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O.S.A Nos.195 & 196 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.07.2024

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR

and

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI

O.S.A Nos.195 & 196 of 2021

and

C.M.P.Nos.8271 & 8291 of 2021

in

O.S.A Nos.195 & 196 of 2021

O.S.A.No.195 of 2021

Airports Authority of India
Represented by its Asst. General Manager
Engg. (C) Project Division I
Meenambakkam,
Chennai-27.

... Appellant

Vs.

M/s.URC Construction (P) Ltd.,
No.13, (Old No.H-102)
Periyar Nagar, Erode - 638 001.

.. Respondent

Original Side Appeal No.195 of 2021 filed under Order XXXVI Rule

1 of the Original Side Rules read with Clause 15 of Letters Patent under

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Section 13(1) of Commercial Courts Act, 2015, praying to set aside the order dated 23.01.2020 passed in O.P.No.108 of 2019 by allowing the above appeal.

O.S.A.No.196 of 2021

Airports Authority of India
Represented by its Senior Manager Engg. (C)
Project Division IV
Project Office at 2nd Floor, Link Building
Chennai Airports Project
Chennai-600 016.

... Appellant

Vs.

M/s.URC Construction (P) Ltd.,
Rep. by its Authorised Signatory
Mr.V.Ganesan, Manager
No.13 (Old No.H-120) Periyar Nagar
Erode - 638 001.

.. Respondent

Original Side Appeal No.196 of 2021 filed under Order XXXVI Rule 1 of the Original Side Rules read with Clause 15 of Letters Patent under Section 13(1) of Commercial Courts Act, 2015, praying to set aside the common order dated 23.01.2020 passed in O.P.No.1068 of 2018 insofar as enhancement of interest portion from 6% p.a. to 12% p.a. on the amount



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awarded in respect of claims 1, 2 and 3 are concerned and allow the above appeal.

For Appellant in both OSAs : Mr.M.S.Krishnan
Senior Counsel
instructed by Mr.V.Lokesh Kumar

For Respondent in both OSAs : Mr.P.J.Rishikesh
along with Ms.Pravartha . J

COMMON JUDGMENT

[Judgment of the Court was made by M.SUNDAR, J.,]

This common order will now dispose of the captioned three intra-Court Appeals i.e., 'Original Side Appeals' {'OSAs' for the sake of brevity} and two 'Civil Miscellaneous Petitions' {hereinafter 'CMPs' for the sake of brevity} thereat.

2. Captioned OSAs have been filed in this 'Commercial Appellate Division' {hereinafter 'CAD' for the sake of brevity} assailing a 'common order dated 23.01.2020 made in O.P.Nos.1068 of 2018 and 108 of 2019' {hereinafter 'impugned common order' for the sake of convenience, clarity and brevity} on the file of Commercial Division of this Court.

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3. When the captioned matter was taken up, Mr.M.S.Krishnan learned Senior Counsel for 'Airports Authority of India' {'AAI' for the sake of brevity} and Mr.P.J.Rishikesh, learned counsel along with Ms.Pravartha .J are before us.

4. Learned Senior Counsel for AAI and learned counsel for respondent very fairly submitted that the central theme in the captioned matters is modification of an award by a Section 34 Court i.e., principle that a Section 34 Court shall not modify an award is the obtaining position today vide *Hakeem* case [*Project Director NHAI Vs. M.Hakeem* reported in (2021) 9 SCC 1]. This Court is conscious that the question as to whether the power of modification can be read into Sections 34 and 37 of 'the Arbitration and Conciliation Act, 1996 (Act 26 of 1996)' {hereinafter 'A and C Act' for the sake of brevity} is a question which has been referred to a Larger Bench by a three member Bench of Hon'ble Supreme Court. To be noted, on this aspect, learned counsel on both sides fairly submitted that captioned matters are directly and squarely covered by another order dated



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24.06.2024 made by this Bench in O.S.A.Nos.118 of 2020 & 218 of 2021 and CMPs thereat [ICMC Case]. To add specificity, we clarify that we make it clear that only this aspect is covered and not facts as the facts in ICMC case and case on hand are completely different.

