

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.12.2019

C O R A M

THE HONOURABLE Ms. JUSTICE P.T. ASHA

O.P.Nos.200 of 2011 and 774 of 2012

Sterlite Technologies Limited
Rep by Chief Manager K.Sundar,
Regional Office at Logix Techno Park,
Tower B, 1st Floor, Sector 127,
Noida - 201 301 ... Petitioner in O.P.No.200 of 2011

M/s.BSNL rep by Chief General Manager,
Southern Telecom Projects,
25, Greenways Lane,
Raja Annamalaipuram,
Chennai 600 028 ...Petitioner in O.P.No.774 of 2012

-Vs.-

1. Bharat Sanchar Nigam Limited,
Rep by Managing Director,
Harish Chandra Mathur Lane,
Janpath, New Delhi 110 001.
and also having its Office at
Office of the Chief General Manager,
Southern Telecom Projects,
No.25, Greenways Salai, Chennai 600 028
2. Shri N.Janardhana Rao,
Arbitrator,
General Manager (NP) CFA,
BSNL, Karnataka Telecom Circle,
Bangalore 560 008 ... Respondents in O.P.No.200 of 2011

1. M/s.Sterlite Optical Technologies Ltd (SOTL),
E1, Waluj MIDC Industrial Area,
Waluj District,
Aurangabad - 431 136
Maharashtra, India.
2. Shri N.Janardhana Rao,
Arbitrator,
General Manager (NP) CFA,
BSNL, Karnataka Telecom Circle,
Bangalore 560 008 ... Respondents in O.P.No.774 of 2012

Prayer in O.P.No.200 of 2011: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Arbitral Award dated 22.11.2010 passed by the Arbitrator / 2nd respondent and consequently allow the claim petition of the petitioner and to direct the respondent to pay the cost of the petition.

Prayer in O.P.No.774 of 2012: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the award passed in Order No.NJR/SOTL/Arb/2009/33 dated 22.11.2010 passed by the sole Arbitrator Mr.N.Janardhana Rao, General Manager, NP-CFA.

For petitioner ... Mr.P.C.Harikumar
in O.P.No.200 of 2011 for M/s.P.C.Harikumar
& Asso.

For petitioner
in O.P.No.774 of 2012 ... Mr.K.Anbarasan

For Respondent-1

O.P.Nos.200 of 2011 and 774 of 2012

in O.P.No.200 of 2011 ... Mr.K.Anbarasan

For Respondents

in O.P.No.774 of 2012 ... Mr.P.C.Harikumar

for M/s.P.C.Harikumar
& Asso.

COMMON ORDER

These two petitions arise out of a common award passed by the Arbitral Tribunal on 22.11.2010 in a dispute that has arisen between the claimant, M/s.Sterlite Optical Technologies Ltd and the respondent, Bharat Sanchar Nigam Ltd. The parties are referred to as "Sterlite" and "BSNL" respectively.

2. O.P.No. 200 of 2011 has been filed by the "Sterlite" and O.P.No.774 of 2011 by the "BSNL". The facts in brief preceeding the filing of the above petitions by the respective parties are as follows:

(i) "Sterlite" which is a Public Limited Company had bid for a tender floated by "BSNL" for the supply of 24F of cable for its Southern Telecom Project on 01.10.2005. The case of "Sterlite" was that in or about July/August 2005, "BSNL" has circulated a letter bearing No.F.No.3-2/2004-MMT/PT-III dated 01.08.2005 informing

that an amendment has been effected to the Fall Clause with immediate effect, in and by which a change had been incorporated to Clause 24 of Section III of the standard form of contract executed by the BSNL with its vendors. The amended Fall Clause would read as follows:

*"Amendment to Clause 24 of Section III
(Fall Clause):-*

24.1. The prices once fixed will remain valid during the scheduled delivery period except for the provisions in clause 12.1 of Section III. Further, if at any time during the contract.

(a) It comes to the notice of purchaser regarding reduction of price for the same or similar equipment/service.

and / or सत्यमेव जयते

(b) the prices received in a new tender for the same or similar equipment / service are less than the prices chargeable under the contract, the purchaser for the purpose of delivery period extension, if any,

will determine and intimate the new price, taking into account various related aspects such as quantity, geographical location etc., and the date of its effect for the balance quantity / service to the vendor. In case, the vendor does not accept the new price to be made applicable during the extended delivery period and the date of its effect, the purchaser shall have the right to terminate the contract without accepting any further supplies. This termination of the contract shall be at the risk and responsibility of the supplier and the purchaser reserves the right to purchase the balance unsupplied quantity / service at the risk and cost of the defaulting vendor besides considering the forfeiture of his performance security.

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24.2(a) *The vendor while applying for extension of time for delivery of equipment / services, if any, shall have to*

provide an undertaking as "We have not reduced the sale price and / or offered to sell the same or similar equipment / service to any person / organisation including Department of central / state Government or any central / state PSU at a price lower than the price chargeable under the contract for scheduled delivery period.

(b) In case under taking as in Clause 24.2(a) is not applicable, the vendor will give the details of prices, the name (s) of purchaser, quantity etc., to the purchaser, while applying extension of delivery period."

(ii) By reason of this amendment, it was made clear that once prices have been fixed, it would remain valid throughout the scheduled delivery period as against the earlier Clause 24 which said that if at any time during the period of the contract ie. scheduled delivery period or its extended period of delivery, if a lower price is charged with reference to the very same service, then the price would be reduced to that lower price.

