REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. _____ 2025
(@ SPECIAL LEAVE PETITION (CIVIL) NOS. 15336-15337 OF 2021)

GAYATRI BALASAMY APPELLANT(S)

VERSUS

M/S ISG NOVASOFT
TECHNOLOGIES LIMITED RESPONDENT(S)

With

CIVIL APPEAL NO. _____ 2025
(@ SLP(C) No. 21301/2024)

CIVIL APPEAL NO. _____ 2025
(@ SLP(C) No. 17941/2019)

CIVIL APPEAL NO. _____ 2025
(@ SLP(C) No. 7973/2022)

CIVIL APPEAL NOS. _____ 2025
(@ SLP(C) Nos. 4961-4962/2024)

CIVIL APPEAL NO. _____ 2025
(@ SLP (C) No. _____ 2025)
(@ Diary No. 7789/2024)

CIVIL APPEAL NOS. _____ 2025
(@ SLP(C) Nos. 18656-18663/2024)

CIVIL APPEAL NO. 8183 OF 2016
AND
CIVIL APPEAL NO. 8184 OF 2016

J U D G M E N T

K.V. VISWANATHAN, J.

1. Delay in refiling the Special Leave Petition is condoned.

2. Leave granted.

3. This reference to a Bench of five judges is primarily to decide the correctness of the judgment of this Court in ***Project Director, National Highways No. 45 E and 220 National Highways Authority of India Vs. M. Hakeem and Anr.,*** (2021) 9 SCC 1. In the said judgment, this Court held that while exercising powers under Section 34 of the Arbitration and Conciliation Act, 1996 ('A&C Act' for short), a Court hearing the petition had no power to "Modify" the Award. A three-Judge Bench of this Court on 20.02.2024, after noticing that there are decisions of this Court which have either modified the awards of the Arbitral Tribunals or upheld orders challenging modified awards and after observing that an authoritative pronouncement is required on this issue, placed the matter before the Hon'ble Chief Justice for constitution of an appropriate Bench. On 23.01.2025, by an order, this Court directed the matter to be placed before a Constitution Bench and that is how the matter has presented itself.

THE HOLDING IN *HAKEEM (SUPRA)*:-

4. The facts in ***Hakeem (Supra)*** were that pursuant to the notifications issued under the provisions of the National Highways Act, 1956 for acquisition of lands by the National Highways Authority of India (NHAI), awards came to be passed by the competent authority under the said Act. A Petition under Section 34 of the A&C Act resulted in enhancement of the award by the District Court which was upheld on further appeal with only a remand to determine compensation for certain trees and crops. The NHAI challenged the same before this Court and contended that in exercise of powers under Section 34, no modification could be made since it was not a challenge on the merits of the award. The contentions of NHAI were that powers under Section 34 were qualitatively different from an appellate power and the only option open was to set aside the award or remit the award under Section 34 (4) in the event of the contingencies provided thereon arising. A contrast was made with the provisions of the Arbitration Act, 1940 which contained express provisions to modify the award under Section 15 therein. NHAI further argued that since the A&C Act was based on the UNCITRAL Model Law on International Commercial Arbitration,

1985, the grounds of challenge were restricted. The land losers in ***Hakeem (Supra)*** contended that power to set aside in Section 34 included a "power to modify" and relied on the judgment of the learned Single Judge of the Madras High Court in ***Gayatri Balaswamy Vs. ISG Novasoft Technologies Limited, 2014 SCC OnLine Mad 6568***. [Coincidentally, ***Gayatri Balaswamy (supra)*** is the first case in this reference after travelling through the Division Bench of the High Court.]

5. This Court in ***Hakeem (Supra)*** held as under:-

> (i) Section 34 of the A&C Act was different from a provision of appeal since the Section contemplates setting aside awards on very limited grounds provided in the sub-Sections thereof. (Para 16)
>
> (ii) "Recourse" in Section 34 meant enforcement or method of enforcing a right and where the right itself is truncated, enforcement of such right would also be only limited in nature. (Para 16)

(iii) That enforcement is truncated was further clear from Section 34(4) which provides that on receipt of an application under Section 34(1), the Court may, where it is appropriate and it is so requested by a party, adjourn for a period of time the Section 34 proceedings 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. It was the opinion of the Arbitral Tribunal which ultimately counted in order to eliminate the grounds for setting aside the award, which may be indicated by the Court. (Para 16)

(iv) That Section 34 was modelled on the UNCITRAL Model Law and no power to modify was given to the Court. (Para 17)

(v) Eminent authors like Redfern and Hunter have opined that the Reviewing Court can neither alter the

terms of an award nor can it decide the dispute based on its own vision of the merits. (Para 18)

(vi) Minimal judicial interference is called for in Arbitral Awards under the UNCITRAL Model Law and unlike the 1940 Act there is no power to modify. (Para 19 & 20)

(vii) In a challenge under Section 34, there is no challenge to the merits of the award as held in a long line of judgments of this Court (Para 23, 24)

(viii) This Court in ***McDermott International Inc. Vs. Burn Standard Co. Ltd.,*** (2006) 11 SCC 181 has held that Court cannot correct the errors of the Arbitrators and that it can only quash the award leaving the parties free to begin the arbitration afresh. (Para 25)

(ix) That in England, the United States, Canada, Australia and Singapore there are express legislative provisions permitting the varying of an Award, unlike Section 34 of the A&C Act. (Para 43)

ORDER OF REFERENCE: -

6. In the referral order of 20.02.2024, this Court, while framing certain questions for consideration, observed as under:-

> "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*** (2021) 9 SCC 1, followed in ***Larsen Air Conditioning and Refrigeration Company*** vs. ***Union of India***, (2023) SCC OnLine SC 982 and ***SV Samudram*** vs. ***State of Karnataka,*** (2024) SCC OnLine SC 19 lay down the correct law, as other benches of two Judges (in ***Vedanta Limited*** vs. ***Shenzden Shandong Nuclear Power Construction Company Limited***, (2019) 11 SCC 465, ***Oriental Structural Engineers Pvt. Ltd.*** vs. ***State of Kerala,*** (2021) 6 SCC 150 and ***M.P. Power Generation Co. Ltd.*** vs. ***Ansaldo Energia Spa***, (2018) 16 SCC 661 and three Judges (in ***J.C. Budhraja*** vs. ***Chairman, Orissa Mining Corporation Ltd.*** (2008) 2 SCC 444, ***Tata Hydroelectric Power Supply Co. Ltd.*** vs. ***Union of India,*** (2003) 4 SCC 172 and ***Shakti Nath*** vs. ***Alpha Tiger Cyprus Investment No.3 Ltd.***, (2020) 11 SCC 685) 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."

CONTENTIONS OF LEARNED COUNSELS: -

7. Wide ranging arguments have been canvassed to contend that a Court under Section 34 of the A&C Act has the power to "modify" the award and equally strong arguments were canvassed contending for the

position that ***Hakeem (Supra)*** is correctly decided and there was no power in the Section 34 Court to modify. The only unanimity in the submission was with regard to the power under Section 34 to sever parts of the award subject to the condition that the Severed part is a standalone part and is not inseparably intertwined with the other parts of the award.

CONCEPTUAL DISTINCTION BETWEEN "MODIFICATION" AND "SEVERANCE": -

8. This judgment approaches the issue by maintaining the conceptual distinction between "modification" and "severance". Wherever modification is discussed, it is to examine whether a Section 34 Court can change, vary or qualify an award. Wherever severance is discussed it has to be understood to mean "to separate" and "disjoin". Parties have also canvassed arguments based on that distinction. While the rival parties were at daggers drawn on the aspect of the power to "modify" in a Section 34 Court, there was unanimity on the power to "sever" subject to conditions compatible with severability.

CONTENTIONS FAVOURING THE POWER TO MODIFY: -

9. Mr. Arvind Datar, learned Senior Counsel made bold to suggest that the Court read words into Section 34. According to the learned Senior Counsel, the words "**and , to the extent**" be read as opening words in Section 34(2) (b) and further that the words "**or modified, and "to the extent**" be added in Section 34(2)(a). According to the learned Senior Counsel, the Court is not powerless to add words and cited a large number of authorities where, according to the counsel, words have been added to avoid irreconcilable conflict and in situations where absurdity and injustice had to be averted. The learned Senior Counsel further contended that ***Hakeem (supra)*** is *per incuriam* as it is contrary to several three-Judge and two-Judge Bench judgments of this Court. Learned Senior Counsel further contended that the only option of setting aside the award will cause enormous hardship to the litigants as that will result in recommencement of the arbitration proceedings. Learned Senior Counsel further argued that power to "set aside" the award will include power to modify as the larger power would include the smaller power. Learned Counsel relied on the legal maxim *omne majus continet in se minus* which meant the greater contains the less.

10. Mr. Darius Khambata, learned Senior Counsel contended that certain foreign jurisdictions have statutorily enabled Courts to modify awards including on a question of law. Referring to passages from "Mustill & Boyd" on Commercial Arbitration, learned Senior Counsel contended that it would be unjust for an obviously wrong decision on an important question of law not to be put right by the Court and any variation which inevitably flows from the Court's determination of the question of law would be perfectly justified. Learned Senior Counsel reiterated the submission that power to modify, if available to the Court, would ensure resolution of dispute in a speedy, effective, inexpensive and expeditious manner. Learned Senior Counsel referred to the Expert Committee Report headed by Dr. T.K. Viswanathan to contend that even the Committee has recommended legislative changes to permit modification of the award. Learned Senior Counsel contended that none of the provisions in the Act including Section 34 prohibit Courts from modifying the award and argued that silence in the Act cannot be read as a prohibition.

11. Learned Senior Counsel canvassed that Courts should have the power to iron out the creases and supported the submission that the

larger power of setting aside ought to include the limited power to modify when such modification inevitably flows from the correction of illegality within the confines of Section 34. Illustrative cases where this Court exercised powers under Article 142 were referred to.

12. Learned Senior Counsel sought to peg the power to modify under Section 151 of the Code of Civil Procedure which saved the inherent powers of Court and contended that inherent powers were always available to a Civil Court exercising powers under Section 34. Learned Senior Counsel contended that any fear that power to modify will result in Section 34 power being turned into an appellate power can be checked, by prescribing guardrails to prevent abuse of the power to modify. Learned Senior Counsel contended that if the modification required reconsideration of facts on merits, Courts' ought to remit the award under Section 34(4), if the remission is to be on narrowly defined issues for pure application to facts. Learned Senior counsel contended that if remission is to be allowed, the correct position of law should be determined by the Court and after recording a finding the remission ought to be made. Learned Senior Counsel contended that severability is well accepted during the course of exercise of power under Section

34, which according to the counsel, was after all a facet of modification and there is no reason why power to modify generally cannot be read into Section 34.

13. Mr. Shekhar Naphade, learned Senior Counsel contended that if impugned award grants reliefs which cannot be granted due to factors specified in sub-clauses (i), (ii), (iv) and (v) of clause (a) of Section 34(2) and sub-clause (i) of clause (b) of Section 34(2), then there was no question of modifying or substituting an award. According to the learned Senior Counsel, the only option then was to set aside the award. Learned Senior Counsel contends that if the award is passed in violation of natural justice then the question would arise as to what the Court ought to do. Equally so with regard to awards infested with corruption and wrongful rejection of claims, learned Senior Counsel contends that mere setting aside would not put an end to the *lis*. Merely setting aside the award in such circumstances would defeat the purpose of resolving disputes expeditiously, contends Mr. Naphade. According to the learned Senior Counsel, it will also be contrary to fundamental notions of justice since there should be some remedy for every wrong and the consequence will be that the proceedings will revive and

continue '*ad infinitum*' involving enormous delay and huge costs. According to the learned Senior Counsel the only possible solution therefore, is that after setting aside the award the Court itself either modifies or substitutes the award and when the Court does so, it is only passing an order which the arbitral Tribunal ought to have passed and being a final step in the proceeding it is consistent with the scheme of the Act.

14. Learned Senior Counsel contends that since a Section 34 application is heard by a Court as defined in Section 2(1)(e), the general principle that every Civil Court has inherent jurisdiction to deal with matters of civil nature and pass such orders as are permissible in law ought to apply. According to learned Senior Counsel, under Section 151 C.P.C., a Court is competent to pass such orders as are necessary to meet the ends of justice.

15. Mr. Naphade contends that rules of statutory interpretation require the Court to make every endeavour to avoid a case of *casus omissus*. Drawing particular attention to the provisions of the NHAI Act and the acquisition made thereunder, learned Senior Counsel contends that such matters involved public law elements unlike

contractual arbitration which involves commercial considerations. Hence, where lands are acquired with paltry compensation and with no remedy to seek a reference for enhancement like under the normal Land Acquisition Laws, the only remedy available is to enable the Section 34 Court to enhance compensation and a restricted view of Section 34 in Statutory arbitrations like in NHAI would render the Section itself *ultra vires* Article 14.

16. Mr. Ritin Rai, learned senior counsel reiterated the submission that 'recourse', is a wider term. He further reiterated that there is no prohibition to modify in the Act. Mr. Ritin Rai submitted that if the conclusion to modify axiomatically follows a finding, then modification should be allowed.

17. Mr. Prashanto Chandra Sen, Dr. Manish Singhvi, Learned Senior Counsels and Mr. Abhishek Kumar Rao, learned Counsel reiterated the arguments of other Senior Counsels. Dr. Manish Singhvi, learned Senior Counsel argued that competent authorities under the NHAI are not legally trained minds and the compensation granted by them cannot be treated as final and the Section 34 Court should have power to enhance. Learned Senior Counsel contended that restrictive parameters

should not be available for compulsory arbitration as opposed to consensual arbitration.

18. Mr. Sumeet Pushkarna, learned Senior Counsel, M/s Ashwin Shanker, Vaibhav Dang, Amit George and Jinendra Jain by and large reiterated the submissions of Mr. Datar and Mr. Khambata. Mr. Vaibhav Dang and Mr. Jinendra Jain supplemented the submissions by adding that substantial cost will be incurred if re-arbitration is to commence and that ***Hakeem (supra)*** did not consider modification by mutual consent and correction of computation and clerical errors by the Section 34 Court. It was further argued by Mr. Amit George that power to grant interest, reduce or increase interest should be read into Section 34 without relegating parties for fresh arbitration. It was argued that if the award of the Tribunal is contrary to the agreement between the parties on interest, modifying the same would not require any elaborate inquiry. Learned Counsel also argues that if in an enquiry under Section 34, the Court finds that modifying the award was the only one conclusion possible, it will be a useless formality to set aside and let parties reagitate in arbitration. It was contended that the word

"recourse" to Court will include the power to modify as, "recourse" is a method of enforcement of right".

19. Mr. Pallav Mongia, learned Counsel contended that any modification should only be through the mechanism of Section 34(4). Learned counsel canvassed the application of the principle of proportionality as modification through the mechanism of Section 34(4) would be a better option than setting aside the award in entirety. Learned Counsel contended that the procedural preconditions mentioned in Section 34(4) should be read as discretionary.

