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OSA(CAD) No.163 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.04.2024

Coram

THE HON'BLE MR.JUSTICE **M.SUNDAR**
and
THE HON'BLE MRS. JUSTICE **K. GOVINDARAJAN THILAKAVADI**

OSA(CAD) No.163 of 2022

Bharat Heavy Electricals Limited
690, Anna Salai, EVR Periyar Building
Nandanam, Chennai - 600 035.
Rep. by its Executive Director Mr.G.Murali .. Appellant

vs

Capco Water Solutions Private Limited
Having its office at 15AJ, Laxmi Indl. Estate
Link Road, Andheri West
Mumbai - 400 053. .. Respondent

Appeal filed under Section 37 of The Arbitration and Conciliation Act, 1996 read with Section 13 of The Commercial Courts Act, 2015 to set aside the order dated 11th October 2022 passed in O.P.No.799 of 2019 upholding the Arbitral Award dated 05th May 2019.



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For Appellant : Mr.Krishna Srinivasan, Senior Counsel
instructed by Ms.Geethi Ara,
Mr.Karthik Ram Mohan
of M/s.S.Ramasubramaniam and Associates

For Respondent : Ms.Preeti Mohan
along with Ms.R.S.Pornima

JUDGMENT

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

This order will now dispose of the captioned OSA.

2. This order has to be read in conjunction with and in continuation of the earlier proceedings made in the previous listing on 01.04.2024, which reads as follows :

'Captioned 'Original Side Appeal' (hereinafter 'OSA' for the sake of brevity) has been filed in this Commercial Appellate Division on 25.11.2022 assailing an order dated 11.10.2022 made in O.P.No.799 of 2019 by a Hon'ble Single Judge of this Court and this 11.10.2022 order shall hereinafter be referred to as 'order under challenge' for the sake of convenience and clarity.

2. Short facts are that Bharat Heavy Electricals Limited



('BHEL' for the sake of brevity) issued a Letter of Intent qua contract for main supply of 'Electrolytic Chlorination Plant' for 2x600 MW North Chennai TPS Units 1 & 2. Suffice to say that Capital Control India Private Limited now 'Capco Water Solutions Private Limited' ('CWSPL' for the sake of brevity) is the contractor. To be noted, the change of name has been duly incorporated in the case file before the Section 34 Court itself.

3. Suffice to say that as arbitral disputes erupted between CWSPL (contractor) and BHEL (employer), 'Arbitral Tribunal' (hereinafter 'AT' for the sake of brevity) was constituted.

4. Further short facts are that AT was constituted by sole Arbitrator who is a former Hon'ble Judge of this Court; that AT after full contest made an award dated 05.05.2019 inter alia awarding a little over Rs.1.07 crores (Rs.1,07,95,570/- to be precise) with 12% pendente lite interest (for the period from 01.01.2014 to 05.05.2019); that a further sum of Rs.32,90,700/- was awarded vide another head; that future interest of 18% was awarded by the AT i.e., from the date of award from 05.05.2019 to the date of realisation of full amount; that assailing this 05.05.2019 award, the aforementioned O.P.No.799 of 2019 was filed in the Section 34 Court by BHEL; that after full contest Section 34 Court sustained the award and dismissed the Section 34 OP; that assailing this Section 34 Court order, captioned OSA i.e., captioned intra-Court Appeal has been filed in this



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Court on 25.11.2022 as already alluded to supra.

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5. Notice was issued by Hon'ble Predecessor Bench. Respondent contractor has entered appearance and captioned OSA is being heard out.

6. Mr.Krishna Srinivasan, learned Senior Counsel instructed by Ms.Geethi Ara of M/s.S.Ramasubramaniam Associates (Law Firm) for the appellant employer and Ms.Preeti Mohan along with Ms.R.S.Poornima, learned counsel on record for the respondent contractor are before us.