(iii) Since the amendment was brought in prior to the tender floated by BSNL, Sterlite by its letter dated 14.10.2005, brought to the notice of "BSNL" the said amendment and "Sterlite" had requested the "BSNL" to incorporate the amended clause 24 into the tender. However, it appeared that the said amendment was not carried out. Thereafter, an advance purchase order was placed by the "BSNL" on 05.01.2006 for the supply of 800 kms of 24F OF cable. "Sterlite" was required to furnish a Bank Guarantee which "Sterlite" had also furnished. Thereafter, "BSNL" had issued a detailed purchase order dated 07.01.2006 for the supply of 800 kms of 24F OF cable. As per the schedule, the purchase order was to be completed on or before 04.04.2006 and the total value of the order was Rs.4,32,40,000/- at a unit rate of Rs.54,050/- per km. The production of 24F OF cables was commenced by "Sterlite" and the tendered quantity was supplied by 24.01.2006 much ahead of the scheduled delivery date. Thereafter, despite several letters from "Sterlite", "BSNL" had not issued the purchase order for the balance quantity of 926 kms out of the 1726 kms bid by the "Sterlite".

(iv) Eventually by advance purchase order dated 16.05.2006, "Sterlite" was asked to supply 847 kms of 24F OF cable and as in the case of the earlier purchase order, "Sterlite" was required to furnish a Bank Guarantee which it did. That was followed by a detailed purchase order dated 30.05.2006 (which is the subject matter of the claim). The total value of the purchase order was Rs.4,97,80,350/-. The delivery was to be effected between the periods (i.e) 01.07.2006 and 30.11.2006 in a staggered manner.

(v) In the meanwhile, "BSNL" had floated a tender for the supply of a relatively smaller quantity of 575 kms of 24F OF cables for its Eastern Telecom Project at a unit rate of Rs.37,994.45 per km and Sterlite had supplied at that rate. "Sterlite" meanwhile had supplied the entire quantity under the purchase order dated 30.06.2006 in a staggered manner in which last of all the supply is dated 09.10.2006. Therefore, even under this purchase order, "Sterlite" had completed the delivery before the scheduled delivery date, namely, 30.11.2006. However, to the utter shock and surprise of "Sterlite", they had received a letter dated 08.08.2006 from "BSNL" informing them that they intended to invoke the Fall clause (i.e) Clause 24 as it existed prior to the amendment. This invocation

was objected to by "Sterlite" stating that though they were ready to make the supplies even prior to 31.05.2006, it was "BSNL", who had not placed the orders for the supply. Despite several requests, vide its series of letters to the "BSNL" not to invoke the Fall Clause, "BSNL" has not heeded to this request and by letter dated 31.12.2007, "BSNL" had expressed its helplessness stating that they have not received the amended Fall Clause 24 from the Office of the Chief General Manager, Southern Telecom Project.

(vi) Thereafter, by letters dated 21st/23rd January 2009, which were in response to the letter of "Sterlite" dated 15.12.2008, "BSNL" contended that since "Sterlite" had signed the General Conditions of Contract which included the unamended Clause 24. "Sterlite" was bound by the same and could not request for an amendment of the Fall Clause. The said letter was challenged by the "Sterlite" in W.P.(Civil) No.7255 of 2009 before the Delhi High Court. By order dated 03.03.2009, the High Court of Delhi observed that since "Sterlite" had a *prima facie* case on merits, the remedy was only to avail the arbitration Clause in the contract and they were also permitted to invoke the arbitration clause. In these circumstances, the claim petition was filed before the Arbitral Tribunal, which is the

subject matter of the present petitions.

(vii) In all, a sum of Rs.1,42,89,189/- was claimed by the "Sterlite", which was a sum of Rs.1,41,39,189/- towards the difference that had been withheld by the "BSNL" for the supplies made with effect from 27.06.2006 that is the contracted price less the price quoted for the supply to the Eastern Telecom Project on 20.06.2006 (i.e) Rs.37,994.45 apart from seeking costs of proceedings and interest @ 24% per annum.

3. The respondent had filed a counter which was in a form of a parawise comments where their primary contention was that they had not received the copy of Amended Fall Clause issued by the Central office of the BSNL. They would therefore contend that since they had not received the said letter/circular, the same had not been incorporated in the tender entered into between them and the petitioner. They would further contend that the dispute had been raised belatedly. They denied the receipt of the petitioner's letter dated 14.10.2005 marked as Ex.P3. In the counter, the respondents have admitted that the the petitioner has adhered to the delivery schedule and there has been delay in the purchase order being

placed at the BSNL's end. The primary argument which has been put forth by the respondent is that the STP rate finalized for 24F OF Cable was Rs.35,400 per Km at Kolkata on 27.06.2006 and Rs.33,369 is per kilometer on 12.10.2006 at Kerala. Therefore it is the contention of the respondent that they have taken the lowest quote namely the quote given at Kerala. It was this price that was fixed by the supplies made after 12.10.2006. The argument of the respondent was that having signed the dotted line, it is not open to the petitioner to now turn around and contend that the price variation cannot be incorporated into the existing contract. However, the Arbitral Tribunal by its award dated 22.11.2010 held that for all these supplies made on or before 08.08.2006, the rates, as mentioned in the purchase order, was to be paid, but thereafter, it was only the lower revised price that was to be paid by "BSNL" to "Sterlite". The interest was denied since the disputed amount was not withheld with a malafide intention. However, the Arbitral Tribunal had stated that if the payment was not made beyond the period of 60 days, the same would carry simple interest at the rate of 12% per annum. The Arbitral Tribunal had arrived at its conclusion on the basis of the fact that "Sterlite" had signed the tender document, in which, the unamended Clause 24 was incorporated, and the Tribunal would

observe that the said Clause was not objected to by "Sterlite" when they signed the documents. Further, as per Clause 24 in case "Sterlite" was not accepting the new price, it was well open to "Sterlite" to terminate the contract prospectively. However, such termination was to be at the risk and responsibility of "Sterlite". The Arbitral Tribunal has also observed that the letter dated 14.10.2005 sent by "Sterlite" to "BSNL" asking them to incorporate the amended Clause 24 has not been received by "BSNL" and therefore, in the light of the above, the Tribunal had passed the order, which is the subject matter of challenge in these petitions. BSNL has challenged the award with reference to the portion that was against them in O.P.No.774 of 2012 and the Sterlite has challenged that portion which is against them in O.P.No.200 of 2011.

