IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL APPEAL NO. 37 OF 2020
IN
COMMERCIAL ARBITRATION PETITION NO.1278 OF 2019
WITH
INTERIM APPLICATION NO. 2137 OF 2019

Urban Infrastructure Real Estate Fund .. Appellant

Versus

Neelkanth Realty Private Ltd. & Ors. .. Respondents

WITH
COMMERCIAL APPEAL NO. 40 OF 2020
IN
COMMERCIAL ARBITRATION PETITION NO. 1260 OF 2019
WITH
INTERIM APPLICATION NO. 2140 OF 2019

Urban Infrastructure Real Estate Fund .. Appellant

Versus

Bhavik Rashmi Bhimjyani & Ors. .. Respondents

WITH
COMMERCIAL APPEAL NO. 38 OF 2020
IN
COMMERCIAL ARBITRATION PETITION NO.1312 OF 2019
WITH
INTERIM APPLICATION NO. 2138 OF 2019

Urban Infrastructure Real Estate Fund .. Appellant

Versus

Rashmi Chunilal Bhimjyani & Ors. .. Respondents

Mr. Fredun Devitre, Senior Advocate a/w Mr. Aditya Bapat, Mr. Siddharth Joshi, Mr. Hamd Bhati i/by Junnnarkar & Associates for Appellant.

Mr. Venkatesh Dhond, Senior Advocate a/w Runali Samgiskar i/by Law Charter for Respondent No.1 in COMAP/37/2020 and for Respondent No.5 in COMAP/38/2020 and COMAP/40/2020.

Ms. Gulnar Mistry, Mr. Saket Mone, Mr. Subit Chakrabarti, Mr. Shrey Shah and Mr. Bhupen Garud i/b Vidhi Partners for Respondent nos.1 and 2 in COMAP/38/2020 and COMAP/40/2020 and for Respondent nos.2 and 5 in COMAP/37/2020.

Mr. Akshay Petkar for Respondent Nos.3(a) to 3(d) and Respondent No.4 in all Appeals

CORAM : ALOK ARADHE, CJ. &
M.S. KARNIK, J.

RESERVED ON : 27th MARCH, 2025
PRONOUNCED ON : 2nd APRIL, 2025

JUDGMENT [PER : CHIEF JUSTICE]

These appeals filed under Section 37 of the Arbitration and Conciliation Act, 1996 (**1996 Act**) emanate from a common order dated 4th December 2019 passed by the learned Single Judge in three petitions filed under Section 34 of the 1996 Act. The learned Single Judge, by impugned order has modified the interim award dated 27th August 2019 passed by the Arbitrator to the extent that finding recorded by the Arbitrator on the basis of demurrer on issue No.1 viz. whether claims of the appellant are within limitation would not foreclose the issue and would not preclude the Arbitrator from examining the issue of limitation on the basis of material on record if tendered and if so warranted. In order to appreciate the challenge of the appellant to the impugned order, relevant facts need mention, which are stated infra.

(A) FACTS:

2. The appellant is a private equity fund incorporated as a public company in Mauritius. The respondent No.1 is a private limited company incorporated under the Companies Act 2013. Respondent Nos.2, 4 and 5 are the Directors of the said Company. Whereas respondent Nos.3(a) to 3(d) are legal representatives of original respondent No.3.

3. The appellant as well as respondent Nos.1, 2, 4 and 5 and original respondent No.3 entered into a share subscription agreement and shareholders agreement (hereinafter referred to as the **agreements**) on 23rd July 2008. The appellant invested a sum of Rs.25,00,00,000/- (Rs. Twenty-Five Crores) in shares and debentures of respondent No.5 company on the basis of agreements and the respondents were required to put up a project on 700 acres in Pune district through respondent No.5 company. According to the appellant, the respondents failed to comply with the terms and conditions of the agreement and committed various breaches of the agreement. The Supreme Court, on the application of the appellant, by an order dated 15th January 2018, appointed sole Arbitrator to adjudicate the dispute between the parties.

