Seok-Am Tech Company Also Known As Satco vs Tema India Limited on 6 June, 2025

Author: G.S. Kulkarni

Bench: G. S. Kulkarni

2025:BHC-OS:8409-DB

Vidya Amin

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

COMMERCIAL ARBITRATION APPEAL (L) NO. 18048 OF 2024
IN
COMMERCIAL ARBITRATION PETITION NO. 342 OF 2020

Seok-Am-Tech Co. Ltd. (SATCO)
a company registered under the laws of Korea
and having registered office at Jinyang Building,
3F, #552-1, Dogok-Dong, Gangnam-Gu,
Seoul, Korea

Versus

Tema India Private Ltd.
having its registered address at Hamilton House,
3rd floor, J.N. Heredia Marg,
Ballard Estate, Mumbai - 400 038.

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Mr. Firoz Bharucha a/w. Mr. Ziyad Madon, Mr. Mahek Kamdar, Mr.
Choksi, Mr. Prathamesh Jadhav, Ms. Deshna Gala i/b. Kanga & Co
appellant.

Mr. Darius Khambata, Senior Advocate a/w. Mr. Karl Shroff, Ms. Daviervala, Mr. Yazdi P. Jijina & Ms. Farzeen Harver i/b. Mull Craigie Blunt & Caroe for the respondent.

CORAM: G. S. KULKA
ADVAIT M. S
RESERVED ON : 8 January,
Pronounced on: 6 June, 2025

Judgment: (Per G.S. Kulkarni, J.)

1. The judgment has been divided into the following sections to facilitate analysis:-

SECTIONS	HEADING	PARA NOS.
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A. Prelude :

2. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short "ACA") is directed against the judgment and order dated 10 April, 2024 rendered by the learned Single Judge of this Court in Commercial Arbitration Petition No. 342 of 2020. By the impugned order, the respondent's petition filed under Section 34 of the ACA assailing the arbitral award dated 18 October, 2019 stands allowed, whereby the arbitral award stands quashed and set aside.

3. The only issue which was urged before the learned Single Judge in the Section

34 proceedings was on limitation, i.e.; whether the appellant's - Seok-Am-Tech Co. Ltd. (for short "Seok") claim in the arbitral proceedings against the respondent - Tema India Private Ltd. (for short, "Tema") in the facts and circumstances of the case, was barred by limitation. The scope of this appeal is thus confined to such determination, within the parameters of limited interference in arbitral awards, as Section 34 of the ACA would mandate.

B. Facts :

4. It is imperative to note the facts, relevant to the dispute between the parties i some detail. They are:- The appellant-Seok, the original claimant in the arbitral proceedings, is a company incorporated under the laws of Korea. It is engaged in the business of manufacturing and engineering services specialized in the field of forging equipment for power plants, chemical and petrochemical plants, refineries and environmental plants. On the other hand, Tema is an Indian company inter alia engaged in the business as a manufacturer, producer, fabricator, processor, distributor and a dealer of general engineering equipments like exchangers, towers, drums, pressure, storage vessels etc.

5. Tema was intending to purchase/procure a supply of "low alloy steel forgings" (for short "forgings") with particular specifications to be utilized in a project that Tema was to execute, namely, the "Essar Project". Tema hence approached Seok for such supply of forging. Seok addressed a quotation dated 1 September, 2008 to Tema for supply of forgings, for an amount of USD 2,048,510. In September, 2008

to finalize the contract on such supply, a representative of Tema visited Korea, when the parties discussed the details on the confirmation of the order qua the forgings to be supplied by Seok. One of the issues was also to confirm that Seok would ensure timely shipping and delivery of the forgings from Korea to India, as the forgings were required to be delivered under a time schedule for the Essar Project.

6. In pursuance thereto, Tema addressed an email dated 15 September 2008 to Seok, thereby forwarding a Purchase Order dated 15 September, 2008 (Reference No. 319/PO/FORG/3825) and requested Seok to confirm the same. On 17 September, 2008, Seok by its email addressed to Tema, attached an "order confirmation" and "proforma invoice" dated 15 September, 2008 (Reference No. TEMA-2-18/08-071) for sale of the "first lot" of the forgings at a total price of USD 733,000 on terms and conditions as set out therein. Seok also informed Tema that it had already commenced work on the forgings, as per instructions and specifications received from Tema during its visit to Korea.

7. Thereafter, Tema issued an amended Purchase Order dated 30 September, 2008 (Reference No. 319/PO/FORG/3825-AM-1) for supply and delivery of the first lot of the forgings, for total order value of USD 735,280 ("First Purchase Order"). This was confirmed by Seok by an order of confirmation and proforma invoice dated 27 September, 2008(Ref. No. TEMA-2-18/08-071-R1).

8. Subsequent thereto, Tema in its email dated 19 September, 2008 addressed to Seok, attached a Purchase Order dated 15 September, 2008 for the supply of "second lot" by Seok and requested Seok to confirm the same. Seok confirmed the second purchase order by its email dated 20 September, 2008 attaching therewith an order confirmation and proforma invoice dated 19 September, 2008 (Reference No. TEMA-3-9/08-072) for sale of the 'second lot' of the forgings, at a total price of USD 1,175,000 on terms and conditions set out therein.

9. Subsequent thereto, Tema by its email dated 26 September, 2008 addressed to Seok attached an amended Purchase Order dated 25 September 2008 (Reference No. 085/PO/FORG/3826-AM-1) requesting Seok to confirm the same. Seok confirmed the same by its email dated 27 September, 2008 attaching therewith an 'Order confirmation and proforma invoice' dated 26 September, 2008 (Reference No. TEMA-3-9/08-072-R1), for sale of the second lot of the forgings at a total price of USD 1,360,000 ("Second Purchase Order"). The Purchase Orders are collectively referred as "Purchase Orders".

10. It is Seok's case that there were several revised specifications issued by Tema, so as to custom-make the forgings to suit Tema's requirements. To such constant revisions, work was required to be undertaken by Seok as per the revised specifications.

11. It is not in dispute that under the First Purchase Order, forgings were dispatched from Korea on 25 November, 2008 and 9 December, 2008 respectively

and accordingly, two invoices dated 19 January 2009 and 20 January 2009 for USD 530,910 and USD 165,490 respectively, totalling to USD 696,400, had become due and payable by Tema to Seok.

12. Insofar as second Purchase Order is concerned, the dates of dispatch of the shipments were on 19 November, 2008, 2 December 2008, 9 December 2008 and 22 December 2008 respectively. In regard to these shipments, four invoices dated 22

January 2009, 20 January 2009, 20 January 2009 and 20 January 2009 for amounts USD 116,860, USD 502,690, USD 266,190 and USD 288,030 respectively were issued by Seok. These amounts having become due and payable by Tema to Seok as placed on record in the Statement of Claim filed by Seok in the arbitral proceedings indicating the date of dispatch and the date on which payment had become due from Tema to Seok, in respect of the shipments under the respective purchase orders needs to be noted in a tabular form, which is as follows:-

Purchase Order No.	319/PO/FORG/3825-AM-1	
Shipment No.	Date of Dispatch	Date when payment became due
Shipment No.1	November 25, 2008	May 24, 2009
Shipment No.2	December 09, 2008	June 8, 2009
Purchase Order No.	085/PO/FORG/3826-AM-1	
Shipment No.	Date of Dispatch	Date when payment became due
Shipment No.1	November 19, 2008	May 18, 2009
Shipment No.2	December 02, 2008	May 31, 2009
Shipment No.3	December 09, 2008	June 8, 2009
Shipment No.4	December 22, 2008	June 21, 2009

13. The table of payments made by Tema and the table of payments outstanding from Tema to Seok as set out in the Statement of Claim:-

PAYMENT MADE BY TEMA-RESPONDENT

Purchase Order No.	319/PO/FORG/3825-AM-1	
Shipment No.	Amount due	Paid on

Shipment No.1	USD 530,910	January 14, 2009
Purchase Order No.	085/PO/FORG/3826-AM-1	
Shipment No.	Amount due	Paid on
Shipment No.1	USD 116,860	January 14, 2009
Shipment No.2	USD 502,690	January 14, 2009

PAYMENT OUTSTANDING FROM TEMA-RESPONDENT

Purchase Order No.	319/PO/FORG/3825-AM-1
Shipment No.	Amounts outstanding
Shipment No.2	USD 165,490
Purchase Order No.	085/PO/FORG/3826-AM-1
Shipment No.	Amounts outstanding
Shipment No.3	USD 266,190
Shipment No.4	USD 288,030

Thus, under Shipment Nos. 2, 3 and 4, amounts USD 165,490, USD 266,190 and USD 288,030, totalling to USD 719,710 had remained outstanding.

14. It is Seok's case that it addressed several reminders to Tema for payment of the amounts under the invoices, and that on Tema's request, in good faith, with a view to

maintain good business relations, Seok also extended the time for making the payment from June, 2009 till 7 September, 2009, solely on the basis of the assurances of payments as made by Tema.

15. It is Seok's case in its pleading before the arbitral tribunal that on 12 June, 2009, a meeting was held at the office of Tema between Mr. K.W. Park of Seok and Mr. Mukesh Lad of Tema to discuss and arrive at an understanding with regard to the

interest to be charged and payable by Tema to Seok for the delay in payments of the outstanding amounts. It is stated that pursuant to the discussions held between these representatives of the parties, it was mutually agreed that Tema would pay interest at the rate of 6% p.a. for the delayed payments. Such agreement including the rate of interest as agreed between the parties was recorded by Seok in its email dated 26 June, 2009 addressed to Tema. Seok thereafter addressed several emails demanding payment of the outstanding amounts, which are emails dated 7 August, 2009, 8 August 2009 and 13 August 2009.

16. In one of the emails of Seok dated 8 August 2009 as addressed to Tema in relation to the outstanding invoices, Seok requested Tema to explain the reasons for not making payment of the interest amount at 6% p.a. Tema was also informed that in this situation, if the amounts were not received within one week, Seok would be constrained to approach State Bank of India to invoke the letters of credit for the outstanding invoices amount to USD 719,710. However, there was no response.

Seok accordingly submitted an interest claim at the rate of 6% p.a. to Tema's Standard Chartered Bank, which was brought to the notice of Tema by Seok's email dated 27 August 2009.

17. It is Seok's case that in and around November, 2009, Tema informed Seok that the Essar Project had failed, and in view thereof Tema would not be utilizing the forgings that were already shipped and delivered to Tema. It is Seok's case that Tema on false assurances as made to Seok of making payment towards the outstanding

invoices, attempted to wriggle out from its obligations to make payments to Seok on the ground that the 'Essar Project' had failed / stood terminated for which forgings were procured by Tema from Seok under the Purchase Orders in question.

18. Seok, on such backdrop, addressed an email to Tema dated 2 December 2009 recording that it was unfortunate that the Essar Project was suspended. Seok stated that it had shipped the forgings for which payments of USD 719,710 were outstanding. In requesting Tema to make payment of the outstanding amounts alongwith interest at the rate of 6% p.a., Seok stated that it had expended its own finances to procure raw materials for manufacturing the forgings, failing which Seok would not complete supply of products under "other purchase orders", raised by Tema on Seok. It was Seok's case that despite several requests and repeated reminders, Tema failed and neglected to make payments to Seok. Several reminder emails were addressed between the period from 2009 to 2013 by Seok to Tema on the outstanding payments.

19. In partial response to such repeated demands made by Seok on 5 February, 2010 and 12 February 2010, Tema made payments to Seok of amounts USD 19,801.55 and USD 18,232.70 respectively towards the interest charged at the rate of 6% p.a. on the total outstanding amounts of USD 719,710.

20. It was Seok's case that Tema had failed to clear the principal amounts due and payable under the said invoices. Confronted with such approach of Tema, Seok

through its Advocates issued a legal notice dated 5 September, 2012 calling upon Tema to clear the outstanding amounts along with interest thereon, amounting to USD 760,382 be paid to Seok within a period of 7 days from the date of receipt of the notice. It is Seok's case that despite receipt of the said notice, Tema failed to make the payment.

21. Significantly, a meeting was held between the representatives of the parties on 04 February 2013 at Mumbai for an action plan to be formulated on the outstanding amounts payable by Tema to Seok. On such backdrop, Tema addressed an email dated 18 February, 2013 to Seok admitting that it had purchased the forgings from Seok for a total value of USD 1,870,170, out of which Tema had made payments of USD 1,150,460 to Seok and balance amount of USD 719,710 had remained outstanding qua which an action plan to resolve the issue of non-payment of the balance amount be worked out. This communication on which much was said by the

parties before the arbitral tribunal is required to be noted, which reads thus:

> "From : anil bhave (mail to :anil.puchase@temaindia.com)
> Sent: Monday, February 18, 2013 10:32 p.m.
> To : KW PARK
> cc:dhaval.kothari@hotmail.com
>
> Subject : Agreement during meeting at our office.
>
> Dear Mr. K.W. Park / Mr. I.J.Park, This has reference to our personal discussion Ballard estate office on 4/2/2013 for payment of 719,710 USD when the following action plan was formulated as a result of our discussion towards addressing this
>
> As you are aware what transpired after the forgings were imported from Satco and reason why the forgings lie unused in our factory. The entire value of forgings imported for Essar Order from yourselves remains unused as Essar project is indefinitely on hold as the project is not laking off. The total value of forging

imported from you is USD 1,870,170, of which Tema has already paid to Satco USD 1,150,460 while the remainder of unpaid lot of forgings worth amounts to USD 719,710.

The forgings and their physical status has been verified by both of you, during your visit to our Achhad factory. Please refer to the discussed and mutually agreed proposal which is as follows:

- All the forgings will remain in Tema's factory to avoid repacking and shipping cost rather than sending the forgings back to Satco, Korea.

- Satco will try their best to sell all the forgings from India to Indian customers or other customers globally. Satco, being forging master is in a better position to carry o this exercise. Salto would be in a better position to do this and fetch the best price a per prevailing market prices.

- If Satco's customer is from India then Tema shall arrange to deliver the forgings to the party, in packed or unpacked condition and bear the local transportation cost.

- If Salco's customer is out of India then Tema shall arrange for packing and shipment but the cost shall be borne by Satco. Also in this case, Satco may be required to establish an Indian Sales Office.