4. Mr.K.Anbarasan, the learned counsel appearing for "BSNL" would make submissions that having accepted and signed the tender document on 01.10.2005 and later having accepted the advance purchase orders wherein the unamended Clause 24 has been extracted, it is not open to "Sterlite" to now turn around and state that they are not bound by the above Clause. Therefore, the learned counsel would submit that there is no perversity in the order

passed by the learned Arbitrator.

5. Per contra, Mr.P.C.Harikumar, learned counsel appearing for "Sterlite" would contend that the circular dated 01.08.2005 is a circular that has been issued by the "BSNL" itself and the said circular was made applicable to all its divisions with effect from the date of the circular, namely, 01.08.2005. A reading of the circular would make it clear that all the Regions/ Telecom circles / Telecom Districts etc., were directed to replace the amended clause for the existing Clause 24. The learned counsel would further submitted that "BSNL" was bound by the said circular and they could not take recourse to the signing of the document by "Sterlite" to escape the liability.

6. Heard the learned counsels for either side and perused the papers.

7. The only issue that calls for the consideration of this Court is whether the contract between "Sterlite" and "BSNL" would include the amended Fall Clause 24 or the unamended Fall Clause 24 which existed prior to 01.08.2005. A reading of the circular dated 01.08.2005 makes it clear that instructions had been given to every

Telecom Circles / Telecom Districts / Projects etc., to replace the existing Clause with the amended Clause 24 of Section 3. The said communication has been addressed to all concerned and therefore, it was imperative on the part of the various regional heads to substitute the existing Clause 24 (Fall Clause) with the amended version. The fact that such amendment has not been carried out by "BSNL" in the tender document dated 01.10.2005 cannot be held against "Sterlite". By reason of the circular dated 01.08.2005, the earlier Clause 24 had been superseded and in any contract that was entered into thereafter, the amended Clause 24 had to be read into it. The learned Arbitrator has ignored the fact that the amendment of the Clause is totally in the hands of "BSNL" and the failure to do so does not give them a right to claim under the unamended Clause. The price variation can be insisted upon only when the delivery period is sought to be extended and that to on the purchaser viz; BSNL determining the same and intimating the revision to the supplier in the instant case "Sterlite". While determining the revision BSNL has to consider the quantity, the geographical location etc. and the date from which they intend to give effect to such revision. A choice is given to the supplier to accept it or not. If the supplier refuses to accept the revision BSNL is free to terminate the agreement and

purchase the balance quantity at the risk and cost of Sterlite. An undertaking from Sterlite is also to be procured. None of these have been done at BSNL's end. The learned Arbitrator has overlooked the fact that it is mandatory on the part of BSNL to give effect to its own circular by amending the Fall Clause in all the agreements post 01.08.2005. Therefore, the Arbitral Award is in conflict with the terms of the general document and agreement, which is the subject matter of dispute.

8. Although this Court finds that the contract between the Sterlite and BSNL is bound by the amended Fall Clause 24, and the findings of the learned Arbitrator is wrong however in view of the restricted scope of interference in an award prescribed under Section 34(2) of the 1996 Act with its amendments this Court is unable to modify or correct or reverse the Award. This Court is also unable to remit the award back to the Arbitral Tribunal in view of the fact that on the final award being passed, the Arbitral Tribunal becomes functus officio and Section 32 (3) of the Act lays down that subject to the provision of Section 33 and Sub section 4 of section 37, the mandate of the Arbitral Tribunal comes to an end on the termination of the arbitral proceedings. Though the claimant is entitled to the

payment once it is held that the contract is governed by the amended Fall Clause, the same cannot be granted by this Court exercising jurisdiction under Section 34 of the Act and the remedy available is only to institute Arbitration proceedings afresh. This would definitely cause a considerable delay and would actually defeat the main objective of the Arbitration and Conciliation Act viz; speedy disposal of cases.

9. In order to appreciate the above concern it is necessary to travel back to the regime of arbitration in India prior to the enactment of the 1996 Act. The Act that was holding fort was the Arbitration Act, 1940. Under the Arbitration Act, 1940, the Court had the power to modify or correct the Award passed by the Arbitral Tribunal or remit the same back to the Tribunal. The Court had the power to modify or correct the Award in the following circumstances under Section 15 of the 1940 act.

" 15. Power of Court to modify award.

*The Court may by **order modify or correct** an award-*

(a) where it appears that a part of, the award is upon a matter not referred to

arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or

(b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or

(c) where the award contains a clerical mistake or an error arising from an accidental slip or omission."

10. Similarly, Section 16 envisaged the remission of the Award in the following circumstances:

1. if the Tribunal had not determined matters which were referred to it or determined matters not referred for arbitration where the subject matter involved cannot be separated without affecting the determination of the matters.

2. Where the award is indefinite and incapable of execution.

3. Where there is error apparent on the face of the award.

11. These provisions have been done away with under the 1996 Act. Under the 1996 Act, the Court exercising jurisdiction under Section 34 could set aside the Award only if it comes within the circumstances/grounds as contained in Section 34 (2) (a) and (b) and (2A) of the Act. Under these provisions the Court has no jurisdiction to remand or modify or correct the award but has the power only to set aside the award or dismiss the challenge to the same.

12. This Court is conscious of the fact that the Law Commission in its wisdom and the Hon'ble Supreme Court have reiterated several times over the narrow parameters within which Courts should exercise their jurisdiction under Section 34 of the Act. However we also have to consider the impact on litigants contesting / defending different kinds of arbitral disputes before different arbitral Tribunals. The litigants involved in these proceedings cover small time borrower/borrowers from small and big financial institutions, small scale industries, members of the multi-state cooperative society, etc. These litigants are not conversant with either the nuances of the Contract Act or their rights and liabilities under the Arbitration Act. In fact the THE MICRO, SMALL AND MEDIUM ENTERPRISES

DEVELOPMENT ACT, 2006 automatically brings the Small Scale Industries within the fold of the Act. There is no agreement between the parties and therefore the terms of agreement between the parties are non-existent and arbitration is held by a facilitation council consisting of members drawn from different spectra. This council sits occasionally and therefore several cases are posted on a same day, by reason of which the Tribunal, in view of paucity of time, is not able to give considerable time for the hearing and on many occasions, non speaking awards are being passed. Similar is the case of matters coming before unqualified Arbitrators some of whom are Advocates or other professionals.

