Through e-mail

HIGH COURT OF ORISSA ARBITRATION CENTRE : CUTTACK

Letter No.: 482/ Date: 04.12.2025

From:

Shri Satyabrata Mishra,
Coordinator,
High Court of Orissa Arbitration Centre

To:

The District & Sessions Judge (All)

Sub.: Circulation of Judgement dated 15.09.2025 of the Hon'ble Supreme Court of India, passed in Special Leave Petition (Civil) No. 26660 of 2025 *(Urban Infrastructure Real Estate Fund –vs- Neeklanth Realty Private Limited & Ors)* along with Special Leave Petition (Civil) No.26661 of 2025 and Special Leave Petition (Civil) No.26662 of 2025

Sir/Madam,

With reference to the subject cited above, I am directed to forward herewith the soft copy of Judgement dated 15.09.2025 of the Hon'ble Supreme Court of India, passed in Special Leave Petition (Civil) No. 26660 of 2025, Diary No.36398 of 2025 *(Urban Infrastructure Real Estate Fund –vs- Neeklanth Realty Private Limited & Ors)* along with Special Leave Petition (Civil) No.26661 of 2025 (Diary No.36228 of 2025) and Special Leave Petition (Civil) No.26662 of 2025 (Diary No.36232 of 2025) for your reference and guidance with a further request to circulate the same among the officers working under your control for their reference and guidance.

This is for your information and necessary action.

Yours faithfully,

04.12.2025

Coordinator
(High Court of Orissa Arbitration Centre)

Through e-mail

OFFICE OF THE DISTRICT JUDGE, GANJAM, BERHAMPUR.

e-mail: dsj.ganjam-od@indiancourts.nic.in

Memo No. 15371(65) ***/ dtd.*** 10/12/2025

Copy along with its enclosures is forwarded to: -

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25. The Peshkar, District Court, Ganjam, Berhampur

    for information and necessary guidance.
26. The System Officer, District Court, Ganjam, Berhampur for information with a direction to upload the same on the Official Website of Ganjam Judgeship for general information.
27. Guard file.

Registrar,
Civil Courts, Berhampur.
10/12/2025

2025 INSC 1255

REPORTABLE

IN THE SUPREME COURT OF INDIA

EXTRAORDINARY APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CIVIL) NO. 26660 OF 2025

(Arising out of Diary No. 36398 of 2025)

URBAN INFRASTRUCTURE REAL ESTATE FUND ...PETITIONER(S)

VERSUS

NEELKANTH REALTY PRIVATE LIMITED & ORS. ...RESPONDENT(S)

WITH

SPECIAL LEAVE PETITION (CIVIL) NO. 26661 OF 2025

(Arising out of Diary No. 36228 of 2025)

AND

SPECIAL LEAVE PETITION (CIVIL) NO. 26662 OF 2025

(Arising out of Diary No. 36232 of 2025)

J U D G M E N T

J.B. PARDIWALA, J.:

For the convenience of exposition, this judgment is divided into the following parts: -

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1. After hearing the learned Counsel appearing for the Petitioner at length, and upon a threadbare examination of the reasoning assigned by the High Court, we ordered dismissal of the Special Leave Petitions. However, considering the nature of the issues involved, we thought it appropriate to assign reasons for the same by a separate judgment. The order dated 15.09.2025 reads thus: -

> *"1. Delay condoned.*
> *2. Heard Mr.Neeraj Kishan Kaul, the learned Senior counsel appearing for the petitioner at length.*
> *3. We find no good ground to interfere with the impugned order passed by the High Court.*
> *3. The Special Leave Petitions are, accordingly, dismissed.*
> *4. Reasons to follow by a separate order."*

2. These petitions arise from the common judgment and order dated 02.04.2025 passed by the High Court of Judicature at Bombay in the Commercial Appeal Nos. 37, 38 and 40 of 2020 respectively (hereinafter, the "**impugned decision**") by which the High Court dismissed the appeal filed by the petitioner herein under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter, the "**Act, 1996**") and thereby, affirmed the common judgment and order dated 04.12.2019 passed by a Single Judge of the High Court interfering with the interim award dated 27.08.2019 and holding that the preliminary issue of limitation decided on the basis of demurrer would not preclude the Arbitral Tribunal from further examining the same on the basis of evidence and other materials on record, if tendered and if so warranted.

A. FACTUAL MATRIX

3. The Urban Infrastructure Real Estate Fund or UIREF (hereinafter, the "**petitioner**") is a private equity fund based in Mauritius incorporated as a public company. The Neelkanth Realty Private Limited (hereinafter, the "**respondent no. 1 company**") is a private limited company incorporated under the Companies Act, 2013. The respondent nos. 2, 7 and 8 respectively are the Directors of the respondent no. 1 company, whereas the respondent nos. 3 to 6 respectively are the legal representatives of the original respondent no. 3 who was also a Director of the respondent no. 1 company.

4. The respondent no.1 company is said to have been set up for the purpose of undertaking an integrated township/resort/bungalow scheme spanning an area of about 700 acres in villages Bhukum, Bhugaon and Ahire/Mokarwadi respectively of Taluka Malushi and Taluka Haveli respectively in Pune, Maharashtra. The petitioner and the respondents entered into two agreements i.e., a Share Subscription Agreement dated 23.07.2008 (hereinafter, the "**SSA**") and a Shareholders Agreement also dated 23.07.2008 (hereinafter, the "**SHA**") respectively. The SSA *inter alia* set out the terms and conditions on which the petitioner had agreed to invest in the respondent no. 1 company. Some relevant clauses are reproduced hereinbelow: -

> "***5.2 Fulfilment of Conditions Precedent***
>
> *5.2.1 The Company and the Promoters shall fulfil all the Conditions Precedent to Subsequent Investment under Clause 5.1 (unless any such conditions are waived by the Investor in writing) within ninety (90) Business Days from the date of*

execution of this Agreement or within such extended period as agreed to by the investor.

5.2.2 If at any time any Party becomes aware of any circumstances that will or is likely to give rise to the non-fulfilment of the Conditions Precedent then such Party shall immediately give to the other Parties, written particulars of any such circumstances and the Parties hereto shall co-operate fully with a view to procuring fulfilment of the relevant Conditions Precedent.

5.2.3 On the fulfilment of the Conditions Precedent, the Promoters and the Company shall submit to the Investor a certificate signed by duly authorised representative of the Company certifying fulfilment of each of the Conditions Precedent.

5.3 Non-Fulfilment of Conditions Precedent

In the event of non-fulfilment of the Conditions Precedent under Clause 5.1 within ninety (90) Business Days from the date of execution of this Agreement or the extended period as agreed to by the Investor, then at the option of the investor, the Company and the promoters shall forthwith refund to the investor the amounts that may have been paid towards any of the obligations of the Investor together with interest thereon at the rate of 18% per annum until the date of payment and/or realization.

xxx xxx xxx

13.2 Arbitration

13.2.1 In the event that any dispute or difference as referred to in Clause 13.1 is not resolved within a period of 30 (thirty) days from the date of reference to the representatives of the Parties for amicable resolution, then such dispute or difference shall be referred to arbitration in accordance with Clause 13.2.2 and Clause 13.2.3. Such arbitration shall be held in accordance with the Arbitration and Conciliation Act, 1996.

13.2.2 The place of arbitration and the seat of arbitral proceedings shall be Mumbai, India. Any arbitral proceeding begun pursuant to any reference made under this Agreement

shall be conducted in English language. The decision of the arbitral tribunal and any award given by the arbitral tribunal shall be final and binding upon the Parties.

13.2.3 The arbitral tribunal shall be comprised of a sole arbitrator if the Parties to the dispute so agree. Failing such agreement, the arbitral tribunal shall comprise 3 (three) Arbitrators, one to be appointed by the Promoters and one to be appointed by the Investor and Other Investors jointly and the third Arbitrator shall be appointed by the two Arbitrators so appointed by the Promoters and the investor and Other Investors, which third Arbitrator shall be the Presiding Arbitrator. It is clarified that in the event that the Company is also a party to the dispute or difference, then for the purpose of appointment of Arbitrators, the Promoters and the Company shall jointly appoint one Arbitrator, the Investor and Other Investors shall jointly the second Arbitrator and the third Arbitrator shall be appointed by the two Arbitrators so appointed by the Parties."

5. In furtherance of the aforesaid agreements, the petitioner paid a sum of Rs. 25 Crore to the respondent no.1 company to fund the undertaking of the project. As per Clause 5.3 of the SSA reproduced hereinabove, in the event of the Conditions Precedent stipulated in the SSA not being fulfilled within a period of 90 days from the date of execution of the SSA, or the extended period as agreed to by the petitioner herein, then at the option of the petitioner, the respondents would be liable to refund the amount paid by the petitioner along with interest at the rate of 18% per annum till the date of payment and/or realisation. The said period of 90 days is said to have ended on 22.10.2008.

6. The Urban Infrastructure Venture Capital Limited or UIVCL, in the capacity of an advisor had acted on behalf of the petitioner in several dealings. On 21.01.2009, the UIVCL addressed a letter to the respondent no.1 company highlighting that no equity had been allotted against the investment of Rs. 25 Crore and called upon them to remit the said amount.

7. The respondent no. 1 company replied to the abovementioned letter only to the effect that a detailed reply would soon be sent to the UIVCL. Thereafter, on 14.02.2009, the UICVL addressed yet another letter to the respondent no.1 company reiterating that no equity instruments had been issued to the petitioner and sought refund of the amount invested. Therein, several other breaches were alleged, including the non-fulfilment of the Conditions Precedent, at the end of the respondents. On 19.02.2009, the respondent no. 1 company replied to the letters dated 21.01.2009 and 14.02.2009 respectively, wherein it was mentioned that without-prejudice negotiations were ongoing between the parties as regards the issues between them. The respondent no.1 company expressed surprise that although without-prejudice negotiations were ongoing, yet the petitioner had chosen to address the letter dated 14.02.2009.

8. It is the case of the petitioner that settlement discussions with a mediator were ongoing between the parties in 2011, however, those remained inconclusive. Subsequently, on 14.09.2016, the petitioner addressed yet another letter to the respondent no. 1 company calling upon them to rectify several alleged breaches which included

providing a suitable exit to the petitioner insofar as their investment was concerned, failing which they would be constrained to invoke arbitration. Yet again, discussions on how the issues could be amicably settled were initiated by the parties, but in vain. Thereafter, finally on 11.01.2017, the petitioner addressed a letter to the respondents calling upon them to compensate them in terms of the Clauses 3.1.14 and 5.3 of the SSA respectively, within a period of 15 days, failing which the disputes would be referred to arbitration. In the said communication, the petitioners had also nominated an arbitrator for the aforesaid purpose.

9. On 19.07.2017, the petitioner filed a petition under Section 11 of the Act, 1996, before this Court for the appointment of an arbitrator. *Vide* order dated 15.01.2018, this Court appointed Hon'ble Mr. Justice S.N. Variava (Retd.) to act as the sole arbitrator to adjudicate the disputes between the parties.

10. On 01.10.2018, the Statement of Claim on behalf of the petitioners was filed before the Arbitral Tribunal. During its meeting dated 26.06.2019, the Arbitral Tribunal proceeded to frame issues and the Issue No. 1 read thus – "*Whether all or any of the claims made by the Claimant are barred by the law of limitation*". The counsel appearing on behalf of the respondents submitted that the Issue No. 1 be decided as a preliminary issue. On the other hand, the counsel for the petitioner submitted that the said issue should be taken up only after all the evidence had been led.

I. <u>The Interim Award</u>.

11. Later, in the next meeting dated 27.08.2019, the arbitrator informed that if Issue No. 1 was to be tried as a preliminary one then it had to be decided on the basis of demurrer. The respondents were also told that, in such a scenario, they would afterwards not be able to contest any statement of fact stated by the claimant in the Statement of Claim or in their evidence, or attempt to prove the contrary. It was made clear that once the issue was decided, it would not be open to the parties to reagitate it subsequently. Over the course of the meeting, the counsel for the respondents seem to have acceded and submitted that no evidence was required to be led on their behalf in order to arrive at a decision insofar as the Issue No. 1 was concerned and also that they would be willing to proceed on the basis of demurrer. Hence, on the same day, the Issue No. 1 was heard on the basis of demurrer as a preliminary issue. The said issue came to be decided in favour of the petitioner herein. The relevant observations made in the interim award dated 27.08.2019 are reproduced as follows: -

> "*1. <u>The Arbitration has been fixed today to decide whether Issue No. 1 should be tried as a Preliminary issue. Parties are told, that if Issue No. 1 is to be tried today as a Preliminary Issue, then it has to be decided on the basis of demurrer. Respondents are told that they would then not be able to contest any statement of fact stated by the Claimant in the Statement of Claim or in their Evidence or on documents annexed to the Statement of Claim or to attempt to prove the contrary. It is clarified that if this Issue proceeds to a hearing on the basis of demurrer, it will be answered today and then it will not be open to reagitate the Issue subsequently</u>.*
>
> *xxx xxx xxx*

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

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

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37. Heard the parties. As stated above, at this stage, the Tribunal is proceeding on the basis of demurrer. Had this issue been answered after all evidence had been recorded, then this Tribunal may have been, inclined to accept some of the submissions of the Respondents. But at this-stage as this Issue is being decided on the basis of demurrer, the averments in the Statement of Claim have to be taken as correct. It is clear that Clause 5.2.1 and 5.3 give to the Claimant a right to extend the

time for performance of the Conditions Precedent. Thus even though a notice may have been given, it is still open to claimant to extend time for performance Of Condition Precedents. Once time is so extended then a fresh cause of action arises if again there is a breach. It is not possible to accept submission that in paragraph 21 the claimant has only averred that it had extended time for payment. Such a submission is against the wording of the paragraph. In paragraph 21 Claimant have averred "The respondents requested the Claimant to consider a settlement of the disputes between the parties and in the meantime extend time for fulfilling various commitments and desist from taking legal action. The Claimant agreed to extend time for compliance of the terms of SSA in accordance with Clause 5.3 and desist from exercising its remedies under the SSA while the parties were exploring a settlement." (Emphasis supplied). The words "fulfilling various commitments" can by no stretch of imagination refer to right of Claimant to receive refund. The words ''Agreed to extend time for compliance of the terms of SSA" cannot be read in isolation and have to be read in the context of the sentence stating that Respondents had requested for extension of time. Read as whole paragraph 21 makes it clear that Claimant is claiming that at the request of Respondents, Claimant extended time to perform the Condition Precedents. Thus even though a notice had been given under Clause 5.3, it was possible for the Claimant to thereafter extend time for performance of the Conditions Precedent. Mr. Seksaria is right the right to take any legal action on the notice dated February 2009 would expire in 2012 and Clause 15.3 would not enable claimant to extend limitation once it had expired. However within the tenure of the SSA Claimant could extend time for compliance and if claimant has extended time for compliance then a fresh cause of action would arise and the Claimant could again exercise its right under Clause 5.3 when there is again a breach of the Condition Precedents. The Claimant has averred that it had extended time. At this stage this averment has to be accepted. As at this stage the proceeding are proceeding on the basis of demurrer, the statement of Claimant that It had extended time has to be accepted. It will therefore have to be held that now time only started running once the negotiations failed and there was a again a breach of the SSA by the Respondents. This was, at the earliest in 2016.

> *38. As this issue is being decided on basis of demurer, in view of a plain reading of the Statement of Claim it is not possible to accept Mr. Geelani's' submission that time had, in fact, been extended only to consider how the payment/refund was to be made. Such a contention may have been possible if Claimants' witness has first been cross examined in this regard and if there was some evidence, to this effect, on Respondents' behalf.*
>
> *39. It will therefore have to be held that the claims are therefore within time. Issue No. 1 is therefore answered in the negative."*
>
> (Emphasis supplied)

12. It appears that the Arbitral Tribunal accepted the submission of the petitioner that as it had extended time for fulfilling the Conditions Precedent as per Clause 5.3 of the SSA, the claims could not be said to be barred by limitation. The Arbitral Tribunal re-emphasised saying that such a conclusion was being reached as the issue was being decided on the basis of demurrer and because the averments in the Statement of Claim had to be taken as true. It was also noted that - "*Had this issue been answered after all evidence had been recorded, then this Tribunal may have been, inclined to accept some of the submissions of the Respondents*" and also that "*Such a contention may have been possible if Claimants' witness has first been cross examined in this regard and if there was some evidence, to this effect, on Respondents' behalf.*"

II. The Decision of the Single Judge under Section 34 of the Act, 1996.

13. Aggrieved by the aforesaid interim award, the respondent nos. 1, 2 and 8 respectively filed separate Arbitration Petitions under Section 34 of the Act, 1996 before the Single Judge of the High Court alleging

that the interim award was in contravention of the fundamental policy of Indian law. *Vide* the common judgment and order dated 04.12.2019, the Single Judge disposed of all the three petitions, by interfering with the interim award and observing that the preliminary finding as regards the Issue No. 1 i.e., the issue of limitation, cannot be foreclosed owing to it being a decision rendered on demurrer. It was observed that the Arbitral Tribunal would not be barred from re-examining the issue on the basis of the evidence that may be led by the parties before the Arbitral Tribunal and other materials on record. The reasoning assigned by the Single Judge may be summarised as follows: -

(i) ***First***, while examining whether the principles underlying Order VII Rule 11 of the Code of Civil Procedure, 1908 (hereinafter, the "**CPC**") could be applied to a determination made on demurrer, the decision of the Calcutta High Court in ***Angelo Brothers Limited v. Bennett, Coleman and Co. Ltd. & Anr.*** reported in **2017 SCC OnLine Cal 7682** was relied upon. Therein, various judicial pronouncements on the aspect of demurrer *vis-à-vis* Order VII Rule 11 was examined and it was held that it is not the law in India that a motion for dismissal of a plaint or petition (in other words, a decision on demurrer) on a preliminary point would have the consequence of the respondent forfeiting the right to contest the case later. It would also not mean that adopting such a procedure would result in an automatic admission of the facts pleaded in such a plaint which was sought to be dismissed. More particularly, when the adjudication of such a preliminary question involves a mixed

question of fact and law, then the adjudication of that question would stand deferred and those points would be left to be determined in the course of the proceedings.

(ii) ***Secondly***, while applying the analogy that was being drawn from Order VII Rule 11(d), a pertinent question was put forth – Even, on the basis of bare averments made in the plaint if the court comes to the conclusion that the suit cannot be said to be barred by any law still could it be said that the court would then be precluded from finally looking into the question as to whether the suit is barred by any law after all the evidence and the other materials on record are examined? The answer, in the court's opinion, was an emphatic 'No'. Therefore, it was held that the finding of the arbitrator would remain a preliminary finding subject to the evidence that may be tendered in the course of the proceedings.

(iii) ***Lastly,*** upon a consideration of Section 3(1) of the Limitation Act, 1963, it was stated that the objection as to limitation is quite fundamental to any dispute. It is a substantive objection which goes to the root of the matter. Such an issue as regards limitation, being a mixed question of fact and law, it would not be proper for the same to be foreclosed especially upon a preliminary determination on maintainability which is made on the basis of demurrer. In other words, a decision on the basis of demurrer cannot preclude a final decision on merit.

The relevant observations made by the Single Judge of the High Court are reproduced herein below: -

"20. Learned Senior Counsel for the petitioners has drawn an analogy of deciding an issue on the basis of demurrer with an application under Order VII Rule 11(d) of the Civil Procedure Code and contends that even if an application for rejection of plaint is rejected at the threshold, the same would not come in the way of the Court to decide whether the suit was barred by any law at the stage of trial when evidence would be available on record.

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24. In Angelo Brothers Limited (supra), Calcutta High Court examined various judicial pronouncements on the point of demurrer vis-a-vis Order VII Rule 11 of the Code of Civil Procedure and came to the conclusion that it is not the law in India that a motion for dismissal of a plaint or petition on a preliminary point forfeits the right of the applicant to contest the case later or such a procedure results in admission of facts pleaded in such plaint or petition whose dismissal is sought for. It was held that the term "demurrer" In the Indian context has been construed to have a connotation wider than the dictionary meaning and a motion for dismissal of a proceeding on a preliminary point has been commonly referred to as an application "in demurrer". Accordingly, it was held that the expression "demurrer" when used in connection with an application seeking dismissal of a petition on a preliminary or maintainability point would not imply automatic admission of facts contained in the plaint or petition whose dismissal is sought for by the opposing party. Principles of Order VII Rule 11 would apply in relation to such a petition and if it is found that adjudication of such motion involves mixed question of fact and law, then adjudication of that question would stand deferred, and those points would be left to be determined on trial.

25. This Court is in respectful agreement with the above proposition of law as propounded by the Calcutta High Court.

26. Proceeding further, let us take a hypothetical case. It is trite that an application under Order VII Rule 11 can be filed at any stage of the suit. For examining whether the suit is barred by any law, the averments made in the plaint alone would be

germane. However, examination of the plaint alone under Order VII Rule 11 would not permit the Court to examine or declare upon the correctness of the contents or otherwise of the plaint. If there is any doubt at this stage, the benefit of doubt has to go to the plaintiff. If the Court comes to the conclusion that on the basis of the averments pleaded in the plaint, it cannot be said that the suit appears to be barred by any law, can it be said that it would preclude the Court from finally looking into the question as to whether the suit is barred by any law when all the evidence and other materials are before the Court.

27. In the considered opinion of the Court, the answer has to be in the negative.

28. The same principle can be applied in the present case as well. Issue No. l was heard as a preliminary issue on the basis of the statement of claim, and on that basis, finding has been recorded by the learned Arbitrator that the claims are within time. Being a preliminary issue decided on demurrer, this finding of the learned Arbitrator would remain a preliminary finding subject to the evidence that may be tendered. As a matter of fact, learned Arbitrator himself stated that the contention of the respondents (petitioners herein) might have been possible if the claimant's witness was first cross-examined in this regard and if there was some evidence to this effect on the respondents' behalf. In fact, learned Arbitrator went on to observe that had this issue been answered after all the evidence had been recorded, then the Arbitral Tribunal might have been inclined to accept some of the submissions of the respondents (petitioners herein).

