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

% **Judgment reserved on: 03 November 2023**
Judgment pronounced on: 30 November 2023

\+ FAO(OS) (COMM) 315/2019 & CM Nos. 47880/2019 & 47884/2019

ANIL KUMAR GUPTA ..... Appellant

Through: Dr. Amit George, Mr. Aditya Chibber, Mr. Rayadurgam Bharat & Mr. Arkaneil Bhaumik, Advs.

versus

MUNICIPAL CORPORATION OF DELHI & ANR. ..... Respondents

Through: Mr. Sunil Goel, SC with Ms. Akshita jain, Mr. Himanshu Goel, Advocates with Mr. Bhanu Pratap Yadav, A.E. (Project), Narela Zone.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J.

1. The appellant / claimant assails the judgment and orders dated 12 December 2018 and 08 August 2019 passed by the learned Single Judge on the Section 34 petition instituted by the respondent under the **Arbitration & Conciliation Act, 1996**[1].

[1] 1996 Act

2. It would appear from the record that in terms of the judgment which was rendered on 12 December 2018, the learned Single Judge while partly allowing the Section 34 petition had reduced the rate of interest awarded in favour of the appellant / claimant passed by the **Arbitral Tribunal**[2] from 18% to 12% and further restricting the application of interest from the date of accrual of cause of action, namely, 08 March 2004 and providing it to commence from the date of invocation of arbitration, namely, 06 July 2008.

3. After the Section 34 petition had been finally disposed of on 12 December 2018, an application for modification came to be moved by the respondent and which was accepted and disposed of in terms of the order dated 08 August 2019. Dealing with the issues which appear to arise on the appeal and on hearing learned counsel for respective parties, we had, on 15 September 2023, passed the following order:

> 1. The instant appeal questions the judgment and order dated 08 August 2019 and 12 December 2018 passed by the learned Single Judge on a petition preferred under Section 34 of the Arbitration and Conciliation Act, 1996 **["the Act"].**
>
> 2. As would be manifest from the record, the Section 34 petition came to be disposed of on 12 December 2018 in the following operative terms: -
>
> > **"14**. The stand that extension of time was not granted is not correct. Thus as per Clause 10CC, escalation is liable to be granted in any contract even during the extended period and the contractor is entitled to escalation. Coming to the question as to whether any evidence was lead on payments made under Clause 10CC – it is the settled position that 10 CC prescribes a formula for calculation of escalation. It stipulates the manner in which escalation is calculated. Once the escalation is awarded, the manner of calculation is done as per the said Clause itself. In any case, during the

[2] AT

period during which escalation was claimed, the work was under progress. The fact that the work was continuing and was also completed itself is proof of material, labour etc., being employed. Thus, the award of escalation under Clause 10CC is not liable to be interfered with.

15. Para 20 and 21 of ***Municipal Corporation of Delhi v. Rakesh Brothers 2005(2) Arb. LR 257 (Delhi)*** are apt and are set out herein below:

> *"**20.** Claim No.5 in sum of Rs.1.35 lacs was based on Clause 10(CC) of the contract provided for escalation as per formula provided therein. Clause 10(CC) has been incorporated in the contract at Serial No. 26 of the general conditions of the contract. Submission of the MCD before the learned arbitrator was that compensation under Clause 10(CC) had to be paid on the basis of actual occurrence of the escalation with return proof. Learned arbitrator has rejected the same by bolding that this would defeat the mandatory provision of the agreement.*
>
> ***21.** Two Division Benches of this Court in the decisions reported as 1998 (VII) AD (Delhi) 300=**1999(1) Arb. LR 88(Del.) (DB) – DDA vs. U. Kashyap** and 2001 (II) AD (Delhi) 116 – **DDA vs. K.C. Goyal**, have held that where a clause in a contract provides a formula to give escalation, award of escalation on the basis of actual increase in price of material would be impermissible. Opposition before the learned arbitrator to Claim No.5 is based on a wrong notion of law and the learned arbitrator has rightly held that escalation has to be as per statutory formula. Decision of the learned arbitrator is in complete harmony with decisions of this Court. Learned arbitrator has awarded a lessor sum on the basis of the final calculations as per formula provided. I accordingly uphold the award pertaining to Claim No.5."*

Thus, the award of escalation under Clause 10CC is based on the formula and not on the basis of any other evidence, which is not liable to be interfered with.

17. The counsel for the Respondent/contractor is unable to show any evidence which has been placed on record that guards were actually employed and any payments were made to them. In the absence of actual evidence, no watch and ward expenses are liable to be allowed.

18. The contractor had demanded interest @ 24% as a condition in the tender. The Arbitrator has awarded interest @ 18% for the entire period from 8th March 2004 viz., '*the date of cause of action i.e. 08.03.2004 till the date of filing suit, date of decree and date of payment holds goods as per law*.' The notice of arbitration was given on 6th July, 2008 i.e. within a period of 10 months after the actual date of completion. However, in view of the fact that the work involved was in respect of the zonal office building of the MCD at Narela, which is a public amenity, the simple interest @ 18% p.a. shall be payable from date of invocation of arbitration i.e., 6th July 2008 till date of award. However, during the period when the objection petition remained pending before this Court, the interest is modified to simple interest on awarded amount @12% p.a. till today.

