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

Reserved on: January 27, 2025
% ***Pronounced on: February 14, 2025***

\+ **FAO(OS) (COMM) 201/2023**

UNION OF INDIA **.....Appellant**

Through: Mr. R. Venkatramani, AGI, Mr. K.K. Venugopal & Mr. Gopal Jain, Senior Advocates with Mr. Amit Dhingra, Mr. Rohit Mahajan, Mr. Siddharth Agrawal, Ms. Kesang Tenzin Doma, Ms. Sayanti Chatterjee, Mr. Abhishek Kr. Pandey & Mr. Raman Yadav, Advocates.

versus

RELIANCE INDUSTRIES LIMITED & ORS. **.....Respondents**

Through: Mr. Harish N. Salve, Senior Advocate with Mr. Sameer Parekh, Mr. Ishan Nagar, Mr. Abhishek Thakral, Ms. Sonali Basu Parekh, Ms. Ruchi Chauhan, Ms. Aditi and Ms. Chetna Kai, Advocates for R1.
Ms. Niyati Kohli, Mr. Nilay Gupta and Ms. Tarini Khurana Advocates for R2.
Mr. K. R. Sasiprabhu, Mr. Parth Rishik, Mr. Vishnu Sharma A.S. and Mr. Mohammed Ilyas, Advocates for R3.

CORAM:
HON'BLE MS. JUSTICE REKHA PALLI
HON'BLE MR. JUSTICE SAURABH BANERJEE

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SAURABH BANERJEE, J.

Premise:

1. The Union of India (through the Ministry of Petroleum & Natural Gas of the Government of India)[1], by virtue of the present appeal under *Section 37* of the Arbitration and Conciliation Act, 1996[2] read with *Section 13(1)* of the Commercial Courts Act, 2015, seeks to assail the order dated 09.05.2023[3] passed by the learned Single Judge in O.M.P. (COMM) 487/2018, whereby the application under *Section 34* of the Act preferred by it, against the Arbitral Award dated 24.07.2018[4] rendered by a 2:1 majority of the Arbitral Tribunal[5] was rejected by the learned Single Judge.

Factual Narrative:

2. The UOI on 12.04.2000, entered into a Production Sharing Contract[6] with both M/s. Reliance Industries Limited[7], who is the respondent no. 1 before us and one Niko Limited[8], who is the respondent no. 3 before us, in respect of Block Kg-DWN-98/3 situated in the Krishna-Godavari Basin off the coast of Andhra Pradesh[9], with a Participating Interest of 90% and 10% respectively. Soon thereafter, by way of a supplementary contract dated

[1]hereinafter referred to as '***UOI***' [Respondent before the learned Arbitral Tribunal; petitioner before the learned Single Judge]
[2]hereinafter referred to as '***Act***'
[3]hereinafter referred to as '***impugned order***'
[4]hereinafter referred to as '***Arbitral Award***'
[5]hereinafter referred to as '***AT***'
[6]hereinafter referred to as '***PSC***'
[7]hereinafter referred to as '***RIL***' [Claimant before the learned Arbitral Tribunal; respondent before the learned Single Judge]
[8]hereinafter referred to as '***Niko***'
[9]hereinafter collectively referred to as '***Reliance Block***'

21.02.2011, RIL transferred a portion of its 'Participating Interest' under the PSC in favor of one British Petroleum Exploration Limited[10], the respondent no. 2 before us.

3. In the said PSC, RIL and Niko as the 'contractor' had the right to take Cost Petroleum in accordance with the provisions of *Article 15* of the said PSC; the right to take its Participating Interest share of Profit Petroleum in accordance with the provisions of *Article 16* of the same PSC; the right to receive its Participating Interest share of any incidental income and receipts arising from Petroleum Operations and the obligation to contribute its Participating Interest share of cost and expenses including Contract Cost.

4. The UOI, also entered into another PSC with one Cairn Energy India Limited[11] in respected of the Block KG-DWN-98/2 and also with Oil and Natural Gas Corporation Limited[12] qua Block KG-OS-IG. Later on, ONGC acquired rights from CEIL qua Block KG-DWN-98/2. Interestingly, both the Block KG-OS-IG and Block KG-DWN-98/2[13] turned out to be adjoining blocks to the Reliance Block.

5. On 25.09.2000, RIL was granted a Petroleum Exploration License[14] qua the Reliance Block w.e.f., 07.06.2000 for a period of seven years, whereafter, from September 2001 till March 2002, RIL carried out 3D seismic survey in the Reliance Block and notified it to the UOI.

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[10]hereinafter referred to as '***BPEL***'
[11]hereinafter referred to as '***CEIL***'
[12]hereinafter referred to as '***ONGC***'
[13]hereinafter collectively referred to as '***ONGC Block***'
[14]hereinafter collectively referred to as '***PEL***'

6. On 26.11.2002, preliminary results qua Original Gas in Place[15] was prepared by one M/s. DeGolyer and MacNaughton[16] and forwarded by RIL to the UOI. The above was then followed by a Final Report by the very same D&M to the Director General of Hydrocarbons[17] on 31.01.2003.

7. Thereafter, though, the very same D&M also submitted an Appraisal Report on 06.11.2003 for Niko[18] however, the same was neither forwarded to the UOI nor the DGH.

8. Thereafter, on 26.05.2004 RIL submitted an Initial Development Plan[19] qua 3 wells, i.e., Well 1 (D1), Well 2 (D2) and Well 3 (D3) situated in the Reliance Block, to the UOI. The said IDP was approved by the UOI in November 2004. Subsequently, RIL submitted an addendum to the above IDP[20] on 20.10.2006 to the Management Committee appointed in terms of *Article 6* of the PSC, who eventually approved it in December 2006 itself.

9. It was only then on 01.04.2009 that RIL commenced commercial production of gas in the Reliance Block in accordance with the two aforesaid approvals granted to it in IDP and AIDP.

Genesis involved:

10. It was during the existence of PSC and though RIL was working in the Reliance Block and the ONGC was working in the ONGC Block, certain disputes arose, whence ONGC addressed a letter dated 22.07.2013

[15]hereinafter collectively referred to as '***OGIP***'
[16]hereinafter collectively referred to as '***D&M***'
[17]hereinafter collectively referred to as '***DGH***'
[18]hereinafter collectively referred to as '***D&M 2003 Report***'
[19]hereinafter collectively referred to as '***IDP***'
[20]hereinafter collectively referred to as '***AIDP***'

to the UOI stating that there was "*… …evidence of lateral continuity of gas pools… …*" *inter-se* the Reliance Block and the ONGC Block i.e., the blocks were connected and there was migration of gas *inter-se* them.

11. The above led to filing of W.P.(C) 3054/2014 by ONGC before this Court against the UOI and RIL, primarily claiming that since the gas reservoirs of the Reliance Block and the ONGC Block were inter-connected, it resulted in the migration of natural gas, and that RIL had been '*unjustly enriched*' by producing and selling the migrated gas from the ONGC Block.

12. In the meanwhile, during the pendency of the said W.P.(C) 3054/2014, ONGC and RIL entered into an "*Agreement for Project Management of Independent Third-Party Study*" without prejudice to the rights and contentions of the parties under the PSC, appointing D&M vide letter of Award dated 03.07.2014 to undertake an independent third-party study of the alleged continuity and migration of gas, as contended by the ONGC, *inter-se*, the Reliance Block and the ONGC Block. The DGH was also appointed as a 'Facilitator' thereof.

13. Later on, a learned Single Judge of this Court vide order dated 10.09.2015, disposed of the said W.P.(C) 3054/2014 with certain directions to the parties for co-operating with D&M and also to furnish all information so required by the D&M for the study of connectivity, and furthermore that UOI would take a decision within a period of six months of the submission of the D&M Report qua the issue of alleged connectivity and migration of gas, as raised by ONGC therein.

14. The relevant portion of the said order dated 10.09.2015 passed by the learned Single Judge of this Court in said W.P.(C) 3054/2014 is as under:-

> "*18. Accordingly, the petition is disposed of with the following directions:*
>
> *(I) All parties concerned shall co-operate fully with M/s. DeGolyer & MacNaughton, being the independent agency appointed by the respondent No.1 UOI, and shall promptly furnish all information, particulars and data required to enable and assist the said agency to submit the report as soon as possible;*
>
> *(II) Upon report being submitted, copies thereof would be supplied to the interveners, petitioner, respondent No.3 RIL and / or such other persons who may be found entitled thereto;*
>
> *(III) The interveners, petitioner as well as the respondent No.3 RIL would be entitled to make their representations to the Government of India with respect to the said report and the Government of India shall, for taking decision on the action if any required on the said report, follow such procedure as it may be required to take and deem necessary, having regard to the principles of transparency, fairness and natural justice;*
>
> *(IV) The respondent No.1 UOI shall take a decision on the action to be taken on the basis of the report aforesaid within a period of six months of the submission thereof by M/s. DeGolyer & MacNaughton;*
>
> *(V) The party/s remaining aggrieved from the decision so taken / not taken by the respondent No.1 UOI / Government of India shall have remedies in accordance with law;*
>
> *(VI) The petitioner as well as interveners are also granted liberty to, if feel the need, apply for revival of this petition, subject of course to all the pleas of the respondents, including as already taken and as to the very maintainability of this petition. This direction shall however not dilute in any manner the directive aforesaid of the Government of India to the PSUs.*"

15. Thereafter, the D&M submitted its Final Report dated 19.11.2015[21] concluding that "*the integrated analyses indicated connectivity and continuity of the reservoirs across the blocks operated by ONGC and RIL*".

[21]hereinafter collectively referred to as '***D&M 2015 Report***'

It is for these reasons that the UOI constituted a single member committee of Hon'ble Mr. Justice A.P. Shah (Retd.)[22] to consider the D&M Report 2015 and to recommend a future course of action in light of the findings therein. However, RIL aggrieved by the stand taken by the DGH before the Shah Committee addressed a letter to the UOI, and withdrew its participation in the hearings before the said Shah Committee.

16. Thereafter, on 29.08.2016 the Shah Committee issued its Final Report, based whereon, the UOI raised a Demand Notice, for USD 1,552,071,067.00 as computed provisionally along with interest till 31.03.2016 and of USD 174,905,120.00 towards revised additional cumulative Profit Petroleum claimed to be receivable till 31.03.2016, for disgorgement of unjust enrichment claimed to have been made by RIL due to the migration of gas, upon RIL.

Arbitral Proceedings:

17. In response, RIL, invoking the arbitration clause in terms of *Article 33* of the PSC, issued a Notice of Arbitration dated 11.11.2016 to the UOI. Whereafter, the 3 member AT was constituted, before whom RIL in its Statement of Claim sought the following reliefs: -

> "*191.1. Declaring that Contractor has produced all hydrocarbons from its Contract Area by conducting Petroleum Operations reviewed and approved by GOI;*
>
> *191.2. Declaring that Contractor has the right to produce all hydrocarbons from wells drilled in its Contract Area by conducting Petroleum Operations reviewed and approved by GOI, which may include hydrocarbons that could have migrated to those wells from an adjacent block;*

[22]hereinafter referred as '***Shah Committee***'

191.3. Declaring that Contractor is entitled to retain all benefits from, and cost recover for, the production referenced in paragraphs 191.1 and 191.2 above in accordance with the provisions of the PSC;

191.4. Declaring that Contractor has paid GOI both Profit Petroleum and royalty for the production referenced in paragraphs 191.1 and 191.2 above in accordance with the provisions of the PSC;

191.5. Declaring that Contractor has paid GOI both Profit Petroleum and royalty for the production referenced in paragraphs 191.1 and 191.2 above in accordance with the provisions of the PSC;

191.6. Declaring Contractor paid GOI both Profit Petroleum and royalty for the production referenced in paragraphs 191.1 and 191.2 above in accordance with the provisions of the PSC and is therefore estopped from pursuing a claim for unjust enrichment against Contractor;

191.7. Declaring that GOI has no right to restitution or other relief, not having suffered any injury or other compensable harm resulting from Contractor's production of hydrocarbons that allegedly migrated to Contractor's wells in its Contract Area from the adjacent ONGC Blocks;

191.8. Ordering GOI to reimburse all of Contractor's costs incurred in connection with this arbitration, including fees and expenses of the arbitrators, legal counsel, witnesses, experts, and consultants;

191.9. Ordering GOI to pay Claimant simple interest of an amount as determined by the Tribunal on any amounts from the date of the award until the date of payment; and

191.10. Ordering that the award be immediately enforceable, notwithstanding commencement or pendency of any action to set it aside or of any other proceeding."

18. In response thereto, first the UOI filed a simpliciter Statement of Defense, however, later raised Counter Claims as well.

