IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

COMM ARBITRATION PETITION NO. 1149 OF 2025

Waterfield Advisors Private Limited
A private limited company registered under
the provisions of Companies Act, 1956,
having its Registered Office at 142,
Maker Chambers VI, 220, Jamnalal Bajaj
Marg, Nariman Point, Mumbai – 400 021. ...Petitioner

Versus

Sridhar Kurpad
Aged 50 years, Indian Citizen
Residing at B1, Paradise Building
Vishnu Baug Society, SV Road,
Andheri West, Mumbai – 400 058. …Respondent

Mr. Sumit Rai, with Nidhi Singh, Nidhi Faganiya and Owais Khan, i/b Vidhii Partners, for the Petitioner.
Mr. Karl Shroff, with Chirag Bhavsar and Anand Jagmalani, i/b Vis Legis Law Practice, for the Respondent.

CORAM : N. J. JAMADAR, J.
RESERVED ON : 15th JULY 2026
PRONOUNCED ON : 5th AUGUST 2026

JUDGMENT:

1. This Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act, 1996") to set aside the Award dated 18th December 2024 passed by the Arbitral Tribunal, comprising of a sole Arbitrator, constituted by an order dated 6th July 2021 passed by this Court in Commercial Arbitration Application No. 95 of 2021.

2. The background facts leading to this Petition can be summarised as under:

2.1 The Petitioner is a private limited company. The Petitioner is engaged, *inter alia,* in the business of providing Management Consultancy and Business Advisory Services. The Respondent joined the Petitioner-Company as a Director Operations on 24th August 2011, pursuant to an Appointment Letter dated 24th August 2011 issued by the Petitioner.

2.2 By way of remuneration, the Respondent was paid an annual salary and benefit package aggregating to Rs.21,60,000/- per annum. The basic salary was Rs.1,80,000/- per month. In addition, the Petitioner offered the Respondent equity shares of the company in the ratio: 0.5% in Y1, 0.2% in Y2, 0.2% in Y3, which were to be allocated to the Respondent in May of each year, based on the total share capital of the company at the relevant time. The shares allocated to the Respondent in Y1, Y2 and Y3 were to vest in the Respondent in Y4(30%), Y5(30%) and Y6(40%) respectively, subject to the Respondent continuing to be employed with the Petitioner. It was further provided that the allocation of equity would be in accordance with the Company's policy.

2.3 The Appointment Letter also contained a clause as regards the termination of the Respondent's employment. The Respondent was required to relinquish all shares vested in him, upon termination of his employment with the Petitioner-Company, as directed by the Company's policy.

2.4 On 1st March 2017, a Grant Letter came to be issued by the Petitioner, thereby declaring the entitlement of the Respondent to transfer in all 31,878 equity shares ("the subject shares").

2.5 Since 4th August 2017, the Respondent remained absent without prior notice or intimation. In the wake of correspondence that ensued, the Respondent tendered his resignation. Vide communication dated 10th April 2018, the Petitioner accepted the resignation of the Respondent and relieved the Respondent from the service of the Petitioner with effect from 1st September 2017.

2.6 The Petitioner claims that, after the termination of the employment vide letter dated 8th December 2018, the Respondent for the first time made a demand for allotment of the subject shares. Correspondence ensued between the parties. Eventually by a communication dated 15th October 2020, the Petitioner informed the Respondent that the allocation of the shares to the Respondent under Clause 3 of the Appointment Letter dated 24th August 2011 was subject to the Company's internal policy and at the sole discretion of the Board of Directors of the Company and the options granted to the Respondent stood relinquished on account of the Respondent ceasing to be an employee of the Petitioner. Thus, having ceased to be an employee of the Petitioner, the Respondent was not entitled to any shares of the Petitioner-Company.

2.7 Operationalising the Dispute Resolution Mechanism contained in Clause 12 of the Appointment Letter, the Respondent invoked the Arbitration. As noted above, pursuant to the order dated 6th July 2021 in Commercial Arbitration Application No. 95 of 2021, the Arbitral Tribunal came to be constituted.

2.8 The Arbitral Tribunal after completion of the pleadings, settled the issues in the Arbitral proceedings. The Respondent-Claimant (CW1) examined himself and the Petitioner-Respondent examined Mr. Kartik Kini, (RW-1), its Chief Operating Officer.