19. If the entire payment is made within 8 weeks, no further interest would be charged and if the payment is not made within 8 weeks, then simple interest @ 18% p.a. would be liable to be paid on the entire amount.**"**

3. Undisputedly, no appeal within the period of limitation as prescribed was taken against the said order. It, however, appears from the record that after the passing of the order of 12 December 2018, an application for modification came to be moved by the respondents here which was entertained and while proceeding to dispose of the same on merits, the learned Single Judge after hearing parties allowed the said application in the following terms:-

"**24**. On merits, the Court, is -convinced that the original record makes it clear that the condition of 24% interest in the event that monthly payment was not made, was clearly withdrawn. On behalf of the Contractor, it has been submitted that any reasonable rate of interest be awarded to the Contractor. However, in order to ensure that such conduct is not encouraged and to ensure the integrity of the adjudication process, it is directed that no interest shall be payable to the Contractor in the facts and circumstances of the present case. The awarded, amount shall be paid within a period of eight weeks to the Contractor. No interest would

be payable from the date of invocation of the arbitration till the date of judgment dated 12th December, 2018. Even the award of costs is set aside. The amounts liable to be paid would be as under:

• **Claim 1** - Allowed. Claimant held to be entitled to payment of Rs. 62,48,150/- escalation charges as per the arbitral award.

• **Claim 2** - Set aside due to absence of evidence by judgment dated 12th December, 2018;

• **Claim 3** - In the impugned award, the Ld. Arbitrator notes that *qua* Claim 3, the Contractor was guilty of submitting false and frivolous claims and a penalty of approximately Rs. 4,000 was levied on him for misleading the arbitrator.

• **Claim 4** - Set aside.

• **Claim 5** - Set aside.

25. Thus, the Corporation is directed to pay a sum of Rs.62,44,150/- without any interest. If the said payment is made within 8 weeks, no further payment would be liable to be made. If the payment is not made, simple interest @ 9% p.a. would be liable to be paid on the awarded amount from expiry of 8 weeks till the date of payment."

4. Quite apart from the fact that an application for modification should not ordinarily be entertained at all once final judgment had been rendered and this more so since even if it were the case of the respondents that the judgment suffered from a manifest or patent error, the only remedy would have been by way of a petition for review, we find ourselves unable to sustain the course as adopted by the learned Single Judge for the following additional reasons.

5. The power of setting aside as conferred on a Court in terms of Section 34 of the Act has been duly elucidated by the Supreme Court in **NHAI vs. M. Hakeem & Anr.** [(2021) 9 SCC 1] where the following pertinent observations came to be made:-

"**25.** As a matter of fact, the point raised in the appeals stands concluded in *McDermott International Inc.* v. *Burn Standard Co. Ltd.* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181] , where this Court held : (SCC p. 208, paras 51-52)

"*51*. After the 1996 Act came into force, under Section 16 of the Act the party questioning the

jurisdiction of the arbitrator has an obligation to raise the said question before the arbitrator. Such a question of jurisdiction could be raised if it is beyond the scope of his authority. It was required to be raised during arbitration proceedings or soon after initiation thereof. The jurisdictional question is required to be determined as a preliminary ground. A decision taken thereupon by the arbitrator would be the subject-matter of challenge under Section 34 of the Act. In the event the arbitrator opined that he had no jurisdiction in relation thereto an appeal thereagainst was provided for under Section 37 of the Act.

52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the 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."

28. Some of the judgments of the High Courts are also instructive. A learned Single Judge of the Delhi High Court in *Cybernetics Network (P) Ltd.* v. *Bisquare Technologies (P) Ltd.* [*Cybernetics Network (P) Ltd.* v. *Bisquare Technologies (P) Ltd.*, 2012 SCC OnLine Del 1155] , held : (SCC OnLine Del paras 47-51)

"*47*. The next question that arises is whether the above claims as mentioned in para 44 that have been erroneously rejected by the learned arbitrator can be allowed by this Court in exercise of its powers under Section 34(4) of the Act?

48. Under Section 34(4) of the Act, the Court while deciding a challenge to an arbitral award, can either 'adjourn the proceedings for a period of time determined by it in order to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the Arbitral Tribunal will eliminate the grounds for setting aside

the arbitral award'. This necessarily envisages the Court having to remit the matter to the Arbitral Tribunal. This is subject to the Court finding it appropriate to do so and a party requesting it to do so.