29. Considering Section 3(1) of the Indian Limitation Act, 1963, it is quite clear that objection as to limitation is quite fundamental. It is a substantive objection which goes to the root of the claim. Limitation being a mixed question of fact and law, a preliminary finding of maintainability on the point of limitation decided on demurrer would not preclude a final determination of the question based on facts which may come on record through adducing of evidence, because application of law is on facts and not in a vacuum. A decision on the basis of demurrer cannot foreclose a final decision on merit.

30. Therefore, in the light of the discussions made above, Court is of the view that the interim award dated 27.08.2019 is liable to be modified to the extent that the preliminary finding on issue No. 1 on the basis of demurrer would not foreclose the issue and would not preclude the Tribunal from examining this issue on the basis of evidence and other materials on record, if tendered and if so warranted. However, no opinion is expressed by the Court.

31. With the above modification, the three Commercial Arbitration Petitions are disposed of."

(Emphasis supplied)

III. <u>The Impugned Decision</u>.

14. Being aggrieved with the aforesaid, the present petitioner preferred three appeals under Section 37 of the Act, 1996 before the Division Bench of the High Court challenging the aforesaid interference to the interim award made by the Single Judge. However, the same came to be dismissed *vide* the common impugned judgment and order dated 02.04.2025. The following are certain aspects which seem to have weighed with the Division Bench: -

(i) ***First,*** while examining whether the grounds for interference under Section 34(2)(b)(ii) of the Act, 1996, was made out, it was opined that the phrase "fundamental policy of Indian law" would require a Court or Tribunal to adopt a 'judicial approach' and also that the decision must not be so perverse or irrational that no reasonable person would arrive at such a conclusion.

(ii) ***Secondly***, it was stated that although Section 19(1) of the Act, 1996 provides that the Arbitral Tribunal would not be bound

by the provisions of the CPC or the Indian Evidence Act, 1872, yet this must not be construed to mean that the Arbitral Tribunal would be prohibited from applying the fundamental principles underlying the aforesaid Acts.

(iii) ***Thirdly,*** it was held that an issue of limitation, which is normally a mixed question of law and fact, could be tried as a preliminary issue, only if the same does not require any evidence.

(iv) ***Lastly,*** it was pointed out that the arbitrator, in the present case, had not arrived at a categorical finding that the issue of jurisdiction was such that the parties were not required to adduce any evidence at all. In such circumstances, the learned arbitrator could be said to have not adopted a 'judicial approach' in rendering the interim award.

The relevant observations made by the Single Judge of the High Court are reproduced herein below: -

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

1872, however Section 19(1) does not prohibit the arbitral tribunal from following the fundamental principles underlying the Civil Procedure Code, 1908 or the Indian Evidence Act, 1872.

20. The Court or other authority dealing with the rights of parties has power to try the issue as a preliminary issue if the same relates to the jurisdiction of the Court or a bar created by any law for the time being in force. An issue of limitation which normally is a mixed question of law and fact could be tried as a preliminary issue only if the same does not require any evidence.

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24. In the instant case, the Arbitrator has not recorded a finding that the issue of jurisdiction is an issue which does not require the parties to adduce any evidence. The Arbitrator himself in para 37 of the interim award has held that had parties adduced evidence it would have arrived at a different conclusion. In our opinion, the Arbitrator, while passing the impugned award has failed to adopt a judicial approach and has arrived at a decision which no reasonable person would have arrived at, especially in absence of any finding in the impugned award whether the issue of limitation is a mixed question of law and fact and whether the same can be decided without recording any evidence. It was clearly stated on behalf of respondent No.3 that issue of limitation should not be decided on the basis of demurrer but on the principles analogous to Order XIV Rule 2 of the CPC and after taking into consideration the pleadings and admitted evidence on record. If paragraph 2, 3, 4, 8, 10 and 11 are read together, the contention that the respondents had agreed t the decision of the issue without recording evidence does not deserve acceptance. Thus, it is axiomatic that the impugned award has been passed in violation of 'fundamental policy of Indian law' and a ground for interference with the impugned award under Section 34(2)(b)(ii) is made out."

(Emphasis supplied)

15. In such circumstances referred to above, the petitioner is here before us with the present Special Leave Petitions.

B. SUBMISSIONS ON BEHALF OF THE PETITIONER

16. Mr. Neeraj Kishan Kaul, the learned Senior Counsel appearing on behalf of the petitioner would submit that the respondents having elected and insisted upon piece-meal adjudication under Section 19 of the Act, 1996 would be estopped from challenging the same procedure under Section 34 of the Act, 1996. The Minutes of Meeting dated 26.06.2019 indicate that it was on the request of the respondents that the issue of limitation was considered as a separate and preliminary issue. As plainly recorded in the interim award dated 27.08.2019, the parties had mutually consented that the question of limitation would be (a) decided on the basis of demurrer, (b) without evidence and (c) would be determined finally. Therefore, the interim award constitutes a final decision on limitation and it cannot be re-opened to allow the respondent a second bite at the cherry. To substantiate this contention, the counsel would place reliance on the decision of this Court in ***IFFCO Ltd. v. Bhadra Products*** reported in **(2018) 2 SCC 534.**

17. The counsel would also submit that, party autonomy, which is the hallmark and bedrock of arbitration, cannot be deprived of its sanctity by the unsuccessful party. A bare reading of Section 19 of the Act, 1996 would reveal that the Arbitral Tribunal would not be bound by the CPC and the parties to the arbitration may agree to any procedure; such procedure which may also differ from the standard

court processes. Therefore, having elected to adopt a certain procedure, the respondents cannot be allowed to cry foul when the decision is adverse to them. They cannot clamour for certain procedures which are legislatively not sanctioned for arbitrations and are, instead, available in the normal machinery of the courts. In other words, since the parties have consciously chosen to deviate from the traditional procedure adopted in the courts, they cannot challenge or reverse their agreement to the same simply because they are dissatisfied with the result.

18. It was also submitted that, the present case being an International Commercial Arbitration, the interim award could not have been interfered with on the ground of the arbitrator not following a 'judicial approach' since the same would fall foul of the law settled by this Court as regards the scope of intervention under Section 34 of the Act, 1996 insofar as the awards rendered in the International Commercial Arbitrations are concerned.

19. Furthermore, it was submitted that the ground of non-adoption of a judicial approach to interfere with an arbitral award would tantamount to intervening in the merits of the matter, which cannot be sustained due to the position of law clarified by this Court in ***Ssangyong Engineering & Construction Co. Ltd v. NHAI*** reported in **(2019) 15 SCC 131.** The said decision clarified that the term "fundamental policy of Indian Law" would be relegated to its understanding as determined by this Court in ***Renusagar Power Co. Ltd. v. General Electric Co.*** reported in **(1994) Supp. (1) SCC 644.** It

was opined in ***Ssangyong*** *(supra)* that the decisions of this Court in ***ONGC v. Saw Pipes Ltd.*** reported in **(2003) 5 SCC 705** and ***ONGC v. Western Geco International Ltd.*** reported in **(2014) 9 SCC 263** respectively, had expanded the scope of the term "public policy" occurring under Section 34 of the Act, 1996 to include the aspects of "patent illegality" and "judicial approach". However, such an expansion was effectively done away with by the 2015 Amendment Act to the Act, 1996.

20. Therefore, he would submit that, the observations made in the impugned decision, more particularly that – "*In our opinion, the Arbitrator, while passing the impugned award has failed to adopt a judicial approach and has arrived at a decision which no reasonable person would have arrived at..*", to justify the interference with the interim award, would stand contrary to settled law.

21. He would further submit that the impugned decision has sought to set aside the award on the basis that it was passed without evidence. The same, as per the decision in ***Ssangyong*** *(supra),* can at most fall under the ambit of "patent illegality" which has been made unavailable as a ground for setting aside an award rendered in an International Commercial Arbitration.

22. As regards the applicability of Section 3 of the Limitation Act, 1963, the counsel would submit that, there has neither been a waiver of the terms of the statute nor have the parties contracted out of the provisions of the Limitation Act, 1963. Rather, it could only be said

that the parties had agreed to a specific procedure by which the issue of limitation would be decided and the arbitrator had granted fair opportunity to both the parties to decide whether the claims raised by the petitioner fell within the prescribed period of limitation or not.

23. The counsel would submit that the respondents, having chosen not to lead evidence, cannot now claim that there has been a violation of the Limitation Act, 1963. He would place reliance on the decision of this Court in ***Associate Builders v. DDA*** reported in **(2015) 3 SCC 49**, to buttress his submission that an Arbitrator is the ultimate master of the evidence and the reason that an award is based on little evidence or such evidence that may not measure up in quality to a trained legal mind, would not constitute the basis for setting aside an award under Section 34 of the Act, 1996. Therefore, even assuming that the award on the issue of limitation is based on insufficient evidence, the same would not constitute a ground for interference with the interim award.

24. In the last, even if argued that interference with the interim award could be sustained under the ground of "basic notions of justice", the counsel would submit that this Court in ***Ssangyong*** *(supra)* has recognised that such a ground could be invoked only in very exceptional circumstances when the conscience of the Court is shocked by the infraction caused to the fundamental notions of principles of justice. This must not be construed to mean that interference may be warranted when justice has not been done 'in the opinion of the Court'. In the present case, he would submit that, no such exceptional circumstances are made out.

25. In such circumstances referred to above, the learned Senior Counsel prayed that there being merit in his petition, notice be issued to the other side and the matter be heard finally. He would submit that the impugned judgment ultimately deserves to be interfered with.

C. ISSUES FOR DETERMINATION

26. Having heard the learned Counsel appearing for the petitioner and having gone through the materials on record, the following questions of law fall for our consideration: -

I) Whether the preliminary issue on the question of limitation, decided on the basis of demurrer, could have been permanently foreclosed by the arbitrator?

II) Whether the doctrine of Party Autonomy, which is the bedrock of arbitration, can be utilised to decide on a procedure which has the consequence of infringing Section 3 of the Limitation Act, 1963?

III) Whether the interim award warranted interference by the court under Section 34 of the Act, 1996?

D. ANALYSIS

I. Whether the Preliminary Issue on the question of limitation decided on demurrer, could have been foreclosed by the arbitrator?

a. The definition, scope and nature of the term "demurrer".

27. The word "demurrer" is derived from the Latin word "*demorari*" or the French word "*demorrer*" which means to wait, stay, rest or pause. **P. Ramantha Aiyar** in his ***Advanced Law Lexicon*** elaborates that this term imports that the party pleading demurrer would go no further insofar as the case or matter is concerned, but would wait the judgment of the court as to whether he is bound to answer his opponent's insufficient pleading. In other words, it is the term formerly applied to the mode of disputing the sufficiency in law of the pleading of the other side or saying that the pleading is yet to show any cause as to why the party demurring should be compelled by the court to proceed further.

28. Generally, a demurrer is an issue upon a matter of law. While raising this issue of law through the plea of demurrer, what occurs is that, the party pleading it confesses (or supposes for argument sake) that the facts as stated by the opposite party or the plaintiff/claimant are true, however, denies that by the law arising upon those facts, any injury is done to the plaintiff/claimant. To put it more simply, it is a method to test the sufficiency of the plaintiff's/claimant's case at the threshold. In the absence of said sufficiency, the matter will collapse on its own strength.

29. Demurrers are either general i.e., where no particular cause is assigned and the insufficiency of the pleading is stated in general terms, or it is special i.e., where some particular defects are pointed out. To put it simply, a general demurrer is a demurrer framed in general terms without showing specifically the nature of the objection. A special demurrer is a demurrer based on some defect of

form, which is specifically set forth. Therefore, demurrers may be to the whole or any part of a pleading. **Edwin E. Bryant** in his ***Law of Pleading under the Codes of Civil Procedure*** goes on to say that each party may demur to what he deems to be an insufficient pleading of the other. The demurrer is general when it is to a matter of substance and it is special when made to a matter of form. When it is special, the specific defect must be pointed out.

30. **Craig R. Ducat** in his ***Constitutional Interpretation,*** elaborates on the concept of demurrer and states it to be a "*form of response in which the defendant argues that, even if the facts are as the plaintiff alleges, no actionable wrong has occurred*".

31. ***Black's Law Dictionary*** defines the terms as "*a pleading stating that although the facts alleged in the complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer.*"

32. A common theme running across these definitions or discussions of the term "demurrer" and its scope, is the understanding that the party raising this plea merely pauses and refrains from making any progress in his case. Instead, he requires the plaintiff/claimant to preliminarily establish that their case rests on a solid foundation, at least on the aspect that a cause of action is made out and that the claim is not barred by any law. At this stage, this duty could be said to be imposed on the plaintiff/claimant for the reason that they must satisfy the court, albeit on a very preliminary level, that a valid legal claim exists. This duty would be co-terminus with their role as the *dominus litus*. If the same is not established, then there would be no

reason to proceed further or for the defendant/respondent to pursue the matter. In other words, the defendant/respondent would be 'bound to answer' only if such a *prima facie* satisfaction that a valid legal claim exists is achieved. If the pleading of the plaintiff/claimant is insufficient in law then the matter would come to an end at the threshold.

33. During such an exercise, i.e., where the defendant/respondent asks the plaintiff to satisfy and also for the court to be satisfied of the legal sufficiency of the plaintiff's case, the defendant/respondent assumes that the averments in the plaint are true and upon that assumption, raises a question of law. What must be noted is that this 'assumption' is limited to the decision on demurrer and must not be taken to bind the defendant/respondent for all times to come. Without absolutely conceding to the truthfulness and veracity of the facts stated in the plaint, the defendant only raises an issue as regards the sufficiency of the plaintiffs case in law. In such a scenario, when the decision on demurrer goes against him, i.e., when the issue raised in law is answered against him, could he be said to be foreclosed from tendering further evidence, in the course of the proceedings, which dispute the truthfulness of the facts which were merely hypothetically 'assumed' as right while raising an issue in law? The answer must be an emphatic 'No'.

34. We say so, also because, at the stage during which such a plea of demurrer is taken, the defendant bears no burden of proof. The plaintiff is yet to shift it to the defendant. Therefore, this 'assumption' as aforementioned, must not be construed to the defedant's

detriment. In an alternate situation, i.e., let us assume that the case was at a stage where the defendant was required in law to dispute a fact brought forth in the pleadings by way of leading witnesses or tendering further evidence. Now, in contravention of that requirement, assume that the defendant chooses to remain silent. In such a scenario, it could very well be said that the defendant failed to discharge his burden of proof and would therefore, be taken to have submitted to the case of the plaintiff and the truthfulness of the plaint's averments. However, this is entirely different from what we are dealing with presently. Here is a scenario, where this plea of demurrer is raised at a stage when there exists no corresponding duty on part of the defendant to convince the court to accept his version of the matter. He is simply pausing or demurring and pointing out to the court that the sufficiency of the plaintiff's case in law be checked first. Therefore, the object of the party raising this plea, at such a stage, is simple – to sweep away a defective pleading, by raising issues of law, upon an assumption that the facts stated in the pleading 'may' be true.

35. If the court agrees that the plaintiff's case is sufficient in law, i.e., if the plea of demurrer remains unsuccessful, then the matter can be proceeded with. However, in such proceedings, the defendant must not be held to be strictly tethered to his stance during the proceedings on demurrer, at least insofar as his assumption of the truthfulness of the facts alleged by the plaintiff, are concerned. If he wishes to adduce further evidence, which was not previously available with the court during its decision on demurrer, he must be allowed to do so. In other words, the question of law, as decided during the plea of

demurrer must not be foreclosed permanently. The defendant should be held to have some opportunity, howsoever small or large, to convince the court to revisit the question of law decided on demurrer. This is especially so because, while deciding on the basis of demurrer, the court is mandated to only look at the averments in the plaint or claim and the documents annexed thereto. It would be entirely futile for the defendant to lead any evidence at that stage because the court would not be allowed to examine them or even taken the defendants version of the case into consideration while rendering a decision on demurrer.

36. Having said so, the aforesaid scope to revisit must not be construed as giving the defendant an endless leeway or a free-pass on completely rehashing the same question of law from scratch. He must not be allowed to upend the decision merely on his whims. He must convince the court that an interference may be warranted and also tender evidence which the court did not have the benefit of looking into. If unable to do so, it is obvious that the arbitrator will be compelled to arrive at a conclusion similar to the one arrived at during his adjudication on demurrer.

37. In rendering a decision on demurrer, all that the Court does is declare that, if the facts be as such, then the question of law would remain answered as such. However, this by no means, must foreclose any opportunity that a party may have, to prove by leading evidence, that the facts are different from the version that has been put forth in the plaint/complaint. Herein, the dismissal of the case of the plaintiff is sought on a maintainability point, without adverting to the merits of

the case. Ergo, since the decision on demurrer is not an adjudication on merits, there arises no question of foreclosing any issue against the party taking the plea of demurrer.

38. This rationale is what is adopted in Indian jurisprudence and the same shall be elaborated upon in the latter parts of this judgment.

b. The legal position in the United States.

39. At this juncture, we find it relevant to discuss the nature of the concept of demurrer as understood in the U.S. since there seem to be several decisions which uniformly hold that an applicant seeking dismissal of a plaint by way of a plea by demurrer would be bound to the facts which are pleaded in the plaint. It is necessary for us to dissect under what circumstances such an assertion may be true and even if true, whether the legal position in India is any different.

40. Only a few states in the U.S., more particularly California and Virginia, still use the demurrer, while most of the other states and the federal government seem to have replaced it with the functionally equivalent "motion to dismiss" for failure to state a claim.

41. The concept of demurrer is well-entrenched in the civil procedure system of the aforementioned States in the U.S. It is a valid method through which any party can reply to the averments of another. Generally, such a route is adopted when the exists no issue of fact to be tried in the cause.

42. Before discussing some decisions in this regard, it would be apposite for us to look into the Civil Procedure Code governing civil actions in the States of California and Virginia respectively, in order to understand the legislative framework under which a plea of demurrer can be raised.

43. In Virginia, in any suit in equity or action at law, the contention that a pleading does not state a cause of action or that such pleading fails to state facts upon which the relief demanded can be granted, may be made by demurrer. However, all such demurrers shall be in writing and shall specifically state the grounds on which the demurrant concludes that the pleading is insufficient in law. In such a case, no grounds other than those specifically stated by the demurrant in the demurrer shall be considered by the court.

44. Moreover, § 8.01-235 of the Code of Virginia on Civil Remedies and Procedure, specifically states that if a party seeks to raise an objection that the action is not commenced within the limitation period prescribed by law, the same must only be raised as an affirmative defense specifically set forth in a responsive pleading and not by way of demurrer. The relevant provision is reproduced as thus: -

> *"§ 8.01-235. Bar of expiration of limitation period raised only as affirmative defense in responsive pleading.*
>
> *The objection that an action is not commenced within the limitation period prescribed by law can only be raised as an affirmative defense specifically set forth in a responsive pleading. No statutory limitation period shall have jurisdictional effects and the defense that the statutory limitation period has expired cannot be set up by demurrer. This*

section shall apply to all limitation periods, without regard to whether or not the statute prescribing such limitation period shall create a new right."

(Emphasis supplied)

45. In California, the Code of Civil Procedure under § 430.10 – 430.90 provides for Objections to Pleadings and provides for two ways in which a party against whom a complaint or cross-complaint has been filed may go about with raising their objections i.e. *One*, by demurrer and/or, *two,* by answer. When an answer is filed by the objecting party, the other party is also free to object to the answer by way of demurrer. Such a demurrer may be taken either to the whole of the complaint, cross-complaint or answer or to any of the causes of action or defenses stated therein. However, it is required that a demurrer distinctly specify the grounds upon which any of the objections to the complaint, cross-complaint, or answer are taken. Unless it does so, the demurrer may be disregarded. Each such ground of demurrer must also be in a separate paragraph. Furthermore, a party filing demurrer must serve and also file therewith a notice of hearing that must specify a hearing date. After this, demurrers are set for hearing not more than 35 days following the filing of the demurrer or on the first date available to the court thereafter. On good cause being shown, this can be preponed or postponed. After the decision on demurrer, i.e., after either overruling or sustaining the demurrer, the court may, in its discretion, also allow the party in fault to plead anew or amend on such terms as may be just.

i. Demurrer to Evidence

46. Several decisions of the Supreme Court of the United States touch upon the concept of demurrer. One of those is the decision in ***Fowle v. Common Council of Alexandria*** reported in **24 U.S. 320** delivered in the year 1826**.** Before delving into this decision, a key procedural aspect involved in raising a plea of demurrer to evidence, must be brought to notice. When a demurrer is offered by one party, the adverse party "joins" with him in demurrer, and the answer which he makes is called a "joinder in demurrer". In a joinder in demurrer, the adverse party essentially agrees with the legal challenge posed by the demurrer and joins in arguing only the point of law raised in demurrer. In other words, both parties clearly agree that there is only an issue of law which remains to be adjudicated. Without such a joinder in demurrer entered on the record, the court would not proceed to give judgment upon the demurrer. Another pertinent aspect here is that such a joinder in demurrer ought not to be required or permitted if there was "*any matter of fact in controversy between the parties*". This reinforces that a decision in demurrer can only be on a question of law.

47. In the aforesaid context, let us look into the decision in ***Fowle*** *(supra).* Therein, after both parties had introduced a good deal of evidence for the purpose of supporting or repelling the presumption of a fact, the defendants demurred to the evidence of the plaintiff as insufficient to maintain their action and the court proceeded to give judgment upon the demurrer in favour of the defendants. While reversing the judgment and ordering a new trial through a new jury panel, the Supreme Court elaborated as follows: -

(i) ***First,*** that the Circuit Court totally misunderstood the nature of proceedings upon demurrer to evidence. It was clarified that the object of such proceedings in demurrer was not to bring before the court, an investigation into the facts in dispute or task the court with weighing the force of the testimonies or the presumptions arising from the evidence. The true and proper object is simple – to refer to the court the law arising from facts, facts which are already admitted and ascertained. Nothing remains except for the court to apply the law to those facts.