CONTENTIONS OPPOSING THE POWER TO MODIFY: -

20. Mr. Tushar Mehta, learned Solicitor General (SG), who, in fact, opened the arguments at the reference contended that the power to modify has to be statutorily conferred and cannot be exercised otherwise. The learned Solicitor General, referred to several statutes of other jurisdictions to contend that wherever power to modify was to be recognized, such powers were expressly conferred by the legislature. Learned SG referred to the provisions in UK, USA, Singapore, Canada and a whole host of other countries to demonstrate the existence of

specific power to modify/vary in their respective arbitration statutes. According to the learned SG, Section 34 of the Arbitration Act has a strong resemblance with the UNCITRAL Model Law, both of which delineate limited grounds for setting aside an Arbitral award. The learned SG made extensive reference to the debates during the preparation of the Model Law to contend that setting aside was the only recourse available in India as at present and that the power to remit under Section 34(4) is intended to prevent annulment on grounds specified therein. Learned SG referred to the 76th Report of the Law Commission on the Arbitration Act to contend that no power to modify was recommended even though the precursor Act, namely, the 1940 Act had in Section 15 a specific power to modify. Learned SG contended that the scope of setting aside proceedings are not akin to Appellate proceedings where evidence is re-evaluated and decision is examined for its correctness on merits. According to the learned SG, the power of modification cannot be subsumed in the power to "set aside" as both exist on different judicial planes requiring application of differing judicial parameters.

21. Learned SG particularly emphasized on Section 5 of the A&C Act to canvass for limited judicial intervention in a manner provided in the statute and nothing more. Learned SG referred to Section 34(4) as the solution, provided the grounds mentioned in the Section are made out. The learned SG distinguished the cases where this Court had exercised power to modify. Learned SG contended that Article 142 power cannot be exercised in contravention of statutory power and not being a situation similar to the one in ***Vishaka and Others*** ***Vs.*** ***State of Rajasthan and Others*****,** (1997) 6 SCC 241, no guardrails can be laid down by the Court. Learned SG referred to the cardinal rule of interpretation that the words should be given their plain and natural meaning and that it was not the duty of the Court to enlarge the language of the provision where the provision is otherwise plain and unambiguous. Learned SG concluded by contending that the exclusion of the power to modify in the UNCITRAL Model law was a conscious decision and it was left to the respective countries to incorporate a provision if it was so desired and that in the absence of any power to modify the only option was to set aside or pending the proceedings, remit under Section 34(4). Learned SG submitted that even the Expert

Committee, namely, the Vishwanathan Committee had only recommended the statutory amendment.

22. Mr. Saurabh Kirpal, learned Senior Advocate contended that Courts cannot modify clear words of the Statute. According to the counsel, there was no reason to consider the provisions of the A&C Act as unworkable since, it has worked well for the past three decades. Reiterating the application of the golden rule of interpretation, learned Senior Counsel urged that the plain meaning be given to Section 34. According to the learned Senior Counsel, 'setting aside' clearly meant quashing the decision. According to the learned senior counsel, granting power of modification may only further delay the proceedings by never ending appeals and the question of speedy justice is a matter for Parliament to decide. According to the learned senior counsel, letting in power to modify into Section 34 will cause uncertainty which is an anathema to business and commerce. Learned Senior Counsel contends that party autonomy and non-interference by Court is a golden thread that runs through the Act and that granting power to modify will drag the Courts into a merits review, which the parties have chosen not to opt, when they decided to arbitrate. Learned Senior Counsel

contends that the principle that greater power will include lesser power has no application and such a principle will apply only if the scope of law is of the same genus. According to the learned Senior Counsel, this Court has already held before the judgment in ***Hakeem (supra)*** that Section 34 does not encompass the power to modify.

23. Mr. Gourab Banerji, learned Senior Counsel contended that the UNCITRAL Model Law and the A&C Act permit only "setting aside" of awards; that countries which have derogated from the Model Law have specifically empowered the Courts to modify, confirm or vary an award in whole or in part, in addition to powers of setting aside; that power to annul is inconsistent with a power to appeal; that no judicially manageable standards exist to determine the contours of modification and the only way forward is by legislation. The learned senior counsel contended that the A&C Act was based on the UNCITRAL Model Law and provides finality and binding nature of the award and minimal judicial intervention. Learned Senior Counsel further contended that the statutory scheme under the A&C Act, 1996 differs from that of the Act of 1940; that Section 34 does not provide a merits challenge nor is it an appellate jurisdiction; that parties consciously opt to exclude the

Court's jurisdiction and choose arbitration for its expediency and finality and that the "limited remedy" under Section 34 is co-terminus with the "limited right" to set aside or remit within the meaning of Section 34(4). According to the learned Senior Counsel, the consequence of a complete annulment is recommencement of proceedings and any new submission will have to be argued before the new Tribunal.

24. Learned senior counsel contended that the setting aside of the award would not affect the validity of the Arbitration agreement. Adverting to Section 34(4), learned Senior Counsel contended that curing defects is limited to cases where award provides no reasoning or there are gaps in reasoning or those which can otherwise be cured to avoid a setting aside. Learned Senior Counsel contends that Section 34(4) excludes reconsideration of the award for the purpose of eliminating the grounds on which the award can be set aside. Dealing with severability, learned senior counsel contended that an award can be segregated and upheld after exclusion of the infirmity, where there are multiple claims and counter claims which are severable and not inter-dependent. The Court in Section 34 can set aside or uphold the

Arbitrator's decision on individual and severable claims, without setting aside the whole award, depending upon the facts and circumstances of the case.

25. Learned Senior Counsel flagged a very important concern if power to modification is permitted. According to the learned Senior Counsel, it will lead to enforcement issues under the New York Convention, apart from other anomalies. Learned Senior Counsel contends that parties clamoring for modification are treating an award akin to a judgment and Section 34 proceedings akin to an appeal. Before the Arbitrator, even the misapplication or misinterpretation of law would bind the parties. Learned Senior Counsel argued that internationally various forms of recourse are recognized and referred to the power to confirm present in the English Act; the power to vary; the power to correct; the power to remit and powers to set aside/annul/vacate. According to the learned Senior Counsel, once the award is set aside, it is quashed, and it never exists in the eye of law. This would mean that parties would be relegated to their original litigating position.

26. According to the learned Senior Counsel, the argument that grave injustice will occur if there is no power to modify is a misconceived submission. Learned Senior Counsel submits that having taken a conscious decision to exclude Court's jurisdiction, it does not lie in the mouth of the parties to draw this red herring and contended that any sanction of power to modify would affect finality and binding nature of the awards. Learned Senior Counsel contended that reading in guardrails would amount to judicial legislation. According to the learned Senior Counsel, permitting modification would compel the Court to do a two-fold exercise, namely, first to decide whether award suffers from any infirmity and then to decide what the correct outcome would be on the facts of the case.

27. Learned senior counsel contends that the power of modification, if permitted, the original award will be rendered incapable of enforcement, particularly in the New York Convention awards and cited how other jurisdictions have handled it by incorporating specific provisions, namely, Section 71 of the English Arbitration Act, Section 5(7) of Schedule 2 of the New Zealand Arbitration Act, 1996 and Section 39(5) of the Kenyan Arbitration Act, 1995. According to the

learned Senior Counsel, absent such legislative shield, India seated arbitrations would be vulnerable and unattractive and the awards would potentially be in breach of the New York Convention.

28. Dealing with statutory arbitrations, learned Senior Counsel contends that solutions to the maladies of the statutory arbitrations must be sourced to the respective statutes mandating these arbitrations and not to the A&C Act and suggests that public law remedies like writ jurisdiction in those cases may provide appropriate remedy.

29. Mr. Gaurav Pachnanda, learned Senior Advocate contended that only if the portion is severable could the court under Section 34 sever the award, and even here, according to the learned Senior Counsel, an exercise has to be undertaken to examine whether the good parts of the award can be separately identified both in terms of liability and quantum without any correlation to the bad parts of the award. According to the learned Senior Counsel, if good parts are intermingled with the bad parts of the award in a manner that it is impossible to sever the bad parts, then principles of severability cannot be applied. To illustrate, the learned Senior Counsel contends that if a final award is arrived at by netting of claims and counter claims, principles of

severability cannot be applied. According to the learned Senior Counsel, netting of claims and counter claims results in composite awards where a single amount is enforceable by the successful parties. According to the learned Senior Counsel, this would also impact the Stamp duty.

30. Learned Senior Counsel argued that the doctrine of merger does not apply to an order of the Court under Section 34. Arguing from that perspective, learned Senior Counsel contended that jurisdiction under Section 34 does not extend to modification, variation or reversal of the Arbitral Tribunal award and the Court can only efface or annul the arbitral award. According to the Learned Senior Counsel, doctrine of merger would not apply if the nature and scope of the power of the superior forum is not identical with the nature and scope of power of the subordinate fora. Learned Senior Counsel contended that a statutory scheme of merger is recognized in UK and Singapore and the same is absent in our country. Learned Senior Counsel contended that the power under Section 151 CPC cannot be resorted to when the mandate of Section 34 is clear.

31. These submissions have been reiterated by Ms. Archana Pathak Dave, learned ASG, Mr. Naresh Markanda, Mr. Surjendu Sankar Das, Mr. Saurav Agarwal, Mr. Saket Sikri and Mr. Rahul G. Tanwani, learned counsels.

32. Both sides referred to a large number of authorities in support of their respective positions.

THE ECO SYSTEM OF ARBITRATION:-

HISTORICAL, TEXTUAL AND THE CONTEXTUAL SETTING:

33. Before the core issue is answered, certain fundamental concepts highlighting the difference between the adjudication of disputes by the procedure in Courts and the procedure in Arbitration needs to be emphasized. The judicial power of the State is exercised by the judiciary and disputes are adjudicated through the mechanism of the Courts at different hierarchical levels. If disputes were to be adjudicated in Courts, normal procedural laws would govern the disposal. For example, while the Code of Criminal Procedure, 1973 (The Bharatiya Nagarik Suraksha Sanhita, 2023) would govern the

procedure in Criminal Courts, the Code of Civil Procedure of 1908 amended in 1976 and thereafter, would govern the procedure in the Civil Courts.

34. The Indian Contract Act, 1872, while otherwise holding that Agreements in restraint of legal proceedings would be void in Section 28, saves Arbitration references. For the sake of convenience, relevant portions of Section 28 of the Contract Act, are set out hereinbelow:-

> "**28. Agreements in restraint of legal proceedings, void**.— Every Agreement,-
>
> (a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or
>
> (b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.
>
> *Exception 1*.—**Saving of contract to refer to arbitration dispute that may arise.—**This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.
>
> *Exception 2*.—**Saving of contract to refer questions that have already arisen.—**Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration".

35. It is by virtue of this provision that Arbitration clauses in contracts by which parties voluntarily agreed to step out of the process of normal legal proceedings through Courts and decide to refer to Arbitration their disputes, is saved. The logic behind the provision is that when two parties with open eyes agree to submit their dispute to a third party in whom they have confidence, such contracts should not be held as void.

36. The earliest statute which exclusively dealt with Arbitration was the Indian Arbitration Act of 1899. Thereafter came the Arbitration Act of 1940 ('1940 Act' for short), which has since been replaced by the A&C Act. What is important to note is that contracts referring parties to Arbitration were regulated by statutes. Parties contracting with open eyes were aware that once they opt for Arbitration, the parameters for Arbitration were to be governed by the statute regulating the same and that the normal remedies available to a litigant who is resorting to the existing Courts could not be applicable and a different procedure would govern the same.

37. The 1940 Act dealt with:- Arbitration without intervention of a Court (Sections 3 to 19); Arbitration with intervention of a Court where

there is no suit pending (Section 20); Arbitration in suits (Sections 21 to 25) and further Section 27 enabled the Arbitrator to make an interim award and in Section 30 grounds for setting aside the award were provided. What is important to note is that Section 15 of the Act of 1940 provided for a power in the Court to modify the award and Section 16 reserved an express power to remit the award.

38. Sections 15 and 16 of the 1940 Act read as under:-

> **"15. Power of Court to modify award .-The Court may by order modify or correct an award-**
>
> (a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or
>
> **(b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such** decision; or
>
> (c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.
>
> **16. Power to remit award .-(1) The Court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit-**
>
> (a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred; or
>
> (b)where the award is so indefinite as to be incapable of execution; or

(c)where an objection to the legality of the award is apparent upon the face of it."

(Emphasis supplied)

39. Thereafter, in Section 30 of the 1940 Act, grounds for setting aside the award were provided. Section 30 reads as follows:-

> **30. Grounds for setting aside award .-An award shall not be set aside except on one or more of the following grounds, namely:-**
>
> (a) that an arbitrator or umpire has misconducted himself or the proceedings;
>
> (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;
>
> (c) that an award has been improperly procured or is otherwise invalid.
>
> (Emphasis supplied)

40. It is important to note that Section 30 of the 1940 Act opened with the phrase "*an award shall not be set aside except on one or more of the following grounds*". These words are exhaustive and limit the setting aside to the three grounds set out therein.

SCHEME OF THE A&C ACT, 1996: -

41. Reverting to the A&C Act, the Statement of Objects and Reasons sets out that the UNCITRAL Model Law and Rules harmonize the concepts on arbitration and conciliation of different legal systems of

the world and contain provisions for universal application; though the UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration and conciliation, they could with appropriate modifications also serve as a model for legislation on domestic arbitration and conciliation; that the present Bill sought to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the UNCITRAL Model Law and Rules. Among the main objectives set out were to minimize the role of the courts in the arbitral process. The Statement of Objects and Reasons of the 1996 Act is extracted herein below:-

> "**STATEMENT OF OBJECTS AND REASONS**
>
> 1. The law on arbitration in India is at present substantially contained in three enactments, namely, the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. It is widely felt that the 1940 Act, which contains the general law of arbitration, has become outdated. The Law Commission of India, several representative bodies of trade and industry and experts in the field of arbitration have proposed amendments to this Act to make it more responsive to contemporary requirements. It is also recognised that our economic reforms may not become fully effective if the law dealing with settlement of both domestic and international commercial disputes remains out of tune with such reforms. Like arbitration, conciliation is also getting increasing worldwide

recognition as an instrument for settlement of disputes. There is, however, no general law on the subject in India.

2. The United Nations Commission on International Trade Law (UNCITRAL) adopted in 1985 the Model Law on International Commercial Arbitration. The General Assembly of the United Nations recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. The UNCITRAL also adopted in 1980 a set of Conciliation Rules. The General Assembly of the United Nations recommended the use of these Rules in cases where the disputes arise in the context of international commercial relations and the parties seek amicable settlement of their disputes by recourse to conciliation. An important feature of the UNCITRAL Model Law and Rules is that they have harmonised concepts on arbitration and conciliation of different legal systems of the world and thus contain provisions which are designed for universal application.

3. Though the said UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration and conciliation, they could, with appropriate modifications, also serve as a model for legislation on domestic arbitration and conciliation. The present Bill seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the said UNCITRAL Model Law and Rules.

4. The main objectives of the Bill are as under:-

(i) to comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation;

(ii) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;

(iii) to provide that the arbitral tribunal gives reasons for its arbitral award;

(iv) to ensure that the arbitral tribunal remains within the limits of its jurisdiction;

(v) to minimise the supervisory role of courts in the arbitral process;

(vi) to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;

(vii) to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;

(viii) to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and

(ix) to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two international Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award.

5. The Bill seeks to achieve the above objects.

(Emphasis supplied)

The Act has since been amended in 2015, 2019 and 2021.

42. It is time now to analyse the conspectus of the legal provisions of the A&C Act that are relevant for answering the issue at hand. Section 5 is an important provision which reads as under:-

> "5. **Extent of judicial intervention.**—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall **intervene except where so provided in this Part.** (Emphasis Supplied)

43. It will be noticed that the section begins with a non-obstante clause and states that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part-I, no judicial authority shall intervene except where so provided in Part-I.