49. In *Union of India* v. *Arctic India* [*Union of India* v. *Arctic India*, 2007 SCC OnLine Bom 409 : (2007) 4 Arb LR 524], a learned Single Judge of the Bombay High Court opined that the Court can modify the award even if there is no express provision in the Act permitting it. The Court followed the decision of the Supreme Court in *Krishna Bhagya Jala Nigam Ltd.* v. *Harischandra Reddy* [*Krishna Bhagya Jala Nigam Ltd.* v. *Harischandra Reddy*, (2007) 2 SCC 720] . A similar view has been taken by a learned Single Judge of this Court in *Union of India* v. *Modern Laminators Ltd.* [*Union of India* v. *Modern Laminators Ltd.*, 2008 SCC OnLine Del 956 : (2008) 3 Arb LR 489] There the question was whether in light of the arbitrator having failed to decide the counterclaim of the respondent in that case the Court could itself decide the counterclaim. After discussing the case law, the Court concluded that it could modify the award but only to a limited extent. It held (Arb LR p. 496) : (*Modern Laminators Ltd. case* [*Union of India* v. *Modern Laminators Ltd.*, 2008 SCC OnLine Del 956 : (2008) 3 Arb LR 489] , SCC OnLine Del para 22)

> '*22.* … Such modification of award will be a species of "setting aside" only and would be "setting aside to a limited extent". However, if the courts were to find that they cannot within the confines of interference permissible or on the material before the arbitrator are unable to modify and if the same would include further fact finding or adjudication of intricate questions of law, the parties ought to be left to the forum of their choice i.e. to be relegated under Section 34(4) of the Act to further arbitration or other civil remedies.'

50. However, none of the above decisions categorically hold that where certain claims have been erroneously rejected by the arbitrator, the Court can in exercise of its powers under Section 34(4) of the Act itself decide those claims. The Allahabad High Court

has in *U.P. State Handloom Corpn. Ltd.* v. *Asha Lata Talwar* [*U.P. State Handloom Corpn. Ltd.* v. *Asha Lata Talwar*, 2009 SCC OnLine All 624 : (2009) 4 All LJ 397] , held that while exercising the powers to set aside an award under Section 34 of the Act the Court does not have the jurisdiction to grant the original relief which was prayed for before the arbitrator. The Allahabad High Court referred to the decision of the Supreme Court in *McDermott International Inc.* v. *Burn Standard Co. Ltd.* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181] , where it was observed (SCC p. 208):

***

51. The view of the Allahabad High Court in *U.P. State Handloom Corpn. Ltd.* v. *Asha Lata Talwar* [*U.P. State Handloom Corpn. Ltd.* v. *Asha Lata Talwar*, 2009 SCC OnLine All 624 : (2009) 4 All LJ 397] appears to be consistent with the scheme of the Act, and in particular Section 34 thereof which is a departure from the scheme of Section 16 of the 1940 Act which perhaps gave the Court a wider amplitude of powers. Under Section 34(2) of the Act, the Court is empowered to set aside an arbitral award on the grounds specified therein. The remand to the arbitrator under Section 34(4) is to a limited extent of requiring the Arbitral Tribunal 'to eliminate the grounds for setting aside the arbitral award'. There is no specific power granted to the court to itself allow the claims originally made before the Arbitral Tribunal where it finds the Arbitral Tribunal erred in rejecting such claims. If such a power is recognised as falling within the ambit of Section 34(4) of the Act, then the court will be acting no different from an appellate court which would be contrary to the legislative intent behind Section 34 of the Act. Accordingly, this Court declines to itself decide the claims of CNPL that have been wrongly rejected by the learned arbitrator.

29. The Delhi High Court in *Nussli Switzerland Ltd.* v. *Organizing Committee, Commonwealth Games, 2010* [*Nussli Switzerland Ltd.* v. *Organizing Committee, Commonwealth Games, 2010*, 2014 SCC OnLine Del 4834] , held : (SCC OnLine Del para 34)

"*34*. A party like the Organising Committee which has its claims rejected, except a part, but which subsumes into the larger amount awarded in favour of the opposite party, even if succeeds in the objections to the award would at best have the award set aside for the reason the Arbitration and Conciliation Act, 1996 as distinct from the power of the court under the Arbitration Act, 1940, does not empower the court to modify an award. If a claim which has been rejected by an Arbitral Tribunal is found to be faulty, the court seized of the objections under Section 34 of the Arbitration and Conciliation Act, 1996 has to set aside the award and leave the matter at that. It would be open to the party concerned to commence fresh proceedings (including arbitration) and for this view one may for purposes of convenience refer to sub-section (4) of Section 43 of the Arbitration and Conciliation Act, 1996. It reads:

'**43.** ***Limitations***.—(1)-(3) * * *

(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.' "

30. An instructive judgment of the Delhi High Court in *Puri Construction (P) Ltd.* v. *Larsen & Toubro Ltd.* [*Puri Construction (P) Ltd.* v. *Larsen & Toubro Ltd.*, 2015 SCC OnLine Del 9126] deals with the authorities of the Madras and Calcutta High Courts on the one hand and the other High Courts dealing with this problem as follows : (SCC OnLine Del paras 115-16 & 118)

"*115*. In these circumstances, this Court holds that the reliefs granted by the Tribunal cannot be sustained and are hereby set aside. The question that follows is whether this Court, exercising jurisdiction under Section 37 read with Section 34 of the Act, can modify, vary or remit the award. At the outset, it is noticed that there are divergent views on this issue. Here, the Court notices a somewhat divergent approach of various High Courts. The case law is discussed in the following part of the judgment.