(ii) ***Secondly,*** that no party could insist upon the other party joining in demurrer without distinctly admitting, upon record, every fact and every conclusion which the evidence conduced to prove. If there is a joinder without such admission i.e., the facts are left unsettled and indeterminate, this would constitute sufficient reason for the court to refuse judgment upon demurrer, and the judgment rendered, if any, is liable to be reversed for error.

(iii) ***Lastly,*** it was stated, in the facts of the case, that the demurrer by the defendant had been so incautiously framed, that there was no manner of certainty in the state of facts, upon which any judgment can be founded. The demurrer was so framed as to rebut what the plaintiff aimed to establish and to overthrow the presumptions arising therefrom through counter presumptions. In such a circumstance, it was the duty of the Circuit Court to overrule the demurrer as incorrect and untenable in principle, more particularly because the question

referred by the demurrer to the court ended up being a question of fact instead of one in law.

The relevant observations are reproduced hereinbelow: -

> "*Indeed, the nature of the proceedings upon a demurrer to evidence, seems to have been totally misunderstood in the present case. It is no part of the object of such proceedings, to bring before the Court an investigation of the facts in dispute, or to weigh the force of testimony or the presumptions arising from the evidence. That is the proper province of the jury. The true and proper object of such a demurrer is to refer to the Court the law arising from facts. It supposes, therefore, the facts to be already admitted and ascertained, and that nothing remains but for the Court to apply the law to those facts. This doctrine is clearly established by the authorities, and is expounded in a very able manner by Lord Chief Justice Eyre in delivering the opinion of all the Judges in the case of Gibson v. Hunter, before the House of Lords. (2 H. Bl. Rep. 187.) It was there held, that no party could insist upon the other party's joining in demurrer, without distinctly admitting, upon the record, every fact, and every conclusion, which the evidence given for his adversary conduced to prove. If, therefore, there is parol evidence in the case, which is loose and indeterminate, and may be applied with more or less effect to the jury, or evidence of circumstances, which is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of other facts, the party demurring must admit the facts of which the evidence is so loose, indeterminate, and circumstantial, before the Court can compel the other side to join therein. And if there should be such a joinder without such admission, leaving the facts unsettled and indeterminate, it is a sufficient reason for refusing judgment upon the demurrer; and the judgment, if any is rendered, is liable to be reversed for error. Indeed, the case made for a demurrer to evidence, is, in many respects, like a special verdict. It is to state facts, and not merely testimony which may conduce to prove them. It is to admit whatever the jury may reasonably infer from the evidence, and not merely the circumstances which form a ground of*

presumption. The principal difference between them is, that, upon a demurrer to evidence, a Court may infer, in favour of the party joining in demurrer, every fact of which the evidence might justify an inference; whereas, upon a special verdict, nothing is intended beyond the facts found.

Upon examination of the case at bar, it will be at once perceived, that the demurrer to evidence, tried by the principles already stated, is fatally defective. The defendants have demurred, not to facts, but to evidence of facts; not to positive admissions, but to mere circumstances of presumption introduced on the other side. The plaintiff endeavoured to prove, by circumstantial evidence, that the defendants granted a license to Marsteller as an auctioneer. The defendants not only did not admit the existence of such a license, but they introduced testimony to disprove the fact. Even if the demurrer could be considered as being exclusively taken to the plaintiff's evidence, it ought not to have been allowed without a distinct admission of the facts which that evidence conduced to prove. But when the demurrer was so framed as to let in the defendants' evidence, and thus to rebut what the other side aimed to establish, and to overthrow the presumptions arising therefrom, by counter presumptions, it was the duty of the Circuit Court to overrule the demurrer, as incorrect, and untenable in principle. The question referred by it to the Court, was not a question of law, but of fact.

This being, then, the posture of the case, the next consideration is, what is the proper duty of this Court, sitting in error. It is; undoubtedly, to reverse the judgment, and award a venire facias de novo. We may say, as was said by the Judges in Gibson v. Hunter, that this demurrer has been so incautiously framed, that there is no manner of certainty in the state of facts, upon which any judgment can be founded. Under such a predicament, the settled practice is, to award a new trial, upon the ground that the issue between the parties, in effect, has not been tried."

(Emphasis supplied)

48. The foremost aspect bearing significance in the decision in ***Fowler*** *(supra)* was the emphasis that if, in the opinion of the court, there appears to be a dispute as to certain facts between the parties, then a decision on demurrer must not be proceeded with. There must be a clear admission of the facts which the plaintiff's evidence conduced to prove, on part of the defendant, for a valid plea of demurrer. Upon such a clear admission, there remains no doubt that the defendant raising the plea of demurrer would be bound by the facts whose veracity was admitted on demurrer.

49. In ***Slocum v. New York Life Ins. Co.*** reported in **228 U.S. 364,** the Supreme Court discussed 'demurrer to evidence' in a similar manner as elaborated in ***Fowle*** *(supra)* and observed that: -

(i) ***First***, that a demurrer to evidence is a proceeding whereby the court is called upon to declare what the law is "upon the facts shown in evidence".

(ii) ***Secondly,*** such a demurrer would be permissible only when it is (a) proposed by one party, (b) joined in by the other, and (c) allowed by the court. The demurrer to evidence must contain an express and distinct admission by the demurrant 'of every fact' which the evidence of his adversary 'conduces to prove'. Otherwise, he would not be able to insist that the adversary join him in the demurrer.

(iii) ***Thirdly***, once a demurrer to evidence is made, for the admission to be effective, the admission must be of the facts and not merely the evidence from which their existence is inferable. In other words, the defendant must demur to facts and not to evidence of facts; must demur to positive admissions

and not to mere circumstances of presumption introduced by the other side. A demurrer to evidence is to state facts and not merely agree to the testimony which may conduce to prove such facts. To put it simply, it would be to admit whatever the jury may reasonably infer from the evidence, and not just the circumstances which form a ground of presumption of facts.

(iv) ***Fourthly,*** only when the matter of fact is so ascertained and shown in the demurrer, the case can be deemed to be ripe for judgment pertaining to a question of law. Therefore, a demurrer to evidence must not be allowed or admitted when the demurring party refuses to admit the facts which the other side attempts to prove and more so, when the demurring party offers contradictory evidence or attempts to establish inconsistent propositions.

(v) ***Lastly,*** if it is concluded by the appellate court that the judgment which was given for one party on a demurrer to evidence must instead have been in favour of the other, such an error can simply be corrected by directing the proper judgment. This is because the error was confined to the judgment and did not affect/reach the facts as ascertained and shown in the demurrer. However, if the appellate court comes to the conclusion that there was an error in allowing the demurrer itself, it would mean that there were no ascertained facts at all on which a judgment could have been based. Therefore, in this scenario, directing a new trial is the only option.

The relevant observations are thus: -

"The leading English cases dealing with demurrers to evidence as employed at common law are Middleton v. Baker, Cro. Eliz. 752; Wright v. Pindar, Aleyn, 18; S.C., Style, 34, and Gibson v. Hunter, 2 H. Bla. 187, 205. The last, which adhered to the principle of the other two, was much considered in the House of Lords, and the opinion delivered by Lord Chief Justice Eyre, who spoke for all the judges, was to the following effect: (a) A demurrer to the evidence is a proceeding whereby the court, whose province it is to answer all questions of law, is called upon to declare what the law is "upon the facts shown in evidence," and, "in the nature of the thing, the question of law to arise out of the fact, cannot arise until the fact is ascertained." (b) Such a demurrer is permissible only when proposed by one party, joined in by the other and allowed by the court. It must contain an express and distinct admission by the demurrant of every fact which the evidence of his adversary conduces to prove, else he cannot insist that the latter join in the demurrer; and the admission, to be effective to that end, must be of the facts, and not merely the evidence from which their existence is inferable. (c) When the matter of fact is so ascertained and shown in the demurrer, the case is deemed ripe for judgment in matter of law, and the jury properly may be discharged from giving a verdict.

This statement of the true office and use of a demurrer to evidence was both accepted and applied by this court in Fowle v. Alexandria, 11 Wheat. 320, decided in 1826. There the court below had sustained such a demurrer, which merely set forth and admitted the evidence as introduced at the trial, as well the testimony of witnesses as written documents. […]

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And that this was not a new doctrine in this court is shown in Young v. Black, 7 Cranch, 565, 568, decided thirteen years before, where, in declining to disturb the action of the court below in refusing to compel a joinder in a demurrer to the evidence, it was said: The party demurring is bound to admit as true, not only all the facts proved by the evidence introduced by the other party, but also all the facts which that evidence legally may conduce to prove. It follows that it [the demurrer] ought never to be admitted where the party demurring refuses to admit

the facts which the other side attempts to prove; and it would be as little justifiable where he offers contradictory evidence, or attempts to establish inconsistent propositions."

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At common law, if on a demurrer to the evidence judgment was given for one party when it should have been for the other, the error was corrected in the appellate tribunal by directing the proper judgment, and this because the error was confined to the judgment, and did not reach the facts as ascertained and shown in the demurrer. But when the reversal was for error in allowing the demurrer, the latter necessarily went for naught, and, as there remained no ascertained facts on which to base a judgment, a new trial was deemed essential. Thus in Gibson v. Hunter, supra, one of the questions was, whether, considering the state of the evidence and the admissions in the demurrer, the plaintiff was obliged to join in it. The question was resolved in the negative, and, as this eliminated the demurrer on which judgment had been given in the court of King's Bench, the judgment of reversal was accompanied by a direction for a new trial. And in Fowle v. Alexandria, supra, where this court ruled that the demurrer ought not to have been allowed, the judgment rendered thereon was reversed with a like direction. So, in the present case when the verdict was set aside there remained no ascertained facts on which a judgment might be rested, and that made a new trial necessary."

(Emphasis supplied)

ii. Demurrer to Declaration or Pleading

50. In ***Aurora City v. W.*** reported in **74 U.S. 82,** the question involved was whether a judgment on demurrer to a declaration or pleading would be a bar to any subsequent action between the same parties for the same cause of action. Answering in the affirmative, the Supreme Court elaborated as thus: -

(i) ***First***, it was stated that it cannot be denied that the effect of a demurrer to a declaration or other pleading, is that it admits all such matters of fact as are sufficiently pleaded. This is a rule universally acknowledged. The foundation of this rule is that the party demurring, has had the option to either plead or demur, and therefore, in choosing to adopt the latter alternative, he shall be considered to have admitted or conceded that he had no ground for denial.

(ii) ***Secondly,*** it was held that, in principle, it would make no difference whether the facts upon which the court proceeded with its adjudication on merits, were proved by competent evidence, or whether they were admitted by the parties. An admission by way of demurrer to a pleading in which the facts are alleged, must be held to be the same as though an admission of fact had been made before a competent jury. Therefore, a judgment rendered on demurrer settles every matter which was well alleged in the pleadings of the plaintiff.

(iii) ***Lastly,*** it was stated that upon the overruling of a demurrer and when the judgment is rendered in favour of one party, it is final only "*if the merits are involved*". Only in such judgments on merits, which are although rendered on demurrer, it would mean that every material matter of fact which was sufficiently pleaded, was admitted.

The relevant observations are reproduced hereinbelow: -

> "*First. They contend that a judgment on demurrer is not a bar to a subsequent action between the same parties for the same cause of action, unless the record of the former action shows that*

the demurrer extended to all the disputed facts involved in the second suit, nor unless the subsequent suit presents substantially the same questions as those determined in the former suit. Where the second suit presents no new question, they concede that the judgment in the former suit, though rendered on demurrer, may be a bar to the second suit, but they maintain that it can never be so regarded, unless all those conditions concur.

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[...] They were not only put in issue but they were determined, unless it be denied that the effect of a demurrer to the declaration or other pleading, is that it admits all such matters of fact as are sufficiently pleaded. Such a denial, if made, would be entitled to no weight, as it is a rule universally acknowledged.

Foundation of the rule is that the party demurring, having had his option to plead or demur, shall be taken, in adopting the latter alternative, to admit that he has no ground for denial or traverse.

On the overruling of a demurrer, the general rule is that judgment for the plaintiff is final if the merits are involved, but a judgment that a declaration is bad, cannot be pleaded as a bar to a good declaration for the same cause of action, because such a judgment is in no just sense a judgment upon the merits. Other exceptional cases might be named, but it is unnecessary, as none of them can have any bearing on this case.

Taken as a whole, the pleadings of the defendants in the respective cases amounted to a demurrer to the respective declarations, and the substantial import of the decision of the court in each case, was that the declaration was sufficient to entitle the plaintiffs to judgment. Beyond question they were judgments on the merits, although rendered on demurrer; and in such case the well-settled rule is that every material matter of fact sufficiently pleaded is admitted.

Objection was taken in the case of Bouchaud v. Dias, that the former judgment between the parties could not be a bar to the subsequent action, because it was rendered on demurrer to the

defendant's plea, but the court held that it made no difference in principle whether the facts upon which the court proceeded were proved by competent evidence, or whether they were admitted by the parties; and they also held that an admission, by way of demurrer to a pleading, in which the facts are alleged, must be just as available to the opposite party as though the admission had been made are tenus before a jury.

Reference to cases decided in other jurisdictions, however, is unnecessary, as this court decided, in the case of Clearwater v. Meredith, that on demurrer to any of the pleadings which are in bar of the action, the judgment for either party is the same as it would have been on an issue of fact joined upon the same pleading, and found in favor of the same party.

Defence of a former judgment rendered upon general demurrer to the declaration was also set up in the case of Goodrich v. The City, and this court held that it was a good answer to the suit, although the appellant insisted that it was not, because the judgment was rendered on demurrer.

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Judgment in a writ of entry is not a bar to a writ of right; but the meaning of the rule is, that each species of judgment is equally conclusive upon its own subject-matters by way of bar to future litigation for the thing thereby decided. Hence, the verdict of a jury, followed by a judgment or a decree in chancery, as held by this court, puts an end to all further controversy between the parties to such suit, and it has already appeared that a judgment for either party on demurrer to a pleading involving the merits, is the same as it would have been on an issue in fact, joined upon the same pleading, and found in favor of the same party.

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Better opinion is, that the estoppel, where the judgment was rendered upon the merits, whether on demurrer, agreed statement, or verdict, extends to every material allegation or statement which, having been made on one side and denied on

the other, was at issue in the cause, and was determined in the course of the proceedings.

[...] Applying that rule to the case at bar <u>it is clear that a judgment rendered on demurrer settles every matter which was well alleged in the pleadings of the opposite party</u>."

(Emphasis supplied)

51. Although the decision in ***Aurora City*** *(supra)* has given a finding that a party pleading demurrer admits the facts as stated in the plaint or the declaration to which he demurs, yet it places importance on the kind and nature of the adjudication made upon the demurrer. It is emphasized that a "*decision on* merits" rendered as a consequence of the demurrer would admit the facts of the declaration demurred to. In other words, the decision on demurrer must be a "final adjudication" between the parties for it to have the effect of barring the demurring party from raising the issue subsequently. Such an observation is made also as a consequence of the stage at which the plea of demurrer is raised and the object it seeks to achieve i.e., whether it seeks to test the maintainability of the suit/claim or whether it seeks to have an impact on the final decision on merits.

52. In the former situation, i.e., while the court is tasked with testing whether the suit or action is simply maintainable or not, or not barred by any law, the defendant could not be said to have elected to demur 'instead of' pleading. Having chosen to demur, he could not be said to have foregone the option to plead and thereby, admitted or conceded that he has no grounds for denial at all. There is simply no requirement for the defendant to plead at this stage since it is the

plaintiff who must satisfy the court that the action is maintainable. On the other hand, when tasked with the obligation to plead in the course of the proceedings, if a party choses to demur, then this choice would imply an admission to the facts sufficiently pleaded by the other. Therefore, a key distinction as regards the consequences of demurrer could be said to lie depending on the stage at which such a plea of demurrer is raised, and also the nature of the finding on demurrer.

53. In ***Gould v. Evansville & C.R. Co.*** reported in **91 U.S. 526,** the Supreme Court reiterated certain principles pertaining to demurrer and stated as follows: -

(i) ***First,*** that in any civil action, if the defendant choses to appear in the matter, he has two options in most jurisdictions i.e., either to elect to plead or demur. This is subject to the condition that if the defendant chooses to plead to the declaration of the plaintiff, then the plaintiff would also have the choice to either reply to the defendant's plea or to demur. The general rule is that, in both the aforementioned scenarios, if the other party joins in demurrer, then it becomes the duty of the court to determine the question of law presented. If such a decision by the court involves the merits of the controversy and it is determined in favour of the demurring party, and if the other party does not amend, then the judgment rendered is final.

(ii) ***Secondly***, that a judgment which is rendered upon demurrer to a declaration or to a material pleading which sets forth the facts, would be equally conclusive of the matters confessed by

the demurrer, similar to a verdict finding the same facts. This is because the matters in controversy are established in the former scenario as well as in the latter, by a matter of record. Therefore, the facts thus established can never be contested between the same parties or those in privity with them, afterwards.

(iii) ***Thirdly,*** it was, however, stated that, if the plaintiffs fails on demurrer in his first action due to an omission of an essential allegation in his declaration and the same is fully supported in the second suit, then the judgment in the first suit would not be a bar to the second suit despite the fact that both the respective actions are instituted to enforce the same right. This is because the merits of the cause, as is being disclosed in the second declaration, were not decided and heard in the first action.

(iv) ***Lastly,*** that, a demurrer admits only the facts which are 'well pleaded'. For instance, it cannot be said to admit to the accuracy of a wrong construction of an instrument, especially when the alleged construction is not supported by the terms of the instrument which is also produced on the record. In other words, the mere averments of a legal conclusion cannot be said to be admitted by a demurrer, unless, the facts and circumstances set forth are sufficient to sustain the allegation.

The relevant observations are reproduced hereinbelow: -

> "*Due service of process compels the defendant to appear, or to submit to a default; but, if he appears, <u>he may, in most jurisdictions, elect to plead or demur, subject to the condition, that, if he pleads to the declaration, the plaintiff may reply to his plea, or demur; and the rule is, in case of a demurrer by the</u>*

defendant to the declaration, or of a demurrer by the plaintiff to the plea of the defendant, if the other party joins in demurrer, it becomes the duty of the court to determine the question presented for decision; and if it involves the merits of the controversy, and is determined in favor of the party demurring, and the other party for any cause does not amend, the judgment is in chief; [...]

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From these suggestions and authorities two propositions may be deduced, each of which has more or less application to certain views of the case before the court: (1.) That a judgment rendered upon demurrer to the declaration or to a material pleading, setting forth the facts, is equally conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be, since the matters in controversy are established in the former case, as well as in the latter, by matter of record; and the rule is, that facts thus established can never after be contested between the same parties or those in privity with them. (2.) That if judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant, or his privies, any similar or concurrent action for the same cause upon the same grounds as were disclosed in the first declaration; for the reason that the judgment upon such a demurrer determines the merits of the cause, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless. Rex v. Kingston, 20 State Trials, 588; Hutchin v. Campbell, 2 W. Bl. 831; Clearwater v. Meredith, 1 Wall. 43; Gould on Plead., sect. 42; Ricardo v. Garcias, 12 Cl. & Fin. 400.

Support to those propositions is found everywhere; but it is equally well settled, that, if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce he same right; for the reason that the merits of the cause, as disclosed in the second declaration, were not heard and decided in the first action. Aurora City v. West, 7 Wall. 90; Gilman v. Rives, 10 Pet. 298; Richardson v. Barton, 24 How. 188.

Viewed in the light of that suggestion, it becomes necessary to examine the third proposition submitted by the plaintiff; which is, that the demurrer to the declaration in the former suit was sustained because the declaration was materially defective, and that the present declaration fully supplies all such imperfections and defects.

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Tested by these considerations, it is clear that the proposition that the defects, if any, in the declaration in the former suit were supplied by new allegations in the present suit, is not supported by a comparison of the two pleadings. Should it be suggested that the demurrer admits the proposition, the answer to the suggestion is, that the demurrer admits only the facts which are well pleaded; that it does not admit the accuracy of an alleged construction of an instrument when the instrument is set forth in the record, if the alleged construction is not supported by the terms of the instrument. Ford v. Peering, 1 Ves. Jr. 78; Lea v. Robeson, 12 Gray, 280; Redmond v. Dickerson, 1 Stockt. 507; Green v. Dodge, 1 Ham. 80.

Mere averments of a legal conclusion are not admitted by a demurrer unless the facts and circumstances set forth are sufficient to sustain the allegation. Nesbitt v. Berridge, 8 Law Times, N.S. 76; Murray v. Clarendon, Law Rep. 9 Eq. 11; Story's Eq. Plead. 254 b; Ellis v. Coleman, 25 Beav. 662; Dillon v. Barnard, 21 Wall. 430."

(Emphasis supplied)

54. While clarifying some general principles pertaining to demurrer, the decision in ***Gould*** *(supra)*, emphasised that the general rule that a demurrer has the consequence of accepting the facts as stated in the declaration would hold good only if the facts are "well pleaded".

55. In ***Alley v. Nott*** reported in **111 U.S. 472,** the State Court had overruled the demurrers of four individual defendants. However,

leave was granted to the demurring defendants to withdraw their demurrers and answer the complaint of the plaintiff within twenty days, on the failure of which, a final judgment would be rendered against them for the relief to which the plaintiff was entitled. After this, the defendants has filed a petition for removal of the matter from the State Court and into the Circuit Court. While deciding that this petition for removal was not filed within the time required by the statute, the Supreme Court made certain pertinent observations on the concept of demurrer: -

(i) ***First,*** that a demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action would be equivalent to a general demurrer to a declaration at common law. This raises an issue, which when tried, would finally dispose of the case on merits, unless the court grants leave to amend or plead over to the party who is unsuccessful in the decision on demurrer.

