IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17-11-2025

CORAM

THE HONOURABLE MR JUSTICE N. ANAND VENKATESH

Original Petition Nos.821 of 2019, 145 of 2017, 454 & 1068 of 2018, 108 of 2019 & OP.No.400 of 2020

OP.No.821 of 2019

Electronics Corporation of Tamil Nadu
Limited,
692, Anna Salai, Nandanam
Chennai 600 035. ...Petitioner

Vs

ICMC Corporation Limited
36, Ambattur Industrial Estate
Chennai 600 0520. ...Respondent

PETITION under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the award dated 22.08.2019 passed by the learned Arbitrator in the dispute arising out contracts dated 14.2.2013 and 23.07.2013 and award cost.

For Petitioner : Mr.E.Srikanth

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

OP.No. 145 of 2017

M/s. Ircon International Limited
(A Government of India Undertaking)
Represented by its Joint General Manager (South)
Ground Floor, DRM Officer Building
Behind DRM Office
South Western Railway
Adjacent to City Railway Station
Bengaluru-560 023. ..Petitioner

.Vs.

The Government of Tamil Nadu
Represented by the Superintending Engineer (H)
SCRD Circle, M.K.S. Building
4A,Kkanthaswamy Lay Out
Second Street, Villupuram 605 002. ..Respondent

PETITION under Section 34 of the Arbitration and Conciliation Act, 1996 praying to to set aside the arbitral award dated 18.05.2016 made in relation to disputes arising out of contract agreement No.13/98-00 dated 25.2.1999 in so far as it relates to claim No.6 towards idling charges of men and materials and claim No.8 towards increased cost for material labour and POL not compensated by normal price variation are concerned.

For Petitioner : Mr.Anirudh Krishnan
for Mr.Adarsh Subramanian

For Respondent : Mr.R.Ramanlal
Additional Advocate General
Asst.By:
Mr.R.Siddharth
Additional Government Pleader

OP.No. 454 of 2018

The Government of Tamil Nadu
Represented by the Superintending Engineer (H)
SCRD Circle, M.K.S. Building
4A,Kkanthaswamy Lay Out
Second Street, Villupuram 605 002. ..Petitioner

.Vs.

M/s.Ircon International Limited
(A Government of India Undertaking)
Represented by its Joint General Manager (South)
Ground Floor, DRM Officer Building
Behind DRM Office
South Western Railway
Adjacent to City Railway Station
Bengaluru-560 023. ..Respondent

PETITION under Section 34 of the Arbitration and Conciliation Act, 1996 praying to to set aside the impugned Award dated 18.05.2016 passed by the Sole Arbitrator Justice Mr.K.P.Sivasubramnaim (Retd), High Court, Madras,

For Petitioner : Mr.R.Ramanlal
Additional Advocate General
Asst.By:
Mr.R.Siddharth
Additional Government Pleader

For Respondent : Mr.Anirudh Krishnan
for Mr.Adarsh Subramanian

OP No. 1068 of 2018

M/s.URC Construction (P) Ltd
Represented by its Authorized Signatory
Mr.V.Ganesan, Manager,
13(Old No.H-102), Periyar Nagar
Erode-638 001. ..Petitioner

.Vs.

M/s.Airport Authority of India
Represented by its Senior Manager Engg(C)
Project Division-IV,
Chennai Airport Project
Chennai-600 016. ..Respondent

Petition under Section 34 of the Arbitration and Conciliation Act, 1996, praying to set-aside the portions of the award dated 20.08.2018 passed by the Arbitral Tribunal to an extent, as aggrieved by the Petitioner herein, in respect of the arbitral proceedings between the Petitioner and the Respondent.

For Petitioner(s): Mr.P.J.Rishikesh

For Respondent(s): Mr.V.Lokesh Kumar

OP No. **108 of 2019**

M/s.Airport Authority of India
Represented by its Senior Manager Engg(C)
Project Division-IV,
Chennai Airport Project
Chennai-600 016. ..Petitioner

.Vs.

M/s.URC Construction (P) Ltd
Represented by its Authorized Signatory
Mr.V.Ganesan, Manager,
13(Old No.H-102), Periyar Nagar
Erode-638 001. ..Respondent

Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, praying to set-aside the Award dated 20.08.2018 passed by the learned Arbitrator, insofar as claims 1, 2, 3 and 6 are concerned.

For Petitioner(s): Mr.V.Lokesh Kumar

For Respondent(s): Mr.P.J.Rishikesh

OP.No.400 of 2020

The Chennai Port Trust
Rep.by its Chief Mechanical Engineer,
Chennai Port Trust,
No.1, Rajaji Salai,
Chennai 600 001. ..Petitioner

.Vs.

Chennai Container Terminal (P) Ltd,,
Rep.by its Managing Director /CEO
Administrative Building,
Chennai Port Trust,
No.1, Rajaji Salai, Chennai 600 001. ..Respondent

Petition under Section 34(2) of the Arbitration and Conciliation Act,

1996, praying to set aside the majority award dated 06.02.2019 insofar as the decisions on issues 1 to 5, 9,10,18,19 passed by the Presiding Arbitrator and Honble Mr.Justice (Retd.) E.Padmanabhan and uphold the minority award except decisions on issue passed by the Honble Mr.Justice (Retd) A.K.Rajan.