Authorities in Favour of the Power to Modify, Vary or Remit the award

116. A learned Single Judge of this Court in *Bhasin Associates* v. *N.B.C.C.* [*Bhasin Associates* v. *N.B.C.C.*, 2005 SCC OnLine Del 689 : ILR (2005) 2 Del 88] held that '*the power to set aside an award when exercised by the court would leave a vacuum if the said power was not understood to include the power to remand the matter back to the arbitrator*'. This view was subsequently adopted in Single Bench decisions in *Union of India* v. *Modern Laminators Ltd.* [*Union of India* v. *Modern Laminators Ltd.*, 2008 SCC OnLine Del 956 : (2008) 3 Arb LR 489] (in the context of modification of the award), *IFFCO-Tokio General Insurance Co. Ltd.* v. *Indo-Rama Synthetics Ltd.* [*IFFCO-Tokio General Insurance Co. Ltd.* v. *Indo-Rama Synthetics Ltd.*, 2015 SCC OnLine Del 6669] (decided on 20-1-2015) and *Canara Bank* v. *BSNL* [*Canara Bank* v. *BSNL*, 2015 SCC OnLine Del 8379] (decided on 26-3-2015). In *Modern Laminators* [*Union of India* v. *Modern Laminators Ltd.*, 2008 SCC OnLine Del 956 : (2008) 3 Arb LR 489] , the Court relied upon the Supreme Court's decision in *Numaligarh Refinery Ltd.* v. *Daelim Industrial Co. Ltd.* [*Numaligarh Refinery Ltd.* v. *Daelim Industrial Co. Ltd.*, (2007) 8 SCC 466] , noting that the Court therein had modified the award in terms of its findings; and the decision in *Krishna Bhagya Jala Nigam Ltd.* v. *G. Harischandra Reddy* [*Krishna Bhagya Jala Nigam Ltd.* v. *Harischandra Reddy*, (2007) 2 SCC 720] , where the interest rate awarded by the arbitrator was modified. The learned Single Judge in *Canara Bank* relied upon a decision of a Single Judge of the Madras High Court in *Gayatri Balaswamy* v. *ISG Novasoft Technologies Ltd.* [*Gayatri Balaswamy* v. *ISG Novasoft Technologies Ltd.*, 2014 SCC OnLine Mad 6568 : (2015) 1 Mad LJ 5] The Court in *Gayatri Balaswamy* [*Gayatri Balaswamy* v. *ISG Novasoft Technologies Ltd.*, 2014 SCC OnLine Mad 6568 : (2015) 1 Mad LJ 5] examined the issue in significant [sic] and held as follows : (*Gayatri Balaswamy case* [*Gayatri*

Balaswamy v. *ISG Novasoft Technologies Ltd.*, 2014 SCC OnLine Mad 6568 : (2015) 1 Mad LJ 5] , SCC OnLine Mad para 52)

'*52*. Therefore, in my considered view, the expression "recourse to a court against an arbitral award" appearing in Section 34(1) cannot be construed to mean only a right to seek the setting aside of an award. Recourse against an arbitral award could be either for setting aside or for modifying or for enhancing or for varying or for revising an award. The expression "application for setting aside such an award" appearing in Sections 34(2) and (3) merely prescribes the form, in which, a person can seek recourse against an arbitral award. The form, in which an application has to be made, cannot curtail the substantial right conferred by the statute. In other words, *the right to have recourse to a court, is a substantial right and that right is not liable to be curtailed, by the form in which the right has to be enforced or exercised*. Hence, in my considered view, the power under Section 34(1) includes, within its ambit, the power to modify, vary or revise.'

The same view had been adopted earlier by Single Bench decisions of the Bombay High Court in *Axios Navigation Co. Ltd.* v. *Indian Oil Corpn. Ltd.* [*Axios Navigation Co. Ltd.* v. *Indian Oil Corpn. Ltd.*, 2012 SCC OnLine Bom 4 : (2012) 114 (1) Bom LR 392] and *Angerlehner Structurals & Civil Engg. Co.* v. *Municipal Corpn. of Greater Mumbai* [*Angerlehner Structurals & Civil Engg. Co.* v. *Municipal Corpn. of Greater Mumbai*, 2012 SCC OnLine Bom 1454 : (2013) 7 Bom CR 83] and a Division Bench of the Calcutta High Court in *W.B. Electronics Industries Development Corpn. Ltd.* v. *Snehasis Bhowmick* [*W.B. Electronics Industries Development Corpn. Ltd.* v. *Snehasis Bhowmick*, 2012 SCC OnLine Cal 10262] .

Authorities holding there is no power to Modify, Vary or Remit the award

***

118. This Court is inclined to follow the decisions in *Central Warehousing Corpn.* [*Central Warehousing Corpn.* v. *A.S.A. Transport*, 2007 SCC

OnLine Mad 972] , *DDA* [*DDA* v. *Bhardwaj Bros.*, 2014 SCC OnLine Del 1581] , *State Trading Corpn. of India Ltd.* [*State Trading Corpn. of India Ltd.* v. *Toepfer International Asia PTE Ltd.*, 2014 SCC OnLine Del 3426] , *Bharti Cellular Ltd.* [*Bharti Cellular Ltd.* v. *Deptt. of Telecommunications*, 2012 SCC OnLine Del 4846] , *Cybernetics Network (P) Ltd.* [*Cybernetics Network (P) Ltd.* v. *Bisquare Technologies (P) Ltd.*, 2012 SCC OnLine Del 1155] and *Asha Talwar* [*U.P. State Handloom Corpn. Ltd.* v. *Asha Lata Talwar*, 2009 SCC OnLine All 624 : (2009) 4 All LJ 397] . The guiding principle on this issue was laid down by the Supreme Court in *McDermott International Inc.* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181] , where the Court held : (*McDermott International Inc. case* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181] , SCC p. 208, para 52)

> '*52.* The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the 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.'