(ii) ***Secondly,*** that if a final judgment is entered on the basis of the demurrer, it will be a final determination of the rights of the parties which can then, in turn, be pleaded as a bar to any other suit instituted for the same cause of action.

The relevant observations are reproduced hereinbelow: -

> "*A demurrer to a complaint because it does not state facts sufficient to constitute a cause of action, is equivalent to a general demurrer to a declaration at common law, and raises an issue which, when tried, will finally dispose of the case as stated in the complaint, on its merits, unless leave to amend or plead over is granted. The trial of such an issue is the trial of the cause as a cause, and not the settlement of a mere matter of form in proceeding. There can be no other trial except at the discretion of the court, and if final judgment is entered on the demurrer, it*

> *will be final determination of the rights of the parties which can be pleaded in bar to any other suit for the same cause of action. [...] In effect, when this case was heard on the demurrer, the issue made by the pleadings, and on which the rights of the parties depended, was submitted to the court for judicial determination. This issue the court decided, but, before entering final judgment, granted a new trial, with leave to amend pleadings. The situation of the case at this time, for the purposes of removal, was precisely the same as it would be if the trial, instead of being on an issue of law involving the merits, had been on an issue of fact to the jury, and the court had, in its discretion, allowed a new trial after verdict. We can hardly believe it would be claimed that a removal could be had in the last case, and, in our opinion, it cannot in the first.*"
>
> (Emphasis supplied)

56. The aforesaid decision in ***Alley*** *(supra)* had thrown light on the aspect that even if a decision on demurrer is rendered, the unsuccessful party could be granted leave to amend or otherwise plead over i.e. file answers to the complaint of the plaintiff, in the discretion of the court. In other words, there remains some scope for manoeuvring before the decision on demurrer could bind the defendant forever in the form of a final determination of the *lis* between the parties.

57. In ***Bissell v. Spring Valley Township*** reported in **124 U.S. 225**, the Supreme Court was, yet again, faced with the same question – whether the litigation is any less concluded because the fact upon which the judgment rested was established by demurrer? The answer was an emphatic 'No'. In answering thus, the Court drew a fine distinction between when a judgment rendered on demurrer can and cannot be a bar to a future action as follows: -

(i) ***First***, it was acknowledged that there are many scenarios in which a final judgment rendered upon demurrer will not conclude as to a future action. For instance, there may be a demurrer which may go to the form of the action, to a defect of pleading or to the jurisdiction of the court. In all such instances, the judgment thereon will not preclude future litigation 'on the merits of the controversy' in a court of competent jurisdiction, upon proper pleadings.

(ii) ***Secondly,*** in a scenario where a demurrer goes both, to the defects of form and also to the merits, and a judgment is rendered, if the judgment does not designate or specify which of the two grounds of demurrer has been sustained or overruled, then such a judgment will be presumed to rest on the former ground i.e., on the demurrer to defects of form. In other words, benefit would be given such that there is still scope for the parties to adjudicate the merits by taking a plea of answer.

(iii) ***Thirdly,*** however, if the demurrer is to a pleading which sets forth distinctly, the specific facts touching upon the merits of the action or defence, and a final judgment is rendered thereon, only then it would be said that the facts thus admitted would be considered as fully established as if found by a jury, or admitted in open court.

(iv) ***Fourthly,*** if a party against whom a ruling is made on demurrer, wants or wishes to avoid the effect of that demurrer as an admission of the facts in the pleading demurred to, then he has scope to seek to amend his pleading or answer, as the

case may be. If such a request is made, leave for that purpose will seldom be refused by the court, if the party states that he can controvert the facts by evidence which he can produce. Only if he does not ask for such a permission, it will be presumed that he is unable to produce any more evidence on the issue and that the fact is, indeed, as is alleged in the pleading. In other words, only in such a scenario, it could be stated that he would be estopped and bound by the facts confessed by the demurrer.

(v) ***Lastly,*** it was emphasised that courts are not established to determine what the law might be upon possible facts, but to adjudge the rights of the parties upon existing facts. Therefore, some certainty must exist that the parties are pleading the actual and not the supposable facts touching upon the matters in controversy.

The relevant observations are reproduced hereinbelow: -

> "*Is the litigation any the less concluded because the fact upon which the judgment rested was established by the demurrer? There are undoubtedly many cases where a final judgment upon a demurrer will not conclude as to a future action. The demurrer may go to the form of the action, to a defect of pleading, or to the jurisdiction of the court. In all such instances the judgment thereon will not preclude future litigation on the merits of the controversy in a court of competent jurisdiction upon proper pleadings. And it has been held that where a demurrer goes both to defects of form and also to the merits, a judgment thereon, not designating between the two grounds, will be presumed to rest on the former. But where the demurrer is to a pleading setting forth distinctly specific facts touching the merits of the action or defence, and final judgment is rendered thereon, it would be difficult to find any reason in principle why the facts thus admitted should not be considered for all purposes as fully*

established as if found by a jury, or admitted in open court. If the party against whom a ruling is made on a demurrer wishes to avoid the effect of the demurrer as an admission of the facts in the pleading demurred to, he should seek to amend his pleading or answer, as the case may be. Leave for that purpose will seldom be refused by the court upon a statement that he can controvert the facts by evidence which he can produce. If he does not ask for such permission, the inference may justly be drawn that he is unable to produce the evidence, and that the fact is as alleged in the pleading. Courts are not established to determine what the law might be upon possible facts, but to adjudge the rights of parties upon existing facts; and when their jurisdiction is invoked, parties will be presumed to represent in their pleadings the actual, and not supposable, facts touching the matters in controversy.

The law on this subject is well stated in Gould's Treatise on Pleading, a work of recognized merit in this country, as follows: "A judgment, rendered upon demurrer, is equally conclusive (by way of estoppel) of the facts confessed by the demurrer, as a verdict finding the same facts would have been; since they are established, as well in the former case as in the latter, by way of record. And facts, thus established, can never afterwards be contested, between the same parties, or those in privity with them." Chap. IX, part 1, sec. 43.

[...] A distinction was suggested between the cases on the ground that the former judgment between the parties was rendered on a demurrer to the defendant's plea. But the court answered that "it can make no difference, in principle, whether the facts upon which the court proceeded were proved by deeds and witnesses, or whether they were admitted by the parties. And an admission by way of demurrer to a pleading, in which the facts are alleged, must be just as available to the opposite party as though the admission had been made ore tenus before a jury. If the plaintiff demurred for want of form, or if for any other reason he wished to controvert the facts alleged in the plea, he might, after learning the opinion of the court, have asked leave to withdraw the demurrer and reply. But he suffered a final judgment to be entered against him. He probably thought that the facts were truly alleged in the plea, and therefore did

not wish to amend. But however that may be, the judgment is a bar to this action." p. 244. See also Coffin v. Knott, 2 Greene, (Iowa,) 582; Birckhead v. Brown, 5 Sandford, Sup. Ct. N.Y. 134."

(Emphasis supplied)

58. In ***Bissell*** *(supra),* the Court highlighted yet another important aspect – the duty of the court to reasonably ensure that the judgment rendered is upon actual facts and not on supposable ones.

59. In ***Nalle v. Oyster*** reported in **230 U.S. 165**, the Supreme Court threw light to the general rule that provided that, after a demurrer is overruled, i.e., after the party demurring is unsuccessful, leave is generally given by the court to instead plead or answer. Now, when the demurring party pleads or answers the pleading that he initially demurred to, he would be considered to have waived the initial demurrer and took it out of the record. This leeway given to the demurring party was also pointed out in ***Alley*** *(supra).* In the facts of ***Nalle*** *(supra),* this general rule was modified by law, to the extent that, the demurring party would have the right to plead over, but without waiving his demurrer. Irrespective, the aspect deserving consideration for the purposes of our inquiry is that the right to answer or plead over, given to the demurring party, remained intact. The relevant observations are thus: -

"Sec. 1533 of the District Code provides that in all cases where a demurrer to a declaration or other pleading shall be overruled, the party demurring shall have the right to plead over, without waiving his demurrer. This is obviously designed to modify the former rule that where after demurrer overruled, leave was given to plead, and the demurring party pleaded to the pleading demurred to, he waived the demurrer, and took it out of the record, so that it did not appear in the judgment roll. Young v.

Martin, 8 Wall. 354, 357; Stanton v. Embry, 93 U.S. 548, 553; Del., Lack. & West. R. Co. v. Salmon, 39 N.J. Law (10 Vr.), 299, 301. The section has no bearing upon the case where a demurrer is sustained."

(Emphasis supplied)

60. A conspectus of this elaborate legal discussion on the position of law as regards the concept of 'demurrer' in the Unites States is as follows: -

(i) The Civil Procedure Code in those States of the U.S. which still employ demurrer as a concept have detailed instructions on how such a plea or objection may be raised by one party. It is a legislatively sanctioned method of replying to the averments and raising objections to the pleadings of another party.

(ii) The State of Virginia, for example, requires that all demurrers be made in writing and specifically state the grounds through which the demurring party alleges that the pleading is insufficient in law. No other grounds other than those that are written in the demurrer would be considered by the Court. In California, as well, the Civil Code requires that the demurrer filed, distinctly specify the grounds upon which any of the objections to the complaint, cross-complaint, or answer are taken. The party filing the demurrer also files a notice of hearing and after the decision on demurrer is taken at the hearing, the court may, in its discretion, also allow the party in fault to plead anew or amend on such terms, as may be just.

(iii) It must be noted that even in Virginia, which endorses the practice of demurrer, if a party seeks to raise an objection that the action is not commenced within the limitation period prescribed by law, the same must only be raised as an

affirmative defense specifically set forth in a responsive pleading and not by way of demurrer.

(iv) What assumes significance in the aforementioned practice adopted in the U.S. is that, a party raising a plea of demurrer has the opportunity to meet with every averment made by the plaintiff in the plaint/claim specifically and either deny or agree with them as they file a demurrer. This is simply because it's a recognised method of pleading just like the filing of a written statement in India.

(v) On facts that the parties disagree on, a decision on demurrer can never be rendered. Only on the facts agreed upon, if a pure issue of law arises, the situation can be directed for a decision on demurrer.

(vi) It is only in this background that it is stated that a decision taken on demurrer has the consequence of the party raising the plea of demurrer admitting to the facts as stated in the plaint or original claim. Therefore, it can be seen that procedurally, the concept is wholly different.

(vii) When a plea of demurrer to evidence is raised, again, things are slightly different. To elaborate further, in such a scenario, when a demurrer is offered by one party, the adverse party has to "join" with him in demurrer, and the answer which he makes is called a "joinder in demurrer". In a joinder in demurrer, the adverse party essentially agrees with the legal challenge posed by the demurrer and joins in arguing only the point of law raised in demurrer. In other words, both parties clearly agree that there is only an issue of law which remains to be

adjudicated. Without such a joinder in demurrer entered on the record, the court would not proceed to give judgment upon the demurrer. Such a joinder in demurrer ought not to be required or permitted by the court if there was "*any matter of fact in controversy between the parties*".

(viii) In the aforesaid context, the decision in ***Fowle*** *(supra)* observed that the object of the proceedings in demurrer would be to only apply the law to facts, those facts which are already admitted or ascertained. If the facts are left unsettled and indeterminate, then there would be no 'joinder' and the court would refuse judgment on demurrer. In short, it would be no demurrer if it ends up raising question(s) of facts instead of one in law. Only if the 'joinder' was proper, then the defendant raising the plea of demurrer would be bound by the facts whose veracity was admitted on demurrer.

(ix) In a similar manner, the decision in ***Slocum*** *(supra)* agreed that when the demurring party refuses to admit the facts which the other side attempted to prove and more so, when the demurring party offered contradictory evidence or attempted to establish inconsistent propositions, this cannot be considered to be a valid demurrer and any consequential decision rendered on demurrer would be liable to be reversed for error. This is for the reason that there were no ascertained facts at all on which a judgment could have been based.

(x) Another aspect pointed out by ***Aurora City*** *(supra)* is that, in the U.S., the party has an "option" to plead or demur. In other

words, one can demur even while the matter is to be decided on merits.

(xi) Therefore, in choosing to adopt the latter alternative, he shall be considered to have admitted or conceded that he had no ground for denial by way of a proper pleading, even on merits. In such a situation, a demurrer is merely a shortcut to admit the facts which the party would anyway not seek to dispute at trial; in that sense, there is no difference whether the facts upon which the court proceeded with, in its adjudication on merits, were proved by competent evidence, or whether they were admitted by the parties by way of demurrer.

(xii) Hence, it is only when the 'merits' of the matter are decided upon the overruling of a demurrer, could it be said that every material matter of fact which was sufficiently pleaded, was admitted.

(xiii) To summarize, a key distinction as regards the consequences of demurrer could also be said to lie depending on the stage at which such a plea of demurrer is raised, and also the nature of the finding on demurrer i.e., whether it is on the merits of the matter or not.

(xiv) The decision in ***Gould*** *(supra)* reinforced the ratio of ***Aurora City*** *(supra)* and added that the general rule that a demurrer has the consequence of accepting the facts as stated in the declaration would hold good only if the facts are "well pleaded".

(xv) The decision in ***Alley*** *(supra)* pointed out that the party who is unsuccessful in the decision on demurrer, may also be granted

leave by the court to amend or plead over afresh. Seldom will such a leave be refused, if the party states that he can controvert the facts, which he initially demurred to, by evidence which he can produce. In other words, there remains some scope for manoeuvring before the decision on demurrer could bind the demurring party in the form of a final determination of the *lis* between the parties.

(xvi) The decision in ***Bissell*** *(supra)* highlighted one another important aspect – that courts are not established to determine what the law might be upon possible facts, but to adjudge the rights of the parties upon existing facts. This could be said to bring forth a corresponding duty of the court to reasonably ensure that the judgment rendered is upon actual facts and not on supposable ones.

61. The aforesaid summary of the position in the United States brings to the fore one conclusion – that the understanding of the concept of demurrer in American jurisprudence cannot be directly imported to ours. Their version of the idea of demurrer is heavily rooted in the civil procedure that they follow, the stage at which the demurrer is made and the nature of the decision which is rendered on demurrer.

62. Even assuming that we could directly borrow from their interpretation of the scope and ambit of the concept of demurrer, it is plainly obvious that when there is an issue of fact, a decision on demurrer, even if rendered by the court, cannot be proper and is liable to be reversed for error. Therefore, courts or forums, even in

the U.S. must be careful to ensure that there is no fact in controversy between the parties before they proceed to give a decision on demurrer.

c. The legal position as understood in Indian jurisprudence.

63. In contradistinction to the legal system and jurisprudence in the Unites States, the concept of 'demurrer' has not found a direct mention in any of our statute books. Such an idea remains alien insofar as the CPC is concerned. However, several decisions of this Court have referred to and have also employed this concept.

i. Some decisions employing the concept of demurrer and the contours thereof.

64. In ***O.N. Bhatnagar v. Rukibai Narsindas and Others*** reported in **(1982) 2 SCC 244,** one of the many questions that this Court was faced with pertained to the issue of jurisdiction i.e., whether it is the Small Causes Court under Section 28(1)(a) of the Bombay Rent Act, 1947 or the Registrar under Section 91(1) of the Maharashtra Cooperative Societies Act, 1960 which would have the jurisdiction to hear the matter. This determination was dependant on the nature of the jural relationship in which the parties stood i.e., whether they had a landlord-tenant relationship or that of licensor-licensee. In this background, this Court observed that the appellant-licensee had raised the objection to jurisdiction in the nature of demurrer i.e., that the issue of jurisdiction had to be determined by adverting to the

allegations contained in the statement of claim made by the respondent no. 1 in the proceedings before the Registrar. Those allegations must be taken to be true. Upon a perusal of the averments it was evident that the respondent no. 1 had unequivocally asserted that the parties stood in a licensor-licensee relationship and that fact was also clearly borne out from the terms of the agreement of leave and licence between the parties.

65. However, after observing as aforesaid, this Court in ***O.N. Bhatnagar*** *(supra)* also observed that when the respondent no. 1 did not admit to a relationship which would attract the provisions of the Bombay Rent Act, 1947, the appellant-defendant cannot by his mere plea on demurrer force the plaintiff-respondent no.1 to go to a forum which is clearly different from the averments made by the respondent no. 1 in the statement of claim and where the claim simply does not lie. It was added that the burden rested on the appellant-licensee to establish that he had the status of a "tenant" within the meaning of the Bombay Rent Act, 1947 and that "he had failed to discharge that burden".

66. The aforesaid observations in ***O.N. Bhatnagar*** *(supra)* must be understood in the right context. The decision in ***O.N. Bhatnagar*** *(supra)* does not say that when a plea of demurrer as regards jurisdiction was raised by the appellant-licensee, the appellant-licensee was also simultaneously required to discharge his burden of proof and prove that he was a tenant as was claimed by him. That would be absurd for the reason that, when only the averments made

in the plaint/complaint are being looked at, there cannot be any burden of proof resting on the opposite party or the defendant which then has to be discharged. In the aforesaid case, when the plea of jurisdiction was raised by way of demurrer, the averments made by the respondent no.1 in the statement of claim along with the terms of the leave and licence agreement were looked at and it was decided that it was the Registrar who had jurisdiction over the matter. However, even as the matter progressed before the Registrar and evidence was taken, the defendant failed to prove that he was a "tenant" as so staunchly averred by him. This is the reason why this Court had observed that the defendant had failed to discharge his burden. This clarification is important for two reasons – (a) When a plea of demurrer is being decided, the party raising the plea could only be said to be pausing or waiting. The question raised on demurrer would not be 'finally' decided when it is decided against the party raising the plea by way of demurrer; and (b) The issue can be said to be finally decided and can also be 'foreclosed' only at a stage when the party who raised the plea by way of demurrer was, by law, required to discharge his burden of proof and he failed to do so.

67. The relevant observations made in ***O.N. Bhatnagar*** *(supra)* are reproduced as under: -

> *"5. [...] Again, the appellant asked for a de novo trial, but in view of the provisions of Section 91-A(4) his application was rejected. Respondent 1 was however re-summoned for further cross-examination and thereafter the appellant's evidence was recorded. In August 1977 there was a change of the Judge of the Cooperative Court and the appellant repeated his prayer for a de*

novo trial but this application of his was also rejected. The learned Judge of the Cooperative Court by his judgment dated April 28, 1978, made an award against the appellant for possession of the flat in dispute and for arrears of rent and mesne profits amounting to Rs 30,000. Against the award the appellant filed an appeal before the Cooperative appellate court but it was dismissed in January 1979. Thereafter the appellant filed a writ petition in the High Court in February 1979 and it was dismissed in March 1981 by a learned Single Judge. The appellant unsuccessfully preferred a letters patent appeal which was dismissed by a Division Bench on April 21, 1981.

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9. The two enactments deal with two distinct and separate fields and therefore the non obstante clause in Section 91(1) of the Act and that in Section 28 of the Rent Act operate on two different planes. The two legislations pertain to different topics of legislation. It will be noticed that Section 28 of the Rent Act proceeds on the basis that exclusive jurisdiction is conferred on certain courts to decide all questions or claims under that Act as to parties between whom there is or was a relationship of landlord and tenant. It does not invest those courts with exclusive power to try questions of title, such as between the rightful owner and a trespasser or a licensee, for such questions do not arise under the Act. The appellant having raised a plea in the nature of demurrer, the question of jurisdiction had to be determined with advertence to the allegations contained in the statement of claim made by Respondent 1 under Section 91(1) of the Act and those allegations must be taken to be true. Respondent 1 unequivocally asserts that the parties stood in the relation of licensor and licensee and that fact is clearly borne out by the terms of the agreement of leave and licence as between the parties. The burden was on the appellant to establish that he had the status of a "tenant" within the meaning of Section 5(11) of the Rent Act, as it then stood, and that burden he has failed to discharge. If, therefore, plaintiff in the plaint does not admit a relationship which would attract any of the provisions of the Act on which the exclusive jurisdiction given in Section 28 depends, the defendant cannot by his plea force the plaintiff to go to a forum where on averments the claim does not lie.

xxx *xxx* *xxx*

> *21. [...] <u>But where the parties admittedly do not stand in the jural relationship of landlord and tenant, as here, the dispute would be governed by Section 91(1) of the Act</u>. No doubt, the appellant acquired a right to occupy the flat as a licensee, by virtue of his being a nominal member, but in the very nature of things, his rights were inchoate. In view of these considerations, we are of the opinion that the proceedings under Section 91(1) of the Act were not barred by the provisions of Section 28 of the Rent Act."*
>
> (Emphasis supplied)

68. In ***Exphar SA and Another v. Eupharma Laboratories Ltd. and Another*** reported in **(2004) 3 SCC 688**, the question pertained to whether the High Court could exercise jurisdiction under Section 62(2) of the Copyright Act, 1957 to entertain the suit. In this context, it was held that when an objection is taken by way of demurrer and not at trial, the objection must be proceeded with on the basis that the facts which are pleaded by the initiator of the proceedings are true. For that objection to succeed, it must be shown that granted those facts, the question of law must be answered against the initiator of the proceedings. The relevant observations are thus: -

> *"9. <u>Besides, when an objection to jurisdiction is raised by way of demurrer and not at the trial, the objection must proceed on the basis that the facts as pleaded by the initiator of the impugned proceedings are true. The submission in order to succeed must show that granted those facts the court does not have jurisdiction as a matter of law</u>. In rejecting a plaint on the ground of jurisdiction, the Division Bench should have taken the allegations contained in the plaint to be correct. [...]"*
>
> (Emphasis supplied)

69. This Court in ***Man Roland Druckimachinen AG v. Multicolour Offset Ltd. and Another*** reported in **(2004) 7 SCC 447**, was concerned with an objection made in the nature of a demurrer. Therein, the respondent no. 1 had filed an application before the Commission set up under the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter, the "**Act, 1969**"), complaining of unfair trade practices and had also made a claim for compensation. The appellant, had raised objections to the Commission's jurisdiction to entertain the respondent's application on two grounds, the first of which was that, in the event of any dispute, the parties had agreed that the applicable law would be German law. It was also said to have been agreed that the disputes between the parties should be resolved either by proceedings brought in German Courts or alternatively, through arbitration conducted in accordance with the International Chamber of Commerce Rules. The second ground was that the appellant being incorporated under German law and having its registered office in Germany, neither provided any service nor carried on any trade or trade practice in India for the purposes of the Act, 1969 and the printing machine in question was also sold to the respondent no. 1 outside India.

