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

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Judgement pronounced on: 20.12.2022

+ **FAO(OS) (COMM) 70/2021**

MBL INFRASTRUCTURES LTD

..... Appellant

Through: Ms. Anusuya Salwan, Ms. Nikita Salwan, Mr. Abhishek Singh Pundir, Mr. Bankim Garg and Mr. Chaitanya Bansal, Advocates.

versus

**TELECOMMUNICATION CONSULTANTS
OF INDIA**

..... Respondent

Through: Mr. Ratan K. Singh, Sr. Adv. with Mr. Nikhilesh Krishnan, Advocate.

+ **FAO(OS) (COMM) 58/2021**

**TELECOMMUNICATION CONSULTANTS
INDIA LTD**

..... Appellant

Through: Mr. Ratan K. Singh, Sr. Adv. with Mr. Nikhilesh Krishnan, Advocate.

versus

MBL INFRASTRUCTURES LTD

..... Respondent

Through: Ms. Anusuya Salwan, Ms. Nikita Salwan, Mr. Abhishek Singh Pundir, Mr. Bankim Garg and Mr. Chaitanya Bansal, Advocates.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE TALWANT SINGH

TALWANT SINGH, J.:

FAO(OS) (COMM) 70/2021

and Conciliation Act, 1996 (in short “Act”) read with Section 13 of the Commercial Courts Act filed by MBL Infrastructure Limited (MBL), challenging judgement dated 10.02.2021 passed in OMP (COMM) 507/2020, limited to the setting aside of the Award with respect to Claim No.1 (partially) and Claim No.7 (B) (C) and (D). The prayer clause of the appeal is reproduced here under:

“a) Allow the present appeal and set aside the impugned judgment dated 10.02.2021 in OMP (Comm.) No.507 of 2020 titled "Telecommunication Consultant India Ltd. Vs. M/s MBL Infrastructures Ltd" in so far as the award with respect to Claim no. 1 (partially) and claim no. 7 (B) (C) & (D) have been partially set aside by this Hon'ble Court.

b) Grant cost of the present proceeding in favour of the appellant and against the respondent; and

c) Issue any other and further order (s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.”

2. In brief facts, it is mentioned that Haryana State Roads & Bridge Development Corporation Ltd. (HSRDC) invited tenders for construction of certain flats at Hisar. The respondent, Telecommunication Company India Ltd. (TCIL) submitted the tender on 22.07.2008, which was accepted for a contract price of Rs.32,29,49,874/- vide letter dated 21.08.2008. A performance guarantee up to 5% of the contract was furnished by TCIL to the HSRDC as per the terms of the contract.

2.1 TCIL approached MBL to execute the project on ‘back-to-back basis’ with TCIL getting margin of 2.5% of the value of the contract. Agreement dated 17.09.2008 was executed between MBL and TCIL. It was agreed that TCIL was to deduct its 2.5% share and release 97.50% of the payment received from HSRDC to MBL immediately. An amended Agreement was also executed on 31.10.2008 between the parties. The work was completed to the entire satisfaction of HSRDC on 31.11.2011.

2.2 On 01.02.2010, TCIL certified that the performance of MBL was

found to be good and it was technically and financially sound. Again on 27.04.2013, TCIL certified the performance of MBL as 'very good'. On 06.06.2013, MBL wrote to TCIL, submitting a Completion Certificate along with a cheque of Rs.10,00,000/- issued by HSRDC to TCIL. On 19.07.2013, HSRDC issued a certificate that the work had been successfully completed on 30.11.2011 and the Defect Liability Period had also expired on 25.06.2013. On 22.07.2013, MBL requested TCIL to release the original Performance Bank Guarantee in the sum of Rs.1,61,47,490/- and Invoice Payment Guarantee of Rs.60,00,000/-.

2.3 MBL also requested TCIL to release the long outstanding dues along with interest at the rate of 18% per annum. Instead of releasing the Performance Bank Guarantee, TCIL sought encashment of the same by approaching bankers of MBL. At that stage, MBL approached this Court and filed a petition under Section 9 of the Act being OMP No.782/2013. *Status quo* was ordered on 12.08.2013. In the meantime, TCIL encashed the bank guarantee and got a Demand Draft prepared in its favour. On 25.09.2013, TCIL was requested to deposit the entire amount of Demand Draft in this Court. MBL was forced to file another petition under Section 9 of the Act, being OMP No.797/2013, in respect of the Invoice Payment Bank Guarantee. TCIL wanted to get the said bank guarantee also encashed.

2.4 This Court vide order dated 13.08.2013 was pleased to direct TCIL not to encash the bank guarantee till the next date of hearing. On 14.09.2013, MBL again demanded release of payments and to discharge the Performance Bank Guarantee and refund of the Security Deposit. TCIL refused to make the payments, so MBL invoked the arbitration clause of the agreement vide its letter dated 24.09.2013. Both MBL and TCIL appointed their nominated arbitrators but on account of disagreement between the

nominated arbitrators, MBL had to approach this Court for appointment of a Presiding Arbitrator by filing OMP No.996/2013. This Court was pleased to appoint retired HMJ J.K. Mehra as the Presiding Arbitrator and it was further directed by this Court that petition under Section 9 of the Act be placed before the Arbitral Tribunal so constituted.

2.5 Statement of Claim was filed by MBL before Arbitral Tribunal under 9 different heads. TCIL had filed its Statement of Defense alongwith counter-claim under three heads.

3. Pleadings were completed; parties led their respective evidence.

4. On account of unfortunate and untimely demise of HMJ J.K. Mehra, this Court substituted the presiding Arbitrator as HMJ Reva Khetarpal (retired). The Majority Award was made and published by HMJ Reva Khetarpal and Mr. O.P. Gaddhyan on 20.01.2020, allowing certain claims.

4.1 On 23.01.2020, the Minority award was delivered by Mr. Vipin Kumar, co-Arbitrator. MBL filed an application in OMP No.782/2013 for release of the amount of Performance Bank Guarantee on 30.01.2020. This Court issued the notice. TCIL consented to deposit the amount before this Court, so an order in this regard was passed on 13.10.2020.

