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INDIA ADR WEEKDAY 1: BANGALORE

SESSION 3

Strengthening the arbitration regime in India - a discussion on Gayatri Balasamy v. ISG Novasoft Technologies Ltd.

02:30 PM To 04:00 PM IST

MODERATOR:

Mr. Prasanth. V. G, Partner, JSA Advocates & Solicitors

PARTICIPANTS:

Justice (Retd.) A. V. Chandrashekhar, High Court of Karnataka

Mr. Harish Narasappa, Senior Counsel, Karnataka High Court

Mr. Vinod Kumar, Partner, JSA Advocates & Solicitors

Ms. Neeti Sachdeva, Registrar & Secretary General, MCIA

HOST: Good afternoon, everyone. We'll be starting the session really soon, please. Thank you for your patience. Good afternoon, everyone. The next session is hosted by JSA Advocates & Solicitors. This topic of the session would be Strengthening the arbitration regime in India-A discussion on the Supreme Court Judgement ***Gayatri Balasamy vs. ISG Novasoft Technologies Limited***. The session will be moderated by Mr. Prasanth V. G. and the panel will be constituting Justice A.V. Chandrashekar, Mr. Harish Narasappa, Mr. Vinod Kumar and Ms. Neeti Sachdeva. Thank you. I kindly request the panellists to take the stage.

PRASANTH. V. G: Good afternoon, everyone. Welcome to the next session of this much awaited India ADR Week of MCIA. We are discussing a judgement which is of a lot of significance and has been much criticised in the last several months. All the discussions that you look at, you see that the judgement has been praised for its minority view, a little over the prices that it has received for the majority view. So, let's see what the panel thinks about the minority view, the majority view, the implications of the judgement for the legal fraternity, for the Clients, for the industry. It is often customary that we assume that everybody in the audience knows about what we are talking about, in these kind of occasions. But let me start by, possibly, reaching out to the last member of the audience who may not have had the benefit of understanding this judgement and explain a little before opening it up to the panel. So, we have some questions for the panel. But before that, for the better understanding of everybody here, I will explain what this judgement is about, so that the context is set, and then we get to the opinions of the panel.

In the 1940 Arbitration Act, Section 15 specifically provided that the courts can modify an Arbitration award. I'm not reading out; I have the Section 15 in front of me. But 1940 Act did provide very specifically that the power of the court, once an award is passed, includes the power to modify an award. The 1996 Act did away with the power of a court to modify the award. Section 34 only says that the court can set aside an award. And there have been three amendments, two or three amendments, major amendments to the Arbitration Act as you know. There is a committee, Mr. Vishwanathan Committee, which recommended that the power to modify, the power of the court to modify an arbitration award, be brought back, and yet even in the latest Bill, which is now being circulated, there is no power to modify, which is sought to be reintroduced by the Legislature. Under such circumstances, the Supreme Court has stepped in and has today, stated that a limited power to modify can be read into the otherwise, such power absent provision of Section 34 and thereafter on Section 37 and thereafter, Supreme Court's powers under Article 142 of the Constitution. This judgement has therefore been criticized for the majority view; the minority view of Justice Vishwanathan says that such power being absent and specifically not being included, despite the 1940 Act having it, cannot be read into it and if you do it, it will be judicial overreach. Now, the reason why the

majority thought that such power should be read into it is because if you don't read such power into the Act, then the only power left with the 34 court will be to set aside the award. And the consequence of setting aside the award is that the Parties will have to go back to the Tribunal and restart the arbitration process. So, the majority thought that that will not serve the ends of justice. In fact, that will be my first question to Justice Chandrashekhar. But to set the context, the majority thought that that will not serve the purpose of justice. The majority thought that in the absence of a specific prohibition, the power can be read into it. So, the question is, does the absence, is the absence something which permits a reading of something into a provision, or is the absence a bar? Does the absence signify a bar? That was a question before Supreme Court. And for whatever logic and reason, the majority has said that in the absence of a bar, it can be read into the words of Section 34 and therefore into Section 37. And therefore, today, at least for, to a limited extent, the courts have the power to modify an award instead of sending it, remanding it back to the Tribunal, and therefore, the expected outcome is that it fastens the judicial process. Otherwise, you go back to the Tribunal, the Tribunal restarts the arbitration, and therefore, it prolongs the entire litigation span for the Parties. But the counter-logic is that in the first place, the Parties wanted to exclude a judge by appointing an Arbitrator. So, if in the first place they thought that justice dispenser has to be the Arbitrator and not the court. Who is the court to modify? The court can only at best, confirm or otherwise set aside, can't modify. So that's the counterargument. So, I hope the last bencher in this audience has understood this because most of you are aware of it. But I explained this only for the benefit of those who are not. So, I hope this has set the context for it.

If you look at the public discourse, strangely, the main minority opinion has gathered most amount of, at least that's the feeling that I got when I was listening to a few YouTube videos for the purpose of this session. I thought that the minority view had got the sentiments of the legal community with it. But the majority view may be something that the industry is prone to accept because it makes it faster. So, we have an esteemed panel here. Justice Chandrashekar is somebody who writes from lower Judiciary, went up to the higher Judiciary, sat in all capacities, and now one of the most sought-after arbitrators in Karnataka. As I was mentioning to him over the lunch, every second matter, third matter in the Section 11 proceeding in the High Court, the Parties say, "can you please appoint Justice Chandrashekhar." Now therefore, sir, my first question to you is being somebody who has come from a position of power which is constituted and conferred on you by the Constitution of India and now acting as somebody who is governed by Party autonomy. You would have seen both sides of the spectrum. Looking at it from both sides of the spectrum, do you think that it really matters who dispenses justice? Is it important that the Arbitrator himself should be permitted to, alone should be permitted to dispense justice? Or is it that the court can, because you are a high functionary when you

were holding the office? Do you think that the court has the power or should be seen to have the power, should be recognised as having the power to do this? Or does it really matter as to who do it? So, where do you stand on this elusive concept of justice? Is justice, something that the Arbitrator alone can dispense in the context of arbitration, where in the first place the Parties have excluded an Arbitrator? Or is justice something that anybody along the way up to Supreme Court, starting from an arbitration, can dispense and what is your take as a person who has got a 360 view on justice? What is your take on who should be the dispenser of justice and any other general take related to this?