7. Mr.Krishna Srinivasan, learned Senior Counsel for BHEL submitted that he would make a three pronged campaign qua order that has been put to challenge and the 3 points are as follows:

(1) Is the principle of natural justice (NJP) i.e., 'pre termination notice' which shall be referred to 'PTN' is necessary for termination of a commercial contract when the contract does not provide for issue of such a pre termination notice. AT and Section 34 Court fell in error in coming to the conclusion that the termination is bad for not issuing pre termination notice by telescoping NJP into a commercial contract;

(2) Interest pendente lite ought not to have been awarded as Clause 8.10 of 'General Conditions of Contract' which



shall be referred to 'GCC' does not provide for interest. To be noted, Clause 8.10 of GCC reads as follows:

'8.10 No interest shall be payable by the purchaser on the security amount, bank guarantee amount or balance which may be lying with the purchaser or any money which may become due owing to difference or misunderstanding or any dispute between the purchaser and the contractor, or any delay on the part of purchaser in making periodical or final payment or any other aspects incidental thereto.'

(3) Bank guarantee invocation pursuant to termination ought not to have been sustained.

8. Before we proceed further we deem it appropriate to say that Points No.3 and 1 are dovetailed as they are effectively one point and to put it differently, Point No.3 is a sequitur qua Point No.1.

*9. Elaborating on the aforementioned Point 1, learned Senior Counsel pressed into service **A.K.Kraipak and others Vs. Union of India and others (1969) 2 SCC 262 (Kraipak), Keshav Mills Co. Limited and another Vs. Union of India and others (1973) 1 SCC 380 (Keshav Mills), State of Gujarat and others Vs. Meghji Pethraj Shah Charitable Trust and others (1994) 3 SCC 552 (Pethraj) and Rishi Kiran Logistics Private Limited Vs. Board of Trustees of Kandla Port Trust and others (2015)***



'9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington v. British Railways Board [(1972) 2 WLR 537 : 1972 AC 877 (HL) [Sub nom British Railways Board v. Herrington, (1972) 1 All ER 749 (HL)]]. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.'

12. As regards Keshav Mills, our attention was drawn to paragraph 8 to say that there cannot be a straight jacket formula in matters of this nature. Keshav Mills is clearly distinguishable on facts as that pertains to the question as to which was the appropriate Government to proceed under a particular statute but we need not go that far as would become evident from our aforementioned discussion and dispositive reasoning infra.

13. The 3rd judgment i.e., Pethraj is a case where a donor



who had donated 15 lakhs to a Government Hospital assailed a decision taken by the Government based on donation. The facts are completely different and therefore Pethraj also does not come to the aid of the appellant.

14. The 4th case law i.e., Rishi Kiran was pressed into service for the principle as regards the touchstone for adjudging whether a decision is arbitrary or not and as to when a decision is bonafide and not actuated by arbitrariness but such a contention is not admissible in administrative law. Rishi Kiran, on facts pertains to allotment of certain plots by Port Trust which subsequently ran into rough weather owing to change in CRZ policy resulting in the Port Trust taking a decision to cancel the tender process which was assailed.

15. We are of the considered view that it may really not be necessary to go into the aforementioned case laws as the Section 34 Court has straight away accepted the argument of BHEL that termination of contract by reading into the same principles of natural justice more particularly into a commercial contract is impermissible. The Section 34 Court has fairly said that such an argument is meritorious and liable to be accepted. Thereafter as pointed out by learned counsel for the contractor, the Section 34 Court has ultimately held that an arbitral award cannot be interfered with merely on account of one erroneous finding unless it goes to the root of the matter and vitiates the award.



Section 34 Court has thereafter taken the view that this by itself does not denude the AT of its power to examine the reasons for termination and examine whether the reasons are sustainable.

*16. The Section 34 Court thereafter as part of legal drill before it, has examined the award under challenge and found that there are three reasons, nay three good reasons against the termination and therefore the verdict returned by the AT is sustainable. In other words, Section 34 Court did sustain AT holding against termination and did not sustain this verdict of AT by rejecting the argument that the termination is not justifiable on the basis of NJP (Principles of Natural Justice) but it did so by going into the award under challenge and saying that the three good reasons found by the AT to say that the termination is bad are good enough. In this regard, we remind ourselves of the principle that in Sections 34 and 37 of A & C Act legal drills, if a view taken by AT is a plausible view, the 34 Court much less the 37 Court will not intercede. We also remind ourselves of **Ssangyong Engineering & Construction Co. Ltd. Vs. National Highways Authority of India (NHAI) reported in (2019) 15 SCC 131 (Ssangyong)** wherein patent illegality under Section 34(2A) of the A & C Act was elucidatively explained that proviso to Section 34(2A) makes it clear that mere erroneous application of law cannot be a ground to set aside an arbitral award. As already alluded to supra, Section 34 Court has ultimately said that the award under challenge cannot be*