4.2 TCIL filed a petition under Section 33 of the Act for correction of the Award on 05.03.2020. MBL filed reply to the same. The majority Arbitrators, vide order dated 25.06.2020, observed that the learned counsel for the respondent had made a statement with regard to 'no objection' regarding the release of Performance Bank Guarantee. TCIL challenged the finding of the majority Award dated 20.01.2020 under Section 34 of the Act being OMP (COMM) No.507/2020. TCIL restricted its arguments only to Claim No.1,2,7 and 9. However, in the course of the arguments the respondent further did not press their objection on Claim No.9.

4.3 Learned Single Judge heard the parties and vide judgement dated 10.02.2021, set aside the Award partially with respect to Claim No.1 and Claim No.7. The appellant, MBL being aggrieved, has filed the present appeal with respect to the findings of the learned Single Judge regarding Claim No.1 and Claim No.7 on the grounds that there is a limited scope of interference in the case of Arbitral Awards; the Court in challenge to an Award, cannot substitute its own view with the view held by the learned Arbitrator; the finding of the learned Single Judge where he has interfered with the finding of the majority Award, has to be set aside; the majority arbitral Tribunal had passed the order after considering all the documents and evidence on record in respect of Claim No.1 and the said finding of fact cannot be brushed aside; the majority Arbitral Tribunal had directed refund of excess WCT lying with the TCIL and that finding has to be maintained.

4.4 The next ground of challenge is that in the majority Award, TCIL was directed to refund the excess WCT of Rs.28,18,608/-. The finding of learned Single Judge that amount of Rs.31,43,111/- paid as WCT is over and above the amount payable towards Sales Tax/WCT of Rs.1,79,44,465/- and the same stood included in the deduction of Rs.4,73,04,188/- is contrary to the evidence on record. The Court, in a petition under Section 34 of the Act, cannot interfere in a finding of the fact as well as law by an Arbitral Tribunal as the Arbitral Tribunal is the final arbitrator of the facts as well as law.

4.5 The further ground of challenge is that the finding of the learned Single Judge of setting aside the Award with respect to Claim No.1 to the extent of Rs.59,61,715/- is an interference with the Award and the same is liable to be set aside.

4.6 Another ground is that under Claim No.4, it was held by the majority

Arbitrators that TCIL was not entitled to make deduction for deployment of its staff and they would be liable to pay MBL a sum of Rs.8,00,000/- and claim of Rs.32,20,000/- made by MBL was rejected. The learned Single Judge has interfered in the said Award. It is well settled that the interference in the arbitration Award by the High Court is limited and circumscribed.

4.7 The MBL has also challenged that in Claim No.7, the finding of the learned Single Judge for setting aside the claim of Rs.10,00,000/- on account of damages towards wrongful invocation of the bank guarantee is liable to be reversed. The arbitral Tribunal, after considering the facts and circumstances of wrongful encashment of bank guarantees, awarded a sum of Rs.10,00,000/- as just and fair compensation to MBL. The Tribunal is well within its jurisdiction to award punitive damages and the finding of the learned Single Judge, setting aside the said award to the tune of Rs.10,00,000/-, is liable to be reversed. Moreover, the finding of the learned Single Judge in setting aside the Award under Claim No.7 for Rs.60,00,000/- towards damages for failure of TCIL to confirm performance certificate of MBL is liable to be reversed and finding of the majority Tribunal deserves to be upheld.

4.8 It was held by the Tribunal that TCIL had been far from being fair in not confirming the certificate dated 24.10.2013 issued by TCIL. The learned Single Judge has erred in setting aside the award of damages under Section 55 and 73 of the Contract Act as it is well settled that the arbitral Tribunal is within its powers to quantify the damages. The finding of the learned Single Judge that there was no evidence in this regard, is not borne from the record, as MBL had led evidence of its Chairman and Managing Director (CW-1) in support of its claim of the damages and the arbitral Tribunal can adopt any procedure for computation of damages having regard to the facts and

circumstances of the case.

5. In view of the above, it has been prayed that the impugned judgement of the learned Single Judge dated 10.02.2021 may be set aside in so far as it has interfered with Award related to Claim No.1 (partially) and Claim No.7 (B) (C) and (D).

5.1 The matter was taken up for initial hearing on 29.04.2021. Efforts were made to get the matter settled in arbitration but it is noted in the order sheet dated 04.06.2021 that the mediation between the parties had failed. On 29.11.2021 during arguments, MBL confined its challenge to ground no.7 only.

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6. It is to be noted that TCIL has also preferred an FAO (OS) (COMM) 58/2021 assailing the same order passed by the learned Single Judge, dated 10.02.2021. The prayer clause of the appeal is reproduced here under:

“a) Allow the present Appeal and set aside the impugned judgment dated 10.02.2021 in OMP (Comm) No. 507 of 2020 titled as Telecommunication Consultant India Ltd.(TCIL) Vs. M/s MBL Infrastructure Ltd., except to the extent findings therein are in favour of the appellant, and set aside the majority award in respect of claim nos. 1, 2, 4 to 9 of MBL and non granting cost of HISSAR Suit, counter claim no. 3 to the extent as challenged by the appellant in Section 34 petition;

b) Grant cost of the present proceeding in favour of the appellant and against the respondent; and

c) Issue any other and further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.”

6.1 It is mentioned in the said petition that in para No.175(a) of the majority Award dated 20.01.2020, in respect of Claim No.1, MBL was awarded a sum of Rs.5,14,48,210/- and in respect of Claim No.7, MBL was awarded a sum of Rs.72,71,257/- but the Hon'ble Single Judge in paras 58-70 of the impugned judgement has held that the learned majority Arbitrators had wrongly granted Rs.99,81,715/- against Claim No.1 and set aside the

said excess claim. Further, in para Nos.76-78 of the impugned judgement, it was held that the majority Arbitrators had wrongly granted Rs.70,00,000/- out of Rs.72,71,257/- under Claim No.7 to MBL and set aside the said amount. The Hon'ble Single Judge has also corrected the error of computation of amount under Claim No.7 in para No.84 of the majority Award. Hence, it has been submitted that the Hon'ble Single Judge has modified the majority Award while dealing with Claim No.1 and Claim No.7 of the MBL, as awarded by the learned majority Arbitrators but this modification, instead of setting aside the award, is impermissible in view of the law as settled in '*McDermatt International Inc. v. Burn Standard Co. & Ors. 2006 (11) SCC 181*'.