JUSTICE (RETD.) A. V. CHANDRASHEKHAR: Thank you, Prasanth for your kind words. First of all, my request to all the younger members who are interested in conducting arbitration cases is please concentrate on trial matters thoroughly. Examination, cross examination, confronting of documents, all these things are required. Don't be under an impression that this arbitration is something different from the regular Civil Procedure Court. It is basically a civil case where Parties themselves have agreed to entrust it to somebody. That's all. There is no imposition of authority. But the manner in which a case is being dealt is almost like a civil case only. None of the provisions of the Substantive Act are held to be inapplicable. All the provisions of the Substantive Act are applicable. Only where the provisions of Arbitration Act are silent, definitely there will be a supplement by way of adopting the well time tested principles of Civil Procedure Code, Evidence Act. I hope all of you have read Evidence Act. My request to all of you is if you have not read Evidence Act thoroughly, try to start reading Evidence Act, Section by section which is now Bharatiya Sakshya Adhaniyam. Absolutely, according to me that Bhartiya Sakshya Adhiniyam has not undergone any change, except the change in the nomenclature because they can't do it also. They have done some important changes for IPC and CRPC, but they have not done any change except Section 65(b) being turned into Section 63, and few provisions of Section 27, subsections being added in other forms. That Evidence Act has remained unchanged. As long as recording of evidence takes place either in civil case or on criminal case, Evidence Act is the be all and the end all.

In the case of ***Sri Engineering versus TUF*** reported in ***AIR 2018, 11, SCC 511***. Oho, I've forgotten the page number file. It's a bench... quorum is two. I think Ashok Bhushan has authored their judgement. Say there is no legal prohibition for a Tribunal to adopt the time-tested principles of Civil Procedure Code and Evidence Act. Friends, he has given a good basis for the discussion. Let us have a view of 1940 Act. Even under the 1940 Act, the principle was when a challenge is made before a regular civil court to make the award a rule of law, it was said that all efforts must be made by the court, before which a challenge is made to uphold the award. When such being the case, what should be the basis for 1996 Act? It must be more

stronger. Now everybody is now feeling no, because of this judgement of... judgement rendered by four is to one by the Honourable Supreme Court in ***Gayatri Balasubramaniyam's*** case is, no, everything is... Now the clock is set back. But there is no other go. It's a constitution bench judgement. As all of you know any bench consisting of five judges and more in the Supreme Court is a constitutional judgement. So, Constitution Bench will be constituted to say, to decide some very, very important constitutional issues or some issues of graver general importance. Of course, since alternative since the arbitration also comes within the purview of Alternative Dispute Resolution Mechanism under Section 89 of CPC. The Honourable Supreme Court thought it to constitute a larger bench of five judges to decide the scope of Section 34.

Now, as rightly pointed out Justice Vishwanathan for the minority. He's the only dissenter, but he is saying that appears to be more acceptable to the legal community, but in the light of a judgement, a majority judgement of a constitution judgement. So we'll have to accept it is a law laid down under Article 141 of the Constitution of India. There is no other go. Even if you thoroughly discuss this judgement, it is applicable so long as it is not set aside, varied, or in any other forum. Can we expect a 360 degree, sorry 180-degree U-turn as was done in the case of ***NN Global*** within seven months of the judgement by five bench judgement? It was. What anomaly was found? It was set aside, set right within seven months. But you can't expect the same in this case. There may be a discussion, there may be conferences about the minority view being upheld but also being more logical. But that is not the case. We have to go by what is laid down. Two approaches have been done in the Supreme Court. One the minority view has upheld has applied the Golden Rule theory of interpreting the provisions of Section 34 within its four corners. But the majority judgement, according to me, has gone a step further if they have adopted a purposive interpretation, I don't know. In such cases, there cannot be anything, only purposive interpretation can be possible where some welfare legislations are required because the court will have to lean in favour of the persons in whose favour the Act has been made. Here, unfortunately the four judges have taken a view that the court dealing with a petition under Section 34 has the power to modify. What is the scope of the word "modify"? Modification to the extent of severance only, not interfering with the award and doing something. Please understand it. The word "modification" here does not have the connotation of regular meaning of modification. The modification is only in respect of severance. Justice Vishwanathan has said even you can't do that also. Even if you want to do that, the exercise of severing one relief from the other, you must see whether the reliefs are, the facts are intertwined. Let us assume, that in a case of eviction, or let us assume that in a Joint Development Agreement, the person, the Developer files a case, he gets Arbitrator appointed, he files Claim Statement, the Owner files the Statement of Defence and also the

Counterclaim. Now, let us assume that he has also, the Developer has also sought damages. Now the question is, whether damages is based upon the legality or otherwise of the termination. So, then it is dependent upon the termination. So, where it is not interdependent and purely dependent, then severance can be possible, is the minority view. And the four judges, the majority view, appears to be of a more broader aspect.