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interfered with on the NJP ground alone as AT has come to the conclusion that the termination is bad on the basis of 3 good reasons which have been articulated in paragraphs 16 to 21 of the Section 34 Court order which read as follows:

'16. Turning to the question of termination of the contract, as correctly pointed out by learned senior counsel for the respondent, the conclusions on termination cannot be viewed in isolation. The said conclusions should be seen in the context of the findings entered in respect of the delay events that were dealt with under paragraph 13. Against that backdrop, the validity of termination was dealt with in paragraphs 14.1 to 14.8. The findings on termination were assailed by learned counsel for the petitioner primarily on the ground that principles of natural justice cannot be read into a commercial contract. Without doubt, the said contention is meritorious and liable to be accepted. However, an arbitral award cannot be interfered with merely on account of one erroneous finding unless such finding goes to the root of the matter and vitiates the award. Whether this finding vitiates the Award is examined next by turning to the clauses on termination.

17. Clause 23.1 is relevant for purposes of termination. The said clause is set out below:

“If the Seller / Contractor fails to deliver the goods or materials or any installment thereof within the period(s) fixed for such delivery or



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delivers goods or materials not of the contracted quality and failing to adhere to the contract specifications or at any time repudiates or otherwise abandons the contract before expiry of such period or refuses or is unable to supply goods or materials covered by the Order / Contract either in whole or in part or otherwise fails to perform the Order / Contract or commits any breach of the Order / Contract not herein specifically provided for or in the event of the death of insanity or if the Seller / Contractor being an individual or if a firm on a partnership thereof, shall at any time, be adjudged insolvent or shall have a receiving order for administration of his estate made against him or shall take any proceeding for composition under any Insolvency Act for the time being in force or make any assignment of the Order / Contract or enter or if the firm dissolved under the Partnership Act or if the Seller / Contractor being a company is wound up voluntarily or by order of a Court or a Receiver, Liquidator or Manager on behalf of the debenture holders and creditors is appointed or circumstances shall have arisen which entitles the Court of debenture holder and creditors to appoint a receiver, liquidator or manager, the purchaser without prejudice to his right to recover any



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expenses, losses or damages to which the purchaser may be put to incur or sustain by reason of the Seller / Contractor-s default or breach of Order / Contract shall be entitled to cancel the Order / Contract either in whole or portion thereof without compensation to the Seller / Contractor and if the purchaser so desires, he may procure upon such terms and in such manner as he deems appropriate, stores not so delivered or others of a similar description where stores exactly complying with particulars are not, in the opinion of the purchaser, which shall be final, readily procurable, at the risk and cost of the Seller / Contractor and the Seller / Contractor shall be liable to the purchaser for any excess costs provided that the Seller / Contractor shall continue the performance of the Order / Contract to the extent not cancelled under the provisions of this clause. The Seller / Contractor shall on no account be entitled to any gain on such repurchases. “

18. On perusal of the above clause, it is evident that the petitioner is entitled to cancel or terminate the contract only in the event of breach by the respondent. Put differently, the contract does not provide for ?no fault? or ? without reason? termination. In this contractual context, the arbitral tribunal was certainly entitled to examine the reasons cited for termination by the petitioner and



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determine whether the said reasons are sustainable. This is precisely what the arbitral tribunal did in the various sub~paragraphs of paragraph 14.

19. Learned counsel for the petitioner contended that the termination notice should not be seen in isolation in as much as it references prior communications between the parties including the letter dated 19.10.2013 from the respondent herein to the petitioner. The said contention is valid but there is no reason to assume that the arbitral tribunal did not take into consideration the communication dated 19.10.2013 or the other evidence on record. As dilated upon earlier, the findings on the various delay events were entered after taking into consideration both oral and documentary evidence. Apart from the alleged delay by the respondent, the termination notice refers to at least three other reasons to justify the termination. The first of these reasons relates to the alleged misrepresentation by the respondent that it had a joint venture with M/s. Severn Trent, USA. With regard to this reason, the arbitral tribunal recorded that the LOI, the bid, the purchase order and the work order did not make reference to M/s. Severn Trent, USA. On that basis, the said ground of termination was held to be unsustainable. The other reason cited in the termination notice was the alleged import of electrolyser by the respondent from China. As regards this reason, the arbitral tribunal concurred with the submission of learned counsel for the claimant before the tribunal that no material had been produced by the



