BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 01.09.2026

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN
and
THE HONOURABLE MRS.JUSTICE M.D.SUMATHI

C.M.A.(MD)Nos.462 and 463 of 2021
and
C.M.P.(MD)No.4036 of 2021

C.M.A.(MD)No.462 of 2021:-

V.O.Chidambaranar Port Trust,
Administrative Office at Harbour Estate,
Bharathi Nagar,
Tuticorin - 628 004. ... Appellant

Vs.

M/s.Flemingo Duty Free Shop (P) Ltd.,
D-73/1, TTC Industrial Area,
MIDC Turbhe,
Navi Mumbai 400 075,
Rep. by its General Manager
and Authorised Signatory. ... Respondent

Prayer : Civil Miscellaneous Appeal is filed under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996, to set aside the order passed by the Principal District Court, Thoothukudi in Ar.O.P No.173 of 2016 dated 12.09.2019 confirming and modifying the award dated 18.12.2014 passed by the Arbitration Tribunal and to set aside the same.

For Appellant : Mr.B.Saravanan,
Additional Advocate General,
Assisted by Mr.A.Arivuchandran.

For Respondent : Mr.C.Mani Shankar, Senior Counsel,
For M/s.Vast Law Associates.

C.M.A.(MD)No.463 of 2021:-

V.O.Chidambaranar Port Trust,
Administrative Office at Harbour Estate,
Bharathi Nagar,
Tuticorin - 628 004,
Tamil Nadu. ... Appellant

Vs.

M/s.Flemingo Duty Free Shop (P) Ltd.,
D-73/1, TTC Industrial Area,
MIDC Turbhe,
Navi Mumbai 400 075,
Rep. by its General Manager
and Authorised Signatory. ... Respondent

Prayer : Civil Miscellaneous Appeal is filed under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996, call for the records relating to the impugned order passed by the Principal District Court, Thoothukudi in Ar.OP No.143 of 2015 dated 12.09.2019 confirming the Award dated 18.12.2014 passed by the Arbitration Tribunal with regard to the rejection of counter claim and to set aside the same.

For Appellant : Mr.B.Saravanan,
Additional Advocate General,
Assisted by Mr.A.Arivuchandran.

For Respondent : Mr.C.Mani Shankar, Senior Counsel,
For M/s.Vast Law Associates.

COMMON JUDGMENT
(By G.R.Swaminathan, J.)

In order to boost the economic relations between India and Sri Lanka, a joint declaration was made by both the countries for setting up a ferry service between Tuticorin and Colombo. Following this, the Shipping Corporation of India as the Nodal Agency issued notification on 10.12.2010 inviting "expression of interest" from eligible parties. Tuticorin Port Trust was declared as the licensor. The Shipping Corporation of India, after following their protocol, chose the consortium comprising M/s.Flemingo Duty Free Shop Private Limited and M/s.Tradex Shipping Company Limited as the licensee. On 22.01.2011, the Tuticorin Port Trust issued a letter of award in favour of the consortium. Interestingly, the said communication was addressed only to M/s.Flemingo Duty Free Shop Private Limited. Formal license agreement was entered into between the parties on 20.05.2011. On 13.06.2011, the ferry service commenced. The operations came to an abrupt end on 18.11.2011. On 04.06.2012, M/s.Flemingo Duty Free Shop Private Limited issued termination notice. Tuticorin Port Trust followed suit by issuing their termination notice on 28.06.2012. Since the license agreement contained an arbitration clause, M/s.Flemingo Duty Free Shop Private Limited invoked the same. They appointed Mr.Justice R.Balasubramaniam, former judge of this Court, as their nominee/Arbitrator. The Port Trust appointed Mr.Justice E.Padmanabhan, a retired Judge of this Court, as their nominee/Arbitrator. Both of them chose Mr.Justice Doraiswamy Raju, former judge, Supreme Court of India, as the umpire. The Arbitral Tribunal thus comprised the aforesaid three members.