4. The appellant filed a statement of claim, whereas respondent No.5 filed a statement of defence and respondent No.1 filed a counter claim before the Arbitrator on 1st October 2018, 22nd November 2018 and 26th November 2018, respectively. The arbitral tribunal framed the issues on 26th June 2019. Issue No.1, which is relevant for the purposes of instant appeal, is extracted below for the facility of reference:

(i) Whether all or any of the claims made by the claimant are barred by law of limitation?

5. Thereafter on 14th August 2019 affidavit in lieu of examination in chief of witness No.1 of the claimant was filed. The arbitral tribunal on 27th August 2019 decided to deal with the aforesaid issue of limitation viz. issue No.1 as a preliminary issue on the basis of demurrer. The Arbitrator, by an interim award dated 27th August 2019 answered the issue No.1 in the negative and held that the entire claim of the appellant was within limitation.

6. The interim award passed by the Arbitrator was challenged in three petitions filed under Section 37 of the 1996 Act. The learned Single Judge, by impugned order dated 4th December 2019, *inter alia;* held that issue of limitation was heard as a preliminary issue on the basis of statement of claim and finding recorded on that basis by the Arbitrator being a preliminary issue decided on demurrer would remain a preliminary finding subject to evidence which may be tendered by the parties. The learned Single Judge further noted that Arbitrator himself recorded the finding that if the issue of limitation would have been answered after all the evidence had been recorded, the Arbitrator would have been inclined to accept some of the submissions of the respondents. The learned Single Judge, therefore, modified the interim award dated 27th August 2019 to the extent that preliminary finding on the issue of limitation on the basis of demurrer would not foreclose the issue and would not preclude the Arbitrator from examining the issue of limitation on the basis of evidence and other materials on record, if tendered and if so warranted. Accordingly, the commercial

petitions under Section 34 of the 1996 Act were disposed of. In the aforesaid factual background the appellant, who is the claimant before the arbitrator, has filed these appeals.

(B) SUBMISSIONS ON BEHALF OF THE APPELLANT:

7. Learned Senior Counsel for the appellant, while inviting attention of this Court to Section 19 of the 1996 Act, submitted that arbitral tribunal is not bound to follow the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872 and the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. In support of aforesaid submission, reference has been made to the decision of Supreme Court in ***JAGJEET SINGH LYALLPURI (DEAD) THROUGH LEGAL REPRESENTATIVES AND OTHERS V. UNITOP APARTMENTS & BUILDERS LTD.***[1]***.***

8. It is submitted that respondents had agreed to the procedure of determination of preliminary issue of limitation on the basis of demurrer. In this connection our attention has been invited to paragraph 11 of the order passed by the Arbitrator. It is, therefore, contended that having consented to the procedure of determination of preliminary issue of demurrer, it is not open for the respondents to approbate and reprobate and it is estopped from raising contention to the contrary. It is further contended that respondents took a chance before the Arbitrator and having failed in their attempt, could not have been allowed to seek a second chance to reagitate the same issue before the Arbitrator at

1 ***(2020) 2 SCC 279***

the later stage of the proceeding.

9. It is submitted that the learned Single Judge ought to have appreciated that he was not sitting as an appellate court and was dealing with a petition under Section 34 of the 1996 Act. It is contended that learned Single Judge ought to have appreciated that the arbitration being an International arbitration, the same could have been set aside only on the ground that the award was in conflict with public policy of India i.e. it was in contravention with fundamental policy of Indian law. It is, therefore, contended that without recording a finding whether the interim award is in conflict with public policy of India, the learned Single Judge erred in dealing with the merits of the matter and in recording a finding that the Arbitrator was in error in deciding an issue of limitation on the basis of demurrer.