For Petitioner(s): Ms.Gopika Nambiar

For Respondent(s): Mr.Vinod Kumar

COMMON ORDER

These batch of cases raise an unusual and unprecedent legal conundrum. These petitions under Section 34 of the Arbitration and Conciliation Act, 1996 have been placed before this Court pursuant to various orders of remand passed by a Division Bench of this Court in statutory appeals under Section 37 of the Arbitration and Conciliation Act, 1996. The grievance of the appellants before the Division Bench was that the learned single judges, whose orders were on appeal, had modified/severed certain portions of the award which was impermissible in a legal drill under Section 34 in view of the decision in ***NHAI Vs. M.Hakeem (2021) 9 SCC 1***. At the relevant point of time when these cases were disposed by the Division Bench the decision in ***M. Hakeem***, was pending reference before a Larger

Bench. The Division Bench has remanded these cases to the Section 34 Court for a de-novo hearing without going into the merits of the respective cases.

2.At the outset, this Court is aware that the orders of remand have been passed by consent. They have not and cannot be challenged. In normal circumstances, the Court to which the remand is made cannot defy the order of remand. But this is not a normal or usual case. The difficulty arises since the order of remand has been made without going into the merits. This implies that the findings expressed on merits by the Section 34 Court in the earlier round have not been vacated/set aside. In this backdrop the following question of law falls for consideration:

"Whether an order of de-novo remand can be implemented by the Section 34 Court when the appellate court in an appeal under Section 37 has not gone into the merits and set aside/vacated the same?

3.To appreciate the controversy, a brief backdrop of the trajectory of the respective cases is necessary. They are as follows:

OP.No. 821 of 2019

a) This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 filed by the Electronics Corporation of India challenging an award dated 22.08.2019. The OP was partly allowed by a learned single judge of this Court (Mr. Justice Senthilkumar Ramamoorthy) by an order dated 24.01.2020, on the following terms:

> *"22. In the result, the Arbitral Award dated 22.08.2019 is partly set aside with regard to the declaration that the imposition of LD under the Second Contract is illegal and the consequential direction for the payment of amounts withheld as LD under the Second Contract along with interest thereon. In all other respects, no interference is warranted with the Award. Consequently, Application No.7830 of 2019 is disposed of by vacating the order of interim stay of the Award and by directing the Petitioner to release the bank guarantees provided in terms of the order. The Petitioner shall also bear the bank charges associated with the extension of the bank guarantee for Rs.26,37,07,807.55 after setting off the proportionate bank charges for the sum of Rs.2,18,00,000/- with interest thereon at 15% per annum from the date of payment thereof to the Respondent. Consequently, application No.7832 of 2019 is closed. No costs."*

b) This order was assailed by the contractor in OSA.No. 118 of 2020

and by the ECI in OSA.No. 218 of 2021 in appeals under Section 37 of the Act. By a common order dated 24.06.2024, the appeals were disposed on the following terms:

> *"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 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 award 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 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;

The Division Bench has, thereafter, made certain directions for expediting the disposal of the Section 34 petition which are omitted since they are not material for the present purposes.

OP.No. 145 of 2017 & OP.No. 454 of 2018

c) The claimant (contractor) before the Arbitral Tribunal is the petitioner in OP.No. 145 of 2017 and the respondent before the Arbitral Tribunal is the petitioner in OP.No. 454 of 2018. The challenge is to an award dated 18.05.2016, where under the contractor was awarded a sum of Rs.7,05,47,000/- as against the aggregate claim of Rs.14,58,81,219. By a common order dated 22.01.2020, Mr. Justice Senthilkumar Ramamoorthy dismissed OP.No. 145 of 2017 and allowed OP.No. 454 of 2018 filed by the Government on the following terms:

"19. In the result, the Award dated 18.05.2016 is set aside as regards Claim No.2, Claim Nos.3.2, 3.3, 3.6, 3.7, 3.9, 3.12, 3.14 and 7, whereas it is upheld as regards Claims 1, 3.5, 3.20, 3.21, 4 and 6. These Claims shall carry interest at the

simple interest rate of 12% per annum in the pre-reference, pendente lite and Post-Award period but subject to that revision, no interference is necessary. In addition, the rejection of Claims 6 and 8 and the other sub-claims in Claim 3 are upheld. Claim 4 and the award thereon consists of interest for belated payment and the unpaid principal sum of Rs.5,88,277/-. As regards the belated payment of retention money of Rs.47,67,896/-, interest shall be computed thereon at simple interest of 12% per annum from 19.03.2004 till 12.03.2007 and paid. Consequently, from 13.03.2007 onwards, including the Post-Award period, interest will be payable only on the unpaid principal sum of Rs.5,88,277/- at the simple interest rate of 12% per annum. Thus, O.P. No.454 of 2018 is disposed of on the above terms and O.P.No.145 of 2017 is dismissed. No costs."

d) As against the aforesaid common order, the Government of Tamil Nadu filed O.S.A (CAD) 51 of 2021 which was directed OP.No.454 of 2018 in so far as it upheld certain claims in favor of the contractor with interest. OSA 207 & 208 were filed by IRCON challenging the order(s) passed in OP.No.145 of 2017 and OP.No. 454 of 2018. The OSA's were disposed by an order dated 15.07.2024 extracted its earlier order dated 24.06.2024 passed in the ***Electronics Corporation of India*** (ECI) case, and held as under:

"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 Hon'ble single Judge, who made the impugned common order dated 22.01.2020 in O.P.Nos.145 of 2017 and 454 of 2018, Gayatri Balaswamy's case, [Gayatri Balaswamy Vs. ISG Novasoft Technologies Ltd., reported in 2014 (6) CTC 602 : 2019 SCC OnLine Madras 15819] was holding

ITEM NO.15 COURT NO.4 SECTION XII

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petitions for Special Leave to Appeal (C) Nos.15336-15337/2021

(Arising out of impugned final judgment and order dated 08-08-2019 in OSA No. 59/2015 08-08-2019 in OSA No. 181/2015 passed by the High Court of Judicature at Madras)