13. The claimants approaching these fora are small traders, borrowers who have to wait to have their claim redressed since invariably the aggrieved party approaches the Court challenging the award on the ground that the award under Section 34 is a non speaking one or the procedure contemplated is not followed. Section 31 (3) stipulates that the Arbitral Award should state the reasons upon which it is passed unless parties have agreed that no reasons need to be given or if the Award passed is by consent. Since there is an arbitral clause existing, the aggrieved party cannot file a suit and

has to wait to have his claim redressed. Even if the challenge under Section 34 ends in their favour, they are once again relegated to a fresh round of arbitral proceedings which apart from being time consuming is also economically unviable as they would have to once again spend on fresh Arbitration proceedings.

This Court is of the opinion that the Law Commission should consider bringing about suitable amendments to Section 34 to include provisions to modify or correct or reverse such awards where the logical conclusion in a case where the challenge to the award is upheld or the award set aside is to correct or reverse the award.

14. Since the object of a speedy disposal is being scuttled by reason of a challenge to certain awards and no finality being achieved in view of the restricted regime for challenge and the consequence flowing thereof, this Court is of the considered opinion that an amendment to the Act to bring about a finality to the dispute between the parties is needed. In order to substantiate my view it is necessary to briefly extract the journey of the 1996 Act from its inception as the Arbitration and Conciliation Bill 1995 till its culmination into the 1996 with the 2015 and 2019 Amendments. The

76th report of the Law Commission which was the precursor for the Arbitration and Conciliation Act, 1996 dealt with the working of the Arbitration Act, 1940, and its pitfalls and drawbacks. The Law Commission had recommended several amendments and in Chapter 5 they had dealt with extensively about the "*proceedings in the Court on an award*". This Chapter was confined to the changes if any to Sections 15 to 19 of the Arbitration Act, 1940. The Law Commission had stated that the scheme of the 1940 Act, perceived the following:

- a) Passing Judgment in terms of an award (Section 17), or
- b) Modifying or correcting the award (Section 15), or
- c) Remit the award on any matter referred to arbitration for reconsideration by the arbitrator or umpire (Section 16), or
- d) set aside the award (Section 30).

The Scheme of the Act therefore contemplated that the Court could either accept the award as a whole or to reject it in toto or take a middle path by either modifying or remitting the same.

15. The Law Commission in the circumstances had deemed it appropriate not to effect any change in Section 15. It was thereafter that the Arbitration and Conciliation Bill, 1995 was introduced into the Parliament, but the said bill could not get the requisite legislative

sanction. Thereafter, the President of India twice promulgated the Arbitration and Conciliation Ordinance 1996 which was ultimately passed by the Parliament and received the assent of the President of India on 16.08.1996 and came into force on 22.08.1996 as the Arbitration and Conciliation Act, 1996 (hereinafter for the sake of brevity referred to as the 1996 Act). This Act was based on the UNCITRAL model law of International Commercial Arbitration, 1995 and UNCITRAL Conciliation Rules, 1980. The 1996 act repealed the earlier laws and for the first time International Commercial Arbitration was also brought within the net of the Indian Arbitration Act. The 1996 act had done away with Section 15. Section 17 was modified into the present Section 35, whereby, it was held that the arbitral award becomes final and binding on the parties and the persons claiming under them. The 1996 Act did not contemplate the Judgment being passed on the award as envisaged under Section 17 of the 1996 Act. The provisions of Section 16 got a modified version in Section 34 (4) and Section 30 was substituted as Section 34 of the 1996 Act. Interestingly, the recommendation of the Law Commission in the 76th report with reference to the continuance of Section 15 has not been adverted either in the 176th report or in the 246th Law Commission report which has suggested amendments to the

Arbitration and Conciliation Act, 1996, and which has been incorporated into Act 3 of 2016.

16. The Law Commission in its 76th report had opined that Section 15 confers the power to modify under three circumstances. Firstly, when it appears to the Court that part of the award is upon a matter which has not been referred to arbitration and such part can be severed from the other part and by such severance the decision on the matter referred would not be affected. Secondly, where the award is imperfect both in form as well as having an obvious error which can be rectified / amended without affecting the decision. Thirdly, when the award contains a clerical mistake or an error arising from an accidental slip or omission.

The Law Commission had dealt with Section 15 of the 1940 Act which related to modification and correction of awards and had observed as follows:

"5.3. It may be noted that section 15 corresponds to the Code of Civil Procedure, 1908, Second Schedule, para 12. There was no such provision in the Indian Act

of 1899. Nor is there any such provision in the English Act. Under the English Act, the Court has no power to alter or amend an award. It may be noted, that even in India, no such provision was contained in the Code of 1882 in relation to arbitration without intervention of the Court (Section 525 of the 1882 Code), and, therefore, the Court had no power to amend the award or remit it. It could either file the award or reject the application. In the absence of such a provision, the Court had either to set aside the award or to remit it. Hence the need for a provision conferring power to modify the award.

5.4. The present provision is a salutary one and we have no change to recommend in section 15."

17. The power of the Court under Section 34 of the Act has been elucidated under various judicial pronouncement by the Hon'ble Supreme Court and our High Court and other High Courts post the introduction of the 1996 Act. Useful reference may now be made to the various Judicial pronouncements of the Honorable Supreme Court and the High Courts in this regard and the extent of modification undertaken in these decision.