5. In the light of the aforementioned common submission, we deem it appropriate to extract and reproduce our entire order dated 24.06.2024 in ICMC case and the same reads as follows:

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 24.06.2024

CORAM

THE HONOURABLE Mr.JUSTICE M.SUNDAR

and

*THE HONOURABLE Mrs.JUSTICE K.GOVINDARAJAN
THILAKAVADI*

O.S.A.No.118 of 2020 and O.S.A.No.218 of 2021

and

C.M.P.No.8978 of 2021 in O.S.A.No.218 of 2021

O.S.A.No.118 of 2020

*M/s.ICMC Corporation Ltd.,
36, Ambattur Industrial Estate
Chennai - 600 058
Tamil Nadu.*

.... Appellant

Vs

*M/s.Electronics Corporation of Tamil Nadu Ltd.,
692, Anna Salai, Nandanam*



O.S.A Nos.195 & 196 of 2021

Chennai - 600 035.

Tamil Nadu

... Respondent

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Prayer : Original Side Appeal filed under Clause 15 of the Letters Patent read with Section 37 of Arbitration and Conciliation Act, 1996 read with Order 36 Rule 1 of Original Side Rules, praying to set aside the fair and decreetal order dated 24.01.2020 passed in O.P. No.821 of 2019 insofar as it interferes with Arbitral Award dated 22.08.2019 passed by the learned Arbitrator, and consequentially restore the Arbitral Award in its entirety by allowing the O.S.A along with costs including complete reimbursement of the cost of extension of Bank Guarantee till 23/01/2020 with interest @ 15% and pass any other orders deemed fit and necessary in the circumstances of this case.

O.S.A.No.218 of 2021

Electronic Corporation of Tamil Nadu Limited

692, Anna Salai, Nandanam

Chennai - 600 035.

.... Appellant

Vs

ICMC Corporation Limited

36, Ambattur Industrial Estate

Chennai - 600 050

Respondent

...

Prayer : Original Side Appeal filed under Clause 15 of the Letters Patent read with Section 37 of Arbitration and Conciliation Act, 1996 read with Order 36 Rule 1 of Original Side Rules, praying to modify the order passed in O.P. No.821 of 2019 dated 24.01.2020 and set aside the award and allow the original petition as prayed for.

O.S.A.No.118 of 2020:

For Appellant : Mr.M.S.Krishnan,
Senior Counsel
for Mr.J.James

For Respondent : Mr.M.Vijayan
assisted by Ms.Bensi Rema
for M/s.King and Partridge



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O.S.A.No.218 of 2021:

*For Appellant : Mr.M.Vijayan
assisted by Ms.Bensi Rema
for M/s.King and Partridge*

*For Respondent : Mr.M.S.Krishnan, Senior Counsel
for Mr.J.James*

COMMON JUDGMENT

This common consent judgment/order will now dispose of the captioned intra-court Appeals i.e., 'Original Side Appeals' [hereinafter 'OSAs' for the sake of brevity] and captioned 'Civil Miscellaneous Petition' [hereinafter 'CMP' for the sake of brevity] in O.S.A.No.218 of 2021.

2. Owing to the trajectory the captioned matters took in the hearing before this Court, it is really not necessary to dilate much on facts. In other words, factual matrix in a nutshell i.e., short facts shorn of granular particulars will suffice.

3. Factual matrix in a nutshell is that the genesis of the matter is constituted by two contracts; 'contract dated 14.02.2013' [hereinafter 'I Contract' for the sake of brevity, convenience and clarity] and 'another contract dated 15.07.2013' [hereinafter 'II Contract' for the sake of brevity, convenience and clarity] between 'ICMC Corporation Limited' [hereinafter 'ICMC' for the sake of brevity] and 'Electronic Corporation of Tamil Nadu Limited' [hereinafter 'ELCOT' for the sake of brevity, convenience and



clarity]; that I Contract is for supply of 3,00,000 laptops and II Contract is for supply of 26,000 laptops; that the laptops were to be supplied by ICMC to ELCOT; that disputes erupted; that a writ petition was filed in this Court and an order was made by a Single Judge; that this was carried in appeal vide an intra-Court appeal; that a Division Bench made an order in the intra-Court appeal; that the matter was further carried to Hon'ble Supreme Court; that Hon'ble Supreme Court disposed of the matter by directing the parties to take steps towards appointment of Arbitrator, besides directing ELCOT to pay the disputed sum to ICMC subject to issuance of bank guarantee pending arbitration; that the parties by consent constituted Hon'ble 'Arbitral Tribunal' [hereinafter 'AT' for the sake of brevity, convenience and clarity]; that Justice (Retd) Ajit Prakash Shah, a former Hon'ble Chief Justice of this Court and Delhi High Court, was the sole Arbitrator ; that Hon'ble AT entered upon reference, adjudicated upon the arbitral disputes between ICMC and ELCOT and rendered a detailed award dated 22.08.2019; that this award shall be referred to as 'impugned award' for the sake of convenience; that the impugned award was assailed by ELCOT in Section 34 Court {to be noted, the Arbitration and Conciliation Act, 1996 (Act 26 of 1996), which shall hereinafter be referred to as 'A and C Act' for the sake of brevity} in Commercial Division of this Court; that the Commercial Division of this Court [a Hon'ble Single Judge] in and by an 'order dated 24.01.2020' ['impugned order' for the sake of convenience and clarity] disposed of the Section 34 petition saying impugned award is 'partly set aside' i.e., set aside with regard to