GAYATRI BALASAMY Petitioner(s)

VERSUS

M/S ISG NOVASOFT TECHNOLOGIES LIMITED Respondent(s)

(FOR ADMISSION, FOR REPORTING COMPLIANCE AND I.A. No.42914/2024 for direction]

Date : 20-02-2024 These petitions were called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE DIPANKAR DATTA
HON'BLE MR. JUSTICE K.V. VISWANATHAN
HON'BLE MR. JUSTICE SANDEEP MEHTA

For Petitioner(s) Mr. Arvind Datar, Sr. Adv.
Mr. M.V Mukunda, Adv.
Ms. Hina Shaheen, Adv.
Mr. Mithun Shashank, Adv.
Mr. M.V Swaroop, Adv.
Mr. Hredai Sriram, Adv.
Mr. Nishanth Patil, AOR

Mr. K.Parameshwar, AOR

For Respondent(s) Mr. Siddharth Bhatnagar, Sr. Adv.
Mr. Debmalya Banerjee, Adv.
Ms. Manmeet Kaur, Adv.
Mr. Rohan Sharma, Adv.
Mr. Gurtej Pal Singh, Adv.
Mr. Abhishek Rana, Adv.
Ms. Ananya Khanna, Adv.
Mr. Aditya Sidhra, Adv.
M/S. Karanjawala & Co., AOR

UPON hearing the counsel the Court made the following
O R D E R

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 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

1 (2021) 9 SCC 1
2 (2023) SCC Online SC 982
3 (2024) SCC Online SC 19

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. Budhraja 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)

4 (2019) 11 SCC 465
5 (2021) 6 SCC 150
6 (2018) 16 SCC 661
7 (2008) 2 SCC 444
8 (2003) 4 SCC 172
9 (2020) 11 SCC 685

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 and that makes it clear that the question as to whether the powers of the Court will include the power to modify an Arbitral Award is not just qua a Section 34 Court but it is qua a Section 37 Court also i.e., this Court. Therefore, it is only appropriate that we remand the matter. As if we sustain the impugned common order after hearing out both sides that will tantamount to modification in a Section 37 legal drill.

7. To be noted, both sides i.e., Mr.Anirudh Krishnan, learned counsel for Ircon and Mr.P.S.Raman, learned Advocate General for State of Tamil Nadu 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 22.01.2020 made in O.P.Nos.145 of 2017 and 454 of 2018 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 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 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 thereat 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 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 will be the date of presentation of Section 34 petition. To be noted, ICMC case supra, (order dated 24.06.2024) as a Division Bench it has held this Daimler Financial Services principle to be correct law / good law and therefore the same i.e., Daimler Financial Services is now a Division Bench order;

(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 in Division Bench of this Court vide Daimler Financial Services.

Captioned three 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 his 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."

OP.No. 1068 of 2018 & OP.No. 108 of 2019

e) These OP's arose out of an arbitral award dated 20.08.2018 which was assailed by the contractor in OP.No. 1068 of 2018 and by the Airports Authority of India (AAI) in OP.No. 108 of 2019. By a common order dated 23.01.2020, the petitions were disposed by Mr. Justice Senthilkumar Ramamoorthy on the following terms:

"In the result, the amount awarded in respect of Claim 2 shall be re-worked, as indicated above, and interest on Claims 1 and 3 shall apply at the rate of 12% per annum from the dates specified above, in respect of each Claim, in the pre-reference, pendente lite and post Award period. Except to the extent indicated above, the respective Petitioners have failed to make out a case to interfere with the Award, as per principles laid down in Ssyangyong, including in paragraphs 35 and 42 thereof. Consequently, O.P. No.108 of 2019 is dismissed and O.P. No. 1068 of 2018 is disposed of on the terms indicated above. No costs. Consequently, connected Application is closed".

f) As against the dismissal of OP.No. 108 of 2019, the AAI filed two OSA's viz., OSA.Nos. 195 and 196 of 2021 which were disposed by the Division Bench by a common dated 15.07.2024. The Division Bench once again makes a reference to its order dated 24.06.2024 passed in the ***ICMC Corporation case***, extracts the same and has gone on to observe as follows:

> *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 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:*

ITEM NO.15 COURT NO.4 SECTION XII

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petitions for Special Leave to Appeal (C) Nos.15336-15337/2021

(Arising out of impugned final judgment and order dated 08-08-2019 in OSA No. 59/2015 08-08-2019 in OSA No. 181/2015 passed by the High Court of Judicature at Madras)

GAYATRI BALASAMY Petitioner(s)

VERSUS

M/S ISG NOVASOFT TECHNOLOGIES LIMITED Respondent(s)

(FOR ADMISSION, FOR REPORTING COMPLIANCE AND I.A. No.42914/2024 for direction]

Date : 20-02-2024 These petitions were called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE DIPANKAR DATTA
HON'BLE MR. JUSTICE K.V. VISWANATHAN
HON'BLE MR. JUSTICE SANDEEP MEHTA

For Petitioner(s) Mr. Arvind Datar, Sr. Adv.
Mr. M.V Mukunda, Adv.
Ms. Hina Shaheen, Adv.
Mr. Mithun Shashank, Adv.
Mr. M.V Swaroop, Adv.
Mr. Hredai Sriram, Adv.
Mr. Nishanth Patil, AOR

Mr. K.Parameshwar, AOR

For Respondent(s) Mr. Siddharth Bhatnagar, Sr. Adv.
Mr. Debmalya Banerjee, Adv.
Ms. Manmeet Kaur, Adv.
Mr. Rohan Sharma, Adv.
Mr. Gurtej Pal Singh, Adv.
Mr. Abhishek Rana, Adv.
Ms. Ananya Khanna, Adv.
Mr. Aditya Sidhra, Adv.
M/S. Karanjawala & Co., AOR

UPON hearing the counsel the Court made the following
O R D E R

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 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

1 (2021) 9 SCC 1
2 (2023) SCC Online SC 982
3 (2024) SCC Online SC 19

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. Budhraja 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)

4 (2019) 11 SCC 465
5 (2021) 6 SCC 150
6 (2018) 16 SCC 661
7 (2008) 2 SCC 444
8 (2003) 4 SCC 172
9 (2020) 11 SCC 685

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 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 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;

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 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.