2.9 After appraisal of the evidence and material on record, the Arbitral Tribunal was persuaded to allow the claim of the Claimant in terms of prayer clauses (A) and (B) of the Statement of Claim, which reads as under :

> "A. this Hon'ble Tribunal be pleased to direct the Respondent to specifically perform the terms of the employment letter dated 24th August 2011 as also the Grant Letter dated 1st March 2017 by allotting to the Claimant 31,878 shares in the Respondent company within such time and on such terms as this Hon'ble Tribunal deems fit;
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> B. this Hon'ble Tribunal be pleased to direct the Respondent to do all acts, execute all deeds and documents as may be necessary to enable the effective transfer of the shares in favour of the Claimant."

2.10 The Arbitral Tribunal also directed the Petitioner to pay an amount of Rs.15,51,265/- as costs. Incidental directions as regards the stamping of the Appointment Letter were also issued.

2.11 The learned Arbitrator was of the view that the vesting of options in favour of the Claimant had already taken place in view of the Appointment Letter read with the Grant Letter and in accordance with Rule 12 of the Companies (Share, Capital and Debentures) Rules, 2014 ("the Rules, 2014").

2.12 The absence of the policy in regard to Employees Stock Option Plan ("ESOP") did not constitute an impediment to the vesting of the subject shares in the Claimant. In substance, the Company was not justified in refusing to allot the subject shares on the premise that the shares stood relinquished upon the termination of the employment of the Claimant as the vesting of the subject shares in the Claimant had occurred prior thereto in terms of the Appointment Letter and the Grant Letter.

2.13 Being aggrieved and dissatisfied, the Petitioner-Company has filed this Petition seeking to set aside the impugned Award, on the ground that the impugned Award is in contravention of the public policy and suffers from patent illegality.

3. I have heard, Mr. Sumit Rai, the learned Counsel for the Petitioner-Company and Mr. Karl Shroff, the learned Counsel for the Respondent-Claimant, at some length. With the assistance of the learned Counsel for the parties, I have also perused the material on record.

4. Mr. Sumit Rai, the learned Counsel for the Petitioner-Company mounted a multi-pronged challenge to the impugned Award. First and foremost, Mr Rai would urge that, the impugned Award is in the teeth of the governing provisions of the Companies Act, 2013 ("the Act, 2013") and the Rules, 2014. Laying emphasis on the provisions contained in Section 53 of the Act, 2013, Mr. Rai would urge, there is an express prohibition against issuance of the shares at a discount except by way of sweat equity shares, which is not the case at hand. Conversely, the allotment of shares to employees under Section 62 of the Act, 2013 is permitted, provided there is a scheme framed by the Company in regard to ESOP authorising the issuance of ESOP. Thus, the shares cannot be allotted to an employee unless there is ESOP Scheme and in the manner provided under Section 62 of the Act, 2013.

5. Mr. Rai further submitted that if the provision in Section 62(1)(b) of the Act, 2013 is read in conjunction with Rule 12 of the Rules, 2014, it becomes explicitly clear that ESOP cannot be extended save in the manner indicated therein. The learned Arbitrator, Mr. Rai would urge, therefore committed a gross error in law in ignoring the governing provisions of the Act, 2013 and the Rules, 2014, by passing an order in the nature of specific performance of the Agreement contained in the Appointment Letter. The reasons which weighed with the learned sole Arbitrator were wholly irrelevant for determining the issue that arose for determination.

6. Secondly, the learned Arbitrator was in error in completely misconstruing the Appointment Letter and Grant Letter by reading those documents in a selective manner. While laying emphasis on

Clause 3 of the Appointment Letter, the learned Arbitrator completely eschewed from consideration the other clauses of the Appointment Letter including the consequences of termination; which according to Mr. Rai, would be attracted even in the case of termination of employment by way of resignation. The learned Arbitrator, Mr. Rai would urge, rewrote the contract between the parties and that constitutes a fundamental error.

7. Mr. Rai would urge, it was not a matter of error in interpretation of the contract but that of rewriting the contract. In the face of such manifest error where the Arbitral Tribunal ignored the terms of the contract, the Award is required to be set aside. To lend support to this submission, Mr. Rai placed reliance on the judgment of the Supreme Court in the case of **Indian Railways Catering And Tourism Corp Ltd Vs Brandavan Food Products.**[1]

8. Thirdly, Mr. Rai submitted that the learned Arbitrator failed to appreciate the three different stages in the matter of the ESOP, namely, options, vesting and the exercise of the vested options. In the case at hand at best, Mr. Rai would submit that, options were given to the Claimant. There was no vesting of those options in the Claimant, much less the exercise of those options by the employee. The learned Arbitrator, completely misread and misconstrued the very terms of the Appointment and Grant Letters to hold that the vesting took place before the Claimant resigned from the Company.