<u>Arbitral Award [Majority (2:1)]: learned Arbitral Tribunal:</u>

19. Based upon the pleadings before it, learned AT, framed the following *twelve* issues:-

"*1) Whether the Claimant's rights and obligations under the PSC to conduct Petroleum Operations in the Contract Area prohibit the Claimant from producing and selling gas which migrated into the sub-sea reservoir lying within the Contract Area from a source outside the Contract Area?*

2) [If the answer to (1) is "YES";] Whether the Claimant is obliged to seek and obtain express permission to produce and sell migrated gas and if so, whether the Claimant obtained such permission?

3) Whether the Claimant produced and sold gas which migrated into the sub-sea reservoir lying within the Contract Area from a source outside the Contract Area. If so, to ascertain quantity?

4) Whether the Claimant produced and sold gas from the sub-sea reservoir lying within the Contract Area which extends beyond the Contract Area. If so, to ascertain quantity?

5) [If the answers to (3) or (4) is "YES";] Whether the Claimant is entitled under the PSC to retain or recover:

i. *cost petroleum;*

and/ or

ii. profit petroleum, from the production and sale of such gas.

6) [If the answer to (5) is "NO"] Whether the Claimant has been "unjustly enriched";

B. Disclosure of the 2003 D&M Report.

7) Whether the Claimant is obliged under Articles 10, 12 and 26 of the PSC to:

a. Make disclosure of the 2003 D&M Report to the Respondent.

b. Provide information and data as well as all interpretative and derivative data, including reports, analysis, interpretations and evaluations prepared in respect of Petroleum Operations, including interpretation and analysis, relating to connectivity of the reservoirs and/ or continuity of the channels across in the boundary of Block KG-DWN-98/3.

8) [If the answer to Issue (7) is "YES";] Whether the Claimant had complied with such obligation.

9) [If the answer to (8) is "NO";] Whether the non-compliance amounts to a material non-disclosure constituting a breach by the Claimant of the PSC and the PNG Rules?

10) [If the answer to Issue (9) is "NO";] Whether this prevented the Respondent from directing a joint development under Article 12 of the PSC or Rule 28 of the PNG Rules?

11) Whether the 2003 D&M report establishes connectivity of the reservoirs and/or continuity of the channels in Block KG- DWN-98/3 and the IG Block?

12) Whether the 2015 D&M Report establishes connectivity of the reservoirs and/or continuity of the channels in Block KG-DWN-98/3 and ONGC's Blocks (the IG Block and Block KG-DWN-98/2)?"

20. While dealing with the aforesaid issues, the learned AT in 2:1 majority rendered an Arbitral Award, primarily by holding as under:-

20.1. *Issue no.1*: As per the learned AT there was no express prohibition against RIL from extracting the migrated gas within the contract area/ development area. Also, that the UOI may require unitization or a joint development if it takes the view that "… …*the Reservoir can be more efficiently developed together on a commercial basis… …for securing the more effective recovery of Petroleum from such Reservoir*… …". In effect, the UOI would not be required to make such an order of joint development until, it is satisfied that joint development is commercially more efficient. Besides that, the learned AT also rendered that the terms of the PSC read together with Petroleum and Natural Gas Rules, 1959[23] make explicit that RIL as the contractor, licensee and lessee, is permitted and required to extract all available gas within its contract area/ development area for the

[23]hereinafter referred to as '***1959 PNG Rules***'

benefit of the UOI, even if, such gas has migrated from beyond the Contract Area.

20.2. *Issue no.2*: As per the learned AT, RIL did not need any further express permission to produce and sell any migrated gas that could have come into its Contract Area.

20.3. *Issue nos.3 and 4*: As per the learned AT, there was connectivity of reservoirs, as such the gas produced by RIL did include the gas which had migrated into the reservoir lying within the Contract Area from a source outside the Contract Area.

20.4. *Issue no.5*: As per the learned AT, RIL was entitled to all rights granted to it under the PSC. It was entitled to retain and recover Cost Petroleum from the gas so extracted, produced and sold.

20.5. *Issue no.6*: In view of the aforesaid finding in issue no.5, as per learned AT, RIL was not '*unjustly enriched*'.

20.6. *Issue no.7*: As per learned AT, RIL was required to disclose not only D&M 2003 Report but also, all data stipulated in *Article 26.1* of the PSC, inclusive of all interpretive and derivative data, including reports, analysis, interpretations and evaluations prepared in respect of petroleum operations; and also interpretation and analysis relating to connectivity of the reservoirs and/ or continuity of the channels across in the boundary of the Reliance Block.

20.7. *Issue no.8*: In view of the aforesaid finding in issue no.7, as per the learned AT, RIL had failed to comply with the requirements under *Article*

26.1 of the PSC since, it failed to provide the D&M 2003 Report to the UOI.

20.8. *Issue no.9*: As per the learned AT, despite having numerous opportunities to order joint development inquiry, the DGH declined to do so notwithstanding the vast amounts of interpretive data provided by RIL to DGH. It is because of this, non-compliance by RIL of the terms of the *Article 26.1* of the PSC, did not amount to a material non-disclosure constituting a breach by the RIL of the PSC and 1959 PNG Rules.

20.9. *Issue no.10*: As per learned AT, the failure of RIL to disclose the D&M 2003 Report did not prevent the UOI from directing a joint development under *Article 12* of the PSC.

20.10.*Issue no.11*: As per the learned AT, since the D&M 2003 Report was not intended to be a scientific investigation or examination of the operations of the Project, therefore, there is no basis for D&M's belief that there was continuity or connectivity of the reservoirs. Thus, the D&M 2003 Report only suggests the connectivity of reservoirs and the learned AT could not find anything in the said D&M 2003 Report that established connectivity of reservoirs.

20.11.*Issue no.12*: As per learned AT, although gas migration estimates made in D&M 2015 Report were highly unreliable, grossly inaccurate and exaggerated, however, there was sufficient evidence to show there was some degree of connectivity.

Dissenting Award: 3rd Arbitrator:

21. The 3rd Arbitrator of the learned AT gave a 'dissenting' Award, wherein the issues involved were divided into four parts after observing as under:-

> "*21. For the purpose of my opinion, I have divided the issues into four parts. Part-1 deals with the question whether the claimant's right and obligations under the PSC to conduct Petroleum Operations in the Contract Area prohibit it from producing and selling gas which migrated into the subsea reservoir lying within the Contract Area from a source outside the Contract Area and if this answer to this question is in affirmative, whether the claimant was under an obligation to seek and obtain express permission to produce and sell migrated gas and whether the claimant had in fact obtained such permission. Part-II deals with the question whether the claimant produced and sold gas which migrated into sub-sea reservoir lying within its Contract Area from a source outside that area, if so, to ascertain quantity of such gas. If these 2 issues are decided in affirmative then the next question is whether the claimant is entitled to retain or recover cost petroleum and/or profit petroleum from the production and sale of such gas. The related issue is whether it is a case of unjust enrichment by the clamant. Part-III addresses the Respondent's allegation that the claimant is guilty of suppression of the facts and in particularly D&M report of 2003, as averred in the counter claim. This takes care of Issues Nos. 7 to 12. Part-IV relates to the conclusions of the findings recorded under Part-J, II and Ill and the cost of arbitration.*"

20.1. *Part I*: As per the dissenting Award, since the PSC was executed *inter-se* the Government of India/ UOI and RIL under *Article 297* of the Constitution of India[24] and other statutory provisions and in light of what has been held by the Hon'ble Supreme Court in ***Reliance Natural Resources Ltd. [RNRL] vs. Reliance Industries Ltd. [RIL]***[25], RIL could not have extracted the natural gas "… …*without the express permission of the Union of India, which permission can be granted only pursuant to a*

[24]hereinafter referred to as "***CoI***"
[25](2010) 7 SCC 1

rationally framed utilization policy… …", and since D&M was itself commissioned in 2015 to determine the question of migrated gas, permission sought prior thereto was not relevant or relating to the migrated gas.

20.2. Further, as per the dissenting Award, under the PSC if a reservoir extends beyond Block boundaries, RIL may either seek permission to enlarge its Development Area, or jointly develop the area with the contractor of the adjoining block i.e., ONGC Block, or relinquish its rights to such reservoir, and there can be no effective lease or enjoyment of an area covered by a reservoir, if such reservoir is being drained by a different person/ entity on its block boundary namely by RIL of the ONGC Block.

20.3. *Part II*: As per the dissenting award, since RIL had participated in the 2015 D&M Report proceedings and was aware of the methodology of the study and did not object to it at the relevant point of time, it was estopped from urging anything to the contrary as also, in view of the *Article 33.2* of the PSC the D&M 2015 was binding upon RIL. Moreover, since the D&M 2015 Report was binding on the parties, the quantification of migrated gas determined therein was conclusive.

20.4. *Part III*: As per the dissenting Award, RIL was obligated under the PSC and the 1959 PNG Rules to disclose the D&M 2003 Report along with all data relating to continuity or connectivity which the RIL failed to do. Although the said D&M 2003 Report may not have conclusively established reservoir connectivity, it strongly suggested the same. Accordingly, the said non-disclosure was material in nature.

20.4. *Part IV*: As per the dissenting Award, in view of the findings in Part I, as also the principle of 'unjust enrichment', RIL was indeed 'unjustly enriched'.

Section 34, The Arbitration and Conciliation Act, 1996 proceedings:

21. Aggrieved by the findings in the majority Arbitral Award rendered by the learned AT, the UOI filed an application under *Section 34* of the Act for setting aside the majority Arbitral Award wherein, it primarily urged that *firstly*, the said Arbitral Award "… …*suffers from patent illegality*" since, despite the learned AT having rendered that RIL was in breach of the *Article 26.1* of the PSC, went on to hold that it was not a material breach, particularly whence, RIL was guilty of suppressing D&M 2003, D&M 2004 and D&M 2005 Report(s) and due to the said suppression on the part of RIL, the DGH/ UOI was not able to exercise its options of joint development of the Reliance Block and the ONGC Block; *secondly*, that the said Arbitral Award "… …*is in conflict with the Public Policy of India*… …" as the learned AT erred in holding that RIL cannot be made accountable for extracting and selling gas outside the Contract Area since this proposition is in the teeth of the Public Trust Doctrine[26] and, as the said doctrine was part of the "*public policy of India*", as also in view of the non-disclosure and suppression of the D&M 2003 Report and the law laid down by the Hon'ble Supreme in ***Common Cause vs Union of India***[27] that 100% disgorgement is mandatory when natural resources have been produced without any lawful/ express authority; and *thirdly* that there was "*Non-*

[26]hereinafter referred to as '***PTD***'
[27](2017) 9 SCC 499

Arbitrability of Disputes" as the claims of RIL fell outside the scope of the arbitration agreement, since it fell within the realm of public law and were matters of "*public policy*" being covered by the PTD, hence not arbitrable.

22. The said application under *Section 34* of the Act came to be dismissed by the learned Single Judge vide the impugned order wherein, he formulated the following issues:-

> *"33.1. Was the arbitration an "international commercial arbitration" within the meaning of section 2 (1)(f) of the A&C Act, and consequently whether "patent illegality appearing on the face of the award" is available as a ground for challenge under section 34 of the A&C Act?;*
>
> *33.2 Did the arbitration involve a question of "public law" making the dispute non-arbitrable?;*
>
> *33.3. Is the award in conflict with the "public policy of India", say, for being in contravention with the fundamental policy of Indian law; or in conflict with the most basic notions of morality or justice?;*
>
> *33.4. Was the transaction between the contesting parties governed by the 'public trust doctrine' with its over-arching considerations, that would warrant interference with the arbitral award on the ground that it was in conflict with the public policy of India?;*
>
> *33.5. Has the arbitral tribunal taken a "possible view and a view which is not "perverse". In addressing this last proposition, it would be necessary for the court to look at the factual controversies; the evidence adduced by the contesting parties in support of their respective positions; and also the conclusions arrived at by the arbitral tribunal, without however substituting the court's own view for the view taken by the arbitral tribunal on points of fact."*

23. The learned Single Judge, while dismissing the application under *Section 34* of the UOI vide the impugned order, went onto hold that the arbitration *inter-se* the UOI and RIL was an 'International Commercial

Arbitration' and as such, the ground of "*patent illegality*" was not available, to interfere with the Arbitral Award; and since there was no disposition of title/ ownership of the natural gas, which always lied with the UOI, RIL had a limited role to explore and extract the natural resources as a licensee. Therefore, as per the learned Single Judge, the PTD was not contravened; and even though RIL was in breach of the PSC by not disclosing the D&M 2003 Report, it was not material; further that RIL divided all profits derived from the production of all-natural gas in the manner provided under the PSC; that the learned AT was correct in coming to the finding that there was indeed existence of PTD, however, RIL had acted in furtherance of such doctrine by extracting petroleum in the most "*… …efficient and commercially sensible manner… …*" and furthermore that the PSC "*… …does not prohibit but permits… …*" the extraction of the migrated gas; that the conclusions drawn by the learned AT were such that a reasonable person could reach them and as such, it was "*certainly a possible view*".