Now Mr. Prashant has said, whether as an Arbitrator, what will be your views? Whether the authority that as a judge you had, could be made applicable by the Arbitrator, who is chosen by the Parties? Of course, Party autonomy is the benchmark in arbitration cases. But at the same time, who ultimately dispenses with the justice? It is ultimately the Arbitrator dispenses the justice. Even you see, Section 34 got a little more scope when Justice M.B. Shah in the year 2003 gave a judgement in ***ONGC*** case. The concept of the public policy, opposed to public policy of India was given a broader view. And in majority of the cases, that judgement even now is followed. So, the very concept of the public policy of India, as was enunciated in 1985 by Justice K. Jagannatha Shetty in ***Renusagar Mills*** case was given a little more scope. So, wherever some injustice is cast, courts used to apply that judgement, and now several judgements have come. Now they say, ignoring the material evidence. Suppose an evidence on record, if applied, the decision would have been otherwise. And if it is ignored, they say it is opposed to public policy of India. Application of the fundamental law of the country. Non-application of the fundamental law of the country also appears to be opposed to public policy of India. It is not as though this judgement of four judges by way of majority have given a new scope. Over a period of time, wherever judges of the highest Court felt that some injustice would be caused they have been doing that, because it is ultimately their power. It's ultimately their power. We can't question them.

Now the question is, the Arbitrator gives his verdict by way of an award. That will be challenged under Section 34. These parameters for challenging the very award are very limited and in spite of the same, if the judges were to interfere with the award, what should be the criteria? Because the judge sitting in the District Court or the chartered High Court under Section 34 will have to keep in mind that this is an award passed by an Arbitrator appointed with the consent of the Parties, where Party autonomy is the benchmark. And therefore, it is always said that even misapplication of minor law into the facts of the case is also a no-good ground. So, I will be jokingly speaking to my former colleagues who are commercial court judges. In fact, you must have a pencil and a small notebook. You must have four or five benchmarks. You must go on asking them whether your case comes within this purview. It will be very easy, I think within one hour or one and a half hours, you can hear the arguments and reserve the case for judgement. It's very difficult that a judge dealing with a petition under Section 34 to interfere with the award because the awards are always speaking awards. Under the new Act,

they're all speaking awards. So far as the first question posed to me is concerned that anybody dealing with a petition under Section 34 or even 37. What is the difference between Section 34 and 37? I think Mr. Prasant, we must seriously think about the role of the court dealing with Section 37 against an order pass against a decision given by a Section 34 court. See, what happened was between Section 96 and 100 of CPC, 96 is a matter of right. It is a right of a Party who has lost in its entirety, or partially to file an appeal. And when such a civil appeal is filed, the court is expected to rehear the entire case, both on facts and law. So far as second appeal is concerned, till '76 was only a question of law. But with 1976 Amendment, what happened? Substantial question of law. Now, of course, even in this ***Gayatri Balasubramanium*** judgement, though they have not gone well deep into the scope of Section 37 vis-a-vis 34, ultimately, it boils down to the fact what grounds available under Section 34 are equally applicable under Section 37. That's all.

PRASANTH. V. G: Thank you, sir. That was very elaborate. We'll come back to you. My next question is to Mr. Harish Narasappa, Senior Counsel. Mr. Narasappa, I see some incongruence. In fact, I was just reading this judgement in the morning very closely, and I noticed. I don't know, I didn't see this in any other discourse, I could be corrected, I'll be delighted to be. But I saw some incongruence between paragraph 87.2 and paragraph 49. Paragraph 87.2, which is a part of the conclusions of the majority bench says that one of the instances where modification can be done is "by correcting any clerical, computational or typographical error which appear erroneous on the face of the record as held in Part 4 and Part 5 of our analysis." But if you go back to their analysis, in Part 5. So this says, this uses the following words, "clerical, computational, or typographical errors" and they say in terms of Part 5 of our analysis. If you go back to Part 5, and if you look at paragraph 49, it says, "Notwithstanding Section 33, we affirm that a court reviewing an award under Section 34 possesses the authority to rectify computational, clerical, or typographical errors as well as any other manifest errors." The incongruity that I see is that "as well as any other manifest errors" is absent in the conclusion. It is there, but conclusion says in terms of Part 5. So, if you read, if you have to read it conjunctively, manifest errors may be a ground on which a modification can be made. If you have got to read it disjunctively and say, I will only go by the conclusion of the judgement, then it is only "clerical, typographical or computational error." Now, my doubt is, does manifest error significantly change the typography? What is manifest error? Now, if a judge does not rely on a binding judgement or, sorry, if an Arbitrator does not rely on a binding judgement, is that not a manifest error? If the Arbitrator fails to appreciate a Witness Statement, completely ignores it, is that not a manifest error? Now, if that is a manifest error, does that not tinker with the merits of the matter, and goes well beyond clerical errors? So therefore, I see that there is some kind of an incongruous part of this judgement, which can

have seminal importance, because the moment you say manifest errors, it can mean the sky, but if you look at Part 5, it does not stop by saying manifest errors. It says "manifest errors, provided that such modification does not necessitate a merit-based evaluation." Now my problem is, if manifest errors are to be identified and gone into and modified, will it not naturally be a merit-based evaluation? What are your thoughts on this?