OP 400 of 2020

g)This petition is filed by the Chennai Port Trust against an impugned arbitral award dated 06.02.2019 passed by three-member Arbitral Tribunal. This petition was partly allowed by Mr. Justice N. Sathish Kumar, by an order dated 22.10.2021, on the following terms:

"40. In such a view of the matter, the Award relating to the Issue No.1 to 5 decided in the Arbitral Tribunal and it is reclassified as Issue No.3 by this Court while sending notice

alone is set aside. It is open to the parties to go for fresh arbitration only in respect of the interpretation of contract relating to the charges to be paid for supply of the power alone.

41. Accordingly, the Original Petition allowed in part. Consequently the Application No.2155 of 2020 is closed."

h) Against the said order, the respondent ie., Chennai Container Terminal Private Limited filed OSA (CAD).No. 146 of 2021 which was disposed by the Division Bench by an order dated 10.06.2024 on the following terms:

"9. Adverting to aforementioned impugned order, learned Senior counsel for appellant CCTPL and learned Solicitor very fairly agreed that the impugned order tantamounts to modification of the impugned award as it has interfered with only part of the impugned award and therefore, the same is contrary to the Hakeem principle, namely ratio laid down by Hon'ble Supreme Court in Project Director NHAI Vs. M.Hakeem reported in (2021) 9 SCC 1 wherein it was laid down that modification of an arbitral award is impermissible in a Section 34 legal drill.

10. A three member Bench of the Hon'ble Supreme Court doubting the correctness of Hakeem, formulated five questions and directed the same to be placed before the Hon'ble Chief Justice of India for an appropriate order. This is vide proceedings /orders dated 20.02.2024 in Special Leave to Appeal (c) Nos.15336-15337/2021 and the order reads as follows:

ITEM NO.15 COURT NO.4 SECTION XII

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petitions for Special Leave to Appeal (C) Nos.15336-15337/2021

(Arising out of impugned final judgment and order dated 08-08-2019 in OSA No. 59/2015 08-08-2019 in OSA No. 181/2015 passed by the High Court of Judicature at Madras)

GAYATRI BALASAMY Petitioner(s)

VERSUS

M/S ISG NOVASOFT TECHNOLOGIES LIMITED Respondent(s)

(FOR ADMISSION, FOR REPORTING COMPLIANCE AND I.A. No.42914/2024 for direction]

Date : 20-02-2024 These petitions were called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE DIPANKAR DATTA
HON'BLE MR. JUSTICE K.V. VISWANATHAN
HON'BLE MR. JUSTICE SANDEEP MEHTA

For Petitioner(s) Mr. Arvind Datar, Sr. Adv.
Mr. M.V Mukunda, Adv.
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Mr. M.V Swaroop, Adv.
Mr. Hredai Sriram, Adv.
Mr. Nishanth Patil, AOR

Mr. K.Parameshwar, AOR

For Respondent(s) Mr. Siddharth Bhatnagar, Sr. Adv.
Mr. Debmalya Banerjee, Adv.
Ms. Manmeet Kaur, Adv.
Mr. Rohan Sharma, Adv.
Mr. Gurtej Pal Singh, Adv.
Mr. Abhishek Rana, Adv.
Ms. Ananya Khanna, Adv.
Mr. Aditya Sidhra, Adv.
M/S. Karanjawala & Co., AOR

UPON hearing the counsel the Court made the following
O R D E R

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 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?
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> 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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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. Budhraja 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)
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(PREETHI T.C.)
COURT MASTER (NSH)

4 (2019) 11 SCC 465
5 (2021) 6 SCC 150
6 (2018) 16 SCC 661
7 (2008) 2 SCC 444
8 (2003) 4 SCC 172
9 (2020) 11 SCC 685

11. We are informed by both sides that the reference is before a Constitution Bench and therefore, a Constitution Bench of Hon'ble Supreme Court is in seizin of the question, more particularly the five questions qua Hakeem, which are subject matter of reference.

12. When a matter is under reference and in seizin qua a Larger Bench, the original order will continue to hold the field until the reference is answered one way or the other. In this view of the matter, both sides fairly agreed that the matter is to be remitted back to Section 34 Court albeit leaving all questions open including resorting to sub-section (4) of Section 34 of A and C Act. Therefore, on the short point of Hakeem principle, the same being under reference and in the light of the consensus between the two sides, we make the following order:

i) Impugned order dated 22.10.2021 made in O.P.No.400 of 2020 and A.No.2155 of 2020 thereat is set aside and the matter is remanded back to the Section 34 Court;

ii) It is made clear that the impugned order is set aside solely for the purpose of a de novo Section 34 legal drill and this means that this Section 37 Court has not expressed any view or opinion on the merits of the matter;

iii) All questions before Section 34 Court are left open;

iv) For adding specificity, we make it clear that it is open to the Section 34 Court either to resort to sub-section (4) of Section 34 or hear out Section 34 petition on merits and sustain or dislodge the award. If the reference is answered in the interregnum, obviously Hakeem ratio as answered in reference

by Hon'ble Supreme Court will govern the proceedings; .

v) In the light of sub-section (6) of Section 34, we deem it appropriate to request Section 34 Court to dispose of the matter which is remanded back to it as expeditiously as the business of Section 34 Court would permit. vi) In this regard, we deem it appropriate to refer to paragraph 25 of State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti reported in (2018) 9 SCC 472 and order dated 10.12.2020 in O.P.No.527 of 2020 [M.Subbiah Vs. Daimler Financial Services India Pvt. Ltd., and another] made by a Section 34 Court wherein in the light of sub-section (5) being held to be directory, the reckoning date in cases when a Section 34 protagonist approaches the Section 34 Court without issue of sub-section (5) notice would become the date of presentation. In other words, time line qua sub-section (6) of Section 34 is the reminder as regards Section 34 legal drill that is to ensue.