Section 37, The Arbitration and Conciliation Act, 1996 proceedings:

Submissions of the Union of India:

24. Aggrieved thereby, the UOI preferred the present appeal under *Section 37* of the Act, before us. Mr. R. Venkataramani, learned senior Advocate and the learned Attorney General of India and Mr. K.K. Venugopal, learned senior Advocate and also the ex-learned Attorney

General of India along with Mr. Gopal Jain, senior Advocate, all appearing on behalf of the UOI[28] have primarily urged that the Arbitral Award is not an International Commercial Arbitration, more so, since the same itself categorically records that "… …*we fully accept and recognize that the named claimant in this arbitration is RIL and that Niko is not formally a party to this arbitration*… …", which, because of non-challenge by the RIL is final and binding on it. For the aforesaid proposition, learned Sr. Advocates for the UOI, placed reliance upon ***Larsen and Toubro Limited Scomi Engineering BHD vs. Mumbai Metropolitan Region Development Authority***[29]. Similarly, learned Senior Advocates also placed reliance upon ***Perkins Eastman Architects DPC vs. HSCC (India) Limited***[30], wherein, the Hon'ble Supreme Court has held that if the lead member of an arbitration proceedings is an Indian company, then the arbitration will not be treated as an International Commercial Arbitration. They then went onto urge that if the lead member in an arbitration is an Indian entity, then the arbitration has to be treated as a domestic arbitration.

25. Based thereon, learned Sr. Advocates for the UOI urged that the reliance on ***West Bengal Ors. vs Associated Contractors***[31] by the learned Single Judge is misplaced. Moreover, and in view thereof, particularly considering that the Arbitral Award being a domestic arbitration, the test of 'patent illegality' is available under *Section 37* of the Act.

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[28]hereinafter collectively referred to as '***learned Sr. Advocates for the UOI***'
[29](2019) 2 SCC 271
[30](2020) 20 SCC 760
[31](2015) 1 SCC 32

26. Learned Sr. Advocates for the UOI also urged that the disputes involved in the arbitration proceedings fell within the scope of "*public law*" since, it was admittedly the UOI, who, as per the recommendations of the Shah Committee, raised a Demand Notice dated 03.11.2016 for payment of a sum of about USD 1.5 billion towards the value of the migrated gas from the adjoining ONGC Block, which was never challenged by RIL. Further, since the said Demand Notice was for the value of migrated gas produced and sold by RIL, it fell within the purview of "*public law*" and was squarely covered by what has been held by the Hon'ble Supreme Court in ***Common Cause (supra)***.

27. Learned Sr. Advocates for the UOI then placing reliance upon ***RNRL (supra)*** urged that since the migrated gas is a vital natural resource and vests with UOI as a trustee of the people of the Union in accordance with the PTD, the disputes qua them were not arbitrable. It is their case that the Arbitral Award is in conflict with the "*public policy of India*" as migrated gas is a vital natural resource and even UOI and/ or the RIL could not have given/ taken it away without an express contract executed pursuant to a well-defined rational policy. Therefore, the exploration of the migrated gas, a vital natural resource, vested with UOI, and parting with the same without due process would trigger PTD. As such, the Arbitral Award is in violation of the "*public policy of India*".

28. Further, as per learned Sr. Advocates for the UOI, in any event there is no express provision either in the PSC or the 1959 PNG Rules, which authorized RIL to extract and sell the migrated gas from the ONGC Block.

29. Learned Sr. Advocates for the UOI next urged that RIL has been taking inconsistent and changing stands qua the connectivity or continuity of the ONGC Block and the Reliance Block and migrated gas therefrom, from what it took in its affidavit before the learned Single Judge of this Court in W.P. (C) 3054/2014. Therefore, in view of D&M 2003 Report, there was clear evidence of connectivity between the ONGC Block and the Reliance Block, which was duly communicated to RIL, however, it urged to the contrary before the writ Court.

30. Continuing further, learned Sr. Advocates for the UOI urged that RIL, while introducing fresh documents after conclusion of evidentiary hearing at the stage of oral submissions before the learned AT, for the first time contended that DGH and UOI knew or ought to have known about the connectivity between the ONGC Block and the Reliance Block. Even though the said fresh documents filed by the RIL before the learned AT were duly responded by the UOI, yet its response was ignored by the learned AT.

31. Learned Sr. Advocates for the UOI then taking us through the provisions of *Article 10* and *Article 12* of the PSC urged that though they provide for a plan of action and terms and conditions for such actions in the event of the discovery beyond the Contract Area, however, since the UOI was kept away from knowledge of migration of gas, resultantly the UOI did not take any steps in furtherance thereof.

32. Learned Sr. Advocates for the UOI then drawing our attention to the D&M 2003 Report urged that the same made clear and unequivocal

observations that OGIP (gas in place on ONGC Block) would require standalone development from the owner of that block, which could prove cost prohibitive and was a clear indication that both parts of the reservoirs could be efficiently developed together on a commercial basis.

33. Proceeding further, learned Sr. Advocates for the UOI urged that though the learned AT concluded that RIL failed to provide the D&M 2003 Report, however, it went onto observe that the said non-disclosure was not material. This, could not be so since, RIL was in breach of the PSC and the law regarding disclosure is well-settled to the effect that parties to the contract are under a solemn duty to disclose or share any and all information, in so far as it may affect the ability and the authority of the other contracting party to take decisions on the continued working of the contract on the same terms and conditions or to negotiate more acceptable terms and conditions which comes to their knowledge. This was in conflict with most basic notions of justice and morality.

34. Furthermore, it was only during the cross examination of witnesses that suggestions were put to them by RIL that the seismic amplitudes of reservoirs as provided by RIL to DGH could have been examined in depth by the DGH to come to the conclusion that the aforesaid reservoirs could have been connected.

35. Next, learned Sr. Advocates for the UOI also urged that D&M, *admittedly*, an expert third party appointed by RIL and ONGC, in its the D&M 2015 Report emphatically concluded that both the Reliance Block

and the ONGC Block were connected and natural gas had migrated from the ONGC Block to the Reliance Block to the tune of 11.24 x 10^9 m^3.

36. Learned Sr. Advocates for the UOI then drawing our attention to *Rule 28* of the 1959 PNG Rules urged that the same also reinforce prohibition requiring any party like RIL herein, to obtain express permission to continue operations if, it appears that a reservoir extends beyond the Contract Area i.e., the Reliance Block boundary. In view thereof, prohibition meant that unless such an order is made, RIL was not permitted to continue petroleum operations beyond its Contract Area. Since the migrated gas belonged exclusively to UOI under the PTD and RIL has no right whatsoever, either to produce the migrated gas, or to appropriate the proceeds of sale thereof, hence, there was "*unjust enrichment*" by RIL. Reliance, for this, was placed on what was held by the Hon'ble Supreme Court in ***Sahakari Khand Udyog Mandal Ltd. vs. Commissioner of Central Excise & Customs***[32].

37. Learned Sr. Advocates for the UOI lastly urged that the learned AT has not taken a '*possible view*', more so, since RIL failed in its obligations under the PSC to disclose all the interpretive data despite having the technical know-how and expertise. Thus, RIL was guilty of fraud as per *Section 17* of the Contract Act, 1872. Even otherwise, UOI could not have known about the continuity of gas reservoirs in the ONGC Block and the Reliance Block by study of seismic data. In any event, it was the duty of

[32](2005) 3 SCC 738

RIL to bring it to the notice of the Management Committee about the connectivity thereof.

Submissions of Reliance Industries Limited:

38. *Per contra*, Mr. Harish Salve, learned senior counsel appearing on behalf of RIL[33], amongst various other contentions, primarily urged that the UOI has reversed its case from the value of gas allegedly produced by migration, to the suppression of the D&M 2003/ 2004/ 2005 Report(s). As per learned Sr. Advocate for RIL, the claim of the ONGC on the value of the migrated gas in its capacity as the lessee of the adjoining field, was strongly opposed by DGH before the writ Court in W.P.(C) 3054/2014, so much so, in 2016 DGH took the position that even if, the allegations of connectivity or continuity were taken to be correct, there could not have been joint development for the simple reason that ONGC was not ready and far behind development in the ONGC Block. Furthermore, UOI never alleged there was any suppression and did not base its claim on the breach of *Article 26* of the PSC before the Shah Committee.

39. Learned Sr. Advocate for RIL then urged that it was only during the course of oral submission before the learned AT that the DGH for the first time reversed its position to the effect that since PTD applied to the natural resources which were being produced, the necessary inference was that the value of the alleged migrated gas was payable by the contractor/ RIL to the UOI. As such, there was no claim founded on the alleged suppression.

[33] Hereinafter referred as "***learned Sr. Advocate for RIL***"

40. It was further submitted that the case of suppression was that, "but for" the suppression, the UOI would have ordered a joint development, and even in the said event, it would not have resulted in value of the entire gas allegedly produced from the adjacent field being paid over to the UOI but, that ONGC and the RIL would jointly develop the fields, in which ONGC would contribute part of the costs of development, and receive upon sale, reimbursement of its share of costs, and share of petroleum, and the UOI would receive the rest of the profit petroleum. Furthermore, the question of suppression was front and center in the arbitration proceedings, the UOI had known about the likelihood of continuity, as the D&M 2003 Report was only introduced at the end of arbitration proceedings. In any event, the UOI claimed the entire value of the allegedly migrated gas produced from the adjacent field, on the principle of PTD.

41. Learned Sr. Advocate for RIL also urged that before the learned AT the UOI accepted that production of migrated gas by RIL was a question of construction of terms of PSC.

42. Learned Sr. Advocate for RIL further urged that since *Rule 28* of the 1959 PNG Rules provided for joint development and allowed UOI to prohibit operations where the petroleum deposits extend beyond the area of the lease, it must follow that absent such a prohibition, there is no inhibition on the petroleum operations within the Contract Area even if, the reservoir extends beyond the boundaries.

43. Learned Sr. Advocate for RIL also urged that since, the PSC provided for petroleum operations within the four corners of the Contract

Area and the only limitation was qua all wells being drilled in the Contract Area. It is impossible to say where the gas produced has migrated from, it is quite possible that RIL has produced gas which had migrated from lower levels or from other adjacent areas which had not been detected. The PSC did not require a contractor like RIL to limit production of hydrocarbon only to the extent found in the reservoir in the Contract Area as the same would be incapable of being acted upon and will also cause a waste of natural resources. Even otherwise, *Article 12* of the PSC and Rule 28 of the 1959 PNG Rules deals with likelihood of continuity with the possibility of connectivity, for which the UOI has the right, but not an obligation, to direct a joint development.

44. Continuing further, learned Sr. Advocate for RIL, then drawing our attention to the stand of DGH before the Shah Committee that "… …*ONGC also had prior knowledge about possible continuity in the channels as far back as 2007, but took no action for several years*… …" as also that "… …*ONGC acquired and processed 3-D seismic Q-marine data in 2006-2007 in Godavari PML overlapping with the KG-DWN-98/3 block. ONGC made a third party G&G study for appraisal plan for Godavari PML, which it submitted to the DGH in October 2007, and which indicated the continuity of Pliocene channels from ONGC's block to RIL's block of KG-DWN-98/3*… …", urged it was that based thereon the Shah Committee concluded that "… …*There appears to be substance in DGH's contention regarding ONGC's prior knowledge*… …".

45. Learned Sr. Advocate for RIL also urged that since ONGC proposed to develop all the discoveries under a single development plan, UOI saved money because of RIL.

46. Learned Sr. Advocate for RIL further urged that reliance upon ***RNRL (supra)*** by UOI is misplaced, and the Arbitral Award considers the judgement rightly. In essence it was urged that there is no notion of production of 'migrated gas' as against non-migrated gas, water and gas are 'fluids' and flow from one place to another within a reservoir.

47. Learned Sr. Advocate for RIL thereafter urged that the Notice of Arbitration dated 11.11.2016 stated that "… …*RIL, BP Exploration (Alpha) Limited and Niko (NECO) Limited holding Participating interest in Block KG-DWN-98/3 of 60, 30 and 10 percent respectively, and together constitute the "Contractor" as defined in the PSC. RIL provides this Notice in its capacity as Operator under the PSC for and on behalf of all constituents of the Contractor*… …" and RIL did not claim that the consequence of the Arbitral Award is only to relieve RIL of its share of the demand, and accepted that the entire demand becomes irrecoverable on account of the said Arbitral Award. In view thereof the issue of the arbitration being international or domestic did not arrive before the learned AT and did confer jurisdiction upon the learned Single Judge while adjudicating the application of UOI under *Section 34* of the Act to observe that the arbitration was an International Commercial Arbitration.

48. It is in view thereof that learned Sr. Advocate for RIL urged that the only causation that survived before the learned AT was, if the PSC did

permit the production of 'migrated gas' and the finding of the learned AT that the production of gas from the Contract Area is perfectly lawful and in compliance with the PSC especially, since there was absence of a special order under *Rule 28* of the 1959 PNG Rules or *Article* 28 of the PSC. The same is in accordance with the rights of RIL under *Article 8* of the PSC and based on the construction of the contract. As per learned Sr. Advocate for RIL, since there are no independent challenges to the above in the present appeal, the same are binding on the UOI.