1 2025 SCC OnLine SC 2369.

9. Mr. Rai submitted that, the patent illegality in the impugned Award is manifest in the incorrect invocation of law in the matter of grant of discretionary relief of specific performance. Amplifying the submission, Mr. Rai urged with tenacity that if it was the case that the petitioner had committed the breach of promise to allot the equity shares, in terms of the appointment letter and grant letter, the appropriate remedy was that of damages. From this standpoint, it was incumbent upon the Arbitral Tribunal to evaluate whether an award in terms of money would not have been an adequate relief. Relief of specific performance in the nature of a direction to allot the subject shares was wholly inappropriate, as from the perspective of the claimant, the subject shares have no special value to the claimant and from the point of view of the company, the latter would have the right to buy back such shares at fair market value at its discretion. The Arbitral Tribunal failed to examine whether it was equitable to grant the relief of specific performance. The consequences that may ensue if an ex-employee, in whom the petitioner company had lost confidence, is introduced as a shareholder of the petitioner company, after eight years of his resignation, were not at all evaluated. This non-application of mind in the matter of the grant of the discretionary relief renders the award patently illegal. To bolster up this submission, Mr. Rai placed reliance on the enunciation of law in the case of ***P. Daivasigamani versus S. Sambandan***[2],

2 (2024) 14 SCC 793.

10. Lastly, Mr. Rai would submit that, the Arbitral Tribunal was completely missed to note the conduct of the claimant in not evincing interest in acquiring the subject shars till the acceptance of his resignation. There was no correspondence emanating from the claimant, even till the month of April 2018, when the claimant sought relieving order. Non-consideration of all these relevant factors renders the impugned award legally infirm, submitted Mr. Rai.

11. Mr. Karl Shroff, the learned Counsel for the respondent-claimant stoutly supported the impugned award. It was submitted that the grounds which were sought to be urged before this Court were not agitated before the Arbitral Tribunal. As recorded in the impugned award, the parties proceeded before the Arbitral Tribunal on the basis that, in case claimant succeeds in demonstrating that the appointment letter coupled with the grant letter constituted vesting of the option, the absence of ESOP Policy would have no bearing on the claimant's claim and that even the resignation with effect from 31 August 2017 would not be an impediment for the grant of the reliefs claimed by the claimant. Having proceeded on that premise, Mr. Shroff would urge, it is now impermissible for the petitioner to turn around and assail the award on the grounds that the ESOP Policy was not in place and the resignation amounted to termination and the failure to exercise the option before the resignation impaired the claim of the claimant.

12. Mr. Shroff further submitted that the letter dated 15 October 2020, wherein the petitioner company declined to allot the subject shares records the sole reason that the option granted to the claimant stood relinquished on account of the claimant having ceased to be an employee of the company. If the appointment letter and the grant letter are perused in the light of the aforesaid reason for refusal, it becomes explicitely clear that the cessation of the employment of the claimant had no bearing on the entitlement to the subject shares. The defences subsequently raised by the petitioner were creatures of the afterthought, submitted Mr. Shroff.

13. Taking the Court through the appointment letter and the grant letter, Mr. Shroff submitted that the options already stood vested in the claimant and such vesting took place before the claimant tendered resignation. This finding of fact recorded by the Arbitral Tribunal, based on the evaluation of the material on record, is impeccable and not open for interference in the petition under Section 34.

14. The absence of ESOP, Mr. Shroff would urge, is a clear subterfuge. The Arbitral Tribunal has found that the employees who were similarly circumstanced, with identical appointment letters, have been granted ESOP and continued to hold such shares even after ceasing to be employees of the petitioner company, though no ESOP Policy was framed by the petitinoer company. The Arbitral Tribunal has also recorded in clear and explicit terms that the petitioner never called upon the claimant to exercise the options or deposit the amount. Since the aspect of the quantity and quality of evidence is within the exclusive domain of the Arbitral Tribunal, the challenge to the impugned award is completely devoid of substance.