- Whatever Initial Sales takes place, Sale value will be deducted from the outstanding amount of USD 719,710. This process will continue till the entire stock of forgings

Imported from Satco is sold.

- Sometimes some rough-machining will be required to be done on OD/ID/THK to match the sizes required by customers. In such cases Tema shall arrange for machining at Tema's or outside factory, cost of this to be settled subject to mutual understanding between Tema and Satco.

You are now requested to confirm your acceptance of the above proposal and withdraw your legal notice issued to us.

Please note we want to continue our good business relationship with Satco and our good Intent is our recently placed order no 12-242/0239 in Dec 2012 worth USD 122,000 with Satco.

We hope you will take the things in a positive spirit and look forward towards strengthening our long business relationship.

May we suggest as Mr. l.J. Park of Satco is currently in Mumbai, We could meet in person for your written acceptance of the above agreement.

Many regards
ANIL BHAVE
Head-Procurement
TEMA India Ltd.

022-66900100 Extn-246"

22. In pursuance thereto, on 14 June, 2013, a Memorandum of Understanding (MOU) was entered between the parties. The relevant terms and conditions of MOU are required to be noted, which reads thus:

> "A. TEMA had imported forgings from SATCO totalling to USD 18,70,170.
> B. TEMA has paid SATCO a sum of USD 11,50,460 WHICL (sic: while) A SUM of USD 7,19,710 remains to be paid.
> C. The said forgings were to be used by TEMA for Essar project which did not take off. TEMA therefore does not have any requirement for the said forgings.
> D. The parties have therefore decided to sell off the forgings on the terms a

conditions contained hereinbelow.

9. Whatever initial sales takes place, sale value will be deducted from the outstanding amount of USD 719,710. This process will continue till the entire stock of forgings imported from SATCO is sold. After the entire amount due to SATCO is adjusted, the amounts earned on the sale of balance forgings will go to TEMA."

23. However, despite the MOU and the best efforts of Seok, the forgings could not be sold which were lying with Tema.

24. It is significant that on such backdrop, the payments nonetheless remaining outstandings to Seok, Tema made part payment to Seok of an amount USD 77,610 in or around June, 2013 out of the total outstanding amount of USD 719,710. According to Seok, thereafter again an amount of USD 10,000 was remitted towards another purchase order. Subsequently, such purchase order was mutually cancelled by the parties and the amount was mutually adjusted in the outstanding payment of

USD 719,710 after giving credit of USD 77,610, hence, the total outstanding amount was reduced from USD 719,710 to USD 632,100 was Seok's case. Before the arbitral tribunal, Seok contended that the adjustment of USD 10,000 was also reflected and confirmed in correspondence exchanged between the parties in February, 2014 and December, 2014.

25. An email dated 24 December, 2014 was addressed by Tema to Seok, in which Tema attached a letter dated 23 December 2014 addressed by Tema to Seok, wherein

Tema requested Seok to provide a confirmation of the outstanding balance as on 31 March, 2013 directly to the auditors of Tema. Pursuant to such request, by an email dated 30 December, 2014 Seok forwarded a statement of account containing the details of the outstanding amounts payable by Tema to Seok as on March, 2013, being an amount USD 632,100. It was hence Seok's case before the arbitral tribunal that Tema was liable to pay Seok an amount of USD 877,871.30, which included the principal amount of USD 632,100 and USD 245,771.30 towards interest at the rate of 6% p.a. for the period commencing from 4 July, 2011 till 31 October, 2017.

26. Seok contended that due to such callous conduct of Tema in not paying the said amounts, a notice dated 24 April 2015 was addressed by Seok's advocates to Tema calling upon Tema to clear the outstanding dues payable as per the invoices raised by Seok under the said Purchase Orders, failing which proceedings would be initiated by Seok for winding up of Tema invoking the provisions of Sections 433 and 434 of the Companies Act, 1956. Such statutory notice was responded by

Tema's advocates by letter dated 9 June, 2015 not disputing the transaction however, Tema denied the liability to make the outstanding payments to Seok on the ground that Seok was purportedly under the obligation to sell the balance goods lying with Tema in order to recover the outstanding dues that were payable by Tema to Seok.

27. On such backdrop, as no payments were forthcoming, Seok approached this Court by filing Company Petition No. 1070 of 2015 on August 13, 2015. Such petition was disposed of by the Court by an order dated 26 September, 2017

referring the disputes between the parties to be adjudicated by the learned sole arbitrator. It is on such conspectus, the learned arbitrator entered reference. A statement of claim was filed by Seok inter alia praying for the following reliefs:

> "(a) Award and direct that the Respondent, i.e. TEMA India Limited, be ordered t pay to the Claimant a sum of USD 877,871.30 (United States Dollars Eight Hundred Seventy Seven Thousand and Eighty Hundred Seventy One and Thirty Cent only) (being the principal amount of USD 632,100 (United States Dollars Six Hundred Thirty Two Thousand and One Hundred only) along with a sum of USD 245,771.30 (United States Dollars Two Hundred Forty Five Thousand and Seven Hundred Seventy one and Thirty Cent only)] towards interest charged at the rate of 6% pe annum for a period commencing from July 4, 2011 till October 31, 2017;"

28. As noted hereinabove, Seok's claim was primarily opposed on the ground of limitation by Tema.

29. A cause of action for the plaintiff to file a suit, in asserting rights to claim relief in the suit as the law would permit, consists of bundle of facts. The factum of the suit being barred by limitation ordinarily would be a mixed question of fact and law. Seok accordingly asserted its right to institute its claim against Tema. In the

context of the limitation, the bare averments as made in the statement of claim was the principal consideration before the arbitral tribunal. In such context, imperative to note the relevant paragraphs as made in the statement of claim and more particularly the averments on limitation as made in paragraph 11 thereof which would be required to be read in the context of the following paragraphs as cumulatively undertaken by the arbitral tribunal, which read thus:-

"3.20 As the Respondent failed to clear the entire outstanding amount, the Advoca for the Claimant, vide a notice dated September 5, 2012, called upon the Responde to clear the aforesaid outstanding amount alongwith interest thereon, totally amounting to USD 760,382 (United States Dollars Seven Hundred Sixty Thousand Three Hundred Eighty Two only) due to the Claimant, within a period of 7 days from the date of receipt thereof. However, despite receipt of the aforesaid notic September 5, 2012. the Respondent failed and neglected to make payment of the aforesaid outstanding amount to the Claimant. Hereto annexed and marked as Exhibit 'Q' is a copy of the aforesaid notice dated September 5, 2012 addressed b Advocates for the Claimant to the Respondent.

3.21 However, instead of clearing the outstanding dues, the Claimant received a l dated October 4, 2012 addressed by the Respondent in response to the aforesaid letter dated September 5, 2012, requesting the Claimant to await a detailed reply also requested the Claimant not to take any precipitating action against them. Th Claimant noted that after all the assurances and promises given by the Respondent from time to time to clear the payments, neither did the Claimant receive any response to the aforesaid letter regarding the payments nor did the Respondent ma any payments towards the outstanding amount due and payable by them to the Claimant. Hereto annexed and marked Exhibit 'R' is a copy of the aforesaid letter dated October 4. 2012 addressed by the Respondent to the Claimant, as and when produced.

3.22 The Respondent addressed an email dated February 18, 2013 to the Claimant admitting that it had purchased the Forgings from the Claimant for a total value USD 1,870,170 (United States Dollars One Million Eight Hundred and Seventy Thousand One Hundred and Seventy only), out of which the Respondent had made payments of USD 1.150.460 (United States Dollars One Million One Hundred and Fifty Thousand and Four Hundred Sixty only) to the Claimant, while the balance amount of USD 719,710 (United States Dollars Seven Hundred Nineteen Thousand Seven Hundred and Ten only) remained outstanding and proposed therein an action plan to resolve the issue of non- payment of the balance amount. Hereto annexed a marked as Exhibit 'S' is a copy of the said email dated February 18, 2013 address the Respondent to the Claimant.

3.23 Thereafter, as suggested by the Respondent. the Claimant in good faith on June 14, 2013, executed a Memorandum of Understanding with the Respondent. which inter alia provided that the Claimant would open an office in India and try its best to sell the balance Forgings lying unsold with the Respondent and thereby recover the outstanding payments amounting to USD 719,710 (United States Dollars Seven Hundred Nineteen Thousand Seven Hundred and Ten only) due from the Respondent ("MOU"). On a plain perusal of the MOU. it is ex facie apparent that the

Claimant was supposed to make its best efforts to sell the Forgings in order to recover the money that is due and payable by the Respondent. The only reason the Claimant entered into the MOU with the Respondent was to assist and help the Respondent in selling the Forgings. Despite its best efforts the Claimant could not sell the Forgings. The MOU does not absolve the Respondents of its liability to make payment of the outstanding amounts of USD 719,710 (United States Dollars Seven Hundred Nineteen Thousand Seven Hundred and Ten only) to the Claimant and it was only an attempt made to resolve the issues and an attempt to reduce the outstanding payments admittedly due to the Claimant. In other words, the Respondent cannot wriggle out of its obligation to make the payment to the Claimant by relying on the MOU. Hereto annexed and marked as Exhibit 'T' is a copy of the MOU dated June 14, 2013 entered into between the Claimant and the Respondent.

3.24 As agreed in the MOU, the Claimant opened an associate office in India with the sole intent to attempt selling the Forgings that were lying in the factory of the Respondent. However, despite the Claimant's best efforts. the Claimant was unable to sell the Forgings lying with the Respondent. as the same were custom-made for the Respondent to be utilized for the Essar Project. The Claimant communicated the same to the Respondent and requested them to make payment of the outstanding amounts under the invoices.

3.25 Thereafter, the Respondent made a part-payment of an amount of USD 77,610 (United States Dollars Seventy Seven Thousand Six Hundred and Ten only) in and around June 2013, out of the total outstanding amount of USD 719.710 (United States Dollars Seven Hundred Nineteen Thousand Seven Hundred and Ten only). The Claimant craves leave to refer to and rely upon bank statements proving receipt of the aforesaid amount of USD 77,610, as and when produced.

3.26 After making the payment of USD 77,610 (United States Dollars Seventy Seven Thousand Six Hundred and Ten only) to the Claimant. the Respondent remitted an amount of USD 10,000 (United States Dollars Ten Thousand only) towards another purchase order. Subsequently, that purchase order was mutually cancelled by the parties. Since an amount of USD 642,100 (United States Dollars Six Hundred and Fory Two Thousand One Hundred only) was due and payable by the Respondent to the Claimant (after giving credit of LSD 77,610), the Claimant adjusted this amount of USD 10.000 (United States Dollars Ten Thousand only) towards its outstanding dues. Hence, the total outstanding amount thereafter reduced to USD 632,100 (United States Dollars Six Hundred and Thirty Two Thousand and One Hundred only). The Claimant craves leave to refer to and rely upon bank statements proving receipt of the aforesaid amount of USD 77.610.25 and when produced.

3.27 The aforesaid adjustment of USD 10.000 (United States Dollars Ten Thousand

only) is also reflected and confirmed in correspondence exchanged between the parties in February, 2014 and December, 2014. Vide an email dated December 24. 2014 addressed by the Respondent to the Claimant, the Respondent attached a letter dated December 23, 2014 addressed by the Respondent to the Claimant, wherein the Respondent requested the Claimant to issue a confirmation of the outstanding balance as at March 31, 2013 directly to the auditors of the Respondent. Pursuant to this request. vide an email dated December 30. 2014. the Claimant has issued a statement with details of the outstanding amount as on March 31, 2013 of USD 632,100 (United States Dollars Six Hundred and Thirty Two Thousand and One Hundred only) due and payable from the Respondent to the Claimant to the Respondent's auditors, which the Respondent has not disputed till date. Hereto annexed and marked as Exhibit 'U' is a copy of the said email dated December 24, 2014 addressed by the Respondent to the Claimant, attaching the letter dated December 23, 2014 alongwith the statement of outstanding amounts due from the Respondent to the Claimant. Hereto annexed and marked as Exhibit 'V' is a copy of the said email dated December 30. 2014 addressed by the Claimant to the Respondent.

.....

3.29 As the Respondent's callous conduct continued. vide a letter dated April 24, 2015. the Advocates for the Claimant, inter alia, called upon the Respondent to clear the outstanding dues and payments as per the invoices raised by the Claimant under the Purchase Orders ("Statutory Notice"). The Advocates for the Claimant also informed the Respondent that its failure and breach of making payments of the outstanding amounts to the Claimant ought to be remedied within a period of 21 (twenty one) days, failing which the Claimant would be constrained to initiate appropriate proceedings for winding-up of the Respondent under the provisions of Sections 433 and 434 of the Companies Act. 1956. The Advocates for the Respondent responded to the Statutory Notice vide letter dated June 9, 2015 admitting that it had purchased goods worth USD 1,870,170 (United States Dollars Eighteen Hundred and Seventy Thousand One Hundred and Seventy only). However, the Respondent for the very first time and as an afterthought while admitting it had purchased the goods, denied it had any liability of making the outstanding payments to the Claimant and alleged that the Claimant was purportedly under the obligation to sell the balance goods lying with the Respondent in order to recover the outstanding dues that were payable by the Respondent to the Claimant. In view thereof, the Advocates for the Claimant addressed a letter dated July 1. 2015 (wrongly typed as July 15, 2015) to the Advocates for the Respondent and denied all the contentions and allegations raised in the aforesaid letter dated June 9, 2015 and once again called upon the Respondent to make the outstanding payments to the Claimant at the earliest. The Advocates for the Respondent once again, vide a letter dated July 13, 2015 addressed to the Advocates for the Claimant, admitted having purchased goods worth USD 1,870,170 (United States Dollars Eighteen Hundred and Seventy Thousand One Hundred and Seventy only) and also admitted that an amount of USD 632,100 (United States Dollars Six Hundred Thirty Two Thousand and One Hundred only) remained due and pending to be paid to the Claimant, however. the Respondent denied any liability on its part to make the said payment to the Claimant. Hereto annexed and marked as Exhibit 'W' is a copy of the Statutory Notice addressed by the Advocates for the Claimant to the Respondent, Exhibit 'X' is a copy of the aforesaid letter dated June 9. 2015 addressed by the Advocates for the

Respondent to the Claimant, Exhibit 'Y' is a copy of the aforesaid letter dated July 1. 2015 addressed by the Advocates for the Claimant to the Advocates for the Respondent and Exhibit 'Z' is a copy of the aforesaid letter dated July 13. 2015 addressed by the Advocates for the Respondent to the Advocates for the Claimant.