49. Learned Sr. Advocate for RIL urges that even if the Arbitral Award is a domestic one, the challenge under *Section 34 (2A)* of the Act is misconceived as any challenge has to be on matters apparent on the face of the Arbitral Award. For this, reliance was placed ***Union of India v Bungo Steel Furniture Private Limited***[34] and ***Trustees of Port of Madras v Engineering Constructions Corporation Limited***[35] wherein the same has been narrowly interpreted.

Rejoinder submissions of the Union of India:

50. In rejoinder arguments learned Sr. Advocates for the UOI urged that the ground of 'fraud' played by RIL, since it suppressed the D&M 2003/ 2004/ 2005 Report(s), was specifically pleaded and raised in the Statement of Defense, Opening Statement on behalf of RIL before the learned AT and the said prevented the UOI from exercising its discretion under *Article 12* of the PSC. Not only that, there were pleading to the same effect before the learned Single Judge in the application under *Section 34* of the Act

[34](1967) 1 SCR 324
[35](1995) 5 SCC 531

proceedings as well, yet the Arbitral Award is wholly silent on this aspect as also the aspect of the stand of RIL in the affidavit filed by RIL in W.P. (C) 3054/2014, wherein it specifically pleaded that it had no knowledge of connectivity or continuity. The said suppression, as per learned Sr. Advocates for the UOI is also punishable under *Rule 32A* of the 1959 PNG Rules, making it patently illegal/ perverse on the face of the Arbitral Award which shocks one's conscience and is in conflict with the most basic notions of justice and morality.

51. After that, learned Sr. Advocates for the UOI urged that the learned AT was wrong in holding that the UOI knew about the connectivity of the Reliance Block and the ONGC Block since 2002, as it is not the case of RIL that the UOI colluded with RIL for production of migrated gas.

52. Thereafter, adverting to the stand of the DGH in the year 2014 in W.P.(C) 3054/2015, learned Sr. Advocates for the UOI urged that the same was so, since the UOI/ DGH was unaware of the connectivity *inter-se* the two Blocks or the D&M 2003 Report thence.

53. Learned Sr. Advocates for the UOI then placing reliance upon ***RNRL vs RIL (supra)*** urged that there is no provision under the PSC, which explicitly permits the extraction of migrated gas. Even otherwise, RIL never produced anything to establish that it had been permitted to extract the migrated gas from the neighboring ONGC Block before the learned AT or the learned Single Judge.

54. Learned Sr. Advocates for the UOI placing reliance upon ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI***[36]; ***RNRL v. RIL (supra)*** further urged that even if, the arbitration proceedings were to be held to be an International Commercial Arbitration, however, since the Arbitral Award is against and in conflict with the '*public policy of India*', most basic notions of morality and justice, it is liable to be set aside.

55. Then, placing reliance upon ***DMRC Ltd. v. Delhi Airport Authority Metro Express (P) Ltd.***[37], learned Sr. Advocates for the UOI urged that the jurisdiction under *Section 37* of the Act is akin to the jurisdiction under *Section 34* of the Act and thus, the same grounds of challenge under the *Section 34* of the Act are available under *Section 37* of the Act as well.

55.1. Learned Sr. Advocates for the UOI lastly urged that the present is not a case where the plausible view theory will be attracted since the only question for consideration was, by reason of frustration of the PTD as a '*public policy of India'* can be endorsed by balancing, on one hand, the set of factors constituting the conduct of parties, relating to suppression of information and knowledge by the RIL, and the possible difficulties in relation to joint development etc. and, on the other hand as has been done by the learned AT which have been upheld by the learned Single Judge.

Analysis and Reasoning:

56. We have heard Mr. R. Venkataramani, learned senior Advocate and the Attorney General of India and Mr. K.K. Venugopal, learned senior

[36](2019) 15 SCC 131
[37](2024) 6 SCC 357

Advocate and the ex-learned Attorney General of India along with Mr. Gopal Jain, senior Advocate, all appearing on behalf of the UOI as also Mr. Harish Salve, senior Advocate appearing for RIL as also the lawyers assisting them and have also gone through the relevant documents on record as also the numerous Note of Arguments handed over by both the UOI and RIL from time to time along with the relevant judgements cited by each of them during the course of their arguments.

57. During the course of their arguments, though the learned Sr. Advocates for the UOI have urged various grounds as also supplemented them with various arguments alongwith numerous documents forming part of the arbitration proceedings, and the learned Sr. Advocate for RIL has also, in response thereto, befittingly countered them during the course of his arguments as well, however, since we are mindful that we are dealing with the present appeal under *Section 37* of the Act, before deliberating into the issues at hand, we deem it appropriate to deal with the scope, intent and application of such an appeal under *Section 37* of the Act.

Scope, intent and application of Section 37, The Arbitration and Conciliation Act, 1996:

58. Section 37 of the Act is a provision relating to "*appealable orders*" under *Chapter 9: Appeals*, which reads as under:

> ***37. Appealable orders**.-(1) Notwithstanding anything contained in any other law for the time being in force, an appeal] shall lie from the following orders (and from no others) to the Court*

*authorized by law to hear appeals from original decrees of the Court passing the order, namely:-**s***

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

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

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

(2) Appeal shall also lie to a court from an order of the arbitral tribunal—

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

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

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

59. Therefore, what entails is that an appeal under *Section 37* of the Act lies only against the order(s) refusing to refer the parties to arbitration under *Section 8* of the Act; granting or refusing to grant any measure under *Section 9* of the Act; setting aside or refusing to set aside an arbitral award under *Section 34* of the Act. Further, an appeal shall also lie to a court from an order of the arbitral tribunal which has accepted the plea referred to in *Section 16(2) or Section 16(3)* of the Act or which has granted or refused to grant an interim measure under *Section 17* of the Act.

60. We, like any Court dealing with an appeal under *Section 37* of the Act, are not to sit over in appeal over the award passed by the arbitrator/s. Meaning thereby, we have to be mindful of the fact that we are not discharging the functions of an appellate Court like a Civil Court. Therefore, we, like any Court dealing with an appeal under *Section 37* of

the Act are to operate within the limited ambit as provided by the Act. In fact, the Hon'ble Supreme Court from time to time, while dealing with the said *Section 37* of the Act and the contours thereof, has expressly laid down the framework and the parameters to be followed by any Court while dealing with such an appeal under *Section 37* of the Act.

61. The provisions under *Section 37* of the Act are akin to that under *Section 34* of the Act and we, like any other Court like us, while adjudicating an application under *Section 37* of the Act have to apply the same analogy and principles applicable to *Section 34* of the Act.

62. As observed hereinabove, since the provisions of *Section 34* of the Act also play a relevant part while we are dealing with and deciding an appeal under *Section 37* of the Act, the same is reproduced hereinbelow:-

> ***34. Application for setting aside arbitral award**.-(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*
> *(2) An arbitral award may be set aside by the Court only if—*
> *(a) the party making the application establishes on the basis of the record of the arbitral tribunal that—*
> *(i) a party was under some incapacity, or*
> *(ii) the arbitration agreement is not valid under the law to which the parties have subjected itor, failing any indication thereon, under the law for the time being in force; or*
> *(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*
> *(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:*
> *Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or*

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

(b) the Court finds that—

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

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

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

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

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

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

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

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

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

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

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

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to

take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.
(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.
(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.

63. We, begin by reproducing hereinbelow the decision in ***Delhi Metro Rail Corporation v. Delhi Airport Metro Express Pvt. Ltd.***[38], wherein the Hon'ble Supreme Court has recently held as under:-

> *"40. A judgment setting aside or refusing to set aside an arbitral award under Section 34 is appealable in the exercise of the jurisdiction of the court under Section 37 of the Arbitration Act. It has been clarified by this Court, in a line of precedent, that the jurisdiction under* ***Section 37 of the Arbitration Act is akin to the jurisdiction of the Court under Section 34 and restricted to the same grounds of challenge as Section 34.***
> *41. In the statutory scheme of the Arbitration Act, a recourse to Section 37 is the only appellate remedy available against a decision under Section 34…. …*
>
> (*Emphasis Supplied*)

64. Similarly, the Hon'ble Supreme Court in ***Punjab State Civil Supplies Corporation Limited & Anr. v. Sanman Rice Mills & Ors.***[39] has also recently held as under:-

> *"11.* ***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****.*

[38](2024) 6 SCC 357
[39]2024 SCC OnLine SC 2632

xxxx

14. 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.***

xxxx

16. It is seen that the scope of interference in an appeal under Section 37 of the Act is r ***estricted and subject to the same grounds on which an award can be challenged under Section 34 of the Act****. In other words, 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****.*

xxxx

20. In view of the above position in law on the subject, the scope of the intervention of the court in arbitral matters is 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 of 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 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 in 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 travelled beyond its jurisdiction that the appellate court can step in and set aside the order passed under Section 34 of the Act. Its power is more akin to that 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 as set out in the earlier part of the decision, is made out. 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.***

21. It must also be remembered that proceedings under Section 34 of the Act are summary in nature and are not like a full-fledged regular civil suit. Therefore, the scope of Section 37 of the Act 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.****"*
>
> (*Emphasis Supplied*)

65. Prior thereto also, the Hon'ble Supreme Court in ***MMTC Ltd. v. Vedanta Ltd.***[40]**,** held as under:

> *"14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34.* ***In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision.*** *Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34, and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."*
>
> (*Emphasis Supplied*)

66. Therefore, it is clear from the above that though we are not to reappreciate and re-examine the evidence led by any of the parties before the learned AT nor any of the documents produced by any of them before the learned AT, unless the Court exercising power under *Section 34* of the Act has failed to exercise jurisdiction vested in it by the said *Section 34* of the Act or has travelled beyond its jurisdiction. It is only under such a scenario that we, under *Section 37* of the Act, can step in and set aside the order passed by the learned Single Judge exercising our power under *Section 37* of the Act. Therefore, there has to be something egregious and/ or scathingly shocking which has either escaped the mind or has been overlooked by the learned Single Judge, and if that be the position, we have

[40](2019) 4 SCC 163

no alternative but, to interfere with the Arbitral Award passed by the learned AT.

67. Therefore, the Arbitral Award passed by the learned AT is not liable to be interfered with unless a case for interference as set out hereinabove is expressly made out, furthermore, unless it is contrary to the substantive provision of law or contrary to any provision of the Act or contrary to the terms of the Contract/ Agreement. Not to forget that the proceedings under *Section 34* of the Act are summary in nature and are not like a full-fledged regular civil suit. As such, even the scope of *Section 37* of the Act is much more summary in nature and not like an ordinary civil appeal. In view thereof, it is only under such circumstances that we, while dealing with an appeal under *Section 37* of the Act, are required to step in to prevent any serious miscarriage of justice by taking corrective measures and set the wrong right.

68. Now keeping in mind what is borne out from the extensive deliberations hereinabove, we are to ascertain if the UOI has been able to make out a case before us which merits interference by us in the present proceedings under *Section 37* of the Act, *especially*, since it is arising out of an appeal from an order passed by the learned Single Judge under *Section 34* of the Act. More specially, we are to examine as to whether the Arbitral Award goes against the '*public policy of India*', the '*Public Trust Doctrine*' or whether the fundamentals of contract law have been vitiated, or any other such factor(s) as would fall within the realm of fundamental policies of any laws of India, along with basic notions of morality and justice.

69. In terms of the above, this largely brings us to a level where we, like any other Court while dealing with an appeal under *Section 37* of the Act, will be required to adjudicate if the learned Arbitral Tribunal and/ or the learned Single Judge was/ were legally and/ or factually sound in arriving at their opinions so formulated in the Arbitral Award and the Impugned Judgement, respectively.

70. Considering the factual matrix involved and what has unfolded before us at the time of arguments addressed by the learned Sr. Advocates appearing for both the UOI and RIL, we feel, it appropriate to restrict ourselves to the below mentioned two material questions:-

> *Q1. Whether the present arbitration proceeding inter-se UOI and RIL was an International Commercial Arbitration? and;*
>
> *Q2: Whether the learned Single Judge erred in not examining the Arbitral Award passed by the learned AT under Section 34 (2A) of the Act, leaving us to adjudicate any involvement of 'patent illegality' in the said Arbitral Award?*

International Commercial Arbitration:

71. Let us begin by analyzing the first of the material issues, i.e. whether the arbitration proceedings *inter-se* the UOI and RIL was an International Commercial Arbitration or not. For this, it would be prudent on our part to commence by tracing back our steps to the observations made by the learned AT in the Arbitral Award, which are reproduced as under:-

> "192. *There is no dispute that the Claimant is required under the Contract to lead the Contractor party under the PSC. Its interest and those of BP and Niko were aligned vis-a-vis the Respondent and they had consistently so acted. However not being a party to the arbitration should the costs incurred*

> *by each of them be included as those incurred by the Claimant and recoverable from the Respondent? In the Tribunal's view, this should not be. The scheme of the PSC is such that the Claimant as operator is the only party in the PSC entitled to deal with the Respondent. Neither BP nor Niko had sought to join the arbitration as a party. The Respondent had throughout these proceedings maintained that BP and Niko had no right to be heard substantively although the Tribunal had on occasions permitted them to make certain statements. Whatever the costs incurred by BP and Niko if not recoverable as a party could not be permitted to be recovered through the conduct of the Claimant. That was not what was contemplated in the PSC and the Tribunal should not permit so.*".