HARISH NARASAPPA: So, we are only five of us here; so, we can't review this judgement, right? So, we have to constitute a seven judge bench. So, we can't... see the problem with interpreting judgements between one paragraph and another paragraph is that we don't really have rules of interpretation like we have for statutes. We only have ratio and obiter. And here the conclusion itself says, please rely on our reasoning in the earlier part to understand this conclusion. See, but manifest errors, there are two points, Prasanth. I think the manifest error needs to be understood in terms of the limited power in Section 34, in the first place, correct? I think so, I don't think the majority judgement empowers Section 34 courts or Section 37 courts to go beyond the text of Section 34 in terms of the grounds that are available for challenging the Arbitral award in the first place. So, even your limited power to modify which has been conferred by this judgement is within that narrow frame of setting aside the award in the first place. So, there are two points here. I don't think any scrutiny of the award on the basis of merits beyond the main grounds of challenge to an Arbitral Award in the first place will survive. So, you can't modify saying, okay, I notice and, I notice that you're not looked at one judgement, but you're only looked at another judgement. That, unless it is of a nature that it violates public policy and all those, limited grounds in Section 34. So, I don't think the use of the power to modify can go beyond the grounds in 34 in the first place. So, it's a very limited power to modify. So, I am not that worried about this larger scrutiny of the award on merits, because even in the current 34, when you are setting aside the award, you're not supposed to do it. It has to be something that is, using the word used by the judgement itself, it has to be something "manifestly egregious" to even use your power under 34 to set aside the award, it has to be something another phrase that is used, shocks the conscience or the court, shocks the public policy principles. It has to meet a very high standard. So, that high standard is not diluted just because you are exercising the power to modify. I think that's the first point we need to remember. But does that mean that an adventurous judge will not go beyond that? They will certainly do, which is why I think you have 37. So, hopefully both courts won't be adventurous in the same matter. But that's hope. We have seen adventurism in a number of matters, right? But hopefully the appeal process will take care of that as to whether the first 34 court has gone beyond the mandate of Section 34 which now includes, by interpretation, the power to modify. But by reading in the power to modify into setting aside the award, I don't think they are changing the grounds for setting aside, right? Therefore, the grounds for

modification is still very limited. Now that, of course, it's easier said than done. I mean, if you are a Section 34 court and until now you may have, in a Section 34 challenge, you may have heard both the Parties and said, yes, there may be something here, but is it so strong to set aside the award? Your conclusion may have been, no, but now you're saying, yeah, there may be this one point; can we modify that one point? And that is very tempting. I think Justice Chandrashekhar, I think he answered the question that Prasanth asked me in an indirect fashion. He's saying. Ultimately, they are doing justice. They have the power to do justice.. I'm going to interpret that statement as saying that obviously, they will. Obviously they will try to use that power. Now I think that's a challenge. So, how adventurous will be the Section 34 court in its using modification? And if you look at the conclusions of the majority opinion, where they set out what can be modified. Severance, I don't think is a problem because there is a power to sever, but subject to various other principles on severability. See, even a computational error, there can be two views about whether it's a computational error or not, right? It's unlikely to be 2 + 2 is being considered as 5. It is very likely that when, for example, damages is being, damages are being computed, the Parties may have argued something different. Both the Parties may have argued something different before the Arbitrator and the Arbitrator while computing the damages, he may have taken or favoured one view. Now, will the Section 34 court only look for arithmetic errors, or will it look for computational errors? Computational errors are very wide, in my view. That's a very slippery slope, right? You can go back, every line of damages that you award, every line of damages that you award in an Arbitral award has to be backed by reason. There is a reason for computing it in the fashion that you have computed. So, it's fine and good for the Supreme Court to say only "computational, typographical or clerical errors", but computational errors are not in the same category as clerical or typographical errors. So, in that context, what Prasanth is, what he's pointing or the difference between 49 and the conclusions is relevant. Now will a computational error be considered manifest? But then manifest according to what? And then, if it's a mere computational error, how the Section 34 judge looks at it, I think is challenging, right? It's not easy. And if he reopens the basis for computation in the garb of correcting a computational error, I think there's a challenge. If it's mere arithmetic errors, I don't think any of the Parties will complain, right? If it's really 2 + 2 has been seen as 5 or 3 or 3.5 or 4.5, either way, I don't think either Party will have a problem with that. Only when they go into the reasons for computation and start finding computational errors there, I think that is the slippery slope in my view with this judgement, in terms of 49 and 34. So it's not as simple, I'm not so worried about the difference between 49 and the conclusion they couldn't have said anything else because saying anything more than that, Prasanth, goes against the text of 34. And they've already done that by saying, by reading in modification into setting aside. But to say that, okay you can go into the marriage would have meant, okay, ignore the grounds of

setting aside for modification. That can't happen. That would have been too much. Then the judgement would *per se* be *per in curiam* be the text of Section 34.

PRASANTH. V. G: I think that's something to think about that, we'll come to that. Because I have a certain thought on one part of what you said, we'll come back to you on that. Neeti, do you have an institutional view? Why I ask is because you are the Registrar of MCIA. Now MCIA to my mind or for that matters the SIAC, LCIA; none of the administering bodies is just an administering platform. People approach the institution thinking that the institution by itself, by embracing the institution itself, certain element of justice is ensured, in terms of smoothness, timeline, etc, etc. So, people's confidence in the institution is, in other words, a part of exercise of Party autonomy. Therefore, have you, or MCIA and other institutions, have you all had any kind of an institutional view to this judgement? Any kind of an institutional response to this judgement? Do you see this judgement as interfering with not merely Party autonomy but also interfering with your institutional peculiarities itself and have you had a thought process around this as to whether there can be or there needs to be an institutional response to a judgement like this? Or are you completely averse to getting into it because it is inconsequential as far as the institution is concerned? Of course, as an arbitration professional, you may have a view, but what's the institutional take on it, if any?