2.M/s.Flemingo Duty Free Shop Private Limited filed their statement of claim seeking compensation under various heads for the Port trust's delay in providing statutory clearances. The claimant also sought the amount paid under protest by the Claimant as liquidated damages along with interest as well as a sum of NR 6,84,00,000 (Rupees Six Crores, Eighty Four Lakhs Only) towards wrongful encashment of Bank Guarantee along with interest among other reliefs. The Port Trust filed counter and also lodged counter-claim seeking damages for the expenses incurred by it.

3.Based on the rival pleadings, the Arbitral Tribunal framed as many as twenty issues. The claimant examined three witnesses on their side and marked exhibits. The Port Trust examined their officials and also marked their documents. After hearing both the sides and perusing the materials on record, the Arbitral Tribunal passed award dated 18.12.2024 upholding only one claim of the claimant and negatived the rest. The Arbitral Tribunal also rejected the counter claim made by the Port Trust. The only relief which the claimant got was the refund of the bank guarantee which was encashed by the Port Trust with 13% interest per annum. Aggrieved by the non-grant of other reliefs, the claimant filed Arbitration O.P.No.173 of 2016 before the Principal District Court, Tuticorin. The Port Trust filed Arbitration O.P.No.143 of 2015 before the same Court. Both the OPs were heard together and vide order dated 12.09.2019, the Arbitration OP filed by the Port Trust under Section 34 of the Arbitration and Conciliation Act was dismissed and the award passed by the Arbitral Tribunal with regard to the rejection of counterclaim was confirmed. Even while upholding that the bank guarantee was rightly ordered to be refunded with interest, the learned Principal District Judge held that the claimant was entitled to a further refund of Rs.68,40,000/- with 18% interest towards liquidated damages. Challenging the said orders, the Port Trust has filed these civil miscellaneous appeals. C.M.A.(MD)No.462 of 2021 pertains to Arbitration O.P.No.173 of 2016 and C.M.A.(MD)No.463 of 2021 pertains to Arbitration O.P.No.143 of 2015.

4.Heard the learned Additional Advocate General for the Port Trust and the learned Senior Counsel for the claimant/respondent.

5.The foremost contention urged by the learned Additional Advocate General is that the very arbitral claim was not maintainable. He pointed out that the agreement was only between the Port Trust and the consortium comprising M/s.Tradex Shipping Company Private Limited and M/s.Flemingo Duty Free Shop Private Limited. According to him, it is only the consortium which could have invoked the arbitral remedy. He contended that a single member of the consortium by themselves cannot be the sole claimant. He placed reliance on the decision of the Hon'ble Supreme

Court rendered in ***(2011) 12 SCC 499 (Gammon India Limited Vs. Commissioner of Customs, Mumbai)***. Though the aforesaid decision was rendered in the context of the Customs Act, he pointed out that the very same principle had been extended to the arbitration law also. In support of this submission, he relied on the decision of the Delhi High Court rendered in ***2016 SCC OnLine Del 6248 (Geo Miller & Co. Pvt. Ltd. Vs. Bihar Urban Infrastructure Development Corporation Limited)***.

6.No doubt, the aforesaid objection is formidable. But unfortunately, this point has not been taken in the memo of appeal. Nor was it a ground of attack in the petition filed under Section 34 of the Arbitration and Conciliation Act, 1996. No doubt, this contention was urged before the Arbitral Tribunal. But then, the Arbitral Tribunal chose to reject the said contention. The question that calls for consideration is whether the claim put forth by the respondents has to be binned on this ground. Are we to hold that it is the consortium comprising both the members which alone could have raised the arbitral claim and not just M/s.Flemingo? That is the issue that calls for consideration.

7.Our attention is drawn to the decision of the Hon'ble Supreme Court reported in ***(2026) 3 SCC 491 (M/s.Andhra Pradesh Power Generation Corporation Limited (APGENCO) Vs. M/s.Tecpro Systems Limited)***. That was a case arising under Section 11 of the Arbitration and Conciliation Act. In the said case also, an objection was raised that the petition under Section 11 of the Act can be filed only by the consortium and not by a constituent member. The Honourable Supreme Court held that at the stage of considering an application under Section 11 of the Act, the Court is concerned with the existence of the arbitration agreement alone. As regards the question as to whether a member of a consortium can also invoke the arbitral remedy, it was held that this required a more nuanced response. It was also clearly indicated that this could be a preliminary objection raised before the Arbitral Tribunal under Section 16(2) of the Act.