72. Interestingly, it is based thereon that the learned AT further in its Arbitral Award held as under:-

> "*157. … …we fully accept and recognise that the named claimant in this arbitration is RIL. And that Niko is not formally a party to this arbitration.… …*".

73. Ignoring the aforesaid, while adjudicating upon the issue qua the arbitration proceeding *inter-se* the UOI and RIL being an International Commercial Arbitration and what was held by the Hon'ble Supreme Court in ***RIL vs. Union of India***[41], the learned Single Judge went onto observe in the impugned order as under:-

> *"… …In the opinion of this court, the disputes that were subject-matter of arbitration in the present case, also relate back to the main contractual rights of all the parties under the PSC. It matters not whether this view was taken in an 'administrative order or in a judicial decision'. This court is in respectful agreement with the view so taken… …*".

74. We, respectfully, disagree with the aforesaid finding rendered by the learned Single Judge since, in our considered opinion, reliance upon ***RIL vs. Union of India (supra)*** is misplaced. We say so, since in the said decision both, the stage of the proceeding and the reasons therefor as given by the

[41](2014) 11 SCC 576

Hon'ble Supreme Court were different. *Admittedly*, the said order was passed when the Hon'ble Supreme Court was dealing with a petition "… …*under Section 11(6) of the Arbitration Act, 1996, with a prayer for appointment of the third and the presiding arbitrator, as the two arbitrators nominated by the parties have failed to reach a consensus on the appointment of the third arbitrator*.… …". Thus, the abovesaid observations were made in an application under *Section 11* of the Act filed even prior to the arbitration proceeding, i.e. at a *pre-adjudication* stage however, in the present case the aforesaid findings rendered by the learned AT hereinabove are made at the time of passing of the final Arbitral Award after conclusion of the arbitration proceedings *inter-se* the UOI and RIL, i.e. at a *post-adjudication* stage.

75. Besides the above, in our considered opinion the learned Single Judge while dealing with an application under *Section 34* of the Act, although *inter se* the same parties, committed an error in overlooking the fact that since RIL had not laid any challenge to the aforesaid findings rendered by the learned AT in the Arbitral Award, the same were/ are deemed admitted and binding upon RIL. Under these circumstances, the learned Single Judge was bound to follow the unchallenged findings rendered by the learned AT in the Arbitral Award that "… …*the named claimant in this arbitration is RIL*… …" rather than the earlier findings in ***RIL vs. Union of India (supra)***, *especially*, since they were rendered at a stage when the Hon'ble Supreme Court was disposing of an application under *Section 11* of the Act.

76. Having said that, we are of the view that although the learned Single Judge was correct in observing that "… …*It matters not whether this view was taken in an 'administrative order or in a judicial decision'*… …" we are unable to agree with the subsequent observations therein qua the arbitration being an International Commercial Arbitration that "… …*the disputes that were subject-matter of arbitration in the present case, also relate back to the main contractual rights of all the parties under the PSC*… …", In our considered opinion, once the learned AT had categorically held that "… …*we fully accept and recognize that the named claimant in this arbitration is RIL and that Niko is not formally a party to this arbitration*… …" as also "… …*the scheme of the PSC is such that the Claimant as Operators the only party in the PSC entitled to deal with the Respondent. Neither BP nor Niko had sought to join the arbitration as a party*… …", this position could not have been overlooked by the learned Single Judge.

77. Further, we may note that the learned AT had itself in the Arbitral Award come to the conclusion that RIL was the sole claimant and it is, *admittedly*, an Indian entity. Therefore, in our considered opinion since the lead member, like RIL in the present case, in an arbitration proceeding is an Indian entity, the arbitration has to be treated as a domestic arbitration and not an International Commercial Arbitration. Relevantly, this is what has been held by the Hon'ble Supreme Court in ***L&T-SCOMI v. MMRDA (supra)***, as under:-

> "*16. Further, the expression "a company or" which was originally at the beginning of Section 2(1)(f)(iii) was omitted by Act 3 of 2016. This was for the reason that the judgment of this Court, in TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd. [TDM*

Infrastructure (P) Ltd. v. UE Development India (P) Ltd., (2008) 14 SCC 271] , held that the expression "a company or" in Section 2(1)(f)(iii) of the Act cannot possibly be said to refer to a company registered and incorporated in India which may be controlled by persons in a country outside India. The Court held: (SCC pp. 278-79, para 20)

"20. The learned counsel contends that the word "or" being disjunctive, sub-clause (iii) of Section 2(1)(f) of the 1996 Act shall apply in a case where sub-clause (ii) shall not apply. We do not agree. The question of taking recourse to sub-clause (iii) would come into play only in a case where sub-clause (ii) otherwise does not apply in its entirety and not where by reason of an exclusion clause, consideration for construing an agreement to be an international commercial arbitration agreement goes outside the purview of its definition. ***Once it is held that both the companies are incorporated in India, and, thus, they have been domiciled in India, the arbitration agreement entered into by and between them would not be an international commercial arbitration agreement and, thus, the question of applicability of sub-clause (iii) of Section 2(1)(f) would not arise."***

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18. This being the case, coupled with the fact, as correctly argued by Shri Divan, that the Indian company is the lead partner, and that the Supervisory Board constituted under the consortium agreement makes it clear that the lead partner really has the determining voice in that it appoints the Chairman of the said Board (undoubtedly, with the consent of other members); and the fact that the Consortium's office is in Wadala, Mumbai as also that the lead member shall lead the arbitration proceedings, would all point to the fact that the central management and control of this Consortium appears to be exercised in India and not in any foreign nation.

19. This being the case, we dismiss the petition filed under Section 11 of the Act, as there is no "international commercial arbitration" as defined under Section 2(1)(f) of the Act for the petitioner to come to this Court"

(Emphasis Supplied)

78. We also find able support in ***Perkins Eastman Architects DPC (supra)***, wherein the Hon'ble Supreme Court has, once again, very recently fortified the aforesaid position by holding as under:-

> *"11. It is not disputed by the respondent that it was a requisite condition to declare a lead member of the Consortium and that by aforesaid declaration Applicant 1 was shown to be the lead member of the Consortium. The reliance is however placed by the respondent on Clause 9 of the Consortium Agreement by virtue of which both the applicants would be jointly and severally responsible for the execution of the project. It is clear that the declaration shows that Applicant 1 was accepted to be the lead member of the Consortium. Even if the liability of both the applicants was stated in Clause 9 to be joint and several, that by itself would not change the status of Applicant 1 to be the lead member. We shall, therefore, proceed on the premise that Applicant 1 is the lead member of the Consortium.*
>
> *xxxx*
>
> *13. It was thus held that "association" and "body of individuals" referred to in Section 2(1)(f) of the Act would be separate categories. However, the lead member of the association in that case being an Indian entity, the "Central Management and Control" of the association was held to be in a country other than India. Relying on said decision we conclude that the lead member of the Consortium company i.e. Applicant 1 being an architectural firm having its registered office in New York, requirements of Section 2(1)(f) of the Act are satisfied and the arbitration in the present case would be an "international commercial arbitration"."*

79. In our considered opinion, as also in view of the aforesaid findings by the learned AT in the Arbitral Award that, *admittedly*, RIL, the sole claimant, was an Indian entity, the issue of the arbitration proceedings *inter-se* UOI and RIL being an International Commercial Arbitration stood settled and the learned Single Judge could not have taken a divergent view therefrom, and that too whence dealing with an application under *Section 34* of the Act.

80. Therefore, in view of the aforesaid legal analysis qua the law regarding an arbitration proceeding being an International Commercial Arbitration and the background involved, in our considered opinion the learned Single Judge has not applied the correct position of law as has repeatedly enunciated by the Hon'ble Supreme Court.

81. Having held so that the learned Single Judge while adjudicating the application under *Section 34* of the Act, exceeded the jurisdiction as encompassed under the *Section 34* of the Act, as such there exist enough cogent reasons for this Court, under *Section 37* of the Act to enter into the domain of *Section 34* of the Act to examine the Arbitral Award.

Patent Illegality:

82. Moving onto the second material issue, i.e., whether the learned Single Judge erred in not examining the Arbitral Award passed by the learned AT under *Section 34 (2A)* of the Act, leaving us to adjudicate any existence of 'patent illegality' in the said Arbitral Award, in our considered opinion, the impugned order and the Arbitral Award rendered by the learned AT would also have to be tested as to if, they are falling into the vice of arbitrariness, perversity or capriciousness, thereby giving an "*impermissible view*" which could not have been reasonably arrived at by any person upon an ordinary application of mind. If, the impugned order and the Arbitral Award fail the said tests, the same must be deemed liable to be set aside in an appeal under *Section 37* of the Act.

83. For this, let us make an effort to venture into, what constitutes a '*patent illegality*'. While dealing with any petition under *Section 34* or

Section 37 of the Act, we are to examine if the application of the law/s which have a nexus/ bearing on the Arbitral Award is/ are patently erroneous and if not, for such an application of the law/ s, the finding could not be arrived at. Furthermore, error of finding of fact having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible viewpoints.

84. Reliance is placed upon ***ONGC Ltd. vs. Saw Pipes Ltd.***[42] wherein the Hon'ble Supreme Court has held as under:-

> *"60. Further, in Maharashtra SEB v. Sterilite Industries (India) [(2001) 8 SCC 482] the Court observed as under: (SCC p. 486, paras 9-10)*
> *"9. The position in law has been noticed by this Court in Union of India v. A.L. Rallia Ram [AIR 1963 SC 1685 : (1964) 3 SCR 164] and Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd. [AIR 1967 SC 1030 : (1967) 1 SCR 105]* ***to the effect that the arbitrator's award both on facts and law is final; that there is no appeal from his verdict; that the court cannot review his award and correct any mistake in his adjudication, unless the objection to the legality of the award is apparent on the face of it. In understanding what would be an error of law on the face of the award****, the following observations in Champsey Bhara & Co. v. Jivraj Balloo Spg. and Wvg. Co. Ltd. [(1922-23) 50 IA 324 : AIR 1923 PC 66] , a decision of the Privy Council, are relevant (IA p. 331)*
>
> > *"****An error in law on the face of the award means, in Their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous.****'*
> > *10. In Arosan Enterprises Ltd. v. Union of India [(1999) 9 SCC 449] this Court again examined this matter and stated that where* ***the error of finding of fact having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible viewpoints,***

[42](2003) 5 SCC 705

> ***the interference in the award based on an erroneous finding of fact is permissible and similarly, if an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator***."
>
> (*Emphasis Supplied*)

85. Reliance is also placed upon ***State of Chhattisgarh v. SAL Udyog (P) Ltd.***[43], wherein the Hon'ble Supreme Court held as under:-

> "*14. The law on interference in matters of awards under the 1996 Act has been circumscribed with the object of minimizing interference by courts in arbitration matters. One of the grounds on which an award may be set aside is "patent illegality". What would constitute "patent illegality" has been elaborated in Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] ,* ***where "patent illegality" that broadly falls under the head of "Public Policy", has been divided into three sub-heads in the following words*** *: (SCC p. 81, para 42)*
>
> > *"42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three sub-heads:*
> > *42.1.* ***(a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:***
> > ***'28. Rules applicable to substance of dispute.—(1) Where the place of arbitration is situated in India,—***
> > ***(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;'***
> > ***42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.***

[43](2022) 2 SCC 275

42.3. (c) Equally, the third sub-head of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

*'28. Rules applicable to substance of dispute.—(1)-(2) * * **

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.'

This last contravention must be understood with a caveat. ***An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do."***

15. In Ssangyong Engg. & Construction Co. Ltd. v. NHAI [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , speaking for the Bench, R.F. Nariman, J. has spelt out the contours of the limited scope of judicial interference in reviewing the arbitral awards under the 1996 Act and observed thus : (SCC pp. 169-71, paras 34-41)

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

36. Thus, it is clear that ***public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , or secondly, that such award is against basic notions of justice or morality*** *as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015)*

2 SCC (Civ) 204] . Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as understood in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , and paras 28 and 29 in particular, is now done away with.