Section 7 defines “arbitration agreement” and mandates that it shall be in writing in the manner as provided in sub-clause (4) therein. Section 8 is an important section, which mandates that a judicial authority before which an action is brought in a manner which is subject to arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies in the circumstance set out therein, the judicial authority shall refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists; Section 9 deals with interim measures; Section 10 deals with number of arbitrators and Section 11 provides for the method of appointment of arbitrators. Sections 12 and 13 deal with bias and procedure for challenging the continuance of an arbitrator.

44. What is important to notice is where a challenge to an arbitrator on the grounds of bias fails, the Arbitral Tribunal is mandated to continue the arbitral proceedings. Section 13(5) provides that where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with Section 34. The point to be noted is that judicial intervention is postponed till the conclusion of the arbitral

proceedings and courts are kept at bay from interfering before the making of an award. This is in line with the mandate of Section 5 which states that except where so provided it shall be a judicial hands-off.

45. Section 14 deals with failure or impossibility of the arbitrator to act and Section 15 deals with termination of mandate and substitution of arbitrator. Section 16 deals with the competence of the Arbitral Tribunal to rule on its own jurisdiction. This section, based on the Principle of Kompetenz- Kompetenz, vests the arbitral tribunal to decide upon its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. Section 16(2) mandates that a plea that the arbitral tribunal does not have jurisdiction is to be raised not later than the submission of the statement of defence; sub-section (5) of Section 16 states that where the arbitral tribunal takes a decision rejecting the objection under sub-sections (2) and (3) it shall continue with the arbitral proceedings and make the award and any such decision upholding the jurisdiction or authority is challengeable only at the stage of Section 34 and no court will intervene pending the proceedings before the arbitrator. However, Section 37(2) provides an appeal to the court in case the arbitrator

upholds the objection to jurisdiction or authority. Here again judicial hands-off is specifically provided and wherever intervention was permitted it took care to make specific provisions for the same. Section 29A is a specific instance in point where Courts' intervention is provided for in the context of extension of time for completion of proceedings. Thereafter, for the purpose of this reference, the next set of sections that would merit discussion is Sections 31 to 43.

46. Section 31 deals with form and contents of arbitral award. Sub-section (1) mandates that the arbitral award shall be made in writing and signed by the members of the arbitral tribunal. Sub-section (4) states that the award shall state its date and the place of arbitration. Sub-section 7(a) deals with manner of award of post-award interest. Sub-section 7(b) states that unless the award otherwise directs any sum directed to be paid by the tribunal shall carry interest at the rate of two per cent higher than the current rate of interest prevalent on the date of award. Sub-section (8) states that the costs of arbitration shall be fixed by the arbitral tribunal in accordance with Section 31A. Sub-section (3) of Section 32 states that subject to Section 33 and sub-section (4) of

Section 34, the mandate of the arbitral tribunal was to terminate with the termination of the arbitral proceedings.

47. Section 33 deals with correction and interpretation of award; additional award. Section 33 is extracted herein below:-

> "**33. Correction and interpretation of award; additional award.—**(1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties—
>
> (a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;
>
> (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.
>
> (2) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.
>
> (3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.
>
> (4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.
>
> (5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.
>
> (6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).

> (7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section."

48. A careful reading of Section 33 would indicate that post the award and subject to the conditions prescribed therein,

(a) either party after notice to the other may request the arbitral tribunal to correct any computation errors and any clerical or typographical errors or any errors of a similar nature occurring in the award;

(b) if so agreed by the parties, any party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award;

(c) such requests, as mentioned above, is to be dealt with by the arbitral tribunal within 30 days from the date of receipt of request and any such interpretation given shall form part of the award;

(d) that on its own initiative, the arbitral tribunal may correct any error or nature of a computation clerical or typographical error within 30 days from the date of the award;

(e) Subject to any contract to the contrary, a party with notice to the other party within 30 days from the receipt of the arbitral award, request

the tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award;

(f) such additional award shall be made within 60 days from the receipt of such request; that the tribunal may extend the period of time within which it shall make correction, give an interpretation and make an additional award under sub-Section (2) of sub-Section (5)

(g) for such correction or interpretation of the arbitral award or to an additional award, Section 31 was to apply.

49. This section is set out only for the reason that after the award is made, situations necessitating correction of computation errors, clerical or typographical errors are provided for to be remedied by approaching the arbitrator. This will have a bearing while interpreting Section 33 & Section 34(4) together, a little later in this judgment.

50. While Section 34 deals with application for setting aside arbitral award, Section 35 speaks of finality of arbitral awards and Section 36 speaks of enforcement. The epicenter for this reference, however, is Section 34, the scope, sweep and ambit of which this reference is directly concerned.

51. Section 34 occurs in Chapter VII under the heading "Recourse against arbitral award", which reads as under:-

> "**34. Application for setting aside arbitral award.—(**1) **Recourse to a Court** against an arbitral award may be made **only by an application for setting aside** such award in accordance with sub-section (2) and sub-section (3).
>
> (2) An arbitral award **may be set aside by the Court only if**—
>
> (a) the party making the application establishes on the basis of the record of the arbitral tribunal that—
>
> (i) a party was under some incapacity, or
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, **only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside**; or
>
> (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or
>
> (b) the Court finds that—
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
>
> (ii) the arbitral award is in conflict with the public policy of India.
> *Explanation 1*.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental **policy of Indian law shall not entail a review on the merits of the dispute.**

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months It may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), **the Court may, where it is appropriate and it is so requested by a party,** 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 arbitral tribunal will eliminate the grounds for setting aside the arbitral award.**

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon other party." (Emphasis Supplied)

52. A careful reading of the section reveals that it provides the procedure and grounds for filing an application for setting aside arbitral awards. It opens with the phrase *"recourse to a Court against an arbitral award which is to be made only by an application for setting aside in accordance with sub-section (2) and (3)"*. "Hence, an application can only be for setting aside" the award which should be in accordance with the grounds under sub-section (2) and (3). Sub-section (2) opens with the phrase "an arbitral award may be set aside by the court" and "**only if**" the party make out the grounds set out therein.

53. Section 34(2)(a) deals with parties being under some incapacity; arbitration agreement not being valid under the law to which the parties have subjected it or under the law for the time being in force; no proper notice of the appointment of arbitrator or the arbitral proceedings being given or the party being otherwise unable to present the case or that the arbitral award dealt with disputes not contemplated by or not falling within the terms of the submission to arbitration or it contained decisions on matters beyond the scope of arbitration;

54. Section 34(2)(a)(iv) has an important proviso which states that if the decisions on matters submitted to arbitration can be separated from

those not so submitted, only that part of the arbitral award which contained decisions on matters not submitted to arbitration may be set aside; Section 34(2)(a)(v) deals with the composition of the arbitral tribunal or the arbitral procedure not being in accordance with the agreement of the parties, unless such agreement itself was in conflict with a provision of Part-I from which parties cannot derogate or failing such agreement was not in accordance with Part-I.

55. Section 34 (2)(b) enables awards to be set aside if the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force or the arbitral award is in conflict with the public policy of India. Explanation I sets out the clarification as to when the award will be in conflict with the public policy of India and it states that if the making the award was induced or affected by fraud or corruption or was in violation of Section 75 (confidentiality in conciliation) or Section 81 (adducing evidence contrary to the mandate of Section 81); where the award is contrary to the fundamental policy of India or was in conflict with the most basic notions of morality or justice. Explanation II clarifies that the test as to whether there is a

contravention with the fundamental policy of India shall not entail a review on the merits of the dispute.

56. Section 34(2A) is significant since it permits patent illegality appearing on the face of the award as a ground to set aside the award for domestic arbitrations and does not extend the said ground for international commercial arbitrations. The proviso appended clarifies that the award was not to be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

57. Section 34(4) is a very significant section which came in for considerable deliberation at the hearing. Under this provision, a "safety valve" is provided to prevent awards from being set aside by the Section 34 court by providing an opportunity to the arbitral tribunal 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 award. This section has come in for judicial interpretation and will be discussed later in the course of this judgment.

58. One other Section which ought to be referred to is Section 43(4) which deals with the situation post the setting aside of the award. Section 43(4) reads as under:-

> "Section 43(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."

59. The overarching note of restraint in judicial intervention as set out in Section 5; the proscription for intervention set out in Section 13(5) and 16(5); the range of options under Section 33 for the parties and the arbitrator to carry out repairs to the award in the manner set out there in; the limited option to seek recourse to set aside on prescribed grounds with the shackle "only if" in Section 34(2) and the further safety valve available in Section 34(4), to go back to the arbitrator under circumstances mentioned therein are clear pointers about the acutely circumscribed nature of the power in the Section 34 court. This, viewed in the background of the fact that parties have with open eyes contracted to go for arbitration and subject themselves to the parameters prescribed in the act after ousting the normal judicial process, clearly indicates that parties were conscious of the limited role

for courts in the review of arbitral awards. The absence of express powers to modify for a court hearing objections against the award, when such a power existed in the Precursor act also points to the legislative intent. It is in this background that the arguments of the parties clamouring for a reading in of the power of modification, needs to be tested.

60. A Seven-Judge Bench of this Court in ***Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 & Stamp Act, 1899, In re, [(2024) 6 SCC 1]*** interpreting Section 5 of the A&C Act had the following to say:

> "81. **One of the main objectives of the Arbitration Act is to minimise the supervisory role of Courts in the arbitral process. Party autonomy and settlement of disputes by an Arbitral Tribunal are the hallmarks of arbitration law. Section 5 gives effect to the true intention of the parties to have their disputes resolved through arbitration in a quick, efficient and effective manner by minimising judicial interference in the arbitral proceedings.** [*Food Corpn. of India* v. *Indian Council of Arbitration*, (2003) 6 SCC 564.] **Parliament enacted Section 5 to minimise the supervisory role of Courts in the arbitral process to the bare minimum, and only to the extent "so provided" under the Part I of the Arbitration Act**. In doing so, the legislature did not altogether exclude the role of Courts or judicial authorities in arbitral proceedings, but limited it to circumstances where the support of judicial authorities is required for the successful implementation and enforcement of the arbitral process. [*Union of India* v. *Popular Construction Co.*, (2001) 8

SCC 470; *P. Anand Gajapathi Raju* v. *P.V.G. Raju*, (2000) 4 SCC 539] The Arbitration Act envisages the role of Courts to "*support arbitration process*" [*Swiss Timing Ltd.* v. *Commonwealth Games 2010 Organising Committee*, (2014) 6 SCC 677 : (2014) 3 SCC (Civ) 642] by providing necessary aid and assistance when required by law in certain situations.

86. Similar to Article 5 of the Model Law, Section 5 uses the expression "in matters governed by this Part". The use of this expression circumscribes the scope of judicial intervention to matters expressly governed by Part I of the Arbitration Act. The matters governed by Part I inter alia include:

86.1. Section 8 which mandates judicial authorities to refer parties to arbitration when prima facie there is a valid arbitration agreement;

86.2. Section 9 which allows Courts to issue interim measures on an application made by a party to an arbitration agreement;

86.3. Section 11 which empowers the Supreme Court or the High Courts to appoint arbitrators on an application made by parties to an arbitration agreement;

86.4. Section 27 which allows the Arbitral Tribunal to request the Court for assistance in taking evidence; and

86.5. Section 34 which empowers the Court to set aside an arbitral award on the basis of the limited grounds mentioned therein.

87. Section 5 has two facets — positive and negative. The positive facet vests judicial authorities with jurisdiction over arbitral proceedings in matters expressly allowed in or dealt with under Part I of the Arbitration Act. The flip side to this approach is that judicial authorities are prohibited from intervening in arbitral proceedings in situations where the Arbitral Tribunal has been bestowed with exclusive jurisdiction. This is the negative facet of Section 5. The non obstante clause limits the extent of judicial intervention in respect of matters expressly provided under the Arbitration Act. [Secur Industries Ltd. v. Godrej & Boyce Mfg. Co. Ltd., (2004) 3 SCC 447] In Bhaven

> Construction v. Sardar Sarovar Narmada Nigam Ltd. [Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd., (2022) 1 SCC 75 : (2022) 1 SCC (Civ) 374] , a Bench of three Judges of this Court observed that the : (Bhaven Construction case [Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd., (2022) 1 SCC 75 : (2022) 1 SCC (Civ) 374] , SCC p. 82, para 12)
>
> "12. … non obstante clause is provided to uphold the intention of the legislature as provided in the Preamble to adopt UNCITRAL Model Law and Rules, to reduce excessive judicial interference which is not contemplated under the Arbitration Act."
>
> 89. Section 5 is of aid in interpreting the extent of judicial interference under Sections 8 and 11 of the Arbitration Act. Section 5 contains a general rule of judicial non-interference. Therefore, every provision of the Arbitration Act ought to be construed in view of Section 5 to give true effect to the legislative intention of minimal judicial intervention."
>
> (Emphasis supplied)

SOME CASES CITED IN THE REFERRAL ORDER:-

61. Before the contentions of the respective parties are addressed, the deck needs to be cleared by discussing the judgments set out in question No.5 in the referral order of 20.02.2024, particularly those cases referred to therein where modification of the award was ordered or an imprimatur was put on the modifications already made, to understand the circumstances under which they came to be done. Considering that this is a Bench of five, those judgments would not be binding. However,

the endeavour here is to understand the rationale behind the said judgments to see whether it will be of any assistance herein.

62. The earliest case referred is ***Tata Hydro-Electric Power Supply Co. Ltd. and Others*** vs. ***Union of India***, (2003) 4 SCC 172. In the said judgment, while setting aside the judgment of the High Court and upholding the Award, a three-Judge Bench of this Court without discussing the legal issue as to whether the power to modify existed in a Section 34 Court or not, modified the date of commencement of interest from the awarded date of August, 1993 to 30.03.1998, which was the date when the Award came to be passed. This authority is of little help since the issue that arises for consideration was not debated and it was on the assumption that the power existed.

63. Insofar as the judgment in ***J.C. Budhraja*** vs. ***Chairman, Orissa Mining Corporation Ltd. and Another***, (2008) 2 SCC 444 is concerned, that case arose under the Arbitration Act, 1940. In the said case, the Arbitrator awarded a sum of Rs.1,02,66,901.36 (which was more than the claim of Rs. 95,96,616.00) with interest @ 12% p.a. from 01.08.1997 till date of Award and future interest @ 6% p.a. from the expiry of one month from the date of the Award till date of decree. The

Award was in respect of 35 claims. Claim Nos. 1-16 related to the schedule of items under the contract and claim Nos. 17 to 34 were in respect of work which did not form part of the contract schedule and Claim No. 35 related to escalation in cost of labour and material on account of delay in execution. The Civil Judge (Senior Division) Bhubaneshwar, overruling the objections of the award debtor made the award a rule of the court. While the award debtor filed Misc. Appeal challenging the decision of the Civil Judge in the High Court, the contractor also filed Misc. Appeal and Civil Revision claiming future interest from the date of decree as the judgment of the Civil Court was silent. By a common judgment, the High Court held that claims of the contractor to be barred by limitation and set aside the Award. It allowed the award debtor's appeal and dismissed the award holders appeal and revision. On further appeal to this Court, this Court held that out of the total claim of Rs.95,96,616.00 the claim for only Rs.28,32,128.00 was within time. The remaining claims aggregating to Rs.67,44,488.00 were fresh claims which were not pending claims in respect of which the acknowledgement was made. Therefore, the fresh claims were held barred by limitation. Therafter, this Court in para 34 held as under:-

> **"34.** Does it mean that the entire award should be set aside? The answer is, no. That part of the award which is valid and separable can be upheld. That part relates to the claims which were validly made before the arbitrator, which were part of the existing or pending claims of Rs 50,15,820 and which were not barred by limitation. As stated above they were the claims which were existing or pending in 1978, 1979 and 1980 (considered by the committee and payment made by OMC) which were carried before the arbitrator to an extent of Rs 28,32,128. Only the amounts awarded by the arbitrator against those claims can be considered as award validly made in arbitration, falling within jurisdiction. They are clearly severable from the other portions of the award.