Captioned OSA and captioned CMPs are disposed of with the aforementioned directives. There shall be no order as to costs."

4.The learned counsel on either side did not canvass the legality of the aforesaid orders. However, this Court entertained a doubt as to whether a de-novo hearing could be conducted when the Division Bench had simply remanded these cases without interfering with the findings on merits.

5.The common thread that runs across all of the aforesaid orders of the Division Bench is that an order of remand by consent was passed taking into consideration the pendency of the reference to a Larger Bench in ***Gayatri Balasamy's case,*** where the correctness of the view taken in ***NHAI v. M. Hakeem*, (2021) 9 SCC 1** was being examined. In ***Hakeem's case***, the Hon'ble Supreme Court held, following its earlier decision in ***McDermott International Inc. v. Burn Standard Co. Ltd.,*** (2006) 11 SCC 181, that the Section 34 Court had no power to modify the award of the Arbitrator.

6.In ***McDermott International Inc. v. Burn Standard Co. Ltd***., (2006) 11 SCC 181, the Supreme Court had observed:

> *"The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, 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."*

Following the said decision, the Supreme Court in *NHAI v. M. Hakeem*, (2021) 9 SCC 1, held as under:

> *"It is important to remember that Section 34 is modelled on the UNCITRAL Model Law on International Commercial Arbitration, 1985, under which no power to modify an award is given to a court hearing a challenge to an award. "*

The aforesaid position of law held the field till 30.04.2025 when the Supreme Court delivered its decision in ***Gayatri Balasamy v. ISG Novasoft Technologies Ltd.*, (2025) 7 SCC 1.** In the said decision, the majority view set out in the judgment of Sanjiv Khanna, CJ held that the jurisdiction under Section 34 included the power to modify an award under certain limited circumstances. The limited circumstances, indicated in the judgment, are as follows:

> I.When the award is severable, by severing the "invalid" portion from the "valid" portion of the award ie., the power of partial setting aside should be exercised only when the valid and invalid parts of the award can be clearly segregated—particularly in relation to liability and quantum and without any corelation between valid and invalid parts.
>
> II.By correcting any clerical, computational or typographical errors which appear erroneous on the face of the record.

III.Post-award interest may be modified in some circumstances.

IV.The fourth head is the power to modify under Article 142 of the Constitution which has no application when the matter is before the High Court.

7.It is well settled that the jurisdiction of the appellate Court under Section 37 is co-extensive with that of the Court under Section 34. This is because the jurisdiction of the appellate court is confined to what the Court can do in a petition under Section 34. This has been recently reiterated by the Supreme Court in ***Punjab State Financial Corporation Limited v Sanman Rice Mills,*** 2024 SCC Online SC 2632, where it was observed as under:

> *"It is seen that the scope of interference in an appeal under Section 37 of the Act is restricted and subject to the same grounds on which an award can be challenged under Section 34 of the Act. In other words, the powers under Section 37 vested in the court of appeal are not beyond the scope of interference provided under Section 34 of the Act."*

8.In OP.No. 454 of 2017 & OP.No. 454 of 2018, the Division Bench has observed as under:

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 and that makes it clear that the question as to whether the powers of the Court will include the power to modify an Arbitral Award is not just qua a Section 34 Court but it is qua a Section 37 Court also i.e., this Court. Therefore, it is only appropriate that we remand the matter. As if we sustain the impugned common order after hearing out both sides that will tantamount to modification in a Section 37 legal drill."

The aforesaid observations are truly intriguing. If there existed a legal embargo to modify an award in Section 37 jurisdiction by virtue of *Hakeem's case* then perforce, such an embargo would apply to the Section 34 Court as well. If the Division Bench could not modify an award, as the law then stood, the embargo would equally apply to a single judge under Section 34. What then was the purpose of remand? To make things even more complicated it appears that in all these cases an order of remand was made even without going into the merits of the case. For instance in OSA 118 of 2020 & OSA 218 of 2021, the Division Bench has observed:

"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 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....."

It has finally concluded:

"Impugned order is set aside solely for the purpose of 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."

9.To be noted, this Court having pondered and fervently perambulated within the statutory perimeters of the legal position as regards remand, finally finds itself in a legal conundrum since now a very unfortunate situation has arisen where the "*de-novo legal drill*" contemplated by the Division Bench simply cannot be given effect to. To explain the extreme difficulty and impossibility in implementing the order passed by the Division Bench, it is perhaps necessary to take a quick look at the jurisdiction of the appellate Court while passing an order of remand.

10.At the outset, it is necessary to bear in mind that the remand was not made in the course of an appeal under Clause 15 of the Letters Patent against an order made in exercise of jurisdiction under Article 226. Section 141 of the Code makes it clear that the provisions of the Code do not apply in writ petition although the general principles have been applied, and orders of remand to administrative authorities are made routinely without expressing any opinion on merits since they are unfortunately misconstrued

as the views of the Court.