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petitioner to corroborate the said statement. In addition, the tribunal recorded that all materials were to be deployed in the project only after inspection and acceptance by the petitioner herein. The third reason, excluding delay, cited in the termination letter is the delay in execution of the Gas Chlorination System of the North Chennai project by the respondent herein. As regards this reason, the tribunal recording the finding that the Gas Chlorination System is an independent project which is unconnected with the project forming the subject of the dispute. After recording all these reasons, the arbitral tribunal held that the termination was not justified because it was not preceded by a show cause notice and because the reasons set out therein are unsustainable.

20. As stated earlier, an arbitral award cannot be interfered with merely because it contains an erroneous finding. There should be a patent illegality which goes to the root of the matter. In the case at hand, even if the non-issuance of a show cause notice is held to be irrelevant in the context of a commercial contract, the conclusion that the termination is unjustified does not call for interference in the light of other reasons set out in paragraphs 13 and 14. The contention, in this regard, of learned counsel for the petitioner that importing principles of natural justice into a commercial contract amounts to violation of the fundamental policy of Indian law is ambitious, to say the least, and completely untenable.



21. While clause 7.4 of the contract enabled the petitioner to make a call on the bank guarantee, such call was to made only in the event of default, failure or neglect on the part of the respondent in fulfillment of performance obligations under the contract. In light of the conclusions that the termination of the contract was unjustified, the logical corollary was to direct the petitioner to refund monies appropriated by making a call on and encashing the bank guarantee. There is no infirmity in the award as regards the differential tax claim also.'

17. This takes us to the 3rd point. As already alluded to supra, point No.3 is a sequitur to 1st point and as the 1st point does not cut ice with us, we hold that the 3rd point is clearly a non starter before this Section 37 Court.

18. This takes us to the 2nd point viz., pendente lite interest.

19. As already set out supra, AT has awarded 12% pendente lite interest i.e., from 01.01.2014 to 05.05.2019. We have already extracted and reproduced Clause 8.10 of GCC.

20. A very interesting scenario emerges as regards the interest argument. The pendente lite interest point has not been raised before the AT. Likewise, it was fairly submitted by both sides that it was not argued before the Section 34 Court though



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a ground has been raised in the Section 34 Petition viz., ground (M). Interestingly and intriguingly, this ground also talks about clause 8.9 and not 8.10 of GCC. Even if it is construed to be a reference to 8.10, it was not argued before the Section 34 Court, therefore the interesting scenario is whether it can be raised before the Section 37 Court for the first time.

*21. Though learned counsel on both sides did not press into service Lion Engineering, we reminded ourselves of **M/s.Lion Engineering Consultants Vs. State of Madhya Pradesh reported in (2018) 16 SCC 758 (Lion Engineering)** wherein Hon'ble Supreme Court held that paragraphs 16 and 17 of MSP (MSP Infrastructure Ltd. Vs. Madhya Pradesh Road Development Corporation Ltd reported in (2015) 13 SCC 713) is no longer good law. A plea set out in the memorandum of grounds, even if it is a point which was not raised before the AT can be raised before the Section 34 Court is Lion Engineering principle. Whether this principle can be extended and applied as between Sections 34 and 37 Courts is the interesting point that falls for consideration. On this point alone, Ms.Preeti, learned counsel for contractor requested for a short accommodation to examine the obtaining position of law and revert to this Court. Request acceded to. List day after tomorrow.*

22. List on 03.04.2024.'



3. The aforementioned proceedings captures all essential facts, decides two of the three points on which appeal was argued and also sets out the trajectory of the matter thus far. Therefore, we deem it appropriate to say that the aforementioned 01.04.2024 proceedings shall be read as an integral part and parcel of this order. This means that the short forms, abbreviations and short references used in the earlier proceedings will continue to be used in the instant order also.