70. While arriving at the conclusion that the jurisdictional clause in the contract between the parties would only determine the manner and forum in which rights under the contract would be enforced, ***Man Roland*** *(supra)* stated the such a clause would not act as a bar to proceedings under the Act, 1969 which provides for statutory

remedies in respect of statutorily defined offences. Observing so, this Court made a few observations on demurrer as follows: -

(i) ***First,*** that an objection to jurisdiction can be taken in two ways – (a) by way of demurrer, or (b) by raising it as a preliminary issue. If taken by way of demurrer, the objection is essentially decided on the basis of the allegations contained in the complaint itself by taking them to be true. If raised as a preliminary issue, it has to be adjudicated upon after the parties are given an opportunity to lead evidence.

(ii) ***Secondly,*** that the Commission wrongly proceeded on the footing that both the objections to the maintainability of the complaint were raised by way of demurrer. It was clarified that the first objection which was based on a clause in the agreement was indeed in the nature of a demurrer and could also be decided as such. However, the second objection must have been determined only after the taking of evidence. Therefore, the appeal was disposed with a direction that the Commission deal with the second objection on the basis of evidence which may be adduced by either party.

The relevant observations are thus: -

> *"18. An objection to jurisdiction can either be taken by way of demurrer or raised as an issue in the proceeding. In the first case the objection will have to be decided on the basis of the allegations contained in the complaint, taking the statements contained therein to be correct. Otherwise an objection to the jurisdiction of a court may be raised as a preliminary issue. In such event, the issue would have to be adjudicated upon after giving the parties an opportunity to lead evidence. The*

Commission proceeded on the basis that both the objections raised by the appellant, were by way of demurrer.

19. The appellant's first objection to the Commission's jurisdiction based on the clause in the agreement was in fact in the nature of a demurrer and could be decided as such. But in our opinion the second objection to the jurisdiction of the Commission was not. It would have to be determined on evidence.

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26. We, therefore, dispose of the appeal by directing the Commission to deal with the second aspect of the preliminary objection on evidence which may be adduced by either party and in the light of the legal issues determined by us. It is clarified that in the event the Commission finds on evidence that the appellant does not carry on business in India through Respondent 2 and that the alleged unfair trade practice did not take place in India, the Commission will dismiss Respondent 1's complaint without deciding the matter on merits. The appeal is accordingly disposed of without any order as to costs."

(Emphasis supplied)

71. The aforesaid observations made in ***Man Roland*** *(supra)* must be scrutinised closely. To reiterate, it was observed that – "*The appellant's first objection to the Commission's jurisdiction based on the clause in the agreement was in fact in the nature of a demurrer and could be decided as such.*" This Court had cleared the misconception of the Commission and stated that both the preliminary objections could not be considered to have been taken by demurrer. The reason behind observing that the first objection could be taken in the nature of a demurrer was because it only involved a contractual clause. In such a scenario, when objection to jurisdiction is taken by drawing the

attention of the court to a clause in the contract, there is no complexity involved in deciding the objection to jurisdiction since both the parties did not question the vires of the clause per say or contend that the contract was entered into due to fraud or misrepresentation. In situations like this, the task is simple. The court does not need any additional evidence to be led by the parties because it can decide the question of jurisdiction by solely resorting to an examination of the clause. This is the reason why it was understood that the first objection was taken by way of demurrer.

72. Due emphasis must also be placed on the words "*and could be decided as such*". This reveals that the court or forum which is deciding an objection must be reasonably convinced that such an objection does not require evidence. This is the incumbent duty of the court or forum before which the dispute is brought. The objection must be such that it is inherently capable of being decided without evidence. Taking this into consideration, and examining the nature of the second objection, this Court held that, contrary to the first objection, the second objection required to be decided as a preliminary issue after evidence was led by the parties. The second objection was intertwined with several questions of fact which had to be established by the parties, i.e., whether the appellant carried on business in India through the respondent no. 2 and if the alleged unfair trade practice even took place in India. This Court was alive to the fact that the parties were at loggerheads insofar as these questions was concerned and therefore, relegated its determination to be on the basis of a preliminary issue and not by way of demurrer. In other

words, both parties wanted to rebut what the other side aimed to establish and lead evidence to the contrary. There was no consensus and the court was cognisant of such a disagreement. In such a scenario, it would be the responsibility of the court or forum deciding the matter, to require the parties to lead evidence and decide the objection thereafter.

73. In ***Indian Mineral & Chemical Co. and Others v. Deutsche Bank*** reported in **(2004) 12 SCC 376,** this Court was concerned with the order of the High Court revoking leave which was earlier granted to the appellants under Clause 12 of the Letters Patent, 1865 to institute a suit. This was done on the ground that no part of the cause of action as pleaded in the plaint had arisen within the original jurisdiction of the court. While the Single Judge dismissed the application for revocation of leave, the Division Bench had allowed it. The Division Bench had conducted a scrutiny into the veracity or plausibility of the averments made in the plaint and examined whether those averments were borne out by the documents which were annexed to the plaint. Disagreeing with the Division Bench of the High Court, this Court observed that leave was wrongly revoked since in determining whether a leave granted is liable to be revoked, one must look at the assertions made in the plaint and must assume them to be true. In other words, the decision must be taken on demurrer.

74. While observing so in ***Indian Mineral & Chemical Co.*** *(supra)*, it was stated that, it might have been open to the Division Bench to hold that what was alleged to be a part of the cause of action did not form

a part of the cause of action at all, i.e., that after assuming the averments are true, the question of law as to whether the cause of action was made out could have been answered against the plaintiffs. However, this was not done. What was done was that a contrary factual conclusion was arrived at by the Division Bench and this was impermissible while rendering a decision on demurrer since it has to be determined *ex-facie* the plaint.

75. What must also be noted is that, in ***Indian Mineral & Chemical Co.*** *(supra),* the defendants had submitted that the High Court did not have jurisdiction because UCO bank, Calcutta was not authorised to receive the documents and that the payment under the letter of credit was to be made, not in Calcutta, but in Düsseldorf, Germany. However, this Court acknowledged that the role that the Calcutta branch of UCO Bank played in the transaction was a mixed question of law and fact and therefore, these contentions of the defendants would have to be decided on the basis of evidence and not in an application for revocation of leave under Clause 12 of the Letters Patent. To put it simply, although this Court, on assuming that the averments in the plaint are true, stated that leave was rightly granted, yet it left it open for the defendants to agitate the issue of jurisdiction after evidence was taken since the question involved was a mixed one of both law and fact. In other words, the issue of jurisdiction decided in favour of the plaintiffs on the basis of demurrer was not foreclosed.

76. The relevant observations made in ***Indian Mineral & Chemical Co.*** *(supra)* are reproduced hereinbelow: -

> *"8. On 30-8-1999, the respondent made an application for revocation of leave under clause 12 of the Letters Patent on the ground that no part of the cause of action arose within the jurisdiction of the Calcutta High Court. The learned Single Judge dismissed the application.*
>
> *9. The Division Bench accepted the submission of the respondent that although the pleadings in the plaint showed that the Calcutta High Court had jurisdiction to entertain the suit, the averments in the plaint were not borne out by the letter of credit which was annexed to the plaint. The Division Bench also accepted the respondents' contention that the letter of credit was to be honoured by payment "at sight" and that if the terms and conditions of credit were fully complied with, the respondent would credit the account of UCO Bank, Düsseldorf Branch upon presentation of the documents indicated in the letter of credit. Payment "at sight" was therefore to be made at Düsseldorf and not in Calcutta as claimed in the plaint and as such no part of cause of action had arisen within the jurisdiction of the High Court.*
>
> *10. We are of the opinion that the learned Judges erred in revoking leave under clause 12 of the Letters Patent in view of the clear assertions made in the plaint, and the assertions in a plaint must be assumed to be true for the purpose of determining whether leave is liable to be revoked on a point of demurrer [See Abdulla Bin Ali v. Galappa, (1985) 2 SCC 54; Roop Lal Sathi v. Nachhattar Singh Gill, (1982) 3 SCC 487; Ritu Sachdev v. Anita Jindal, AIR 1982 Cal 333 and Secy. of State v. Golabrai Paliram, AIR 1932 Cal 146] . In the plaint the jurisdiction of the High Court was claimed on the ground that:*
> *(1) UCO Bank's branch, which was within the Court's jurisdiction, intimated the plaintiffs that the letter of credit had been issued by the respondent;*
> *(2) the documents were presented by the plaintiffs to the said branch of UCO Bank; and*
> *(3) payment was to be received by the plaintiffs from the said branch of UCO Bank.*

11. The Division Bench could have held that what was alleged to be a part of the cause of action did not form part of the cause of action at all. This the Division Bench did not do. It was not open to the Division Bench to come to a contrary factual conclusion in respect of any of these three grounds. The appeal is, therefore, liable to be allowed on this ground alone.

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14. [...] What the role of UCO Bank in fact was is a mixed question of law and fact. At present, since we have to determine the court's jurisdiction ex facie the plaint, we cannot proceed on the assumption that UCO Bank was not authorised to receive the documents or that the payment under the letter of credit was to be made, as far as the appellants are concerned, at Düsseldorf. Ultimately it will depend upon whether UCO Bank was acting for the respondent or the appellants. All these matters will have to be decided on evidence and cannot be decided on an application for revocation of leave under clause 12 of the Letters Patent.

15. The observations of Rankin, C.J. in Secy. of State v. Golabrai Paliram [See Abdulla Bin Ali v. Galappa, (1985) 2 SCC 54; Roop Lal Sathi v. Nachhattar Singh Gill, (1982) 3 SCC 487; Ritu Sachdev v. Anita Jindal, AIR 1982 Cal 333 and Secy. of State v. Golabrai Paliram, AIR 1932 Cal 146] correctly represents the law as to how the Court should approach an application for revocation of leave: (AIR p. 147)

> *"I do really protest against questions of difficulty and importance being dealt with by an application to revoke the leave under clause 12 of the Letters Patent and to take the plaint off the file. Normally it is well settled that the proper way to plead to the jurisdiction of the court is to take the plea in the written statement and as a substantive part of the defence. Except in the clearest cases that should be the course."*

16. In the circumstances, we are of the view that the learned Single Judge was justified in rejecting the respondent's application for revocation of leave. The Division Bench should

not have allowed the respondent's appeal. The impugned decision is accordingly set aside and the appeal allowed with costs. The High Court is requested to dispose of the suit as expeditiously as is conveniently possible."

(Emphasis supplied)

77. In another decision of this Court in ***State of Haryana v. State of Punjab and Another*** reported in **(2004) 12 SCC 673**, it was held that the question whether the plaint must be rejected should be decided on the basis of the allegations contained in the plaint and by way of demurrer and observed as follows: -

"29. The application under Order 23 Rule 6 of the Rules is by way of demurrer. The question whether the plaint should be rejected must, therefore, be decided on the basis of the allegations contained in the plaint [See D. Ramachandran v. R.V. Janakiraman, (1999) 3 SCC 267, 271]."

(Emphasis supplied)

78. Meaning thereby, that while deciding an application for rejection of plaint, the averments contained in the plaint must be assumed as true.

79. In ***J.P. Srivastava & Sons (P) Ltd. and Others v. Gwalior Sugar Co. Ltd. and Others*** reported in **(2005) 1 SCC 172,** this Court was concerned with the maintainability of the petition under Sections 397 and 398 of the Companies Act, 1956 respectively alleging oppression and mismanagement. The petition would be maintainable only if filed by persons having a requisite percentage of shares. The petitioner's case was that petitioner no. 3 also represented the family trust which held some shares, thereby fulfilling the criteria to

maintain their petition. However, the petition was dismissed as not maintainable on the ground that the trust had not consented to the filing of the petition on its behalf by the petitioner no.3. In this background, this Court observed that if the objection by the respondents to the maintainability of the petition is taken by way of demurrer, then the Company Law Board could decide the issue on the basis of the averments contained in the petition alone, while accepting the pleas stated therein as correct.

80. While stating so, it was also observed in ***J.P. Srivastava*** *(supra)* that when the Board had taken into consideration certain facts outside the petition, then an opportunity must also be given to the petitioners to support their case as stated in petition on the basis of further evidence i.e., evidence which may have not been annexed to the petition. This observation must, again, be understood in the right manner. When an objection is decided by way of demurrer, and the objection succeeds (as in ***J.P. Srivastava*** *(supra)*), the matter would come to a end, of course with the exception that the petitioner can further appeal this decision taken by way of demurrer before an appellate forum. Therefore, when we say the matter would come to a halt, we mean that the suit would not progress any further. In ***J.P. Srivastava*** *(supra),* what had occurred was that, the Board had taken into consideration the allegations contained in one of the respondent's application as well – in essence, they did not proceed on the basis of demurrer. Therefore, this Court had held that the unsuccessful petitioner must not be prevented from adducing further evidence and the issue must not be foreclosed. This observation must, by no means, be understood as laying down the proposition of law that

when a plea of demurrer is taken by a respondent/defendant and the court, rightly proceeding on the correct understanding of the concept of demurrer, rejects the objection of the respondent/defendant taken by way of demurrer, then the issue would be permanently foreclosed. In other words, it must not be understood to mean that it is only the petitioner who can enjoy the benefit of the issue not being foreclosed and that this benefit would not accrue to the respondent/defendant who takes the plea by way of demurrer.

81. The relevant observations in ***J.P. Srivastava*** *(supra)* are as follows:

> *"11. The hearing in the matter was concluded by CLB and judgment reserved two days after the last affidavit was filed. [...] However, CLB upheld the contention of Respondent 8 that the application under Sections 397 and 398 was not maintainable on the ground that the petitioner did not hold the requisite 10 per cent shares. CLB proceeded on the basis that the Trust held 1029 shares in the Company but that it had not consented to the filing of the petition under Sections 397, 398 by Nini Srivastava. [...]*
>
> *xxx xxx xxx*
>
> *40. Given these powers in CLB, we cannot hold that non-compliance with one of the requirements in Sl. No. 27 in Ann. III of Regulation 18 goes to the very root of the jurisdiction of CLB to entertain and dispose of a petition under Sections 397, 398. All that Regulation 18 requires by way of filing of documents, is proof that the consent of the supporting shareholders had in fact been obtained prior to the filing of the petition in terms of Section 399(3). <u>It cannot be gainsaid that it is open to the persons opposing the application under Sections 397 and 398 to question the correctness of an assertion as to consent made by the petitioner. It is equally open to the petitioner to provide evidence in support of the plea taken in the petition. If of course the objection to the maintainability is taken by way of demurrer, CLB can decide the issue on the basis of the averments contained in the petition alone, accepting the pleas</u>*

therein as correct. But where CLB takes into consideration facts outside the petition as it has done in this case, it cannot foreclose the petitioner from supporting its case in the petition on the basis of evidence not annexed thereto. Since CLB calculated the total shareholding of the Company including preference shares based on the allegations contained in Respondent 8's application, it was for CLB to determine the issue of actual prior consent on evidence. This view finds support from Regulation 24 which says:

> *"24. Power of the Bench to call for further information/evidence. – The Bench may, before passing orders on the petition, require the parties or any one or more of them, to produce such further documentary or other evidence as the Bench may consider necessary –*
> *(a) for the purpose of satisfying itself as to the truth of the allegations made in the petition; or*
> *(b) for ascertaining any information which, in the opinion of the Bench, is necessary for the purpose of enabling it to pass orders on the petition."*

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43. The finding of CLB and the High Court to the effect that the petition of the appellant deserved to be rejected only because the letters of consent had not been annexed to the petition was therefore incorrect. What CLB and the High Court should have done was to have satisfied themselves that the consent had in fact been given prior to the filing of the petition. There is nothing either in the orders of CLB or the High Court which could even remotely be construed as a rejection of the affidavits, resolution, etc. filed by Nini Srivastava to show that prior consent had in fact been obtained. [...]"

(Emphasis supplied)

ii. Deciding the issue of Limitation on demurrer and its similarity with an application under Order VII Rule 11(d) of the CPC.

82. The decision of this Court in ***Ramesh B. Desai and Others v. Bipin Vadilal Mehta and Others*** reported in **(2006) 5 SCC 638** delved into an in-depth analysis of whether the question of limitation can be determined as a preliminary issue by way of demurrer or after evidence has been led by both the parties. Therein, the application of the respondent nos. 1 and 2 respectively, to dismiss the company petition for being barred by limitation was allowed by the Company Judge and also affirmed by the Division Bench of the High Court. However, while allowing the appeal and directing the High Court to decide the company petition afresh, this Court observed as follows: -

(i) ***First***, attention was drawn to sub-rule (2) of Order XIV Rule 2 which provides that where issues of both law and fact arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, then it may try that issue first if it related to (a) the jurisdiction of the court, or (b) a bar to the suit created by any law for the time being in force. In other words, the court may postpone the settlement of issues of fact until after the issues of law have been determined.

(ii) ***Secondly***, that the route as aforesaid must be adopted only when, in the opinion of the court, the whole suit may be disposed of on the issue of law alone. The CPC must not be construed as conferring jurisdiction upon a court to try a suit on mixed issues of law and fact as preliminary issues. When the issues of law and fact in the suit are so intertwined i.e., when the issues of law in the suit depend upon a decision on issues of fact in the suit, trying the mixed questions of law and fact as

a preliminary issue would result in a lopsided trial of the suit, because it is normally the duty of the court to try and decide all issues.

The relevant observations are thus: -

> *"13. Sub-rule (2) of Order 14 Rule 2 CPC lays down that where issues both of law and of fact arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the court, or (b) a bar to the suit created by any law for the time being in force. The provisions of this Rule came up for consideration before this Court in Major S.S. Khanna v. Brig. F.J. Dillon [(1964) 4 SCR 409 : AIR 1964 SC 497] and it was held as under: (SCR p. 421)*
>
> > *"Under Order 14 Rule 2, Code of Civil Procedure where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the court; not to do so, especially when the decision on issues even of law depend upon the decision of issues of fact, would result in a lopsided trial of the suit."*
>
> *Though there has been a slight amendment in the language of Order 14 Rule 2 CPC by the amending Act, 1976 but the principle enunciated in the above quoted decision still holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as a preliminary issue and where*

the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue."

(Emphasis supplied)

83. What must be pointed out from the aforementioned ratio in ***Ramesh B. Desai*** *(supra)* is that, while deciding an issue of law as to whether the court has jurisdiction or whether the suit is barred by any law, including that of limitation, the court must be convinced that it is a pure question of law alone.

84. Thereafter, the aforementioned decision also holds that when the issues of law and fact in the suit are so intertwined i.e., when the issues of law in the suit depend upon a decision on issues of fact in the suit, trying the mixed questions of law and fact as a preliminary issue would result in a lopsided trial of the suit. This must be understood in the right context. In ***Ramesh B. Desai*** *(supra)*, the question as to whether the company petition was within limitation was dependant on 'when' the petitioners obtained knowledge of the alleged fraud as well as whether the alleged fraud was sufficiently pleaded and could be said to have been committed in the first place. Therefore, the question of limitation was in itself a mixed question of law and fact while also being dependant on the decision on other issues of law and fact. In such a scenario, it was stated that when the issues of law and fact 'in the entire suit' are so intertwined, courts must not resort to deciding the issue of limitation as a preliminary issue. However, what if the issue of limitation is not a pure question of law; it is a mixed question of law and fact; but it is also at the same time divorced from other issues of fact and law? In such a situation, could it be decided as a preliminary issue? The answer would be in

the affirmative. But can such a preliminary issue be decided by way of demurrer? This answer must be in the negative.

85. As elaborated previously, a preliminary issue can be decided in two ways, (a) by way of demurrer, or (b) after the parties have lead evidence confined to the preliminary issue. The decision in ***Ramesh B. Desai*** *(supra)* elaborated on the concept of demurrer and stated that: -

(i) ***First***, the plea of demurrer is an act of objecting or taking exception or a protest. It is a pleading made by one party which assumes the truth of the matter as alleged by the opposite party, but sets up that it is insufficient in law to sustain his claim, or that there is some other defect in the pleadings which constitutes a legal reason as to why the suit must not be allowed to proceed further. In other words, that even assuming those facts as pleaded are true, the court does not have jurisdiction as a matter of law.

(ii) ***Secondly***, such a plea of demurrer was equated with the principle underlying Order VII Rule 11(d) CPC. Rule 11(d) speaks of rejection of the plaint, if it appears from the statement of the plaint that it is barred by any law. Disputed questions cannot, as a matter of rule, be decided while considering an application filed under Order VII Rule 11(d). What has to be decided is whether on the face of it, the averments made in the plaint, without any doubt or dispute, show that the suit is or is not barred by limitation or any other law in force. Therefore, the averments in the plaint are assumed to be correct, and without looking at the pleas raised in the written statement or

any other piece of evidence, the fate of the application under Order VII Rule 11(d) must be decided.