10. It is urged that the learned Single Judge ought to have appreciated that the interim award is a final award on the matters connected therein and the same finally decides a matter which can be decided in the final award. In support of aforesaid submission, reliance has been placed on decision of Supreme Court in ***M/S. INDIAN FARMERS FERTILIZER COOPERATIVE LIMITED VS. BHADRA PRODUCTS[2].*** It is contended that learned Single Judge cannot be permitted to substitute his view for the view of Arbitrator. Lastly it is contended that while passing the impugned order, the learned Single Judge has travelled beyond the limited scope of Section 34 of the 1996 Act. In support of his submission, reliance has been placed on the decision of the Supreme Court in ***SHRI***

2 ***(2018) 2 SCC 534***

RAMO BARMAN AND OTHERS VS. SMT. DAGRIPRIYA KACHARI AND OTHERS[3] and ***SSANGYONG ENGINEERING & CONSTRUCTION CO. LTD. VS. NATIONAL HIGHWAYS AUTHORITY OF INDIA (NHAI)***[4]***.*** It is, therefore, contended that the impugned order be set aside.

(C) SUBMISSION ON BEHALF OF THE RESPONDENTS:

11. On the other hand, learned Senior counsel for the respondents submitted that the interim award passed by the Arbitrator is required to be read as a whole. It is submitted that on reading the interim award in its entirety, it is evident that respondents were agreeable to preliminary issue being decided even after the affidavit of evidence was filed as they legitimately believed that while deciding the preliminary issue the Arbitrator would consider the defence of the respondent as well. It is contended that respondents were surprised when at the commencement of the hearing the Arbitrator declared that he would decide the issue finally with regard to limitation on the basis of demurrer. It is submitted that such a course of action was wholly impermissible in law to the Arbitrator. It is pointed out that the respondents strongly objected to the procedure adopted by Arbitrator on principle as well as with reference to judicial precedent. It is contended that neither the principles of waiver nor estoppel apply to the facts of the case. It is submitted that the Arbitrator had decided the issue of limitation while conducting an Order VII Rule 11 like inquiry by looking into the pleadings of appellant only and therefore, such preliminary finding cannot foreclose

3 ***AIR 1992 GAUHATI 72***
4 ***2019 SCC OnLine SC 677***

the right of respondents from establishing that claim is barred by limitation on consideration of pleadings and evidence of both the parties. It is submitted that the impugned award is in conflict with public policy of India and therefore, has rightly been modified by the learned Single Judge. In support of his submission reliance has been placed on decision of the State Appellate Court in the United States, in the case of ***Leibman Vs. Curtis***[5]***.***

(D) REJOINDER ON BEHALF OF THE APPELLANT:

12. By way of rejoinder reply, the learned senior counsel for the appellant submitted that the submission that Arbitrator, while deciding the preliminary issue with regard to limitation, has acted unfairly in not allowing the parties to lead evidence on the issue of limitation is incorrect. It is contended that if para 8 of the interim award is read with para 11 it is *ex facie* clear that respondents agreed to a certain procedure relating to the manner in which issue with regard to limitation would be decided i.e. the procedure contemplated by Section 19 of the 1996 Act. It is urged that respondents agreed that no evidence would be laid by them on the issue of limitation and the same can be decided as a preliminary issue on the demurrer on the terms as clarified by the Arbitrator. It is pointed out that the issue of limitation has been decided on the statement of claim and documents annexed thereto. It is urged that learned Single Judge, while deciding the petitions under Section 34 of the 1996 Act, has acted like an appellate court. It is also pointed out that the contention that interim

5 ***138 Cal.App.2d 222, 225-226 (1955)***

award contains a finding that had the evidence been led, the tribunal may have been inclined to accept some of the submissions of the respondents, is not correct. It is submitted that reference by the Arbitrator to the expression 'at this stage' means on that day itself. It is contended that now it is not open to the respondents to complain that Arbitrator ought to have deferred the hearing on the issue of limitation till the evidence was recorded. It is argued that order passed by the learned Single Judge cannot be upheld on the ground that the same is fair and reasonable. In support of aforesaid submission reliance has been placed on the decision of the Supreme Court in ***ASSOCIATE BUILDERS VS. DELHI DEVELOPMENT AUTHORITY[6].***

(E) CONSIDERATION:

13. We have considered the rival submissions and perused the record. Before proceeding further, it is apposite to take of relevant extract of Section 34 of the 1996 Act, after it was amended by Arbitration and Conciliation (Amendment) Act, 2015 (Act of 3 of 2016) dated 13th December 2015 w.e.f. 23rd October 2015, which reads as under:

> ***34. Application for setting aside arbitral awards.***
>
> *(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]--*

6 ***(2015) 3 SCC 49***

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

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

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

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

(b) the Court finds that--

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

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

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

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

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

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

Explanation 2 - For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy

of Indian law shall not entail a review on the merits of the dispute.