8.With the assistance of ***M.Sricharan Rangarajan's Treatise on Arbitration Law & Practice***, we analysed the facts on hand. No doubt, an objection on the above lines had been taken by the Port Trust. But the Port Trust remained satisfied with that effort. They did not file a petition under Section 16 of the A&C Act, 1996 and invite a ruling from the Tribunal. By contending that the arbitral claim cannot be maintained at the instance of a member of the consortium, the Port Trust was questioning the very jurisdiction of the Tribunal. The Three Judges Bench of the Hon'ble Supreme Court in the decision reported in ***(2013) 1 SCC 641 (Chloro Controls India (P) Ltd., v. Severn Trent Water Purification Inc.,)*** observed that "the issue of jurisdiction normally is a mixed question of law and facts; occasionally, it may also be a question of law alone. It will be appropriate to decide such questions at the beginning of the proceedings itself and that they should have finality." This observation, though rendered in the context of Section 45 of the Act, is equally relevant to the present facts also. The objection that claim is not maintainable because it is only a member and not the consortium who is the claimant must not only be pleaded in the statement of defence but a formal ruling must also be obtained under Section 16 of the Act. The objector must file a petition under

Section 16 and invite a ruling. If no such petition is filed and the objector participates in the arbitral proceedings, this plea cannot be projected at the post-award stage. This proposition of law is found in the Two Judges Bench decision rendered in ***MSP Infrastructure Ltd., v. M.P Road Development Corporation Ltd. (2015) 13 SCC 713***. But ***MSP Infrastructure Ltd.*** was overruled by a Three Judges Bench in ***Lion Engineering Consultants v. State of M.P (2018) 16 SCC 758*** which held that a purely legal plea can be urged in a petition filed under Section 34 of the Act even without a formal pleading before the Tribunal. Interestingly, the same Bench In ***M.P. Rural Road Development Authority v. L.G. Chaudhary Engineers and Contractors, (2018) 10 SCC 826*** held that if no objection in terms of Section 16(2) of the Arbitration and Conciliation Act, 1996 was raised at the appropriate stage within the time stipulated, the award could not have been annulled only on that ground.

9.A learned Judge of this court in ***National Highways v. Gowpatt Associates (2019 SCC OnLine Mad 4092)*** held that ***Lion Engineering case*** is an authority for the proposition that a party which has not raised preliminary objection available to it under section 16 of A and C Act, can raise it for the first time subsequently in proceedings under Section 34 of A and C Act. Interestingly, the confusion on account of the rulings in ***M.P. Rural Road Development Authority v. L.G. Chaudhary Engineers & Contractors, (2018) 10 SCC 826*** and ***Lion Engineering*** was noticed by the Hon'ble Supreme Court in ***Sweta Construction v. Chhattisgarh State Power Generation Co. Ltd.*** reported in ***(2024) 4 SCC 722.*** The Bench comprising His Lordships Sanjay Kishan Kaul J and M.M. Sundresh J noted that ***Lion Engineering*** was an order and not a judgment and held that the sentence " we do not see any bar to plea of jurisdiction being raised by way of an objection under Section 34 of the Act even if no objection was raised under Section 16 of that Act" occurring in ***Lion Engineering*** does not take away the law laid down in the substantive judgment in ***L.G. Chaudhary Engineers*** which dealt with awards already made where petitions were pending before the competent Court under Section 34 of the said Act. It was further held that the objections under Section 34 of the said Act, where no such plea of jurisdiction was raised in proceedings before the arbitrator, should not be dealt with on the plea of jurisdiction alone i.e. it should be considered on merits. In ***Union of India v. Pam Development (P) Ltd., (2014) 11 SCC 366,*** the Hon'ble Supreme Court was considering an issue as to whether the plea regarding jurisdiction of the sole arbitrator to conduct the arbitration proceedings, contrary to the terms of the agreement between the parties, could be raised for the first time before the Court. In this context, it was held that the appellant having failed to raise the plea of jurisdiction before the Arbitral Tribunal cannot be permitted to raise for the first time in the District Court and that failure to object before the Arbitral Tribunal would constitute a waiver of the right to object as per Section 4 of the A &C Act. Further in ***Gayatri Project Ltd. v. M.P. Road Development Corpn. Ltd., (2025) 10 SCC 750,*** the Hon'ble Supreme Court clarified the position of law in the following terms:

> *"Although* ***Lion Engg.*** *affirms that a plea of lack of jurisdiction, being a question of law, may be raised for the first time under Section 34 of the 1996 Act, yet such a plea is nevertheless subject to the waiver as held in* ***Pam Development****. Furthermore, as per* ***GAIL v. Keti Construction***

> ***(I) Ltd., (2007) 5 SCC 38****, such a plea may only be entertained if the party demonstrates a strong and sufficient reason for not raising it before the Arbitral Tribunal."*

It was clarified that there was no conflict between ***Lion Engineering*** and ***L.G. Chaudhary Engineers*** and the latter was rendered by keeping in mind the ratio laid down in the former. It was further held that the proposition in ***L.G Chaudhary*** that an arbitral award will not be annulled solely on the ground of jurisdiction, particularly where the issue was not raised before the Tribunal, would continue to govern.

10.It is true that in ***State of Chhattisgarh v. SAL Udyog (P) Ltd.*****, (2022) 2 SCC 275,** the three Judges Bench of the Hon'ble Supreme Court rejected the contention that since an objection was not raised in Section 34 petition, it cannot be raised as a ground in the appeal under Section 37, and held that waiver would not get attracted in such cases. The reasoning was that the power available to the Court acting on its own in deciding a petition under Section 34(2-A) for setting aside an award on the ground of patent illegality would obviously be available to the High Court while considering an appeal preferred under Section 37 of the 1996 Act. The question that arises is what then constitutes patent illegality? This is too well-settled. A finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality (vide ***Associate Builders v. DDA, (2015) 3 SCC 49).*** When the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them, or when the award contains no reasons for the findings contained therein, the award would be liable to be set aside on the ground of patent illegality (vide ***Delhi Airport Metro Express (P) Ltd. v. DMRC, (2022) 1 SCC 131)***. In the light of the aforesaid discussion, we hold that a finding on the issue of maintainability of the arbitral proceedings at the instance of a single member of the consortium after appreciation of evidence cannot be held to be one vitiated by patent illegality especially when the parties have failed to remedy the error by impleading the other member of the consortium during the course of the arbitration proceedings. This is fortified by the decision in ***Andhra Pradesh Power Generation Corporation Ltd.. v. TEC Pro Systems Ltd., (2026) 3 SCC 491.*** The

Hon'ble Supreme Court noted that the issues as to whether the arbitration was validly invoked individually, whether the consortium continues to exist, whether consent of other consortium partners was necessary are all matters which may legitimately be raised, contested and determined before the Arbitration Tribunal under Section 16 of the Act. One can safely conclude from the above observation that the plea as to whether a member of the consortium by itself can raise an arbitral claim falls more in the realm of facts. ***Lion Engineering*** permitted only a pure legal issue to be raised under Section 34 even if it was not raised under Section 16. We, therefore, hold that the plea of jurisdiction if founded on facts must be raised by filing a petition under Section 16 of the Act and failure to do so would come in the way of the objector from raising the said ground after the passing of the award. By holding so, we are not going against ***Lion Engineering***. On the other hand, we rest this proposition within the contours of the said decision. We, however, have our own misgivings if the said proposition would meet with the approval of the learned author in the next edition of his ***Treatise on Arbitration Law & Practice.***

11.This approach is wholesome. By inviting the Arbitral Tribunal to give a ruling under Section 16, much time would be saved. If the plea of want of jurisdiction is upheld, the claimant can file an appeal under Section 37 of the Act before the court concerned. If the plea is negatived, the objector can include it as a ground of attack in the petition under Section 34 of the Act. In the event of the claimant suffering an adverse ruling, he could take recourse to remedial measures. If on the other hand, if he is non-suited at the later stage, say, in an appeal under Section 37 of the Act before the High Court, much time would have been lost and he may not be in a position to put the clock back. Some irreversible consequences can arise. That is why, ***Chloro Controls India (P) Ltd., v. Severn Trent Water Purification Inc.,*** underlined the need for settling these issues at the preliminary stage itself.