11.However, in this case the appeal was being heard by the Division Bench in its civil appellate jurisdiction. Before a Civil Court, the scope of remand is confined to the provisions of Order 41 Rule 23, 23-A and 25 of the Code of Civil Procedure, 1908. The power of remand is confined to these three provisions and there exists no inherent power of remand as was held by the Supreme Court in ***P. Purushottam Reddy v. Pratap Steels Ltd***., (2002) 2 SCC 686. Order XLI Rule 23 deals with a case where the case is disposed by the trial court on a preliminary issue, and Rule 25 deals with a situation where the appellate court retains control of the appeal and calls for a finding from the trial court on specific issues to facilitate the disposal of the appeal. Both these situations do not apply to the case on hand. The other provision is Order XLI Rule 23-A which contemplates a remand when the "*decree is reversed on appeal*" and a "*re-trial is considered necessary*". The expression "*decree is reversed on appeal*" is extremely important for it underscores the need for the appellate court to enter into the merits of the judgment of the trial court and set aside the same to facilitate fresh disposal of the matter by way of a re-trial. Thus, where the appellate court does not enter into the merits of the matter and orders re-trial the order of remand would be, apart

from being wholly illegal, completely unworkable since the findings on merits would remain and is not vacated so as to allow the trial court to examine the issue afresh by way of a re-trial.

12.The legal position in this regard is well settled by a series of decisions. In ***P. Purushottam Reddy v. Pratap Steels Ltd.*, (2002) 2 SCC 686,** the Supreme Court had the occasion to observe as under:

> *"In 1976, Rule 23-A has been inserted in Order 41 which provides for a remand by an appellate court hearing an appeal against a decree if (i) the trial court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being satisfied, the appellate court can exercise the same power of remand under Rule 23-A as it is under Rule 23. After the amendment, all the cases of wholesale remand are covered by Rules 23 and 23-A. In view of the express provisions of these Rules, the High Court cannot have recourse to its inherent powers to make a remand because, as held in Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati [AIR 1965 SC 364 : 66 Bom LR 681] (AIR at p. 399), it is well settled that inherent powers can be availed of ex debito justitiae only in the absence of express provisions in the Code. It is only in exceptional cases where the court may now exercise the power of remand dehors Rules 23 and 23-A. To wit, the superior court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by*

Order 20 Rule 3 or Order 41 Rule 31 CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for rewriting the judgment so as to protect valuable rights of the parties. An appellate court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23-A or Rule 25 CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided."

The above decision was followed by A.S Chandurkar, J (as he then was) in ***Rampyare Ram v. Usha Prasad*, (2017) 5 Mah LJ 378,** where it was held:

"Under the provisions of Order XLI, Rule 23-A of the Code, the Appellate Court can direct remand of the proceedings after it reverses the decree and further finds that a fresh trial is necessary. For said purpose, the Appellate Court would have to first go into the merits of the adjudication by the trial Court and only on being satisfied that the decree is liable to be reversed and fresh trial is considered necessary that such order of remand can be passed. In P. Purushottam Reddy (supra), the Hon'ble Supreme Court has held that it is only in exceptional cases and where the conditions stipulated by provisions of Order XLI, Rule 23-A of the Code are satisfied that such order of remand can be passed. In the present case, the Appellate Court without entering into merits of the adjudication by the trial Court merely remanded the proceedings so as to give one opportunity to the respondent to contest the proceedings. In absence of the conditions stipulated under Order XLI, Rule 23-A of the Code being satisfied such order of remand could not have been passed."

In ***A. Ramaiah v. A Pedda Sayanna Sailoo*, 1988 SCC OnLine AP 162 : (1989) 1 AP LJ 391,** the Andhra Pradesh High Court has held as under:

> *"From a plain reading of Rule 23-A it is evident when the suit is decreed otherwise than on a preliminary issue and retrial is considered necessary, it is only then that the case has to be remanded. In other words, it is only after the judgment under has been reversed on merits when the question of relief falls for consideration, if the appellate court comes to the conclusion that retrial is necessary, than it can remand the case. The approach to reverse the decree merely to order remand is contrary to letter and spirit of Rule 23-A C.P.C. In this case, it appears to me that the learned Judge has reversed the judgment merely with a view remand the case which is not permissible under Order 41 Rule 23-A C, P.C."*

13.**In *Municipal Corpn., Hyderabad v. Sunder Singh*, (2008) 8 SCC 485,** the Hon'ble Supreme Court categorically observed that to justify a remand, the appellate court must disagree with the findings of the trial court. Only when a decree is to be reversed in appeal, and when the appellate court considers it necessary it can remand the case in the interest of justice. It was also held:

> *"It is not to be exercised by the appellate court only because it finds it difficult to deal with the entire matter. If it does not agree with the decision of the trial court, it has to come with a proper finding of its own. The appellate court cannot shirk its duties."*

The aforesaid position was reiterated in ***Shivakumar v.***

***Sharanabasappa*, (2021) 11 SCC 277,** where it was observed:

"It gets perforce reiterated that the occasion for remand would arise only when the factual findings of the trial court are reversed and a retrial is considered necessary by the appellate court."