18. In the Judgment of the Hon'ble Supreme Court reported in **2006 (11) SCC 181, McDermott International INC Vs. Burn Standard Co. Ltd,** the Supreme Court while discussing the grounds for setting aside the Award observed that the 1996 Act cast a Supervisory role for the Court for reviewing the Arbitral Award only to test its fairness. The Court was not vested with the power to correct errors of the Arbitrators and could only quash the Award leaving the parties free to begin the Arbitration once again. The reasons for the Hon'ble Supreme Court arriving at this conclusion has been stated by them as follows:

"So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it"

The challenge was primarily on the ground that the Arbitrator had no jurisdiction to make a piecemeal award under the 1996 Act since the Arbitrator has passed a partial award (Sic : a preliminary

award) followed by an Additional award and a final award. That apart the award was challenged on its merits. The challenge was also to the refusal of the Arbitrator to implead the Oil and Natural Gas Corporation Ltd which was the Buyer from Burn Standard.

The Honorable Supreme Court ultimately invoking their Jurisdiction under Article 142 to do complete Justice between the parties had *modified the interest by reducing it from 10% to 7½ %*.

19. The learned Judges had also observed that under the 1996 Act unlike the 1940 Act it is mandatory upon the Arbitrator to assign reasons in support of the Award. Further Section 31 (3) of the Act enjoins the Arbitrator to provide reasons for the award. They had relied on ***Konkan Railway Corporation Ltd Vs. Mehul Construction Co - 2000 (7) SCC 201*** where the Honorable Supreme Court had emphasised the mandatoriness of giving reasons in the award.

20. The following Judgements also resulted in modifying the award. ***Tata Hydro-Electric Power Supply Co. Ltd and others Vs. Union of India - (2003) 4 SCC 172*** and ***Hindustan Zinc Ltd.***

Vs. Friends Coal Carbonisation – (2006) 4 SCC 445. In the above Judgements *modification to the award of the Arbitrator was with reference to the quantum of interest.* In the case of ***Krishna Bhagya Jala Nigam Ltd. Vs. G.Harischandra Reddy and another*** reported in ***(2007) 2 SCC 720***, which Judgement was also relied upon in case of ***McDermott***. Once again *modification was with reference to the interest.* In the case of ***Hindustan Zinc*** as well as the case of ***Krishna Bhagya Jala Nigam Ltd*** the modification was with consent of parties as well.

21. In the case of ***MSK Projects India (JV) Limited Vs. State of Rajasthan and another*** reported in ***(2011) 10 SCC 573*** which was the case where the private party who had submitted the tender for constructing the Bharatpur Bypass for the road from Bharatpur to Madhura had invoked the arbitration clause with reference to the following disputes.

“a) Delay in issuance of notification prohibiting entry of commercial vehicles into Bharatpur Town and diverting traffic through the bypass;

b) Collection of toll from vehicles using Bharatpur – Deeg patch of the road.”

22. The arbitral award was passed in favor of the private contractor with the Arbitrator holding a delay on the part of the state. The award was challenged by the State of Rajasthan before the District Judge, Jaipur City, Jaipur. The District Judge held in favor of the State of Rajasthan. The contractor MSK Projects took the matter on appeal to the High Court and the High Court by its order dismissed the appeal upholding the order of the District Judge. Challenging this order the said MSK Projects had moved the Honorable Supreme Court. The Honorable Supreme Court had held that the arbitrator cannot proceed beyond the terms of reference and ultimately within the intent to complete Justice had remitted the matter back to the arbitral tribunal to reconsider and adjudicate upon two issues which are framed by the Honorable Supreme Court. Therefore the Honorable Supreme Court had applied the provisions of Section 34 (4) and exercised the power of remission.

23. In the matter of ***Oil and Natural Gas Corporation Limited Vs. Western Geco International Limited – 2014 (9) SCC 263***, the issue in appeal before the Honorable Supreme Court was whether the order passed by the Division Bench of the High

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Court of the Judicature in Bombay in partly allowing the Judgement of Single Bench of the High Court with a modification by deleting the pendente lite and future interest awarded by the Tribunal. The Honorable Supreme Court has held as follows:

"We may at this stage deal with the contention urged on behalf of the respondent that the jurisdiction of the Court to set aside an arbitral award being limited to grounds set out in Section 34 of the Arbitration and Conciliation Act, 1996, this Court ought not to interfere with the same. It was contended that none of the grounds on which a Court is authorised to interfere with an arbitral award are present in the case at hand. Alternatively, it was contended that even if a contrary view is possible on the facts proved before the Arbitral Tribunal, the Court cannot, in the absence of any compelling reason, interfere with the view taken by the Arbitrators as if it was sitting in appeal over the award made by the Tribunal."

24. Ultimately, the award was modified to the extent that been detailed in paragraph no.43 of the Judgement which reads

as follows:

"43. In the result, we allow this appeal but only to the extent that out of the period of 4 months and 22 days which the arbitrators have attributed to the appellant-Corporation a period of 56 days comprising 42 days of the first interval and 14 days of the second referred to in the judgment shall be reduced. Resultantly, deductions made by the appellant-Corporation for the said period of 56 days shall stand affirmed and the award made by the arbitrators modified to that extent with a proportionate reduction in the amount payable to the respondent. No costs."

25. A Single Bench of this Court in the Judgment reported in **2013 (5) LW 264 in S.P.Periyasamy & Co. Vs. The Superintending Engineer, PWD, WRO New Veeranam Project Circle and another** dealt with the specific issue as to "Whether the Court can modify the arbitral?" The learned Judge held as follows:

"6. A plain reading of Section 34 will make it clear that the answer shall be in the negative. Nowhere in the Section it has been contemplated that the Court in which

an application under Section 34 has been filed shall have any of the powers of the appellate Court, especially to set aside the award in part or to modify the award. On the other hand, the power conferred on the Court is to see whether the award has to be set aside on specified grounds. If an award is found to be vitiated by any one of the grounds set out in Section 34, it has to be set aside in its entirety. It does not contemplate partly setting aside of the award or modification of the award.”