6.2 It has been further submitted that the same position has been reiterated by the Hon'ble Supreme Court in '*Dakshin Haryana Bijlivitran Nigam Ltd. v. Navigant Technologies Pvt. Ltd.*' 2021 SCC Online SC 157, so it has been submitted that modification of the majority Award in respect of Claim No.1 and Claim No.7 is impermissible and the Award ought to have been set aside, leaving the parties free to begin the arbitration again, if it is so desired.

6.3 It is also submitted on behalf of the TCIL that the security deposit amount of Rs.50 lacs withheld by the principal employer, HSRDC is liable to be deducted from the amount claimed by MBL. The sum of Rs.50 lacs was withheld by HSRDC while passing 1st running bill to 6th running bill on account of security deposit. The total amount due till 17th running bill is liable to be reduced by Rs.50 lacs as the said amount is still withheld by HSRDC.

6.4 The claim of MBL regarding gross work done to the tune of Rs.44.86 crores was considered in the majority Award without reducing the sum by

Rs.50 lacs of security deposit still withheld by HSRDC. Moreover, TCIL has been also directed to pay 12% interest on the said security deposit of Rs.50 lacs without TCIL receiving the security deposit from HSRDC. So, the amount of Rs.4,14,66,495/- granted by the Hon'ble Single Judge to MBL is also liable to be reduced by Rs.50 lacs.

6.5 Another gross illegality pointed out by TCIL is that MBL has been given an adjustment of Rs.86,39,753/- towards interest payable by it to TCIL on mobilization advance and invoice payment less TDS in terms of the agreement dated 17.09.2008 and 31.10.2008 up to 11th/12th running bill but adjustment of further interest of Rs.16,47,872/- up to 16th RA bill towards interest on mobilization advanced and interest on cost of cement has not been given. The finding of the majority Arbitrators that this amount of Rs.16,47,872/- was wrongly withheld by TCIL is without any basis or any material in support of the same. The total interest up to 16th RA bill was Rs.1,02,87,625/- but the learned majority Arbitrators considered the same only to the extent of Rs.86,39,753/-.

6.6 The entitlement of TCIL towards the remaining interest amount of Rs.16,47,872/- is to be adjusted towards the claim of MBL awarded by Hon'ble Single Judge.

7. It has been submitted that there was a gross illegality committed by Hon'ble Single Judge while giving finding in para No.69 that there was no dispute regarding MBL's claim to the extent of Rs.8,00,000/- towards cost of manpower recovered by TCIL, while making payments of the RA bills. In para No.70 of the impugned judgement, the learned Single Judge has held that Claim No.1 of the MBL was liable to be reduced by Rs.40,20,000/- which admittedly included Rs.8,00,000/- claimed by MBL in Claim No.4, then the Claim No.4 to the extent of Rs.8,00,000/- cannot be sustained.

7.1 The TCIL had in total deducted Rs.47,90,000/- towards manpower in terms of clause 3 of the agreement dated 17.09.2008 and this deduction was not disputed by MBL till completion of work on 30.11.2011 and this issue was raised for the first time in arbitration. MBL deemed to have admitted the said deductions till 17th RA bill and the said deductions cannot be questioned now.

7.2 Up to 13th RA bill, the learned Majority Arbitrators had accepted this deduction as 3 engineers were deployed by TCIL, so they could not have declined the same from the 14th RA bill to the 17th RA bill, where deputation letters of 3 engineers during the said period have been duly proved on record along with an affidavit, so the Claim No.1 was liable to be reduced by Rs.47,90,000/- and not only by Rs.32,20,000/-.

8. It has been further submitted on behalf of TCIL that non consideration of its plea that MBL seeking Rs.7,36,358/- towards refund by Birla Cement and granted by the majority Arbitrators under claim No. 1 was totally perverse, so the Claim No. 1 was further liable to be reduced by the said amount.

9. Further perversities in the impugned judgment have been pointed out by TCIL that the undisputed recovery claimed by HSRDC in 18th and final bill of Rs.1,32,08,868/-, upholding the grant of bank charges of Rs.18,318/- and Rs.2,71,257/-; not dealing with the plea the TCIL regarding illegal grant of declaratory award under Claim No.2 of the MBL; not dealing with the plea of TCIL that legal fee of Rs.30 lakhs granted to MBL was without any basis and exorbitant; not dealing with the plea of at TCIL that MBL was not entitled to cost; not dealing with the plea that grant of interest @ 12% per annum and that too from 24.12.2013 was illegal and beyond the prayer made by MBL; not dealing with non-grant of counter-claim regarding cost of

Hisar suit and cost of counter-claim and legal cost of the appellant. Under these circumstances, the appellant TCIL has prayed for setting aside of the judgement of the learned Single Judge except the findings, which are in favour of the appellant.

9.1 On the above grounds, TCIL has prayed for setting aside of the impugned judgement as detailed in para no.6 above.

Proceedings before Appellate Court:

10. On the very first date, the following order was passed:-

“2. One of the grounds that Mr. Ratan Kumar Singh, learned Senior Counsel, who appears for the appellant, raises, is that, the learned Single Judge could not have modified the award. In other words, the argument is that the learned Single judge could have, possibly, set aside the impugned award in the given facts but not modified it.

2.1 In support of this plea, Mr. Singh relies upon the judgments of the Supreme Court in McDermott International Inc. vs. Burn Standard Co. Ltd., 2006 (11) see 181 and Dakshin Haryana Bijli Vitran Nigam Ltd. vs. Navigant Technologies Pvt. Ltd., 2021 SCC OnLine SC 157.

3. Broadly, according to Mr. Singh, the learned Single Judge, via the impugned judgement dated 10.02.2021, has modified claim nos. 1 and 7.

4. Ms. Anusuya Salwan, who appears for the respondent, refutes this submission, advanced by Mr. Singh.

5. We are of the view that this is a case where the parties could attempt a settlement via mediation with regard to the claims and counter-claims obtaining in the matter.