The relevant observations are thus: -

> *"14. The plea raised by the contesting respondents is in fact a plea of demurrer. Demurrer is an act of objecting or taking exception or a protest. It is a pleading by a party to a legal action that assumes the truth of the matter alleged by the opposite party and sets up that it is insufficient in law to sustain his claim or that there is some other defect on the face of the pleadings constituting a legal reason why the opposite party should not be allowed to proceed further. In O.N. Bhatnagar v. Rukibai Narsindas [(1982) 2 SCC 244] (SCC para 9) it was held that the appellant having raised a plea in the nature of demurrer, the question of jurisdiction had to be determined with advertence to the allegations contained in the statement of claim made by Respondent 1 under Section 91(1) of the Act and those allegations must be taken to be true. In Roop Lal Sathi v. Nachhattar Singh Gill [(1982) 3 SCC 487] (SCC para 24) it was observed that a preliminary objection that the election petition is not in conformity with Section 83(1)(a) of the Act i.e. it does not contain the concise statement of the material facts on which the petitioner relies, is but a plea in the nature of demurrer and in deciding the question the Court has to assume for this purpose that the averments contained in the election petition are true. Reiterating the same principle in Abdulla Bin Ali v. Galappa [(1985) 2 SCC 54] it was said that there is no denying the fact that the allegations made in the plaint decide the forum and the jurisdiction does not depend upon the defence taken by the defendants in the written statement. In Exphar SA v. Eupharma Laboratories Ltd. [(2004) 3 SCC 688] (SCC para 9) it was ruled that where an objection to the jurisdiction is raised by way of demurrer and not at the trial, the objection must proceed on the basis that the facts as pleaded by the initiator of the impugned proceedings are true. The submission in order to succeed must show that granted those facts the court does not have jurisdiction as a matter of law. In this case the decision of the High Court on the point of the jurisdiction was set aside as the High Court had*

examined the written statement filed by the respondents in which it was claimed that the goods were not at all sold within the territorial jurisdiction of the Delhi High Court and also that Respondent 2 did not carry out business within the jurisdiction of the said High Court. Following the same principle in Indian Mineral & Chemicals Co. v. Deutsche Bank [(2004) 12 SCC 376] (SCC paras 10 and 11), it was observed that the assertions in a plaint must be assumed to be true for the purpose of determining whether leave is liable to be revoked on the point of demurrer.

15. The principle underlying clause (d) of Order 7 Rule 11 is no different. We will refer here to a recent decision of this Court rendered in Popat and Kotecha Property v. State Bank of India Staff Assn. [(2005) 7 SCC 510] where it was held as under in para 10 of the report: (SCC p. 515)

> *"10. Clause (d) of Order 7 Rule 7 (sic) (Rule 11) speaks of suit, as appears from the statement in the plaint to be barred by any law. Disputed questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 CPC. Clause (d) of Rule 11 of Order 7 applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force."*

16. It was emphasised in para 25 of the report that the statement in the plaint without addition or subtraction must show that it is barred by any law to attract application of Order 7 Rule 11 CPC. The principle is, therefore, well settled that in order to examine whether the plaint is barred by any law, as contemplated by clause (d) of Order 7 Rule 11 CPC, the averments made in the plaint alone have to be seen and they have to be assumed to be correct. It is not permissible to look into the pleas raised in the written statement or to any piece of evidence. Applying the said principle, the plea raised by the contesting respondents that the company petition was barred by limitation has to be examined by looking into the averments made in the company petition alone and any affidavit filed in reply to the company petition or the contents of the affidavit

filed in support of Company Application No. 113 of 1995 filed by the respondents seeking dismissal of the company petition cannot at all be looked into."

(Emphasis supplied)

86. After laying down the aforesaid background and drawing parallels between a plea of demurrer and an application made under Order VII Rule 11(d), this Court in ***Ramesh B. Desai*** *(supra)* went on to discuss the nature of a plea of limitation. It was stated that "*a plea of limitation cannot be decided as an abstract principle of law divorced from facts, as in every case, the starting point of limitation has to be ascertained, which is entirely a question of fact*". Therefore, it is reiterated that a plea of limitation would be a mixed question of law and fact. Therefore, more often than not, there may arise situations wherein it cannot be decided whether the suit could be dismissed as being barred by limitation or not without the aid of proper pleadings, the framing of an issue of limitation and the taking of evidence. In other words, it cannot be decided *ex-facie* the plaint. Therefore, it was observed that, "*unless it becomes apparent from the reading of the company petition that the same is barred by limitation, the petition cannot be rejected under Order VII Rule 11(d) CPC*". The relevant observations are thus: -

"*19. A plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained which is entirely a question of fact. A plea of limitation is a mixed question of law and fact. The question whether the words "barred by law" occurring in Order 7 Rule 11(d) CPC would also include the ground that it is barred by law of limitation has been recently considered by a two-Judge Bench of this Court to which one of us was a member (Ashok Bhan, J.) in Balasaria Construction (P) Ltd. v. Hanuman Seva Trust [(2006) 5 SCC 658, below] it was held: (SCC p. 661, para 8)*

> *"8. After hearing counsel for the parties, going through the plaint, application under Order 7 Rule 11(d) CPC and the judgments of the trial court and the High Court, we are of the opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact. Ex facie in the present case on the reading of the plaint it cannot be held that the suit is barred by time."*
>
> *This principle would be equally applicable to a company petition. Therefore, unless it becomes apparent from the reading of the company petition that the same is barred by limitation the petition cannot be rejected under Order 7 Rule 11(d) CPC."*
>
> (Emphasis supplied)

87. Upon such a situation arising, i.e., when a mixed question of fact and law arises in deciding an application under Order VII Rule 11(d), what must be the approach adopted by the court? The suit must be allowed to proceed and the application under Order VII Rule 11(d) must be rejected for the reason that the issue needs a more elaborate consideration by the court and that the court is not convinced that the matter be kicked out at the threshold. The same is borne out of the decision of this Court in ***Pawan Kumar v. Babulal*** reported in **(2019) 4 SCC 367** which observed as follows: -

> *"13. In the present case, the controversy has arisen in an application under Order 7 Rule 11 CPC. Whether the matter comes within the purview of Section 4(3) of the Act is an aspect which must be gone into on the strength of the evidence on record. Going by the averments in the plaint, the question whether the plea raised by the appellant is barred under Section 4 of the Act or not could not have been the subject-matter of assessment at the stage when application under Order 7 Rule 11 CPC was taken up for consideration. The matter required*

fuller and final consideration after the evidence was led by the parties. It cannot be said that the plea of the appellant as raised on the face of it, was barred under the Act. The approach must be to proceed on a demurrer and see whether accepting the averments in the plaint the suit is barred by any law or not. We may quote the following observations of this Court in Popat and Kotecha Property v. SBI Staff Assn. [Popat and Kotecha Property v. SBI Staff Assn., (2005) 7 SCC 510] : (SCC p. 515, para 10)

> *"10. Clause (d) of Order 7 Rule 7 speaks of suit, as appears from the statement in the plaint to be barred by any law. Disputed questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 CPC. Clause (d) of Rule 11 of Order 7 applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force."*

14. We, therefore, allow this appeal, set aside the view taken by the courts below and dismiss the application preferred by the second defendant under Order 7 Rule 11 CPC. Since the suit has been pending since 2006, we direct the trial court to expedite the matter and dispose of the pending suit as early as possible and preferably within six months from today. Needless to say that the merits of the matter will be gone into independently by the trial court."

(Emphasis supplied)

88. In ***Pawan Kumar*** *(supra)*, the question related to whether the suit was barred by the provisions of Section 4(3) of the Benami Transactions (Prohibition) Act, 1988 and it was opined that this aspect must be gone into on the strength of the evidence on record and it cannot be subject to assessment at the stage when an application under Order VII Rule 11(d) CPC was taken up for consideration. The matter required a "*fuller and final consideration*" after evidence was led.

However, on the face of it, and proceeding on the basis of demurrer, it was held that the suit could not be said to be barred by any law.

89. Therefore, it is inherent in the nature of a decision as regards the rejection of a plaint that, if the court deems it fit to not reject the plaint at the threshold upon an examination of the averments in the plaint, the ground that the suit is still barred by any law can be taken by the defendant in the course of the suit proceedings, after leading evidence. This is because the defendant is not given an opportunity to place his defence as regards the issue that the suit is barred by any law, on record, during the Order VII Rule 11(d) stage. Even if he does, the court would not look into the defendant's written statements or any evidence which he may want to adduce. Therefore, a decision which goes against him, without giving him an opportunity to properly defend it, must not be to his detriment. Since a plea of demurrer is akin to an application made under Order VII Rule 11(d), the same principles must apply.

iii. Decision of the Privy Council in Kanhaya Lal v. The National Bank of India and that of the Calcutta High Court in Angelo Brothers.

90. The nuanced issue with which we are presently concerned has been answered by the decision of the Privy Council in ***Kanhaya Lal v. The National Bank of India Ltd.*** reported in **1913 SCC OnLine PC 4.** Therein, the plaintiff instituted an action claiming return of money paid to the defendant bank under protest along with damages for the alleged illegal acts of the bank. The bank filed certain preliminary

pleas in objection, of which, the foremost was that the plaint discloses no cause of action. The Privy Council held that the necessary consequence of the nature of the objection or plea raised by the defendant bank was that it be decided by way of demurrer i.e., by assuming, for the sake of argument, that the defendant admits to the allegations of the plaintiff in his plaint as true in manner and form. While the decision on the objection or the plea raised would be given assuming as such, the Privy Council clarified that, the defendant, in doing so, would reserve the right to show that these allegations are either wholly or partially false in the further stages of the action, should his objection be overruled. However, insofar as the decision on the objection which is raised as a preliminary point is concerned, everything stated in the plaint would be taken as true. In other words, the Privy Council had unequivocally and clearly stated that a decision on a mixed point of law and fact, taken by way of demurrer, would not be foreclosed in a situation where the party taking such a plea is unsuccessful.

91. The lucid observations made in ***Kanhaya Lal*** *(supra)* are as thus: -

> *"In reply to the above plaint the Respondent Bank filed certain preliminary pleas relating to the claim for the return of the money paid under protest, of which it is only necessary to cite the first, which was that "the suit as framed will not lie". It is admitted that this plea is in substance identical with the more usual form of plea, viz., that "the plaint discloses no cause of action."*
>
> *xxx xxx xxx*
>
> *The question raised by this Appeal is therefore a pure point of law. Both the District Judge and the Chief Court have clearly stated that the decisions which they have given are based on the*

allegations in the plaint, and that for the purposes of such decisions these allegations must be taken to be true in fact. This is a necessary consequence of the nature of the plea, and the same understanding must apply to the present judgment. In asking the Court to decide an issue like the present (which is essentially a demurrer by whatever name it may be called) the Defendants must be taken to admit for the sake of argument that the allegations of the Plaintiff in his plaint are true modo et forma. ***In so doing they reserve to themselves the right to show that these allegations are wholly or partially false in the further stages of the action, should the preliminary point be overruled, but so far as the decision on the preliminary point is concerned everything contained in the plaint must be taken to be true as stated****.*

xxx xxx xxx

In their Lordships' opinion, therefore, the Chief Court ought to have given judgment in favour of the Plaintiff in his appeal against the order of the 18th November, 1902. The consequence of such a decision would have been that the case would have gone back to the District Judge to be tried on the facts.

As has already been stated, the decision of this Board does not affect or prejudice any contention of either party with regard to the facts or any other contention of law not covered by the present judgment."

(Emphasis supplied)

92. The decision of the Calcutta High Court in ***Angelo Brothers*** *(supra),* further built on the position as aforementioned and stated that: -

(i) ***First,*** it cannot be stated that an application or plea by way of demurrer constitutes an admission of the facts in the suit or the application, whose dismissal is sought for, for all times to come. In other words, a motion for dismissal of a plaint or a petition on a preliminary point cannot be said to have the consequence of such an applicant forfeiting his right to contest the case later.

Such an assertion cannot be made by adverting to the principles contained in Order VIII because a decision is sought for on a point of maintainability and not on the merits of the matter. Therefore, when the expression "demurrer" is used in connection with an application seeking dismissal of a petition on a preliminary or maintainability point, it shall not imply an "automatic admission of the facts" contained therein by the party seeking dismissal.

(ii) ***Secondly***, reliance was placed on the decision of a Coordinate Bench of the Calcutta High Court in ***Himungsu Kumar Basu v. Sudhangsu Kumar Basu*** reported in **AIR 2004 Cal 217** to buttress that a point can be decided on demurrer when there is no need for investigation of fact and it is only a point of law that needs to be resolved.

(iii) ***Thirdly***, the principle of Order VII Rule 11(d) would apply in relation to such petitions and if it is found that the adjudication of such a motion involves mixed questions of fact and law, then the adjudication would stand deferred to be determined on trial.

(iv) ***Lastly,*** the practice as regards the concept of demurrer which has been followed in the United States and England has not been accepted as a part of Indian jurisprudence. The law in India proceeds on a different trajectory on this aspect.

The relevant observations are thus: -

"*14. Mr. Kar in course of hearing before me has indeed taken a stand that his application is in the nature of demurrer, but his case is that in Indian jurisprudence, an application in the nature of demurrer retains the characteristic of an application for*

rejection of plaint, and the import of the noun "demurrer" in the Indian legal context cannot be given the same meaning it has in the U.S. or English jurisdiction. His further submission is that the provisions of Order VIII of the Code could apply only after filing of written statement or when the defendant foregoes the right to file written statement, but in this case his client has assailed the recall petition on the ground of maintainability alone and has not abandoned its right to contest the applications on merit. On this point, he has relied on a judgment of the Supreme Court in the case of Ramesh B. Desai & Ors. v. Bipin Vadilal Mehta and Ors. [(2006)5 SCC 638].

xxx xxx xxx

16. In the aforesaid judgment, the Supreme Court applied the principles of Order 7 Rule 11 in relation to the petition for dismissal, but allowed the appeal against judgment of the High Court by which the dismissal plea was upheld. The High Court was directed to hear the company petition afresh. [...]

17. The point of demurrer has been used interchangeably with motion for dismissal of a suit on preliminary issue in a judgment of a Coordinate Bench of this Court in the case of Himungsu Kumar Basu v. Sudhangsu Kumar Basu (AIR 2004 Cal 217). In paragraph 10 of the Report, a learned Single Judge of this Court held:-

> *"... Even I have no doubt or hesitation in my mind about such principle by whatever name it may be called. Similarly I do believe that the explanation as made by Mr. Bagchi in this case is not very clear. The principal point is demurrer as a preliminary issue can be decided as the earliest when there is no need of investigation of fact. Such analytical aspect of the judgment has to be appreciated. The real import is that when there is availability of two possibilities the point of demurrer can be taken as a point of law and it has to be determined as a preliminary point."*

18. Saleem Bhai and Ors. v. State of Maharashtra & Ors. [(2003)1 SCC 557] is an authority for the proposition of law that an application under Order 7 Rule 11 of the Code can be taken out at any stage of the suit. The Bombay High Court also

has taken the same view in P.R. Sukeshurla v. Dr. Devadatta V.S. Kerkar (AIR 1995 Bom 227). In Ramesh B. Desai (supra), it was held that for examining whether a plaint is barred under law, the averments made in the plaint alone have to be seen and they have to be assumed correct. Same view was taken by the Supreme Court in the cases of Man Roland Druckimachinen AG v. Multicolour Offset Ltd. & Anr. [(2004)7 SCC 447] as also Popat and Kotecha Property (supra). In the case of ABN-AMRO Bank v. Punjab Urban Planning and Development Authority (AIR 2000 P & H44), a view was taken that under Order 7 Rule 11, there is no concept of partial rejection of plaint. Ratio of that authority is not applicable in the facts of these proceedings. None of these authorities lay down the ratio that an application referred to as a "demurrer" constitutes admission of facts in the suit or application whose dismissal is asked for. The principles contained in the aforesaid Rules of Order VIII cannot be implanted in a case of this nature, in which dismissal of an application is sought for on maintainability point, without adverting to merits of the case. Mr. Kar, on the other hand, has cited a judgment of the Bombay High Court in the case of Globex Financial Services Ltd. v. Bakulesh T. Shah and Ors. [2000(2) ALL MR 419]. Submission on this very point was rejected by a learned Single Judge of the Bombay High Court in this case, and it was held in the context of that case that when the defendant proceeded on demurrer, it would only mean that they are denying the contentions of the plaintiffs as raised in the plaint and in their view assuming without conceding that those contentions were to be gone into, the Court did not have the pecuniary jurisdiction.

19. The opinions expressed in these authorities do not lay down the law that a motion for dismissal of a plaint or petition on a preliminary point in India forfeits the right of the applicant to contest the case later or such a procedure results in admission of facts pleaded in such plaint or petition whose dismissal is sought for. On the other hand, in the case of Ramesh B. Desai (supra), the Supreme Court examined an application seeking dismissal of a company petition applying the principles of Order 7 Rule 11 of the Code. In the judgment of a Coordinate Bench in the case of Himungsu Kumar Basu (supra), the learned Judge has dealt with the concept of demurrer interchangeably with an

application for rejection of plaint under Order 7 Rule 11 of the Code. [...]

20. I accordingly hold that the expression demurrer, when used in connection with an application seeking dismissal of a petition on a preliminary or maintainability point shall not imply automatic admission of facts contained in the plaint or petition whose dismissal is sought for by opposing party. The principles of Order 7 Rule 11 would apply in relation to such petitions, and if it is found that adjudication of such motion involves mixed questions of fact and law, then adjudication of that question would stand deferred, and those points would be left to be determined on trial. Though there does not appear to be a clear Indian authority on this point as yet, from the decisions to which I have referred to earlier, it is apparent that the practise followed in England and the US had never been accepted as a part of Indian jurisprudence. The term "demurrer" in the Indian context has been construed to have connotation wider than the dictionary meaning, and motions for dismissal of a proceeding on a preliminary point has been commonly referred to as applications "in demurrer". Otherwise, no statutory reference to this term has been brought to my notice. The U.S. and English principle on demurrer does not apply in the Indian context. Law in India proceeds on a different trajectory on this point, and I do not find any reason to adopt a different course though such a course would be compatible with the US and the English principles."

(Emphasis supplied)

93. We express our agreement with the aforementioned decisions of the Privy Council and the Calcutta High Court respectively on this aspect.

94. The aforesaid discussion on the position of law prevailing in India may be summarised as follows: -

(i) The plea of demurrer is an act of objecting or taking exception or a protest. It is a pleading made by one party which "assumes" the truth of the matter as alleged by the opposite

party, but sets up that it is insufficient in law to sustain the claim, or that there is some other defect in the pleadings which constitutes a legal reason as to why the suit must not be allowed to proceed further. In other words, that even assuming those facts as pleaded are true, the court does not have jurisdiction as a matter of law. The party raising the plea challenges legal sufficiency of a complaint/plaint/action rather than its factual accuracy.

(ii) To put it simply, a decision on demurrer has to be determined *ex-facie* the plaint.

(iii) The decision of this Court in ***Man Roland*** *(supra)* brought to the fore an important perspective – that only certain objections are capable of being decided by way of demurrer. Only those objections which do not involve questions of facts nor the adducing of any further evidence, could be decided by way of demurrer.

(iv) The rule that when a mixed question of law and fact is decided on the basis of a demurrer, the issue would not be permanently foreclosed was also inherent in the decision of this Court in ***Indian Mineral & Chemical Co.*** *(supra).*

(v) This Court in ***Ramesh B. Desai*** *(supra)*, was directly concerned with the issue of limitation being decided by way of demurrer and it directed attention to the mandate under Order XIV Rule 2 which provides that only if the court is of the opinion that the case or any part thereof may be disposed of on a pure issue of law alone, it may try that issue first. This issue of law can very well be whether the suit is barred by limitation or not,

but, provided that such a question of limitation is purely an issue of law.

(vi) The parallel between an issue of limitation raised by way of demurrer and an application for rejection of plaint under Order VII Rule 11(d) CPC was drawn for the first time in ***Ramesh B. Desai*** *(supra)*. Disputed questions cannot, as a matter of rule, be decided while considering an application filed under Order VII Rule 11(d). What has to be decided is whether on the face of it, the averments made in the plaint, without any doubt or dispute, show that the suit is or is not barred by limitation or any other law in force.

(vii) This Court in ***Ramesh B. Desai*** *(supra)* went on to discuss the nature of a plea of limitation. It was stated that "*a plea of limitation cannot be decided as an abstract principle of law divorced from facts, as in every case, the starting point of limitation has to be ascertained, which is entirely a question of fact*". Therefore, it was reiterated that, more often than not, a plea of limitation would be a mixed question of law and fact. Therefore, there may arise situations wherein it cannot be decided whether the suit could be dismissed as barred by limitation or not without the aid of proper pleadings, the framing of an issue of limitation and the taking of evidence. In other words, it cannot be decided *ex-facie* the plaint.

(viii) Therefore, it is inherent in the nature of a decision as regards the rejection of a plaint that, if the court deems it fit to not reject the plaint at the threshold upon an examination of the averments in the plaint, the ground that the suit is still barred

by any law can be taken by the defendant in the course of the suit proceedings, after leading evidence.

(ix) This is because the defendant is not given an opportunity to put forward his defence as regards the issue that the suit is barred by any law, on record, during the Order VII Rule 11(d) stage. Even if he does, the court would not look into the defendant's written statements or any evidence which he may want to adduce. Therefore, a decision which goes against him, at the preliminary stage, without giving him an opportunity to properly defend it, must not be to his detriment. Since a plea of demurrer is akin to an application made under Order VII Rule 11(d), the same principles must apply.

(x) It cannot be said that at the stage of rejection of plaint, the defendant/respondent chooses to waive his right to plead and instead, adopts the course of only testing the sufficiency of the plaint in law. At this stage, there is no choice between either pleading or demurring and the defendant/respondent cannot be taken to have elected to demur instead of pleading. This is simply because, there exists no burden of proof on him, at that stage, to plead. He can simply pause or wait for the plaintiff to prove the sufficiency of his claim in law, without affecting his right to plead or lead evidence in the future.