3.30 As no payment was forthcoming from the Respondent, the Claimant initiated appropriate winding up proceedings against the Respondent under the provisions of the Companies Act. 1956. Accordingly, on August 13. 2015. the Claimant filed Company Petition No. 1070 of 2015 before the Hon'ble Bombay High Court. The aforesaid Company Petition was disposed of by the Hon'ble High Court of Bombay vide an order dated September 26, 2017. referring the present disputes to the Learned Sole Arbitrator. The Claimant craves leave to refer to and rely upon the pleadings in Company Petition No. 1070 of 2015. as and when produced. Hereto annexed and marked as Exhibit 'AA' is a copy of the aforesaid order dated September 26, 2017 passed by the Hon'ble High Court of Bombay in the aforesaid Company Petition.
.....
5. The Claimant submits that from the date of receipt of the said Forgings under the Purchase Orders till date, the Respondent has never disputed the quantity and/or quality of the Forgings sold. supplied and delivered to them and has in fact, the Respondent accepted the goods without any protest or demur whatsoever. Therefore, it is evident that the Respondent was satisfied with the quality of the Forgings sold and delivered by the Claimant and in view thereof, cannot dispute the same.

6. The Claimant submits that the reliance of the Respondent on the MOU in order to avoid making payment of the outstanding amounts is bad in law, mala fide and unlawful. The Claimant submits that the MOU does not expressly override or terminate the Purchase Orders and the MOU does not, in any manner. absolve the Respondent of its obligations to make the payment for the Forgings in accordance with the Purchase Orders, which are due and payable to the Claimant. There is no waiver express or implied given in the MOU by the Claimant to the Respondent in respect of the outstanding amounts of USD 719.710 (United States Dollars Seven Hundred Nineteen Thousand Seven Hundred and Ten only) due and payable by the Respondent to the Claimant. Despite its best efforts, the Claimant being unable to sell the Forgings, does not by itself absolve the Respondent of its payment obligations to the Claimant. This is even more so because of two reasons, i.e. firstly, the amount of USD 719,710 (United States Dollars Seven Hundred Nineteen Thousand Seven Hundred and Ten only) is an admitted amount due and payable by the Respondent to the Claimant and secondly, the Claimant entered into the MOU to make its best efforts to sell the Forgings only to accommodate and assist the Respondent. It is trite law that any agreement whereby a party shall make its best efforts to perform certain obligations, cannot be specifically enforced.

7. It is ludicrous for the Respondent to even suggest that on account of the parties entering into the MOU, their obligation to pay the admitted amount to the Claimant ceases to exist. It is submitted that the existence of the arbitration clause i the MOL itself indicates that the MOU is not final document and that the MOU does

not waive off the rights of the Claimant or prohibits the Claimant from in any manner recovering the outstanding amounts of USD 719.710 (United States Dollars

> Seven Hundred Nineteen Thousand Seven Hundred and Ten only) which is admittedly not paid till date by Respondent. In other words, the MOU does not discharge the Respondent from its liability of paying the outstanding amounts of USD 719,710 (United States Dollars Seven Hundred Nineteen Thousand Seven Hundred and Ten only) nor does the MOU in any manner prohibit or bar the Claimant from in any manner recovering the outstanding amounts of USD 719,710 (United States Dollars Seven Hundred Nineteen Thousand Seven Hundred and Ten only) along with interest thereon.
> ... ...
> 10. The Respondent has defaulted in making payment of the Amount despite repeated reminders and requests made by the Claimant towards the invoices raised supply of the Foreigns by the Claimant and despite several admissions made by the Respondent of the outstanding amounts due from the Respondent to the Claimant, including the letter dated December 23, 2014 addressed by the Respondent to the Claimant.
> 11. No part of the Claimant's claim is barred by the law of limitation as the def and failure of the Respondent to pay the debts of the Claimant is of continuous nature in view of the part-payments made by the Respondent to the Claimant in 201 and the admission of liability, as set out in the aforesaid letter dated December 2014 (annexed as Exhibit U hereto). to clear the balance outstanding payments to Claimant. Furthermore, the aforesaid Company Petition was filed in the Hon'ble High Court of Bombay on August 13, 2015, which was pursued by the Claimant diligently and with bonafide intentions. Since the outstanding amounts payable by the Respondent to the Claimant was undisputed, the Claimant had filed the aforesa Company Petition and was in a bonafide manner and diligently prosecuting the same Hence, the time taken in prosecuting the Company Petition i.e. from the winding u notice dated April 24, 2015 till the disposal of the aforesaid Company Petition o September 26. 2017, ought to be excluded by the Learned Sole Arbitrator, while computing the period of limitation for initiating the present arbitral proceeding Hence, the present claim is not barred by the law of limitation."
>
> (emphasis suppl

30. In response to such plea on limitation as asserted by Seok in paragraph 11 of the Statement of Claim, in its Statement of Defence, Tema made the following averments:

"36) With reference to paragraph 11 of the SoC, it is denied that no part of the Claimant's claim is barred by limitation. The Claimant's claim, apart from being untenable on merits, is entirely barred by limitation. It is denied that there ha any default or failure of a continuing nature by the Respondent. It is denied tha payments made in 2013 operate to extend the period of limitation in the Claimant' favour or that the Respondent has admitted its liability to make payment of the

amount claimed in its letter dated 23rd December, 2014. It is denied that the Company Petition filed in the Hon'ble High Court of Bombay was pursued by the Claimant diligently or at all. It is denied that the alleged outstanding amounts payable by the Respondent to the Claimant were undisputed and put the Claimant t the strict proof thereof. It is denied that the time taken in prosecuting the Co Petition i.e. from the winding up notice dated 24th April, 2015 till the disposa aforesaid Company Petition on 26th September, 2017, ought to be excluded by the Learned Sole Arbitrator, while computing the period of limitation for initiating present arbitral proceedings. It is denied that the present claim is not barred law of limitation. It is well settled law that filing a winding up petition does the Petitioner therein from instituting other recovery proceedings and in view o same the Claimant cannot now be allowed to plead exclusion of time taken by it i prosecuting the Winding up Petition and use the same as shelter to wriggle out o law of limitation."

31. In the arbitral proceedings, the learned sole arbitrator, by an order dated 6 April, 2018, framed the following issues:

"1) Whether the Respondent proves that the Claimant's claim is barred by the Law of Limitation, as alleged in paragraph 2(a) of the Statement of Defence (SoD)?
2) Whether the Claimant proves that it is entitled to the amounts as claimed in t Statement of Claim (SoC), and any interest thereon?
3) Whether the respondent proves that there has been a novation in view of the Memorandum of Understanding (MoU) dated 14 June, 2013, as alleged in paragraph 2(b) of the SoD, and if so proved, its liability to make payment to the Claimant extinguished?
4) Whether the claimant can make a claim in terms of US Dollars, in proceedings governed by Indian Law?

(emphasis sup

32. Seok led evidence of Mr. Kuk Won Park (CW-1), while Tema led evidence of three witnesses, Mr. Anil Bhave (RW-1), Mr. Akhil Sippy (RW-2) and Mr. Sudip Bhattacharya (RW-3).

33. As observed by the learned sole arbitrator, the primary issue in the arbitral proceedings was whether the claim of Seok (claimant) was barred by law of limitation

or not. The learned sole arbitrator considering the provisions of Sections 14, 18 and 19 of the Limitation Act and the documentary, oral evidence on record and the position in law, as relied on behalf of the parties, held that Seok/claimant was entitle to the amounts as prayed for in its statement of claim. The relevant observations on the issue as also the operative part of the award is required to be noted, which reads thus:

> "48) Having cogitated through the documents, material on record, and the argumen of the respective counsel for the parties, it would be clear and evident that th lies in a fairly narrow compass i.e. whether the claim of the Claimant is barred law of Limitation or not.
> 49) It was forcefully submitted by the Claimant that having regard to Sections 1 and 19 of the Limitation Act as well as on the documents on record and the judgm placed in support thereof, the claim is within time and the Claimant is entitled amounts as prayed for in the Claim.
>
> 50) The Respondent has contended that having regard to the part payment made on 5th February, 2010 and 12th February, 2010, time would be extended upto 12th February, 2013. Thereafter, there was no extension of time and Section 18 and 19 the Limitation Act in no way comes to the aid of the Claimant in its quest to re monies under these proceedings. There is no acknowledgement of liability or part payment by the Respondent after this date i.e. 12 February, 2013. Mr. Shroff rel upon Section 18 of the Limitation Act and placed particular emphasis on the word "before the expiration of the prescribed period".
>
> 51) Whilst the Respondent has contended that the prescribed period expired on 12

February, 2013 there is on record, admittedly, a meeting held on 4th February, 2
(i.e. before 12th February, 2013) between the parties in Mumbai to sort out the
between them with regard to the balance payment due to the Claimant from the
Respondent and the unused forgings already supply and delivered. By email dated
18th February, 2013 from the Respondent to the Claimant, it was recorded that a
meeting was held on 4th February, 2013 for payment of USD 719710 when an action
plan was formulated during the discussion. It was canvassed by the Respondent th
an email was not a "writing" within the meaning of Section 18 of the Limitation
Subsequently, the Respondent, after referring Section 5 of the Information
Technology Act, 2000 admitted that the email would be tantamount to a writing bu
the same is not "signed" as required under Section 18 of the Limitation Act. The
Arbitral Tribunal is unable to agree with the abvoe submission in as much as the
email emanated from the Respondent. The Respondent cannot rely upon the e-mail
dated 18th February, 2013 to say, on the one hand, it was only a mode of mitigat
and on the other hand, to say that it was not "signed" by the Respondent. The

Respondent cannot have it both ways. The email dated 18th February, 2013 would amount to an acknowledgement in writing. In the said email dated 18th February, 2013, the Respondent has recorded that the "unpaid lot of forgings worth amounts of USD 719,710". Further it is also recorded that, "....., sale value will be deducted from the outstanding amount of USD 719,710" (emphasis supplied by the Arbitral Tribunal). According to the Respondent, the email dated 18th February, 2013 was a recording of what transpired at the said meeting of 4th February, 2013 and that it was only a method by which the Respondent could mitigate the Claimant's loss. In the view of the Arbitral Tribunal, since the email dated 18th February, 2013 is a recordal of the meeting held on 4th February, 2013, the said email relates back to the meeting of 4th February, 2013 which is prior to the prescribed period of 12th February, 2013. The e-mail dated 18th February 2013 was sent within a period of 2 weeks of the meeting held on 4th February, 2013. It is not a case where there has been substantial/ enormous delay in recording what transpired earlier, so as to oust the claim of the Claimant. Further, it was the Respondent's email. It would have been an altogether another story, if the Claimant had sent such an email as that would then have to be confirmed by the Respondent. It was further to this email of 18th February, 2013 that the parties entered into the MoU 14th June, 2013. Therefore, in the view of the Arbitral Tribunal the email dated 18th February, 2013 addressed by the Respondent to the Claimant is clearly an acknowledgement of their liability recording the events of the meeting on 4th February, 2013 and acknowledging the specific amount to be paid to the Claimant, Further, having regard to Recital "B" of the MoU dated 14th June, 2013, reading as, "Tema has paid SATCO, a sum of USD 11,50,460 WHICL A SUM of USD 719, 710 remains to be paid", in the view of the Arbitral Tribunal the same, is clearly an acknowledgement of its liability in the part of the Respondent. The Respondent has unequivocally and categorically stated that an amount of USD 719,710 remained to be paid to the Claimant. This is separate and apart from the

contention of the Respondent that there has been a novation in view of the MoU dated 14th June, 2013, and that the liability to make payment to the Claimant stood extinguished. Therefore, the contention of the Respondent that there was no acknowledgement after 12th February, 2013, in the view of the Arbitral Tribunal is not correct and thus, fails.

57) The other issue that needs to be addressed is that whether the MoU dated 14th June, 2014 was a novation and that the liability of the Respondent to make payment for the balance unpaid forgings stood extinguished or that the Respondent was absolved of its liability to make any payment to the Claimant upon entering into the MoU dated 14th June, 2013.

58) It was contended by the Respondent that, the Respondent was not liable for the cost of the unpaid forgings in as much as it was agreed between the parties that the Claimant would recover its losses by sale of the forgings and carry on business with the Respondent. It was submitted by the Respondent that, there were other circumstances and in any event, a plausible case, which would go to show that the Respondent was absolved of its liability to make any further payment to the Claimant even though there was no clause which set out what would/ was to happen if the Claimant did not sell the forgings and that the MoU was completely silent in this regard.

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59) In the view of the Arbitral Tribunal, the MoU dated 14th June, 2013 was entere into by and between the parties after a clear understanding of its respective posi Both the parties had the benefit and wisdom of their respective Advocates in the drafting and finalization of the MoU. The Arbitral Tribunal is unable to agree wit submissions of the Respondent that its liability to make payment of the unused forgings, was extinguished in the light of the MoU. It would not be appropriate no correct on part of the Arbitral Tribunal to read something more in a document or contract than what is specifically stated in the document or contract. In the view Arbitral Tribunal, there is no necessity for "reading between the lines". The "oth circumstances" and/or "plausible case" could be looked into only if there was some ambiguity in the clauses/ document. The MoU could have specifically stated that th "mode of recovery" would completely absolve Respondent of making any payment to the Claimant whether or not the unused forgings were sold or not. In this regard, Arbitral Tribunal is in complete Agreement with the judgment of the Hon'ble Supreme Court reported in AIR 2019 SC 3327 in the case of Caretel Infotech Ltd. v/ HPCL and Ors. (paragraphs 39 to 42). Clearly the MoU dated 14th June, 2013 does not say what the Respondent would have the Arbitral Tribunal to believe i.e. that Respondent was absolved of its liability to make payment upon the parties entering into the MoU.