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

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

14. In the instant case, the interim award passed by the Arbitrator was challenged on the ground mentioned under Section 34(2)(b)(ii) of the 1996 Act i.e. the same was in contravention of fundamental policy of Indian law. Explanation (1) provides that an award is in conflict with 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) makes it evident that the test whether contravention with fundamental policy of Indian law shall not entail a review on merits of the dispute.

SCOPE OF SECTION 34 OF THE 1996 ACT

15. The scope and ambit of Section 34 is well delineated by decisions of Supreme Court. In ***SSANGYONG ENGINEERING & CONSTRUCTION CO. LTD. VS. NATIONAL HIGHWAYS AUTHORITY OF INDIA (NHAI)***

(SUPRA), while dealing with powers of the Court deciding the application under Section 34 of the 1996 Act, the Supreme Court took note of the amendments brought about to Section 34 of the Act by Amendment Act 2015 and explained the ratio of the decision of the Supreme Court in ***ONGC VS. WESTERN GECO INTERNATIONAL LTD.***[7], and laid down the following principles which are mentioned in para 34 to 41 of the judgment which are extracted for the facility of reference:

> *"(i) The interference by the court with an award on the ground that arbitrator has not adopted a judicial approach would tantamount to interference with merits of the award which cannot be permitted, post amendment of Section 34 of the Act.*
>
> *(ii) The ground for interference insofar as it concerns 'interests of India' has been deleted, therefore, it is no longer permissible to interfere with the award on the said ground.*
>
> *(iii) Similarly, the ground for interference in the award on the basis that the same is in conflict with justice and morality, has to be understood as conflict with 'most basic notions of morality or justice.*
>
> *(iv) The expression 'public policy of India' is now restricted to mean that a domestic award is contrary to fundamental policy of Indian law and the ground for interference that such an award is against basic notions of justice or morality is done away with.*
>
> *(v) The exercise of re-appreciation of evidence, which the appellate court can undertake is not permitted on the ground of patent illegality in the award.*
>
> *(vi) Mere contravention of substantive law of India by itself is no longer a ground available to set aside an arbitral award.*

7 ***(2014) 9 SCC 263***

(vii) The change made in Section 28(3) by the Amendment Act follows that construction of terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in a manner that no fair minded or reasonable person would, in short that arbitrators' view is not even a possible view to take. If the arbitrator wanders outside the contract and deals with the matter not allotted to him he commits an error of jurisdiction and this ground of challenge is covered under Section 34(2-A) of the Act.

(viii) A decision of the arbitral tribunal, which is perverse is though no longer a ground of challenge under public policy of India', would certainly amount to a patent illegality appearing on the face of the award.

(ix) Thus a finding recorded by an arbitrator which is based on no evidence at all or an award which invokes vital evidence in arriving at its decision would be perverse and is liable to be set aside on the ground of patent illegality."

(F) SCOPE OF SECTION 37 OF THE 1996 ACT:

16. An appeal is a continuation of an original proceeding. It is equally well settled in law that in absence of any statutory provision to the contrary, the power of appellate Court is co-terminus with the power of a subordinate court. [See : ***JUTE CORPN. OF INDIA LTD. VS. CIT[8].*** Thus, an appellate Court exercising the power under Section 37 of the 1996 Act would interfere only if a ground under Section 34 of the Act is made out. [See : ***STATE OF CHHATISGARH AND ANOTHER VS. SAL UDYOG PRIVATE LIMITED[9]***].