NEETI SACHDEVA: You put me really in a spot here, Prasanth, because I always speak at a panel and say that I'm not giving an MCIA view, I'm giving my own view. And I don't think that MCIA or any institution would publicly take a stand on any judgement of a Supreme Court to say whether it's right, wrong or whatever. And does it impact? Let's talk about, let me dissect your question into two parts of it that would this judgement in any way interfere or we will have to modify, let me put it, the modification judgement, will the modification judgement will have to modify the rules of the institution? To that, the answer is very simple. "No", because see, an institution's role really starts from an appointment of an Arbitrator to making sure that you get your award in a most cost effective, efficient manner. Now, when that award has to be challenged in the court, whether it be modified, will it stand the scrutiny of the court or not, is not something which I would say, *per se* an institution looks into. Of course, we have to appoint the right Arbitrator, we make sure the process is efficient, procedural efficiencies are taken care of it, and not on a procedural ground you will have an award set aside. When it comes to merits, any institution, be it MCIA or any other we will not go into it. As I understand this judgement, I think there are two ways to look at it. One is where the courts are trying to say that we will cure an award for the purpose of efficiency. Whether it will create efficiency or not, I'm not on that. The reading of the judgement says seems to say that vis-a-vis the Party autonomy that if the Parties have decided to go to an Arbitrator and it is a conscious call to have an arbitration process, not in the court have an Arbitrator get an award, then why should

there be a second bite at the cherry and say, that now let the court look at the award. We don't want that, right. So, on a lighter note, let me say this Prasanth, MCIA has a provision of scrutiny of awards, and we are not the only institution to have it. LCIA doesn't have it. ICC has it. SIAC has it. I would say that the MCIA scrutiny of awards is a bit more lighter touch. So, when anybody would ask me before this judgement came in and say, what does it really mean that you scrutinise the award? I would say when a draft award is submitted to the MCIA as the head of the Secretariat, we will make sure that there are no computational errors; now, which I'm very careful of, not to say, clerical errors and things like this. And if the Arbitrator has failed to appreciate any or give a reason for any issue, then we tell the Arbitrator that you need to be giving your award on this. It's not on the merit.

JUSTICE (RETD.) A. V. CHANDRASHEKHAR: Think over.

NEETI SACHDEVA: Think over. I mean, this issue has not been dealt with or would you want to substantiate your decision on this particular issue and that's about it, right? You look at, and you leave it at there, I would say. So, I think now I can just use the language of the judgement on a lighter note and say this is what exactly what we do. So you come to an institutional arbitration, you will not have to go back to the court because you can tell the court institutions already looked into it. I'll give you a very small example in one of our cases, what happened and which may be relevant to think about as to what the court is trying to do here. We had a very detailed award, very well-reasoned award. At the end part of it, the operative part of it, the Arbitrator gave a quantum and said that Party XYZ is entitled to so and so money and an interest thereupon from the date of the award to the realization, which is fair enough. Everybody does it, right? One lawyer as in my team, with-in lawyer. They said maybe tell me Neeti, this whether this would be a Simple Interest or a Compound Interest. That's a valid question. We all know the ingenuity of our lawyers. We can make this argument, go into the court, take it to the court and say, this is not clear. This is not clarified. Please tell us what it is there. So, we wrote back to the Arbitrator and said that, would you like to just clarify that, whether you're giving it as a Simple Interest or a Compound Interest, and we got the decision back in a very quick modified or I would say corrected, whichever word one may want to put it and do it. Now, if this was a sort of a situation, I wonder, in the court, where you have an *ad hoc* arbitration, you have an award, you write back of course, our Arbitration Act also permits for a clarification correction and an additional award as well. So, when that provision is already there, and you will go back to the Tribunal and say that could you kindly pass an additional award or could you kindly clarify, then what really is the court going to correct on a clerical, computational or a typographical error really is the question one would wonder. I think this scrutiny would really be really of what an institution does and not something far beyond from that. But it does open a Pandora's box. We all saw what happened with ***Bhatia***, right? ***Bhatia***

was in the right instance of saying that you can't be remedy-less. So, I carve out an exception and give you a remedy. And it led us to what it led us to a can of worms being opened up. So we don't want a situation where India is making efforts to see it to be a pro-arbitration, and then you get your award stuck up in the court purely because the court wants to have a second look at it. But as an institution, I would say is not really affects us directly. Of course, it affects us in the sense of whether we want to be seen in a pro-arbitration jurisdiction.

PRASANTH. V. G: Thanks, Neeti, we'll come back to you. In fact, it's very interesting. I don't know how many of you really knew that there is a role post the award in terms of ensuring that it's in shape and order that the institution placed. That's a very important aspect. I think we need to debate about it. We need to look into why institutions are required to do that. And in that view, as Neeti said, what is then left for the court to modify is a question that we will need to further look into. Going on to Mr. Vinod Kumar. He's the Partner of J. Sagar, Chennai office, and does a large number of arbitrations. One of the issues that Justice Chandrashekhar dealt with and thereafter Mr. Harish Narasappa dealt with, is the power of the court under 37. Now the take that Justice Chandrashekhar had was that 37 and 34 almost exercised the same power. I thought Mr. Narasappa also took it one step ahead by saying 37 court has one more obligation, that is to look into whether 34 court has done the act correctly. Now, if that's the case, my understanding of this judgement is that 37 court now will be more burdened with whether 34 courts have exercised the power to modify correctly or not? Because if the power to modify is a limited power under the majority judgement, then it means that Arbitrator can still be approached. The moment it falls outside the limited circumscribed power of modification, and the court just sets this aside, Arbitrator can still be reapproached. So, we continue with a situation where we may have to go back to the Arbitrator because the power to modify is only a limited power. Therefore, if there is power to modify and the obligation or the right to go back to Arbitrator coexisting today, whether this power has been correctly and proportionately exercised and whether the modification has been correctly done, thereby not requiring the Parties to go back or not, can be a huge consideration before 37 court. This can change the timelines that 37 court will otherwise deal with. This can change the entire landscape. This becomes a huge appellate process, is what I would think. What are your takes on that?,