4. Continuing from ***Lion Engineering*** which was rendered by a three member Bench of Hon'ble Supreme Court, today, Ms.Preeti Mohan, learned counsel for CWSPL pressed into service another case law which was rendered by a two member Bench of Hon'ble Supreme Court vide ***Union of India Vs. Susaka Private Limited and Others*** reported in ***(2018) 2 SCC 182 (Susaka)***. ***Susaka*** was rendered by Hon'ble Supreme Court on 08.12.2017. To be noted, ***Susaka*** has not been placed before the Hon'ble Bench which decided ***Lion Engineering*** on 22.03.2018. Therefore we are going to the question as to whether ***Susaka*** aids the learned counsel for CWSPL. On facts, ***Susaka*** is a case where the works contract for repair was awarded by Railways which ran into rough weather leading to arbitral proceedings, wherein the AT thereat awarded interest on various claims for



different periods and the question as to whether the AT was justified in awarding interest on various claims made upto the Supreme Court in **Susaka** travelled to Supreme Court. Clause 13.3 of GCC thereat [hereinafter 'Susaka GCC' for clarity] did not allow interest to be claimed on sums payable under the contract except on government securities, if deposited with Union of India. In **Susaka** also there was no dispute that this 13.3 of Susaka GCC plea had not been raised at any earlier stage. As regards Section 34 Court, the Susaka GCC clause 13.3 point was raised as a ground, but was 'not pressed' at the time of arguments but in **Susaka** and this has been recorded by Hon'ble Single Judge and therefore it was construed as a waiver. This is one difference between **Susaka** and the case on hand but there is a more striking difference qua **Susaka** and the case on hand and that is owing to issue No.8 framed by AT. AT has framed as many as 10 issues and adumbration of this 10 issues is in paragraph 6 of the said award, which reads as follows :

'6. The parties filed their respective Draft issues on 02.11.2016 and on the basis of the same, the following issues were framed and communicated in the Proceedings dated 02.11.2016, to both the Counsels.

- 1. Whether the Claimant is entitled to the Claims as in the Claim Petition?*



2. *Whether the Respondent failed to perform its obligations in the Contract and/or afford reasonable facilities to the Claimant for the performance of their obligation? If so, what are the consequences of such failure?*
3. *Whether the Claimant failed to perform its obligations under the Contract?*
4. *Whether the termination of the Contract by the Respondent was justified?*
5. *Whether the Respondent has established that delays were solely attributable to the Claimant?*
6. *Whether the liquidated damages levied by the Respondent is sustainable under the terms of the Contract and law?*
7. *Whether the Respondent is entitled to the Counter Claims as in the Statement of Defence?*
8. *Whether the parties are entitled for interest, and if so, on what amount, at what rate and for what period?*
9. *Whether the parties are entitled to costs?*
10. *What other reliefs are the parties entitled to?'*

5. A perusal of Issue No.8 will make it clear that AT has framed a issue as to whether the parties are entitled to interest and AT has not stopped with that. It has also framed pointed extension of issue as to on what amount, at what rate and for what period. In other words, AT has framed an



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issue as to whether parties are entitled to interest and has also extended the issue by saying that if the answer is in affirmative i.e., if the parties are entitled to interest, three aspects i.e., (a) amount; (b) rate and (c) period, have to be decided. Interestingly and intriguingly this Issue No.8 has not been discussed much less has dispositive reasoning been given by the AT, though *pendente lite* interest has been awarded vide the first limb of the operative portion of the award. Therefore, **Susaka** does not come to the aid of CWSPL in the case on hand.

6. Learned counsel also placed before this Court an order dated 01.08.2022 made by another co-ordinate Division Bench in OSA.No.78 of 2021 and CMP.No.2950 of 2021 (***Nuclear Fuel Complex Vs M/s.URC Constructions Private Ltd., & Another***) wherein **Susaka** has been adverted to and more particularly paragraph Nos.26 to 30 of **Susaka** have been relied on, as would be evident from the Division Bench (DB of this Court) order in ***Nuclear Fuel Complex*** case. The Division Bench was addressing itself to the question of entertaining a new ground in Section 37. Learned counsel also submitted that this ***Nuclear Fuel Complex*** case was carried to Hon'ble Supreme Court vide SLP.(C) No(s).19632/2022 and Hon'ble Supreme Court in and by order dated 21.11.2022, dismissed the SLP. The order is as



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follows :

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'No case for interference is made out in exercise of powers under Article 136 of the Constitution of India.