64. It is clear that apart from the fact that the said judgment arose under the old Act, it was a case where the principle of severability was applied. In any event, being a matter under the 1940 Act, power to modify clearly existed. Hence, the judgment cannot be of any help in deciding the scope of power under Section 34 of the A&C Act.

65. Insofar as the judgment in ***Madhya Pradesh Power Generation Company Limited and Another*** vs. ***Ansaldo Energia Spa and Another***, (2018) 16 SCC 661 is concerned, as is clear from paras 38 & 39 of the said judgment, this Court on the finding that the bank guarantees dated 22.02.2000 and 23.02.2000 were towards the amounts advanced by the Board to the contractor severed the amounts involved

in the bank guarantee of the said two dates. Paras 38 & 39 read as under:-

> **"38.** The bank guarantee given on 24-2-2000 was a performance bank guarantee and the claimant is entitled for return of the amount for which the bank guarantee was given. The Arbitral Tribunal, however, failed to take notice of the fact that the other two bank guarantees were given for the amounts to be advanced by the Board. In fact, the Board had advanced the said amounts to the claimants. We are of the opinion that the claimant is not entitled for return of the amounts involved in the bank guarantees dated 22-2-2000 and 23-2-2000 as they were towards the amounts advanced by the Board. The rejection of the claim pertaining to the damages mentioned in Ext. HH of the statement of claim which includes loss of profit, overheads and loss of commercial opportunities clearly indicates that the Arbitral Tribunal never intended to grant any damages to the claimant. The claims allowed by the Arbitral Tribunal pertained only to the return of the claimants' money involved in the bank guarantees and the amounts actually spent by the claimants.
>
> **39.** We uphold the award of the Arbitral Tribunal with the modification that the claimants are not entitled for the amounts involved in the bank guarantees dated 22-2-2000 and 23-2-2000 given by the claimants."

66. Since the severed portion was a standalone portion not inseparably intertwined with other portions of the award, this Court had no difficulty in severing. Hence, really it is not a case of modification of any portion of the award but a case of severance.

67. Now coming to the judgment in ***Vedanta Limited*** vs. ***Shenzhen Shandong Nuclear Power Construction Company Limited***, (2019) 11 SCC 465, this Court modified the interest with regard to the EUR

component and held that in respect of the award rate of 9% on the EUR component, the award debtor will be liable to pay interest @ LIBOR rate + 3 percentage points, prevailing on the date of the award. The question as to whether interest can be modified, has been dealt with in the later part of this judgment.

68. ***Shakti Nath and Others*** vs. ***Alpha Tiger Cyprus Investment No.3 Limited and Others***, (2020) 11 SCC 685 was a case where, by consent of parties, the interest and penal interest was modified. Para 4 of the said judgment reads as follows:-

> **"4.** After having heard the counsel appearing for all the parties, the challenge to the ICC award is hereby rejected. With respect to the amount awarded towards interest and penal interest under the award, the same has been modified by consent of parties, as a prudent commercial decision, …"

69. ***Oriental Structural Engineers Private Limited*** vs. ***State of Kerala***, (2021) 6 SCC 150 was against a case where interest was modified from 12% to 8% which is an aspect discussed hereinbelow.

ANALYSIS OF THE CONTENTIONS AND REASONING: -

CAN WORDS BE READ INTO SECTION 34?

70. The contention that the words "**and, to the extent**" and the words "**or modified**", **and** "**to the extent**" be read into parts of Section 34 is only to be stated to be rejected. The justification for this argument that the Court can iron out the creases is not appealing at all because what is sought to be done is virtual mutilation of the fabric and not just the ironing out of the creases. It is also very well settled that where the language is plain and clear, the Court will prefer the plain meaning rule and when there is no *casus omissus,* the Court cannot interpret a statute as to create one.

71. This Court in ***CIT, Central Calcutta vs. National Taj Traders, (1980) 1 SCC 370*** has lucidly captured this, in the following words :-

> **"10. Two principles of construction — one relating to casus omissus and the other in regard to reading the statute as a whole — appear to be well settled. In regard to the former the following statement of law appears in Maxwell on Interpretation of Statutes (12th Edn.) at p. 33:**
>
> **"Omissions not to be inferred.—It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it**

> **omitted to express. Lord Morsey said: 'It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do'**. 'We are not entitled', said Lord Loreburn L.C., 'to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself'. **A case not provided for in a statute is not to be dealt with merely because there seems no good reason why it should have been omitted, and the omission appears in consequence to have been unintentional."**
>
> In regard to the latter principle the following statement of law appears in Maxwell at p. 47:
>
> "A statute is to be read as a whole.—It was resolved in the case of Lincoln College [(1595) 3 Co. Rep. 58b at p. 59b] that the good expositor of an Act of Parliament should 'make construction on all the parts together, and not of one part only by itself'. Every clause of a statute is to 'be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute'." (Per Lord Davey in Canada Sugar Refining Co. Ltd. v.R., 1898 AC 735.)"
>
> (Emphasis supplied)

72. The case law cited by Mr. Datar, learned Senior Counsel to read words into have no application to the present case. As the cited cases indicate they were done in situations where irreconcilable conflict was to be avoided; where failure to do so would have resulted in absurdities and injustice; where it was needed to bring the provision in consonance with reason and justice and where parts of the statute would otherwise have been rendered ineffective and meaningless. That is not the situation here.

73. Section 34 speaks of **'Recourse'** being taken against an arbitral award. The word 'Recourse' has been defined in P. Ramanatha Aiyar's Advanced Law Lexicon Third Edition to mean:

> **"the act of seeking help or advice; enforcement or method of enforcing a right."**

Further, Section 34 of the A&C Act clearly states that an arbitral award may be "**Set aside**" by the Court "**only if**" the prescribed circumstances are established.

74. The expression "**Set aside**" has been defined in P. Ramnatha Aiyar's Advanced Law Lexicon (third edition) to mean

> **"to annul, quash, render, void or negatory".**

75. Further, the phrase "**only if**" in the context in which it is used makes it amply clear that only if the grounds prescribed are established could the award be set aside. The word "only" has been interpreted by this Court to mean to be a phrase ordinarily used as an exclusionary term and it has been held that in ascertaining its meaning its placement is material, as also the context in which the word is used (See ***Ramesh Rout v. Rabindra Nath Rout, (2012) 1 SCC 762***).

76. The combined use of the phrase "set aside" and "only if" read with the phrase "recourse" makes it amply clear that the only manner of interfering with the award as permitted in the Act and as reinforced by Section 5 of the said Act is to file an application to set aside or annul the award by establishing the grounds prescribed therein. As already pointed out, Section 5 mandates that no judicial authority is to intervene except where so provided under the A&C Act.

THE FALLACY IN THE 'HARDSHIP' ARGUMENT: -

77. The argument that absurdities will result and hardship will be caused if power to modify is not read in has no merit. There are at least two compelling reasons to hold so. The A&C Act in Section 43(4) itself contemplates that on the setting aside of the award the option is to commence proceedings including arbitration with respect to the dispute. The law makers are fully conscious of the situation that setting aside of the award will result in the dispute continuing to be thrown open at large since notwithstanding the setting aside of the award the legal position is that the arbitration agreement survives, except in situations where the order setting aside has findings impinging on the validity of the arbitration agreement itself.

78. Though said in the context of Section 19 of the 1940 Act, ***Juggilal Kamlapat v. General Fibre Dealers Ltd., 1961 SCC OnLine SC 402***, reinforces the point that the arbitration agreement can survive the setting aside of award. It was said that when a court sets aside an arbitral award, it retains the discretion to either supersede the reference to arbitration or allow it to continue, a power peculiar to the arbitration Act of 1940. If the court decides to supersede the reference, it must also order that the arbitration agreement ceases to have effect concerning the dispute referred. However, if the court does not supersede the reference, both the arbitration agreement and the reference remain valid, enabling the parties to proceed with further arbitration. This Court in ***Juggilal Kamlapat (supra)*** observed:

> "8. …..The intention of the legislature in making this change in the consequences to follow the setting aside of an award is clear in as much as the provision recognises that there may be different kinds of arbitration agreements, some of which might be exhausted by the reference already made and the award following thereon which has been set aside while others may be of a more comprehensive nature and **may contemplate continuation of the reference relating to the same dispute or successive references relating to different disputes covered by the arbitration agreement. …..**
>
> ……It will thus be seen that the discretion vested in the court under Section 19 depends upon the nature of the arbitration agreement in particular cases and it is on a consideration of those terms that the court may decide in one case to supersede the

> reference and order the arbitration agreement to cease to have effect after taking into account the reasons which have impelled it to set aside the award and in another not to set aside the reference with the result **that the reference and the arbitration agreement subsist; and if the arbitration agreement provides for machinery to have further arbitration on the same dispute** or other disputes arising under the arbitration agreement it is permissible to have further arbitration on the same dispute or other disputes. …."
>
> (Emphasis supplied)

79. This Court in ***Mcdermott International Inc. (Supra)*** pertinently observed that "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." (Emphasis supplied)

80. Chief Justice, Sundaresh Menon of the Supreme Court of Singapore explains this concept in ***AKN vs. ALC, 2015 SGCA 63***, thus:

> "51. There is simply nothing to warrant the conclusion that where an award has been set aside, the tribunal which made that award would somehow resume the ability and mandate to determine afresh the matters that had been dealt with in the award. But, as alluded to above, this goes to the mandate of that particular tribunal. **The fact that the award has been set aside would not, in and of itself, affect the continued validity and force of the arbitration agreement between the parties, save in the situation where the award was set aside on the ground that there was no arbitration agreement between the parties. In L W Infrastructure (HC), Belinda Ang J described this as "Situation 2" and observed as follows (at [48]): Similarly, where an arbitral award is "beyond power" in the sense that the tribunal lacks jurisdiction to deal with the dispute**

altogether (for instance, where there is no valid agreement to arbitrate, where a party to the arbitration agreement was under some incapacity or where the arbitral tribunal has not been properly appointed) ... that would clearly be the end of the enquiry and the tribunal would obviously not be vested with jurisdiction to deal with the matter merely because the award has been set aside by the court. [emphasis in original]

52. We agree with this analysis. **But save in this situation, the arbitration agreement will generally survive the setting aside of an award. On this basis, it may be open, subject to certain other limitations, to which we will briefly turn, for a party which has successfully obtained an award in the arbitration and then seen that set aside by the court, to start a fresh arbitration.** This follows given that:

(a) The dispute has not yet been resolved since the award has been set aside; and

(b) The arbitration agreement remains binding on the parties as to how they will resolve their disputes."

54. Against this background, we return to the possible limitations that we alluded to at [52] above, which might stand in the way of a party seeking to commence fresh arbitration proceedings after an award was set aside. This is by no means an exhaustive list but it seems to us that there are at least three possibly significant matters that would have to be considered, quite apart from practical considerations of cost and time, which are mentioned in some of the extracts from the academic commentaries that we have referred to:

(a) It is possible that a limitations defence might have accrued by the time the fresh set of proceedings is commenced. This possibility also has been alluded to in some of the academic commentaries that we have referred to above. We note that it is possible for this to be addressed in appropriate circumstances pursuant to s 8A(2) of the IAA, which empowers the court in the exercise of its discretion to extend

time for the commencement of proceedings by excluding from consideration the period between the commencement of the arbitration and the setting aside of the award. We comment further on s 8A(2) below (at [64]–[67]).

(b) We have said that the arbitration agreement will generally survive the setting aside of the award. This would entail, however, the recommencement of fresh arbitration proceedings and in general, one would expect a new tribunal to be constituted. It is of course possible for both parties to agree to reconstitute the previous tribunal as the new one. But in the absence of such agreement, there remains the possibility that objections might yet be taken by one of the parties to any attempt by the other to re-appoint a member of the previous tribunal, on the grounds that there exist justifiable doubts as to the impartiality of the prospective appointee by reason of his or her prior involvement in the matter and in the award that has been set aside. This will plainly be a fact-sensitive inquiry and we say no more about this.

(c) We think it is inevitable that in attempting to commence a fresh arbitration, consideration will have to be given to the issue of res judicata. We deal with this in the next section of this judgment.

(Emphasis supplied)

81. Hence, recommencement of proceedings including arbitration proceedings- wherever legally maintainable- being expressly contemplated in the statute the same cannot be brushed aside on the grounds of causing hardship to the parties. Parties, no doubt, will have all contentions and defences open as are available to them in law.

CONTRACTUAL OUSTER OF THE NORMAL JUDICIAL PROCESS: -

82. The second reason is equally compelling. As briefly discussed earlier, when parties agree to arbitrate, they consciously with open eyes agree to step out of the normal judicial process and submit their dispute to a third party. Parties then are also conscious that when they agree to arbitrate their rights and liabilities will be governed by the regulating Act, which in this case is the A&C Act. In that sense, there is a contractual ouster subject to the terms of the A&C Act of the normal judicial process and the said course of action is sanctified under Section 28 of the Contract Act since such agreements are expressly held not to be opposed to public policy.

83. In the normal judicial process, the dispute would be adjudicated by the Court of first instance and appeals as provided in the Code of Civil Procedure, 1908 (C.P.C. for short) would ordinarily have been available to the aggrieved parties.

CONTRAST WITH THE APPELLATE POWER UNDER CPC: -

84. A perusal of the conspectus of the scope of the appellate power under the C.P.C. would bring the contrast between the normal appellate power and the powers available to a Section 34 Court under the A&C Act. Part VII of the Code of Civil Procedure, 1908, as amended in 1976, read with Order XLI sets out the scope of the power of an Appellate Court. Section 107 and 108 reads as under:

> **"107. Powers of Appellate Court**.—(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—
>
> (a) to determine a case finally;
>
> (b) to remand a case;
>
> (c) to frame issues and refer them for trial;
>
> (d) to take additional evidence or to require such evidence to be taken.
>
> **(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.**
>
> **108. Procedure in appeals from appellate decrees and orders**.—The provisions of this Part relating to appeals from original decrees shall, so far as may be, apply to appeals—
>
> (a) from appellate decrees, and
>
> (b) from orders made under this Code or under any special or local law in which a different procedure is not provided."
>
> (Emphasis supplied)

85. Order XLI of the CPC prescribes certain rules, some of which are relevant herein. Rule 31, 32 and 33 are extracted hereinbelow:

> **31. Contents, date and signature of judgment**.—The judgment of the Appellate Court shall be in writing and shall state— (a) the points for determination; (b) the decision thereon; (c) the reasons for the decision; and **(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled; and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.**
>
> **32. What judgment may direct.—The judgment may be for confirming, varying or reversing the decree from which the appeal is preferred, or, if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be made in appeal, the Appellate Court may pass a decree or make an order accordingly.**
>
> **33. Power of Court of Appeal**.—The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:
>
> Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."
>
> (Emphasis supplied)

86. It will be noticed that an Appellate Court under the normal judicial process has powers coextensive with the original Court (Section 107(2) CPC). The respondent in an appeal can challenge the findings against him (Order XLI Rule 22). The Appellate Court can confirm, vary, reverse the decree and if the parties to the appeal agree as to the form which the decree in appeal is to take or as to the order to be made in appeal, the Appellate Court may pass a decree or make an order (order XLI Rule 31 and 32) and the Appellate Court shall have the power to pass any decree and make any order which ought to have been passed or made and pass or make such further or other decree or order. Further, the Appellate Court may exercise the power notwithstanding that the appeal was only to a part of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection (Order XLI Rule 33).