(xi) In ***Kanhaya Lal*** *(supra),* the Privy Council clarified that, while the decision on the objection or the plea raised by way of demurrer would be given assuming that the averments of the plaint are true, the defendant, would simultaneously reserve the right to show that these allegations are either wholly or

partially false in the further stages of the action, should his objection be overruled. However, insofar as the decision on the objection which is raised as a preliminary point is concerned, everything stated in the plaint would be taken as true. In other words, the Privy Council had unequivocally and clearly stated that a decision on a mixed point of law and fact, taken by way of demurrer, would not be foreclosed in a situation where the party taking such a plea is unsuccessful.

(xii) The Calcutta High Court in ***Angelo Brothers*** *(supra)* also buttressed that when a defendant/respondent raises a plea by way of demurrer, it cannot be said that it constitutes an admission of the facts in the suit or the application, whose dismissal is sought for, for all times to come. In other words, the assumption made while seeking a decision on a preliminary point cannot be said to have the consequence of such an applicant forfeiting his right to contest the case later. Such an assertion cannot be made by adverting to the principles contained in Order VIII because a decision herein is sought for on a point of maintainability and not on the merits of the matter.

95. Coming back to the facts of the present case, the arbitrator, while passing the interim award could not have decided the issue of limitation, on the basis of demurrer, owing to the fact that it was a mixed question of law and fact. Even if he had chosen to do so, he could not have foreclosed the issue permanently.

96. The impugned decision is correct in observing that the arbitrator has not even recorded a finding that the issue of jurisdiction in the present facts did not "require" any evidence. In other words, he did not state that the averments of the statement of claim and the documents annexed thereto would be sufficient to decide the issue of limitation in the circumstances of the present matter. If this sufficiency had been indicated and then, the issue would have been decided by way of demurrer, it might have been possible for us to attribute some merit to the argument of the present petitioner that the issue could be foreclosed. However, it is the arbitrator's own opinion that if further evidence was adduced or witnesses were cross-examined, he might have leaned towards arriving at a contrary finding. With such an apprehension weighing on his mind, the arbitrator should not have foreclosed the issue of limitation permanently.

97. When the parties were informed that the issue of limitation would be decided on the basis of demurrer, there was no corresponding duty on the respondent to adduce any evidence because it was apparent that it is the maintainability of the claim which is being decided on principles akin to Order VII Rule 11(d). Therefore, the argument of the present petitioner that, the respondent was asked whether they wanted to lead any evidence and they consciously chose not to, would also not be of any avail to them, particularly to contend that the decision on the issue of limitation, was final. In other words, there would be no question of estoppel.

98. The learned arbitrator seems to have directly adopted the approach followed in the U.S. and England, without appreciating the differences which exist in our legal systems on the concept of demurrer. Even assuming that such an approach could have been directly imported, the arbitrator ought to have taken note of the fact that it is a well-settled position even in the U.S. that questions of fact cannot be adjudicated by way of a decision on demurrer.

99. In our opinion, the observations made by the Single Judge, which has been affirmed by the impugned decision, must not be construed as giving unbridled scope to the respondents to re-agitate the issue. The specific words used by the Single Judge are that the Arbitral Tribunal could further examine this issue on the basis of evidence and other materials on record "if tendered and if so warranted". Therefore, the respondents must satisfy the Arbitral Tribunal that the issue warrants re-visiting through cogent evidence, in the absence of which, the arbitrator would be compelled to arrive at the same conclusion, similar to the one arrived at while adjudicating on demurrer. To put it simply, the respondent must successfully discharge their burden of proof on this aspect in the course of the proceedings. If not, any decision finally rendered on merits could not be assailed on the basis that the respondents did not concede to the truth of the assertions made in the statement of claim.

II. <u>Whether the Doctrine of Party Autonomy can be utilised to adopt a procedure which has the consequence of infringing Section 3 of the Limitation Act, 1963</u>?

100. As elaborated by us previously, the issue of limitation is a mixed question of law and fact, and goes to the root of any claim that a party may put forward. Therefore, it is incumbent upon any Court or Tribunal having jurisdiction over any dispute to, first, adjudicate the question of limitation and dismiss the claim if found to be barred by limitation, even if limitation is not set up as a defence. This comes as a direct mandate from Section 3 of the Act, 1963 which reads thus: -

> *"**3. Bar of limitation.—***
> *(1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence."*

(Emphasis supplied)

101. Therefore, there exists a positive duty upon any forum adjudicating any dispute to ensure that the claim is within limitation. This duty must be reasonably and properly discharged in a manner which is tailored to the facts and circumstances of each case. If the peculiar facts of the matter are such that, the issue of limitation cannot be decided *sans* further evidence, then the mandate of Section 3 of the Act, 1963, must be understood to also empower the court or tribunal to require further evidence in order to adjudicate the issue. We say so because, the responsibility fastened upon the court or tribunal, is not merely to decide the issue of limitation in a superficial manner but to decide it properly and conscientiously, by adopting a procedure which adequately, appropriately and fairly decides the issue. Therefore, deference to this duty must not just be on the surface level and this obligation must be not be understood in a narrow and restricted manner.

102. Section 43 of the Act, 1996, which makes the Act, 1963 applicable to arbitrations explicitly states that, the Act, 1963 "shall" apply to arbitrations as it applies to proceedings in court. This is again, a positive mandate. Therefore, by virtue of Section 43 of the Act, 1996, the Arbitral Tribunal would also be bound by the statutory mandate underlying Section 3 of the Act, 1963 which requires the arbitrator to decide the issue of limitation in a proper and reasonable manner.

103. The question which then arises is whether parties can adopt a procedure which may have a direct impact on this positive obligation which is cast upon the Arbitral Tribunal? In other words, can party autonomy be exercised in a manner such that the issue of limitation comes to be decided inadequately or superficially? The answer would, again, be an emphatic 'No'. To elaborate on why the answer to the aforesaid must necessarily be in the negative, one has to first understand the contours of the doctrine of party autonomy itself and the breadth of its expanse. That the doctrine of party autonomy is not limitless, although an unpopular premise, is a premise that finds backing from an apparent reading of Section 19 of the Act, 1996 which embodies the core of doctrine of party autonomy insofar as the determination of procedural rules are concerned. The Section reads as thus: -

> "***19. Determination of rules of procedure. –***
> *(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).*
>
> *(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.*

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

(Emphasis supplied)

104. The words used at the beginning of Section 19(2) is "*Subject to this Part*". The very insertion of this phrase indicates that the legislature in its wisdom wanted to circumscribe, to an extent, the undoubtedly expansive scope which has been afforded to the doctrine of party autonomy under the framework of arbitration. How this plays out *vis-á-vis* the legislative scheme of Part I of the Act, 1996, will be dealt with shortly. However, we can safely begin this discussion on the boundaries of the doctrine of party autonomy, after having brought due attention to this legislative intent.

105. It is no more *res integra* that parties are empowered to agree on certain procedures which is to be followed by the Arbitral Tribunal during the conduct of its proceedings. Such a procedure may also be at variance compared with those traditionally adopted in the court proceedings. In the decision of this Court in ***Centrotrade Minerals and Metal Inc. v. Hindustan Copper Limited*** reported in **(2017) 2 SCC 228**, the issue that fell for consideration was whether the parties could have agreed to a two-tier arbitration and if the same was prohibited by the provisions of the Act, 1996. While holding that party autonomy could be exercised in such a manner whereby the arbitral

award rendered in India could again be reconsidered by another arbitrator(s) by way of an appeal, this court made some observations as regards the doctrine of party autonomy: -

(i) ***First,*** that party autonomy is virtually the backbone of arbitrations. The parties would be free to agree on the application of three different laws which would govern their entire relationship i.e., the proper law of contract, the proper law of the arbitration agreement and the proper law for the conduct of arbitration.

(ii) ***Secondly***, that there are four foundational pillars to an arbitration; The first of which is the "fair, speedy and inexpensive trial" by an Arbitral Tribunal and the second would be the exercise party autonomy in the choice of procedure. As a consequence of the second pillar, if a particular procedure is prescribed in the arbitration agreement, that procedure must generally be resorted to, owing to the fact that the parties have agreed to it.

(iii) ***Thirdly,*** the scope of party autonomy was said to extend not only to the choice of procedure, but to the choice of substantive law as well. To elaborate, parties would also be free to determine the substantive law or rules which would be applicable to the merits of the dispute. Through this, parties could avoid the application of an unfavourable or inappropriate law to an international dispute. This would mean that the choice of jurisdiction is left to the wisdom of the contracting parties.

The relevant observations are thus: -

*"**Party autonomy***

38. Party autonomy is virtually the backbone of arbitrations. This Court has expressed this view in quite a few decisions. In two significant passages in Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. [Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2016) 4 SCC 126 : (2016) 2 SCC (Civ.) 580, Hon'ble Judges/Coram : Anil R. Dave, Kurian Joseph and Amitava Roy, JJ.] this Court dealt with party autonomy from the point of view of the contracting parties and its importance in commercial contracts. In para 5 of the Report, it was observed : (SCC p. 130)

> *"5. Party autonomy being the brooding and guiding spirit in arbitration, the parties are free to agree on application of three different laws governing their entire contract— (1) proper law of contract, (2) proper law of arbitration agreement, and (3) proper law of the conduct of arbitration, which is popularly and in legal parlance known as "curial law". [...]*

39. In Union of India v. U.P. State Bridge Corpn. Ltd. [Union of India v. U.P. State Bridge Corpn. Ltd., (2015) 2 SCC 52 : (2015) 1 SCC (Civ.) 732] this Court accepted the view [O.P. Malhotra on the Law and Practice of Arbitration and Conciliation (3rd Edn. revised by Ms Indu Malhotra, Senior Advocate)] that the A&C Act has four foundational pillars and then observed in para 16 of the Report that : (SCC p. 64)

> *"16. First and paramount principle of the first pillar is 'fair, speedy and inexpensive trial by an Arbitral Tribunal'. Unnecessary delay or expense would frustrate the very purpose of arbitration. Interestingly, the second principle which is recognised in the Act is the party autonomy in the choice of procedure. This means that if a particular procedure is prescribed in the arbitration agreement which the parties have agreed to, that has to be generally resorted to."*
>
> *(emphasis supplied)*

40. This is also the view taken in Law and Practice of International Commercial Arbitration [Chapter 6. Conduct of

the Proceedings in Nigel Blackaby, Constantine Partasides, et al., Redfern and Hunter on International Arbitration [Sixth Edn., © Kluwer Law International, Oxford University Press 2015] pp. 353-414, Para 6.07] wherein it is said:

> *"Party autonomy is the guiding principle in determining the procedure to be followed in an international arbitration. It is a principle that is endorsed not only in national laws, but also by international arbitral institutions worldwide, as well as by international instruments such as the New York Convention and the Model Law."*

41. However, the authors in Comparative International Commercial Arbitration [Chapter 17 Determination of Applicable Law in Julian D.M. Lew, Loukas A. Mistelis, et al., Comparative International Commercial Arbitration (© Kluwer Law International, Kluwer Law International 2003) pp. 411-437, Para 17-8] go a step further in that, apart from procedure, they say that party autonomy permits parties to have their choice of substantive law as well. It is said:

> *"All modern arbitration laws recognise party autonomy, that is, parties are free to determine the substantive law or rules applicable to the merits of the dispute to be resolved by arbitration. Party autonomy provides contracting parties with a mechanism of avoiding the application of an unfavourable or inappropriate law to an international dispute. This choice is and should be binding on the Arbitration Tribunal. This is also confirmed in most arbitration rules."*
>
> *(emphasis supplied)*

42. Be that as it may, the legal position as we understand it is that the parties to an arbitration agreement have the autonomy to decide not only on the procedural law to be followed but also the substantive law. The choice of jurisdiction is left to the contracting parties. In the present case, the parties have agreed on a two-tier arbitration system through Clause 14 of the agreement and Clause 16 of the agreement provides for the construction of the contract as a contract made in accordance

with the laws of India. We see nothing wrong in either of the two clauses mutually agreed upon by the parties."

(Emphasis supplied)

106. Some attention must be paid to the foundational pillars of arbitration which has been alluded to in ***Centrotrade Minerals*** *(supra)*. The first foundational pillar involves ensuring a "fair" trial of the dispute whose resolution is sought through arbitration. Now, the question arises, what if there is a conflict between the aforementioned first pillar and the second pillar of party autonomy? To put it simply, whether the second pillar of party autonomy in exercising an option over choice of procedure could be used to undermine the idea fairness which is also equally fundamental to arbitrations? The answer must be in the negative. Moreover, the thumb rule is that the choice of procedure agreed to by the contracting parties must "*generally be restored to*". Therefore, there may arise circumstances wherein such a choice of procedure exercised by the parties would stand detrimental to the fair resolution of the dispute itself and in such a scenario, there would be no other choice but to place the fair and just resolution of the dispute at the helm. Ignoring the principles of limitation law would result in an unfair resolution of the dispute and therefore, any procedure which enable this, even if agreed to by the parties, must not be given any impregnable or inviolable immunity from scrutiny.

107. One another very pertinent observation made in ***Centrotrade Minerals*** *(supra),* was that the two-tier arbitration mechanism agreed upon by the parties did not by-pass any mandatory provision of the

Act, 1996, either implicitly or explicitly. This is precisely why such an exercise of party autonomy, i.e., to agree to a two-tier arbitration, was held to be a valid and permissible exercise of party autonomy. The relevant observations are as follows: -

> *"46. [...] The parties to the contract have not by-passed any mandatory provision of the A&C Act and were aware, or at least ought to have been aware that they could have agreed upon the finality of an award given by the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. Yet they voluntarily and deliberately chose to agree upon a second or appellate arbitration in London, UK in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. There is nothing in the A&C Act that prohibits the contracting parties from agreeing upon a second instance or appellate arbitration – either explicitly or implicitly. No such prohibition or mandate can be read into the A&C Act except by an unreasonable and awkward misconstruction and by straining its language to a vanishing point. We are not concerned with the reason why the parties (including HCL) agreed to a second instance arbitration – the fact is that they did and are bound by the agreement entered into by them. HCL cannot wriggle out of a solemn commitment made by it voluntarily, deliberately and with eyes wide open."*
>
> (Emphasis supplied)

108. Therefore, a reasonable inference which could be drawn from the above is that, when the exercise of party autonomy is in teeth with any mandatory provision of the Act, 1996, the same could not be said to be proper.

109. The decision of this Court in ***Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation*** reported in **(2017) 4 SCC 665** discussed the 246th Report of the Law Commission, more specifically in the context

of neutrality of arbitrators and its interaction with the doctrine of party autonomy. The relevant portions of the Law Commission Report is reproduced as under: -

> *"**Neutrality of Arbitrators***
> *53. It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. In the context of arbitration, neutrality of arbitrators viz. their independence and impartiality, is critical to the entire process. [...]*
>
> *xxx xxx xxx*
>
> *57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the Arbitral Tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles — even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. [...] The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous — and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes."*
>
> (Emphasis supplied)

110. The Report emphasized that a delicate balance has to be maintained between procedural fairness and giving effect to contracts wherein the suggested arbitrator is an employee of one of the parties. It was stressed that party autonomy cannot be exercised in complete disregard of the principles of impartiality and independence which is crucial to arbitrations. It was added that, there are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. In this manner, the unduly expansive way in which the concept of party autonomy was being construed was criticised and some necessary checks and balances were deemed necessary.

111. In yet another decision of this Court in ***Lombardi Engineering Limited v. Uttarakhand Jal Vidyut Nigam Limited*** reported in **(2024) 4 SCC 341,** where one of us (J.B. Pardiwala, J.), was a member of the Bench, the counsel for the respondent sought to press the argument that, the petitioner having consented to a pre-deposit clause, cannot be permitted to turn around and question its validity at the stage of Section 11(6) application because it would circumvent the principle of party autonomy. However, such an argument was rejected on the basis of the reasoning that, the concept of party autonomy cannot be stretched to an extent where it violates the fundamental rights guaranteed under the Constitution. The relevant observations are thus: -

> *"21. It was also argued that the petitioner having consented to the pre-deposit clause cannot be permitted to turn around and question its validity at the stage when a petition under Section 11(6) of the 1996 Act is being considered, thereby circumventing the principle of "party autonomy".*

xxx *xxx* *xxx*

83. The concept of "party autonomy" as pressed into service by the respondent cannot be stretched to an extent where it violates the fundamental rights under the Constitution. For an arbitration clause to be legally binding it has to be in consonance with the "operation of law" which includes the Grundnorm i.e. the Constitution. It is the rule of law which is supreme and forms parts of the basic structure. The argument canvassed on behalf of the respondent that the petitioner having consented to the pre-deposit clause at the time of execution of the agreement, cannot turn around and tell the Court in a Section 11(6) petition that the same is arbitrary and falling foul of Article 14 of the Constitution is without any merit."

(Emphasis supplied)

112. We are not in any way trying the dilute the sanctity of the doctrine of Party Autonomy. It is undoubtedly, the bedrock of arbitration. The general rule is always that arbitrations are to be conducted on the basis of what the parties have agreed upon and consented to. However, all that we are trying to convey is that, when parties wish to adopt procedures which strike at the root of very adjudication of the dispute and have the potential to upend any established principle of fairness which our legal system has created and nurtured over the years, one has to see whether such an exercise of party autonomy is within the confines of the Act, 1996 and within the confines of the doctrine of party autonomy envisaged by the Act, 1996. Undoubtedly, the doctrine is quite expansive, but is it expansive enough to strike at the most basic principles of limitation law, more particularly Section 3 of the Act, 1963? - is the question that we are concerned with. We, are of the opinion, that it isn't.

113. No doubt, **Gary B. Born** in his commentary on International Commercial Arbitration, discusses party autonomy as follows: -

> *"One of the principal reasons that this procedural autonomy is granted is to enable the parties and arbitrators to dispense with the technical formalities and procedures of national court proceedings and instead fashion procedures tailored to particular disputes"*

114. While we are in complete agreement with the afore-stated, one must be able to distinguish when this procedural autonomy is used to dispense with mere "technical" formalities and procedures, and when it is wielded to dispense with certain core principles which any method of dispute resolution must abide by. Any procedure agreed upon by parties cannot and must not have the consequence of the matter being decided in ignorance of settled principles of law, which includes the principles of limitation, or have the effect of the matter being decided in an unfair and lopsided manner. One must be able to distinguish between instances when party autonomy is used to dispense with mere technicalities in the pursuit of a fair and speedy resolution of the dispute, and instances when the doctrine is being disguised to shorthand fairness and justice itself.

115. To buttress our view, we may look at this question from one another angle – a perspective to which we had alluded to briefly at the beginning of our discussion on this issue. Upon a careful perusal, it can be seen that specific words used in Section 19(2) which embodies the doctrine of party autonomy is – "*Subject to this Part*". Therefore, this reinforces the idea that party autonomy cannot be wielded as a

unbridled and limitless doctrine. The same is also subject to certain restrictions, however limited those restrictions may be.

116. It would be apposite to point out that, Section 43 of the Act, 1996 which makes the law of limitation applicable to arbitrations would fall under the ambit of the phrase "*Subject to this Part*" finding mention under Section 19(2) of the Act, 1996 since Section 43 is also included under Part I of the larger scheme of the Act, 1996. Therefore, one of those few reasonable restrictions which may limit the scope of the doctrine of party autonomy, may very well include certain provisions of the Limitation Act as well, more particularly, Section 3 thereof. To put it simply, the elasticity of the doctrine of party autonomy cannot be tested and pushed to the extent that it has the consequence of being at loggerheads with the duty of the Arbitral Tribunal which is manifest in Section 3 of the Act, 1963.

117. The counsel for the present petitioner is right insofar as submitting that parties have the right to agree to procedures that differ from standard court processes, such as agreeing to an award without reasons, agreeing to a custom-made procedure for challenging the appointment of an arbitrator and determination of bias, or agreeing to a proceeding without oral hearings. However, what must be noticed is all the aforesaid instances in which party autonomy can be freely exercised are specifically laid out or delineated under some provision falling under Part I of the Act, 1996. For instance, it is Section 31(3) which allows the parties to dispense with the requirement of an award with reasons, Section 13(1) which provides the party the right to agree on a distinct procedure for challenging an

arbitrator's appointment and Section 29B which allows parties to opt for a fast-track procedure without the requirement of oral hearings. Hence, the exercise of party autonomy in the aforesaid instances would not have any conflict with the term "*Subject to this Part*" occurring in Section 19(2). On the other hand, it would be in consonance with it. However, the same cannot be the case when party autonomy is exercised in a manner that conflicts with Section 43 of the self-same Act and the basic, core principles of limitation law, especially having explained that Section 43 of the Act, 1996 is couched in a mandatory language and is included within the scheme of Part I of the Act, 1996.

118. Let us look at this issue from yet another angle. There are several provisions which begin with the phrase "*unless otherwise agreed by the parties*" throughout the scheme of Part I of the Act, 1996. In all such provisions, the legislature in its wisdom, has given a considerable amount to importance to party autonomy and therefore, the parties may reasonably resile from the aspect elucidated upon in those respective provisions and chose to adopt an alternate course by means of an agreement with the other party. Then, there are certain other provisions which begin with the phrase, "*the parties are free to agree/determine*", which, again, gives considerable priority to what the parties may decide to agree upon with respect to what is dealt with in those respective provisions. However, Section 19(2), with which we are directly concerned with states – "*Subject to this Part, the parties are free to agree on the procedure…*". The use of the words, "*Subject to this Part*" in Section 19(2), must therefore, be taken to understand the doctrine of party autonomy as far as procedural matters are

concerned, in its right hue and light – as one with reasonable restrictions.

119. What we have attempted to say in so many words is that there are certain non-derogable provisions within the scheme of the Act, 1996 itself, which the parties cannot ignore or attempt to bypass, even by agreement. Parties have the autonomy to decide their own procedure including the modalities of the arbitration but within the confines of the provisions of Part I of the Arbitration Act, 1996. This, by extension, would also mean that the chosen procedure must align with the underlying principles of limitation law owing to the mandate reflected in Section 43 of the Act, 1996.