The Special Leave Petition stands dismissed.'

7. ***Nuclear Fuel Complex*** case does not become an order of Hon'ble Supreme Court as there is no doctrine of merger owing to dismissal of SLP at pre-leave stage. Doctrine of merger point has already been decided by Hon'ble Supreme Court vide ***Kunhayammed and others Vs. State of Kerala and another*** reported in (2000) 6 SCC 359. Therefore, ***Nuclear Fuel Complex*** case continues to remain a judgment of another co-ordinate Bench and in any event it is clearly distinguishable on fact as that was the case of entertaining a new ground in Section 37. On a demurrer there is another reason as to why ***Nuclear Fuel Complex*** case does not come to the aid of CWSPL as ***Nuclear Fuel Complex*** has not considered the judgment of Hon'ble Supreme Court in ***State of Chhattisgarh and Another Vs. Sal Udyog Private Limited*** reported in (2022) 2 SCC 275 (***Sal Udyog***). On facts, ***Sal Udyog*** is a case pertaining to supply of Sal seeds for a twelve year period to the Government i.e., State Government (State of Madhya Pradesh), dispute erupted, Section 11 route for constitution of AT was taken, AT made



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an award in favour of the contractor company which included interest for two different periods, State filed a 34 petition, learned District Judge (Section 34 Court) modified the interest part alone. This was assailed by the State and the contractor company in the 37 Court by way of a cross appeal and it is in this context that the scope of an appeal vide Section 37 Court was dealt with by Hon'ble Supreme Court as the ground of illegality on the face of the award vide grounds (J) and (K) thereat in 37 Court and this was resisted on the ground of waiver but this remained unanswered by the section 37 Court. When the matter went to Hon'ble Supreme Court, an expression that '*the Court finds that*' occurring in Section 37 was considered and it was made clear that the argument that a Section 34 Court powers would not be available to a Section 37, does not stand to reason. In other words, Hon'ble Supreme Court in ***Sal Udyog*** made it clear that all the powers of Section 34 Court are available to a Section 37 Court. We deem it appropriate to extract and reproduce paragraphs 24 and 25 of ***Sal Udyog***, which reads as follows :

'24. We are afraid, the plea of waiver taken against the appellant State on the ground that it did not raise such an objection in the grounds spelt out in the Section 34 petition and is, therefore, estopped from taking the same in the appeal preferred under Section 37 or before this Court, would also not



be available to the respondent Company having regard to the language used in Section 34(2-A) of the 1996 Act that empowers the Court to set aside an award if it finds that the same is vitiated by patent illegality appearing on the face of the same. Once the appellant State had taken such a ground in the Section 37 petition and it was duly noted in the impugned judgment, the High Court ought to have interfered by resorting to Section 34(2-A) of the 1996 Act, a provision which would be equally available for application to an appealable order under Section 37 as it is to a petition filed under Section 34 of the 1996 Act. In other words, the respondent Company cannot be heard to state that the grounds available for setting aside an award under sub-section (2-A) of Section 34 of the 1996 Act could not have been invoked by the Court on its own, in exercise of the jurisdiction vested in it under Section 37 of the 1996 Act. Notably, the expression used in the sub-section is "the Court finds that". Therefore, it does not stand to reason that a provision that enables a Court acting on its own in deciding a petition under Section 34 for setting aside an award, would not be available in an appeal preferred under Section 37 of the 1996 Act.

25. Reliance placed by the learned counsel for the respondent Company on the ruling in Hindustan Construction Co. Ltd. is found to be misplaced. In the aforesaid case, the Court was required to examine whether in an appeal preferred under Section 37 of the 1996 Act against an order refusing to set aside an award, permission could be granted to amend the



memo of appeal to raise additional/new grounds. Answering the said question, it was held that though an application for setting aside the arbitral award under Section 34 of the 1996 Act had to be moved within the time prescribed in the statute, it cannot be held that incorporation of additional grounds by way of amendment in the Section 34 petition would amount to filing a fresh application in all situations and circumstances, thereby barring any amendment, however material or relevant it may be for the consideration of a Court, after expiry of the prescribed period of limitation. In fact, laying emphasis on the very expression "the Court finds that" applied in Section 34(2)(b) of the 1996 Act, it has been held that the said provision empowers the Court to grant leave to amend the Section 34 application if the circumstances of the case so warrant and it is required in the interest of justice. This is what has been observed in the preceding paragraph with reference to Section 34(2-A) of the 1996 Act.'