14.In the context of appeals under Section 37 of the Arbitration and Conciliation Act, 1996, the Hon'ble Supreme Court in ***Bombay Slum Redevelopment Corpn. (P) Ltd. v. Samir Narain Bhojwani*, (2024) 7 SCC 218,** has construed the scope of remand to be even narrower and has held as follows:

> *"There may be exceptional cases where remand in an appeal under Section 37 of the Arbitration Act may be warranted. Some of the exceptional cases can be stated by way of illustration:*
>
> *(a) Summary disposal of a petition under Section 34 of the Arbitration Act is made without consideration of merits;*
>
> *(b) Without service of notice to the respondent in a petition under Section 34, interference is made with the award; and*
>
> *(c) Decision in proceedings under Section 34 is rendered when one or more contesting parties are dead, and their legal representatives have not been brought on record."*
>
> Grounds (b) and (c) are procedural infirmities warranting remand whereas ground (a) is when the appellate court is constrained to remand as its appellate powers cannot be exercised effectively when there is no order on merits by the

Court under Section 34. Here the position is converse. The appellate court had before it a fully reasoned order of the Section 34 Court on merits. The grievance was one of modification of the award under Section 34. A remand was however made not because it could not decide the issue by applying the law as it stood then but it because the Division Bench chose not to decide the matter as the reference was pending before the Supreme Court. However, the law, as pointed out by the Division Bench itself, is that the judgment under reference continues to be the law till it is reversed (***Iveco Magirus Brandschutztechnik GMBH v. Nirmal Kishore Bhartiya***, (2024) 2 SCC 86). The order of remand does not fall within any of the "exceptionable circumstances" indicated by the Supreme Court.

15.In in ***Bombay Slum Redevelopment Corpn. (P) Ltd. v. Samir Narain Bhojwani*****, (2024) 7 SCC 218,** the Supreme Court observed that Order 41 has not been made applicable to appeals under Section 37. On facts, the appeal was from an order of the Bombay High Court. The position in the Madras High Court is slightly different and is governed by the Madras High Court Arbitration Rules, 2020.

16.In the context of exercise of appellate jurisdiction, it should be pointed out that Section 37 only contains the substantive right of appeal as against the orders enumerated therein. It stipulates that an appeal lies to "*the*

Court authorised by law to hear appeals from original decrees of the Court." Having stipulated the forum the 1996 Act does not contain provision which provides the procedure as to how such appeals are to be heard and dealt with. The principle that is to be applied in such situations is explained by the Constitution Bench of the Supreme Court in ***National Sewing Thread Co. Ltd. v. James Chadwick & Bros. Ltd.*****, (1953) 1 SCC 794,** wherein it was held:

> **"***The Trade Marks Act does not provide or lay down any procedure for the future conduct or career of that appeal in the High Court, indeed Section 77 of the Act provides that the High Court can if it likes make rules in the matter. Obviously after the appeal had reached the High Court it has to be determined according to the rules of practice and procedure of that Court and in accordance with the provisions of the Charter under which that Court is constituted and which confers on it power in respect to the method and manner of exercising that jurisdiction. The rule is well settled that when a statute directs that an appeal shall lie to a Court already established, then that appeal must be regulated by the practice and procedure of that Court. This rule was very succinctly stated by Viscount Haldane, L.C. in National Telephone Co. Ltd. v. Postmaster General [National Telephone Co. Ltd. v. Postmaster General, 1913 AC 546 (HL)] , in these terms : (AC p. 552)*
>
> *"... When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decisions likewise*

attaches."

17.In the context of intra-Court appeals in the Madras High Court, the procedure is governed by the Madras High Court (Arbitration) Rules, 2020 which have been framed under Section 82 of the Arbitration and Conciliation Act, 1996. Rule 9 deals with procedure in relation to appeals under Sections 37,50 & 59. Sub-Rule (v) of Rule 9 is as follows:

> *"The Code, the Civil Rules of Practice, the Madras High Court Appellate Side Rules and the Madras High Court Original Side Rules shall apply, to the extent applicable, to the filing and hearing of appeals under Sections 37, 50 and 59."*
>
> Thus, the procedure in the Code for regulating the procedure for hearing appeals under Section 37 has been expressly made applicable to intra-court appeals in the Madras High Court. Therefore, there is no escape from the consequence that even if a remand is to be tested with reference to provisions in the CPC it must come within the four corners of Rule 23, 23-A and 25 of Order 41. As stated supra, a remand could not have been made for de-novo hearing without going into the merits and setting aside the same.

18.It is for the above reason that it has been consistently held that the doctrine of merger would not apply where the appellate court does not affirm/reverse or modify the decree on merits. If the Division Bench had vacated the findings on merits, and then remanded the case for fresh

disposal, the doctrine of merger would apply and the Section 34 Court would be free to decide the cases afresh. However, the converse position does not obtain. This has been made clear in a recent judgment of the Supreme Court in ***Vishnu Vardhan v State of UP***, 2025 SCC Online SC 1501, wherein it was held as under:

> *"108. In MRF Ltd. v. Manohar Parrikar (2010) 11 SCC 374, a two-Judge Bench held that the doctrine of merger does not apply when the higher court has not adjudicated the issues on merits, and the controversy between the parties has not been looked into."*

19. From the above discussion the following aspects become clear:

- To order a wholesale remand, the Division Bench was required to enter the merits of the dispute and reverse the same before ordering a fresh de-novo hearing.
- The Division Bench while remanding the cases has not ventured into or expressed any opinion on merits in any of the cases. In other words, the findings of the learned single judges remain intact on merits. In one case, the Division Bench has even observed that the impugned order cannot be faulted.
- Consequently, the doctrine of merger contemplating merger of the

order of the Section 34 Court with that of the appellate court does not apply.

- As doctrine of merger does not apply, the findings in the original order on merits stands. Consequently, to implement the directions of the Division Bench by conducting a de-novo hearing, this Court must either re-write the order of the Division Bench by construing it as having set aside the order of the learned single judge on merits despite the Division Bench indicating to the contrary or assume for itself that the findings on merits rendered by the learned single judge have judicially vaporized and vanished into thin air leaving this Court to decide the matter de-novo as indicated by the Division Bench.