87. This wide power is not available to a Court under Section 34 of the A&C Act while entertaining an application to set aside the arbitral award. The word 'modify' has been defined in P. Ramanatha Aiyar's Advanced Law Lexicon Third Edition to mean:

'To change, or vary, to qualify or reduce'.

The position that the Court does not sit in appeal over the arbitral award is well- settled by now. This Court in ***Dyna Technologies Private Limited v. Crompton Greaves Limited, (2019) 20 SCC 1***, observed:-

> ***"24.*** *There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award.* ***Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction***. ***The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law.*** *If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.*
>
> *25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act."*

88. There is a sound jurisprudential reason for the same. Arbitration has its origin in the contract between parties where parties have stepped

out of the ordinary judicial process and in that sense there is an ouster of the jurisdiction of the Court's power to adjudicate.

89. In view of this, the Section 34 Court unless expressly authorized by law cannot modify or vary the award since it will be tantamount to exercising the power of merits review, when parties have contracted to have their disputes referred to a third party outside the normal judicial process, for adjudication by arbitration.

90. It will be difficult to countenance the argument that words be read into, to confer that power to modify, as it will tantamount to exercising legislative power. Modification or variation of the award in the absence of an express legislative sanction would tantamount to courts usurping the power of the arbitrator when there is no legislative sanction for the same.

IS POWER TO 'MODIFY' A LESSER POWER?

91. Parties have contended that the power to set aside is a larger power and hence a power to modify is after all a lesser power which should be subsumed in the larger power. They have relied on the legal maxim ***omne majus continet in se minus***:- the greater contains the less.

At first blush, though the argument seems attractive, a close scrutiny reveals that the argument has really no substance. As explained hereinabove, the qualitative nature of an appellate power is different from the power under Section 34. The two operate in different spheres and are not of the same genus. They do not have similar characteristics. It cannot be said just on a first blush understanding that power to set aside is larger and power to modify is smaller or lesser without keeping the context in which Section 34 occurs in the Act and without considering the very ecosystem of the arbitration process.

92. There is a useful authority albeit from the criminal jurisdiction which brings out this concept. In ***Shamnsaheb M. Multtani* vs. *State of Karnataka*, (2001) 2 SCC 577,** a question arose whether an accused charged under Section 302 Indian Penal Code could be at the trial convicted for offences under Section 304-B of the Indian Penal Code and as to whether Section 304-B could be said to be a minor offence. Answering in the negative, this Court, speaking through K.T. Thomas, J., felicitously explained the principle thus.

> "15. Section 222(1) of the Code deals with a case "when a person is charged with an offence consisting of several particulars". The section permits the court to convict the accused "of the minor

offence, though he was not charged with it". Sub-section (2) deals with a similar, but slightly different situation.

> "222. (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it."

16. What is meant by "a minor offence" for the purpose of Section 222 of the Code? Although the said expression is not defined in the Code it can be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. The two illustrations provided in the section would bring the above point home well. **Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-à-vis the other offence.**

17. The composition of the offence under Section 304-B IPC is vastly different from the formation of the offence of murder under Section 302 IPC and hence the former cannot be regarded as minor offence vis-à-vis the latter. However, the position would be different when the charge also contains the offence under Section 498-A IPC (husband or relative of husband of a women subjecting her to cruelty). As the word "cruelty" is explained as including, inter alia, "harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand".

18. So when a person is charged with an offence under Sections 302 and 498-A IPC on the allegation that he caused the death of a bride after subjecting her to harassment with a demand for dowry, within a period of 7 years of marriage, a situation may arise, as in this case, that the offence of murder is not established as against the accused. Nonetheless, all other ingredients necessary for the offence under Section 304-B IPC would stand established. Can the

accused be convicted in such a case for the offence under Section 304-B IPC without the said offence forming part of the charge?

34. In such a situation, if the trial court finds that the prosecution has failed to make out the case under Section 302 IPC, but the offence under Section 304-B IPC has been made out, the court has to call upon the accused to enter on his defence in respect of the said offence. Without affording such an opportunity to the accused, a conviction under Section 304-B IPC would lead to real and serious miscarriage of justice. Even if no such count was included in the charge, when the court affords him an opportunity to discharge his burden by putting him to notice regarding the prima facie view of the court that he is liable to be convicted under Section 304-B IPC, unless he succeeds in disproving the presumption, it is possible for the court to enter upon a conviction of the said offence in the event of his failure to disprove the presumption.

35. As the appellant was convicted by the High Court under Section 304-B IPC, without such an opportunity being granted to him, we deem it necessary in the interest of justice to afford him that opportunity. The case in the trial court should proceed against the appellant (not against the other two accused whose acquittal remains unchallenged now) from the stage of defence evidence. He is put to notice that unless he disproves the presumption, he is liable to be convicted under Section 304-B IPC."

(Emphasis supplied)

93. Hence, power to modify which would include the Court entering the arena of adjudicating the dispute on merits when parties have contractually agreed to go to the arbitrator, cannot be said to be subsumed in the power to "set aside". It will be a different matter if the power to modify or power to vary is conferred by the legislature itself. Post the UNCITRAL Convention when the participating countries

legislated, while India did not recognize in the statute the power to modify or vary, several jurisdictions like U.K. and Singapore positively legislated. The provision in the U.K. State Arbitration Act and the Singapore Arbitration Act are set out hereinbelow to bring home the point.

Relevant provisions under the English Arbitration Act, 1996

> **"67. Challenging the award: substantive jurisdiction.**
>
> (1)A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court—
>
> (a)challenging any award of the arbitral tribunal as to its substantive jurisdiction; or
>
> (b)for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.
>
> A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
>
> (2)The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.
>
> (3)On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order—
>
> (a)confirm the award,
>
> **(b)vary the award, or**
>
> (c)set aside the award in whole or in part.

(4)The leave of the court is required for any appeal from a decision of the court under this section.

69. Appeal on point of law.

(1)Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

(2)An appeal shall not be brought under this section except—

(a)with the agreement of all the other parties to the proceedings, or

(b)with the leave of the court.

The right to appeal is also subject to the restrictions in section 70(2) and (3).

(3)Leave to appeal shall be given only if the court is satisfied—

(a)that the determination of the question will substantially affect the rights of one or more of the parties,

(b)that the question is one which the tribunal was asked to determine,

(c)that, on the basis of the findings of fact in the award—

(i)the decision of the tribunal on the question is obviously wrong, or

(ii)the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d)that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

(4)An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5)The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.

(6)The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.

(7)On an appeal under this section the court may by order—

(a)confirm the award,

(b) vary the award,

(c)remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or

(d)set aside the award in whole or in part.

The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(8) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal.

But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal."

Relevant provisions of the Singapore Arbitration Act, 2001:-

"No judicial review of award

47. The Court does not have jurisdiction to **confirm, vary, set aside or remit an award on an arbitration agreement except where so provided in this Act.**

Appeal against award

(8) On an appeal under this section, the Court may by order —

(a) confirm the award;

(b) vary the award;

(c) remit the award to the arbitral tribunal, in whole or in part, for reconsideration in the light of the Court's determination; or

(d) set aside the award in whole or in part.

(9) The Court is not to exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the arbitral tribunal for reconsideration."

(Emphasis supplied)

94. The Act of 1940 in our country had an express power to modify. When the A&C Act was enacted, for reasons best known to the legislature, the power was not incorporated. Dr. T.K. Viswanathan Committee which examined reforms to the A&C Act has recommended for the incorporation of the provision in its report but as yet the legislature has not enacted a provision to modify. The relevant portions are extracted herein below –

> "3.25.8 The Committee has examined the proposal to permit courts to modify or vary an award, while setting aside such an award in exercise of its section 34 jurisdiction. This is proposed to be achieved by amending sub-section (2) and sub-section (2A) of section 34.
>
> 3.25.9 Such orders must, however, be made only in exceptional circumstances to meet the ends of justice. This will enable a section 34 Court to provide a quietus to the matter, so as to avoid further

litigation. It is proposed to substitute the words "set aside by the Court" with the words "set aside in whole or in part by the Court" and add a proviso for partly varying the award in exceptional circumstances.

3.25.10 The Committee feels that the proposed amendment will provide relief to parties in situations where the findings in the arbitral award can be varied, having regard to the arbitral records. Needless to state, any such modification to the arbitral award can only be ordered by the Court if the strict parameters for setting aside the arbitral award under section 34 of the Act are made out, and there is no need to adduce fresh evidence.

3.25.11 An express provision incorporated in the Act is likely to streamline the process, saving time, effort, and resources for all the parties involved. Thus, granting the Courts the authority to modify awards within well-defined limits would help strike a balance between preserving finality of the arbitral process and ensuring fairness.

3.25.12 The Committee recommends amendment to sub-sections (2) and (2A) of section 34 to substitute the words "set aside by the Court", with the words "set aside in whole or in part by the Court" and to add the following proviso, namely "Provided that in cases where the Court sets aside the arbitral award in whole or in part, the Court may make consequential orders varying the award only in exceptional circumstances to meet the ends of justice.".

Recommendation

It is proposed to amend section 34-

(i) to insert a new sub section(1A) to provide that an application for setting aside an award under sub-section (1) shall be accompanied by the original award and where the parties have not been given the original award, they may file a copy of the award signed by the arbitrators;

(ii) in sub-section (2) - (a) for the words "An arbitral award may be set aside by the Court", the words "An arbitral award may be set aside in whole or in part by the Court" be substituted; (b) after clause (b) and before Explanation 1 the following proviso shall be inserted, namely:- Provided that in cases where the Court sets aside the arbitral award in whole or in part, the Court may make consequential orders

varying the award only in exceptional circumstances to meet the ends of justice"

(iii) in sub-section (2-A)- (a) for the words "An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court", the words "An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside in whole or in part by the Court" shall be substituted. (b) after the proviso the following proviso shall be inserted namely: -

"Provided further that in cases where the Court sets aside the arbitral award in whole or in part, the Court may make consequential orders varying the award only in exceptional circumstances to meet the ends of justice"

95. In a 2006 judgment of this Court in ***Mcdermott International Inc. (supra)***, itself this Court expressly observed that there is no power in a Section 34 Court to modify. The relevant passage from ***Mcdermott (supra)*** reads as follows:

> "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."**
>
> (Emphasis supplied)

96. Notwithstanding the fact that there have been three occasions for the Parliament to amend the A&C Act in 2015, 2019 and 2021, the power to modify has not been incorporated. Hence, for the Court to read the power would be completely untenable and the submissions on that score are rejected.

LEGAL MAXIMS – TO BE DEPLOYED AFTER ASCERTAINING CONTEXT:

97. It is apt to observe herein that mechanical deployment of the legal maxims unless they apply on all fours to a case should be discouraged. Legal maxims, no doubt, are very useful tools but its application has to be with great caution, for in law things are not cut and dried and nicely weighed in all situations. There will be shades of grey and sometimes legal maxims if deployed without adequate attention may lead to pitfalls. Justice Benjamin Cardozo, in ***Berkey Vs. Third Avenue Railway Co., 244 N.Y, 84,*** speaking of metaphors in law had the following caution to administer:-

> "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."

What Cardozo J. said of metaphors is equally true of legal maxims.

THE ARGUMENT ON INHERENT POWERS: -

98. Parties in support of the power to modify sought to seek refuge in Section 151 of the Code of Civil Procedure which saved the inherent powers of the Court. Section 151 CPC reads as under:

> "**151. Saving of inherent powers of Court.—**Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

99. The contention was that Section 34 recourse is taken in the normal Civil Courts as defined in Section 2(e) of the A&C Act and those Courts being Civil Courts of Original jurisdiction or the High Courts the inherent power vested in them should be available to modify awards. There is no merit in this submission. As the discussion hereinabove would reveal Section 34 is couched in clear terms and the parameters for setting aside the award are clearly laid out in mandatory terms. Could inherent powers under CPC be exercised in a manner to be in conflict with the expressly provided powers by the legislature? The answer has to be an emphatic 'No'. Almost six decades ago, a four-Judge Bench of this Court in ***Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal, 1961 SCC OnLine SC 17,*** speaking through

Raghubar Dayal J. following the holding in ***Padam Sen*** ***Vs.*** ***State of Uttar Pradesh*****,** (1961) 1 SCR 884, made the following telling observations:

> "21. A similar question about the powers of the Court to issue a commission in the exercise of its powers under s. 151 of the Code in circumstances not covered by s. 75 and Order XXVI, arose in Padam Sen v. The State of Uttar Pradesh (1) and this Court held that the Court can issue a commission in such circumstances. It observed at page 887 thus:
>
> > "The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purpose mentioned in s. 151 of the Code when the exercise of those powers is not in any way in **conflict with what has been expressly provided in the Code or against the intentions of the Legislature."**
>
> These observations clearly mean that the inherent powers are not in any way controlled by the provisions of the Code as has been specifically stated in s. 151 itself. **But those powers are not to be exercised when their exercise may be in conflict with what had been expressly provided in the Code or against the intentions of the Legislature. This restriction, for practical purposes, on the exercise of these powers is not because these powers are controlled by the provisions of the Code but because it should be presumed that the procedure specifically provided by the Legislature for orders in certain circumstances is dictated by the interests of justices."**
>
> (Emphasis supplied)

Nothing more needs to be said on this aspect of the matter.

DOCTRINE OF IMPLIED POWERS:-

100. Undeterred, an attempt was made to fall back upon the doctrine of implied powers to somehow vest in Section 34 Court a power to modify the award. It is well settled that if a statute conferring a power to be exercised on certain conditions, the conditions prescribed are normally held to be mandatory and a power inconsistent with those conditions is impliedly negatived. No doubt, there is a principle in law that a Court must as far as possible adopt a construction which effectuates the legislative intent and purpose and that an express grant of a statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective.

101. In ***Savitri Vs. Govind Singh Rawat,*** (1985) 4 SCC 337, Justice E. S. Venkataramiah (as the learned Chief Justice then was) set out the principle thus:-

> "Every court must be deemed to possess by necessary intendment all such powers as are necessary to make its orders effective. This principle is embodied in the maxim "ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest" (Where anything is conceded, there is conceded also anything without which the thing itself cannot exist). [Vide Earl Jowitt's Dictionary of English Law, 1959 Edn., p. 1797.] **Whenever anything is required to be done by law and it is found impossible to do that thing unless something**

> **not authorised in express terms be also done then that something else will be supplied by necessary intendment. Such a construction though it may not always be admissible in the present case however would advance the object of the legislation under consideration. A contrary view is likely to result in grave hardship to the applicant, who may have no means passed to subsist until the final order is passed.**
>
> (Emphasis supplied)

102. As is clear, the doctrine of implied powers is invoked to effectuate the final power. Where it is impossible to effectuate the final power unless something not authorized in express terms be also done, in such an event, the power will be supplied by necessary intendment as an exception. The exceptional situation is to advance the object of the legislation under consideration and to avoid grave hardship.

103. This doctrine has no application to the question under consideration herein. The objects of the statute are very clear and have been elucidated hereinabove. The difference between the normal judicial procedure and the arbitration process contractually agreed upon with all its qualitative differences is also well established. No implied power is needed to effectuate the final power provided under Section 34 and, as set out earlier, there is no impediment to exercise the final power. In the teeth of the legislature expressly contemplating fresh

arbitrations and other legal proceedings under Section 43(4), it cannot be said on some conjectured assumptions that hardship will cause to the parties.