15. Mr. Shroff further submitted that the submission on behalf of the petitioner that, the Arbitral Tribunal has rewritten the contract between the parties is belied by plain text of the appointment letter and grant letter. Laying emphasis on Clause 3 of the appointment letter and the grant letter, Mr. Shroff would urge, no other inference than the one drawn by the Arbitral Tribunal was conceivable. In substance, the findings of facts recorded by the Arbitral Tribunal on the basis of the interpretation of the documents is an exercise within the realm of the Arbitral Tribunal's jurisdiction and, by no stretch of imagination, it could be termed as rewriting of the contract.

16. Mr. Shroff submitted that the challenge to the award premised on the award being in contravention of the fundamental policy and suffering from the vice of patent illegality is driven by the objective of bringing the case within the limited scope of interference under Section 34 of the Act, 1996. To emphasise that the scope of interference in exercise of the power under Section 34 is extremely limited and strictly confined to the grounds specified therein, Mr. Shroff placed reliance on the judgments of the Supreme Court in the cases of ***Consolidated Construction Consortium Limited vs. Software Technology Parks of India,***[3] ***Associate Builders vs. Delhi Development Authority,***[4] ***PSA Sical Terminals Private Limited vs. Board of Trustees of V. O.***

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3 (2025) 7 SCC 757.

4 (2015) 3 SCC 49.

Chidambranar Port Trust Tuticorin and others,[5] ***Hindustan Construction Company Limited vs. National Highways Authority of India,***[6] and ***Dyna Technologies Priavate Limited vs. Crompton Greaves Limited***[7].

17. Before adverting to appreciate the aforesaid rival submissions canvassed across the bar, it is imperative to keep in view the approach expected of the Court in a Petition seeking setting aside of an Arbitral Award. The only recourse against an Arbitral Award is a Petition under Section 34 of the Act, 1996. Per force the challenge to an Arbitral Award is confined to the statutory grounds enumerated in Sub-Section (2) and (2-A) of Section 34 of the Act, 1996. The prime reason for the restricted jurisdiction conferred upon the Court under Section 34 is the adherence to the fundamental principles of arbitral autonomy and minimal judicial intervention in the arbitral proceedings. Lest, the very object of arbitration as a preferred dispute resolution mechanism, resorted to by the parties as a matter of choice, would be defeated.

18. In the facts of the case at hand, the grounds mentioned in clause (a) of sub-section (2) of Section 34 have no application. The challenge, as noted above, is mounted on the twin ground that the award is in conflict with the public policy of India [sub-clause (ii) of clause (b) of sub-section (2)] and that it suffers from the vice of patent illegality (sub-section 2-A of Section 34). These expressions have defined judicial

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5 (2023) 15 SCC 781

6 (2024) 2 SCC 613

7 (2019) 20 SCC 1

connotation. Over a period of time, these expressions have been refined in the form of concrete propositions, albeit not exhaustive. In the very text of Section 34(2)(b)(ii) and sub-section (2-A) of Section 34, the legislature has made the provisions which confine the ambit of these expressions to obviate the possible expansive interpretation which would undermine the arbitral autonomy and run counter to the policy of minimal judicial intervention.

19. Explanation 1 to sub-clause (b) of sub-section (2) clarifies when an award can be said to be in conflict with public policy of India. It reads as under :

> [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."

20. Explanation 2 further constricts the scope of interference by providing that the test as to whether there is contravention with fundamental policy of Indian law shall not entail a review on the merits of the dispute. Thus, the arbitral award cannot be attacked in an indirect manner by resorting to evaluation of the merits of the dispute. The proviso to sub-section (2-A) of Section 34 restricts the scope of interference on the ground of patent illegality by providing that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence. The legislative prescription is, thus, abundantly clear. The arbitral award cannot be set aside on the ground that the award is erroneous in law by resorting to re-appraisal of evidence before the Tribunal. A Petition challenging the award cannot be allowed to be converted into an appeal in disguise where the Appellate Court is empowered to re-appreciate the evidence and correct the errors on facts and in law.