6. It is not in dispute that the principal employer in respect of the subject work was HSRDC. It is also not in dispute that the appellant had sub-contracted the work to the respondent.

6.1 It is not disputed that the appellant was entitled to retain 2.5% of the amount that it was to receive from HSRDC. In other words, the respondent was to receive 97.5% of the amount, albeit, subject to the statutory and contractual deductions.

7. The claims and counter claims veer around the aforesaid aspects, which, in a sense, is the core of the matter.

8. Mr. Singh and Ms. Salwan say that they will have no objection if this Court were to refer the matter to a mediator appointed by the Delhi High Court Mediation and Conciliation Centre [in short the "Centre"].

9. Accordingly, authorized representative of the parties and/or their respective counsels will present themselves, before the mediator, appointed by the Centre, albeit, via videoconferencing mechanism, on 22.04.2021 at 3.30 p.m.

10. The mediator will render the report before the next date of hearing.

11. List the matter before the Court on 25.05.2021.”

10.1 The matter was referred to mediation, however, nothing positive came out of the mediation. In the meantime, MBL came under the sway of the National Company Law Tribunal (NCLT), Kolkata Branch and it was informed by the learned Senior Counsel appearing on behalf of TCIL on 19.07.2021 that the resolution plan of MBL was stayed by the Hon’ble Supreme Court. On the other hand, it was informed by Ms. Anusuya Salwan, counsel appearing on behalf of MBL that the Resolution Professional appointed by NCLT has been discharged.

DISCUSSION:

11. Arguments were heard. Both the parties also filed their brief written submissions. We have gone through the file. It is to be noted that on 29.11.2021, Ms. Anusuya Salwan stated that in the appeal preferred by MBL Infrastructure Ltd., the prayer is confined to Claim no.7, i.e., for damages of Rs.10 lacs awarded for wrongful encashment of bank guarantee and Rs.60 lacs awarded as damages as per findings of the Majority Arbitral Tribunal, were reversed by the learned Single Judge.

11.1 It is to be noted here that vide impugned judgement dated 10.02.2021, the learned Single Judge has made modifications/corrections in the impugned Award dated 10.01.2020 as under:

I. No.	Claim/Counter-claim MBL/TCIL	Majority Tribunal Award	Amount (₹) modified by learned Single Judge
(i)	Against Claim No.1	₹ 5,14,48,210/-	₹ 4,14,66,495/-
(ii)	Against Claim No.4 (No change)	₹ 8,00,000/-	₹ 8,00,000/-
(iii)	Against Claim No.7	₹ 72,71,257/-	₹ 2,89,575/-
	Total	₹ 5,95,19,467/-	₹ 4,25,56,070/-
Less:	Counter Claim No.2 of the Respondent (No change)	₹ 3,82,653/-	₹ 3,82,653/-
	Net	₹ 5,91,36,814/-	₹ 4,21,73,417/-

11.2 The Claim no.1 made by MBL in its claim statement was for payment against 17th Running Account Bill of Rs.5,53,47,958/-, revised to Rs.5,14,48,210/-. The Arbitral Tribunal had awarded Rs.5,14,48,210/- i.e., the entire amount as claimed by MBL in its award. However, the learned Single Judge in the impugned judgement dated 10.02.2021 has modified the Award/corrected the errors as discussed in the following paragraphs of the impugned judgement:

“58. The next issue to be examined is with regard to the payment of WCT amounting to ₹31,43,111/- made by TCIL to the Assessing Officer, VAT/WCT and the amount of ₹28,18,608/- paid to MBL from the amounts of ₹59,34,715/- withheld by TCIL on the aforesaid account.

59. There is no dispute that TCIL had withheld a sum of ₹59,61,715/- which was due and payable to MBL. The said amount had been withheld on account of payment of WCT. The Contract dated 27.12.2005, entered into between TCIL and MBL, expressly included a clause requiring MBL to bear the applicable taxes including WCT. The said clause reads as under:

“(v) M/s MBL undertakes that it shall adhere to the laws pertaining to all types of taxes including but not limited to income tax, VAT, CST and LST, WCT, labour, insurance etc. Further, MBL agrees

that VAT, CST and LST, WCT as payable on TCIL's contract value shall be the M/s MBL from any dues of any other contract whatsoever of any nature entered into by TCIL with M/s MBL as a set off."

60. In view of the above, MBL was liable to pay WCT in respect of works sub-contracted to it. TCIL had produced a payment voucher dated 24.04.2009, evidencing a deposit of ₹31,43,111/- with the Assessing Officer, VAT/WCT. In addition, it had also produced a payment voucher dated 14.10.2009, evidencing the payment of ₹28,18,608/- to MBL. It had, thus, accounted for a sum of ₹59,61,715/- withheld by it. MBL does not dispute that it was liable to pay WCT and had, accordingly, withdrawn its Claim No.3. The sum of ₹31,43,111/- deposited by TCIL being payment against WCT was, thus, on account of MBL.

61. There is no real dispute that the amount of ₹28,18,608/- was refunded to MBL and the amount of ₹31,43,111/- was deposited by TCIL against WCT; essentially, the controversy arises as the Arbitral Tribunal has not accounted for the said amounts while computing the amount payable to by MBL to TCIL up to the 17th RA Bill (Claim No.1). This is clearly a patent error on the fact of the award.

62. Ms. Salwan had earnestly contended that the amount of ₹31,43,111/- deposited by TCIL as WCT and ₹28,18,608/- paid by it to MBL was from the amount of ₹59,61,715/- payable to MBL which was withheld by TCIL and therefore, there was no error in the impugned award. The said contention does not address the point in issue. There is no dispute that TCIL had withheld ₹59,61,715/- from the payments due to MBL and had partly used the said sum to pay WCT (₹31,43,111/-) and had refunded the balance. Thus, indisputably, TCIL was required to be provided the necessary credit for the same while calculating the amounts payable by TCIL to MBL as determined under Claim No.1. This would become apparent if one examines the manner in which the amount claimed under Claim No.1 was determined by the Arbitral Tribunal.