12.The appellant Port Trust should have called upon the Arbitral Tribunal to go into the very maintainability of the arbitral claim at the threshold and invited a ruling. If the plea had been affirmatively answered, the proceedings would have been terminated at the threshold itself. It is seen that the Port Trust did not file a formal petition under Section 16 of the Act. Nor did they urge this before the District Court. We hold that the failure to raise it at Section 34 stage as well as in the memo of grounds filed before us would constitute waiver of the said objection. We are therefore of the view that it is too late in the day to raise this as a ground of attack in the oral arguments all the more so when neither party has endeavoured to implead the other member of the consortium as party to the proceedings before the Tribunal.

13.Be that as it may, it is seen that M/s.Flemingo Duty Free Shop Private Limited had made 100% investment and it was the leading financial partner and that M/s.Tradex Shipping Company Private Limited was only a technical partner, and it was in that capacity, 11% equity was allotted to them. We had a look at the license agreement between the Port Trust and the consortium. In fact, the claimant is very much a party to the license agreement. If a special purpose vehicle had been formed and a new entity had emerged, may be the objection raised by the learned Additional

Advocate General would have carried greater weight. That does not appear to be the case. We are therefore not inclined to non-suit the claimant on this technical ground.

14.The learned Senior Counsel appearing for the claimant drew our attention to the material findings of the Arbitral Tribunal. The Arbitral Tribunal had categorically held that the Port Trust did not perform its part of the contract and that was why the licensee was unable to carry on the operations. In fact, the Arbitral Tribunal expressed its surprise as to how the licensee was able to carry on the ferry service for six months. According to the learned Additional Advocate General, even if we assume that the Port Trust was at fault, still the claim was not maintainable in view of Clause 29.8 of the agreement which reads as follows:-

> "*29.8 The bidder, who is awarded the license to operate the passenger service/s, shall operate the service for a minimum for a period of one year. If the operator fails to fulfil this requirement (1 year minimum) for reasons whatsoever, his/her performance guarantee shall be*

forfeited."

He emphasised on the employment of the expression "**for reasons whatsoever**". According to him, the licensee was obliged to run the ferry service for a minimum period of one year. Admittedly, the ferry service got stopped in six months. The reasons are irrelevant. Hence, according to the learned Additional Advocate General, invocation of the bank guarantee was justified.

15.No doubt, the expression "***for reasons whatsoever***" is too wide and all encompassing. But no agreement can be interpreted in a manner which will lead to defeat of the provisions of the Indian Contract Act, 1872. Section 55 of the Indian Contract Act read with the provisions in Chapter VI enable the innocent party who suffers breach of contract to make a claim for compensation for any loss or damage suffered by them. If we were to accept the contention of the learned Additional Advocate General, an offending party can go scot-free. Let us be more specific and take a hypothetical situation. The Port Trust willfully violates the provisions of the agreement and as a result, the licensee is unable to even commence their ferry service. If they suffer a loss, they can certainly claim compensation from the Port Trust. But if the aforesaid clause is literally applied, the licensee cannot make a claim for damages. Such a situation would be monstrous and oppressive. Courts' interpretation of the clauses of the contract ought to avoid such a result.

16.We draw inspiration from the decision reported in ***AIR 1957 SC 121 (Shri Hariprasad Shivshankar Shukla and anr v. Shri A.D Diwelkar and Barsi Light Railway Company Ltd., v. K.N.Joglekar***). The titans of the day argued the case. Question arose as to what the expression 'for any reason whatsoever" occurring in Section 2(oo) defining "retrenchment" in the I.D Act, 1947 would mean. That was a case which involved sending out the workmen on account of closure of the industry. But it was argued that as per the definition, termination by the employer of the service of the workmen for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action would amount to retrenchment. The Five Judges Bench of the Hon'ble Supreme Court held that Section 25F of the Act has no application to a closed or dead industry. The Hon'ble Supreme Court thus construed the expression with reference to the context.