Although the Madras High Court in *Gayatri Balaswamy* [*Gayatri Balaswamy* v. *ISG Novasoft Technologies Ltd.*, 2014 SCC OnLine Mad 6568 : (2015) 1 Mad LJ 5] appropriately noted that these observations in *McDermott International Inc.* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181] were not in the context of

the specific issue being dealt herewith, this Court is of the opinion that it is determinative of the Court's approach in an enquiry under Section 34 of the Act. Indeed, a court, while modifying or varying the award would be doing nothing else but "*correct[ing] the errors of the arbitrators*". This is expressly against the *diktat ofMcDermottInternational Inc.* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181] Further, if the power to remit the matter to the arbitrator is read into Section 34, it would render inexplicable the deliberate omission by Parliament of a provision analogous to Section 16 of the Arbitration Act, 1940 in the present Act. Section 16 of the 1940 Act specifically armed courts with the power to remit the matter to arbitration. Noticeably, the scope of remission under the present Act is confined to that prescribed in sub-section (4) of Section 34. Besides the Division Bench rulings of this Court in *DDA* [*DDA* v. *Bhardwaj Bros.*, 2014 SCC OnLine Del 1581] , *State Trading Corpn. of India Ltd.* [*State Trading Corpn. of India Ltd.* v. *Toepfer International Asia PTE Ltd.*, 2014 SCC OnLine Del 3426] , this was also noted by a Full Bench of the Bombay High Court in *R.S. Jiwani* v. *Ircon International Ltd.* [*R.S. Jiwani* v. *Ircon International Ltd.*, 2009 SCC OnLine Bom 2021 : (2010) 1 Bom CR 529] , where the Court held : (*R.S. Jiwani case* [*R.S. Jiwani* v. *Ircon International Ltd.*, 2009 SCC OnLine Bom 2021 : (2010) 1 Bom CR 529] , SCC OnLine Bom paras 28 & 35)

> '*28.* … An award can only be set aside under the provisions of Section 34 as there is no other provision except Section 33 which permits the Arbitral Tribunal to correct or interpret the award or pass additional award, that too, on limited grounds stated in Section 33. …
>
> ***

> *35*. … It is also true that there are no pari materia provisions like Sections 15 and 16 of the Act of 1940 in the 1996 Act but still the provisions of Section 34 read together, sufficiently indicate vesting of vast powers in the court to set aside an award and even to adjourn a matter and such acts and deeds by the Arbitral Tribunal at the instance of the party which would help in removing the grounds of attack for setting aside the arbitral award.'

On the other hand, the Calcutta High Court in *Snehasis Bhowmick* [*W.B. Electronics Industries Development Corpn. Ltd.* v. *Snehasis Bhowmick*, 2012 SCC OnLine Cal 10262] did not analyse this distinction, or the specific observations of the Supreme Court in *McDermott International Inc.* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181] quoted above. Further, the decisions in *Numaligarh Refinery* [*Numaligarh Refinery Ltd.* v. *Daelim Industrial Co. Ltd.*, (2007) 8 SCC 466] and *Harischandra Reddy* [*Krishna Bhagya Jala Nigam Ltd.* v. *Harischandra Reddy*, (2007) 2 SCC 720] did not discuss the Court's power to modify, vary or remit the award under Section 34 of the Act. Therefore, in light of the *dictum* in *McDermott International Inc.* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181] and the difference in provisions of the 1940 Act and the present Act, this Court holds that the power to modify, vary or remit the award does not exist under Section 34 of the Act."

31. Thus, there can be no doubt that given the law laid down by this Court, Section 34 of the Arbitration Act, 1996 cannot be held to include within it a power to modify an award. The sheet anchor of the argument of the respondents is the judgment of the learned Single Judge in *Gayatri Balaswamy* [*Gayatri Balaswamy* v. *ISG Novasoft Technologies Ltd.*, 2014 SCC OnLine Mad 6568 : (2015) 1 Mad LJ 5] . This matter arose out of a claim for damages by an employee on account of sexual

> harassment at the workplace. The learned Single Judge referred to the power to modify or correct an award under Section 15 of the Arbitration Act, 1940 in para 29 of the judgment. Thereafter, a number of judgments of this Court were referred to in which awards were modified by this Court, presumably under the powers of this Court under Article 142 of the Constitution of India. In para 34, the learned Single Judge referred to para 52 in *McDermott case* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181] and then concluded that since the observations made in the said para were not given in answer to a pointed question as to whether the court had the power under Section 34 to modify or vary an award, this judgment cannot be said to have settled the answer to the question raised finally."