8 ***1991 Supp 2 SCC 744***
9 ***(2020) 21 SCC OnLine 1027***

SCOPE AND AMBIT OF PHRASE 'PUBLIC POLICY OF INDIA'

17. In ***ONGC LTD. VS. SAW PIPES[10],*** the Supreme Court dealt with the scope and ambit of expression 'public policy of India'. It was held that if award is contrary to 'fundamental policy of Indian law', or interest of justice or morality or patently illegal, the same would be contrary to 'public policy of India'. A three Judge Bench of Supreme Court in ***ONGC VS. WESTERN GECO INTERNATIONAL LTD. (SUPRA)*** however, noted that the expression 'fundamental policy of Indian law' was not elaborated upon in ***ONGC LTD. VS. SAW PIPES (SUPRA).*** It was held that the expression 'fundamental policy of Indian law' would include three distinct and fundamental juristic principles which must be understood as part and parcel of Indian law, which are as under:

> *(i) In every determination, a Court or other authority that affects rights of a citizen or leads to any civil consequences the Court or authority is bound to adopt a judicial approach. The duty to adopt such an approach arises from the very nature of power exercised by the court and authority.*
>
> *(ii) The Court or a quasi-judicial authority, while determining the rights and obligation of the parties must follow principles of natural justice.*
>
> *(iii) A decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law.*

It was further held that the expression 'fundamental policy of law' cannot be put in the straight jacket of a definition.

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10 ***(2003) 5 SCC 705***

18. The Parliament, after the aforesaid decision of the Supreme Court, amended Section 34 of the 1996 Act by Amendment Act of 2015 w.e.f. 23rd October 2015 and incorporated the clarification to ensure that the phrase 'fundamental policy of Indian law' is narrowly construed so as not to entail a review on merits of a dispute.

ANALYSIS:

19. In the backdrop of aforementioned well settled legal position, we now examine whether a ground under Section 34(2)(b)(ii) for interference with the impugned interim award is made out. An award shall be treated to be in conflict with public policy of India if it is in contravention of fundamental policy of Indian law or is conflict with most basic notions of morality or justice. The phrase 'fundamental policy of Indian law' requires a Court or other authority determining the rights of citizen to adopt a judicial approach. The expression 'fundamental policy of Indian law' would include within its ambit a decision which is so perverse or irrational that no reasonable person would arrive at the same. Thus, the Arbitrator, while deciding the issue of limitation is required to adopt a judicial approach. Even though Section 19(1) of the 1996 provides that arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or by the Indian Evidence Act, 1872, however, Section 19(1) does not prohibit the arbitral tribunal from following the fundamental principles underlying the Civil Procedure Code, 1908 or the Indian Evidence Act, 1872.

20. The Court or other authority dealing with the rights of parties has power to try the issue as a preliminary issue if the

same relates to the jurisdiction of the Court or a bar created by any law for the time being in force. An issue of limitation which normally is a mixed question of law and fact could be tried as a preliminary issue only if the same does not require any evidence.

21. Now we advert to the facts of the case in hand. In the instant case, the Arbitrator framed the issues on 26th July 2019. Thereafter, on 14th August 2019 affidavit in lieu of examination in chief of the appellant was filed. On 27th August 2019 the proceedings before the Arbitrator was fixed whether the issue No.1 should be tried as preliminary issue. In paragraph 1 the Arbitrator has recorded a finding that the parties were told that if issue No.1 has to be tried as a preliminary issue, it has to be decided on the basis of demurrer. Thereupon, the counsel for respondent No.3 made the following submission which is recorded in paragraph 2 of the interim award, which reads as follows:

> ***"2.*** *Mr. Prateek Seksaria, the learned Counsel for Respondent No.3 insists that Issue No.1 must be tried, not on the basis of demurrer but on the basis of principles analogues to Order XIV Rule 2 of the Code of Civil Procedure, 1908 ("CPC") and after taking into consideration the pleadings and the admitted evidence on record. He further submits that the application to determine the Issue o limitation as a preliminary Issue is not on the principles of Order VII Rule 11 of the CPC and thus the question of deciding it on the basis of demurrer does not arise."*