8. This brings us back to the question on hand i.e., clause 8.10 of GCC. Learned counsel for CWSPL submitted that if there had been a contest before the AT, the question of interpretation of clause 8.10 would have been gone into. In this regard, it is to be noted that AT had framed eight issues (extracted and reproduced supra) and therefore, CWSPL ought to have addressed AT on the issue on interest, i.e., issue no.8. To be noted, issue arises only when there is an assertion and denial. The second aspect is



a point which could have been made before the AT or before the section 34 Court, can well be made before the section 37 Court in the light of ***Lion Engineering*** and ***Sal Udyog*** principle.

9. The argument on clause 8.10 of GCC is that it pertains only to monies payable by the purchaser on a security amount, bank guarantee amount or the balance amount which may be lying with the purchaser and that by itself does not denude the AT from the power of awarding interest. A careful reading of clause 8.10 of GCC makes it clear that there shall be no interest on money which may become due owing to the differences or misunderstanding or any dispute between the purchaser and the contractor. Also to be noted, clause 8.10 has already been extracted and reproduced supra. A comprehensive reading of contract would make it clear that AT is denuded of its power to award *pendente lite* interest is learned counsel's (counsel for CWSPL) say. Therefore, the AT considering Section 28(3) of 'The Arbitration and Conciliation Act, 1996 (26 of 1996)' (hereinafter 'A & C Act') should have considered clause 8.10 and answered Issue No.8. AT should have specifically adverted to Issue No.8 and answered it, as the award is clearly on money which has become due owing to differences / misunderstandings / dispute between BHEL and CWSPL.



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10. If we now go on to interpret clause 8.10, that can tantamount to modifying the said award as we may end up interfering with regard to the *pendente lite* interest portion alone. As regards modification, Mr.Krishna Srinivasan, learned Senior Advocate in his usual fairness brought to our notice that a judgment rendered by a single Judge of this Court Hon'ble Mr.Justice V.Ramasubramanian (as His Lordship then was) in ***Gayatri Balaswamy Vs. ISG Novasoft Technologies Ltd.***, reported in **2014 (6) CTC 602** and confirmed by a Division Bench vide order in an intra-court appeal reported in **2019 SCC OnLine Mad 15819 : (2019) 6 CTC 601 : (2019) 5 LW 409**, which has been carried to Hon'ble Supreme Court by way of SLP.(C) Nos.15336-15337/2021 and a three member Bench of the Hon'ble Supreme Court has referred five questions to a larger Bench and adumbration of these five questions is in paragraph No.3 of the reference order. We deem it appropriate to reproduce the order dated 20.02.2024 in SLP (C) Nos.15336-15337/2021, which is as below :

*'1. I.A.No.42914/2024 for direction stands dismissed.
Time to comply with the order dated 19.10.2023 is
extended by three weeks from date.*

2. Whether or not the Courts in exercise of power under



sections 34 and 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 clarify 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**, followed in **Larsen Air Conditioning and Refrigeration Company vs. Union of India** and **SV Samudram vs. State of Karnataka** lay down the correct law, as other benches of two judges (in **Vendanta Limited vs. Shenzden Shandong Nuclear Power Construction Company Limited**, **Oriental Structural Engineers Pvt. Ltd. vs. State of Kerala** and **M.P. Power Generation Co. Ltd. vs. Ansaldo Energia Spa** and three Judges (in **J.C.Budhraja vs. Chairman, Orissa Mining Corporation Ltd.**, **Tata Hydroelectric Power Supply Co. Ltd. vs. Union of India** and **Shakti Nath vs. Alpha Tiger Cyprus Investment No.3 Ltd.**) of this Court have either modified or accepted modification of the arbitral awards under consideration?”*



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

11. At this juncture, Mr.Krishna Srinivasan, instructed by Ms.Geethi Ara and Mr. Karthik Ram Mohan, learned counsel for BHEL and Ms.Preeti Mohan along with R.S.Pornima, learned counsel for CWSPL submitted that they would opt for re-arbitration. To be noted if we had interfered and set aside the award, this would have been the course owing to paragraph 52 of ***McDermott International Inc. Vs. Burn Standard Co. Ltd. and others*** reported in ***(2006) 11 SCC 181***. Both sides, on instructions fairly agreed/consented that re-arbitration can now be restricted to *pendente lite* interest aspect alone.