6. It would thus be manifest that while it may have been open for the learned Single Judge to have set aside the Award partially if an exercise of severance were permissible bearing in mind the judgment of the Court in **National Highways Authority of India vs. Trichy Thanjavur Expressway Ltd.** [2023 SCC OnLine Del 5183], we find that the learned Single Judge has ultimately undertaken an exercise of modifying the terms of the Award itself. That was clearly not permissible and for the aforesaid reason, we find ourselves unable to sustain the ultimate directions as framed by the learned Single Judge.

7. Learned counsel for the appellant stated that since an appeal in respect of the order of 12 December 2018 had not been instituted within the period prescribed, they do not choose to press the said relief. We, however, and at this stage refrain from proceeding on the basis of the aforenoted statement for reasons which follow.

8. Quite apart from the order passed on the modification application, undisputedly the order of 12 December 2018 had also set aside a part of the award and modified the rate at which interest had been awarded. For the completeness of the record, it becomes pertinent to note that in terms of the original order of 12 December 2018, the learned Single Judge had while allowing Claim 1, had set aside Claim 2 as granted by the Arbitral Tribunal ["**AT**"]. The learned Single Judge had also modified the interest which had been awarded by the AT. Claim No. 3 had been denied by the AT itself and that decision has not interfered with at all by the learned Single Judge in the twin rounds of litigation which ensued before this Court.

> 9. By the subsequent order of 08 August 2019, the learned Single Judge has also set aside the award rendered by the AT on claims 4 and 5. Apart from the above, the learned Single Judge has in terms of the aforesaid order also denied interest payable in terms of Section 31(7) of the Act and denied interest payable in terms of clause (a) thereof completely. This is in stark contrast to the provisions made in the original order where interest had been granted and was directed to be paid from the date of invocation of arbitration up to the date of pronouncement of the award. Interest had also been provided for in terms of Section 31(7)(b) of the Act.
>
> 10. However, and notwithstanding the challenge to the order of 12 December 2018 proposed to be given up, we find that the said order would be deemed to have merged in the order of 08 August 2019. This position would continue to exist irrespective of the respondent proposing not to assail the order of 12 December 2018. Both the orders passed by the learned Single Judge have clearly modified the award as originally pronounced by the AT. While we were, originally and upon hearing learned counsels for parties in light of *M. Hakeem*, inclined to set aside the order of 08 August 2019 alone, since the aforesaid aspect, namely of both the orders appearing to be contrary to the law as laid down by the Supreme Court had not been pointed out by learned counsels appearing for respective parties, we thought it expedient in the interest of justice to grant them an opportunity to address submissions before we finally dispose of this appeal. We are prima facie of the opinion that bearing in mind the complex position which has come to exist in light of the nature of the directions framed by the two orders of 12 December 2018 and 08 August 2019, the ends of justice may warrant the petition under Section 34 of the Act being restored to the board of the learned Single Judge to be heard afresh.
>
> 11. Consequently, let the appeal be called again on 21.09.2023 to enable us to hear learned counsels for parties afresh and in light of the issues flagged hereinabove."

4. Undisputedly, the solitary issue which warrants consideration is that of interest which was ultimately awarded by the AT and the course as adopted by the learned Single Judge and evidenced from the orders dated 12 December 2018 and 08 August 2019. Quite apart from the issue of whether the judgment rendered on 12 December 2018 could

have been re-opened in the manner in which the learned Single Judge proceeded, we had also taken note of the principles enunciated by the Supreme Court in **NHAI vs. M. Hakeem & Anr.**[3] and which restrained the Section 34 court from modifying the award that may be rendered. It was in the aforesaid backdrop that we had heard learned counsels appearing for respective sides.

5. Appearing for the appellant Dr. George, learned counsel submitted that the learned Single Judge appears to have erroneously proceeded on the assumption that the appellant / claimant had misled the AT into granting interest @ 18%. It was pointed out by Dr. George that the claim for interest @ 18% was accepted by the AT in light of the various communications exchanged between the parties and none of which were questioned by the respondent. Dr. George pointed out that on the record was a document tendered by the respondent itself which would appear to indicate that the appellant / claimant had claimed interest @ 24%. Notwithstanding the above, the AT ultimately granted interest only @ 18%. According to Dr. George, there was, therefore, no justification for the learned Single Judge to interfere with the Award rendered on that score. The modulation of the terms of the award initially and in terms of the judgment dated 12 December 2018 and subsequently by the order dated 08 August 2019 was also assailed with Dr. George contending that not only did *M. Hakem* forbid the learned Judge from modifying the rate of interest as awarded by the AT, the entertainment of an application for modification seven weeks after the

[3] [(2021) 9 SCC 1]

Section 34 petition had been disposed of was clearly impermissible. It was further pointed out that the learned Judge clearly erred in allowing the modification application and ultimately coming to hold that the appellant / claimant would not be entitled to any interest at all. It was submitted that the respondent had not chosen to prefer any appeal against the order originally passed by the learned Single Judge. It was Dr. George's submission that the learned Single Judge had erroneously proceeded on the basis that fraud had been committed by the appellant/ claimant losing sight of the fact that it had never claimed interest @ 24%. Viewed in that light, according to Dr. George, the learned Single Judge has clearly erred in passing the orders impugned.