VINOD KUMAR: So, thanks, Prashant. So, even before this judgement, we have seen that. In fact, the judgement itself talks about cases where the 34 and 37 courts have modified and then the Supreme Court has affirmed it. So, it's not something new that they have done. Therefore, I would think that to that extent 37 court is already used to, may not be in all cases, but today, of course, because the Supreme Court has very explicitly said that you can modify, you will have more instances of modification which the 37 court will have to grapple with. But

my concern is a different one. According to me, what this judgement has done is it has helped people like Harish and me because we can argue more now, right? With the same limited grounds we can earlier we could say only set aside today I can say set aside please modify or at least send it back to the Arbitrator, right? Now, if the 34 court were to modify, let's say now the 37 ground will be you should not have modified. You should have sent it back. Earlier it would be only set it aside. Or if they say, send it back to the Tribunal, then they will say no, you shouldn't have sent it back, you should have set it aside. Now, if it is set aside, then they will say no, you could have sent it back. Therefore, 37 is going to be a further long drawn process. There is yet another interesting aspect in this judgement which I would think Neeti was talking about pandora's box. Now, what the judgement says is that the power under 34(4) of remanding can be exercised by the 37 court. Now, if you look at 34(4), what it says is the 34 court will keep the matter adjourned, keep with it pending, send it back for correction. Now the judgement also says when it is sent to the Tribunal, the Tribunal can modify. Now if you do it at a 37 stage and if I'm aggrieved by the modification, now what do you even call that? Is it an award for me to challenge? I think that's something serious. The 37 courts will really have to come up with answers to these questions.

PRASANTH. V. G: Yes, that's right. So, 37 sends it back, Arbitrator modifies it. You have another 34 on modification.

VINOD KUMAR: What they should have done is, if the 37 court feels that it has to be sent back, they should have said, we remand it to 34, for 34 court to do it. Now they have said that 37 court can do it. That's going to be problematic.

PRASANTH. V. G: That's a very interesting...

JUSTICE (RETD.) A. V. CHANDRASHEKHAR: Mr. Prashant.

PRASANTH. V. G: Sir?

JUSTICE (RETD.) A. V. CHANDRASHEKHAR: Just before you proceed further. Paragraph 49. You can exercise with regard to manifest errors. Last, it is said, such modification does not necessitate a merit-based evaluation. In the conclusion, those words have been left out. But the conclusion cannot be read in isolation of entire contents of paragraph 49. Now the question is, he has raised a very important issue, pertinent issue, manifest errors. What are those manifest errors, as is found in the power of review under Order 47 of CPC? Suppose, let us assume that an Arbitrator has rightly point out, he has seen list of judgements. He has considered six judgements and one judgement which is rightly applicable to the facts of the case and rightly pointed or passed by the Honourable Supreme Court. Now

if that is not taken into consideration, does it not become amount to manifest error? So, these words give rise for some modification of this decision at a later point of time, when Constitutional Courts interpret. Therefore, you must always find loss and flaws. Therefore, this judgement also will give rise to some modification at a later point of time. And it all depends upon how geniusly you expose those facts.

PRASANTH. V. G: Sir, let me ask you a related question on that you just mentioned about Constitutional courts revisiting this. Do you think that the way in which modification happens or does not happen, can lead to a lot of writ petitions now being filed? Because, of course, we are very clear that while writ is to be applied very limited, in a very limited way to arbitration, it's not completely excluded. Now this, will it result in a lot of matters going the writ way?

HARISH NARASAPPA: It depends on High Court to High Court. I think it's very clear there are some High Courts who are very liberal in entertaining writs. What the ultimate conclusion, they come to is a different issue, but they are very happy to excise writ jurisdiction. But I think 226 really, writ but from where? From the 34 court or from the Arbitral Award?

PRASANTH. V. G: 34 Court.

HARISH NARASAPPA: From the 34 court, yeah, certainly there will be some writs. I hope they don't go down that route because it's a rabbit hole, if you ask me. But there will be some courts. Just look at this entire DRT jurisprudence, right? Despite the Supreme Court having said many times, don't entertain, don't entertain day in and day out, you see many writ courts exercising jurisdiction, granting stays on procedures. So, there will be... at least lawyers will try. Whether how long it will be seen, I don't know, but I don't think substantially, I don't think there are grounds for writ jurisdiction to be exercised, but judges may excise nevertheless.

JUSTICE (RETD.) A. V. CHANDRASHEKHAR: Normally they would say, all right, no, this could be one of the grounds either in Section 37. Because they must say like that only. Otherwise, it will be opening a Pandora's box. Well, where do we go, the very objective of act will be defeated.

