

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

Petition(s) for Special Leave to Appeal (C) No(s). 7973/2022

(Arising out of impugned final judgment and order dated 04-02-2022 in ARBA No. 39/2012 passed by the High Court Of Kerala At Ernakulam)

M/S KAMAL JAIN ASSOCIATES

PETITIONER(S)

VERSUS

COCHIN INTERNATIONAL AIRPORT LIMITED

RESPONDENT(S)

(IA No. 128468/2022 - EARLY HEARING APPLICATION
IA No. 63701/2022 - EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT)

Date : 05-03-2024 This petition was called on for hearing today.

CORAM :

HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MR. JUSTICE AHSANUDDIN AMANULLAHFor Petitioner(s) Mr. P B Suresh, Sr. Adv.
Mr. Samarjit Pattnaik, Adv.
Mr. Debmalya Banerjee, Adv.
Mr. Vikas Gogne, Adv.
Mr. Rohan Sharma, Adv.
Mr. Kartik Bhatnagar, Adv.
Mr. Satyam Chaturvedi, Adv.
Mr. Nicholas Choudhury, Adv.
Mr. Anmol, Adv.
Ms. Ananya Khanna, Adv.
Ms. Tanvi Seth, Adv.
M/s. Karanjawala & Co., AORFor Respondent(s) Mr. Ritin Rai, Sr. Adv.
Mr. Benny P Thomas, Adv.
Mr. Abel Tom Benny, Adv.
Mr. Prakash Ranjan Nayak, AORUPON hearing the counsel the court made the following
O R D E R

1. Mr. Ritin Rai, learned Senior counsel appearing for the respondent submits that after this matter was partly heard on 20th

February, 2024 and adjourned to be taken up today for further arguments, there have been some developments. He hands over a copy of an order dated 20th February, 2024 passed by a Bench of 3-Judges of this Court in Petitions for Special Leave to Appeal (Civil) No.15336-15337 of 2021 titled 'Gayatri Balasamy vs. M/s. ISG Novasoft Technologies Limited'. By the said order, five questions have been formulated to be answered by a larger Bench. The said questions are focused on the powers to be exercised by the Courts under Sections 34 and 37 of the Arbitration and Conciliation Act, 1996 in the context of modifying an arbitral award and if it is held that the power to modify is available, clarify as to whether such a power can be exercised only when the award is severable and a part thereof can be modified. Referring to a series of decisions of this Court in formulating question No.5, the matter has been directed to be placed before Hon'ble the Chief Justice of India for appropriate orders.

2. In the present case too, a similar issue has been highlighted by the petitioner and out of four questions of law framed in the Petition for Special Leave to Appeal two are as follows :

"(i) Whether the Hon'ble High Court erred in modifying the Award passed by the Ld. Arbitral Tribunal considering the limited scope of Section 37 of the Act?

(iv) Whether the Hon'ble High Court failed to consider that when the court under Section 34 has affirmed the award, in a further limited scope under Section 37, as per the law laid down, it is erroneous to undertake an independent assessment of the merits of the award and it must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision?"

3. The aspect of segregation of the award on items that do not suffer from any infirmity has been specifically raised and discussed in para 16 of the impugned judgment which is extracted hereunder :

16. Similar is the challenge for the items claimed under Part II- Deviated items, referred to in page 92 and 93 of the appeal paper book and pages 24 and 25 of the Award. This part is again sub divided into two parts. The dispute is regarding items in list 3.b, which reads -

"b) Tender items executed as per Contract Agreement where quantity is exceeding 25% and rates are agreed rates - List 3.b	} ₹69,21,433.00
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The Award of this amount is disputed by the respondent. According to them, List 3.b is related to tender items executed in which the quantity exceeded 25%, that is, above 125%. The claimant adopted revised rates for the total quantity executed, whereas the respondent granted revised rates only for the quantity exceeding 125% of the quantity included in the contract. According to the respondent, under this head, amount calculated at enhanced rates for work done in excess of 125% would be ₹51,10,878/-. The claimant on the other hand adopted revised rates for the entire quantity, as per which the amount would be ₹69,21,433/-. This cannot be justified, for the claimant can claim enhanced rates for the work done over and above the quantity agreed in the contract. Therefore, for the work done in excess of the quantity agreed (quantity agreed+ 25% = 125%) only, the claimant is entitled to enhanced rate. Hence the difference would be ₹69,21,433/- (amount claimed by the claimant) minus ₹51,10,878/- (admitted to be due by the respondent), which is ₹18,10,555/- (69,21,433 - 51,10,878==18,10,555). Therefore, to that extent the Award needs to be interfered with as it is against the terms of the contract executed between the parties. This would not amount to a modification of the Award, which alone is prohibited by the dictum in **Project Director, National Highways Authority of India v. M. Hakeem, (2021 SCC Online 473)**, wherein it has been held that Section 34 does not empower the court to modify an Award. But this is a case where the Award deals with and decides several claims separately and distinctly. In such cases, as held in **J. G. Engineers Pvt. Ltd. v. Union of India, 2011 KHC 4418: AIR 2011 SC 2477**, even if the Court finds that the award in regard to some items is bad, the Court can segregate the award on items which do not suffer from any infirmity and uphold the award to that extent."

4. In view of the reference order made in terms of the order dated 20th February, 2024, it is deemed appropriate to direct the Registry to tag this matter with Petitions for Special Leave to Appeal (Civil) No.15336-15337 of 2021 for consideration.

(Geeta Ahuja)
Assistant Registrar-cum-PS

(Nand Kishor)
Court Master (NSH)