6. Apart from the judgment of the Supreme Court in *M. Hakeem*, Dr. George also drew our attention to a recent decision rendered by the Supreme Court in **Larsen Airconditioning and Refrigeration Company vs Union of India & Ors.**[4] where yet again a reduction of the rate of interest from 18% to 9% was described to be an "*impermissible modification of the award*". We deem it apposite to extract the following passages from that decision:

> **"13.** In the present case, given that the arbitration commenced in 1997, i.e., after the Act of 1996 came into force on 22.08.1996, the arbitrator, and the award passed by them, would be subject to this statute. Under the enactment, i.e. Section 31(7), the statutory rate of interest itself is contemplated at 18% per annum. Of course, this is in the event the award does not contain any direction towards the rate of interest. Therefore, there is little to no reason, for the High Court to have interfered with the arbitrator's finding on interest accrued and payable. Unlike in the case of the old Act, the court is powerless to modify the award and can only set aside partially, or wholly, an award on a finding that the conditions spelt out under Section 34 of

[4] 2023 SCC Online SC 982

the 1996 Act have been established. The scope of interference by the court, is well defined and delineated [refer to *Associate Builders* v. *Delhi Development Authority*[11], *Ssangyong Engineering Construction Co. Ltd* v. *National Highways Authority of India (NHAI)*[12] and *Delhi Airport Metro Express Pvt. Ltd.* v. *Delhi Metro Rail Corporation Ltd.*[13]].

14. The reliance on *Kalsi Construction Company* (supra) by the respondent-state, is inapt, given that this court had exercised its Article 142 jurisdiction in light of three pertinent factors - the award had been passed 20 years prior, related to construction of a Paediatrics Centre in a medical institute, and that the parties in that case had left the matter to the discretion of the court. Similarly, in *Oriental Structural Engineers* (supra) this court held that since the contract stipulated interest entitlement on delayed payments, but contained no mention of the rate of interest applicable - the Tribunal ought to have applied the principles laid down in *G.C. Roy* (supra), and therefore, in exercise of Article 142, this court reduced the rate of interest awarded by the tribunal on the sum left unpaid. The judgment in *Municipal Corporation of Greater Mumbai* (supra) no doubt discusses the inherent powers of the High Court as a superior court of record, but relates specifically to the jurisdiction to recall its own orders, and offers little assistance in the present dispute.

15. The limited and extremely circumscribed jurisdiction of the court under Section 34 of the Act, permits the court to interfere with an award, *sans* the grounds of patent illegality, i.e., that "*illegality must go to the root of the matter and cannot be of a trivial nature*"; and that the tribunal "*must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground*" [ref : *Associate Builders* (supra)]. The other ground would be denial of natural justice. In appeal, Section 37 of the Act grants narrower scope to the appellate court to review the findings in an award, if it has been upheld, or substantially upheld under Section 34. It is important to notice that the old Act contained a provision[14] which enabled the court to modify an award. However, that power has been consciously *omitted* by Parliament, while enacting the Act of 1996. This means that the Parliamentary intent was to exclude power to modify an award, *in any manner*, to the court. This position has been iterated decisively by this court in *Project Director, National Highways No. 45E and 220 National Highways Authority of India* v. *M. Hakeem*[15]:

> *"42. It can therefore be said that this question has now been settled finally by at least 3 decisions* [McDermott

> International Inc. *v.* Burn Standard Co. Ltd., *(2006) 11 SCC 181]*, [Kinnari Mullick *v.* Ghanshyam Das Damani, *(2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106]*, [Dakshin Haryana Bijli Vitran Nigam Ltd. *v.* Navigant Technologies (P) Ltd., *(2021) 7 SCC 657] of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the Uncitral Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the "limited remedy" under Section 34 is coterminous with the "limited right", namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996."*
>
> **16.** In view of the foregoing discussion, the impugned judgment warrants interference and is hereby set aside to the extent of modification of rate of interest for past, *pendente lite* and future interest. The 18% per annum rate of interest, as awarded by the arbitrator on 21.01.1999 (in Claim No. 9) is reinstated. The respondent-state is hereby directed to accordingly pay the dues within 8 weeks from the date of this judgment.
>
> **17.** The present appeal, and pending application(s) if any, stand disposed of in the above terms, with no order as to costs."

7. Appearing for the respondent Mr. Goel, learned counsel, in terms of a Note which has been placed for our consideration has relied upon the following chart evidencing the grant of interest originally by the AT, then setting out the position as it came to exist post the order of 12 December 2018 and ultimately as per the order of 08 August 2019. The said chart is extracted hereinbelow:

Position of Interest under Award	**Position of Interest Under Order dt 12.12.2018**	**Position of Interest Under Order dt 8.8.2019**

Int @ 18% wef 8.3.2004 till payment. Arbitrator illegally awarded interest w.e.f. 8.3.2004, by wrongly taking date of cause of action as 8.3.2004 by wrongly assuming date of work order as 8.3.2004 : see @ **page 176**. Infact, the date of work order is 25.8.2004 as mentioned on 1st page of SOC (see **@ page 237**) itself. (*8.3.2004 is the date of issuance of tender, as seen from page 431*). Date of Work order can never be the cause of action for the purpose of interest. It, at best, can be from the date of invocation of arbitration.	Int @ 18% wef 6.7.2008 (date of invocation of arb) till date of award (1.4.2011). But during the period of pendency of S.34 petition, Interest @ 12% till today (12.12.2018).	Claim no.4 set aside.