63. The Arbitral Tribunal had noted that the amount disbursed up to 17th Running Bill was a sum of ₹44,88,11,636/-. TCIL's margin at the rate of 2.5% worked out to ₹1,12,15,291/- and, MBL was entitled to receive the balance amount of ₹43,73,96,345/- (being 97.5% of ₹44,88,11,636/-).

64. The Arbitral Tribunal also held that MBL was liable to bear certain charges/amounts aggregating ₹4,73,04,188/- [(i) WCT ₹1,79,44,465/-; (ii) Labour Cess ₹44,86,116/-; (iii) Testing Charges ₹1,68,394/-; (iv) Deductions towards steel other than RINL/Steel ₹36,99,150/-; (v) TDS ₹87,47,972/-; (vi) Insurance Charges ₹8,22,372/-; (vii) TCIL Sales Margin (a) at the rate of 0.25% on materials ₹3,17,199/- and (b) Interest on materials, Mobilisation Advance and Invoice Payment less TDS ₹86,39,753/-; and (viii) Withheld by

HSRDC towards steeletc. ₹24,78,812/-].

65. In addition to the sum of ₹4,73,04,188/-, MBL was also liable to pay for the material supplied by TCIL, which was valued at ₹12,08,81,304/- less ₹7,36,358/-, refunded by Birla Cement Corporation Ltd. towards material.

66. Admittedly, MBL had received ₹21,84,99,001/- (which did not include ₹28,18,608/-). The Arbitral Tribunal had, thus, computed the amount payable by TCIL to MBL at ₹5,14,48,210/- as under:

	Amount payable up to the 17 th RA Bill	₹43,73,96,345/-
Less:	Deductions	₹4,73,04,188/-
Less:	Amount payable for materials adjusted by refund from Birla Cement (₹12,08,81,304 less ₹7,36,358/-)	₹12,01,44,946/-
Less:	Amount received from TCIL (according to MBL)	₹21,84,99,001/-
	Total	₹5,14,48,210/-

67. Admittedly, the amount of ₹31,43,111/- paid as WCT is over and above the amount payable towards Sales Tax/WCT of ₹1,79,44,465/- which is included in the sum of ₹4,73,04,188/- as mentioned above. Thus, TCIL was also entitled to credit for the said amount, which has been omitted by the Arbitral Tribunal while computing the deductions liable to be paid by MBL. The amount of ₹28,18,608/- received by MBL has also been accounted for in the above calculation. Either the Arbitral Tribunal was required to give TCIL the credit for the entire amount of ₹59,61,715/- (₹31,43,111/- plus ₹28,18,608/-) in the above calculation as deduction on account of amount payable by MBL or in the alternative, add the amount of WCT of ₹31,43,111/- to the amount of deduction on account of charges payable by MBL and also add the figure of ₹28,18,608/- to the amount admittedly received by MBL. Either way, the amount of Claim No.1 would necessarily be reduced by the said amount of ₹59,61,715/-. In view of the above, Claim No.1 awarded to MBL to the extent of ₹59,61,715/- has to be set aside and consequently, the said amount awarded under Claim No.1 is required to be reduced to ₹4,54,86,495/- (₹5,14,48,210/- less ₹59,61,715/-).

68. There is also merit in TCIL's contention that the aforesaid amount of claim is required to be further reduced as the Arbitral Tribunal had not considered the Project Supervision Charges liable to be paid by MBL (which formed a part of Claim No.4). Admittedly, in terms of the contract, TCIL was required to depute three Engineers for coordination between TCIL, MBL and HSRDC. The salaries of the said TCIL employees at the rate of ₹40,000/- per month, per Engineer were required to be borne by MBL. There is no dispute that this was over and above TCIL's margin of 2.5% of the disbursement, for the execution of the contract. During the course of the contract, TCIL had

withheld a sum of ₹40,20,000/- from the amounts payable to MBL. MBL claimed that the said deductions were unjustifiable as TCIL had not engaged or posted any Engineer at this site.

69. The Arbitral Tribunal considered the said claim (Claim No.4) and held that MBL's claim for deductions made on account of the salaries of Engineers prior to 13th RA Bill (which was till 30.10.2010) was time barred. TCIL had withheld a sum of ₹28,20,000/- till 13th RA Bill. Thus, to this extent MBL's claim was rejected as time barred. Out of the remaining amount of ₹12,00,000/- withheld by TCIL, the Arbitral Tribunal found that MBL's claim to the extent of ₹8,00,000/- was merited as TCIL had not deputed Engineers, as claimed by it. In other words, the amount of ₹4,00,000/- (that is, ₹12,00,000/- less ₹8,00,000/-) withheld by TCIL was held to be justified. Thus, in all, MBL's claim to the extent of ₹32,20,000/- (being ₹28,20,000/- plus ₹4,00,000/-) out of the total sum of ₹40,20,000/- withheld by TCIL, was rejected and balance of ₹8,00,000/- was awarded in favour of MBL. None of the parties have disputed the reasoning of the Arbitral Tribunal in sustaining MBL's claim to the extent of ₹8,00,000/- and rejecting it to the extent of ₹32,20,000/- (₹28,20,000/- on account of being time barred and ₹4,00,000/- as being justified). The controversy is limited to the question of not accounting for this amount in the amount as computed to be payable to MBL under Claim No.1. The Arbitral Tribunal had expressly noted that it was not considering the claim regarding the salaries of Engineers (Project Supervision) under Claim No.1 as it was examined separately as Claim No.4. There can be no cavil with that. Plainly, after having rejected MBL's claim to the extent of ₹32,20,000/-, the Arbitral Tribunal ought to also have credited TCIL with the said amount, while determining the amount payable to MBL as determined. Thus, the amount payable to MBL as determined under Claim No.1 is required to be further reduced by a sum of ₹32,20,000/-. Or, in the alternative by ₹40,20,000/- but sustaining the award of ₹8,00,000/- under Claim No.4.

70. In view of the above, the amount determined as payable to MBL under Claim No.1 is required to be reduced by a sum of ₹59,61,715/- as discussed above and a further sum of ₹40,20,000/-.

71. Accordingly, the amount awarded against Claim No.1 to the extent of ₹99,81,715/- (₹59,61,715/- plus ₹40,20,000/-) is set aside. Claim No.1 to the extent of ₹4,14,66,495/- requires no interference by this Court."