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declaration that imposition of 'Liquidated Damages' ['LD'] qua II Contract is illegal and made a consequential direction for payment of amounts withheld as LD under II Contract with interest thereon; that both ELCOT and ICMC are on 'intra-Court appeals' i.e., 'captioned appeals' before this Court {to be noted, captioned 'O.S.A. No.118 of 2020' which shall hereinafter be referred to as 'I OSA' has been preferred by ICMC and captioned 'O.S.A. No.218 of 2021' which shall hereinafter be referred to as 'II OSA' has been preferred by ELCOT}; that captioned matters are now before this Bench.

4. This Court having captured a thumb nail sketch of facts i.e., broad facts imperative for appreciating this simple consent order and the trajectory the matter has taken in reaching this Court now proceeds with the kernel of the Section 37 legal drill at hand.

5. Mr.M.S.Krishnan, learned Senior Advocate instructed by Mr.J.James, learned counsel on record for ICMC and Mr.M.Vijayan of M/s.King and Partridge [Law Firm] assisted by Ms.Bensi Rema of M/s.King and Partridge for ELCOT submitted in one voice in unison that the impugned order made by Section 34 Court modifies the impugned award.

*6. The above takes us to the moot question as to whether an arbitral award can be modified in a legal drill under Section 34 of A and C Act. This question was answered by Hon'ble Supreme Court in **Project Director NHAI Vs. M.Hakeem** reported in (2021) 9 SCC 1. To be noted, Hon'ble Supreme Court held that modification of an award by a Section 34 Court in a legal drill vide Section 34 is impermissible.*



7. This takes us to the order of Hon'ble Single Judge i.e., Hon'ble 34 Court, which is before us in appeals i.e., captioned appeals. To be fair to the Hon'ble Single Judge, it is to be noted that the impugned order is dated 24.01.2020 but **Hakeem** was rendered by Hon'ble Supreme Court only on 20.07.2021. Therefore, on the date on which the impugned order was made by Hon'ble Commercial Division, **Gayatri Balaswamy's** case, being **Gayatri Balaswamy Vs. ISG Novasoft Technologies Ltd.**, reported in 2014 (6) CTC 602 and confirmed by a Division Bench vide order in a intra-Court appeal reported in 2019 SCC OnLine Mad 15819 was holding the field. However, in **Hakeem**, **Gayatri Balaswamy** was specifically and categorically overruled. This means the modification qua legal drill under Section 34 is impermissible and in **Hakeem**, Hon'ble Supreme Court has not resorted to prospective overruling. Therefore, this principle will apply on and from 22.08.1996 i.e., the date on which A and C Act kicked in. To be noted, A and C Act {including section 34} was amended by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) on and from 23.10.2015 and it was further amended {including section 34} by the Arbitration and Conciliation (Amendment) Act, 2019 (Act 33 of 2019) dated 09.08.2019, a conditional legislation wherein 11 out of 16 sections kicked in, on and from 30.08.2019.

8. In the light of the narrative thus far, if we were to sustain the award in its entirety by agreeing with the appellant in I OSA (ICMC), there is no difficulty but if it is going to be the other way, we would end up modifying the impugned award which is impermissible as of



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today. This has led to a peculiar situation in the instant case on hand as we can neither say that the impugned order is faulty nor sustain modification of an arbitral award if we proceed further with the legal drill and find that we are not persuaded by arguments of appellant in I OSA.

9. Be that as it may, we deem it appropriate to record that we have noticed **Gayatri Balaswamy** was carried to Hon'ble Supreme Court vide SLP.(C) Nos.15336-15337/2021 and a three member Bench of Hon'ble Supreme Court in and by order dated 20.02.2024 formulated five questions and referred the matter to a Larger Bench. In this order (making reference) Hon'ble Supreme Court has categorically held that the issue is whether in exercise of powers under Section 34 or Section 37 of A and C Act, Courts are empowered to modify an arbitral award frequently arises in proceedings not only before the Supreme Court but also before the High Courts and the District Courts. This Court being a Section 37 Court is faced with that very question which has been described as 'peculiar situation' supra. Therefore, both learned counsel i.e., senior counsel (on instructions) in I OSA and counsel on record in II OSA fairly agreed for having the impugned order set aside and remanded to Section 34 Court.