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be ***patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.***

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

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

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

ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under ***"public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse."***

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

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

> ***of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality".***"
>
> (*Emphasis Supplied*)

86. Some time back also the Hon'ble Supreme Court in ***PSA SICAL Terminals v. Board of Trustees.***[44], elaborated the issue qua *Section 37* of the Act, especially when it was regarding on the scope of '*public policy of India*' under *Section 34* of the Act as under:-

> *"40. ... …**The interference would be so warranted when the award is in violation of "public policy of India", which has been held to mean "the fundamental policy of Indian law".** (…) The ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a **conflict with the most basic notions of morality or justice**. It is only such arbitral awards that **shock the conscience of the court, that can be set aside on the said ground.** An award would be set aside on the ground of **patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference**. Equally, **reappreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award**.*
>
> *"41. A decision which is **perverse**, **though would not be a ground to challenge under "public policy of India"**, would **certainly amount to a patent illegality appearing on the face of the award. However, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality**."*
>
> (*Emphasis Supplied*)

87. In the facts before us, the issue of '*patent illegality*' involves the applicability of the provisions of *Article 297* of the CoI and, since it involved a vital natural resource, '*public policy in India*', '*public law*' and

[44](2023) 15 SCC 781

'*Public Trust Doctrine*', would have to be also considered since, in our considered opinion, they are all intertwined with each other.

88. As per *Article 297* of the CoI[45], the UOI is a depository, holding the natural resources of India as a Trustee, for and on behalf of the people of India and without the *explicit and express permission* of the UOI, there can be no extraction of the said resources by anyone. It is also explicit that any (in)action(s) of/ by the UOI qua the said resources have to be governed in the light of the mandate of the CoI.

89. The position with respect to what is/ are '*public policy in India*', '*public law*' and '*Public Trust Doctrine*', since none of them are defined in any Statute(s), will have to be culled out from the definitions given to them in various decisions rendered by the Hon'ble Supreme Court from time to time.

90. For this reliance is placed upon the dictum of the Hon'ble Supreme Court in ***M.C. Mehta vs. Kamal Nath***[46], wherein it has been held as under:-

> *"**25.** The **Public Trust Doctrine primarily** rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said*

[45]Article 297: *Things of value within territorial waters or continental shelf and resources of the exclusive economic zone to vest in the Union.—(1) All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for the purposes of the Union. (2) All other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union. (3) The limits of the territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones, of India shall be such as may be specified, from time to time, by or under any law made by Parliament.*

[46](1997) 1 SCC 388

resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. According to Professor Sax the Public Trust Doctrine imposes the following restrictions on governmental authority:

"Three types of restrictions on governmental authority are often thought to be imposed by the public trust : first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third the property must be maintained for particular types of uses.*"*

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32. *We may at this stage refer to the judgment of the Supreme Court of California in National Audubon Society v. Superior Court of Alpine County [33 Cal 3d 419]. The case is popularly known as "the Mono Lake case". Mono Lake is the second largest lake in California. The lake is saline. It contains no fish but supports a large population of brine shrimp which feed vast numbers of nesting and migrating birds. Islands in the lake protect a large breeding colony of California gulls, and the lake itself serves as a haven on the migration route for thousands of birds. Towers and spires of tura (sic) on the north and south shores are matters of geological interest and a tourist attraction. In 1940, the Division of Water Resources granted the Department of Water and Power of the City of Los Angeles a permit to appropriate virtually the entire flow of 4 of the 5 streams flowing into the lake. As a result of these diversions, the level of the lake dropped, the surface area diminished, the gulls were abandoning the lake and the scenic beauty and the ecological values of Mono Lake were imperiled. The plaintiffs environmentalist — using the public trust doctrine — filed a law suit against Los Angeles Water Diversions. The case eventually came to the California Supreme Court, on a Federal Trial Judge's request for clarification of the State's public trust doctrine. The Court explained the concept of public trust doctrine in the following words:*

"'By the law of nature these things are common to mankind — the air, running water, the sea and consequently the shores of the sea.' (Institutes of Justinian 2.1.1) From this origin in Roman law, the English common law evolved the concept of the public trust, under which the sovereign owns 'all of its navigable waterways and the lands

lying beneath them as trustee of a public trust for the benefit of the people.' "

The Court explained the purpose of the ***public trust as under:***

"The objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways. As we observed in Marks v. Whitney [6 Cal 3d 251] , '[p]ublic trust easements (were) traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the State, and to use the bottom of the navigable waters for anchoring, standing, or other purposes. We went on, however, to hold that the traditional triad of uses — navigation, commerce and fishing — did not limit the public interest in the trust res. In language of special importance to the present setting, we stated that '[t]he public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the State is not burdened with an outmoded classification favouring one mode of utilization over another. There is a growing public recognition that one of the important public uses of the tidelands — a use encompassed within the tidelands trust — is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favourably affect the scenery and climate of the area.'

Mono Lake is a navigable waterway. It supports a small local industry which harvests brine shrimp for sale as fish food, which endeavour probably qualifies the lake as a 'fishery' under the traditional public trust cases. The principal values plaintiffs seek to protect, however, are recreational and ecological — the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds. Under Marks v. Whitney [6 Cal 3d 251] , it is clear that protection of these values is among the purposes of the public trust."

The Court summed up the powers of the State as trustee in the following words:

"Thus, the public trust is more than an affirmation of State power to use public property for public purposes. It is an affirmation of the duty of the State to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust…."

The Supreme Court of California, inter alia, reached the following conclusion:

*"**The State has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. Just as the history of this State shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests**. (See Johnson, 14 U.C. Davis L. Rev. 233, 256-57/; Robie, Some Reflections on Environmental Considerations in Water Rights Administration, 2 Ecology L.Q. 695, 710-711 (1972); Comment, 33 Hastings L.J. 653, 654.) **As a matter of practical necessity, the State may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the State must bear in mind its duty as trustee to consider the effect of the taking on the public trust (see United Plainsmen v. N.D. State Water Cons. Comm'n [247 NW 2d 457 (ND 1976)] at pp. 462-463, and to preserve, so far as consistent with the public interest, the uses protected by the trust."***

The Court finally came to the conclusion that the plaintiffs could rely on the public trust doctrine in seeking reconsideration of the allocation of the waters of the Mono basin.

33.** It is no doubt correct that the **public trust doctrine under the English common law extended only to certain traditional uses such as navigation, commerce and fishing. But the American Courts in recent cases have expanded the concept of the public trust doctrine. The observations of the Supreme Court of California in Mono Lake case [33 Cal 3d 419] clearly show the judicial concern in protecting all ecologically important lands, for example fresh water, wetlands or riparian forests. The observations of the Court in Mono Lake case [33 Cal 3d 419] to the effect that the protection of ecological values is among the purposes of public trust, may give rise to an argument that the ecology and the environment protection is a relevant factor to determine which lands, waters or airs are protected by the public trust doctrine. The Courts in United States are finally beginning to adopt this reasoning and are expanding the public trust to encompass new types of lands and waters. In Phillips Petroleum Co. v. Mississippi [108 SCt 791 (1988)] the United States Supreme Court upheld Mississippi's extension of public trust doctrine to lands underlying non-navigable tidal areas. The majority judgment adopted ecological concepts to determine which lands can be considered tide

lands. Phillips Petroleum case [108 SCt 791 (1988)] assumes importance because the Supreme Court expanded the public trust doctrine to identify the tide lands not on commercial considerations but on ecological concepts. We see no reason why the public trust doctrine should not be expanded to include all ecosystems operating in our natural resources.

34. *Our legal system — based on English common law —* ***includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership****."*

(*Emphasis Supplied*)

91. Reliance is further placed upon ***RNRL vs. RIL (supra)***, wherein the Hon'ble Supreme Court has held as under:-

"248. ***The concept of public trust actually finds its genesis with respect to the ocean and waters, and some have even traced this concept to the Ch'in Dynasty in China (249-207 BC) and the Roman Justinian Institutes. This has been extended substantially, and the broader notion now is that the State really is acting only in a fiduciary capacity. "The message is simple: the sovereign rights of the nation-States over certain environmental resources are not proprietary, but fiduciary****." [Peter H. Sand, Sovereignty Bounded: Public Trusteeship for Common Pool Resources. See also Turnipseed, Roady, Sagarin & Crowder: "The Silver Anniversary of the United States Exclusive Economic Zone—Twenty-five Years of Ocean Use and Abuse, and the Possibility of a Blue Water Public Trust Doctrine", 36 Ecology LQ 1 (2009).]*

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250. We hold that with respect to the natural resources extracted and exploited from the geographic zones specified in Article 297 the Union may not:

(1) transfer title of those resources after their extraction unless the Union receives just and proper compensation for the same;

(2) allow a situation to develop wherein the various users in different sectors could potentially be deprived of access to such resources;
(3) allow the extraction of such resources without a clear policy statement of conservation, which takes into account total domestic availability, the requisite balancing of current needs with those of future generations, and also India's security requirements;
(4) allow the extraction and distribution without periodic evaluation of the current distribution and making an assessment of how greater equity can be achieved, as between sectors and also between regions;
(5) ***allow a contractor or any other agency to extract and distribute the resources without the explicit permission of the Union of India, which permission can be granted only pursuant to a rationally framed utilisation policy****; and*
(6) no end user may be given any guarantee for continued access and of use beyond a period to be specified by the Government.

Any contract including a PSC which does not take into its ambit stated principles may itself become vulnerable and fall foul of Article 14 of the Constitution."

(*Emphasis Supplied*)

92. Reliance is also placed upon ***Ssangyong Engineering & Construction Co Ltd.*** (supra), wherein the Hon'ble Supreme Court has held as under:-

*""34. What is clear, therefore, is that the expression "****public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders [(2015) 3 SCC 49] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263] expansion has been done away with. In short, Western Geco] , as explained in paras 28 and 29 of Associate Builders, would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and*

34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders. "35. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paras 36 to 39 of Associate Builders , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground. "36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law*, as understood in paras 18 and 27 of Associate Builders , or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders . Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco , as understood in Associate Builders, and paras 28 and 29 in particular, is now done away with*

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65. This would imply that the ***defence of public policy which is permissible under Section 7(1)(b)(ii) should be construed narrowly. In this context, it would also be of relevance to mention that under Article I(e) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Protocol & Convention Act of 1837 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression "public policy" covers the field not covered by the words "and the law of India" which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required****."*

(*Emphasis Supplied*)

93. Reliance is further placed upon ***Associate Builders vs. DDA***[47], wherein the Hon'ble Supreme Court has held as under:-

> *"18. In Renusagar Power Co. Ltd. v. General Electric Co. [1994 Supp (1) SCC 644], the Supreme Court construed Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961:*
>
> *"7. Conditions for enforcement of foreign awards.—(1) A foreign award may not be enforced under this Act—*
>
> *Xxx*
>
> *(b) if the Court dealing with the case is satisfied that—*
>
> *Xxx*
>
> *(ii)* ***the enforcement of the award will be contrary to the public policy." In construing the expression "public policy" in the context of a foreign award, the Court held that an award contrary to***
>
> ***(i) The fundamental policy of Indian law,***
>
> ***(ii) The interest of India,***
>
> ***(iii) Justice or morality, would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (see SCC p. 685, para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law,*** *but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law (see SCC pp. 689 & 693, paras 85 & 95)*
>
> *Xxxx*

[47](2015) 3 SCC 49

"27. Coming to each of the heads contained in Saw Pipes [(2003) 5 SCC 705] judgment, we will first deal with the head ***"fundamental policy of Indian law". It has already been seen from Renusagar judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law***

Xxxx

36. The third ground of public policy is, ***if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court.*** *An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice".*

37. The other ground is of "morality". Just as the expression "public policy" also occurs in Section 23 of the Contract Act, 1872 so does the expression "morality". Two illustrations to the said section are interesting for they explain to us the scope of the expression "morality":

"(j) A, who is B's Mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1000 rupees to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Penal Code, 1860.

39. This Court has confined morality to sexual morality so far as Section 23 of the Contract Act, 1872 is concerned, which in the context of an arbitral award would mean the enforcement of an award say for specific performance of a contract involving prostitution. "Morality" would, if it is to go beyond sexual morality necessarily cover such

agreements as are not illegal but would not be enforced given the prevailing mores of the day. However, interference on this ground would also be only if something shocks the court's conscience."