The learned Judge drew support from the Judgement of the Division Bench in **Mekala Traders Vs. Tamil Nadu Civil Supplies Corporation Ltd., reported in 2010-3-L.W.731.** The Learned Judge went on to state that modification was possible only within the confines.

26. However in the Judgement reported in **2014 (6) CTC 602 – Gayatri Balaswamy Vs. ISG Novasoft Technologies Ltd,** the learned Judge had struck a different note. The challenge was to an award passed in a money claim only under one head. While rejecting the claim under the other heads as also dismissing the counter claim made by the respondent. The claimant alone challenged the said

award. The learned Judge had framed two questions for consideration.

"(i) Whether in a petition under Section 34, this Court is entitled to modify the award, either by enhancing the amount awarded by the Tribunal or by granting a relief that was rejected by the Tribunal, especially in the light of the express language of Section 34?

and

(ii) If the answer to the first question is in the affirmative, whether the petitioner is entitled to the grant of reliefs that were negated by the Arbitral Tribunal?"

27. The learned Judge elaborately discussed the Judgements of the Hon'ble Supreme Court which are as follows:

a) ***Tata Hydro-Electric Power Supply Co. Ltd and others Vs. Union of India – (2003) 4 SCC 172***

b) ***Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation – (2006) 4 SCC 445.***

c) ***Krishna Bhagya Jala Nigam Ltd. Vs. G.Harischandra***

Reddy and another - (2007) 2 SCC 720

d) **McDermott International INC. Vs. Burn Standard Co Ltd - 2006 (11) SCC 181.**

28. He had also drawn parallels from the English Arbitration Act, 1996, Commercial Arbitration in Australia, Canada, United States of America and Singapore. Ultimately the learned Judge held as follows:

"51.The expression "recourse to a Court against an arbitral award" is a comprehensive and inclusive expression. Merely because such recourse is to be made in the form of an application to set aside the award, it cannot be construed that the power of the Court is limited by Section 34(1), only to set aside the award and to leave the parties in a position much worse than what they contemplated or deserved before the commencement of the arbitral proceeding. A statute cannot be interpreted in such a manner as to make the remedy worse than the disease. A narrow interpretation of Section 34(1) would actually spell doom for the arbitration regime and actually create a mischief.

52. Therefore, in my considered view, the expression "recourse to a Court against an arbitral award" appearing in Section 34(1) cannot be construed to mean only a right to seek the setting aside of an award. Recourse against an arbitral award could be either for setting aside or for modifying or for enhancing or for varying or for revising an award. The expression "application for setting aside such an award" appearing in Section 34(2) and (3) merely prescribes the form, in which, a person can seek recourse against an arbitral award. The form, in which an application has to be made, cannot curtail the substantial right conferred by the statute. In other words, the right to have recourse to a Court, is a substantial right and that right is not liable to be curtailed, by the form in which the right has to be enforced or exercised. Hence, in my considered view, the power under Section 34(1) includes, within its ambit, the power to modify, vary or revise.

53. The same conclusion can be arrived at, through a different route also. It is well settled that in a petition under Section 34, a Court does not exercise the powers of an Appellate Court. The jurisdiction vested under Section 34 is not an appellate jurisdiction. Even as per the decision in *Mc Dermott*, the Court exercises under Section 34, only a supervisory role. It is almost like a revisional jurisdiction or may be little less in its scope than a revisional jurisdiction under Section 115 of the Code of Civil Procedure. But, a revisional jurisdiction would normally include within its purview, a power to correct patent illegalities. The fact that the jurisdiction of the court under section 34 is revisional, is quite obvious. Section 34(1) comprises of two parts. The first is in clause (a), where the burden is on the party assailing the award to prove certain things. The second is in clause (b) of sub-section (1), where the court tests the award with reference to certain parameters. There is no necessity for splitting sub-section (1) of section 34 into 2 clauses, one imposing an obligation upon the party to establish certain facts and another imposing a duty upon

the court to satisfy itself about a different set of factors, unless the jurisdiction sought to be conferred is revisional in nature. Therefore, I am of the view that this Court has power under Section 34 to modify or vary the award passed by the arbitral Tribunal."

This Judgement which was taken up on appeal by the respondent has been upheld by the Division Bench with a modification. The Division Bench had observed as follows:

"We wish to observe that the Court, in exercise of Jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996 shall vary or modify the amount awarded without disturbing the factual finding and such course is legally permissible under Section 34 of the said Act."

29. The view taken by the Supreme Court in "**McDermott International INC. Vs. Burn Standard Co Ltd**" reported in **[2006 (11) SCC 181]** has been relied upon by the Delhi High Court in the Judgment reported in **[2015 SCC Online Del 13394]** in the case of "**Steel Authority of India Limited Vs. Indian Council of**

Arbitration & another" The learned Judge has stated as follows:

48. Notwithstanding the issue whether a Court has the power to remit the award under Section 34 of the Act, the fact is that this Court had by a judgment dated 9th May, 2012 set aside the award rejecting GE shipping's claim but had not remitted the matter. Thus the claims of GE Shipping remained to be finally adjudicated. Admittedly, the parties had agreed to resolve the disputes arising out of the charter party by arbitration. Thus, it would not be open for SAIL to avoid resolution of such disputes through arbitration. At this stage, it is necessary to refer to the following observations of the Supreme Court in *Mcdermott International Inc. (supra)* whereby the Supreme Court had held as under:-

" The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the Court is envisaged in few

circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

49. A plain reading of the aforesaid passage also clearly indicates that once an award has been set aside, the parties would be free to begin the arbitration once again. Thus, in my view, the contention that GE Shipping could not initiate the arbitration after the decision of this Court Section 34 of the Act, cannot be accepted."

30. The Delhi High Court in another judgment in ***Angel Broking Ltd. vs Sharda Kapur*** reported in **2017 VAD (Delhi) 310** was called upon to consider the scope of Award where the claimant had received the money claim but had not been granted the alternative prayer of return of shares as well as grant of interest. The learned Single Judge of the Delhi High Court had observed that the sole issue therefore was whether the Court hearing the challenge to the Award could modify the award and grant the additional relief or the alternative relief which was denied by the Arbitrator.