60) Thus, it is the finding of the Arbitral Tribunal that the MoU does not absolve Respondent from making payment of the unpaid forgings despite the sales of the sam not having taken place."

.....

"ORDER

1) The Claimant is entitled to receive from the Respondent and the Respondent is liable to pay to the Claimant, the sum of USD 632100 plus interest thereon at the of 6% per anum from 1st January, 2015 till payment and/or realization.

2) In the circumstances above, parties are to bear their own costs and accordingly costs are awarded.

3) The cost of the Arbitral Tribunal towards the dictation of the Award, stamp pap costs, stenographer charges, printing charges is adjusted from the advanced deposi by the parties and nothing is due and payable by the parties to the Arbitral Tribu and vice versa."

(emphasis suppli

34. Tema being aggrieved by the arbitral award, approached this Court (the learned Single Judge) in the proceeding of Section 34 of the ACA, which has been allowed by the learned Single Judge by the impugned order, subject matter of

challenge in the present appeal.

35. On a perusal of the impugned order, it is seen that the learned Single Judge has proceeded to record findings on the purport of the email dated 18 February, 2013 to hold that although such email was addressed on what transpired in the meeting held between the parties on 4 February, 2013, there were no minutes of the said meeting in writing and purely going by the fact that the last payment made by Tema

to Seok was on 12 February, 2010 under purchase orders dated 15 September, 2008 and 30 September, 2009, and as thereafter no payments being made for a period of three years from 12 February, 2010, the learned Single Judge held that the period of limitation necessarily would be three years from the last payment being made by Tema as according to the learned Single Judge, the limitation expired on 12 February, 2013. It was observed that there was no acknowledgment in writing by Tema before the expiration of the said period. Accordingly, the learned Single Judge held that Seok's claim was barred by limitation.

Submissions on behalf of the Appellant

36. On behalf of the appellant-Seok, Mr. Bharucha, learned Counsel has made the following submissions :-

(i) There was no dispute that an amount of USD 719,710 was due and payable by Tema to Seok. Tema had acknowledged the outstanding amounts and had agreed to make payment as set out in the e-mail dated 18 February

2013 (supra), also in this regard MOU dated 14 June 2013 was entered between the parties on Tema accepting the outstanding amounts under the purchase order.

ii) It is submitted that on such backdrop, the sole issue considered by the learned Single Judge was whether Seok's claim was barred by limitation, Tema asserting that it had made part payment under the purchase orders, on 12

February 2010, hence the period of limitation ended after three years from 12 February 2010, i.e., 12 February, 2013 by applying Article 18 of the limitation Act.

(iii) It is submitted that the findings and approach of the learned Single Judge is beyond the scope of the jurisdiction Section 34 confers on the Court as the tribunal categorically recorded a finding of fact that the e-mail/writing dated 18 February 2013 was an admission of the subsisting liability as observed in paragraph 51 of the award (supra). As also a further finding of fact was recorded that MOU dated 14 June 2013 did not constitute a novation of the e-mail/writing dated 18 February 2013. It is submitted that such findings as recorded by the arbitral tribunal are on appreciation of the oral and documentary evidence as clearly seen from the observations of the learned arbitrator as made in the arbitral award.

(iv) It is submitted that if such findings on the issue of limitation as recorded by the arbitral tribunal are mixed finding on fact and law, unless such findings

were patently contrary to the record or were surmises, the same could not have been interfered within the limited jurisdiction which was available with the learned Single Judge under Section 34 of the ACA Act.

(v) It is his submission that the Tema's case of the limitation for Seok to claim the amounts in question having expired on 12 February 2013 is untenable as held by the arbitral tribunal, as the e-mail/writing dated 18 February 2013 even otherwise constituted a promise [without admitting that

the debt was time barred] applying the provisions of Section 25(3) of the Indian Contract Act, 1872. In such context, it is submitted that learned Single Judge committed a patent illegality by not applying the law to the facts of the case.

(vi) It is next submitted that learned Single Judge could not have held that it was not Seok's case that e-mail/writing dated 18 February 2013 was not an acknowledgment of liability and it was Tribunal on its own finding. As Seok had unequivocally asserted in the statement of claim that by e-mail/letter dated 18 February 2013 Tema had admitted that "the balance amount of USD 719710 had remained outstanding and proposed therein an action plan to resolve the issue of non-payment of the balance amount" (supra). It is submitted that Tema never advanced such an argument since Tema set out this very argument in its written submissions filed before the Tribunal.

(vii) It is next submitted that the issue before the learned Single Judge was of interpretation of a contractual document which cannot be in a manner the Court would interpret a statute. For such reason, the reliance on behalf of Tema to the decision of the Supreme Court in Union of India Vs. Susaka Pvt. Ltd.,1 according to Seok was completely misplaced. This more particularly as in the facts of the present case, Seok had not advanced any factual arguments but had merely relied upon Section 25(3) of the Indian Contract Act, to

elucidate the position of law, given the factual findings of the Arbitral Tribunal.

(viii) It is next submitted that the learned Single Judge has not found any reason to set aside the findings of fact arrived at by the Arbitral Tribunal. It submitted that considering that a point of law can be argued at any stage of proceedings, waiver on a point of law can be inferred, only if a party does not advance the same at any stage of the litigation.

(ix) It is next submitted that Tema's reliance on the decision of Valliamma Champaka Pillai Vs. Sivathanu Pillai & Ors. 2 is misplaced as the respondent in such proceedings contended that the liability had stood extinguished by payment of the debt in its entirety. It is submitted that however, in the presen case, Tema categorically admitted in its statement of defense that the e-mail/letter dated 18 February 2013 recorded that settlement was arrived. It

1 (2018) 2 SCC 182

2 (1979) 4 SCC 429

is submitted that the Tema never attributed to assert that it has paid the entir amount under the purchase orders.

(x) It is submitted that arbitral award has appropriately taken into consideration the documentary and oral evidence to reach to a conclusion that there was a valid and subsisting liability of Tema to pay Seok and such claim of Seok was not barred by limitation considering the evidence on record. Hence,

the impugned order passed by the learned Single Judge be set aside and the appeal be allowed.

(xi) In support of the above submissions, reliance is placed on the decision in Mst. Rukhmabai Vs. Lala Laxminarayan & Ors. 3, Khatri Hotels Pvt. Ltd & Anr. Vs. Union of India & Anr. 4, Shakti Bhog Food Industries Ltd. Vs. Central Bank of India & Anr.5.

Submissions on behalf of the Respondent

37. On the other hand, Mr. Darius Khambata, Senior Advocate on behalf of Tema, in supporting the impugned judgment, at the outset, has submitted that the appellate jurisdiction under Section 37 of the ACA is extremely limited and involves only a supervisory jurisdiction to ensure that under Section 34, the Court has acted within the parameters of the jurisdiction vested under Section 34 of the ACA in interfering with the arbitral award, as held by the Supreme Court in the case of

3 AIR 1960 SC 335

4 (2011) 9 SCC 126

5 (2020) 17 SCC 260

Punjab State Civil Supplies Corporation Ltd. & Anr. vs. Sanman Rice Mills & Ors. 6. It is next submitted that the learned Single Judge in paragraphs 24 to 27 of the impugned order has considered the provisions of Section 18 of the Limitation Act, 1963 and has rightly held that " there has to be an acknowledgment of liability which must be in writing and it must be made by such writing before the expiry of

limitation" and that "dating back of an acknowledgment finds no place in this provision". It is next submitted that in paragraph 28, learned Single Judge has referred to the decision of the Supreme Court in Valliamma Champaka Pillai (supra) to hold that the email dated 18 February, 2013 is not an acknowledgment under Section 18 of the Limitation Act, as it only speaks of the past liability, which was a recording of what was discussed between the parties, thus, such finding is not amenable for assail.

38. It is next submitted that the learned Single Judge in paragraph 29 of the impugned order recorded an accurate finding to the effect that the impugned award noted Seok's case for extension of limitation only based on three events, namely, (i) an alleged part payment on 10 June 2013; (ii) correspondence in December 2014; and (iii) an adjustment payment of USD 10,000 on 9 th and 20th January, 2015 mentioned in Company Petition No. 1070 of 2015. Further that Seok's contention on Tema's email dated 18 February, 2013 was an acknowledgment of the liability, was not its case before the arbitral tribunal and as rightly observed by the learned Single

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Judge and that, the learned arbitrator has on his own placed reliance on the email dated 18 February, 2013 as an acknowledgment, which amounted to a patent illegality, in rendering the award. In such context, reference is made to paragraph 3.22 (supra) of the Statement of Claim. It is next submitted that even assuming that the finding of the learned Single Judge that the arbitrator has on his own placed

reliance on the email dated 18 February, 2013 is incorrect, it does not result in the impugned order being beyond the scope of Section 34.

39. It is next submitted that Seok's plea of a contract to pay a time-barred debt under Section 25 of the Contract Act was admittedly not pleaded or urged before the arbitral tribunal, hence, in view of the decision of the Supreme Court in Union of India Vs. Susaka Pvt. Ltd. (supra), such plea even of law, cannot be considered for the first time under Sections 34 or 37 of the ACA.

40. In support of the above submissions, on behalf of Tema reliance is placed on the decisions in Valliamma Champaka Pillai vs. Sivathanu Pillai & Ors. (supra) and Union of India Vs. Susaka Pvt. Ltd. (supra)

Analysis and Conclusion:-

41. As noted hereinabove, the only question which fell for consideration before the learned Single Judge was whether Seok's monetary claim as made in the arbitral proceedings, was within the prescribed limitation or it was time barred.

42. As seen from the findings as recorded by the arbitral tribunal in paragraphs 51 to 60 of the award (supra), such issue was examined on documentary and oral evidence by the arbitral tribunal. The Tribunal considering the provisions of Sections 14, 18 and 19 of the Limitation Act, as also, considering the events subsequent to 12 February, 2013 (when the limitation would expire as contended by Tema) Seok's claim was well within the prescribed period of limitation. The learned

Single Judge, as noted above, however, has purely proceeded on the strict applicability of Section 18 of the Limitation Act, to come to a different conclusion than what has been arrived at by the tribunal. It is such conundrum which falls for consideration in this appeal, the scope of which would be whether the reasons as recorded by the learned Single Judge are within the parameters of Section 34 of ACA.

43. At the outset, the admitted facts need to be noted: That an Agreement was entered between Seok and Tema inter alia in the form of purchase orders dated 25 September, 2008 and 30 September, 2009 for supply of forgings. The forgings were dispatched by Seok to Tema. There is no dispute on the delivery of the forging being received by Tema. It is also not in dispute that part payments in regard to the said supply were made on 14 January 2009 in regard to Shipment nos. 1 and 2 for amounts USD 530,910, USD 116,860 and USD 502,690 respectively. However, in regard to shipment no. 2, shipment no. 3 and shipment no. 4, the amounts USD 165,490, USD 266,190 and USD 288,030 had remained outstanding, totalling to

USD 719,710. Despite several reminders, such amounts were not paid by Tema to Seok. A meeting was held between the representatives of Tema and Seok on 12 June 2009, in which it was agreed that Tema would pay interest on the outstanding amount at the rate of 6% p.a. In August, 2009, Seok raised a claim of USD 719,710, being the amounts outstanding qua the invoices in regard to shipment nos. 2, 3 and 4. In November-December, 2009, Tema informed Seok that the supply of forgings

procured from Seok, which were meant to be utilized for the Essar Project, could not be utilized for such purpose, as the Essar Project had failed and stood terminated, hence the entire materials were lying with Tema. Further, it is not in dispute that after persistent demands and requests, Tema on 5 February, 2010 and 12 February, 2010 made payments to Seok of amounts USD 19,801.55 and USD 18,232.70 respectively, being the amount of interest charged @6% p.a. on the total outstanding amount of USD 719,710.

44. Another significant facet not in dispute is to the effect that as Seok was not paid the balance outstanding amount, a legal notice dated 5 September, 2012 was issued by Seok to Tema calling upon Tema, to clear the outstanding amounts with interest thereon, being an amount USD 760,382 within a period of 7 days from the date of receipt of the said notice. Despite such notice, Tema failed to make payment of the outstanding amounts to Seok. It is on such backdrop, a meeting was held between the parties on 4 February, 2013 at the Ballard Estate, Mumbai office of Tema between Mr. Anil Bhave of Tema and and Mr. K.W. Park/Mr. I.J. Park of Seok,

in which an action plan was formulated in regard to the payment of said amounts to Seok. It is also not in dispute that such action plan was set out in writing in the emai addressed by Tema to Seok dated 18 February, 2013, which is extracted in paragraph 21 (supra). As observed by the arbitral tribunal, from the contents of the said email it was clear that Tema explicitly acknowledged its liability to pay an amount USD 719,710 to Seok and the manner in which certain amounts can be recouped. It is further not in dispute that the action plan as agreed between the parties and subject

matter of email dated 18 February, 2013 was set out in writing in an MOU as entered between the parties, which again explicitly acknowledged the amount of USD 719,710 to be paid by Tema to Seok. It also appears to be not in dispute that despite efforts, the materials (forgings) could not be sold and the price of the goods could not be recovered.

45. What is further significant is that although such MOU was entered on 14 June, 2013 between Seok and Tema, in June 2013, Tema remitted an amount of USD 77,610 and further an amount of USD 10,000, albeit, it is Tema's case that such payment was in respect of another purchase order and there was no adjustment towards the outstanding amounts. It also appears to be not in dispute that as the balance amounts to be paid by Tema to Seok remained outstanding, Seok resorted to legal proceedings, when it filed Company Petition No. 1070 of 2015 in this Court, praying for winding up of Tema on the ground that Tema was unable to pay its debts.

In such proceedings, by an order dated 26 September, 2017, this Court referred the disputes to be adjudicated in arbitration, by appointing the learned sole arbitrator.

46. On such conspectus, the issue of limitation as urged by Tema before the arbitral tribunal as also urged in the Section 34 proceedings before the learned Single Judge, was to the effect that Seok's claim was for recovery of the unpaid price of the goods, was barred by limitation in terms of Article 14 of the Schedule to the Limitation Act i.e. "For the price of goods sold and delivered, where no fixed period

of credit is agreed upon", for which the prescribed period of limitation is three years from the date of delivery of the goods.