(*Emphasis Supplied*)

94. Further, the Hon'ble Supreme Court in ***MMTC Ltd. v. Vedanta Ltd.***[48]**,** has also held as under:-

"11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit, in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e., if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of ***Indian public policy****, in turn, includes* ***a violation of the fundamental policy of Indian law, a violation of the interest of India conflict with justice or morality, and the existence of patent illegality in the arbitral award.*** *Additionally, the concept of the "****fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury reasonableness.*** *Furthermore, "****patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of them 1996 Act, and contravention of the terms of the contract.***

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference ***does not entail a review of the merits of the dispute,*** *and is limited to situations where* ***the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts.***

13. It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), ***the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of***

[48](2019) 4 SCC 163

> ***Section 75 or Section 81 of the Act, contravention of the fundamental policy of India law, and conflict with the most basic notions of justice or morality. Additionally, sub-section 2A has been inserted in Section 34 which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by appreciation of evidence.***"
>
> (*Emphasis Supplied*)

95. Interestingly, after conclusion of arguments in the present proceedings and reserving judgment, we now also came across a very recent pronouncement on the applicability of *Section 37* of the Act qua '*public policy*' in ***AC Chokshi Share Broker Private Limited vs Jatin Pratap DesaI & Anr.***[49] wherein the Hon'ble Supreme Court has held as under:-

> "*24. The term "public policy" in Section 34(2)(b)(ii) has been interpreted by this Court as meaning (a) the fundamental policy of Indian law, or (b) the interest of India, or (c) justice or morality. In ONGC v. Saw Pipes, this Court further held that an arbitral award can be set aside as being contrary to public policy if it is patently illegal. The illegality must go to the root of the matter and must be so unfair and unreasonable that it shocks the court's conscience; it cannot be of a trivial nature. Such patent illegality includes a situation where the award is in contravention with substantive law.*
> *24.1 Further, an award can be set aside as being opposed to the "fundamental policy of India" if it is perverse,34 i.e., the finding is not based on evidence, or the arbitral tribunal takes something irrelevant into account, or ignores vital evidence. However, an award is not perverse if the finding of fact is a possible view that is based on some reliable evidence.*"

96. Since we have already, noted hereinabove, the applicability, scope and permissible interference by us while dealing with an appeal of the present nature under *Section 37* of the Act, as has been held by the Hon'ble

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Supreme Court time and again, which has once again been reinforced by the Hon'ble Supreme Court in ***AC Chokshi Share Broker Private Limited (supra)***, there is no need to dwell and/ or reiterate the same once again here. However, before proceeding to dwell upon the aspect of '*public policy in India*', it is worthwhile to note that what clearly emerges from the undisputed factual position involved before us is that neither of the parties, especially RIL, ever disputed the aforesaid aspect of law at any point of time qua the applicability of '*public policy of India*', be it at the time of pendency of the arbitration proceedings before the learned AT or at the time of pendency of the petition under *Section 34* of the Act before the learned Single Judge, and the mandate of Article 297 of the CoI qua the Natural Resources, be it before the learned AT and/ or before the learned Single Judge. The gravamen of the dispute *inter-se* the parties before us, is qua the knowledge about the '*Migrated Gas*' and its concealment and exploration/ extraction thereof by the RIL.

97. In our considered opinion, the observations qua the implicit permission by the UOI of the '*Migrated Gas*' as made by the learned AT in the Arbitral Award that *"89.… … unless such an order is made, the Claimant is not prohibited and is permitted to continue its Petroleum Operations within its Contract Area in a situation where the reservoir extends beyond its Contract Area into another… …"*, needs some consideration.

98. We say so, since we find something worthy of credence in the objectives and reasons for New Exploration License Policy[50] from which the PSC emanates, which is reproduced hereinbelow:-

> "*Government of India formulated a policy called New Exploration Licensing Policy in 1997. The main objective was to attract significant risk capital from Indian and Foreign companies, state of part technologies, new geological concepts and best management practices to explore oil and gas resources in the country to meet rising demands of oil and gas. This policy, NELP was approved in 1997 and it became effective in February, 1999 Since then licenses for exploration are being awarded only through a competitive bidding system and National Oil Companies (NOCs) are required to compete on an equal footing with Indian and foreign companies to secure Petroleum Exploration Licences (PELs).Nine rounds of bids have so far been concluded under NELP, in which production sharing contracts for 254 exploration blocks have been signed. The salient features of NELP are as under:*
> *i) 100% FDI is allowed under NELP*
> *ii) No mandatory state participation through ONGC/OIL or any carried interest of the Government.*
> *iii) Blocks to be awarded through open international competitive bidding.*
> *iv) ONGC and OIL to compete for obtaining the petroleum exploration licenses on a competitive basis instead of the existing system of granting them PELs on nomination basis.*
> *v) ONGC and OIL to get the same fiscal and contract terms as private companies.*
> *vi) Freedom to the contractors for marketing of crude oil and gas in the domestic market.*
> *vii) Royalty at the rate of 12.5% for the onland areas and 10% for offshore areas.*"

99. It is worthy of credence to also note that the UOI chose to enter into a PSC with RIL since RIL had the '*technical know-how*' and the resources to produce and explore/ extract the natural resources from the deep-sea beds as

[50] Hereinafter referred to as '***NELP***'

required by the UOI, i.e. RIL was appointed only for a specific and limited purpose. Moreover, noted hereinabove, such explorations/ extractions will and have to be seen in light of *Article 297* of the CoI, since it is the duty of the State which is being delegated, and the entity which is carrying on with such a duty, will be constrained with the same restraints as the Union and governed by the CoI. In effect, RIL was supposed to do all those for and on behalf of the UOI, as it was accountable to the UOI by acting in such a manner which was in the public interest of the people of this Country and the UOI. Therefore, the gas coming out of the Reliance Block as a result of any such extractions belongs to the UOI, *albeit*, in terms of the PSC. This issue has already been reflected upon, dealt and determined by the Hon'ble Supreme Court in ***RNRL vs. RIL (supra)***, wherein it has been held as under:-

> "***118.*** *It is relevant to note that the* ***Constitution envisages exploration, extraction and supply of gas to be within the domain of governmental functions. It is the duty of the Union to make sure that these resources are used for the benefit of the citizens of this country. Due to shortage of funds and technical know-how, the Government has privatised such activities through the mechanism provided under the PSC****. It would have been ideal for the PSUs to handle such projects exclusively. It is commendable that private entrepreneurial efforts are available,* ***but the nature of the profits gained from such activities can ideally belong to the State which is in a better position to distribute them for the best interests of the people. Nevertheless, even if private parties are employed for such purposes, they must be accountable to the constitutional set-up.*** *The statutory scheme of control of natural resources is governed by a combined reading of the Oilfields (Regulation and Development) Act, 1948, the Petroleum and Natural Gas Rules, 1959 and the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act."*
>
> (*Emphasis Supplied*)

100. There are/ is no law and/ or pronouncement by the Hon'ble Supreme Court or any other High Court which says anything contrary thereto, at least which we have come across. Meaning thereby that a private entity like RIL was/ is always bound by the provisions of *Article 297* of the CoI and that the same is final and conclusive for all extensive purposes, especially in the present scenario whence the learned AT and the learned Single Judge and we, are also similarly dealing with a dispute of the present nature involving a scarce natural resource i.e., natural gas, exploration/ extraction thereof, public interest of the Country and the UOI on the one hand and the interests of a private party like RIL on the other hand.

101. Coming to the facts involved herein, it is crucial to note that it has never been the case of either of the parties that the UOI ever gave an *explicit and express* permission qua the said '*Migrated Gas*' or that the RIL received an explicit and express permission qua extraction of the said '*Migrated Gas*' that found its way into the Reliance Block. The case of RIL is that the said permission, if any, was not compulsorily required and silence by the UOI meant deemed grant of permission.

102. For this let us examine the relevant provisions of 1959 PNG Rules as also relevant Article(s) of the PSC for better understanding, which are extracted and set out as under:-

PNG RULES 1959

"***RULE 28:*** *Regulations of operations.—(1) The Central Government may by notification in the Official Gazette prescribe conditions to regulate the conduct of operations by a lessee or licensee in a field or area where it has reason to believe that the petroleum deposit extends beyond the boundary of the leased or licensed area into areas worked by other lessees or licensee or into areas not covered by any license*

or lease and may require the lessee or licensee to undertake any operation or prohibit any operation or permit it to be undertaken subject to such conditions as it may deem fit. (2) Any order under Rule 27 or notification issued by the Central Government under sub-rule (1) of this rule shall be deemed to be a condition of the lease.

RULE 30: *Suspension etc., of operations. —No licensee or lessee shall—*
(i) suspend normal drilling;
(ii) suspend normal producing operations;
(iii) abandon an oil well or gas well;
(iv) re-condition such a well;
(v) resume drilling operations after a previous completion, suspension or abandonment of such a well; or
(vi) resume producing operations after a previous suspension without priority giving to the Central Government at least a fortnight's notice of any or all of the aforesaid actions, provided that, if normal drilling or normal producing operations have to be suspended immediately due to any unforeseen reason, notice thereof shall be given to the Central Government within twenty-four hours of such suspension under intimation to the State Government.

ARTICLES OF THE PSC
12.1 If a Reservoir in a Discovery Area is situated partly within the Contract Area and partly in an area in India over which other parties have a contract to conduct petroleum operations and both parts of the Reservoir can be more efficiently developed together on a commercial basis, the Government may, for securing the more effective recovery of Petroleum from such Reservoir, by notice in writing to the contractor require that the Contractor: a) collaborate and agree with such other parties on the joint development of the Reservoir; b) submit such agreement between the Contractor and such other parties to the Government for approval; and c) prepare a plan for such joint development of the said Reservoir, within one hundred and eighty (180) days of the approval of the agreement referred to in (b) above. "
12.2 If no plan is submitted within the period specified in Article 12.1 (c) or such longer period as the Government and the Contractor and the other parties referred to in Article 12.1 may agree, or, if such plan as submitted is not acceptable to the Government and the Parties cannot agree on amendments to the proposed joint development plan, the Government may cause to be prepared at the expense of the Contractor and such other parties a plan for such joint development

consistent with generally accepted Good International Petroleum Industry Practices which shall take into consideration any plans and presentations made by the Contractor and the aforementioned other parties.

12.3 If the parties are unable to agree on the proposed plan for joint development, the Government may call for a joint development plan from an independent agency, which agency, may make such a proposal after taking into account the position of the parties in this regard. Such a development plan, if approved by Government, shall be binding on the parties, notwithstanding their disagreement with the plan. However, the Contractor may in case of any disagreement on the issue of joint development or the proposed joint development plan, prepared in accordance with Article 12.2 or within thirty (30) days of the plan approved as aforesaid in the Article, notify the Government that it elects to surrender its rights in the Reservoir/Discovery in lieu of participation in a joint development.

12.4 If a proposed joint development plan is agreed and adopted by the parties, or adopted following determination by the Government, the plan as finally adopted shall be the approved joint development plan and the Contractor shall comply with the terms of the said Development Plan as if the Commercial Discovery is established

12.5 The provisions of Articles 12.1, 12.2 and 12.3 shall apply mutatis mutandis to a Discovery of a Reservoir located partly within the Contract Area, which although not equivalent to a Commercial Discovery if developed alone, would be a Commercial Discovery if developed together with that part of the Reservoir which extends outside the Contract Area to the areas subject to contract for Petroleum Operations by other parties.

26.1 The Contractor shall, promptly after they become available in India, provide the Government, free of cost, with all data obtained as a result of Petroleum Operations under the Contract including, but not limited to geological, geophysical, geochemical, petrophysical, engineering, Well logs, maps, magnetic tapes, cores, cuttings and production data as well as all interpretative and derivative data, including reports, analyses, interpretations and evaluation prepared in respect of Petroleum Operations (hereinafter referred to as "Data"). Data shall be the property of the Government, provided, however, that the Contractor shall have the right to make use of such

> *Data, free of cost, for the purpose of Petroleum Operations under this Contract as provided herein.*
> *xxxx*
>
> *26.3 Contractor shall keep the Government currently advised of all developments taking place during the course of Petroleum Operations and shall furnish the Government with full and accurate information and progress reports relating to Petroleum Operations (on a daily, monthly, yearly or other periodic basis) as Government may reasonably require, provided that this obligation shall not extend to proprietary technology. Contractor shall meet with the Government at a mutually convenient location in India to present the results of all geological and geophysical work carried out as well as the results of all engineering and drilling operations as soon as such Data becomes available to the Contractor."*

103. What is borne from the aforesaid is that, both *Rule 28* and *Rule 30* of the 1959 PNG Rules are very clear as they stipulate the conditions to be followed. Also, as per *Article 26.1* of the PSC, a contractor like RIL was supposed to divulge all the data available to/ by it qua the Petroleum Operations to the UOI. Not stopping therein, also as per *Article 26.3* of the PSC, a contractor like RIL was also supposed to keep the UOI informed of all the developments taking place in the Contract Area during the course of Petroleum Operations.

