the stage of entering into the contract. It was, thus, held that the fraud that is practised outside of Section 17 of the Contract Act, i.e. in the performance of the contract, may be governed by the tort of deceit, which would lead to damages, but not rescission of the contract itself.

(68) It was further observed that both kinds of fraud are subsumed within the expression "fraud" when it comes to arbitrability of an agreement which contains an arbitration clause. The observations in this regard in Paragraphs' 40, 43 to 47" of the judgment in ***Avitel (supra)*** are relevant to be noted hereinunder:-

> ***"40.*** *In* ***Syed Askari Hadi Ali Augustine Imam*** *v.* ***State (NCT of Delhi)****, it was held : (SCC pp. 537-38, paras 24 & 25)*
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> *"24. If primacy is to be given to a criminal proceeding, indisputably, the civil suit must be determined on its own merit, keeping in view the evidence brought before it and not in terms of the evidence brought in the criminal proceeding. The question came up for consideration in K.G. Premshanker v. State ....*
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> *25. It is, however, significant to notice that the decision of this Court in Karam Chand Ganga Prasad v. Union of India, wherein it was categorically held that the decisions of the civil courts will be binding on the criminal courts but the converse is not true, was overruled.... Axiomatically, if judgment of a civil court is not binding on a criminal court, a*

judgment of a criminal court will certainly not be binding on a civil court."

***43**. In the light of the aforesaid judgments, para 27(vi) of Afcons and para 36(i) of Booz Allen, must now be read subject to the rider that the same set of facts may lead to civil and criminal proceedings and if it is clear that a civil dispute involves questions of fraud, misrepresentation, etc. which can be the subject-matter of such proceeding under Section 17 of the Contract Act, and/or the tort of deceit, the mere fact that criminal proceedings can or have been instituted in respect of the same subject matter would not lead to the conclusion that a dispute which is otherwise arbitrable, ceases to be so.*

***44.** Section 17 of the Contract Act defines "fraud" as follows:*

*"**17. "Fraud" defined**.—"**Fraud**" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract—*

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud,

unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech."

45. *Section 10 of the Contract Act states that all agreements are contracts if they are made with the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. Section 14 states that consent is said to be free when it is not caused inter alia by fraud as defined in Section 17. Importantly, the section goes on to say that consent is said to be so caused when it would not have been given but for the existence, inter alia, of such fraud. Where such fraud is proved, and consent to an agreement is caused by fraud, the contract is voidable at the option of the party whose consent was so caused. This is provided by Section 19 of the Contract Act which reads as follows:*

*"**19. Voidability of agreements without free consent**.— When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.*

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representation made had been true.

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17, the contract, nevertheless, is not voidable, if the party whose

consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party of whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable."

***46**. It has been held by the Bombay High Court in Fazal D. Allana v. Mangaldas M. Pakvasa, that Section 17 of the Contract Act only applies if the contract itself is obtained by fraud or cheating. However, a distinction is made between a contract being obtained by fraud and performance of a contract (which is perfectly valid) being vitiated by fraud or cheating. The latter would fall outside Section 17 of the Contract Act, in which the remedy for damages would be available, but not the remedy for treating the contract itself as being void. This is for the reason that the words "with intent to deceive another party thereto or his agent" must be read with the words "or to induce him to enter into the contract", both sets of expressions speaking in relation to the formation of the contract itself. This is further made clear by Sections 10, 14 and 19, which have already been referred to hereinabove, all of which deal with "fraud" at the stage of entering into the contract. Even Section 17(5) which speaks of "any such act or omission as the law specially deals to be fraudulent" must mean such act or omission under such law at the stage of entering into the contract. Thus, fraud that is practised outside of Section 17 of the Contract Act i.e. in the performance of the contract, may be governed by the tort of deceit, which would lead to damages, but not rescission of the contract itself.*

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> ***47***. *Both kinds of fraud are subsumed within the expression "fraud" when it comes to arbitrability of an agreement which contains an arbitration clause."*

(69) As held in ***A.Ayyasamy (supra)***, affirmed in ***Rashid Raza (supra)*** and relied in ***Avitel (supra)***, "serious allegations of fraud" arise only if either of the two tests laid down therein are satisfied. If the first test with the plea of fraud permeate the entire contract and above all the agreement of arbitration rendering it void, is satisfied, it can be said that the arbitration clause or the agreement itself cannot be said to exist in a clear case in which the court finds that the party against whom breach is alleged cannot be said to have entered into the agreement relating to arbitration at all. As observed by the Apex Court in ***Avitel (supra)*** in Para-25, the second test that the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain, can be said to have made in cases in which the allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or mala fide conduct, thus, necessitating the hearing of the case by a court of law in the public domain, inasmuch as, they are predominantly questions arising from the contract itself or breach thereof, but questions arising in the public law domain.

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(70) Having noted the above, atleast, it is evident that the allegations of fraud and collusion in arriving at the contract namely the lease agreement dated 14.09.2012 were required to be examined by the learned Arbitrator so as to examine the question of arbitrability or non-arbitrability of the dispute, to arrive at the conclusion as to whether the pleas of fraud permeate the entire contract and the agreement of arbitration, rendering it void.

(71) Without examining the said question, it was not permitted for the learned Arbitrator to ignore the lease agreement dated 14.09.2012 to reach at the conclusion of relegating the claimants on the question of determination of rent, issuing directions to the competent authority under the Government resolutions / circular / public policy, pressed into service by the Respondent Company.

(72) Moreover, if after due examination of the rival contentions of the averments before it, the learned Arbitrator would have reached at the conclusion that the contract itself is an outcome of fraud, practiced at the stage of entering into the contract, within the meaning of Section 17 of the Contract Act, it could have referred to the parties to avail the remedy in ordinary civil law before the Civil Court in public Fora.

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(73) As this has not been done, we find that the award passed by the learned Arbitrator suffers from patent illegality and is against the substantive law regulating the contract namely the Indian Contract Act. The award, therefore, is liable to be set aside within the limited scope of Section 37 of the Arbitration and Conciliation Act' 1996, as it is not permissible for this Court to enter into the issue of arbitrability or non-arbitrability of the dispute in exercise of the supervisory powers under Section 37, which is akin to the revisional power of the Court of law. We may also record that the learned Commercial Court has committed an error of law in ignoring the above aspect of the matter while rejecting the application under Section 34 of the Act' 1996, noticing the findings returned by the learned Arbitrator at internal Page '33' of the impugned award.

(74) For the above discussion, the judgment and order dated 13.09.2024 passed by the learned Special Judge, Commercial Court and 3rd Addl. District and Sessions Judge, Ahmedabad (Rural) at Navrangpura as also the award dated 26.11.2021 passed by the learned Arbitrator are hereby set aside. The parties are at liberty to avail the remedy available in law, either through arbitration or by approaching the Civil Court, as may be advised. In any such evantualities, all rights and contentions of the parties are left open and it is clarified

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that any of the observations made hereinabove will not come in the way of either of the parties in any such proceedings.

(75) With the above, the First Appeal stands disposed of.

(SUNITA AGARWAL, CJ)

(PRANAV TRIVEDI,J)

SAHIL S. RANGER