47. According to Tema, having regard to the part payment made on 5 February, 2010 and 12 February, 2010, limitation to sue Tema was extended for a period of 3 years, i.e., upto 12 February, 2013 and as there was no extension of time thereafter, as after 12 February, 2013, there being no acknowledgment of liability or part payment by Tema, Seok's claim was time barred relying on Section 18 of the Limitation Act which provides for the "Effect of acknowledgment in writing", when the said provision postulates an acknowledgment "before the expiration of the prescribed period".

48. Tema also contended that the prescribed limitation having expired on 12 February, 2013, the meeting held between the parties on 4 February, 2013 and the course of action as recorded in the email dated 18 February, 2013 cannot revive a

time barred claim, although there was a very short period between the date on which limitation expired (i.e., 12 February, 2013) and the date of email dated 18 February, 2013 being only few days. It is such contention of Tema which has been accepted by the learned Single Judge purely referring to the provisions of Section 18 of the Limitation Act. The relevant findings/observations in that regard as made by the learned Single Judge are required to be noted, which reads thus:

> "25. Thus, for section 18 to apply, there has to be an acknowledgment of liabili which must be in writing; and it must be made by such writing before the expiry

limitation. The decisions relied upon by Mr. Mustafa Doctor in Sampuran Singh (Supra) and State of Kerala (Supra) are apposite.

26. In the present case, there is no dispute with regard to the fact of the emai dated 18th February, 2013 recording the events which transpired at the meeting h between the Petitioner and Respondent on 4th February, 2013. There were no minutes of the said meeting in writing prior thereto. Further, the relevant fact the last payment made by the Petitioner to the Respondent of US$ 18232.17 was on 12th February, 2010 towards purchase orders dated 15th September, 2008 and 30th September, 2008 and thereafter there being no payments made for a period of thre years from 12th February, 2010, which fact is undisputed. The statement of claim also proceeds on the basis that the claim is made under the purchase orders date 15th September, 2008 and 30th September, 2008 for unpaid dues. Thus, the period of limitation would necessarily be three years from the last payment being made the Petitioner and which period of limitation expired on 12th February, 2013. Th being no acknowledgment in writing of the Petitioner before the expiration of th said prescribed period.

27. The impugned Award proceeds on the premise that there was an acknowledgment of liability made in writing signed by the party against whom suc right is claimed by email dated 18th February, 2013 and which dates back to the meeting held on 4th February, 2013, this giving rise to a fresh period of limita However, the learned Arbitrator has lost sight of what has been expressly provid Section 18 of the Limitation Act, as dating back of an acknowledgment finds no place in this provision. I find much substance in the submission of Mr. Mustafa Doctor that there would be a hiatus if the email of 18th February, 2013 is treat an acknowledgment giving rise to a fresh period of limitation i.e. the hiatus wo for the period from 12th February, 2013 till 18th February, 2013.

28. Thus, the finding of the learned Arbitrator in the impugned Award that the email of 18th February, 2013 is required to date back to 4th February, 2013 and

there being extension of limitation is in my view patently illegal and runs cont Section 18 of the Limitation Act. Further, if one was to note the contents of th of 18th February, 2013, there is a mere admission of past liability which has be held by the Supreme Court in Valliama Champaka Pillai (Supra) to be not sufficie There must be an acknowledgment of subsisting liability.

29. I further find that the impugned Award has noted the case of the Respondent extension of limitation only based on three events, namely (i) an alleged part payment on 10th June, 2013; ii) correspondence in December 2014 and (iii) an

> adjustment payment of US$ 10,000 on 9th and 20th January, 2015 mentioned in Company Petition 2015. It was not even the Respondent's claim that the email of 18th February, 2013 is an acknowledgment. The learned Arbitrator has on his own placed reliance on the email dated 18th February, 2013 as an acknowledgment thereto which as held above is patently illegal.
> .....
> 33. The impugned Award being contrary to the law of limitation i.e. Section 18 o the Limitation Act is contrary to public policy. The decisions relied upon by Mr Mustafa Doctor namely N. Balakrishnan (Supra) and Pralhad Raut (Supra) are apposite. Thus, the impugned Award requires to be set aside on the grounds of patent illegality and being contrary to public policy of India."
>
> (emphasis suppl

49. We are not persuaded to accept the view of the learned Single Judge, for the reasons we discuss hereinbelow.

50. In our opinion, when the Court exercising jurisdiction under Section 34 of the ACA was confronted with an issue of limitation, i.e., as to whether Seok's claim was time barred, the judicial scrutiny and/or parameters in exercising such jurisdiction was to consider, whether such mixed question of fact and law is addressed by the arbitral tribunal on materials/evidence on record of the arbitral proceedings or whether there was an apparent patent illegality on the part of the arbitral tribunal in recording findings contrary to the records. Further, the obligation on the Section 34

Court was also to examine whether the findings on limitation as recorded by the arbitral tribunal could be a plausible view.

51. In other words, the scope of interference under Section 34 was limited to determine as to whether the award was vitiated by patent illegality and in

determination of the same, by applying the "proviso" below sub-section (2-A) of Section 34, namely, that an award could not to be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence. The other enquiry which could be made was whether in the facts of the present case, the award was in contravention with the fundamental policy of Indian law or whether it is very basis of justice. The relevant part of Section 34 of ACA is required to be noted, which reads thus:

> Section 34 : Application for setting aside arbitral awards.
>
> (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section(3).
>
> (2) An arbitral award may be set aside by the Court only if--
>
> (a) the party making the application establishes on the basis of the record the arbitral tribunal that-
> (i) a party was under some incapacity, or
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the for the time being in force; or
>
> (iii) the party making the application was not given proper notice of th appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
>
> Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the

arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

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

(b) the Court finds that--

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

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

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

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

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

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

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

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

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

.....

(emphasis supplied)

52. In determining the issue on limitation, the jurisprudential principles on the law which have guided the Courts are well settled. The Limitation Act is an adjective

law. It is 'lex fori' and in the nature of a procedural law. It is a disabling statute, hence, unless expressly or by necessary implication the suit is barred, the tendency of the Court is to keep the right to sue alive. It is also a settled that when there were t competing articles which may be applied, because they are wide enough to cover the same cause of action, then whichever article keeps the right to sue alive should ordinarily and as a general principle be preferred. The emphasis is also as to whether any presumption can be drawn that a right was not exercised for a long time so as to render the said right to be non-existent. In the celebrated works of Salmond on Jurisprudence7, the learned author observes that in order to avoid the difficulty and error, that necessarily results from lapse of time, the presumption of the coincidence of fact and right is accepted as final after a certain number of years. Whoever wishes to dispute this presumption must do so within the period, otherwise his rights if he has one, will be forfeited as a penalty for his neglect. This is in recognition of the principle "Vigilantibus non dormientibus jura subveniunt" , i.e., 'Laws come to the assistance of the vigilant and not of the sleepy. It is also well settled that the Rules Limitation being rules of procedure do not create any right in favour of any person, nor do they define or create causes of action. Law of Limitation simply prescribes that the remedy can be exercised only upto a certain period and not subsequently.

7
"Salmond On Jurisprudence", Twelfth Edition, Pg. 437 & 438

Further, in deciding any plea of limitation vis-a-vis the provisions of different articl

it is trite that guidance is required to be sought from the substance of the suit and no from incidental or subsidiary prayer and that the Court should have regard to the claim actually made on the cause of action and the frame of the suit and not to what is found at the end of the trial. It is also a principle well established that the limitation applicable to a suit should be ascertained on the allegations in the plaint and the reliefs as prayed for as held by the Division Bench of the Madras High Court in V. C. Thani Chettiar vs. D. Mudaliar8, in which Chief Justice Rajamannar speaking for the Bench observed thus:

> ".... ... .. With great respect to the learned Judges, we are unable to ag with this reasoning. In discussing the application of any Article of the Limitation Act, to a particular suit, the most important fact to be consid is the relief prayed for. A discussion of the legal rights on which relief sought may be helpful to a certain extent, but ultimately the decision depends on the actual relief sought. ... ... "

53. Also, a Division Bench of this Court in Gulabchand Daulatram vs. Suryajirao Ganpatrao9 has observed thus:

> ".... ... .. However, the provisions of the Limitation Act applicable to a can only be ascertained on the allegations made in the plaint and the reli prayed for and not by speculating as to what relief the plaintiff should h prayed for. If the plaintiff prays for a relief to which he is not entitle Court may reject his claim, but the Court has no jurisdiction to find out what relief he should have claimed and then apply the provisions of the Limitation Act by reference to the relief which the plaintiff should have claimed but has not claimed. ... ... "
>
> (emphasis suppl

8 ILR (1955) Mad 1278

9 AIR 1950 Bom 401

54. In pre-independence decision in the case of Des Raj-Hukam Chand vs. Lachhi Ram-Prabh Dayal10, a Division Bench of the Lahore High Court speaking through Bhide, J. observed that 'it is well-settled, that the question whether a suit is within time must be decided primarily on the basis of the plaintiffs' own pleadings and not on the basis on the defence set up'. These jurisprudential principles are required to be kept in mind by the Court in determination of an issue as to limitation.

55. K. Subba Rao, J. speaking for the Bench in Rukhmabai Vs. Lala Laxminarayan & Ors. (supra) has held as follows:-

> 1. It is trite that right to sue would accrue when the defendant clearly a unequivocally threatened to infringe the right asserted by the plaintiff and that every threat by a party to such a right, however ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit.
>
> 2. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right. Thus, when there are successive invasions or denials of a right, only when a person's right has been "clearly and unequivocally" threatened would compel him to institute a suit so as to establish such right.

10 AIR 1933 Lah 404

3. It is well settled that there is nothing in law which says that the moment a person's right is denied, he is bound at his peril to bring a suit.

56. At the outset the relevant "provisions" of the Limitation Act, 1963 and the "Articles", around which the controversy in the present proceedings revolves, are required to be noted:-

"Section 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.
(2) For the purposes of this Act,--
(a) a suit is instituted,--
(i) in an ordinary case, when the plaint is presented to the proper officer;
(ii) in the case of a pauper, when his application for leave to sue pauper is made; and
(iii) in the case of a claim against a company which is being wound up by the court, when the claimant first sends in his claim to the official liquidator;
(b) any claim by way of a set off or a counter claim, shall be treated as separate suit and shall be deemed to have been instituted--
(i) in the case of a set off, on the same date as the suit in which set off is pleaded;
(ii) in the case of a counter claim, on the date on which the counte claim is made in court;
(c) an application by notice of motion in a High Court is made when the application is presented to the proper officer of that court.

Section 14.- Exclusion of time of proceeding bona fide in court without jurisdiction.
(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, again the same party for the same relief shall be excluded, where such proceeding is

prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation.--For the purposes of this section,--
(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;
(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;
(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

Section 18.- Effect of acknowledgment in writing.
(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation.--For the purposes of this section,--
(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the property or right,

(b) the word "signed" means signed either personally or by an agent duly authorised in this behalf, and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

Section 19.- Effect of payment on account of debt or of interest on legacy.

Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made:

Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.

Explanation.--For the purposes of this section,--

(a) where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment;

(b) "debt" does not include money payable under a decree or order of a court.

Section 22.- Continuing breaches and torts.
In the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues.

PERIODS OF LIMITATION
PART II - Suits Relating to Contracts

	Description of suit	Period of Limitation	Time from which period begins to run
14	For the price of goods sold and delivered, where no fixed period of credit is agreed upon.	Three years	The date of the delivery of the goods.
26	For money payable to the plaintiff for money found to be due from the	Three years	When the accounts are stated in writing signed by the defendant or his agent duly authorised in this behalf,

	defendant to the plaintiff on accounts stated between them.		unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives.

PART III - Suits relating to Declarations

58	To obtain any declaration.	other	Three years	When the right to sue first accrues.

Part x - Suit for which there is no prescribed period

113	Any suit for which no period of limitation is provided elsewhere in this Schedule.	Three years	When the right to sue accrues.

57. It is necessary to consider the principles of law as laid down in the various decisions in the context of the aforesaid provisions of the Limitation Act. A reference is required to be made to the decision of the Supreme Court in Shakti Bhog Food Industries Ltd. Vs. Central Bank of India & Anr. (supra) in which referring to the earlier decisions in Khatri Hotels Pvt. Ltd. & Anr. vs. Union of India & Anr. (supra), the Supreme Court has analysed the distinction between Article 58 and Article 113. The Supreme Court on a review of the law on the right to sue in the context of applicability of the said provisions of the Limitation Act, held it to be well establish that although Articles in First Division of the Schedule deal with suits, which unambiguously refer to the happening of a specified event, however Article 113, being a residuary clause (which was invoked by all the three Courts in the said case)

did not specify happening of particular event as such, but merely provided to the accrual of a cause of action, on the basis of which the right to sue would accrue. The Supreme Court reiterated the settled principle that there can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least clear and unequivocal threat to infringe that right, by the defendant against whom

the suit is instituted. The relevant observations on such principles of law as made by the Supreme Court are required to be noted which read thus:

> "17. The expression used in Article 113 of the 1963 Act is "when the right to accrues", which is markedly distinct from the expression used in other Articles i Division of the Schedule dealing with suits, which unambiguously refer to the happening of a specified event. Whereas, Article 113 being a residuary clause and has been invoked by all the three courts in this case, does not specify happening particular event as such, but merely refers to the accrual of cause of action on of which the right to sue would accrue.
>
> 18. Concededly, the expression used in Article 113 is distinct from the expre used in other Articles in the First Division dealing with suits such as Article 5 the right to sue "first" accrues), Article 59 (when the facts entitling the plain the instrument or decree cancelled or set aside or the contract rescinded "first" known to him) and Article 104 (when the plaintiff is "first" refused the enjoymen the right). The view taken by the trial court, which commended to the first appel court and the High Court in the second appeal, would inevitably entail in reading expression in Article 113 as -- when the right to sue (first) accrues. This would rewriting of that provision and doing violence to the legislative intent. We must that Parliament was conscious of the distinction between the provisions referred above and had advisedly used generic expression "when the right to sue accrues" i Article 113 of the 1963 Act. Inasmuch as, it would also cover cases falling under 22 of the 1963 Act, to wit, continuing breaches and torts.
>
> 19. We may usefully refer to the dictum of a three-Judge Bench of this Court Union of India v.West Coast Paper Mills Ltd. [(2004) 2 SCC 747] , which has had a occasion to examine the expression used in Article 58 in contradistinction to Art of the 1963 Act. We may advert to paras 19 to 21 of the said decision, which read (SCC p. 754)

"19. Articles 58 and 113 of the Limitation Act read thus:

58	To obtain any other declaration.	Three years	When the right to sue first accrues.
*	*	*	*
113	Any suit for which no period of limitation is provided elsewhere in this Schedule.	Three years	When the right to sue accrues.