17.The aforesaid clause found in the agreement between the parties cannot be interpreted in a manner as to empower the Port Trust to encash the bank guarantee, even if they are at fault. The license agreement cannot prevail over the provisions of the Indian Contract Act, 1872. Where the performance of an agreement depends on discharge of reciprocal obligations, if the party at fault is empowered to encash the bank guarantee, that would amount to permitting the party at fault to take advantage of his own wrong. Clause 29.8 of the agreement cannot therefore be understood in the sense argued by the learned Additional Advocate General.

18.The scope for interference under Section 34 of the Arbitration and Conciliation Act, 1996 is limited to the grounds set out therein. The claimant had sought a host of reliefs from the Arbitral Tribunal. The Arbitral Tribunal had rejected almost all of them. But they held that the claimant's bank guarantee ought not to have been encashed and that was why, it directed its refund with interest. The grant of relief was anchored primarily on appreciation of facts. The approach of the Tribunal was reasonable and supported by evidence. It cannot be said to be perverse at all. Far from it. It was fully justified in coming to the aforesaid conclusion. The learned Principal District Judge rightly affirmed this part of the award. However, the learned Principal District Judge while exercising his jurisdiction under Section 34 of the Act, chose to award liquidated damages to the claimant, which relief was specifically denied by the Arbitral Tribunal.

19.The moot question is whether the Court exercising jurisdiction under Section 34 or 37 of the Act, can modify the award passed by the Arbitral Tribunal. This issue has been authoritatively answered by the Constitution Bench in the decision reported in ***(2025) 7 SCC 1 (Gayatri Balasamy Vs. ISG Novasoft Technologies Limited)***. The majority set out their conclusions as follows :

> *"85.Accordingly, the questions of law referred to by Gayatri Balasamy (supra) are answered by stating that the Court has a limited power under Sections 34 and 37 of the*

1996 Act to modify the arbitral award. This limited power may be exercised under the following circumstances:

I. when the award is severable, by severing the "invalid" portion from the "valid" portion of the award, as held in Part II of our Analysis.

II. by correcting any clerical, computational or typographical errors which appear erroneous on the face of the record, as held in Part IV and V of our Analysis;

III. post award interest may be modified in some circumstances as held in Part IX of our Analysis; and/or

IV. Article 142 of the Constitution applies, albeit, the power must be exercised with great care and caution and within the limits of the constitutional power as outlined in Part XII of our Analysis."

His Lordship Mr.Justice K.V.Viswanathan who partly dissented summed up his conclusions as follows :

"CONCLUSION:-

(a) The Courts exercising power under Section 34 and Courts hearing appeals thereunder have no power to "modify" an award.

(b) The power to modify is not a lesser power to that of the power to set aside, as the two operate in separate spheres and are not of the same genus.

(c) The inherent power under Section 151 C.P.C. cannot be used to modify awards as it will be contrary to the express

power mentioned in Section 34. Similarly, there is no scope for applying the doctrine of implied power to modify awards.

(d) Article 142 of the Constitution of India will not be exercised by this Court to modify awards passed by arbitrators as it is well settled that the Article 142 power cannot be used to give a go by to the substantive statutory provision.

(e) Interest awarded also cannot be modified in exercise of powers of setting aside and the course of action under Section 34(4) will have to be adopted as discussed in the judgment.

(f) Hakeem (supra) is not per incuriam insofar as it held that a Section 34 Court cannot modify the award and will be read with the only exception made in this judgment now. On the principle of actus curiae neminem gravabit (act of Court shall prejudice no one) computation, clerical and typographical errors or other errors of similar nature is permissible to be corrected by the Section 34 Court, in terms of the holding above.

(g) Kinnari Mullick (supra) does not lay down the correct law insofar as it holds that the request under Section 34(4) to the Court by a party to grant an opportunity to the Arbitral Tribunal to resume proceedings or to take such other action has to be in writing. Even an oral request under Section 34(4) can be entertained by the Court.

(h) The power under Section 34(4) can be exercised by the

Court Suo Moto also under the circumstances set out hereinabove.

(i) A Court under Section 34 and the Courts hearing appeals thereafter have the power to "sever" parts of the award in exercise of the powers of setting aside awards under Section 34. However, while severing, the parameters set out hereinabove and flowing from the judicial precedents discussed therein have to be followed."