8. It was the submission of Mr. Goel that the appellant / claimant clearly committed a fraud and obtained the Award along with interest @ 18% and that too against a public body. Apart from Section 34, Mr. Goel submitted that it was open for the Court to have even invoked its inherent powers and make such orders as may be considered expedient in the interest of justice or to prevent abuse of process. It was further contended by Mr. Goel that the judgment in *M. Hakeem* came to be pronounced only on 20 July 2021 and would thus have no application to matters which stood concluded prior thereto. Reliance was also

sought to be placed on various provisions of the **Interest Act, 1978**[5] and thus assailing the award of interest @ 18% by the AT.

9. It was the contention of Mr. Goel further that as would be evident from the Award as ultimately pronounced that the AT had taken into consideration the claim of interest @ 24% as urged on behalf of the appellant / claimant. Mr. Goel also questioned the claim of interest to commence from 08 March 2004 and submitted that the same was erroneously described as the date of the First Work Order. It was pointed out that the date of the First Work Order was in fact 25 August 2004 as admitted in the Statement of Claim itself. Even otherwise it was his submission that interest could not have been awarded from any date prior to when the appellant / claimant invoked arbitration and thus could have commenced only from 06 July 2008. Mr. Goel also sought to place reliance on various decisions rendered by High Courts as well as the Supreme Court in support of his submissions that the award of interest @ 18% was clearly unjustified and exorbitant and thus having been rightly set aside by the learned Single Judge.

10. Having noticed the rival submissions we at the outset find that undisputedly the petition under Section 34 had come to be finally disposed of on 12 December 2018. The application which came to be moved by and on behalf of the respondent was styled as being one of modification. In our considered opinion, once the petition had been finally disposed of, the only recourse available or open to the respondent was to petition for review. It becomes pertinent to note that

[5] Interest Act

the order of 08 August 2019 cannot possibly be construed as being representative of the learned Judge exercising the review power. As we read the said order, we come to the firm conclusion that the same constitutes a decision reached on a de novo rehearing as opposed to the discovery of a patent error or mistake apparent on the face of the record. We are of the firm opinion that once a matter comes to be finally disposed of it cannot be re-opened except in accordance with a procedure which stands sanctioned in law. We, thus, come to the firm conclusion that the judgment rendered on 12 December 2018 could not have been re-opened in the manner that the learned Single Judge chose to adopt. The order of 08 August 2019 is thus liable to be set aside on this ground alone.

11. Proceeding then to the power to modulate the terms of an Award, we had in our detailed order dated 15 September 2023 taken note of the principles which came to be enunciated by the Supreme Court in *M. Hakeem*. The said judgment while explaining the extent of the setting aside power as conferred upon a court in terms of Section 34, has categorically held that a modification of the award would clearly not fall within the specie of "*setting aside*". The Supreme Court in *M. Hakeem* had also taken notice of the shift in the statutory position and the departure from the power of variation and modification as it earlier existed in the **Arbitration Act, 1940**[6]. It was on a consideration of the aforesaid aspects coupled with the language in which Section 34 stands couched which weighed upon the Supreme Court to hold that while

[6] 1940 Act

considering a petition under Section 34 of the Act, a court could only set aside the award as opposed to a variation or modulation of the operative directions that may be framed by the AT.

12. By way of the order of 12 December 2018, it is this injunct which clearly appears to have been breached by the learned Single Judge. The legal position which prevails today clearly renders the aforesaid order unsustainable on this score alone. We find that the decision of the Supreme Court in *M. Hakeem* has been reiterated in terms of the judgment in *Larsen Airconditioning*. *Larsen Airconditioning* was again a case where the Section 34 court had chosen to reduce the rate of interest as awarded by the AT. The Supreme Court had found this as constituting a sufficient ground to set aside the said judgment.

13. While Mr. Goel had commended for our consideration that the subsequent order of 08 August 2019 should be viewed as a setting aside of the award of interest, we find ourselves unable to sustain that submission since, we have already found that the order of 08 August 2019, for reasons aforenoted, is rendered unsustainable. The submission of learned counsel that awards and decisions rendered prior to *M. Hakeem* should be left untouched also cannot possibly be countenanced bearing in mind the indubitable principle of judgments principally being declaratory in character. *M. Hakeem* also does not indicate the Supreme Court having adopted the precept of prospective overruling, a power which is otherwise recognised to inhere in that court.

14. Accordingly, and for all the aforesaid reasons, the instant appeal stands allowed. All pending applications shall also stand disposed of.

The orders dated 12 December 2018 and 08 August 2019 as passed by the learned Single Judge are hereby set aside. The Section 34 petition shall in consequence stand restored and placed on the board of the learned Single Judge for consideration afresh and in light of the observations appearing hereinabove.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

NOVEMBER 30, 2023
kk