10. In the light of narrative thus far, we make the following order :

- a) Impugned order dated 24.01.2020 made in OP.No.821 of 2019 is set aside;
- b) Impugned order is set aside solely for the purpose of



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*facilitating a de novo Section 34 legal drill. This means, we make it clear that we have not expressed any view or opinion on the merits of the matter. This also means Section 34 will now deal with the matter on own its merits and in accordance with law i.e., in accordance with **Hakeem** as obtaining today;*

- c) As **Hakeem** has been referred to a Larger Bench and one of the questions formulated by Hon'ble Larger Bench vide sub paragraph (4) of paragraph 3 of **Hakeem** is 'Whether the power to modify an award can be read into the power to set aside an award under section 34 of the Act?', if the Larger Bench renders the verdict / answers the reference in the interregnum, Section 34 Court will apply the law as declared by the Larger Bench but until then, **Hakeem** which overruled **Gayatri Balaswamy** will be holding the field and therefore, Hon'ble Single Judge will proceed on that basis;*
- d) Though obvious, for the sake of specificity, we make it clear that all questions are left open and all options i.e., resorting to sub section (4) of Section 34, sustaining the award or setting aside the award or following the verdict of Larger Bench if the verdict is returned / reference is answered in the interregnum are all open to Section 34 Court;*
- e) As regards the time line for disposal of an application*



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by Section 34 Court, sub-section (6) of Section 34 prescribes a time line of one year from the date on which notice under sub-section (5) is served upon the other party. To be noted, sub-section (6) also makes it clear that the application under Section 34 shall be disposed of expeditiously. In this regard, we deem it appropriate to refer to **State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti** reported in (2018) 9 SCC 472 and paragraphs 25 and 26 therein which reads as follows:

'25. We come now to some of the High Court judgments. The High Courts of Patna [Bihar Rajya Bhumi Vikas Bank Samiti v. State of Bihar; 2016 SCC OnLine Pat 10104], Kerala [Shamsudeen v. Shreeram Transport Finance Co. Ltd., 2016 SCC OnLine Ker 23728] , Himachal Pradesh [Madhava Hytech Engineers (P) Ltd. v. Executive Engineers, 2017 SCC OnLine HP 2212] , Delhi [Machine Tool India Ltd. v. Splendor Buildwell (P) Ltd., 2018 SCC OnLine Del 9551] , and Gauhati [Union of India v. Durga Krishna Store (P) Ltd., 2018 SCC OnLine Gau 907] have all taken the view that Section 34(5) is mandatory in nature. What is strongly relied upon is the object sought to be achieved by the provision together with the mandatory nature of the language used in Section 34(5). Equally, analogies with Section 80 CPC have been drawn to reach the same result. On the other hand, in Global Aviation Services (P) Ltd. v. Airport Authority of India [Global Aviation Services (P) Ltd. v. Airport Authority of India,



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2018 SCC OnLine Bom 233] , the Bombay High Court, in answering Question 4 posed by it, held, following some of our judgments, that the provision is directory, largely because no consequence has been provided for breach of the time-limit specified. When faced with the argument that the object of the provision would be rendered otiose if it were to be construed as directory, the learned Single Judge of the Bombay High Court held as under : (SCC OnLine Bom para 133)

“133. Insofar as the submission of the learned counsel for the respondent that if Section 34(5) is considered as directory, the entire purpose of the amendments would be rendered otiose is concerned, in my view, there is no merit in this submission made by the learned counsel for the respondent. Since there is no consequence provided in the said provision in case of non-compliance thereof, the said provision cannot be considered as mandatory. The purpose of avoiding any delay in proceeding with the matter expeditiously is already served by insertion of appropriate rule in the Bombay High Court (Original Side) Rules. The Court can always direct the petitioner to issue notice along with papers and proceedings upon other party before the matter is heard by the Court for admission as well as for final hearing. The vested rights of a party to challenge an award under Section 34 cannot be taken away for non-compliance of issuance of prior notice before filing of the arbitration petition.”