PARTY AUTONOMY:-

104. It is time now to discuss the concept of party autonomy, which is the underlying theme of the arbitration process. Gary B. Born, in his commentary "International Commercial Arbitration", South Asian Reprint Edition published by Wolters Kluwer discussed the concept of party autonomy in the following terms.

> "A further objective, and perceived advantage, of international commercial arbitration is the effort to **maximize party autonomy and provide procedural flexibility.** As discussed below, leading international arbitration conventions and national laws accord parties broad autonomy to agree upon the substantive laws and procedures applicable to "their" arbitrations. This emphasis on the importance of party autonomy parallels applications of the doctrine throughout the field of contemporary private international law, and commercial law more generally, but has particular significance in the field of international commercial arbitration. **One of the principal reasons that this procedural autonomy is granted is to enable the parties and arbitrators to dispense with the technical formalities and procedures of national court proceedings and instead fashion procedures tailored to particular disputes.** Thus, technically-complex disputes can include specialized procedures for testing and presenting expert evidence, or "fast track" procedures can be adopted where time is of the essence, or tailor-made dispute resolution mechanisms can be adopted in particular commercial markets. More

> generally, parties are typically free to agree upon the existence and scope of discovery or disclosure, the modes for presentation of fact and expert evidence, the length of the hearing, the timetable and other matters. The parties' ability to adopt (or, failing agreement, the tribunal's power to prescribe) flexible procedures is a central attraction of international arbitration - again, as evidenced by empirical research and commentary."
>
> (Emphasis Supplied)

105. As would be clear, party autonomy enables parties to dispense with technical formalities and procedures of National Court proceedings, contractually. They agree to abide by the terms of the statute regulating arbitration which they perceive as advantageous. Having done so, they cannot be allowed to cry afoul, when it does not suit their needs and clamor for certain procedures which are legislatively not sanctioned in the arbitration process and are available in the normal machinery of the Courts.

106. Further, as held earlier, a Section 34 Court cannot be invited to enter into the merits. The limited recourse available is the one provided under Section 34 and when the Section is plain and clear the historical, textual and the contextual interpretation does not permit the reading in of any implied power to expand the scope of Section 34.

107. The Judgment in ***Centrotrade Minerals & Metal Inc.*** ***vs.*** ***Hindustan Copper Ltd.*****, *(2017) 2 SCC 228*** cited by learned Senior Counsel, Mr. Darius Khambata that it is not always that acts not mentioned in the statute are impermissible has no application herein. In that case, this Court was concerned with not any Statutory Court procedure but with an appeal procedure mutually agreed upon by the parties in a contract, which the Court sanctioned inter alia referring to principles of party autonomy.

CAN ARTICLE 142 POWERS BE EXERCISED TO MODIFY?

108. Parties have referred to cases where this Court in some cases exercised powers under Article 142 in modifying the award particularly the percentage of interest awarded by the arbitrators. The aspect of award of interest is discussed hereinbelow, while dealing with Section 34(4).

In this segment of the judgment the only question considered is whether power under Article 142 of the Constitution would be exercised by this Court to modify in any manner an arbitral award when matters come up after initiation of proceedings under Section 34.

109. A Constitution Bench of this Court in ***Supreme Court Bar Association vs. Union of India and Another, (1998) 4 SCC 409,*** while delving on the scope of this Court's power under Article 142, held that the power under Article 142 cannot be used to "supplant" substantive law applicable to the case or cause under consideration of the Court. It has been held that express statutory provisions cannot be ignored and Article 142 cannot be used to achieve indirectly what cannot be achieved directly. It has been held that to balance the equities between conflicting claims of the litigating parties "ironing out the creases" in a cause or matter before it could be done but, in no circumstance will substantive statutory provision dealing with the subject matter be given a go bye. It has been clarified that though the powers of this Court cannot be controlled by any statutory provisions, however, when the exercise of power comes directly in conflict with what has been expressly provided in a statute, the power under Article 142 is not to be exercised.

110. We need to do nothing more than to extract Para 47 and 48 of the judgment in ***Supreme Court Bar Association (supra).***

"47. "The plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are complementary to those powers which are specifically conferred on the Court by various statutes though are not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of supplementary powers. This power exists as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis for its exercise may be put on a different and perhaps even wider footing, to prevent injustice in the process of litigation and to do complete justice between the parties. This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties, while administering justice according to law. There is no doubt that it is an indispensable adjunct to all other powers and is free from the restraint of jurisdiction and operates as a valuable weapon in the hands of the Court to prevent "clogging or obstruction of the stream of justice". It, however, needs to be remembered that the powers conferred on the Court by Article 142 being curative in nature cannot be construed as powers which authorise the Court to ignore the substantive rights of a litigant while dealing with a cause pending before it. **This power cannot be used to "supplant" substantive law applicable to the case or cause under consideration of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly.** Punishing a contemner advocate, while dealing with a contempt of court case by suspending his licence to practice, a power otherwise statutorily available only to the Bar Council of India, on the ground that the contemner is also an advocate, is, therefore, not permissible in exercise of the jurisdiction under Article 142. The construction of Article 142 must be functionally informed by the salutary purposes of the article, viz., to do complete justice between the parties. It

cannot be otherwise. As already noticed in a case of contempt of court, the contemner and the court cannot be said to be litigating parties.

48. "The Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such order as is necessary for doing complete justice "between the parties in any cause or matter pending before it". **The very nature of the power must lead the Court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the conflicting claims of the litigating parties by "ironing out the creases" in a cause or matter before it.** Indeed this Court is not a court of restricted jurisdiction of only dispute-settling. It is well recognised and established that this Court has always been a law-maker and its role travels beyond merely dispute-settling. It is a "problem-solver in the nebulous areas" but the substantive statutory provisions dealing with the subject-matter of a given case cannot be altogether ignored by this Court, while making an order under Article 142. **Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject".**

111. Recently, a Constitution Bench of this Court, while sounding a note of caution on the exercise of powers under Article 142 in ***Shilpa Sailesh*** *vs.* ***Varun Sreenivasan, (2023) 14 SCC 231,*** had the following to say.

"19. **Given the aforesaid background and judgments of this Court, the plenary and conscientious power conferred on this Court under Article 142(1) of the Constitution of India, seemingly unhindered, is tempered or bounded by restraint, which must be exercised based on fundamental considerations of general and specific public policy.** Fundamental general conditions

> of public policy refer to the fundamental rights, secularism, federalism, and other basic features of the Constitution of India. **Specific public policy should be understood as some express pre-eminent prohibition in any substantive law, and not stipulations and requirements to a particular statutory scheme. It should not contravene a fundamental and non-derogable principle at the core of the statute.** Even in the strictest sense, it was never doubted or debated that his Court is empowered under Article 142(1) of the Constitution of India to do "complete justice" without being bound by the relevant provisions of procedure, if it is satisfied that the departure from the said procedure is necessary to do "complete justice" between the parties."

112. A careful reading of the above paragraph reveals that the power under Article 142 will not be exercised if it would contravene a fundamental and non-derogable principle at the core of a statute. Further, it has been held that the power under Article 142 is to be tempered or bounded by restraint based on fundamental considerations of general and specific public policy. Amplifying further, it was held that specific public policy should be understood as some express pre-eminent prohibition in any substantive law and not mere stipulations and requirements to a particular statutory scheme.

113. From the reasons stated in the earlier part of the judgment, it is crystal clear that Courts exercising powers under Section 34, which will include the appellate hierarchy cannot change, vary, or qualify "arbitrary awards" as it strikes at the very core and root of the ethos of

the arbitration process. Such an exercise of power will derogate from the core aspects of the A&C Act and will breach a pre-eminent prohibition in the said Act.

114. Apart from the above, if power is reserved for this Court to modify, at the fag end of the litigation, contracting parties will have grave uncertainties as they would not be sure of how the matter will play out when it reaches the apex Court. It will be antithetical to arbitration as an alternative and efficacious mode of dispute resolution.

115. Hence, in matters arising out of Section 34 of the A&C Act, this Court will refrain from exercising its power under Article 142, in view of the law laid down in ***SCBA (supra)*** and ***Shilpa Shailesh(supra).***

LAYING DOWN GUARDRAILS FOR SECTION 34 – IS IT AN OPTION FOR THIS COURT?

116. Parties aspiring for the power to modify to be vested in Section 34 contend that any possible abuse of power to modify, if vested in a Court hearing a Section 34 application, can be checked by prescription of guardrails. Learned counsels have contended that any modification or variation which inevitably flows from the Courts determination of

the question of law should be permitted. Equally, learned counsels contended that modification should be permitted to align the award with the contractual provision. Counsels have referred to the theory of useless formality, where in certain scenarios only one conclusion is possible and implore this Court to lay down parameters for modification.

117. The contention is without merit. As has been rightly contended by the learned Solicitor General, the situation here is not a situation akin to what arose in ***Vishaka (supra)***. In ***Vishaka (supra)*** noticing the absence of any enacted law to provide for effective enforcement of basic human rights of gender equality and guarantee against sexual harassment and abuse at workplaces and in exercise of powers under Article 32 for enforcement of fundamental rights, this Court, pending enactment of a statute, laid down guidelines to prevent sexual harassment at the workplace. The interpretation of the A&C Act is not akin to the situation that obtained in ***Vishaka (supra)*** and other cases where recognising certain positive obligations in the State, this Court filled the gap by setting out guidelines. Further, as rightly contended by Mr. Gourab Banerji, learned Senior Counsel, there are no judicially

manageable standards and this Court cannot venture into formulating guidelines as myriad situations will arise when Section 34 applications are heard before the appropriate Courts. Further, as rightly contended by the learned Senior Counsel, it would amount to judicial legislation which we are loathe to do. Learned Counsel for the parties, in support of their plea to lay down guardrails, referred to a judgment of this Court in ***Oil and Natural Gas Corporation Limited*** ***vs.*** ***Afcons Gunanusa JV, 2022 SCC OnLine SC 1122***. We have carefully examined the judgment. That case concerned the rights of arbitrator(s) to unilaterally fix fees for their sittings in arbitration. Negating the plea, the Court ruled that there was no sanction for the same in terms of the A&C Act. The guidelines for ad-hoc arbitrations were only on the modalities for arriving at the consensus and there was no deviation from the statute. That case has no relevance here.

SUBMISSIONS BASED ON PECULIARITIES IN STATUTORY ARBITRATIONS:-

118. Submissions were made that if power to modify is not recognised in Section 34, enormous hardship will be caused in cases where the A&C Act has been made applicable to some statutes. Example of the

National Highways Authority Act was given. It was contended that against the order awarding compensation for acquisition by the competent authority, reference is made to the arbitrator appointed by the Central Government and against his award only a recourse to Section 34 is available. The contention was that, these are compulsory arbitrations and not consensual arbitrations. Learned Senior Counsel Mr. Gourab Banerji, responded to this submission by arguing that the interpretation to the A&C Act has to be uniform and if there are any maladies in the other statutes by which arbitrators are appointed, the solution will have to be found by addressing the grievances prevalent in those statutes and not by truncating the interpretation of the A&C Act.

119. By no stretch of imagination can we bifurcate the interpretation of Section 34 and offer one set of interpretations for commercial arbitrations and another for statutory arbitrations to which the A&C Act is applicable. Hence, the submission for a differential interpretation of the A&C Act for some statutory arbitrations alone is rejected.

120. Equally, for this reason, the submissions of Mr. Darius Khambata, learned Senior Counsel that power to modify be at least restricted to

domestic arbitrations where patent illegality is found in the award cannot be accepted. There is neither any scope nor any legal basis for such a course of action to be adopted.

COMPLICATIONS DUE TO MODIFICATIONS IN NEW YORK CONVENTION AWARDS:-

121. Mr. Gourab Banerji, learned Senior Counsel and Mr. Gaurav Pachnanda, learned Senior Counsel drew the attention of this Court to certain specific statutory provisions obtaining in the UK, Singapore, New Zealand and Kenya. This was to drive home the point that not only were there express provisions to modify awards in those statutes by the Court hearing the setting aside application, there are also express provisions recognising that the award will hitherto be read in the modified form. Learned Senior Counsels contended that in the absence of similar statutory regime serious complications will arise in enforcement of New York Convention awards and will constitute a serious threat to India seated arbitrations under the New York Conventions.

122. In particular, attention was drawn to Section 71 of the UK English Arbitration Act which we deem it appropriate to set out hereinbelow:-

> "**71. Challenge or appeal: effect of order of court**.
>
> (1) The following provisions have effect where the court makes an order under section 67, 68 or 69 with respect to an award.
>
> (2) Where the award is varied, the variation has effect as part of the tribunal's award.
>
> (3) Where the award is remitted to the tribunal, in whole or in part, for reconsideration, the tribunal shall make a fresh award in respect of the matters remitted within three months of the date of the order for remission or such longer or shorter period as the court may direct.
>
> (4) Where the award is set aside or declared to be of no effect, in whole or in part, the court may also order that any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which the arbitration agreement applies, is of no effect as regards the subject matter of the award or, as the case may be, the relevant part of the award."
>
> (Emphasis supplied)

123. It will be noticed that in the United Kingdom and certain other countries, clear statutory provisions exist stating that where the award is varied the variation has the effect as part of the Tribunal's award. It will be noticed that to give effect to the New York Convention, like the A&C Act has provisions in Part II, several other countries have also adopted statutory provisions for recognition and enforcement of foreign awards. Learned Senior Counsels submit that if the award is

modified by the Section 34 Court in India, any enforcement brought abroad will run into complications as objections will be taken that what is sought to be enforced is not the award but the judgment of the Court. There is merit in the submission and this is one another reason why these matters are best left for the legislature to be comprehensively addressed. Enforcement of foreign judgements and enforcement of foreign awards are distinct legal concepts and hence, the argument cannot be characterized as not convincing jurisprudentially or in principle.

124. Learned Senior Counsel, Mr. Gaurav Pachnanda, pressed the argument that when a Section 34 Court passes an order there is no application of the doctrine of merger. This Court in ***Kunhayammed & Others Vs. State of Kerala and Another,*** (2000) 6 SCC 359, has discussed the doctrine of merger and held that doctrine of merger is not a doctrine of universal or unlimited application.

125. Considering the holding in this judgment that there is no power under Section 34 court to modify, in the absence of a statutory enablement, it is not considered necessary to go into the aspect of the applicability of the Doctrine of merger.

IS *HAKEEM (SUPRA)* PER INCURIAM?

126. In ***National Insurance Co. Ltd. Vs. Pranay Sethi and Others, (2017) 16 SCC 680,*** *a* Constitution Bench of this Court held as follows: a decision or judgment can be *per incuriam* if any provision in a statute, rule or regulation was not brought to the notice of the court. (Para 28) It was also held that a decision or judgment can be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgement of a co-equal or a larger bench. We find that the judgement in ***Hakeem (supra***) has rightly interpreted the provisions of A&C Act and is in no manner conflict with any ratio of a co-equal or larger Bench. In the earlier parts of the judgement, we have distinguished the other judgements referred to in the referral order. ***Hakeem (supra***) itself distinguished certain other earlier pronouncements. We find ***Hakeem (supra***) will now be read in accordance with the ratio laid down in the present judgment.