"20. It was not a case where the respondents prayed for a declaration of thei
The declaration sought for by them as regards unreasonableness in the levy of
freight was granted by the Tribunal.

21. A distinction furthermore, which is required to be noticed is that wher
terms of Article 58 the period of three years is to be counted from the dat
"the right to sue first accrues", in terms of Article 113 thereof, the peri

limitation would be counted from the date "when the right to sue accrues". The distinction between Article 58 and Article 113 is, thus, apparent inasmuch as the right to sue may accrue to a suitor in a given case at different points of time and, thus, whereas in terms of Article 58 the period of limitation would be reckoned from the date on which the cause of action arose first, in the latter the period of limitation would be differently computed depending upon the last day when the cause of action therefor arose." (emphasis supplied)

20. Similarly, in Khatri Hotels (P) Ltd. v. Union of India (2011) 9 SCC 126 this Court considered the expression used in Article 58 in contradistinction to Article 120 of the old Limitation Act (the Limitation Act, 1908). In para 24, the Court noted thus: (SCC p. 138)

"24. The Limitation Act, 1963 (for short "the 1963 Act") prescribes time-limit for all conceivable suits, appeals, etc. Section 2(j) of that Act defines the expression "period of limitation" to mean the period of limitation prescribed in the Schedule for suit, appeal or application. Section 3 lays down that every suit instituted, appeal preferred or application made after the prescribed period shall, subject to the provisions of Sections 4 to 24, be dismissed even though limitation may not have been set up as a defence. If a suit is not covered by any specific article, then it would fall within the residuary article. In other words, the residu article is applicable to every kind of suit not otherwise provided for in the Schedule." (emphasis supplied)

21. The distinction between the two Articles (Article 58 and Article 120) has been expounded in paras 27 to 30 of the decision, which read thus : [Khatri Hotels (P) Ltd.

case [Khatri Hotels (P) Ltd. v. Union of India, (2011) 9 SCC 126 : (2011) 4 SCC (Civ) 484] , SCC p. 139]

"27. The differences which are discernible from the language of the above reproduced two articles are:
(i) The period of limitation prescribed under Article 120 of the 1908 Act was six years whereas the period of limitation prescribed under the 1963 Act is three years and,
(ii) Under Article 120 of the 1908 Act, the period of limitation commenced when the right to sue accrues. As against this, the period prescribed under Articl 58 begins to run when the right to sue first accrues .

28. Article 120 of the 1908 Act was interpreted by the Judicial Committee in Bolo v. Koklan AIR 1930 PC 270] and it was held: (SCC OnLine PC: IA p. 331)
'There can be no "right to sue" until there is an accrual of the right asserted in suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted.'

The same view was reiterated in Annamalai Chettiar v. A.M.K.C.T. Muthukaruppan Chettiar 1930 SCC OnLine PC 75 : (1930-31) 58 IA 1 : ILR (1930) 8 Rang 645] and Gobinda Narayan Singh v. Sham Lal Singh 1931 SCC OnLine PC 6 : (1930-31) 58 IA 125] .

29. In Rukhmabai v. Lala Laxminarayan AIR 1960 SC 335] , the three-Judge Bench noticed the earlier judgments and summed up the legal position the following words: (Rukhmabai case AIR p. 349, para 33)

'33. ... The right to sue under Article 120 of the [1908 Act] accrues the defendant has clearly or unequivocally threatened to infringe the asserted by the plaintiff in the suit. Every threat by a party to suc however ineffective and innocuous it may be, cannot be considered to clear and unequivocal threat so as to compel him to file a suit. Whet particular threat gives rise to a compulsory cause of action depends the question whether that threat effectively invades or jeopardises t right.'

30. While enacting Article 58 of the 1963 Act, the legislature has designed made a departure from the language of Article 120 of the 1908 Act. The word "first" has been used between the words "sue" and "accrued". This would mea that if a suit is based on multiple causes of action, the period of limitat begin to run from the date when the right to sue first accrues. To put it

differently, successive violation of the right will not give rise to fresh
the suit will be liable to be dismissed if it is beyond the period of limit
counted from the day when the right to sue first accrued."

Notably, the expression used in Article 113 is similar to that in Article 120
"when the right to sue accrues". Hence, the principle underlying this dictum
apply proprio vigore to Article 113.

22. It is well-established position that the cause of action for filing a sui
consist of bundle of facts. Further, the factum of the suit being barred by limit
ordinarily, would be a mixed question of fact and law. .....

(emphasis sup

58. Adverting to the aforesaid principles of law in their application to the facts of the present case, in appreciating the documentary and oral evidence on record, the arbitral tribunal has recorded findings of fact, that at no point of time, Tema disputed its liability to pay the amounts outstanding and/or the amounts which were due and payable to Seok. Such acknowledgment of liability being prior to 12 February, 2013, which is the date on which the limitation otherwise would expire, is not in dispute, however, the liability also being acknowledged subsequent to 12 February, 2013, i.e.,

in the email dated 18 February, 2013 and in the MOU as entered between the parties on 14 June 2013 is a finding recorded by the arbitral tribunal. The consideration to this effect by the arbitral tribunal was on the legal consequences which are brought about by these significant events, which were events relevant to the issue of limitation and which were not only prior to 12 February, 2013, but also, as to what had transpired between the parties, subsequent to 12 February, 2013, i.e., the

consequence of Tema's email dated 18 February, 2013, which was on the basis of the settlement talks which had taken place on 4 February, 2013. As noted herebefore, a meeting was held between the parties on 4 February, 2013, to chalk out a course of action between the parties, on the acknowledged liability of Tema. Such course of action was recorded in the said email dated 18 February, 2013 addressed by Tema to Seok.

59. As observed by the arbitral tribunal, consequent to what was set out in the e-mail dated 18 February 2013, an MOU dated 14 June, 2013 (supra) was entered between the parties. All this was coupled with the fact that there were certain payments which were made by Tema to Seok in and around June, 2013 being an amount of USD 77,610 as also the alleged adjustment of USD 10,000 although this adjustment is disputed by Tema. It is difficult to accept Tema's case that these facts which were considered relevant by the arbitral tribunal, had no bearing whatsoever on the issue of limitation, and as held by the learned Single Judge. The arbitral tribunal considering the case of Seok and testing the same on facts as to whether

Seok was sleeping over its rights qua its claim against Tema, in our opinion and rightly so, applying the principles of " Vigilantibus non dormientibus jura subveniunt" and the applicability of the principles of law of limitation, decided that Seok's claim was not time barred.

60. We find substance in the contention as urged on behalf of Seok that considering the materials on record of the arbitral proceedings and the view taken thereon by the arbitral tribunal, an extremely technical and/or a narrow pedantic

approach, to proceed only on the strict applicability of Section 18 of the Limitation Act to reach to a conclusion that there was no acknowledgment of liability on the part of Tema after 12 February, 2013, should not to have been taken by the Section 34 Court in passing the impugned order. This for the reason that for Section 18 of the Limitation Act to apply, there has to be an acknowledgment of liability, which must be in writing, before the expiry of limitation, however, the facts on record demonstrated that the things did not stop at this, as there were material facts subsequent thereto, which were germane for consideration of the issue on limitation, as considered by the arbitral tribunal. In making the observations as made by the learned Single Judge and proceeding only on the applicability of Section 18 of the Limitation Act, all subsequent events found relevant by the arbitral tribunal stands totally discarded. This is the plain consequence of what has been held by the learned Single Judge.

61. More pertinently, at the same time, the learned Single Judge has also observed that there is no dispute on Tema's email dated 18 February, 2013 recording the events which transpired at the meeting held between the parties on 4 February 2013. The learned Single Judge, however, observed that there were no minutes of the meeting held on 4 February, 2013 and merely from the reason that the last payment was made by Tema to Seok on 12 February, 2010 on the purchase orders in question and thereafter there being no payment for the period of three years, Seok's claim was

required to be held to be time barred, without attributing any relevance to the payment of USD 77,610 made by Tema to Seok in June 2013, and the facts subsequent thereto.

62. The learned Single Judge, although observed that the impugned award proceeded on the premise that there was an acknowledgment of liability in writing by Tema in terms of email dated 18 February, 2013, which gives effect and/or dates back to the meeting dated 4 February, 2013 and which gave rise to a fresh period of limitation, however, held that the arbitral tribunal lost sight of what has been expressly provided in Section 18 of the Limitation Act, namely, that dating back of an acknowledgment finds no place in this provision, and that such contention of Seok if accepted, there would be a hiatus in respect of the period 12 February 2013 to 18 February 2013. It is also on such premise, the learned Single Judge held that such finding of the learned arbitrator is patently illegal and runs contrary to Section 18 of the Limitation Act. We do not agree. In our considered opinion, the learned sole

arbitrator was correct in his approach when he recorded findings of fact on the basis of applicability of the provisions of Section 14, 18 and 19 of the Limitation Act and on appreciation of the documentary and oral evidence on record, accepting Seok's case on limitation, on its merits. This more particularly considering what was also pleaded by Seok in paragraph 11 of the Statement of Claim, when Seok categorically averred that no part of Seok's claim was barred by the law of limitation, as the default and failure of Tema to pay the debts of Seok was of "continuous nature", in view of

the part-payments made by Tema to Seok in 2013 and the admission of liability, as set out in the letter dated 23 December 2014, when Tema undertook to clear the balance outstanding amounts to Seok. Having so observed, it is necessary to note Tema's letter dated 23 December 2014, which reads thus:

"Date : December 23, 2014

SATCO
(JINYANG BLDG 3F)
552-1, DOGOK-DON
G, GANGNAM-GU,
SEOUL, KOREA

Kind attn.:

Sub: Confirmation of outstanding balance as at 31 March, 2013.

In connection with the audit of our financial statements, please provide directly our auditors M/s. Deloitte Haskins & Sells LLP, Chartered Accountants, at the below mentioned address, the balance due to you, together with a statement of the items making up such balance, as at 31 March, 2013.

Rajesh K. Hiranandani/Ashok Suchak
M/s. Deolitte Haskins & Sells LLP,
32nd floor, Tower-3, India Bulls Finance Centre,
Senapati Bapat Marg,
Elphinstone (W), Mumbai - 400 018, India.

Your prompt attention to this request will be appreciated. Addressed reply-paid envelopes are enclosed for your reply.

Yours truly,
Tema India Limited,

Authorised Signatory"

63. The aforesaid letter was considered by the arbitral tribunal coupled with the fact that Seok had filed Company Petition in this Court on August 13, 2015 praying for winding up of Tema, on its inability to pay debts, wherein the parties agreed for reference of the disputes to arbitration in pursuance to which this Court passed an order dated 26 September 2017 referring the parties to arbitration. As observed by the Arbitral Tribunal, filing of the said proceedings under the Companies Act also attracted the provisions of Section 14 of the Limitation Act, in saving the limitation between the period of filing of the winding up proceedings in this Court and till the disposal of the winding up proceedings, when the parties were referred to arbitration. It is in such context, taking into consideration the cumulative applicability of Sections 14, 18 and 19 of the Limitation Act, the arbitral tribunal decided the issue of limitation, when it held that email dated 18 February, 2013 and MOU dated 14 June, 2013 were clear acknowledgments of Tema of its liability and the specific amount payable to Seok. The following findings as recorded by the arbitral tribunal are findings of fact on interpretation of documentary evidence:

> "It was further to this email of 18th February, 2013 that the parties entered int
> MoU 14th June, 2013. Therefore, in the view of the Arbitral Tribunal the email da

> 18th February, 2013 addressed by the Respondent to the Claimant is clearly an acknowledgement of their liability recording the events of the meeting on 4th February, 2013 and acknowledging the specific amount to be paid to the Claimant, Further, having regard to Recital "B" of the MoU dated 14th June, 2013, reading a "Tema has paid SATCO, a sum of USD 11,50,460 WHICL A SUM of USD 719, 710 remains to be paid", in the view of the Arbitral Tribunal the same, is clearly an acknowledgement of its liability in the part of the Respondent."

64. The arbitral tribunal also held that the letter dated 23 December 2014 addressed by Tema to Seok (supra) amounted to acknowledgment of liability by Tema. It is seen from Tema's said letter that the confirmation of outstanding balance as on 31 March 2013 was sought by Tema in the following words ".... please provide directly to our auditors ..... the balance due to you, together with a statement of the items making up such balance, as at 31 March, 2013". This was replied by Seok's auditors by letter dated 30 December 2014 inter alia stating as under:

> "It is request for confirmation of your account ..... the balance of actual USD 623,100 + Bank Interest USD 138,103.60 is supported by the attached statement and should be payable to SATCO. If not correct, please list in the space provided below full details fo the difference."

65. Thus, the arbitral tribunal concluded that even if the e-mail dated 18 February 2013 is to be assumed not to relate back to 4 February 2013, however, it was material that it was acted upon by the parties in arriving at an MOU dated 14 June 2013, pursuant to which payments were made by Tema to Seok in June 2013 of USD 77,610. The arbital tribunal has considered these facts to be relevant to hold that the claim as made by Seok is within the prescribed limitation of three years albeit not referring to specific Article of the Limitation Act. Per contra the learned Single Judge

in paragraph 24, referring to Articles 113 or 58 of the Limitation Act, has made the following observations:

> "24. Having considered the rival submissions, in my view, what has been lost sight of by the Respondent in their reliance placed upon Article 113,

formerly Article 120 of the Limitation Act, is that these Articles are residuary articles and expressly provide that where a Suit for which no period of limitation is provided elsewhere in the schedule the period of limitation begins to run when the right to sue accrues. Further, Article 58 of the Limitation Act is an Article concerning a Suit to obtain any other declaration where a period of limitation of three years is provided when the right to sue first accrues. The Residuary Article and Article 58 are inapplicable in the present case as there is an existing Article expressly providing for a period of three years for the price of goods sold and delivered from the date of delivery of the goods where there is no fixed credit period agreed upon. Further, past payment for the goods, would extend the period of limitation by a period of three years from last payment made. Further, where there is an acknowledgment of liability / debt due, the relevant Section 18 of the Limitation Act expressly provides as under:-

.. .."