120. In view of the aforesaid, the defence of party autonomy would not be available to the present petitioner to contend that the arbitrator was right in finally deciding the issue of limitation, which is a mixed question of fact and law, on the basis of demurrer and foreclosing it permanently.

III. <u>Whether the Interim Award warranted interference by the court under Section 34 of the Act, 1996</u>?

121. The law as it has evolved as regards the scope of interference with an arbitral award under Section 34 of the Act, 1996, has been very succinctly explained by this Court in ***Ssangyong*** *(supra).* The words "public policy of India", which had gradually adopted a wide import was circumscribed by the 2015 Amendment Act to the Act, 1996. It was necessarily clarified that an award would be in conflict with the

"public policy of India" only if, (a) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or 81 of the Act, 1996 respectively; or (b) it is in contravention with the fundamental policy of Indian law; or (c) it is in conflict with the most basic notions of morality or justice.

122. The first ground or circumstance, as inserted by the 2015 Amendment Act, on the occurrence of which an award would be in conflict with the public policy of India does not require much clarification. It is fairly clear as to when an award could be induced by fraud or corruption or when it would stand contrary to Sections 75 or 81 of the Act, 1996 respectively. However, the second and third grounds are couched in such language that could prompt some interpretational creativity and therefore, its scope was re-clarified by this Court in ***Ssangyong*** *(supra)* as follows: -

(i) ***First,*** the second ground i.e., the expression "fundamental policy of Indian law" would be relegated to its understanding in the decision of this Court in ***Renusagar*** *(supra)*. The same has been adequately expounded in paragraphs 18 and 27 respectively of the decision of this Court in ***Associate Builders*** *(supra).*

(ii) ***Secondly,*** the third ground for interference i.e., an award being in conflict with the "most basic notions of morality or justice" must be understood in line with paragraphs 36 to 39 of the decision of this Court in ***Associate Builders*** *(supra).* For this ground to be invoked, the award sought to be set aside must shock the conscience of the court.

(iii) ***Lastly,*** perversity would not figure as a ground either separately or within the aforementioned two grounds subsumed under the larger umbrella of the phrase "public policy of India". Such a decision which is perverse would instead amount to a "patent illegality" appearing on the face of the award. However, this ground of patent illegality which is removed from the ambit of public policy of India, would only be available for setting aside awards rendered in domestic arbitrations.

The relevant observations are reproduced 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 [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] 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 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , 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 [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204].*

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] . [...]

xxx xxx xxx

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.

42. Given the fact that the amended Act will now apply, and that the "patent illegality" ground for setting aside arbitral awards in international commercial arbitrations will not apply, [...]"

(Emphasis supplied)

123. As a natural consequence of the clarification in ***Ssangyong*** *(supra)*, one must advert to paragraphs 18, 27, 36, 37, 38 and 39 respectively of the decision in ***Associate Builders*** *(supra)* in order to comprehend the scope of the second and third grounds of "fundamental policy of Indian law" and the "most basic notions of justice and morality" respectively subsumed within the phrase "public policy of India". In the aforementioned paragraphs, the decision in ***Associate Builders*** *(supra),* has elaborated as thus: -

(i) ***First,*** that the import of the words "public policy of India" as explained by this Court in ***Renusagar*** *(supra)* would include an award that is contrary to (a) the fundamental policy of Indian law, (b) the interest of India and (c) justice or morality. Option (b) relating to the "interest of India" has now been consciously excluded by the 2015Amendment Act.

(ii) ***Secondly,*** that as far as the head "fundamental policy of Indian law" is concerned, it is not the contravention of every statute which could be said to be against the fundamental policy of Indian law, *for example*, the recovery of compound interest on interest, would not fall within its scope. However, if provisions of the Foreign Exchange Regulation Act, 1973 are contravened, the same would strike at the fundamental policy of Indian law since the statute was enacted for national economic interest in order to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the country.

(iii) ***Thirdly,*** that even disregarding orders passed by the superior courts in India would fall within the ambit of "fundamental

policy of Indian law" for the purpose of setting aside an award under Section 34 or refusing enforcement under Section 48 of the Act, 1996.

(iv) ***Fourthly,*** insofar as the ground of "justice" was concerned, it was stated that for an award to be against justice, it must necessarily shock the conscience of the court. An illustration was given to better understand the concept in a contextual manner – i.e., in an arbitration, a claimant restricts his claim to a sum, say X, in his statement of claim and he does not at any point indicate that he seeks a higher amount, however, the award ultimately grants the claimant a sum of, say X+Y, without any acceptable reason or justification for the additional amount of Y. In such a scenario, the award would shock the conscience of the court and be contrary to justice itself.

(v) ***Lastly,*** as regards the expression "morality", the same was understood in the context of Section 23 of the Indian Contract Act, 1872. It was stated that morality has been confined to sexual morality under the aforesaid Section 23. However, some leeway was given to expand the scope of morality in the context of setting aside an award beyond sexual morality. It was stated that the expression may also cover such agreements that are not illegal per say but those would not be enforced in light of the prevailing mores of the day. It was deemed appropriate, rightly so, to not further elaborate on what the prevailing mores of the day would be since the concept being inherently dynamic cannot be confined to a single definition or an exhaustive list of circumstances. However, it was cautioned that even for

invoking the ground of "morality" for the purpose of setting aside an award, it must qualify as something which shocks the conscience of the court.

The relevant observations are thus: -

> "*18. In Renusagar Power Co. Ltd. v. General Electric Co. [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 –*
> > ***
> > *(b) if the Court dealing with the case is satisfied that –*
> > ***
> > *(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).*
>
> ***Fundamental Policy of Indian Law***

27. Coming to each of the heads contained in Saw Pipes [(2003) 5 SCC 705 : AIR 2003 SC 2629] judgment, we will first deal with the head "fundamental policy of Indian law". It has already been seen from Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] 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.

Justice

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".

Morality

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."*

38. In Gherulal Parakh v. Mahadeodas Maiya [1959 Supp (2) SCR 406 : AIR 1959 SC 781] , this Court explained the concept of "morality" thus : (SCR pp. 445-46 : AIR pp. 797-98)

> *"Re. Point 3 — Immorality : The argument under this head is rather broadly stated by the learned counsel for the appellant. The learned counsel attempts to draw an analogy from the Hindu law relating to the doctrine of pious obligation of sons to discharge their father's debts and contends that what the Hindu law considers to be immoral in that context may appropriately be applied to a case under Section 23 of the Contract Act. Neither any authority is cited nor any legal basis is suggested for importing the doctrine of Hindu law into the domain of contracts. Section 23 of the Contract Act is inspired by the common law of England and it would be more useful to refer to the English law than to the Hindu law texts dealing with a different matter. Anson in his Law of Contracts states at p. 222 thus:*
>
> > *'The only aspect of immorality with which courts of law have dealt is sexual immorality….'*
>
> *Halsbury in his Laws of England, 3rd Edn., Vol. 8, makes a similar statement, at p. 138:*
>
> > *'A contract which is made upon an immoral consideration or for an immoral purpose is unenforceable, and there is no distinction in this respect between immoral and illegal contracts. The immorality here alluded to is sexual immorality.'*
>
> *In the Law of Contract by Cheshire and Fifoot, 3rd Edn., it is stated at p. 279:*
>
> > *'Although Lord Mansfield laid it down that a contract contra bonos mores is illegal, the law in this connection gives no extended meaning to morality, but concerns itself only with what is sexually reprehensible.'*

In the book on the Indian Contract Act by Pollock and Mulla it is stated at p. 157:

> *'The epithet "immoral" points, in legal usage, to conduct or purposes which the State, though disapproving them, is unable, or not advised, to visit with direct punishment.'*

The learned authors confined its operation to acts which are considered to be immoral according to the standards of immorality approved by courts. The case law both in England and India confines the operation of the doctrine to sexual immorality. To cite only some instances : settlements in consideration of concubinage, contracts of sale or hire of things to be used in a brothel or by a prostitute for purposes incidental to her profession, agreements to pay money for future illicit cohabitation, promises in regard to marriage for consideration, or contracts facilitating divorce are all held to be void on the ground that the object is immoral.

The word 'immoral' is a very comprehensive word. Ordinarily it takes in every aspect of personal conduct deviating from the standard norms of life. It may also be said that what is repugnant to good conscience is immoral. Its varying content depends upon time, place and the stage of civilisation of a particular society. In short, no universal standard can be laid down and any law based on such fluid concept defeats its own purpose. The provisions of Section 23 of the Contract Act indicate the legislative intention to give it a restricted meaning. Its juxtaposition with an equally illusive concept, public policy, indicates that it is used in a restricted sense; otherwise there would be overlapping of the two concepts. In its wide sense what is immoral may be against public policy, for public policy covers political, social and economic ground of objection. Decided cases and authoritative textbook writers, therefore, confined it, with every

> *justification, only to sexual immorality. The other limitation imposed on the word by the statute, namely, 'the court regards it as immoral', brings out the idea that it is also a branch of the common law like the doctrine of public policy, and, therefore, should be confined to the principles recognised and settled by courts. Precedents confine the said concept only to sexual immorality and no case has been brought to our notice where it has been applied to any head other than sexual immorality. In the circumstances, we cannot evolve a new head so as to bring in wagers within its fold."*
>
> *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)

124. What is apparent from the aforesaid is that the phrase "public policy of India" must be construed narrowly and an undue expansion of the grounds of "fundamental policy of Indian law" and "most basic notions of justice or morality" respectively, cannot be countenanced.

125. The learned Senior Counsel appearing for the petitioner is right insofar as two things are concerned. *First,* that the ground of patent illegality which was earlier subsumed within the expression public policy of India, has now been removed and has instead, been granted as a separate ground through which awards rendered in domestic

arbitrations can be assailed. The same is evident from a bare reading of Section 34(2A) of the Act, 1996. Therefore, the ground of "patent illegality" would not be available for setting aside awards rendered in international commercial arbitrations. *Secondly*, that the ground relating to the adoption of a "judicial approach" or the lack thereof, was understood to be a part of the phrase "fundamental policy of Indian law" prior to the 2015 Amendment Act only as a result of the decision in ***Western Geco*** *(supra).* It was the decision in ***Western Geco*** *(supra)* that added three other distinct juristic principles which was to be understood as a part and parcel of fundamental policy of Indian law, which included the aspect of judicial approach. This expansion has now been done away with since it was considered as amounting to an intervention in the merits of the matter.

126. Therefore, we agree with the learned Senior Counsel that the non-adoption of a "judicial approach" cannot form a valid ground for the purpose of justifying an interference to the present interim award under Section 34 of the Act, 1996. However, what must be noted is that, the decision of the Single Judge was rendered before this Court had the opportunity to clarify the scope of the 2015 Amendment Act in relation to Section 34 of the Act, 1996, in ***Ssangyong*** *(supra).*

127. In ***Ssangyong*** *(supra),* on the aspect of "most basic notions of justice", this Court observed that – "*what is referred to is, substantively and procedurally, some fundamental principle of justice which has been breached, and which shocks the conscience of the Court.*". We are not denying that this ground can only be attracted under very exceptional

circumstances where the conscience of the court is shocked by the infraction of the most fundamental notions or principles of justice.

128. Having said so and having agreed with the contention that "judicial approach" is not available as a ground for interference under Section 34, we are nevertheless of the view that the award was liable to be partially set-aside.

129. A constitutional Bench decision of this Court in ***Gayatri Balasamy v. M/s ISG Novasoft Technologies Limited*** reported in **(2025) 7 SCC 1**, had the occasion to decide the question whether the power to set-aside an award under Section 34 of the Act, 1996 also included the power to partially set-aside the award. It was elaborated that the power conferred on the courts under the *proviso* to Section 34(2)(a)(iv) is only clarificatory in nature. In other words, that the power of severance is inherent in the court's jurisdiction when setting aside an award. In this context, the doctrine of *omne majus continent in se minue* i.e., "the greater power includes the lesser" was used to state that the power to set aside would encompass the power to also set aside the award in part, rather than in its entirety. However, it was cautioned that such an exercise of partially setting-aside must be undertaken only when the valid and invalid portions are not interdependent or intertwined and are capable of being severed. To put it simply, there must be no correlation between the valid and invalid parts. The relevant observations of the majority opinion are reproduced hereinbelow: -

> *"**II. Severability of awards***

xxx *xxx* *xxx*

33. We hold that the power conferred under the proviso to Section 34(2)(a)(iv) is clarificatory in nature. The authority to sever the "invalid" portion of an arbitral award from the "valid" portion, while remaining within the narrow confines of Section 34, is inherent in the Court's jurisdiction when setting aside an award.

34. To this extent, the doctrine of omne majus continet in se minus – the greater power includes the lesser – applies squarely. The authority to set aside an arbitral award necessarily encompasses the power to set it aside in part, rather than in its entirety. This interpretation is practical and pragmatic. It would be incongruous to hold that power to set aside would only mean power to set aside the award in its entirety and not in part. A contrary interpretation would not only be inconsistent with the statutory framework but may also result in valid determinations being unnecessarily nullified.

35. However, we must add a caveat that not all awards can be severed or segregated into separate silos. Partial setting aside may not be feasible when the "valid" and "invalid" portions are legally and practically inseparable. In simpler words, the "valid" and "invalid" portions must not be interdependent or intrinsically intertwined. If they are, the award cannot be set aside in part.

36. [...] Thus, the power of partial setting aside should be exercised only when the valid and invalid parts of the award can be clearly segregated – particularly in relation to liability and quantum and without any corelation between valid and invalid parts."

(Emphasis supplied)

130. The dissenting opinion in ***Gayatri Balasamy*** *(supra)* authored by one of us, K.V. Viswanathan, J., had also conceptually clarified the scope of the doctrine of severance and agreed that courts do possess the power to sever and partially set-aside an award, subject to the

conditions compatible with severability being fulfilled. The dissenting opinion elaborated as follows: -

(i) ***First,*** that the word "sever" would mean to separate or disjoin.

(ii) ***Secondly,*** it was agreed that severance as a concept was recognised under the proviso to Section 34(2)(a)(iv) which allows the decisions on matters submitted to arbitration to be separated from those not submitted.

(iii) ***Thirdly,*** having said so, another question was put forth i.e., when several claims, all of which fall within the scope of submission to arbitration, are decided, and if the award on a few claims falls foul of Section 34, then, can the decision on those claims which fall foul of Section 34 be set aside while keeping the decision on the other claims intact? While answering in the affirmative, it was stated that such standalone claims can be set-aside, provided that they are capable of being severed.

The relevant observations are reproduced hereinbelow: -

> "***Severability under Section 34***
> *239. If there was one aspect on which there was a chorus among the rival factions, it was on the aspect of Section 34 Court having power to sever that part of the award which fell foul of Section 34 from the good part.*
>
> *240. According to P. Ramanatha Aiyar's Advanced Law Lexicon (3rd Edn.):*
>
> > *"Sever — 'to separate; to insist upon a plea distinct from that of other co-defendants; to disjoin and severable — 'capable of being separated',"*

241. A bare perusal of Section 34 indicates that the power to sever an award is recognised in Section 34(2)(a)(iv) which reads as under:

> *"34. (2)(a)(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;"*

242. A reading of the above sub-section reveals that where the arbitral award deals with disputes not contemplated by or not falling within the terms of the submission to arbitration or it contains decision on matters beyond the scope of the submission to arbitration, the award can be set aside.

243. However, the proviso states 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.

244. So, severance as a concept is recognised intrinsically in Section 34 itself on the aspect mentioned hereinabove. But the question is when there are several claims adjudicated and if awards on a few claims fall foul of Section 34 and if each of the claims which fall foul of Section 34 are capable of separation could the awards on those claims be set aside? This issue was not discussed in Hakeem [NHAI v. M. Hakeem, (2021) 9 SCC 1 : (2021) 4 SCC (Civ) 437]. However, the consistent view of this Court has been that such standalone claims falling foul of Section 34 can be set aside as long as they are capable of being severed without affecting the other parts of the award. In other words, if the claims falling foul of Section 34 are not inseparably intertwined with the good portion of the award, the award can be severed.

xxx xxx xxx

250. A learned Single Judge of the Delhi High Court addressing the issue of severability in NHAI v. Trichy Thanjavur Expressway Ltd. [NHAI v. Trichy Thanjavur Expressway Ltd., 2023 SCC OnLine Del 5183] , set out the principle thus: (SCC OnLine Del paras 38-42 & 87)

[…]

"L. The power to partially sever an offending part of the award would ultimately depend on whether the said decision is independent and distinct and whether an annulment of that part would not disturb or impact any other finding or declaration that may have been returned by the AT. The question of severability would have to be decided bearing in mind whether the claims are interconnected or so intertwined that one cannot be segregated from the other. This for the obvious reason that if the part which is sought to be set aside is not found to stand independently, it would be legally impermissible to partially set aside the award. A partial setting aside should not lead to a component of the award being rendered vulnerable or unsustainable. It is only when the award relates to a claim which is found to stand on its own and its setting aside would not have a cascading impact that the Court could consider adopting the aforesaid mode.

M. The Court is thus of the firm opinion that the power to set aside an award in part would have to abide by the considerations aforenoted mindful of the imperatives of walking a line which would not dislodge or disturb another part of the award. However, as long as the part which is proposed to be annulled is independent and stands unattached to any other part of the award and it could be validly incised without affecting the other components of the award, the recourse to partial setting aside would be valid and justified."

> *251. The views expressed in the judgment, referred to hereinabove, are correct and the power to set aside will include the power to partially set aside and sever the portions of the award which fall foul of Section 34 subject to the riders engrafted hereinabove."*
>
> (Emphasis supplied)

131. Therefore, when undertaking the exercise of severing an award, it must be ascertained whether the illegality is such that it affects the award as a whole. If not, then that portion of the award which does not suffer from any infirmity could be upheld. While severing, the courts must be vigilant to ensure that the good or viable part(s) of the award is not rendered vulnerable or unsustainable as a direct consequence of the severing. Therefore, while employing the doctrine of severance, one must walk the tight rope of not dislodging the good part of the award.

132. In the present facts and circumstances, the arbitrator has effectively done two things - *first*, held that although his decision on the issue of limitation would be rendered by way of demurrer, yet the same would be final and binding and; *secondly*, that after a perusal of the facts as averred in the statement of claim along with the materials annexed thereto, the claims are within limitation. Insofar as the second aspect i.e., the finding on demurrer is concerned, we are not expressing any disagreement with the learned arbitrator. What the respondents were aggrieved with, was the decision on the first aspect i.e., that the decision on demurrer would have the consequence of altogether foreclosing the issue of limitation forever.

133. This observation as regards the finality of the decision rendered on demurrer is capable of being severed from the rest of the interim award such that the viable part is not made unsustainable or vulnerable. Therefore, the present interim award is capable of being partially set-aside, provided the grounds for interference under Section 34 are made out.

134. What has occurred in the present facts and circumstances of the matter is that the very understanding of the concept of demurrer, on part of the arbitrator, did not align with the well-established principles of law in India as elaborated by us in the preceding paragraphs of this judgment. The arbitrator's view on the concept of demurrer cannot in any manner be justified in law. At the stage of demurrer, it is only the statement of claim which is to be looked into to decide whether the matter must be thrown out at the threshold or not. The respondent is not required to put forth his version of the case at this stage and there rests no burden on him. Therefore, there arises no question of deciding an issue 'finally' on the basis of demurrer. The fact that it was the issue of limitation which was decided as such, causes all the more reason for alarm. The question of limitation cannot be decided in such a manner, especially if there exists some disputed questions of fact. In the present matter, the parties were at logger-heads as to whether time was extended for the fulfilment of conditions precedent or for the payment of refund i.e., there existed a serious disputed question of fact and therefore, the finding on demurrer was incapable of achieving finality without having looked at further evidence in that regard. If an approach such as the one adopted by the arbitrator is approved, a substantial miscarriage of

justice could occur because claims which may otherwise be barred by limitation would be decided hurriedly and foreclosed, with no recourse whatsoever to the respondent to assail it in an appropriate manner if the decision is adverse to him. Such a procedural fallacy, in our opinion, was fundamentally wrong and has shocked the conscience of this Court.

135. There is no gainsaying that the Arbitral Tribunal is neither required to conduct arbitration proceedings strictly like a civil court nor that the provisions of the CPC and Evidence Act respectively do not apply *stricto sensu* to arbitral proceedings. However, it cannot be denied that any procedure adopted in the arbitral proceedings must subscribe to and not be at variance with the underlying principles of justice.

136. We are not laying down a rule as to how evidence must be led or in what manner the arbitrator is supposed to weigh the evidence brought on record. This is clearly within the domain and wisdom of the arbitrator who is the master of the evidence. However, all that we are saying is that, the issue of the limitation being one of both fact and law, could not have been 'finally' decided on the basis of demurrer, at the risk of stale claims being entertained. At a stage when the respondent is required to adduce some evidence, if they choose not to, then the arbitral award cannot be assailed for being passed without any evidence or with little evidence and any decision which follows would be binding on both parties. However, this is not the situation that we are faced with.

137. In view of the above, the arbitrator's decision that the finding on the question of limitation by way demurrer would be 'final' and hence, the issue would be 'foreclosed', has offended the most basic notions of justice and must be set-aside. However, we must clarify that the remaining portion of award would remain intact.

E. CONCLUSION

138. For all the foregoing reasons, we have reached the conclusion that the interim award dated 27.08.2019 warranted interference under Section 34 of the Act, 1996 and it was rightly held that the preliminary issue of limitation decided on the basis of demurrer could be further examined by the Arbitral Tribunal on the basis of evidence and other materials on record, if tendered and if so warranted.

139. The Registry shall forward one copy each of this judgment to all the High Courts.

..... J.
(J.B. PARDIWALA)

..... J.
(K.V. VISWANATHAN)

New Delhi,
15th September, 2025.