127. Reliance was placed on ***Oil and Natural Gas Corporation Ltd. vs. Western Geco International Ltd., (2014) 9 SCC 263,*** to contend that ***Hakeem (supra)*** did not consider the said judgment. It was argued that power to modify in Section 34 Court was recognised in ***Western***

Geco (supra). A close reading of Para 40 of ***Western Geco (Supra),*** indicates that though the word 'modified' occurs in the judgment, it was clearly in the context of severability, an aspect ***Hakeem (supra)*** was not concerned with. Hence, it cannot be said that ***Hakeem (supra)*** is *per incuriam* for not noticing ***Western Geco (supra)***. The other judgments prior to ***Hakeem (supra)*** have not discussed the aspect whether power to modify exists in a Section 34 Court. Hence, we reject the argument of parties that ***Hakeem (supra***) is per incuriam. ***Hakeem (supra)*** insofar as it held that a Section 34 Court has no power to modify the award, is not per incuriam.

POWERS UNDER SECTION 33 AND 34 (4) OF THE A&C ACT – THE 'SAFETY VALVES':-

128. As to what errors could be corrected and how it could be done has been first provided for in Section 33 of the A&C Act. Section 33 deals with correction and interpretation of award and making of additional award by the arbitrator. The provision has already been discussed in the earlier part of this judgment. Section 33(i)(a) deals with correction of computation error, clerical or typographical error or any other error of a similar nature occurring in the award. This provision is akin to Section

15 (b) and (c) of the 1940 Act. Power is also there in the arbitral Tribunal to Suo Moto correct these errors. Even in the Code of Civil Procedure, Section 152 provides for a similar power for the Courts. Section 152 is set out hereinbelow:

> "152. Amendment of judgments, decrees or orders.—Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties."

129. Even if any claim is not adjudicated, parties could move to arbitral Tribunal for the same and an additional award can be made.

130. Now turning to Section 34(4), it reads as follows:-

> "34.(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, 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 arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

Section 34(4) occurs in sequence after 34(1), 34(2), 34(2A), 34(3). After recourse is made under Section 34(1) and the Court has applied the rigors of 34(1), (2), (2A), the Court would be fairly clear as to whether any ground has been made out for setting aside the arbitral

award or not. At this stage, Section 34(4) comes into the picture and provides that:-

(i) On receipt of an application under sub-section (1), the Court may;

(ii) Where it is appropriate and it is so requested by a party;

(iii) Adjourn the proceedings for a period of time determined by it;

(iv) In order to give the arbitral Tribunal an opportunity;

(v) To resume the arbitral proceedings or to take such other action as in the opinion of arbitral Tribunal will eliminate the grounds for setting aside the arbitral award.

131. It must be noticed that all that the Section mentions is a request being made and there is no prescription that the request should be in writing. In this regard, the holding in ***Kinnari Mullick & Anr. vs. Ghanshyam Das Damani, (2018) 11 SCC 328*** to the effect that discretion available under Section 34(4) to give an opportunity to the arbitrator can be exercised only upon a written application made in that behalf by a party is not the correct legal position. To that extent ***Kinnari Mullick (supra)*** does not lay down the correct law.

132. It cannot be disputed that ordinarily the stage of Section 34(4) would arise when the Court has put the award through the test of fire under the prior clauses of Section 34 and entertains the opinion that there are grounds for setting aside the arbitral award. At this stage, in given cases where it considers appropriate and a request is made by a party even orally, the Court may adjourn the proceeding for a period of time in order to give the arbitral Tribunal an opportunity to resume the arbitral proceeding or to take such other action as in the opinion of the arbitral Tribunal will eliminate the grounds for setting aside the award. The Court shall in the order indicate its reasons for entertaining the opinion and as to why it considers that there are grounds for setting aside the arbitral award. Ordinarily, it will be the award holder, who will be the respondent in the Section 34 application, who will be interested in sustaining the award. The very fact that he is stoutly defending the award is a clear indication that he wants the award to be sustained and grounds, if any, which exist to set aside the award are eliminated.The grounds may be of different hues.

133. To illustrate, Section 31 which speaks of form and contents of the arbitral award has the following prescription:- (i) The award shall be

signed by the members of the Tribunal. (ii) The award shall state the reasons. (iii) The award shall state the date and place of arbitration. (iv) The costs of the arbitration to be fixed in accordance with Section 31(A). (v) The award may deal with disputes not contemplated or falling within the terms of the submissions to arbitration. (vi) The award may have decision on matters beyond the scope of submissions of arbitration. In a given case any of the above aspects could be attracted.

134. The above are only illustrative aspects. This Court in ***I-Pay Clearing Services (P) Ltd. v. ICICI Bank Ltd., (2022) 3 SCC 121*** quoted the decisions in ***Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1*** and ***Som Datt Builders Ltd. v. State of Kerala, (2009) 10 SCC 259*** and held as follows:-

> "34. In the judgment in Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1] , it was a case where there was no inquiry under Section 34(4) of the Act and in the said case, this Court has held that the legislative intention behind Section 34(4) of the Act, is to make the award enforceable, after giving an opportunity to the Tribunal to undo the curable defects. It was not a case of patent illegality in the award, but deficiency in the award due to lack of reasoning for a finding which was already recorded in the award. In the very same case, it is also clearly held that when there is a complete perversity

in the reasoning, then the same is a ground to challenge the award under Section 34(1) of the Act.

35.Som Datt Builders Ltd. v. State of Kerala [Som Datt Builders Ltd. v. State of Kerala, (2009) 10 SCC 259 : (2009) 4 SCC (Civ) 153] is also a case where no reasons are given for the finding already recorded in the award, as such, this Court held that in view of Section 34(4) of the Act, the High Court [State of Kerala v. Somdatt Builders Ltd. Arbitration Appeal No. 16 of 2005, order dated 3-6-2005 (Ker)] ought to have given the Arbitral Tribunal an opportunity to give reasons."

In para 37 to 43 in ***I-Pay (supra),*** this Court held as under:-

"37. In our view, Section 34(4) of the Act can be **resorted to record reasons on the finding already given in the award or to fill up the gaps in the reasoning of the award. There is a difference** between "finding" and "reasons" as pointed out by the learned Senior Counsel appearing for the respondent in the judgment in ITO v. Murlidhar Bhagwan Das [ITO v. Murlidhar Bhagwan Das, AIR 1965 SC 342] . It is clear from the aforesaid judgment that "finding is a decision on an issue". Further, in the judgment in J. Ashoka v. University of Agricultural Sciences [J. Ashoka v. University of Agricultural Sciences, (2017) 2 SCC 609 : (2017) 1 SCC (L&S) 517] , this Court has held that "reasons are the links between the materials on which certain conclusions are based and the actual conclusions".

38. In absence of any finding on Point 1, as pleaded by the respondent and further, it is their case that relevant material produced before the arbitrator to prove "accord and satisfaction" between the parties, is not considered, and the same amounts to patent illegality, such aspects are to be considered by the Court itself. It cannot be said that it is a case where additional reasons are to be given or gaps in the reasoning, in absence of a finding on Point 1 viz. "whether the contract was illegally and abruptly terminated by the respondent?".

39. **Further, Section 34(4) of the Act itself makes it clear that it is the discretion vested with the Court for remitting the matter to**

Arbitral Tribunal to give an opportunity to resume the proceedings or not. The words "where it is appropriate" itself indicate that it is the discretion to be exercised by the Court, to remit the matter when requested by a party. When application is filed under Section 34(4) of the Act, the same is to be considered keeping in mind the grounds raised in the application under Section 34(1) of the Act by the party, who has questioned the award of the Arbitral Tribunal and the grounds raised in the application filed under Section 34(4) of the Act and the reply thereto.

40. Merely because an application is filed under Section 34(4) of the Act by a party, it is not always obligatory on the part of the Court to remit the matter to Arbitral Tribunal. The discretionary power conferred under Section 34(4) of the Act, is to be exercised where there is inadequate reasoning or to fill up the gaps in the reasoning, in support of the findings which are already recorded in the award.

41. Under the guise of additional reasons and filling up the gaps in the reasoning, no award can be remitted to the arbitrator, where there are no findings on the contentious issues in the award. If there are no findings on the contentious issues in the award or if any findings are recorded ignoring the material evidence on record, the same are acceptable grounds for setting aside the award itself. Under the guise of either additional reasons or filling up the gaps in the reasoning, the power conferred on the Court cannot be relegated to the arbitrator. In absence of any finding on contentious issue, no amount of reasons can cure the defect in the award.

42. **A harmonious reading of Sections 31, 34(1), 34(2-A) and 34(4) of the Arbitration and Conciliation Act, 1996, make it clear that in appropriate cases, on the request made by a party, Court can give an opportunity to the arbitrator to resume the arbitral proceedings for giving reasons or to fill up the gaps in the reasoning in support of a finding, which is already rendered in the award.** But at the same time, when it prima facie appears that there is a patent illegality in the award itself, by not recording a finding on a contentious issue, in such cases, Court may not accede to the request of a party for giving an opportunity to the Arbitral Tribunal to resume the arbitral proceedings.

> 43. Further, as rightly contended by the learned counsel appearing for the respondent, that on the plea of "accord and satisfaction" on further consideration of evidence, which is ignored earlier, even if the Arbitral Tribunal wants to consciously hold that there was "accord and satisfaction" between the parties, it cannot do so by altering the award itself, which he has already passed."
>
> (Emphasis supplied)

It is clear from the above that the power to remit under Section 34(4) can be exercised for undoing the curable defects.

AWARD OF INTEREST- USE OF SECTION 34(4) POWER:-

135. Equally, in a given case where the Court feels that interest has not been awarded or interest beyond the terms of the agreement have been awarded or excessive interest have been awarded or abysmally low interest is awarded, the Court under Section 34 cannot modify the interest. The course of action to be adopted would be to record reasons in the order and remit the matter to the arbitrator for the arbitral Tribunal to make the necessary course correction. It is true that if only on account of interest if awards are to be set aside, the whole exercise will have to be undertaken again. If the Court in a Section 34 proceeding (which will include the courts in that appellate hierarchy) is of the opinion that interest aspect needs a relook, the correct course of action to be adopted is to remit the matter under Section 34(4) for

the purpose of enabling the arbitrator to take a call. If thereafter again, when the matter comes back to the Court, the Court feels that the grounds for setting aside the award are not eliminated, it will have no choice except to set aside the award.

SUO MOTO EXERCISE OF THE SECTION 34(4) POWER:-

136. Section 34(4) is the safety valve provided in the A&C Act by the legislature to prevent awards being set aside and to offer a chance to the arbitral Tribunal to adopt a course correction. In this regard, considering the purpose for which Section 34(4) was intended, and since the respondent is defending the award and attempting to sustain it, if the Court deems it appropriate after arriving at an opinion with reasons recorded in writing, that there exists ground for setting aside the arbitral award the Court is even Suo Moto empowered to invoke powers under Section 34(4) in accordance with the parameters set out hereinabove. There is nothing in Section 34(4) which detracts from such an interpretation. There will be on record an application under Section 34(1) by the applicant to set aside the award and the award holder invariably is stoutly defending the award and is straining every nerve to uphold the same. After the court has passed through the

motions of Section 34(2)(a) (b) and 2 A, it would have arrived at an opinion as to whether the award is susceptible or whether it is sustainable. If it arrives at an opinion that the award is vulnerable and the threat of setting aside is looming large and if within the parameters laid down in Section 34(4) the grounds for setting aside can be eliminated - the case is appropriate and time is ripe for exercise of power under Section 34(4). The need for an application oral or in writing is really directory and does not militate against the exercise of Suo Moto powers in given cases by the Court.

COMPUTATION, CLERICAL AND TYPOGRAPHICAL ERROR OR ANY OTHER ERROR OF SIMILAR NATURE - *ACTUS CURIAE NEMINEM GRAVABIT* PRINCIPLE:-

137. Section 33 enables parties to move the Arbitral Tribunal to correct any computational error, any clerical error or typographical error or any other errors of similar nature. Section 33(3) enables the arbitral Tribunal itself to correct any of those errors. No doubt, a time limit of 30 days has been prescribed for the parties to move unless there is a contract to the contrary. Equally, sub-Section 2 of Section 33 directs that the correction should be made within 30 days and sub-Section 6 of

Section 33 states that the arbitral Tribunal may if necessary extend the period of time within which it shall make a correction.

138. In this regard, it is useful to refer to the recent judgment of this Court in ***North Delhi Municipal Corporation v. M/S. S.A. Builders Ltd., 2024 INSC 988***, wherein it was held as under:

> "45.1. As per sub-Section (1), within 30 days from the date of receipt of the arbitral award, a party with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award. Further, if the parties agree, a party with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award. The period of 30 days contemplated under subSection (1) may stand extended to another period of time if agreed upon by the parties. Therefore, ordinarily the time limit for correction of errors or for interpretation of a specific point or part of the award is 30 days from the date of receipt of the arbitral award. **However, the limitation of 30 days can be waived for another period of time, if agreed upon by the parties**. Question for consideration is what would be the contours of the expression unless another period of time has been agreed upon by the parties, as appearing in sub-Section (1) of Section 33.
>
> 45.2. Sub-Section (7) of Section 33 clarifies that correction or interpretation of arbitral award or passing of additional arbitral award would attract Section 31 of the 1996 Act as discussed supra. Therefore, the language of sub-Section (1) of Section 33 makes it abundantly clear that the period of 30 days as provided in Section 33(1) is not an inflexible period. If the parties agree, the said period can be extended.
>
> 45.3. There is no dispute to the proposition of law laid down in Harshad Chiman Lal Modi (supra), relied upon by the appellant, that where a court has no jurisdiction over the subject matter of the suit

> by reason of any limitation imposed by the statute, charter or commission, it cannot take up the cause or matter; an order passed by the court having no such jurisdiction is a nullity. Question is whether such a proposition would have any application to the facts and circumstances of the present case. As we have seen, there was no embargo on the Arbitral Tribunal to exercise jurisdiction over the subject matter. **The only limitation was that the correction and/or interpretation of the award should be done within 30 days from the date of receipt of the arbitral award unless another period of time has been agreed upon by the parties. Therefore, the expression unless another period of time has been agreed upon by the parties assumes critical significance."**
>
> (Emphasis supplied)

139. With regard to computational errors, clerical or typographical error or any other error of similar nature – (the expression any other error of similar nature will be read *ejusdem generis* and will apply to errors similar to computational errors, clerical or typographical errors), what should be the course of action if the party has not moved under Section 33 or having moved the arbitrator has mechanically rejected the correction?

140. With regard to Section 152 CPC, this Court after holding that Section 152 is founded on the maxim - *actus curiae neminem gravabit* speaking through Dr. Arijit Pasayat J. in ***U.P. SRTC vs. Imtiaz Hussain, (2006) 1 SCC 380*** lucidly explained the position thus.