66. We are not persuaded to accept the aforesaid findings as made by the learned Single Judge not only on law but also considering what has been succinctly observed by the arbitral tribunal on merits of the issue. In this context we may, at the outset, observe that as noted hereinabove the settled principles of applicability of law of limitation namely that when there are two competing articles which may be applied when they are wide enough to cover the same cause of action, then the approach of the Court would be to apply whichever article, which keeps the right to sue alive as discussed by us hereinabove.11

11 "Salmond On Jurisprudence", Twelfth Edition, Pg. 437 & 438

67. It is in such context when a contention was urged on behalf of Seok, that Article 113 would become applicable, which provided for a limitation of three years

from "when the right to sue accrues" and/or for that matter, Seok's claim fall within the ambit of Article 26 which provides ' for money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them', under which the prescribed period of limitation is three years, when the limitation would begin to run inter alia when the accounts are stated in writing signed by the defendant or his agent duly authorised in this behalf, considering the letter dated 23 December 2014 (supra) addressed by Tema to Seok. In such context, we may observe that although Article 14 prescribes the limitation of three years for recovery of price of goods sold and delivered, where no fixed period of credit is agreed upon providing that the limitation would commence from the date of the delivery of the goods, the same cannot take within its ambit the subsequent facts / events which have taken place between the parties namely admission of liability in the e-mail dated 18 February 2013, payment of USD 77610 and a letter dated 23 December 2014 in relation to the accounts addressed by Tema to Seok. These are events which were clearly falling outside Article 14 and fell within the ambit of Article 113 or Article 26. In this view of the matter, by no stretch of imagination there was any illegality on the part of the arbitral tribunal to reach to a conclusion that the claim as made by Seok was within the prescribed limitation. In this view of the matter, the learned Single Judge reaching to a conclusion that Article 14 is

sacrosanct and Article 113 would be required to be taken into consideration as a residuary Article and would not be applicable when Article 14 was attracted, would

be a finding contrary to the provisions of the Limitation Act.

68. It is true that Section 18 of the Limitation Act certainly takes within its ambit an acknowledgment of liability before the expiration of the prescribed period for a suit as plainly provided by the provision, however, the arbitral tribunal was not oblivious of the legal effect, the email dated 18 February 2013 created when it acknowledged the liability of Tema to pay Seok, as it existed prior to the limitation expiring on 12 February 2013. In other words, the recognition of Seok's rights as set out in Tema's email dated 18 February 2013, relates back to the period prior to the expiry of the limitation. Thus, what was considered by the arbitral tribunal was the legal effect and consequence of Tema's email dated 18 February 2013 brought about, being a subsequent act of a party to the Contract (i.e. of Tema) recognizing the relevant past and present rights and/or the "subsisting jural rights" between the parties, qua the amounts in question, as claimed by Seok. In our opinion, in such situation, the well settled principles of relation back become applicable. The doctrine which stands attracted is the "doctrine of relation back". It is a legal principle, wherein an act or event that has occurred at a later time is treated as if it has happened at an earlier time, for legal purposes. It implies that certain rights become operative, retrospectively from the date earlier than their actual occurrence. The doctrine is aimed to protect individuals from harm that may occur in the interim

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period between the actual event and its legal enforcement, by leaving the rights enforceable from the earlier date. Black's Law Dictionary defines the doctrine of relation back as under:

> "Relation back, 1. The doctrine that an act done at a later time is, under cert
> circumstances, treated as though it occurred at an earlier time. In federal civ
> procedure, an amended pleading may relate back, for purposes of the statute of
> limitations, to the time when the original pleading was filed."

69. In the present case as noted hereinabove, acting upon the email dated 18 February 2013, an MOU dated 14 June 2013 was entered between the parties, which acknowledged Tema's debt payable to Seok. On 10 June 2013 Tema paid an amount of USD 77610/- to Seok. Admittedly, such amount was in recognition of what was set out between the parties in the email dated 18 February 2013, as also acknowledged by the subsequent MOU. The fact, however, remains and as set out by the arbitral tribunal, that once on 10 June 2013 recognizing such jural relationship between the parties as it existed on 4 February 2013, payment of USD 77610/- was made by Tema to Seok, the claim of Seok was certainly within the prescribed period of limitation, considering the provisions of Section 19 of the Limitation Act.

70. It was hence neither erroneous nor illegal for the arbitral tribunal to reach to conclusion that the claim was not barred by limitation taking into consideration, the payments which were made by Tema post 12 February 2013 namely, payment dated 10 June 2013 as such payments had relevance, when the applicability of the

provisions of Section 19 of the Limitation Act was to be considered, which weighed with the arbitral tribunal, in recording its findings on such materials in the arbitral award.

71. In such context, in Kamla Devi & Ors. Vs. Pt. Mani Lal Tewari & Ors. 12, V. R. Krishna Iyer, J. speaking for the Bench held that the function of Section 19 is to provide a later date to count the period of limitation afresh, and that fresh period of limitation will be computed from the time when the acknowledgment is signed. It was observed that the office of Section 19 is to postpone the date of reckoning limitation and not to create a different substantive period of limitation, the latter depends upon the appropriate Article of the Limitation Act which applies to the suit. The relevant observations are required to be noted which read thus:

> "The last contention pressed was that the personal decree should not have granted, because it was barred by limitation. The basis for this contenti the payment of Rs. 25/-, which has been acknowledged on the registered mortgage-deed, was not itself by a registered endorsement and, therefore, plaintiff was entitled to a period of three years only, even if Section 1 an extension of limitation. We see no merit in this contention. The funct Section 19 is to provide a later date to count the period of limitation a that fresh period of limitation will be computed from the time when the acknowledgement is signed. Nothing turns on whether the acknowledgement i itself registered or not The office of Section 19 being to postpone the d reckoning limitation and not to create a different substantive period of limitation, the latter depends upon the appropriate Article of the Limita which applies to the suit .... "

72. Thus, the payment which was made by Tema in June 2013 was not outside the contract in question, namely, under the purchase orders. It was also not Tema's

12 (1976) 4 SCC 818

case that such payment was alien to the principal claim as made by Seok in regard to the purchase orders. This coupled with the fact that Tema addressed a letter dated 23

December 2014 to Seok requesting for the balance due and payable to Seok by Tema together with the statement of items making up such balance as on 31 March 2013, thus clearly acknowledging that the amounts were due and payable by Tema to Seok. This acknowledgment of liability was relevant for the purpose of computing the prescribed limitation, as taken into consideration by the arbitral tribunal. The limitation of three years from the date of said letter by Tema dated 23 December 2014, as observed by the arbitral tribunal, was available upto 23 December 2017 and the arbitral claim de hors the Seok pursuing the winding up petition before this Court (between the period 13 August 2015 to 26 September 2017) was filed in September 2017, which even otherwise stood saved by application of Section 14 of the Limitation Act. Thus, as rightly held by the arbitral tribunal, it could not have been held by the impugned order that the Seok's claim was barred by the Law of Limitation. All this has not been considered and/or overlooked by the learned Single Judge, in reaching to a conclusion that the arbitral award needs to be set aside merely on the application of Section 18 of the Limitation Act.

73. In the context of acceptance by a party of a liability in the statement of accounts which is in the nature of an acknowledgment of such liability, the decision of the Supreme Court in Hiralal & Ors. Vs. Badkulal & Ors.13 needs to be referred.

13 (1953)1 SCC 400

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In such case the Supreme Court was considering the defendant's contention that the plaintiff's suit should have been dismissed, it could not be maintained merely on the

basis of an acknowledgment of liability and that such an acknowledgment could only save limitation but could not furnish a cause of action on which a suit could be maintained. It was observed that the Judicial Commissioner took the view that an unqualified acknowledgment of the statement of the account under which the entry had been made, were sufficient to furnish a cause of action to the plaintiffs for maintaining the suit. It was held that the acknowledgment which formed the basis of the suit was made in the ledger of the plaintiffs, in which earlier mutual accounts had been entered and truly speaking, the suit was not based merely on this acknowledgment, but was based on the mutual dealings and the accounts stated between them, which was held to be clearly maintainable. The relevant observations made by the Supreme Court are required to be noted which read thus:

> "11. Mr. Bindra next urged that the plaintiff's suit should have been dismissed because it could not be maintained merely on the basis of an acknowledgment of liability, that such an acknowledgment could only save limitation but could not furnish a cause of action on which a suit could be maintained. The Judicial Commissioner took the view that an unqualified acknowledgment like the one in the suit, and the statement of the account und which the entry had been made, were sufficient to furnish a cause of action t plaintiffs for maintaining the present suit. We are satisfied that no excepti be taken to this conclusion. It was held by the Privy Council in Maniram v. S Rupchand (1906 SCC OnLine PC 15), that an unconditional acknowledgment implies a promise to 'pay because that is the natural inference if nothing is the contrary. It is what every honest man would mean to do. In Fateh Chand v. Ganga Singh [ILR(1929)10 Lah 748] the same view was taken. It was held that a suit on the basis of a balance was competent. In Kahanchand Dularam v. Dayaram Amritlal [ILR(1929)10 Lah 745] the same view was expressed and it Was observed that the three expressions "balance due ", " account adjusted " "balance struck" must mean that the parties had been through the account. The defendant there accepted the statement of account contained in the plaintiff'

account book, and made it his own by signing it and it thus amounted to an "

> accounts stated between them" in the language of Article 64 of the Limitation Act. The same happened in the present case. The acknowledgment which forms the basis of the suit was made in the ledger of the plaintiffs in which earli mutual accounts had been entered and truly speaking, the suit was not based merely on this acknowledgment but was based on the mutual dealings and the accounts stated between them and was thus clearly maintainable."
>
> (emphasis supplied)

74. The facts clearly demonstrate that it was Tema's request for balance confirmation, which was taken into consideration by the arbitral tribunal, and considered to be relevant and appropriate acknowledgment by Tema of its liability, when the arbitral tribunal observed that Tema voluntarily asked for the balance due and payable to Seok. This according to the arbitral tribunal clearly established the jural relationship between Tema and Seok. The arbitral tribunal observed that being an affirmative statement by Tema to the effect that there were amounts due to Seok by Tema, which clearly established a jural relationship between the parties, certainly amounted to be destructive of Tema's contention of Seok's right to claim amounts having stood extinguished including under the MOU.

75. In our opinion, the arbitral tribunal has rightly held that the MOU recognised Seok's rights to its lawful and legitimate claims for the amounts payable to it by Tema. We cannot agree that the MOU could be considered to be a document of no consequence on the ground that it is of a subsequent date, after Seok's right to the entitlement of the outstanding amounts due and payable by Tema had stood extinguished on 12 February 2023 as urged by Tema. This would be a contention

contrary to the facts, namely, acknowledgments of debt payable to Seok in the writings dated 18 February, 2013 as also confirmation in MOU dated 14 June 2014 and letter dated 23 December, 2014 addressed by Tema to Seok. All such findings and the legal consequences thereto as discussed by the arbitral tribunal overlooked in the impugned order, purely on the strict applicability of Section 18 of the Limitation Act. In fact the impugned judgment does not contain any discussion on any of such findings of fact, as recorded by learned sole arbitrator, much less to record any rationale to displace such findings.

76. We may observe that it is well settled principle of law that the arbitrator is best Judge of the quantum and quality of evidence. The Supreme Court in Municipal Corporation of Delhi vs. M/s Jagan Nath Ashok Kumar & Anr. 14, although was considering the issue under the Arbitration Act, 1940 (the principle of law in such context however would not be different), held that the arbitrator is the sole judge of the quality as well as quantity of evidence and it will not be for the Court to take upon itself the task of being a judge of the evidence before the arbitrator. The following observation as made by the Court are required to be noted which reads thus:

> "4. .....It is not a case where the arbitrator has refused cogent and mat
> factors to be taken into consideration. The award cannot be said to be viti
> by non-reception of material or non-consideration of the relevant aspects o
> the matter. Appraisement of evidence by the arbitrator is ordinarily never
> matter which the court questions and considers. The parties have selected
> their own forum and the deciding forum must be conceded the power of
> appraisement of the evidence. In the instant case, there was no evidence of

14 (1987) 4 SCC 497

> violation of any principle of natural justice. The arbitrator in our opini
> the sole judge of the quality as well as quantity of evidence and it will
> for this Court to take upon itself the task of being a judge of the eviden
> before the arbitrator. It may be possible that on the same evidence the co
> might have arrived at a different conclusion than the one arrived at by th
> arbitrator but that by itself is no ground in our view for setting aside t
> award of an arbitrator."
>
> (emphasis supplie

77. Similar observations were made by the Supreme Court in M/s. Sudarsan Trading Co. vs. Government of Kerala & Ors. 15. Sabyasachi Mukharji, J. speaking for the Bench observed thus:

> "29. .....Furthermore, in any event, reasonableness of the reasons give
> the arbitrator, cannot be challenged. Appraisement of evidence by the
> arbitrator is never a matter which the court questions and considers. If t
> parties have selected their own forum, the deciding forum must be conceded
> the power of appraisement of the evidence. The arbitrator is the sole Judg
> the quality as well as the quantity of evidence and it will not be for the
> to take upon itself the task of being a judge on the evidence before the
> arbitrator. See the observations of this Court in MCD v. Jagan Nath Ashok
> Kumar [(1987) 4 SCC 497]."
>
> (emphasis suppl

78. The aforesaid position is reiterated in the Associate Builders vs. Delhi Development Authority16. We have also noted that the requirement of sub-section (2-A) of Section 34 of the ACA, when an award is to be set aside on the ground of patent illegality, the Court cannot be oblivious to the specific requirements of the proviso below sub-section (2-A), which stipulates that the award cannot be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

15 (1989) 2 SCC 38

16 (2015) 3 SCC 49

79. On a bare perusal of the arbitral award, purely on the applicability of Section 18 of the Limitation Act, it could not have been held that the claim of Seok was time barred, as the arbitral tribunal has clearly held that this was a case wherein the issue of limitation was being tested applying the provisions of Sections 14, 18 and 19 of the Limitation Act. Also a specific plea of Seok was urged in paragraph 11 of the Statement of Claim that the failure of Tema to pay the debts of Seok was pleaded to be of a "continuous nature", in view of part payment made by Tema to Seok in 2013 and the admission of liability in Tema's letter dated 23 December 2014 (supra).