21. General nature of the jurisdiction exercised by the Court under Section 34 and the limitations thereon, were expounded by the Supreme Court in the case of **Consolidated Construction Consortium Ltd. (supra),** in the following terms :

> "46. Scope of Section 34 of the 1996 Act is now well crystallized by a plethora of judgments of this Court. Section 34 is not in the nature of an appellate provision. It provides for setting aside an arbitral award that too only on very limited grounds i.e. as those contained in sub-sections (2) and (2A) of Section 34. It is the only remedy for setting aside an arbitral award. An arbitral award is not liable to be interfered with only on the ground that the award is illegal or is erroneous in law which would require re-appraisal of the evidence adduced before the arbitral tribunal. If two views are possible, there is no scope for the court to re-appraise the evidence and to take the view other than the one taken by the arbitrator. The view taken by the arbitral tribunal is ordinarily to be accepted and allowed to prevail. Thus, the scope

> of interference in arbitral matters is only confined to the extent envisaged under Section 34 of the Act. The court exercising powers under Section 34 has perforce to limit its jurisdiction within the four corners of Section 34. It cannot travel beyond Section 34. Thus, proceedings under Section 34 are summary in nature and not like a full-fledged civil suit or a civil appeal. The award as such cannot be touched unless it is contrary to the substantive provisions of law or Section 34 of the 1996 Act or the terms of the agreement." (emphasis supplied)

22. As the challenge in the instant case is premised on the ground of contravention of "public policy" and vitiation on account of "patent illegality" it may be apposite to note the judicial precedents which expound these expressions. In the case of **Associate Builders (supra)**, the Supreme Court elaborately exposited as to what constitutes "fundamental policy of Indian Law" After adverting to the decisions in the cases of **Renusagar Power Co. Ltd. V/s. General Electric Co.**[8] and **ONGC Ltd. V/s. Western Geco International Ltd.**[9], the Supreme Court culled out the juristic principles, the violation of which would constitute the violation of fundamental policy of Indian law :

(i) the violation of the governing statute. For instance, the violation of Foreign Exchange Act, in **Renusagar Power Co. Ltd. (supra)**.

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8 1994 Supp (1) SCC 644

9 (2014) 9 SCC 263

(ii) disregard to the orders of the superior Courts in India.

(iii) disregard to the binding effect of the judgment of a superior Court.

(iv) failure to adopt a "judicial approach" which demands that a decision be fair, reasonable and objective. Conversely, if the determination by the arbitral tribunal is arbitrary and actuated by extraneous consideration, it would violate the fundamental policy of Indian law.

(v) non-observance of the principles of natural justice, which also finds resonance in Sections 18 and 34(2)(a)(iii) of the Arbitration Act, 1996. Non-application of mind by the arbitral tribunal is subsumed in this juristic principle.

(vi) perversity – a decision which is perverse or so irrational that no reasonable person would have arrived at the same, falls foul of the fundamental policy of Indian law. Perversity may arise on account of the findings being based on no evidence or the findings being based on irrelevant consideration or the findings being the product of non-consideration of the material/evidence which is relevant.

23. In the case of **Associate Builders (supra)**, the Supreme Court also administered a caution that, while applying the test of "Public Policy" to an arbitration award the Court must be alive to the fact that it is not acting as a Court of appeal and, consequently, errors of fact cannot be corrected. Relevant observations in para 33 read as under :

> "33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts……" (emphasis supplied)

24. In the said case, the Supreme Court also expounded the concept of "patent illegality" in the following words :

> "42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads :
>
> 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 :
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> "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."
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> 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.

42.3 (c) Equally, the third subhead 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) and (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 this 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."

(emphasis supplied)

25. In the case of **PSA Sical Terminals Pvt. Ltd. (supra)**, after adverting to the previous pronouncements, the Supreme Court further expounded the concept of 'patent illegality' in the following words :

"40. It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and re-appreciate the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act. 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". A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Section 18 and 34(2)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. 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. <u>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, re-appreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award</u>.

41. <u>A decision which is perverse, though would not be a ground for 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</u>." (emphasis supplied)

26. In the case of **Indian Railways Catering and Tourism Corp. Ltd. (supra)**, on which reliance was placed by Mr. Rai, the Supreme Court enunciated that, rewriting contract for the parties would be a breach of fundamental principle of justice. The observations in para 65 to 67 read as under :