> "8. **The basis of the provision under Section 152 of the Code is founded on the maxim "actus curiae neminem gravabit" i.e. an act of court shall prejudice no man. The maxim "is founded upon justice and good sense; and affords a safe and certain guide for the administration of the law", said Cresswell, J. in Freeman v. Tranah [12 CB 406 : 138 ER 964] (ER p. 967). An unintentional mistake of the court which may prejudice the cause of any party must and alone could be rectified. In Master Construction Co. (P) Ltd. v. State of Orissa [(1966) 3 SCR 99 : AIR 1966 SC 1047] it was observed that the arithmetical mistake is a mistake of calculation, a clerical mistake is a mistake in writing or typing whereas an error arising out of or occurring from accidental slip or omission is an error due to careless mistake on the part of the court liable to be corrected.** To illustrate this point it was said that in a case where the order contains something which is not mentioned in the decree, it would be a case of unintentional omission or mistake as the mistake or omission is attributable to the court which may say something or omit to say something which it did not intend to say or omit. **No new arguments or reargruments on merits can be entertained to facilitate such rectification of mistakes. The provision cannot be invoked to modify, alter or add to the terms of the original order or decree so as to, in effect, pass an effective judicial order after the judgment in the case."**
>
> (Emphasis supplied)

141. Ordinarily errors of the nature set out above like computational error, clerical or typographical error or any other error of a similar nature would not be objected by other party. However, in the unlikely event of an objection and in a scenario where the arbitrator has not been moved under Section 33 or having moved the Arbitral Tribunal has been obstinate in not correcting, a Court in Section 34 to uphold the

maxim *actus curiae neminem gravabit* can invoke the power and correct computational errors, clerical or typographical errors or any other errors of similar nature without modifying, altering or adding to the original award. It should not be forgotten that under Section 35 finality is granted to the arbitral awards subject to the provisions in part I and under Section 36 where the time for making an application to set aside the arbitral award under Section 34 has expired, then subject to the provisions of sub-Section 2 such award shall be enforced in accordance with the provisions of the Code of Civil Procedure in the same manner as it were a decree of the Court. Hence, a limited exception alone to the holding in ***Hakeem (supra)*** is made.

SEVERABILITY UNDER SECTION 34:-

142. If there was one aspect on which there was a chorus among the rival factions, it was on the aspect of Section 34 Court having power to sever that part of the award which fell foul of Section 34 from the good part.

143. According to P. Ramanatha Aiyar's Advanced Law Lexicon (third edition):

"**Sever – 'to separate; to insist upon a plea distinct from that of other co-defendants; to disjoin and severable – 'capable to being separated',"**

A bare perusal of Section 34 indicates that the power to sever an award is recognised in Section 34(2)(a)(iv) which reads as under.

> "34(2)(a)(iv). the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
>
> Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside;"

144. A reading of the above sub-Section reveals that where the arbitral award deals with disputes not contemplated by or not falling within the terms of the submission to arbitration or it contains decision on matters beyond the scope of the submission to arbitration, the award can be set aside.

145. However, the proviso states that if the decisions on matters submitted to arbitration can be separated from those not so submitted,

only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside.

146. So, severance as a concept is recognised intrinsically in Section 34 itself on the aspect mentioned hereinabove. But the question is when there are several claims adjudicated and if awards on a few claims fall foul of Section 34 and if each of the claims which fall foul of Section 34 are capable of separation could the awards on those claims be set aside? This issue was not discussed in ***Hakeem (supra).*** However, the consistent view of this Court has been that such standalone claims falling foul of Section 34 can be set aside as long as they are capable of being severed without affecting the other parts of the award. In other words, if the claims falling foul of Section 34 are not inseparably intertwined with the good portion of the award, the award can be severed.

147. In ***J.G. Engineers (P) Ltd. vs. Union of India & Anr., (2011) 5 SCC 758,*** R.V. Raveendran J. speaking for the Court clearly set out the principle as follows:-

> "25. It is now well settled that if an award deals with and decides several claims separately and distinctly, even if the court finds that

> the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent. As the award on Items 2, 4, 6, 7, 8 and 9 was upheld by the civil court and as the High Court in appeal did not find any infirmity in regard to the award on those claims, the judgment of the High Court setting aside the award in regard to Claims 2, 4, 6, 7, 8 and 9 of the appellant, cannot be sustained. The judgment to that extent is liable to be set aside and the award has to be upheld in regard to Claims 2, 4, 6, 7, 8 and 9."

148. This Court in ***Madhya Pradesh Power Generation Company (supra)*** had severed the award with regard to the return of amounts ordered on the Bank guarantees dated 22.02.2000 and 23.02.2000 which pertained towards the amount advanced by the award debtor therein.

149. During the course of the submissions, the concern expressed by the several learned counsels were that severability should be carefully invoked and the exorcised portion of the award should not be inseparably intertwined with the other portions which are upheld and ought not to be inter dependent on the good parts of the award. The further concern expressed was that the Section 34 Court wanting to sever portions of the award should perform an exercise to see whether the good part of the award can be separately identified both in terms of variability and quantum without any co-relation to the bad parts of the

award. The submission was that if the good parts are intermingled with the bad parts of the award in a manner that it is impossible to sever the bad parts, the principle of severability cannot be applied. Mr. Gaurav Pachnanda, learned Senior Counsel illustrated the submission by submitting that if a final award is arrived by netting off claims and counter claims, principles of severability cannot be applied as what is available in the award was a composite award with a single amount mentioned therein enforceable by the successful party. There is merit in this submission and such prerequisites are essential while severing parts of the award.

150. A Full Bench of the High Court of Judicature at Bombay, in ***R.S. Jiwani vs. Ircon International Ltd., 2009 SCC OnLine Bom 2021,*** held as under.

> "20. The cases would be different where it is not possible or permissible to sever the award. In other words, where the bad part of the award was intermingled and interdependent upon the good parts of the award there it is practically not possible to sever the award as the illegality may affect the award as a whole. In such cases, it may not be possible to set aside the award partially. However, there appears to be no bar in law in applying the doctrine of severability to the awards which are severable."

151. Sanjay Kumar J., (as His Lordship then was) in the High Court of Judicature at Hyderabad for the State of Telangana *in* ***Saptarishi Hotels Pvt. Ltd.*** ***vs.*** ***National Institute of Tourism & Hospitality Management, 2019 SCC OnLine TS 1765,*** following ***J.G. Engineers (supra)*** held as follows.

> "33. In J.G. ENGINEERS PVT. LTD. v. UNION OF INDIA, the Supreme Court observed that it is now well settled that if an Award deals with and decides several claims separately and distinctly and if such Award is found to be bad in regard to some items, the Court would be entitled to segregate the Award on the items which did not suffer from any infirmity so that it could be upheld to that extent."

152. A learned Single Judge of the Delhi High Court addressing the issue of severability in ***National Highways Authority of India*** ***vs.*** ***Trichy Thanjavur Expressway Ltd., 2023 SCC OnLine Del 5183,*** set out the principle thus.

> "38. In our considered opinion, therefore, the answer to the question which stands posed would have to be rendered on an interpretation of the phrase "setting aside" as ultimately adopted and forming part of Section 34. As was noticed hereinbefore, Section 34(2)(a)(iii) does speak of an award being set aside in part. We find that the key to understanding the intent underlying the placement of the Proviso in sub-clause (iv) of Section 34(2)(a) is in the nature of the grounds for setting aside which are spoken of in clause (a). As would be manifest from a reading of the five sub-clauses which are

positioned in Section 34(2)(a), those constitute grounds which would strike at the very heart of the arbitral proceedings. The grounds for setting aside which are set forth in clause (a) strike at the very foundation of validity of arbitration proceedings. Sub-Clauses (i) to (v) thus principally constitute grounds which would render the arbitration proceedings void ab initio. Although the Section 34(2)(a)(iv) ground for setting aside also falls in the same genre of a fundamental invalidity, the Legislature has sought to temper the potential fallout of the award being set aside in toto on that score. The Proviso to sub-clause (iv) seeks to address a comprehensibly conceivable situation where while some parts of the award may have dealt with non-arbitrable issues or disputes falling outside the scope of the reference, its other components or parts constitute an adjudication which could have been validly undertaken by the AT. The Proviso thus seeks to address such a situation and redeems as well as rescues the valid parts of an award. This saves the parties from the spectre of commencing arbitral proceedings all over and from scratch in respect of all issues including those which could have validly formed part of the arbitration.

39. The grounds for setting aside encapsulated in Section 34(2)(b) on the other hand relate to the merits of the challenge that may be raised in respect of an award and really do not deal with fundamental invalidity. However, the mere fact that the Proviso found in sub-clause (iv) of Section 34(2)(a) is not replicated or reiterated in clause (b) of that provision would not lead one to conclude that partial setting aside is considered alien when a court is considering a challenging to an award on a ground referable to that clause. In fact, the Proviso itself provides a befitting answer to any interpretation to the contrary. The Proviso placed in Section 34(2)(a)(iv) is not only an acknowledgment of partial setting aside not being a concept foreign to the setting aside power but also of parts of

the award being legitimately viewed as separate and distinct. The Proviso itself envisages parts of an award being severable, capable of segregation and being carved out. The Proviso is, in fact, the clearest manifestation of both an award being set aside in part as well as an award comprising of distinct components and parts.

40. Undoubtedly, an award may comprise a decision rendered on multiple claims. Each claim though arising out of a composite contract or transaction may be founded on distinct facts and flowing from separate identifiable obligations. Just as claims may come to be preferred resting on a particular contractual right and corresponding obligation, the decision which an AT may render on a particular claim could also be based on a construction of a particular covenant and thus stand independently without drawing sustenance on a decision rendered in the context of another. If such claims be separate, complete and self-contained in themselves, any decision rendered thereon would hypothetically be able to stand and survive irrespective of an invalidity which may taint a decision on others. As long as a claim is not subordinate, in the sense of being entwined or interdependent upon another, a decision rendered on the same by the AT would constitute an award in itself. While awards as conventionally drawn, arranged and prepared may represent an amalgam of decisions rendered by the AT on each claim, every part thereof is, in fact, a manifestation of the decision rendered by it on each claim that may be laid before it. The award rendered on each such claim rules on the entitlement of the claimant and the right asserted in that regard. One could, therefore, validly, subject of course to the facts of a particular case, be entitled to view and acknowledge them as binding decisions rendered by the AT on separate and distinct claims.

41. The Court notes in this regard that Mr. Mukhopadhaya, Mr. Rajshekhar Rao, learned senior counsels as well as Mr.

Ashim Sood had urged that while an award as ultimately rendered may contain findings on numerous claims, the decision rendered in respect of each such claim is entitled to be viewed as an award in itself. This, according to learned counsels, clearly flows from the power of the AT to not just render a final award but also and in the course of arbitral proceedings render interim awards in respect of various claims. It was rightly pointed out by learned counsels that each such decision on a claim could stand independently and be final and binding in itself. Those findings or decisions in relation to various claims that stand placed before the AT may each constitute an award itself and the operative directions framed representing the disposition of all such claims. As was rightly contended by Mr. Mukhopadhaya, the declaration with respect to entitlement and the award of a money claim consequent thereto would be liable to be viewed as independent Arbitral Awards. Mr. Sood had chosen to describe such a disposition of claims as being an "agglomeration" of awards. The Court accords its emphatic and wholehearted acceptance to the aforenoted submissions and comes to the conclusion that an award is thus liable to be viewed and understood accordingly. It thus comes to conclude that each such decision rendered by an AT could be validly viewed as the decision rendered on a particular claim and thus constituting an independent award in itself.

42. Once an award is understood as comprising of separate components, each standing separately and independent of the other, there appears to be no hurdle in the way of courts adopting the doctrine of severability and invoking a power to set aside an award partly. The power so wielded would continue to remain one confined to "setting aside" as the provision bids one to do and would thus constitute a valid exercise of jurisdiction under Section 34 of the Act.

Conclusion:

G. Undoubtedly, an award may comprise a decision rendered on multiple claims. Each claim though arising out of a composite contract or transaction may be founded on distinct facts and flowing from separate identifiable obligations. Just as claims may come to be preferred resting on a particular contractual right and corresponding obligation, the decision which an AT may render on a particular claim could also be based on a construction of a particular covenant and thus stand independently without drawing sustenance on a decision rendered in the context of another. If such claims be separate, complete and self-contained in themselves, any decision rendered thereon would hypothetically be able to stand and survive irrespective of an invalidity which may taint a decision on others. As long as a claim is not subordinate, in the sense of being entwined or interdependent upon another, a decision rendered on the same by the AT would constitute an award in itself.

H. While awards as conventionally drawn, arranged and prepared may represent an amalgam of decisions rendered by the AT on each claim, every part thereof is, in fact, a manifestation of the decision rendered by it on each claim that may be laid before it. The award rendered on each such claim rules on the entitlement of the claimant and the right asserted in that regard. One could, therefore, validly, subject of course to the facts of a particular case, be entitled to view and acknowledge them as binding decisions rendered by the AT on separate and distinct claims.

I. Once an award is understood as consisting of separate components, each standing separately and independent of the other, there appears to be no hurdle in the way of courts adopting the doctrine of severability and invoking a power to set aside an award partly. The power so wielded would continue to remain one confined to “setting aside” as the

provision bids one to do and would thus constitute a valid exercise of jurisdiction under Section 34 of the Act.

L. The power to partially sever an offending part of the award would ultimately depend on whether the said decision is independent and distinct and whether an annulment of that part would not disturb or impact any other finding or declaration that may have been returned by the AT. The question of severability would have to be decided bearing in mind whether the claims are interconnected or so intertwined that one cannot be segregated from the other. This for the obvious reason that if the part which is sought to be set aside is not found to stand independently, it would be legally impermissible to partially set aside the award. A partial setting aside should not lead to a component of the award being rendered vulnerable or unsustainable. It is only when the award relates to a claim which is found to stand on its own and its setting aside would not have a cascading impact that the Court could consider adopting the aforesaid mode.

M. The Court is thus of the firm opinion that the power to set aside an award in part would have to abide by the considerations aforenoted mindful of the imperatives of walking a line which would not dislodge or disturb another part of the award. However as long as the part which is proposed to be annulled is independent and stands unattached to any other part of the award and it could be validly incised without affecting the other components of the award, the recourse to partial setting aside would be valid and justified.

(Emphasis supplied)

153. The views expressed in the judgment, referred to hereinabove, are correct and the power to set aside will include the power to partially set

aside and sever the portions of the award which fall foul of Section 34 subject to the riders engrafted hereinabove.

ABANDONMENT OF CLAIMS - COMPROMISE ARRIVED AT BETWEEN THE PARTIES:

154. Situation may arise where claims for which awards have been granted may be abandoned or parties may arrive at compromises contrary to the terms of the award. If the compromise has the effect only of severing a standalone portion of the award with it being not inseparably intertwined with any other portion, a Section 34 Court can give effect to compromise and sever that portion of the award in accordance with the principles of severability set out hereinabove.

155. Equally, with regard to abandonment or giving up of claims by a successful party, the same principle will apply. However, if the aspects are not severable and the abandonment/giving up has the effect of impinging upon the award and is inseparably intertwined and permeates the warp and woof of the award, then the option available to the Section 34 Court is to set aside the award. In case of settlements

which are not severable, the option will be to dismiss the Section 34 application as not pressed, in view of the settlement arrived at.

156. I have since had the benefit of reading the judgment of the Hon'ble Chief Justice. In my judgment, I have independently given my reasons on each of the issues arising herein. The judgment of the Hon'ble Chief Justice grants power to the Section 34 Court to modify the post-award interest. I am not able to agree with the said view for the reasons stated hereinabove. Equally, the judgment of the Hon'ble Chief Justice permits the exercise of power under Article 142 of the Constitution of India to modify the award, though it has been stated in the judgment that the power must be exercised with caution. Here again, I am not able to agree with the said view for the reasons stated in my judgment.

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 will be read with the only exception made in this judgment now. On the principle of *actus curiae neminem gravabit* computation, clerical and typographical errors or

other errors of similar nature is permissible to be corrected made 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.

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).

158. Appreciation is recorded for the painstaking efforts put in by the learned Solicitor General and all the Learned Senior Counsels/Counsels who addressed arguments and to the teams assisting them.

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

…….J.
[**K. V. VISWANATHAN**]

New Delhi,
30th April, 2025.