The aforesaid judgment has been followed by recent judgments of the High Courts of Bombay [Maharashtra State Road Development Corpn. Ltd. v. Simplex Gayatri Consortium, 2018 SCC



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OnLine Bom 805] and Calcutta [Srei Infrastructure Finance Ltd. v. Candor Gurgaon Two Developers and Projects (P) Ltd., 2018 SCC OnLine Cal 5606].

26. We are of the opinion that the view propounded by the High Courts of Bombay and Calcutta represents the correct state of the law. However, we may add that it shall be the endeavour of every court in which a Section 34 application is filed, to stick to the time-limit of one year from the date of service of notice to the opposite party by the applicant, or by the Court, as the case may be. In case the Court issues notice after the period mentioned in Section 34(3) has elapsed, every court shall endeavour to dispose of the Section 34 application to what has been provided in Section 14 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. This will give effect to the object sought to be achieved by adding Section 13(6) by the 2015 Amendment Act.'

*f) As sub-section (5) of Section 34 notice is held to be directory and not mandatory qua sub-section (6) of Section 34 and one of us sitting Single (M.Sundar.J.) in Section 34 Court in O.P.No.527 of 2020 [**M.Subbiah Vs. Daimler Financial Services India Pvt. Ltd., and another**] in and by order dated 10.12.2020 has held that the reckoning date will be the date of presentation of Section 34 petition. As sub-section (5) of Section 34 has been held to be directory and not mandatory, we hold that this principle is now good law;*



- g) *In the case on hand, considering the trajectory the matter has taken, the time frame qua sub-section (6) will run from today. We make it clear that we are not fixing a time frame for Hon'ble Commercial Division but we are only referring to the provisions of law and judgment of Hon'ble Supreme Court in **Bhumi Vikas Bank**;*
- h) *As regards Section 34 petition, the specific sub-section has not been mentioned, as would be evident from Section 34 petition that has been placed before us, as part of the case file. Therefore, Rules made under Section 82 of A & C Act, being 'Madras High Court (Arbitration) Rule 2020' kicked in on 17.03.2021. Be that as it may, in the hearing today, it was fairly agreed between the two learned counsel and more particularly, learned counsel for ELCOT who is the protagonist of Section 34 petition that the legal drill before Section 34 Court which is to ensue would be on two of the eight pigeon holes qua Section 34 and those two pigeon holes are 34(2)(b)(ii) clause 2 of Explanation 1 [Public policy and contravention to policy of Indian law] and sub-section(2A) of Section 34 [patent illegality obviously with proviso thereat];*
- i) *Though sub-section (6) provides for one year, we are of the considered view that in the light of first limb of sub-section (6) of Section 34 which says that a 34 petition*



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*shall be disposed of expeditiously considering that the impugned award is of the year 2019 and that the contracts are more than a decade old i.e., 2013 and observation of Hon'ble Supreme Court in **Bhumi Vikas Bank**, it may be desirable to have a expedited hearing albeit subject to the Board of Hon'ble Section 34 Court.*

11. Captioned OSAs and captioned CMP are disposed of in the aforementioned manner with the aforesaid observations/directions. There shall be no order as to costs.'

To be noted, even the order dated 24.06.2024 made in O.S.A.Nos.118 of 2020 and 218 of 2021 (extracted and reproduced supra) originally had a minor secretarial error but the same was subsequently corrected with the consent of both sides after being listed under the cause list caption 'FOR BEING MENTIONED' on 10.07.2024.

6. This means that there should be a remand to Section 34 Court for a *de novo* Section 34 legal drill but before we do that, we deem it appropriate to set out the following two points :

(i) To be fair to the Hon'ble single Judge i.e., the Section 34 Court which made the impugned common order dated



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23.01.2020 in O.P.Nos.1068 of 2018 and 108 of 2019, **Gayatri Balaswamy's** case, [**Gayatri Balaswamy Vs. ISG Novasoft Technologies Ltd.**, reported in **2014 (6) CTC 602 : 2019 SCC OnLine Madras 15819**] was holding the field but post impugned common order i.e., on 20.07.2021 **Gayatri Balaswamy** was overruled by Hon'ble Supreme Court in **Hakeem** case. Therefore, Hon'ble single Judge has applied the then obtaining position of law but **Hakeem** case dates back to 22.08.1996 i.e., the date on which A and C Act dated 16.08.1996 kicked in. Therefore, we have no option other than resorting to remand;

(ii) The second point is, the order of reference made by a three member Hon'ble Bench of Hon'ble Supreme Court being order dated 20.02.2024 in SLP.(C) Nos.15336-15337/2021 reads as follows:



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ITEM NO.15 COURT NO.4 SECTION XII
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

Petitions for Special Leave to Appeal (S) Nos. 19586-19627/2021
(Arising out of unreported Final Judgment and order dated 08-10-2019
in O.S. No. 68/2015 09-03-2019 in O.S. No. 121/2015 passed by the
High Court of Judicature at Madras)

FOR PETITIONER(S) PETITIONER(S)
VERSUS
RESPONDENT(S)

S/S ISG MOWASOFT TECHNOLOGIES LIMITED RESPONDENT(S)
(FOR ADMISSION, FOR REPORTING COMPLIANCE AND I.A. No.42914/2021 for
direction)

Date: 28-12-2021 These petitions were called on for hearing today.

CORAM :
HON BLE. MR. JUSTICE HIMANSHU DATTA
HON BLE. MR. JUSTICE N.V. VISWANATHAN
HON BLE. MR. JUSTICE SANDEEP KANTA

For Petitioner(s): Mr. Arvind Datar, Sr. Adv.
Mr. P.V. Ramesh, Adv.
Ms. Hans Shubham, Adv.
Mr. Rishabh Shasthark, Adv.
Mr. P.V. Suresh, Adv.
Mr. Arvind Sriram, Adv.
Mr. Akshath Pillai, Adv.
Mr. K. Paragashankar, AM

For Respondent(s): Mr. Siddharth Sharmakar, Sr. Adv.
Mr. Subramanyam Banerjee, Adv.
Mr. Paragashankar, Adv.
Mr. Rishabh Shasthark, Adv.
Mr. Gurtej Pal Singh, Adv.
Mr. Abhishek Bhat, Adv.
Ms. Ananya Khanna, Adv.
Mr. Aditya Sidana, Adv.
M/S. Karanjwal & Co., AM

UPON hearing the counsel the court gave the following
O R D E R

I.A. No.42914/2021 for direction stands dismissed. Time to comply with
the order dated 19.10.2021 is extended by three weeks from date.



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SLP(C) Nos. 15336-15337/2021

2. Whether or not the Courts in exercise of power under sections 34 or 37 of the Arbitration and Conciliation Act, 1996 are empowered to modify an arbitral award is a question which frequently arises in proceedings not only before this Court but also before the High Courts and the District Courts. While one line of decisions of this Court has answered the aforesaid question in the negative, there are decisions which have either modified the awards of the arbitral tribunals or upheld orders under challenge modifying the awards. It is, therefore, of seminal importance that through an authoritative pronouncement clarity is provided for the guidance of the Courts which are required to exercise jurisdiction under the aforesaid sections 34 and 37, as the case may be, day in and day out.

3. We are of the considered view that the following questions need to be referred to a larger Bench for answers:

- “1. Whether the powers of the Court under section 34 and 37 of the Arbitration and Conciliation Act, 1996, will include the power to modify an arbitral award?
2. If the power to modify the award is available, whether such power can be exercised only where the award is severable and a part thereof can be modified?
3. Whether the power to set aside an award under section 34 of the Act, being a larger power, will include the power to modify an arbitral award and if so, to what extent?
4. Whether the power to modify an award can be read into the power to set aside an award under section 34 of the Act?
5. Whether the judgment of this Court in **Project Director NHAI vs. M. Hakeem**¹, followed in **Larsen Air Conditioning and Refrigeration Company vs. Union of India**² and **SV Samudram vs. State of Karnataka**³ lay down the correct law, as other benches

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1. (2021) 8 SCC 1
2. (2021) 10 SCC 109 (SC 198)
3. (2024) 10 SCC 109 (SC 18)



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SLP(C) Nos.15336-15337/2021

of two Judges (in *Vedanta Limited vs. Shenzden Shandong Nuclear Power Construction Company Limited*⁴, *Oriental Structural Engineers Pvt. Ltd. vs. State of Kerala*⁵ and *M.P. Power Generation Co. Ltd. vs. Ansaldo Energia Spa*⁶) and three Judges (in *J.C. Budh Raja vs. Chairman, Orissa Mining Corporation Ltd.*⁷, *Tata Hydroelectric Power Supply Co. Ltd. vs. Union of India*⁸ and *Shakti Nath vs. Alpha Tiger Cyprus Investment No.3 Ltd.*⁹) of this Court have either modified or accepted modification of the arbitral awards under consideration?"