31. Though the Arbitrator passed an award insofar as it related to the money claim however, with reference to the additional and alternative relief the award was silent. The learned Judge has observed as follows:

"6. The sole issue in this case is that whether the court below or this Court has a power under Section 34 of the Act to modify the Award and grant additional reliefs not granted by the Award or grant the alternative relief's which were prayed for in the arbitration proceedings but were denied by the Award.

7. In my opinion, the issue is no longer res integra and this issue has been decided by a judgment of this Court in the case of **Puri Construction P. Ltd. and Ors. Vs. Larsen And Toubro Ltd. and Anr., MANU/DE/1316/2015**. The Division Bench of this Court has considered the two divergent views as regards the power of the court to modify the Award by granting reliefs which are not granted by the Award, and this Court held that courts do not have the power to modify the Award and grant additional or alternative relief's which were not granted by the Arbitration Tribunal. It was held that civil courts hearing objections under Section 34 of the Act have only power to set aside the Award and thereafter parties are free to again invoke arbitration proceedings to seek the relief's which have been denied to them."

Ultimately the learned Judge had held that the claimant was not entitled to the relief of return of shares and denied the relief namely the prayer for modifying the Award to grant the additional relief or alternative relief.

32. The learned Judge would further submit that under the 1996 Act, the power to remit the award has also been taken away and would observe as follows:

"if the power to remit the matter to the arbitrator is read into Section 34, it would render inexplicable the deliberate omission by Parliament of a provision analogous to Section 16 of the Arbitration Act, 1940 in the present Act. Section 16 of the 1940 Act specifically armed courts with the power to remit the matter to arbitration. Noticeably, the scope of remission under the present Act is confined to that prescribed in sub-section (4) of Section 34."

Ultimately, the learned Judge drawing from the ratio laid in the case of Puri Construction Private Ltd. and Others Vs. Larsen And Toubro Ltd. and Another as held as follows:

"In view of the ratio in the case of Puri Construction P. Ltd.(supra) the Award could only be set aside and the parties thereafter had to invoke arbitration proceedings for seeking reliefs which were denied but held by the court hearing objections under Section 34 of the Act to be wrongly denied."

33. In the Judgement in the case of **Poysha Oxygen Pvt Ltd, Vs. Ashwini Suri & others – 2009 SCC OnLine DEL 2216**, the Single Judge of the Delhi High Court had opined that modification within the confines of interference as provided under the act was permissible. The learned Judge had arrived at this conclusion on the following basis:

"35.However, the Apex Court in Numaligarh Refinery Ltd. Vs. Daelim Industrial Company Ltd. MANU/SC/3629/2007 has not disapproved the modification of the award done by the District Court and the High Court in appeal in that case and itself also modified the award in terms of its findings. In fact in Mcdermott International Inc also, the Apex Court after laying in para 55 that under Section 34 the court is only empowered to set aside, in the last para modified the award. Similarly, the interest rate awarded by arbitrator has been modified in Krishna Bhagya Jala Nigam Ltd. vs. G. Harischandra Reddy, MANU/SC/0705/2007."

34. In the Judgment reported in **2007 (5) Mh.L.J. 174 –**

Union of India Vs. Arctic India, Bangalore, the Bombay High Court a challenge under Section 34 of the Act was made. The learned Judge discussing the power of the Court to modify had observed as follows:

"The Supreme Court in Mcdermott International Inc. v. Burn Standard Co. Ltd. and Ors. - (2006) 11 SCC 181 has modified the award on merit as well as on interest. In Tata Hydro-Electric Power Supply Co. Ltd. v. Union of India - 2003(4) SCC 172, the Supreme Court has modified the award. Therefore, as there is no bar under the act to modify the award and in the fact and circumstances of the case I am acceding to the submission made by the counsel appearing for the petitioner. Only for the above extent, the award stands modified for the above reasons."

Ultimately the award was modified only to the extent of the grant of damages on the ground of delay in favor of the respondents.

35. All the Judgments cited supra arise out of the pre-amendment regime of the 1996 Act. The Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) came into effect on

23.10.2015.

36. By reason of the amendment Explanation 1 and 2 of Section 34 (2) was substituted and Section 34 (2A) and Section 34 (5) & (6) was inserted. After the Amending Act came into force the Hon'ble Apex Court dealing with the scope of interference under Section 34 of the Act had passed the following Judgement.

(a) The Supreme Court in the Judgment in ***Kinnari Mullick Vs. Ghanshyam Das Damani*** reported in **(2018) 11 SCC 328** was called upon to answer as to whether Section 34(4) of the Arbitration and Conciliation Act empowers the Court to relegate the parties the Arbitral Tribunal after having set aside the Arbitral Award in question and more so suo moto in the absence of any application being made by either party to the arbitral proceedings.

The learned Judge after extracting the provisions of Section 34 (4) of the Act would observe that from a reading of the above provision it is clear that the Court can defer the hearing of the application under Section 34 on a written request being made by a party to enable the Arbitral Tribunal to resume the Arbitral proceedings or to take such other action as in the opinion of the

Arbitral Tribunal would eliminate the grounds for setting aside the Award. The quintessence for exercising this power is that the Arbitral Award has not been set aside.

The learned Judges had observed as follows therein:

"No power has been invested by Parliament in the Court to remand the matter to the Arbitral Tribunal except to adjourn the proceedings for the limited purpose mentioned in sub-section (4) of Section 34. This legal position has been expounded in McDermott International Inc. In para 8 of the said decision, the Court observed thus : (Bhaskar Industrial case, SCC Online Kar)

"8... Parliament has not conferred any power of remand to the Court to remit the matter to the Arbitral Tribunal except to adjourn the proceedings as provided under sub section (4) of Section 34 of the Act. The object of sub-section (4) of section 34 of the

Act is to give an opportunity to the Arbitral Tribunal to resume the arbitral proceedings or to enable it to take such other action which will eliminate the grounds for setting aside the arbitral award."