80. The learned Single Judge could not have been oblivious of such specific plea of limitation as urged on behalf of Seok when in paragraph 11 of the statement of claim (supra), Seok, on its plea of limitation, averred that the case was a case of continuing wrong. A plea of continuing wrong is a legal plea. Section 22 of the Limitation Act (supra) provides for computation of limitation in the case of a continuing breach of contract or tort, to provide that a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues.

81. In the context of the continuing breach of contract attracting the applicability of the provisions of Section 22 of the Limitation Act, the principles in such context are well settled, which ought to have been considered in the impugned order. A useful reference can be made to a recent decision of the Supreme Court in Samruddhi Cooperative Housing Society Ltd. Vs. Mumbai Mahalaxmi Construction

Pvt. Ltd.17 in which the Supreme Court was considering the issue which revolved around the maintainability of the complaint filed before the Consumer Commissioner and as to whether the same was barred by limitation. The appellant therein had argued that the cause of action was of a continuing nature which was in the context of the occupancy certificate to be provided by the respondent. It is in such context, considering the doctrine of continuing wrong, the Court made the following observations:

> "12. Section 24A of the Consumer Protection Act 1986 provides for th period of limitation period for lodging a complaint. A complaint to a consu forum has to be filed within two years of the date on which the cause of ac has arisen. In the instant case, the appellant has submitted that since the action is founded on a continuing wrong, the complaint is within limitation
>
> 13. Section 22 of the Limitation Act 1963 provides for the computat of limitation in the case of a continuing breach of contract or tort. It pr in case of a continuing breach of contract, a fresh period of limitation be run at every moment of time during which the breach continues. This Court i Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneshwar Maharaj Sansthan (AIR 1959 SC 798) elaborated on when a continuous cause of action arises.
>
> 14. Speaking for the three-judge Bench, Justice PB Gajendragadkar (as the learned Chief Justice then was) observed that
>
> > "31. ..... Does the conduct of the trustees amount to a continuing wrong under Section 23? That is the question which this contention raises for our decision. In other words, did the cause of action ari die in diem as claimed by the appellants? In dealing with this argum it is necessary to bear in mind that Section 23 refers not to a cont right but to a continuing wrong. It is the very essence of a continu wrong that it is an act which creates a continuing source of injury renders the doer of the act responsible and liable for the continuan the said injury. If the wrongful act causes an injury which is compl there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a chara that the injury caused by it itself continues, then the act constitu continuing wrong. In this connection it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury. It is only in reg

17 (2022)4 SCC 103

> acts which can be properly characterized as continuing wrongs that Section 23 can be invoked. ....

The Court held that the act of the trustees to deny the rights of Guravs as hereditary worshippers and dispossessing them through a decree of the court was not a continuing wrong. Although the continued dispossession caused damage to the appellants, the injury to their rights was complete when they were evicted.

15.In CWT v. Suresh Seth (1981)2 SCC 790, a two-judge Bench of this Court dealt with the question of whether a default in filing a return under the Wealth Tax Act amounted to a continuing wrong. Justice ES Venkataramiah (as the learned Chief Justice then was) observed that:

> "11. ... ... The distinctive nature of a continuing wrong is that the law that is violated makes the wrongdoer continuously liable for penalty. A wrong or default which is complete but whose effect may continue to be felt even after its completion is, however, not a continuing wrong or default. It is reasonable to take the view that the court should not be eager to hold that an act or omission is a continuing wrong or default unless there are words in the statute concerned which make out that such was the intention of the legislature. ... ... Explaining the expression "a continuing cause of action" Lord Lindley in Hole v. Chard Union [(1894) 1 Ch D 293 : 63 LJ Ch 469 : 70 LT 52(CA)] observed:
>
> > "... ....What is a continuing cause of action? Speaking accurately, there is no such thing; but what is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought."

The Court further provided illustrations of continuous wrongs: (CWT Vs. Suresh Seth Case, SCC p.800 para 17)

> "17. The true principle appears to be that where the wrong complained of is the omission to perform a positive duty requiring a person to do a certain act the test to determine whether such a wrong is a continuing one is whether the duty in question is one which requires him to continue to do that act. Breach of a covenant to keep the premises in good repair, breach of a continuing guarantee, obstruction to a right of way, obstruction to the right of a person to the unobstructed flow of water, refusal by a man to maintain his wife and children whom he is bound to maintain under law and the carrying on of mining operations or the running of a factory without complying

with the measures intended for the safety and well-being of workmen may be illustrations of continuing breaches or wrongs giving rise to civil or criminal liability, as the case may be, de die in diem."

17. In M. Siddiq v. Suresh Das [(2020)1SCC1], a Constitution Bench of this Court (of which one of us (Justice DY Chandrachud) was a part) examined the precedents with regards to a continuing wrong. The Court observed that:

"343. The submission of Nirmohi Akhara is based on the principle of continuing wrong as a defence to a plea of limitation. In assessing the submission, a distinction must be made between the source of a legal injury and the effect of the injury. The source of a injury is founded in a breach of an obligation. A continuing wrong arises where there is an obligation imposed by law, agreement or otherwise to continue to act or to desist from acting in a particular manner. The breach of such an obligation extends beyond a single completed act or omission. The breach is of a continuing nature, givin rise to a legal injury which assumes the nature of a continuing wrong. For a continuing wrong to arise, there must in the first place be a wr which is actionable because in the absence of a wrong, there can be no continuing wrong. It is when there is a wrong that a further line of enquiry of whether there is a continuing wrong would arise. Without a wrong there cannot be a continuing wrong. A wrong postulates a breach of an obligation imposed on an individual, whether positive or negativ to act or desist from acting in a particular manner. The obligation on one individual finds a corresponding reflection of a right which inher in another. A continuing wrong postulates a breach of a continuing dut or a breach of an obligation which is of a continuing nature. ..... Hence, in evaluating whether there is a continuing wrong within the meaning of Section 23, the mere fact that the effect of the injury caused has continued, is not sufficient to constitute it as a continui wrong. For instance, when the wrong is complete as a result of the act omission which is complained of, no continuing wrong arises even though the effect or damage that is sustained may enure in the future. What makes a wrong, a wrong of a continuing nature is the breach of a duty which has not ceased but which continues to subsist. The breach o such a duty creates a continuing wrong and hence a defence to a plea o limitation."

18.A continuing wrong occurs when a party continuously breaches an obligation imposed by law or agreement. ... ..."

(emphasis supp

82. Thus, the plea of limitation as urged by Seok and the objections of Tema, the issue of limitation has been decided by the arbitral tribunal on facts and applicability of laws, which stand recognized in the aforesaid decisions.

83. We may observe that in exercise of jurisdiction under Section 34 of the ACA, it was not permissible for the Section 34 Court to re-appreciate evidence and come to

a different conclusion from what has been recorded by the arbitral tribunal analyzing the documentary and oral evidence on the issue of limitation, merely on the applicability of Section 18 of the Limitation Act. Thus, even if there was an erroneous application of law, it was not the province of the Court in exercising jurisdiction under Section 34 of ACA, reaching to a different conclusion on limitation, purporting to fault the award on the ground of patent illegality.

84. Applying the aforesaid principles of law qua the applicability of the provisions of the Limitation Act to the findings as recorded by the arbitral tribunal, we are at a loss to understand as to how the arbitral award could be held to be patently illegal.

85. Now coming to the other decisions which are relied on behalf of Tema. The learned Single Judge has accepted Tema's case referring to the decision of the Supreme Court in Valliamma Champaka Pillai (supra). We deal with this decision in some detail. In this decision, the Court was concerned with a co-mortgagor redeeming the mortgage by discharging the entire mortgage debt. One of the question for determination before the Supreme Court was whether the articles of the

"Travancore Limitation Regulations" would govern a suit filed by a non-redeeming co-mortgagor, to recover possession of his share of the hypotheca on payment of the proportionate amount of the mortgage debt discharged by the redeeming co-mortgagor. The Supreme Court held that the suit in question was filed more than 12 years after the expiry of the 50 years' limitation prescribed for a suit for redemption under Article 136 of the Travancore Limitation Regulations and more than 28 years

after the redemption, in 1918, of the last mortgage by the redeeming co-mortgagor. It was observed that this being the situation, the non-redeeming mortgagor's suit for his share of the property on payment of his proportionate share of the mortgage money would be barred irrespective of whether the limitation was governed by the provisions of the said Limitation Regulations corresponding to Article 132 or 144 or any other Article of the Indian Limitation Act, 1908. It was observed that since the limitation started running in 1913 or 1918, the suit was time barred from every point of view. On such backdrop, the question for determination before the Supreme Court was whether the release deeds executed by the original mortgagees would amount to an acknowledgment of the liability to be redeemed, and whether it furnished a fresh start of limitation for a suit of redemption. It is in such context th Supreme Court, considering Section 18 of the Limitation Act, observed that one of the essential requirements for a valid 'acknowledgment' under Section 18 of the Limitation Act is that the writing concerned must contain an admission of a subsisting liability. It was observed that a mere admission of a past liability is not

sufficient to constitute such an 'acknowledgment'. It was observed that hence a mere recital in a document as to the existence of a past liability, coupled with a statement of its discharge, does not constitute an 'acknowledgment' within the provisions of Section 18 and it is for this reason the Supreme Court held that the release deeds executed by the original mortgagees, stating in effect, that the mortgages had been extinguished by payment of the mortgage debts in entirety by the redeeming co-

mortgagor, do not amount to 'acknowledgements' of a subsisting liability, which could give a fresh starting point of limitation, and for such reason a suit could not be saved from being time-barred. There can be no two opinions as what has been held by the Supreme Court in such context qua the applicability of Section 18. However, this decision would not support Tema's case considering the view we have taken and more particularly on the applicability of Section 18 of the Limitation Act.

86. We are also not persuaded to accept Tema's contention relying on the decision in Union of India Vs. Susaka Pvt. Ltd. (supra) when a contention is raised that Seok is raising pleas which are not urged before the learned Single Judge. We have considered the contentions as urged by the parties which were part of the arbitral proceedings and also subject matter of consideration before the learned Single Judge. True it is, that a new plea on facts could not have been raised before the Section 34 Court and a plea which was not raised before the arbitral tribunal cannot be raised for the first time in the Section 37 proceedings. However, we are not persuaded to accept Tema's case that any such plea is urged on behalf of Seok which was not

subject matter of consideration before the arbitral tribunal as clear from the extensive recording of the rival pleas taken by the parties before the arbitral tribunal. However, a pure plea of law within the parameters of the scope of Section 34 of the ACA in the context of the findings as recorded by the Section 34 Court can certainly be raised in the Section 37 proceedings.

87. The aforesaid discussion would lead us to a conclusion that the impugned judgment and order rendered by the learned Single Judge exceeded the scope of intervention of the Court beyond what is confined and envisaged under Section 34 of the ACA. We have observed that in exercise of jurisdiction under Section 34 of the ACA, the learned Single Judge could not have rendered findings of patent illegality of the award, in the facts of the case when its jurisdiction was limited and confined to the exercise of jurisdiction under Section 34 of the ACA and not otherwise. We have examined the issue within the limited jurisdiction of the Appellate Court exercising powers under Section 37 of the ACA. In the light of the aforesaid discussion, in our opinion, this is a clear case, wherein, the learned Single Judge has travelled beyond the jurisdiction conferred under Section 34 of the ACA in determination of the legality of the arbitral award. It is for such reason considerin the principles of law as laid down by the Supreme Court in Punjab State Civil Supplies Corporation Ltd. and Anr. (supra) , the impugned judgment and order is required to be interfered. In such context, we may also refer to a recent decision of a

three Judge Bench of the Supreme Court in OPG Power Generation Pvt. Ltd. Vs. Enexio Power Cooling Solutions India Pvt. Ltd. & Anr. 18 wherein the Supreme Court in the context of parameters of interference with arbitral award, has held as under:

> "168. ..... In our view, a distinction would have to be d between an arbitral award where reasons are either lacking/unintelligible or and an arbitral award where reasons are there but appear inadequate or insuf (See paragraphs 79 to 83 of this judgment.). In a case where reasons appear

18 (2025) 2 SCC 417

> insufficient or inadequate, if, on a careful reading of the entire award, coupl documents recited/ relied therein, the underlying reason, factual or legal, tha the basis of the award, is discernible/ intelligible, and the same exhibits no perversity, the Court need not set aside the award while exercising powers unde Section 34 or Section 37 of the 1996 Act, rather it may explain the existence o underlying reason while dealing with a challenge laid to the award. In doing so Court does not supplant the reasons of the arbitral tribunal but only explains better and clearer understanding of the award."

88. In the aforesaid circumstances, we are of the clear opinion that the appeal needs to succeed. Hence, the following order:

ORDER

(i) The impugned judgment and order dated 10 April 2024 passed by the learned Single Judge in Commercial Arbitration Petition No. 342 of 2020 is quashed and set aside. It is held that the award rendered by the learned sole arbitrator is legal and valid.

(ii) Respondent-Tema is directed to bear the cost of the Section 34 and the present proceedings, the quantum of such costs to be decided by the Taxing Master, High Court, Original Side, in terms of the provisions of the Commercial Courts Act, 2015. The appellant shall produce all materials relevant thereto before the Taxing Master within two weeks from today. The Taxing Master shall thereafter decide the CARBAL18048_2024.DOC quantum of costs after considering the materials within four weeks.

89. The appeal accordingly stands allowed in the aforesaid terms.

(ADVAIT M. SETHNA, J.) (G. S. KULKARNI, J.)