22. The Counsel for respondent also relied on the judgment of Delhi High Court in ***MOHAMMED YASIN VS. ABDUL KALAM AND ANR.***[11] The Arbitrator, in paragraph 8 to 11 of the interim award, held as under:

11 ***1987 SCC OnLine Delhi 135***

"8. It appears that Mr. Seksaria has not understood what the Tribunal had stated at the start. The authorities cited only deal with what a Court or Tribunal can do. The question today is not what the Tribunal can or cannot do. Respondents have first to decide whether they want Issue No.1 to be decided only on the basis of Statement of Claim, documents annexed thereto and evidence of Claimant as they stand today. If so, it would necessarily mean on the basis of the demurrer. What the Tribunal has enquired is whether the Respondents feel that any evidence is required on this Issue. If Respondents or any of them feel that evidence is necessary then they must say so at this stage. If Issue No.1 is being argued today, it is on the basis that according to the Respondents no evidence is required to be led by them on this issue. Therefore, this issue will necessarily be argued today on the basis of a demurrer. Once the issue is argued, this Tribunal is not going to leave this open unanswered so that parties can reagitate the same issue subsequently. Therefore, Respondents are called upon again to state whether according to them this issue requires any evidence at all or whether it can be tried only on the basis of the pleadings. If the Respondents decide that this issue will require evidence, then the issue cannot be proceeded with today.

10. The Respondents are now called upon to decide whether they want this issue to be tried today or whether according to them some evidence will be necessary on this issue.

11. Mr.Ghelani, Mr. Seksaria and Mr. A.S.Pal state that the Respondents are willing to proceed on the basis of demurrer, as according to them, no evidence is required to decide issue No.1. Accordingly, issue No.1 is being heard on the basis of demurrer as a Preliminary issue.

23. The Arbitrator, in paragraph 37 held that had this issue been answered after all the evidence been recorded, this Tribunal may have been inclined to accept some of the submissions of the respondents. It was further held that since at this stage, issue is being decided on the basis of demurrer, the averments in the statement of claim have to be

taken as correct. The relevant extract of para 37 reads as *under:*

> *"37. Heard the parties. As stated above, at this stage, the Tribunal is proceeding on the basis of demurrer. Had this issue been answered after all evidence had been recorded, then this Tribunal may have been inclined to accept some of the submissions of the Respondents. But at this stage as this issue is being decided on the basis of demurrer, the averments in the Statement of Claim have to be taken as correct……"*

24. In the instant case, the Arbitrator has not recorded a finding that the issue of jurisdiction is an issue which does not require the parties to adduce any evidence. The Arbitrator himself in para 37 of the interim award has held that had parties adduced evidence it would have arrived at a different conclusion. In our opinion, the Arbitrator, while passing the impugned award has failed to adopt a judicial approach and has arrived at a decision which no reasonable person would have arrived at, specially in absence of any finding in the impugned award whether the issue of limitation is a mixed question of law and fact and whether the same can be decided without recording any evidence. It was clearly stated on behalf of respondent No.3 that issue of limitation should not be decided on the basis of demurrer but on the principles analogous to Order XIV Rule 2 of the CPC and after taking into consideration the pleadings and admitted evidence on record. If paragraph 2, 3, 4, 8, 10 and 11 are read together, the contention that the respondents had agreed to the decision of the issue without recording evidence does not deserve acceptance. Thus, it is axiomatic that the impugned award has been passed in violation of 'fundamental policy of Indian law' and a ground for interference with the impugned award

under Section 34(2)(b)(ii) is made out.

25. Even though we find substance in the submissions made by learned senior counsel that learned Single Judge has acted like a court of appeal while dealing with objections under Section 34 of the 1996 Act, yet for the reasons assigned by us in the preceding paragraphs, we agree with the conclusion arrived at by the learned Single Judge that the award passed by the Arbitrator was required to be modified.

26. In the result, appeals fail and are hereby dismissed.

(M. S. KARNIK, J.) **(CHIEF JUSTICE)**