12. Broadly speaking, the learned Single Judge has found fault with the way in which the Arbitral Tribunal had dealt with sum of Rs.59,61,715/-, which was withheld by TCIL on account of WCT. As per the learned Single

Judge, it was the duty of MBL to pay WCT. TCIL, out of the withheld amount, had deposited Rs.31,43,111/- with the Assessing Officer, VAT/WCT on 24.04.2009 and vide payment voucher dated 14.10.2009, made a payment of Rs.28,18,604/- to MBL. As per the learned Single Judge, the Arbitral Tribunal has not accounted for the said amounts while computing the amounts payable to MBL by TCIL up to the 17th Running Account Bill and there is a patent error on the face of the Award.

12.1 The second fault found by the learned Single Judge in the Award is regarding non-consideration of Project Supervision Charges, which were liable to be paid by MBL. TCIL had withheld a sum of Rs.40,20,000/- from the amounts payable to MBL but MBL had claimed that the said deductions were unjustified as TCIL had not engaged or posted any engineer at the site. As per the Arbitral Tribunal, the deductions made till 13th Running Account Bill till 30.10.2010 were found to be time-barred. Till that date, a sum of Rs.28,20,000/- was withheld by TCIL. Out of the remaining Rs.12,00,000/- withheld by TCIL, a sum of Rs.8,00,000/- was awarded to MBL on the ground that TCIL had not deputed the required number of Engineers to supervise the project, so the remaining amount of Rs.4.00 lakhs withheld by TCIL, was found to be justified.

12.2 In view of the above, the learned Single Judge has concluded that a sum of Rs.32,20,000/-, out of the total sum of Rs.40,20,000/- withheld by TCIL, was to be considered as payable by MBL under Claim No.1. So, as per learned Single Judge, a sum of Rs.99,81,715/- is liable to be deducted from the Claim No.1, which was decided in favour of MBL to the tune of Rs.5,14,48,210/- and award to the said extent was set- aside.

13. Next intervention made by the learned Single Judge is against Claim No.7 of MBL. The MBL has raised this claim on account of losses incurred

due to non-fulfillment of reciprocal obligations by TCIL; due to prolongation of the contract; losses and damages caused due to invocation of the bank guarantees; losses and damages caused due to non-confirmation of the Completion/Performance Certificates, etc. The Majority Arbitral Tribunal had awarded Rs.72,71,257/- on this account. The learned Single Judge has reduced it to Rs.2,89,575/- with the following reasoning:

“72. This Court also finds merit in the contention that an amount of ₹10,00,000/- awarded to MBL for damage on account of wrongful invocation of the Bank Guarantee is not sustainable (Claim No.7).

73. MBL had submitted two Bank Guarantees to TCIL. A Performance Bank Guarantee in the sum of ₹1,61,47,490/- (hereinafter ‘PBG’) and a Bank Guarantee in the sum of ₹60,00,000/- to secure payments of invoice (hereinafter ‘IBG’). MBL contended that TCIL had illegally and arbitrarily invoked the said Bank Guarantees, resulting in a loss of ₹3,48,75,000/- per annum. MBL had premised the said claim on the basis that it had been granted non fund based limits (bank guarantee/LCs etc.) to the extent of ₹465/- crores and as a result of invocation of the Bank Guarantees, the bank had increased the commission charges from 0.5% per annum to 1.25% per annum. Thus, resulting in an additional cost of ₹3,48,75,000/- per annum. In addition, MBL also claimed that there was an additional cash outflow of ₹23.5 crores on account of the banks demanding cash margin for the non-fund based limits of Bank Guarantees/LC of ₹465/- crores granted to MBL. Apart from the claim of damages, MBL also claimed that it had incurred a cost of ₹12,63,202/- towards the extension of two Bank Guarantees: ₹9,91,945/- for extending the PBG and ₹2,71,257/- for extending the IBG.

74. The Arbitral Tribunal found in favour of MBL that TCIL had illegally and arbitrarily failed to release the PBG. IT held that TCIL was obliged to release the PBG (Performance Bank Guarantee) after the defect liability period had expired. The Arbitral Tribunal reasoned that HSRDC had issued a certificate to TCIL clearly recording that defect liability period had expired on 25.06.2013 and had, accordingly, released the Performance Bank Guarantee issued by TCIL. TCIL was, therefore, under a corresponding obligation to release the PBG submitted by MBL. The Tribunal also found in favour of MBL that TCIL was required to release the IBG as there was no dispute regarding payment of the invoice amounts. Accordingly, the Tribunal held that MBL was entitled to receive the bank charges for the extension of PBG after expiry of the defect liability period plus 28 days from the expiry of defect liability period (23.07.2013) till the date it was invoked (04.10.2013) was computed at ₹18,318/-. In addition,

the Tribunal held that MBL was also entitled to receive bank charges for extension of IBG which was subsisting, as on the date of the award. The same was computed for the period 04.07.2013 to 04.01.2019 at ₹2,71,257/-. Accordingly, the Tribunal awarded a sum of ₹2,89,575/- (₹18,318 plus ₹2,71,257) as bank charges for extension of Bank Guarantees. This Court finds no infirmity with the said decision.

75. Insofar as the remaining claim is concerned, the Tribunal found that there was no material on record to show that MBL had availed of the Bank Guarantee limits to the extent of ₹465 crores. On the contrary, the evidence on record indicated that MBL had utilized the limits only to the extent of ₹90 crores. MBL could also not establish the additional cash outflow of ₹23.5 crores by way of cash margin increased on account of wrongful invocation of the Bank Guarantees. Similarly, the Arbitral Tribunal also did not find sufficient evidence to support MBL's claims of a pay out of increased commission of ₹3,48,74,000/- per annum. The Tribunal held that MBL's claim that it had lost its creditworthiness was also unsubstantiated as the letters from State Bank of Mysore placed on record indicated that State Bank of Mysore had enhanced the cash credit limits available to MBL. Accordingly, the Tribunal also held that the said claim for increased commission was "not tenable". Having held the above, the Arbitral Tribunal also found in favour of MBL that TCIL had wrongfully, illegally and arbitrarily invoked the Bank Guarantees (PBG and IBG). And, such invocation was, wholly without any justification. The Arbitral Tribunal also noted that whereas TCIL's counsel had contended that TCIL had no objection if the award is made by the Tribunal for releasing the PBG and the amounts lying with this Court in favour of MBL, but in the written submissions TCIL had taken a contrary stand. Considering the wrongful conduction on the part of TCIL, the Arbitral Tribunal awarded ₹10,00,000/- in favour of MBL, as it was the view of the Arbitral Tribunal, that the same was a "just and fair compensation" to MBL for wrongful and illegal invocation of the Bank Guarantees by TCIL.