16. In any case, the limited discretion available to the Court under Section 34(4) can be exercised only upon a written application made in that behalf by a party to the arbitration proceedings. It is crystal clear that the Court cannot exercise this limited power of deferring the proceedings before it suo motu. Moreover, before formally setting aside the award, if the party to the arbitration proceedings fails to request the Court to defer the proceedings pending before it, then it is not open to the party to move an application under Section 34(4) of the Act. For, consequent to disposal of the main proceedings under Section 34 of the Act by the

Court, it would become functus officio. In other words, the limited remedy available under Section 34(4) is required to be invoked by the party to the arbitral proceedings before the award is set aside by the Court."

(b) In a recent judgment of the Hon'ble Supreme Court reported in **2019 (8) SCALE 41 - Ssangyong Engineering Vs. National Highways Authority**, the Hon'ble Supreme Court was considering the orders passed by the Delhi High Court, both the Single Judge (under section 34 of the Act) and the Division Bench (under Section 37 of the Act) challenging the Award passed by the Arbitral Tribunal consisting of three arbitrators. Ultimately, the claim was allowed and the challenge to the Award under Section 34 was rejected by the Single Bench of the Delhi High Court which was confirmed by the Division Bench. This Judgment threw up the issue as to what was the regime governing challenge under Section 34 of the Act - Whether it is the 1996 Act or the 2015 Act. The Hon'ble Supreme Court clearly held that all the petitions filed under Section 34 of the Act, post 23.10.2015, would be governed by the provisions of the Amended Act, 2015. The Hon'ble Supreme Court also held

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that ignoring the binding effect of the Supreme Court would also be regarded as violations of the fundamental policy of India.

37.The dispute involved in the above case was whether the Contract between the appellant and the respondent would be governed by the terms of the Contract or the Circular issued by the respondent on 15.12.2013 whereby a new formula for determining indices was used by applying a "linking factor" based on the year 2009-2010. The dispute arose as the respondent had contended that the Circular would have to be applied to the Contract stipulated. They further directed that the Contractor should furnish an undertaking/affidavit that this price adjustment is acceptable to them and that would make any claim whatsoever on this account in future after payment. The respondent has insisted that this Circular should be applied to the Contract in question which was not acceptable to the appellant. Therefore, the question before the Tribunal was whether the price adjustment would continue as per the Contract or as per the Circular?.

38.The Tribunal consisted of three Arbitrators and the majority held that the Circular would apply within the contractual stipulations

and rejected the claim. The dissenting award was that neither the Circular nor the guidelines could be applied as they were *de hors* the Contract between the parties. The dissenting Member therefore allowed the claim in full.

39. The Section 34 petition filed by the appellant was rejected by the Single Judge of the Delhi High Court which was confirmed by the Division Bench in the Section 37 appeal. One of the issues which arose for consideration was whether the Section 34 petition would be governed by the Arbitration and Conciliation (Amendment) Act, 2015 or the 1996 Act. Following the Judgment in **BCCI v. Kochi Cricket Private Limited [(2018) 6 SCC 287]**, the Bench held that in respect of all the petitions under Section 34 of the Act filed after 23.10.2015, it is the 2015 Act which would apply. The Bench had exhaustively dealt with various judicial pronouncements with reference to the scope of interference by the Courts over the Awards of the Arbitral Tribunal. The learned Judges had observed in the said Judgment as follows with reference to this scope of interference of Court in a Section 34 Application:

"Under no circumstance can any Court interfere with an arbitral award on the ground that justice has

not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this Judgment

40. After discussing the grounds of challenge under Section 34 and its scope juxtaposed with various judicial pronouncements the learned Judges ultimately observed as follows:

"Under the Scheme of Section 34 of the 1996 Act, the disputes that were decided by the majority award would have to be referred afresh to another arbitration. This would cause considerable delay and be contrary to one of the important objectives of the 1996 Act, namely, speedy resolution of disputes by the arbitral process under the Act. Therefore, in order to do complete justice between the parties, invoking our power under Article 142 of the Constitution of India, and given the fact that there is a minority award which awards the appellant its claim based upon the formula mentioned in the agreement between the parties, we uphold the minority award, and state that it is this award, together with

interest, that will now be executed between the parties."

This was also a case where the Honorable Supreme Court exercised its power under Article 142 of the Constitution of India.

41. A conspectus of the Judgments prior to the amending Act 3 of 2016 would indicate that Courts can modify the Award, however, to a very limited extent relating to interest, reduction of damages granted etc, without moving out of the confines of Section 34. With the dicta laid in the recent Judgment in ***Ssangyong Engineering Vs. National Highways Authority [2019 (8) SCALE 41]***, where the Hon'ble Supreme Court has held that "*Under no circumstance can any Court interfere with an arbitral award on the ground that Justice has not been done in the opinion of the Court*" the power to modify becomes negligible.

42. After the 1996 Act had come into effect though the power to modify was being exercised to a limited extent the power to correct as provided under Section 15 of the 1940 Act ceased to be exercised by the Courts in view of the language of Section 34 of the 1996 Act. It is for this reason that in cases similar to the case on hand despite setting aside the award on the ground of perversity and

patent illegality this Court is unable to correct the award by allowing the claim as it would amount to reversing the award.

43. In the above circumstances, since the award suffers from a patent illegality the award is liable to be set aside. Consequently O.P.No.200 of 2011 is allowed and O.P.No.774 of 2012 stands dismissed. The parties therefore revert to the pre-arbitration status.

44. In the light of the discussion in Paragraphs 9 to 39 supra regarding the restricted scope for interference by the Courts in a Section 34 application to modify or remit or correct the award which in given cases, results in the object of the Act not being achieved, this Court is of the considered opinion that the Law Commission should revisit the power to modify or correct the award in the light of the recommendation contained in the 76th Law Commission Report.

11.12.2019

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P.T.ASHA. J,

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