104. Now let us examine hereinbelow as to what the learned AT has rendered in the Arbitral Award qua the breach, if any, having been committed by the RIL:-

> "*165. For these reasons, we would answer Issue 7(a) in a qualified way that the Claimant was obliged under Article 26.1 of the PSC to:*
> *a. make disclosure of the 2003 D&M Report dated 6 November 2003 to the Respondent; and*
> *b. provide to the Respondent all data as stipulated in Article 26.1 of the PSC.*
> *For the avoidance of doubt, (b) includes-*

(i) *All interpretive and derivate data, including reports, analysis, interpretations and evaluations prepared in respect of Petroleum Operations; and*

(ii) *Interpretation and analysis relating to connectivity of the reservoirs and/ or continuity of the channels across in the boundary of Block Kg-DWN-99/3"*

105. Furthermore, the learned AT also held that:-

> *"181. For all these reasons, the Tribunal's conclusion are:*
> *i. With regard to Issue 9 is 'NO'. The-non compliance by the claimant did not amount to a material non-disclosure constituting a breach by the Claimant of the PSC and the PNG Rules. …… "*

106. The learned AT qua the 2003 D&M Report went onto observe that:-

> "*143. In relation to Issue 11, the Tribunal could only say that while the 2003 D&M report does not itself establish connectivity of the reservoirs, it suggests connectivity and D&M did proceed to value the gas on the basis that there was continuity of the reservoirs in KG-DWN-98/3 and the IG Block."*

107. Therefore, it is apparent from the aforesaid findings of the learned AT that RIL was, in fact, very much in breach of the PSC. This goes onto show that RIL, *admittedly*, failed to disclose the said D&M 2003 Report, which as reflected hereinabove was in clear violation of *Article 26.1* of the PSC by RIL. Not only that, there was a clear suggestion of connectively of the reservoirs *inter-se* the Reliance Block and the ONGC Block. All in all, the said led to taking away the rights of the UOI, to use the said resources as it best deemed fit for the benefit, of the people of this Country and/ or of the Union. Since this also led to extraction thereof by RIL without informing the UOI, therefore, there was never any '*explicit and express permission*' by the said UOI for RIL, to proceed further, significantly, since there is no dispute qua the same, the same has *rightly* never been challenged

by RIL under *Section 34* of the Act nor before us, even otherwise, there was never any '*explicit and express permission*' qua extraction of the said '*Migrated Gas*' or the gas that might migrate once the production was commenced by RIL. This leads to the conclusion that the aforesaid findings of the learned AT are final and are binding upon RIL and much less, cannot be gone by this Court.

108. More so, considering the nature of transaction involved with the UOI wherein the public interest of this Country and/ or of the Union was involved, surely this could not thus be a case of tacit understanding and/ or deemed acceptance on the part of the UOI. RIL cannot be allowed to take and/ or derive benefit of any silence by the UOI. This was a clear case wherein RIL was guilty of impeding the rights conferred to the ONGC through an '*express and explicit*' license qua its block, under the NELP. In view thereof, particularly in light of the said failure to disclose the 2003 D&M Report, there was concealment and suppression, which was material and not of a trivial nature, upon which the change in profit ratio set out in the PSC depended. This, indeed, was a vital factor which was ignored and not considered by the learned AT, which was also open to correction by the learned Single Judge in the proceedings under *Section 34* of the Act as well. Alas! the same went amiss on two stages, which call upon for interference by us in these proceedings under *Section 37* of the Act.

109. It is also relevant to note that though it was always the stand of RIL before the learned AT that considering the various reports submitted by it to the UOI from the year 2002, the UOI could have concluded the connectivity

of reservoirs *inter-se* the Reliance Block and the ONGC Block. It is hard to believe so since it was the other way round and it was RIL, who, being the technical expert and in view of the NELP ought to have known or knew or could have concluded about the likelihood of connectivity *inter se* the Reliance Block and the ONGC Block. This, we are of the view, was an essential element which ought to have been considered by the learned AT, at the time of rendering the Arbitral Award, however, since there is no whisper about this aspect in the Arbitral Award, it has been clearly overlooked/ ignored by the learned AT. Subsequently, also this aspect has not been gone into by the learned Single Judge while passing the impugned order as well.

110. It is because of the aforesaid findings in the Arbitral Award rendered by the learned AT that the breach by RIL is of utmost relevance. Furthermore, considering the unwavering and unfettered stand taken by the very same RIL as a respondent in W.P.(C) 3054/2014 before a learned Single Judge of this Court, itself took a stand and stated in its Counter Affidavit that "… … ***it is impossible to allege less to conclude that the discoveries within the ONGC and RIL blocks are connected and it is the case of these Respondents that there is no continuity or connectivity between the RIL Block and ONGC Block as is being falsely suggested by the Petitioner***… …", which, once again, was of immense relevance and extreme significance.

111. Despite the aforesaid categoric stand taken by RIL in the aforesaid W.P.(C) 3054/2014 stating that there was no connectivity inter-se the

Reliance Block and the ONGC Block, which stand, as evident from above, is much prior to the filing of the Statement of Claim(s) before the learned AT, and the case of RIL before the learned AT was that as per the data submitted by RIL to the UOI from the year 2002, reservoir connectivity could have been concluded by the UOI. Once again, there is no analysis and/ or finding to that effect by the learned AT in the Arbitral Award rendered by it and also subsequently by the learned Single Judge in the impugned order passed by it. The same went into the root of the matter as it was both pertinent and significant for due adjudication *inter se* the parties, more so, since it was against the very terms of the PSC and the doctrine of '*public policy*', '*public law*' and '*Public Trust Doctrine*'.

112. Under these circumstances, the fact, *admittedly*, is that there was a significant breach by RIL of the terms of the PSC, however, the learned AT went onto hold otherwise that the breach on part of the RIL was not material. In our considered opinion the learned AT was wrong in holding that "*… …The non-compliance by the claimant did not amount to a material non-disclosure constituting a breach by the Claimant of the PSC and the PNG Rules. … … "*. This is patently erroneous as the breach on the part of RIL could not be said to be insignificant and labelled as being not material by the learned AT at the time of rendering the Arbitral Award. Consequently, the plea of the UOI that the RIL has played a fraud on them cannot be simply brushed aside. Furthermore, the same has also skipped the attention of the learned Single Judge while adjudicating the application under *Section 34* of the Act and passing the impugned order.

113. To sum up, there are no analysis nor are there any findings rendered by the learned AT with respect to the aspect of shifting stand of RIL, which the UOI has claimed clearly an attempt to play fraud. The same is the position qua the proceedings under *Section 34* of the Act before the learned Single Judge. It is for the aforesaid reasons, when we find that there exists a patent illegality on the face of the Arbitral Award as it is fallacious, in contravention of substantive laws and the terms of the PSC, PTD, 1959 PNG Rules and the fundamental law of the land, we feel the need to look into it while dealing with the present appeal under the provisions of *Section 37* of the Act. For this, we derive strength from ***State of Chhattisgarh v. SAL Udyog (P) Ltd (supra)***, wherein the Hon'ble Supreme Court has also held as under:-

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

for setting aside an award, would not be available in an appeal preferred under Section 37 of the 1996 Act."

114. Relevantly, RIL in the light of the said breach not only did it succeed in extraction of huge amounts of '*Migrated Gas*' belonging to the ONGC Block, but also, was enriched from the profits thereof at the cost of causing losses to the public exchequer, moreover, since the commodity at hand was/ is a vital natural resource belonging to the UOI as a trustee, in the public interest of the people of this Country. Any private entity like RIL cannot be allowed to subsume it for its own benefit at the cost of taking the UOI for a ride by remaining silent, and that when it is against the letter and spirit of the PSC.

115. It is also worthwhile to note that *Rule 30* of the 1959 PNG Rules talks about '*normal*' drilling operations and not about a '*special*' circumstance where the reservoir extends beyond the Contract Area into any area, be it the Contract Area held by another party like the ONGC herein. As such, the actions of the RIL qua the extraction of '*Migrated Gas*' were against NELP and the fundamental laws of India.

116. Significantly, it is trite law that mere silence of the UOI/ Government qua the '*Migrated Gas*', in terms of PNG Rules or *Article 12* of the PSC, cannot be considered as an approval by the UOI to extract the '*Migrated Gas'*. Reliance is placed upon ***RNRL vs. RIL****(Supra)*, wherein the Hon'ble Supreme Court has held as under:-

"*277. The learned Senior Counsel for RNRL also argued, very vehemently, that the GoI had remained silent for a very long time, and even though it knew that RIL was making commitments to its internal*

divisions, said and did nothing. From this, they attempted to draw the implication that the GoI had agreed to RIL making such commitments to its own internal divisions. They went even further. They claimed that in the atmosphere of such a silence, RIL and the gas-based energy producing division within RIL could make and indeed have made such allocations and that such a silence implies that rights have vested in them. That is an unsustainable argument.

278. It is not uncommon for government agents to remain silent, even though the instruments under which private parties get rights to exploit natural resources provide otherwise and impose restrictions that are being flouted. This happens many a times, and for obvious reasons. That cannot become the basis for evisceration of policy-making rights of the GoI. And in this case, it involves a scarce resource in such massive quantity, that is almost 50% of what had been available throughout the country for use by all the other users in the previous decade, that silence by officials of the GoI cannot and ought not to be given any weight at all.

279. It was also argued by the learned Senior Counsel for RNRL that various utterances by senior officials and replies by some Ministers in Parliament indicate that the Government knew that the PSC provided the kinds of rights to RIL that RNRL claims in order to sustain its demands. The short answer to that, in the context of this case is: it does not matter… …"

117. Therefore, in our considered opinion, knowledge of the UOI qua the reservoir connectivity could not have been deduced by the learned AT by mere conjectures and surmises. Without adverting to the merits involved, we can say that though RIL has extracted the '*Migrated Gas*', however, the said extraction/ exploration of the '*Migrated Gas*' without any 'explicit and express permission' cannot be said to have been in '*most efficient manner for betterment of the Union*', which did not belong to it and which did not entitle them to reaping any profits therefrom.

118. In view of the aforesaid, in our considered opinion, the view taken by the learned AT in the Arbitral Award was *not* a possible view since, the said view is not only against the dicta of the Hon'ble Supreme Court in ***RNRL vs RIL*** *(supra)* but is also volatile of the provisions of the NELP and the '*Public Trust Doctrine*' and the fundamental law of the land, and is thus, patently erroneous.

119. Furthermore, in view of the above, the conclusion drawn by the learned Single Judge while disposing of the proceedings under *Section 34* of the Act that "… … *what was comprised in the PSC was a purely commercial transaction entered into by two contracting parties*… …" is correct, however, in our considered opinion and in view of the aforesaid analysis and findings, the learned Single Judge erred in stating that "… … *the factual conclusions are perfectly rational, coherent and logical*… …", since the said assertions were arrived at by the learned AT after patently erroneous application of law, as such there did exist a patent illegality on the face of the award. In view thereof, we respectfully do not agree with the finding of the learned Single Judge that, it was the other way and was *not* a 'possible view'.

Findings and Conclusions:

120. In view thereof, in our considered opinion, the view of the learned AT that "… … *unless such an order is made, the Claimant is not prohibited and is permitted to continue its Petroleum Operations within its Contract Area in a situation where the reservoir extends beyond its Contract Area into another*… …", is patently erroneous, against the fundamental law of

India and against the '*public policy of India*', more so, being in breach of the terms of the PSC and being the technical expert and having the *know-how*, it was the fiduciary duty of the RIL to disclose the D&M 2003 Report to the UOI.

121. As such, the view expressed and the findings rendered by the learned AT in its Arbitral Award qua the above, would be in the teeth of objects of the NELP from which the PSC emanates.

122. Accordingly, in view of the factual position involved we find sufficient reasons to interfere with the impugned order dated 09.05.2023 i.e., specifically after the finding(s) of the learned AT in the Arbitral Award qua the proceedings *inter se* the UOI and the RIL being an International Commercial Arbitration as also since it is held in the impugned order passed by the learned Single Judge that the learned AT has taken a '*possible view*'. In any event, as elaborately discussed hereinabove, we have found '*patent illegality*' on the face of the Arbitral Award worthy of interference by us in the present appeal under *Section 37* of the Act.

123. Based on the aforesaid detailed analysis and findings qua the scope of *Section 37* of the Act, as also finding that there was a '*patent illegality*' on the face of the Arbitral Award, we have no alternative but to set aside the impugned order passed by the learned Single Judge along with the Arbitral Award rendered by the learned AT.

124. *De hors* the aforesaid and before parting, the aspect qua the disputes not being arbitrable since it fell into the public law domain, needs no consideration and/ or adjudication by us since we agree with the findings

recorded by both the learned AT and the learned Single Judge about the stance of the UOI in its Demand Notice to RIL based upon breach of terms of the PSC by RIL, wherein it was stated that "*Further, the Government, without prejudice to the foregoing, reserves its rights to take such other and further actions as it may deem appropriate for the breach of the provisions/ obligations committed by you under the PSC.*". The said Demand Notice was, *admittedly*, sent prior to the Notice of Arbitration sent by the RIL subsequently. As such, what is borne out from the aforesaid is that the Demand Notice from which the dispute arose leading to arbitration *inter-se* the parties, was itself based upon the breach of terms of the PSC and not under the public law domain exclusively.

125. In view of the above, the impugned order dated 09.05.2023 passed by the learned Single Judge and the Arbitral Award passed by the learned Arbitral Tribunal dated 24.07.2018, being contrary to the settled position of law, are set aside.

126. Accordingly, the present appeal of the UOI is allowed along with pending application, if any, leaving the parties to bear their own costs.

(SAURABH BANERJEE)
JUDGE

(REKHA PALLI)
JUDGE

FEBRUARY 14, 2025
bh/ab