76. The said award is, plainly, unsustainable. After the Arbitral Tribunal had examined MBL's contention and had found that MBL had not substantiated its claims for the losses allegedly incurred by it, it could not proceed to award any amount as fair compensation for the wrongful invocation of the Bank Guarantees. This Court is of the view that the impugned award is patently illegal to the aforesaid extent. There is no evidence on record to establish the measure of damages. Thus, the award of ₹10,00,000/-, is without any basis and is patently illegal.

77. This Court is also unable to sustain the Arbitral Award to the extent it awards a sum of ₹60,00,000/- against TCIL for its failure to confirm the certificate of performance issued by it to MBL. Admittedly, TCIL had issued a certificate certifying that MBL's performance was very

good on parameters of technical proficiency, financial soundness, mobilization of adequate T & P, mobilization of manpower and general behaviour. It had also certified that the quality of the work performed by MBL was very good. The said certificate had been furnished by MBL to M/s RITES Ltd., in connection with another bid. However, TCIL failed to confirm to RITES Ltd. that it had issued the said certificate. Mr. Singh contended that TCIL was right in not confirming the said certificate as disputes had arisen between TCIL and MBL. The said contention is, plainly, unmerited. TCIL was merely to confirm the authenticity of the said certificates to RITES Ltd. Since, there is no dispute that it had issued the certificate in question, there was, thus, no reason for it not to confirm the same. The Tribunal had noted the conduct of TCIL and found that despite being put to notice that failure to confirm the said certificate would result in a substantial loss to MBL, TCIL had not submitted the certificate in question. The Tribunal found that the conduct of TCIL was *mala fide* and it had not confirmed the certificate for ulterior motives resulting in a loss to MBL. This Court finds no infirmity with the said view. There is ample evidence on record, which indicates that TCIL's conduct has been less than fair. This Court finds no reason to interfere with the conclusion of the Arbitral Tribunal.

78. Having stated the above, this Court is unable to sustain the award of ₹60,00,000/- as compensation for "*the loss and damages caused to MBL due to non-confirmation of the performance certificate issued by TCIL*". This is because, there was no evidence on record to establish that MBL had suffered a loss to the aforesaid extent. The impugned award to the aforesaid extent is, accordingly, set aside.

14. The sum and substance of the above intervention by the learned Single Judge is that, a sum of Rs.10.00 lacs awarded to MBL for damages on account of wrongful invocation of the bank guarantee, did not find favour with him. The said amount was awarded by the Arbitral Tribunal being just and fair compensation to MBL for wrongful and illegal invocation of the bank guarantee by TCIL but in the considered view of the learned Single Judge, the award of Rs.10.00 lacs is not sustainable as MBL had failed to substantiate its claim for losses allegedly incurred by it, so there could not have been any fair compensation for wrongful invocation of the bank guarantees. The Award is held to be patently illegal to the said extent.

Moreover, it is held that there is no evidence on record to establish the

measure of damages, hence, the award under Claim No.7 to the extent of Rs.10.00 lacs was set aside.

14.1 Similarly, the award of sum of Rs.60.00 lacs in favour of MBL and against TCIL, which was made on account of failure of TCIL to confirm the Certificate of Performance issued by TCIL to MBL, was also set aside. The learned Single Judge has agreed with the contention of MBL, that since a certificate was issued certifying the performance of MBL as 'very good' and the said certificate was submitted by MBL to RITES (A Government of India Undertaking) and as TCIL was merely required to confirm the authenticity of the said certificate to RITES, so there was no reason available to TCIL for not confirming the same. TCIL did not authenticate the said certificate and due to the said conduct of the TCIL, which was *mala fide*, so, loss was caused to MBL.

14.2 The learned Single Judge also agreed that TCIL's conduct has been less than fair and the learned Single Judge found no reason to interfere with the conclusion of the Arbitral Tribunal in this regard. But surprisingly, the learned Single Judge set-aside the awarded amount of Rs.60.00 lacs as compensation on the ground that there was no evidence on record to establish that MBL had suffered a loss to the aforesaid extent. Some calculation error has been also pointed out as the amount awarded by the Arbitral Tribunal ought to have been Rs.72,89,575/- instead of Rs.72,71,257/- and after deducting Rs.70,00,000/-, out of this corrected amount, the learned Single Judge was pleased to sustain the award against Claim No.7 to the extent of Rs.2,89,575/-.

15. The learned Single Judge while hearing the objections, was exercising his jurisdiction under Section 34 of the Act. The said Section is reproduced

here under:

Signature Not Verified
Digitally Signed By: MAMTA
RANI

Signing Date: 23.12.2022 11:04 AM (COMM) 70/2021 & 58/2021

“34. Application for setting aside arbitral award. — (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application [establishes on the basis of the record of the arbitral tribunal that]—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

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

(b) the Court finds that—

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

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

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

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

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

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

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

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

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

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

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

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

[(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.]

[(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.]

16. It is to be noted that in the present case, the arbitral Award dated 20.01.2020, passed by the Majority Arbitrators, was modified/set aside/corrected. Section 34(2)(a)(iv) deals with separation of the claims and

it gives power to the Civil Court to set aside only part of the arbitral Award but the overriding condition is that the said part of the Award, which can be set aside, should have dealt with a dispute, which is beyond the terms of submission to arbitration or the decision made was beyond the scope of submission to arbitration.