4. The special leave petitions may be placed before the Hon'ble the Chief Justice of India for an appropriate order.

(RAJNI MUKHI)
COURT MASTER (SH)

(PREETHI T.C.)
COURT MASTER (NSH)

3

4	(2019) 3 SCC 460
5	(2021) 6 SCC 150
6	(2018) 16 SCC 661
7	(2008) 2 SCC 444
8	(2003) 4 SCC 173
9	(2020) 11 SCC 685



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Paragraph No.3 of aforementioned reference order gives an adumbration of points of reference and sub-paragraph (1) / point No.1 is of immense significance as that makes it clear that the question as to whether the powers of the Sections 34 and 37 Courts will include the power to modify an Arbitral Award. In other words it is not just qua a Section 34 Court but it is qua a Section 37 Court also i.e., this Court. Therefore, we have no option other than resorting to remand as, if we set aside the impugned order there would not be any issue but if we sustain the impugned common order after hearing out both sides on merits that will tantamount to modification in a Section 37 legal drill when the neat question as to whether power of a Section 37 Court will include power to modify an arbitral award has been referred to a Larger Bench by a three member Bench of Hon'ble Supreme Court.

7. To be noted, owing to the aforementioned obtaining position, both sides i.e., Mr.M.S.Krishnan learned Senior Counsel for AAI and



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Mr.P.J.Rishikesh, learned counsel for respondent consented for an order of remand.

8. In the light of the narrative thus far, the following order is made:

(a) Impugned common order dated 23.01.2020 in O.P.Nos.1068 of 2018 and 108 of 2019 on the file of the Commercial Division is set aside;

(b) Impugned common order is set aside only for facilitating *de novo* Section 34 legal drill. This means that we make it clear that we have not expressed any view or opinion on the merits of the matter. This also means that Section 34 Court will now deal with the matter on its own merits and in accordance with law i.e., in accordance with **Hakeem** case law as obtaining today;

(c) As **Hakeem** has been referred to a Larger Bench (to be noted reference order dated 20.02.2024 has been scanned and reproduced supra) and two of the questions formulated by Larger Bench vide sub-paragraphs (1) and (4) of paragraph



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No.3 are of immense significance qua Section 34 and 37 Courts and if the Larger Bench renders a verdict i.e., answers reference in the *interregnum*, Section 34 Court will apply the law as declared by the Larger Bench but until then **Hakeem** case which has overruled **Gayatri Balaswamy** will be holding the field and therefore, Hon'ble single Judge will proceed on that basis;

(d) Though obvious, for the sake of specificity, we make it clear that all questions are left open and all options i.e., resorting to sub-section (4) of Section 34 of A and C Act, sustaining the award or setting aside the award or following the verdict of the Larger Bench if the verdict is returned / reference is answered in the *interregnum*, are all open to Section 34 Court;

(e) As regards time line for disposal by Section 34 Court, sub-section (6) of Section 34 of A and C Act prescribes one



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year from the date on which notice under sub-section (5) of Section 34 of A and C Act is served upon the other party. To be noted, sub-section (6) of Section 34 A and C Act also makes it clear that an application under Section 34 of A and C Act shall be disposed of expeditiously. In this regard, we deem it appropriate to refer to ***Bhumi Vikas Bank*** case [***State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti*** reported in (2018) 9 SCC 472] and remind ourselves of paragraph Nos.25 and 26 thereof which read as follows:

'25. We come now to some of the High Court judgments. The High Courts of Patna [Bihar Rajya Bhumi Vikas Bank Samiti v. State of Bihar, 2016 SCC OnLine Pat 10104], Kerala [Shamsudeen v. Shreeram Transport Finance Co. Ltd., 2016 SCC OnLine Ker 23728] , Himachal Pradesh [Madhava Hytech Engineers (P) Ltd. v. Executive Engineers, 2017 SCC OnLine HP 2212] , Delhi [Machine Tool India Ltd. v. Splendor Buildwell (P) Ltd., 2018 SCC OnLine Del 9551] , and Gauhati [Union of India v. Durga Krishna Store (P) Ltd., 2018 SCC OnLine Gau 907] have all taken the view that Section 34(5) is mandatory in nature. What is strongly relied upon is the object sought to be achieved by the provision together with the mandatory nature of the language used in Section 34(5). Equally, analogies with Section 80 CPC have been drawn to reach the same result. On the other hand, in Global Aviation Services (P) Ltd. v. Airport Authority of India [Global Aviation Services (P) Ltd. v. Airport Authority of India, 2018 SCC OnLine Bom 233] , the Bombay High Court, in



answering Question 4 posed by it, held, following some of our judgments, that the provision is directory, largely because no consequence has been provided for breach of the time-limit specified. When faced with the argument that the object of the provision would be rendered otiose if it were to be construed as directory, the learned Single Judge of the Bombay High Court held as under : (SCC OnLine Bom para 133)