PRASANTH. V. G: Yes, that's right. Now I'm reminded that we just left with 15 minutes before we open it up to the audience. So very quickly, Harish I had a follow up question to you, and then we'll go on to Neeti and Mr. Vinod. Harish, my next question is any conference or any debate following any seminal judgement like this, I see a polarization between the arbitration community and the litigation community. And in fact, this polarization today is represented in the form of a minority judgement, majority judgement here. The arbitration community seems to side with the minority judgement. The litigation community thinks that

the judges can modify. After all, they have the inherent power. They are courts. Why not the judges? What is exclusive about arbitration? Last year we were told by the Government that the Government has lost confidence in arbitration. Do you see this judgement as the courts? In fact, we went to arbitration because of distrust in courts. Do you think that the wind is blowing the other side now and a judgement like this has come up because courts have started or public has started losing confidence in the arbitration and therefore courts will have to re-step in in to correct an award?

HARISH NARASAPPA: I think we can only ask the majority judges who wrote this judgement because none of the points that you mentioned are actually, that reasoning is not seen, right? And it was not argued also. See, what comes out of the majority judgement, at least to me in terms of its philosophy was listen, if you don't have the power to modify, whatever is very limited power to modify, it's going to result in a longer arbitration process because courts don't have an option but to send it back to arbitration, okay? Or even if they set it aside, that means Parties have to start all over again. That's the objective that comes out in the majority judgement, right? And it's stated many times. That's really the only objective. And then they say, okay, if you look at other jurisdictions, there are many jurisdictions where the power to modify exists. Therefore, we don't see this as a big thing. So, there seems to be what "practical and pragmatic" is the word the majority uses at different places in the majority judgement. So, that is the reason why they seem to have done it. Now, whether they have done it because the court doesn't have confidence in the arbitration system, I don't think that's the case. I don't think we can go that far. But to your question about whether this is split between litigating community and arbitrating committee, I don't think so. See, we haven't had a good run in the last year for the arbitration community right? I mean, it's not, I mean, forget about one judgement being set, one award being set aside for the Arbitral Tribunal not having exercise its mind. I think we had two instances, and this is by a foreign court. In the Singapore court, set aside two awards. And for what? For saying that the Arbitral Tribunal has only copied from some other thing, and it's a moment of shame. Right? So, we haven't covered ourselves with glory. I mean, I'm talking about the arbitration community now, right? But has that led to this judgement? I don't think so. I mean, the majority' view is very clear. From a practical perspective, they feel that setting aside the award will mean Parties have to start all over again, and therefore, let's give this limited power to the courts, okay? Is it well intentioned to enhance the arbitration process? Yes, it is well-intentioned to enhance the arbitration process. Is it opening a Pandora's box, or does it lead us down a slippery slope? I think it does, and for the reasons I explained earlier particularly in terms of computation error. The more important reason, I don't think the majority judgement is well reasoned enough, okay? And I think, because you made a different point. The arbitration community seems to prefer the

minority judgement. I feel the minority judgement is very well reasoned. Whether you agree with the conclusion is a separate point. In terms of standing the test of reason, the minority's judgement stands a test of reason, the majority judgement doesn't stand the test of reason, except to say that this is practical and pragmatic. Does it indicate a lack of confidence in arbitration? I don't think so, because I think the very judges who have written the majority opinion have been exhorting everybody to adopt the arbitration and make India an arbitration hub and all that. So, I don't think that's the case. I don't know what the Government's point of view is. I'm not aware of that. But the Solicitor General opposed it, right? I don't know whether he did it in his capacity as he represents the Government. Otherwise, I'm not sure, but he opposed it. He was against the power to modify. So, I don't think there's a split. I don't think there's a suspect or doubt about the arbitration process, because even now, the majority of Arbitrators in India are retired judges. So, I don't think there's a doubt about that. Did they see it as an additional check? I don't think they see it as an additional check also. That's why we should not forget that they've not gone beyond the grounds of challenge to Section 34. That they have not modified, that they have not tinkered with. So, we will, I suppose we have to wait and see, and hopefully we will get a reconsideration by a seven judge bench.

PRASANTH. V. G: So, that wait and see versus concluding statement. I think I have only time for one more question before we open it up to the audience? I'll ask. We know the last question, Harish said wait and see. The beauty of law is sometimes you wait and see if it's something which is not really perfect. You still get a lot of answers because law being a work in progress itself sometimes results in a lot of beauty. And therefore, my question to Vinod is this should we immediately have a statutory amendment clarifying one way or the other modification power should be there or not there can be clarified by the statute. That's one view that people have had, that should be a statutory amendment to clarify one way or the other. Because majority says it is not there, therefore there's no prohibition. Minority says it is not there, therefore it is not permitted. So, that being the case, whether it should be there or should not be there can be clarified by statute. Should we have a statutory amendment, or do we keep the law as work in progress for some more time, for the beauty to evolve? With this we'll open it up to the audience

VINOD KUMAR: Before I answer that question, just the previous question what Harish was answering, you see, we often not on topics on arbitration, but generally when we talk about what is the peril that we face in the judiciary? We talk about the population ratio, the judge-population ratio. Now, how many of us can confidently say that we have good Arbitrators who can handle commercial matters, with due respect to all Arbitrators? I mean there is complete disproportionality there in terms of the number of agreements that have arbitration clauses and good Arbitrators. Now, ultimately, if you have a good award, you don't need modification.