> "65. Again, in PSA Sical Terminals Pvt. Ltd. (supra), this Court found that the arbitral tribunal had thrust a new term into the agreement between the parties and thereby created a new contract for them. Referring to **Ssangyong Engineering**[10], this Court affirmed that rewriting a contract for the parties would be a breach of the fundamental principles of justice, entitling a Court to interfere as it would shock its conscience and would fall within the exceptional category.
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> 66. A little later, in **State of Chhattisgarh and Anr. V/s. SAL Udyog Pvt. Ltd.**[11], a 3-Judge Bench of this Court dealt with the issue as to what would constitute 'patent illegality' appearing on the face of the award, in terms of Section 34(2-A) of the Act of 1996. Reference was made to the earlier decisions in Associate Builders (supra) and Ssangyong Engineering (supra), and it was held that the failure of the arbitral tribunal to decide in accordance with the terms of the contract governing the parties would certainly attract the 'patent illegality' ground as the said oversight amounted to gross contravention of Section 28(3) of the Act of 1996, which enjoined the arbitral tribunal to take into account the terms of the contract while making the award.
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> 67. Much earlier, in **Industrial Promotion and Investment Corporation of Orissa Limited vs. Tuobro Furguson Steels Private Limited and others**[12], this Court observed, on facts, that the High Court had completely overlooked the fact that the parties, with their eyes widely open, had entered into a

10 (2019) 15 SCC 131

11 (2022) 2 SCC 275

12 (2012) 2 SCC 261

> contract, which was subject to the terms and conditions clearly spelled out therein, and in furtherance of the contract, payments were made and possession changed hands. This Court noted that both sides had therefore acted on the basis of the contract, changed their respective positions and assumed rights and obligations against each other. This Court held that the contract, having been acted upon, could not unilaterally be abrogated at the sweet will of either of the parties."
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> (emphasis supplied)

27. In the light of the aforesaid enunciation of law on the contours of the jurisdiction of the Court under Section 34 of the Act, 1996, the challenge to the impugned award deserves to be appreciated. By and large, there is not much controversy over the foundational facts narrated above. The core controversy revolves around the question whether the subject shares had vested in the claimant or was it a case of mere options. The subsidiary question which hinges upon the answer to the preceding question would be, whether the alleged non-exercise of the option, after vesting of the subject shares by the claimant, would defeat the right of the claimant.

28. To explore an answer, of necessity, reference to the appointment letter becomes indispensable. Clause 3 of the appointment letter which constitutes the substratum of the claim of the claimant, reads as under :

> "3. Company Equity : The Company is pleased to offer you equity shares of the Company on the following basis 0.5% in Y1, 0.2% in Y2, 0.2% in Y3, which will be

> allocated to you in May each year based on the total share capital of the Company at such time. The Y1 tranche will be allocated to you in January 2012. The shares allocated to you in Y1, Y2 and Y3 shall vest to you in Y4 (30%), Y5(30%) and YE (40%) respectively, subject to your remaining with the Company The allocation of equity will be in accordance with the Company's policies in this regard, which will be made available to you in due course. Should your employment with the Company be terminated for any reason, you will be required to relinquish all shares vested in you, as directed by the Company's policies at such time."

29. Mr. Rai, learned Counsel for the Petitioner, submitted that the aforesaid clause 3 of the appointment letter is required to be read in conjunction with other clauses, especially clause 9, governing the termination of service. Relevant part of clause 9 reads as under :

> "9. Termination and suspension : Your employment may be terminated upon the occurrence of one or more of the following events :
>
> (i) Your employment may be terminated at will, by you or the Company, other than for Cause, by providing ninety (90) days prior written notice, or by payment of basic salary in lieu of notice in case of termination of employment by the company……
>
> On termination of your employment, the Company shall not have any liability towards you other than for remuneration, allowances and perquisites which may have accrued prior to the date of termination of employment. Upon termination of employment for any reason whatsoever, you shall surrender or handover to the company, in good condition, all property of the

> company, in your possession including records and documents whether stored electronically or otherwise, office access cards, keys corporate credit cards, passes or any other property and equipment of the Company which you may have received during the term of your employment."

30. The learned Arbitrator was of the view that the appointment letter read as a whole, makes it abundantly clear that it was in the nature of grant of options and those options would vest on the claimant upon completing 4th, 5th and 6th year of employment with the Petitioner. Support was sought to be drawn by the learned Arbitrator from the course of conduct of the Petitioner in the matter of vesting of shares in the other employees in the absence of the ESOP policy. The thrust of the submission of Mr. Rai was that the learned Arbitrator misconstrued the aforesaid appointment letter and, in fact, rewrote the contract between the parties. Mr. Rai would urge, the aforesaid interpretation is in the teeth with the provisions contained in Section 62(1)(6) of the Companies Act, 2013 and Rule 12 of the Rules 2014, given the indisputable fact that there was no policy of ESOP.