“133. Insofar as the submission of the learned counsel for the respondent that if Section 34(5) is considered as directory, the entire purpose of the amendments would be rendered otiose is concerned, in my view, there is no merit in this submission made by the learned counsel for the respondent. Since there is no consequence provided in the said provision in case of non-compliance thereof, the said provision cannot be considered as mandatory. The purpose of avoiding any delay in proceeding with the matter expeditiously is already served by insertion of appropriate rule in the Bombay High Court (Original Side) Rules. The Court can always direct the petitioner to issue notice along with papers and proceedings upon other party before the matter is heard by the Court for admission as well as for final hearing. The vested rights of a party to challenge an award under Section 34 cannot be taken away for non-compliance of issuance of prior notice before filing of the arbitration petition.”

The aforesaid judgment has been followed by recent judgments of the High Courts of Bombay [Maharashtra State Road Development Corpn. Ltd. v. Simplex Gayatri Consortium, 2018 SCC OnLine Bom 805] and Calcutta [Srei Infrastructure Finance Ltd. v. Candor Gurgaon Two Developers and Projects (P) Ltd., 2018 SCC OnLine Cal 5606].

26. We are of the opinion that the view propounded by the High Courts of Bombay and Calcutta represents the correct state of the law. However, we may add that it shall be the endeavour of every court in which a Section 34 application is filed, to stick to the time-limit of one year



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from the date of service of notice to the opposite party by the applicant, or by the Court, as the case may be. In case the Court issues notice after the period mentioned in Section 34(3) has elapsed, every court shall endeavour to dispose of the Section 34 application to what has been provided in Section 14 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. This will give effect to the object sought to be achieved by adding Section 13(6) by the 2015 Amendment Act.'

(f) As sub-section (5) of Section 34 of A and C Act has been held to be directory and not mandatory qua sub-section (6) of Section 34 of A and C Act, one of us sitting single (M.Sundar,J.,) in Section 34 Court vide order dated 10.12.2020 in O.P.No.527 of 2020 [***M.Subbiah Vs. Daimler Financial Services India Pvt. Ltd., and another***] has held that reckoning date [for the purpose of sub-section (6) time line] will be the date of presentation of Section 34 petition. To be noted in ICMC case supra (order dated 24.06.2024) a Division Bench has held this ***Daimler Financial Services*** principle as regards reckoning date for sub-section (6) to be correct law / good law and therefore the same i.e., ***Daimler Financial Services*** is now



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a Division Bench order;

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(g) In the case on hand, considering the trajectory the matter has taken, the time frame qua sub-section (6) of Section 34 of A and C Act will run from today. We make it clear that we are not fixing any time frame for Hon'ble single Judge but only referring to the provisions of law and obtaining position of law qua judgment of Hon'ble Supreme Court in ***Bhumi Vikas Bank*** case and order of Division Bench of this Court holding ***Daimler Financial Services*** to be good law;

9. We are informed by both sides that a sum of Rs.80 Lakhs is lying to the credit of captioned OSAs the same having been deposited pursuant to Court orders as a condition for an interim order.

10. In the light of the order we propose to make, this sum of Rs.80 Lakhs will continue to lie in the deposit but will be lying to the credit of OPs i.e., O.P.Nos.1068 of 2018 and 108 of 2019. Therefore, we also make



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it clear that Section 34 Court can take a call as regards this deposit and any request by either of the parties with regard to this deposit, we further make it clear that all rights and contentions of both sides are preserved in this regard also.

11. Captioned two OSAs are disposed of in the aforesaid manner with the aforementioned observations / directives. Consequently, captioned CMPs thereat are disposed of as closed albeit with liberty to the petitioner in CMPs to resuscitate the same before Section 34 Court but we also make it clear that Section 34 Court would take a call at its discretion on its own merits and in accordance with law and all questions are left open for this purpose. There shall be no order as to costs.

(M.S.,J.) (K.G.T.,J.)
15.07.2024

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M.SUNDAR, J.,
and
K.GOVINDARAJAN THILAKAVADI, J.,

mk

To

The Sub-Assistant Registrar
Original Side
High Court, Madras.

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