In some of law reports, the final paragraph read as follows :

"ANSWERS TO THE REFERENCE:-

157. In view of the discussion hereinabove, the reference is answered in the following terms.

Question No. 1 - As set out in the body of the judgment, while exercising power under Section 34 of the A&C Act and consequently the Courts in the appellate hierarchy do not have the power to modify the arbitral award.

Question No. 2 - Modification and severance are two different concepts while modification is not permitted under Section 34, severance of the award falling foul of Section 34 is permissible in exercise of powers under Section 34. Such a power of severance is also available to the courts in the appellate hierarchy to the Section 34 Court.

Question No. 3 & 4 - The power to set aside will not include the power to modify since the power to modify is not a lesser *power subsumed in the power to set aside and, as held hereinabove, the power to set aside and power to modify do not emanate from the same genus and are qualitatively different powers in the context of the A&C Act.*

Question No. 5 - The judgment in Hakeem (supra), insofar as it holds that a Section 34 Court has no power to modify the award, lays down the correct law. The only exception made in this judgment is with regard to the power to carry out corrections in computational errors, clerical errors or typographical errors and any other errors of similar nature. This is based on the principle of actus curiae neminem gravabit (act of court shall prejudice no one).

...

159. The reference is disposed of in the above terms."

20. In view of the continuous numbering of the paragraphs of the judgements of both the majority judges as well as that of His Lordship K.V.V.J, many of us went by the final paragraph as the answer to the reference. We did wonder that it was not in tune with what the majority expressed. We would request the law reporters to ensure that such confusions are not caused in the future. Be that as it may, even the majority judgment does not permit granting something that was refused by the Arbitral Tribunal. Only a limited

modification was permitted. The Principal District Judge in this case has modified the entire claim by re-appreciating the evidence and awarding liquidated damages. Such a course of action is clearly impermissible. It runs counter to the dictum laid down in ***Gayatri Balasamy.***

21.We, therefore, hold that by granting the relief of liquidated damages to the claimant, the learned Principal District Judge has virtually rewritten the award. Therefore, the impugned order dated 12.09.2019 is set aside.

22.The learned Additional Advocate General added that the power of modification was acknowledged to a limited extent. This Court can enhance or reduce the post-award interest. He pointed out that awarding 13% interest appears to be on the high side. He submitted that the maximum rate of interest that is normally awarded is 9%.

23.We would have definitely acceded to this request and reduced the interest rate to 9% but for one glaring fact. The claimant was granted the license upon his paying an up-front license fee of Rs.7.20 Crores. This had gone down the drain ("sunk in the sea" would have been more appropriate). They could not even run the ferry service beyond six months. Even those six months had entailed a humongous loss. It is submitted that a big vessel was chartered from Greece at considerable cost. We have already held that granting liquidity damages was illegal. In these circumstances, it is only the award of 13% interest which to some extent would mitigate the claimant's loss.

24.In this view of the matter, the order passed by the Principal District Court, Tuticorin in Arbitration O.P.No.173 of 2016 is set aside in so far as it awards liquidated damages in favour of the claimant and modifies the award. C.M.A.(MD)No.462 of 2021 is allowed accordingly. The order passed in Arbitration O.P.No.143 of 2015 is confirmed and C.M.A.(MD)No.463 of 2021 is dismissed. It is stated that this Court while granting interim stay had directed the Port Trust to deposit a certain sum. The said condition has been complied with. The claimant is entitled to withdraw the same and levy execution for recovering the balance amount. No costs. Consequently, connected miscellaneous petition is closed.

(G.R.S. J.,) & (M.D.S. J.,)
01.09.2026

NCC : Yes/No
Index : Yes / No
Internet : Yes/ No
ias/skm

To:

1.The Principal District Court,
Thoothukudi.

2.V.O.Chidambaranar Port Trust,
Administrative Office at Harbour Estate,
Bharathi Nagar,
Tuticorin - 628 004.

Copy to:

The Section Officer, ER/VR Section,
Madurai Bench of Madras High Court,
Madurai.

G.R.SWAMINATHAN, J.
and
M.D.SUMATHI, J.

ias/skm

C.M.A.(MD)Nos.462 and 463 of 2021

01.09.2026