31. A bare perusal of clause 3 of the appointment letter indicates that the shares, in the ratio indicated therein, aggregating to 0.9% of the total share capital, were offered to be allocated to the claimant in the month of May each year in the first three years. Offer of allotment of shares did not stop at that. Had it been a case of the appointment letter only offering the shares, probably it could have been construed as that of offering an option only. The appointment letter also envisages vesting of the shares in a definite manner, namely, the shares allocated in Y1 would vest in the claimant in Y4; those allocated in Y2 would vest in Y5 and the last tranche allocated in Y3 would vest in Y6, provided the claimant continued to be in the employment of the company. Vesting of the respective shares was to take effect after the period of three years.

32. Clause 3 of the appointment letter (extracted above) indicates that the parties were alive to the necessity of making the provision for vesting of the shares. The quantity of shares that would vest was specified. The duration was prescribed. Thus, clause 3 of the allotment letter cannot be construed as a simple offer of options. The Arbitral Tribunal was, therefore, justified in construing clause 3 in a rational and meaningful manner.

33. Mr. Rai would urge that the other clauses of the appointment letter and even the later part of clause 3, were not considered by the Arbitral Tribunal to gather the real intent of the parties. Indeed, the latter part of clause 3 provided that the allocation of equity would be in accordance with the policy of the company, in that regard. The second caveat was that, should the employment of the claimant with the company be terminated for any reason, the claimant would be required to relinquish all shares vested in the claimant, as directed by the Company's policy at the given time. Co-relating the second caveat with clause 9(i) (extracted above), Mr. Rai would urge that, even in case termination brought about by the resignation , the clause of relinquishment of the equity kicked in.

34. I find it rather difficult to accede to the aforesaid submission. Clause 9(i) clearly provides that, upon termination of employment, the company would not have any liability towards the employee other than the remuneration, allowances, perquisites, which had accrued prior to the date of termination of the employment. If the subject shares stood vested in the claimant before the termination of the employment, and the prevailing policy did not provide for relinquishment of those shares, (when the Petitioner pitches the case on the premise of absence of policy), the second caveat contained in the latter part of clause 3 did not get attracted. This also becomes evident from the fact that the continuance of the employment with the Petitioner was a condition for vesting of the subject shares at the stipulated time.

35. This brings to the fore the implications of the grant letter. Clause 1 of the grant letter dated 1 March 2017 reads as under :

> "<u>Subject : Grant of equity shares</u>
> In consideration of the services rendered by you, in relation to your employment with Waterfield Advisors Private Limited ("Company"), the Company hereby grants to you, an entitlement to receive equity shares of the Company in accordance with the terms and conditions detailed below.
> 1. You are entitled, at the sole determination of the Board of Directors of the Company to such number of equity shares of the Company at a face value of INR 10

> transferred by Waterfield Employee Benefit Trust ("Trust") as are set out below :
>
> a) On the date of execution of this letter, 31878 equity shares;"

36. If there was any doubt whether subject shares vested in the claimant, the aforesaid disposition in the grant letter removes the same. 31878 equity shares were quantified as the entitlement of the claimant in consideration of the services rendered by the claimant in relation to his employment with the Petitioner Company. Grant letter was evidently issued after the claimant had completed six years of employment with the Petitioner.

37. The Arbitral Tribunal was, thus, within its jurisdiction in construing the appointment letter in juxtaposition with the disposition under the grant letter. The construction of the terms of the contract, it is trite, is within the province of the jurisdiction of the Arbitral Tribunal. The error in the construction of contract, or, for that matter, the erroneous interpretation of the terms of the contract, is not a sustainable ground for the interference with the arbitral award.

38. A profitable reference can be made to the decision of the Supreme Court in the case of **Mcdermott International Inc. V/s. Burn Standard Co. Ltd.**[13], wherein the Supreme Court emphasised that, the construction of the contract agreement is within the jurisdiction of the arbitrators. The observations in para 112 read as under :

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13 (2006) 11 SCC 181

> "112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See **Pure Helium India (P) Ltd. V/s. Oil and Natural Gas Commission**[14] and **D.D. Sharma v. Union of India**[15]**.**"

39. In the case of **Hindustan Construction Company Ltd. (supra)**, after adverting to the aforesaid pronouncement and the decision in the case of **MSK Projects (1) (JV) Ltd. V/s. State of Rajasthan**[16]**,** the Supreme Court held that, for a long time, it is the settled jurisprudence of the Courts in the country that awards which contain reasons, especially when they interpret contractual terms, ought not to be interfered with, lightly.