- It is in this context that an unusual and unprecedent situation has been created where this Court is constrained to say that the "*de-novo drill*" as indicated by the Division Bench is not capable of being implemented.

20. The other aspect is that all these orders of remand have been passed by consent. Consent may preclude the party giving consent from challenging the correctness of the order. Indeed, to be fair to the learned senior

counsel/counsel it is not the case of the parties before the Court that they are challenging the correctness of the consent made before the Division Bench. That does not solve the problem of this Court in finding ways to implement the order in the face of unsurmountable legal obstacles and contradictory directions. In all six cases, the Division Bench has passed identical directions making it clear that:

i.That it has not expressed any view or opinion on the merits of the matter;

ii.That the impugned order is set aside solely for the purpose of a de novo Section 34 legal drill;

iii.All questions before Section 34 Court are left open;

iv.That the Section 34 Court can either to resort to sub-section (4) of Section 34 or hear out Section 34 petition on merits and sustain or dislodge the award.

v.If the reference as regards Hakeem is answered in the interregnum, the ratio as answered in reference by Hon'ble Supreme Court will govern the proceedings.

21.The real issue in implementing (ii) to (v) is because (i) states that

the Court has not gone into the merits. As has been pointed out above, this means the Court has not vacated the findings in the order on merits. Under Order XLI Rule 23-A, which must be taken to be applicable to intra-Court appeals by virtue of Rule 9(v) of the Madras High Court Arbitration Rules, 2020, no order of remand can be passed unless the appellate court reverses the judgment of the learned single judge on merits. The interpretation of Rule 23-A of Order XLI by the Hon'ble Supreme Court has made it clear that the appellate court must go into the merits, set aside/vacate the findings and then order de-novo proceedings. This is the real impediment in this case as the merits have been left completely untouched while passing the order of remand.

22.In the light of the above discussion, this Court must necessarily find a way out of this conundrum. The learned single judges whose orders were assailed in the appeals leading to the order of remand, have painstakingly gone through the records, spent several hours hearing the matter and writing a detailed judgment. In these times, when judicial time is severely scarce it would seem to be a complete waste of time to repeat the exercise which has already been undertaken earlier but which has been knocked off by a sidewind by the order of remand without pointing out any

perversity or error in reasoning.

23. This Court must also factor in the fact that the litigant has also spent a considerable sum of money towards court fees, and an even more considerable sum of money to have their respective stands defended. In the opinion of this Court, when litigants come to the highest Court in this State, they are entitled to a certain standard and quality of justice. *Hakeem's case* was the only apparent obstacle. The Division Bench ought to have either applied Hakeem and set aside the modification, if the same was erroneous or awaited the outcome of the reference. It did neither. In the interregnum, *Hakeem* has been overruled and the question of severability has been answered holding that a partial modification is permissible. This means that the procedure adopted by Justice N. Sathish Kumar and Justice Senthilkumar Ramamoorthy in severing/modifying the award cannot be faulted now. The correctness of those orders as to whether such severance was correct or not was never tested by the Division Bench. If this Court were to reiterate the conclusions of the Section 34 Court or differ from it either of the parties will be aggrieved and a fresh round of appeals will once again commence. This undesirable result must, therefore, be avoided.

24.In this unusual and unprecedent backdrop, this Court is of the

considered opinion that its hands are tied by an unsurmountable legal obstacle and the only effective remedy for the parties is to necessarily approach the Division Bench by way of appropriate applications to review the various orders of remand passed in the OSA's. In this connection it may be worthwhile to notice that in *Accord Advertising Pvt Limited, v Airports Director*, AAI, 2019 SCC Online Cal 9462, it was held:

> *"The court which passes an order in relation to an appeal under section 37 of the Act in its civil appellate jurisdiction can also review its own order. This power is not expressly excluded in the Act. All courts, unlike Tribunals, inheres the power of review of its own order, unless such power is expressly excluded."*

25.Even otherwise, this Court being a Court of Record can always review its own orders. In *Municipal Corpn. of Greater Mumbai v. Pratibha Industries Ltd.,* (2019) 3 SCC 203, it was held:

> *"It is clear that these constitutional courts, being courts of record, the jurisdiction to recall their own orders is inherent by virtue of the fact that they are superior courts of record. This has been recognised in several of our judgments."*

By adopting such a course, the Division Bench could examine the difficulty expressed by this Court in implementing the order of remand and have the benefit of examining the latest decision in ***Gayatri Balasamy v. ISG Novasoft Technologies Ltd***., (2025) 7 SCC 1 which may now render a further remand unnecessary.

26.In the result, the following order is passed:

a.The petitioners/respondents who were the appellants in their respective OSA's ie., OSA Nos.118, 207 & 208 of 2020, OSA Nos. 218, 195, 196, 146 & 53 of 2021, before the Division Bench are granted liberty to approach the Division Bench by way of applications seeking review of the common orders/orders passed in their respective appeals.

b.If such review applications are filed within four weeks from the date of receipt of a copy of this order, the Registry shall entertain and number the same without any objection as to limitation.

c)Depending on the outcome of the review applications, the petitioners are granted liberty to revive these OP's if the need or circumstances so arise.

26.The Original Petitions are closed with the aforesaid liberty and directions. There shall be no order as to costs.

17.11.2025

Index : Yes
Neutral Citation : Yes
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To

1.ICMC Corporation Limited

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4.M/s.Airport Authority of India
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5.M/s.URC Construction (P) Ltd
Represented by its Authorized Signatory
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N.ANAND VENKATESH J.
kp

Original Petition Nos.821 of 2019, 145 of 2017, 454 & 1068 of 2018, 108 of 2019 & OP.No.400 of 2020

17.11.2025