12. Both sides agreed that they will resort to fast track procedure vide 29B of A & C Act.

13. In the light of the narrative, discussion and dispositive reasoning set out supra, the following consent order is passed:

(a)Sub paragraph (1) of paragraph 17 of the 05.05.2019 award is set aside by consent of both sides and



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this shall not be construed as modification of the award. It is made clear that this setting aside by consent is for the limited purpose of facilitating re-arbitration qua *pendente lite* interest;

(b)As it is a consent order, this order will not serve as a precedent.

(c)Hon'ble Mr.Justice V.Ramasubramanian, former Judge of Hon'ble Supreme Court, residing at No.12, TP Scheme Road, R.A.Puram, Chennai - 600 028, [Ph.No.(044) 24939936 Mobile: 93184-56789] is appointed as Hon'ble Arbitrator for the aforesaid purpose and both sides agree on the Arbitrator. Hon'ble sole Arbitrator is requested to enter upon reference qua said loan agreement, adjudicate upon arbitrable dispute regarding *pendente lite* interest qua the said loan agreement and render an Arbitral Award by holding sittings for oral hearing/s (if any) either virtual or physical in the 'Madras High Court Arbitration Centre under the aegis of this Court' (MHCAC) as per Madras High Court Arbitration Proceedings Rules 2017 and fee of Hon'ble sole Arbitrator shall be in accordance with the Madras High Court



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Arbitration Centre (MHCAC) (Administrative Cost and Arbitrator's Fees) Rules 2017.

(d) Arbitration by aforementioned Hon'ble Arbitrator shall be by way of fast track procedure vide Section 29B of A and C Act and such rearbitration shall be on the basis of available records, i.e., written pleadings and documents already before the AT and it shall be on *pendente lite* interest aspect alone, i.e., sub paragraph (1) of paragraph 17 of the 05.05.2019 award which has been set aside. Submissions if any alone can be filed by the parties and that will also pertain to *pendente lite* interest alone.

(e) Aforementioned limb of this operative portion pertaining to rearbitration regarding sittings in MHCAC is in the light of clauses (b) and (c) of sub section (3) of section 29B of A and C Act, vide which Hon'ble Arbitrator may call for further information or clarification from the parties and may hold oral hearing at his discretion if the parties make a request and if Hon'ble Arbitrator considers it necessary for clarifying certain issues. After Hon'ble Arbitrator returns his verdict in the rearbitration, by consent, both parties agree that



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the same will replace sub paragraph (1) of paragraph 17 of 05.05.2019 award alone and all other parts of the 05.05.2019 award will remain as such. To be noted, this is also by consent and therefore, it shall not serve as a precedent.

(f)As regards not resorting to modification as **Hakeem** is under reference to a Larger Bench vide order of Hon'ble Supreme Court dated 20.02.2024, till such time the reference is decided, **Hakeem** will hold the field and obviously whether **Hakeem** will continue to hold the field post reference will depend on the verdict which Larger Bench returns.

14. Captioned OSA disposed of by consent in the aforesaid manner.

There shall be no order as to costs.

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

03.04.2024

Index : Yes / No

Neutral Citation : Yes / No

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Note: Registry is directed to communicate a copy of this order forthwith to

1.The Hon'ble Mr.Justice V.Ramasubramanian
Former Judge of Hon'ble Supreme Court,
No.12, TP Scheme Road, R.A.Puram,
Chennai - 600 028.



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[Ph.No.(044) 24939936 Mobile: 93184-56789]

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2.The Director

Tamil Nadu Mediation and Conciliation Centre
cum – Ex Officio Member
Madras High Court Arbitration Centre
Madras High Court, Chennai – 600 104.



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

ds

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Dated : 03.04.2024