40. At best, error in the interpretation of a contract by an Arbitrator is "an error within his jurisdiction". An inference is inescapable that the Arbitral Tribunal has after ascribing adequate and justifiable reasons

14 (2003) 8 SCC 593
15 (2004) 5 SCC 325
16 (2011) 10 SCC 573

construed the appointment letter and the grant letter in a reasonable manner and arrived at a sustainable finding. I am therefore afraid to accede to the submission of Mr. Rai that the Arbitral Tribunal, in effect, rewrote the contract. Thus, the challenge to the impugned award on the ground that it is in contravention of the terms of the contract between the parties or that the Arbitral Tribunal rewrote the contract, does not merit acceptance.

41. The submission that the Arbitral Award is in breach of the governing law, also does not carry much substance. Section 62(1) which empowers the Company to issue further share capital, inter alia, provides that such shares may be offered to employees under a Scheme of Employee Stock option, subject to special resolution passed by the Company and subject to such condition as may be prescribed [clause (b)].

42. The prescription of conditions is to be found in Rule 12 of the Rules 2014, under the heading "Issue of employee stock option". Rule 12 proscribes offer of shares by the company to its employees under ESO scheme, unless the Company complies with the requirements stipulated in sub-rule (1) and (2), in particular. Under sub-rule (1), a special resolution is required to be passed by the share holders of the company. Disclosures as warranted under sub-rule (2) are required to be made including : (d) the requirement of vesting and period of vesting; (e) the maximum period within which the options shall be vested; (g) the exercise period and process of exercise; (k) the conditions under which option vested in employees may lapse e.g. in case of termination of employment for misconduct; and (l) the specified time period within which the employee shall exercise the vested options in the event of a proposed termination of employment or resignation of employee.

43. If the aforesaid stipulations are construed in the context of the appointment letter and grant letter, by and large, the conditions of requirement of vesting and period of vesting, the lapse of the option vested in employee, could be said to have been adequately prescribed. On first principles, the Petitioner company cannot be permitted to take advantage of its failure to frame employee stock option scheme. It was not a case that the company was disabled or restrained from framing such a scheme. To allow the Petitioner to now take advantage of its omission to frame a scheme, when it had made an offer of equity as a part of its remuneration package to the employees would amount to putting a premium on its own wrong. The fact that the allocation of shares was in the nature of the recompense for the services rendered by the claimant cannot be lost sight of.

44. The aspect of the alleged failure on the part of the claimant to exercise the option does not advance the case of the submission to the extent desired by Mr. Rai. The Arbitral Tribunal upon appraisal fo the evidence has recorded that no fault can be attributed to the claimant on the said count. In any event, the Arbitral Tribunal has recorded that there was evidence to show that the shares were allocated to similarly circumstanced employees, despite the absence of the ESOP, which was sought to be urged as a ground to deny the same dispensation to the claimant. Such finding of fact cannot be said to be either perverse or suffering from the patent illegality.

45. The last submission of Mr. Rai that the Arbitral Tribunal had invoked an incorrect law while granting the discretionary relief of specific performance, again touches upon the matter which can be said to be an erroneous application of law, which is beyond the scope of interference under Section 34 of the Act, 1996. In the circumstances of the case, the exercise of discretion to award a relief which compels the Petitioner company to perform its part of the contract to allot the shares on the faith of which the claimant had rendered services for requisite period, cannot be faulted at, even on equitable consideration.

46. The allocation of shares to the tune of 0.9% of the then paid up share capital of the company would not present such difficulties in the management of the affairs of the company that it could be construed as such hardship as was not envisaged by the company when the contract was made. To now urge that the damages could have been awarded in terms of money, instead of the shares for the reason that the value of the shares of the company has substantially increased, is to dispute the very rationale of offering the shares to the employee as a part of the growth prospect and incentive for the employee to render the services for the company. Looked at from any perspective, the challenge to the impugned award on this count, does not deserve countenance.

47. The conspectus of aforesaid consideration is that the impugned award does not deserve to be interfered with on any of the grounds sought to be urged on behalf of the Petitioner. Resultantly, the Petition deserves to be dismissed.

48. Hence, the following order :

ORDER

(i) The Arbitration Petition stands dismissed with costs.

[N. J. JAMADAR, J.]