16.1 In the present case, where parts of Claim Nos.1 and 7 of the MBL have been set aside, the learned Single Judge has neither pointed out nor exercised his powers under Section 34(2)(a)(iv) of the Act. There is no other power available with the learned Single Judge to set aside a part of the award. The award can only be set aside as a whole. Moreover, the learned Single Judge has no power to modify the award as the same is beyond the scope of Section 34 of the Act.

16.2 Similarly, if there are errors in the Award, the learned Single Judge, again, has no power to correct the said errors in the Award, as the power in this regard is vested with the arbitrators themselves in view of the provisions of Section 33 of the Act, which is reproduced here under:

“33. Correction and interpretation of award; additional award.—(1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties—

(a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers the request made under sub-section

(1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

(3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).

(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.”

16.3 The law in this regard is very clear. It is not in doubt that under the Arbitration Act, 1940, the Court had power to modify or correct an Award as provided under Section 15 of the Arbitration Act, 1940. Under Section 16 of the Arbitration Act, 1940, the Court had power to remit the Award back to the arbitrators. These two powers have been expressly taken away after promulgation of the Arbitration and Conciliation Act, 1996.

17. It is again to be noted here that sub-Section (4) of Section 34 of the Act gives power to the Court to adjourn the proceedings, giving an opportunity to the Arbitral Tribunal to resume its proceedings or to take any other action to eliminate the grounds for setting aside the arbitral Award. The said power is to be exercised on the specific request by a party. No such request was made, so there was no occasion even to remit the matter to the Arbitral Tribunal.

17.1 The law in this regard was settled by the Hon’ble Supreme Court in the matter of *McDermott International Inc. v. Burn Standard Co. & Ors.*

2006 (11) SCC 181’:

“52. 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 arbitration again if it is desired.** 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.” (*Emphasis supplied*)

17.2 In view of the above settled position of law, which was reiterated by the Hon’ble Supreme Court in number of judgements, it is clear that the Civil Court has no power to correct the errors of the Arbitrators. The only option open to the Civil Court is to quash the Award and the parties may again begin the arbitration, if it is so advised.

17.3 In the present case, the learned Single Judge has taken upon himself the responsibility of correcting the errors committed by the Arbitrators and has partly set-aside the Award, which is not permissible. The only course open to the learned Single Judge was to quash the Award and leave the parties free to take appropriate action, if he had found that there were numerous errors in the approach of the Majority Arbitrators.

18. In the matter of ‘*NHAI v. M Hakim and Anr. (2021) Vol 9 SCC 1*’, the Hon’ble Supreme Court has reiterated the law and has held as under:

“16. What is important to note is that, far from Section 34 being in the nature of an appellate provision, it provides only for setting aside awards on very limited grounds, such grounds being contained in sub-sections (2) and (3) of Section 34. Secondly, as the marginal note of Section 34 indicates, “recourse” to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-sections (2) and (3). “Recourse” is defined by P. Ramanatha Aiyar’s Advanced Law Lexicon (3rd Edn.) as the enforcement or method of enforcing a right. Where the right is itself truncated, enforcement of such truncated right can also be only limited in nature. **What is clear from a reading of the said provisions is that, given the limited grounds of**

challenge under sub-sections (2) and (3), an application can only be made to set aside an award. This becomes even clearer when we see sub-section (4) under which, on receipt of an application under sub-section (1) of Section 34, the court may adjourn the Section 34 proceedings and give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or take such action as will eliminate the grounds for setting aside the arbitral award. Here again, it is important to note that it is the opinion of the Arbitral Tribunal which counts in order to eliminate the grounds for setting aside the award, which may be indicated by the court hearing the Section 34 application.

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19. The statutory scheme under Section 34 of the Arbitration Act, 1996 is in keeping with the UNCITRAL Model Law and the legislative policy of ***minimal judicial interference in arbitral awards.***

XXXX

41. As has been pointed out by us hereinabove, *MsDermott [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181]* has been followed by this Court in *Kinnari Mullick [Kinnari Mullick v. Ghanshyam Das Damani, (2018) 11 SCC 328; (2018) 5 SCC (Civ) 106]*. Also, in *Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd. [Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd., (2021) 7 SCC 657]*, a recent judgement of this Court also followed *McDermott [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181]* stating that there is no power to modify an arbitral award under Section 34 as follows : (*Dakshin Haryana Bijli Vitran Nigam case [Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd., (2021) 7 SCC 657]*, SCC p. 676, para 44)

“44. In law, where the court sets aside the award passed by the majority members of the Tribunal, the underlying disputes would require to be decided afresh in an appropriate proceeding. Under Section 34 of the Arbitration Act, ***the court may either dismiss the objections filed, and uphold the award, or set aside the award if the grounds contained in sub-sections (2) and (2-A) are made out. There is no power to modify an arbitral award.***”

4.2 ***It can therefore be said that this question has now been settled finally by at least 3 decisions [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181], [Kinnari Mullick v. Ghanshyam Das Damani, (2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106], [Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd.,***

(2021) 7 SCC 657] of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in *Redfern and Hunter on International Arbitration*, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, ***the “limited remedy” under Section 34 is coterminous with the “limited right”, namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996.”*** ***(Emphasis supplied)***

19. It is clear from the ratio of the above-mentioned judgements that the Civil Court can either set-aside the Award or affirm the Award under Section 34 of the Act, but the law does not give power to a Civil Court to correct or modify the Award. The Hon’ble Telangana High Court in CMA No.1264/2012 vide judgment dated 27.01.2022 titled ‘***Mrs. Raqya Bee & Anr. v. S.R. Constructions & Anr.***’, has held that the Civil Court is not competent to alter or modify the Award of Arbitrator in a petition filed under Section 34 of the Act.

20. In our considered view, the impugned judgement dated 10.02.2021 passed by the learned Single Judge in OMP (COMM) 507/2020 cannot be sustained. Accordingly, the impugned judgment is hereby set aside. Resultantly, the Majority Award dated 20.01.2020 will govern the rights of the parties.

21. Both the appeals are disposed of in these terms.

**TALWANT SINGH
(JUDGE)**

**RAJIV SHAKDHER
(JUDGE)**

Signature Not Verified
Digitally Signed By: MAMTA
RANI

Signing Date: 23.12.2022 11:04 AM
F140 (OS) (COMM) 70/2021 & 58/2021