That's the bottom line. Now, the Supreme Court, like Harish says, doesn't say all these things. They say, complete justice, pragmatism. But I think that is the real truth. We need to have a large pool of good arbitrators. Institutions like MCIA, that's where I think they come in. Yeah, that was the point on the earlier question. Now coming to the question that you asked me. I mean of course, the Expert Committee had recommended that that is not even there in the Bill. Now that we have this judgement. We don't know what the Government is up to, whether there's going to be an amendment or not, but I would think. Okay, let it play the field. Let us see what are the issues that we will face and therefore, an amendment, after seeing how it is going to pan out. I think that would be ideal, but it shouldn't be something which we wait forever. It should happen maybe, what, a year, two years, maybe. That would be ideal.

NEETI SACHDEVA: How many of such applications are being filed and being sort of entertained by the court as well, right? I mean, there may be one judgement we're talking about. It's good to have as such judgements because then we can have discussions in the conference, but we may not really see much impact in the practical side of it. And that is what will, I think, probably determine as to whether we'll have a legislation coming in clarifying or another seven judge bench clarifying what they have to say.

HARISH NARASAPPA: Just to add Prasanth. I'll take one more minute. So I was arguing a Section 34 about six, seven months ago and one of the grounds, we were defending the award. One of the grounds that the Petitioner had taken was that the award did not interpret a regulation in the... it was matter concerning electricity, so it not interpret one regulation correctly, okay? And that was one of the grounds of challenge. There were many other grounds, and they asked for setting aside with the award. And this issue of modification came up and we of course, this before ***Gayatri Balasamy***. So, we said there's no power to modify. The judge actually found on that interpretation question. He found that the Arbitral Tribunal had not interpreted it correctly but he said all the other things are fine. And since I can't set aside, I can't modify, I don't interfere with the award. Now that is the danger, right? So, he can't sit on appeal but he has a different view on how a regulation has to be interpreted. Now, I think it is in these cases where there's an interplay of regulation or even case law as Justice Chandrashekhar mentioned. If the Section 34 judge thinks that, I would have decided it differently. Now, what does he do? He could say it earlier and still say, I don't set aside the award because there's nothing to set aside. But now he's forced to think about whether he can modify. And that's the danger. The danger is now you are opening the door for the Section 34 court as Justice Chandrashekhar said earlier. They have to consider whether there is something to be modified. They have to deal with his judgement in every Section 34. Okay, that's the point.

NEETI SACHDEVA: Harish, do you think that that's also going to lead to, if you have to enforce an award internationally because one thought, which was there was this, that if an Arbitrator has given an award, that's an award of the Arbitral Tribunal. And then if the judge was to modify it and at the New York Convention, the new modified award would still stand the scrutiny of being called an award and can then a Party challenge an international court and said, but this is not what your award is given. So, you cannot enforce it. I think that's going to be a bigger challenge. And India would face internationally in an international commercial arbitration if our judges decide to modify an award.

JUSTICE (RETD.) A. V. CHANDRASHEKHAR: That angle, I think there are a lot of things which can be definitely dealt with by way of decisions, and then there may be scope for some modification of the judgement also.

VINOD KUMAR: You have improved the judgement.

PRASANTH. V. G: I think we'll open it up to the audience.

HARISH NARASAPPA: I think we can.

PRASANTH. V. G: I don't know which time we have. Neeti, how much time will we have for the audience?

NEETI SACHDEVA: We should finish in five minutes.

PRASANTH. V. G: In five minutes. So, we'll take some rapid questions.

AUDIENCE: I am practicing Advocate from Hon'ble High Court of Telangana. Hi to the very distinguished team. Sir, I feel it this way. A thing that cannot be done directly. It can be done indirectly is what principle most of the advocates practice before various forums. Now that this whole lot of debate has taken place on Section 34 and 37. The very essence of arbitration is an appeal cannot be allowed. However, it can be challenged. Is it not that the Parties are trying to do the same thing in the guise of challenging the award? There are many things where even the Judiciary under 226 shouldn't have entertained such cases, but however, that again gets entertained in the mask of a challenging the award, in the mask of many other things. Isn't it a form of one other kind of appeal?

PRASANTH. V. G: I have an answer to it. I'm sorry. I'm sure the question is to the panel, not to the moderator. But I have one answer to it. I'll tell you one answer. This is my thought process. My thought process is if there are two ways to look at it. Like Harish said, a judge

thought that he would have decided it in another way. If there are two ways to look at it, and the Tribunal has looked at it in one of those ways, even if the 34 court thinks that I would have decided it in another way, he can't interfere. But if there is only one way to interfere and the Tribunal has taken another route, that's a perverse order, and that can be interfered with. That's my understanding of scope of 34.

AUDIENCE: Not to debate, sir. The intention is not to debate, but further, with the permission of the panel. A perverse order on the face of it can be understood, but a thin line of difference which, in the guise of challenging the award, only to appeal it, even that can be understood. In the very same discussion that the panel had, there was certain challenge which the Senior Counsel, Narasappagaru has said that's in the form of challenging it's no less to an appeal. In an analogous case, if it is a 138 NIA case, there is a timeline set that this case should have been closed within so and so timeline. Likewise, the very essence of this arbitration is the time. It cannot be perpetuated as a litigation. Even the arbitration awards, in the guise of 37, only under the mask of challenging it, under the mask of correcting something, or whatever it be, aren't the Parties, aren't the advocates encouraging the appeals?

HARISH NARASAPPA: No, absolutely, I agree with you 200%. I agree with you 200%, absolutely. See, this is the nature of dispute resolution in our country. And that's the wider problem, right? Let's not expand it, but just look at arbitration. Look at the claims made or the counterclaims made, right? It is preposterous. And we have responsibility as lawyers to tell the Clients, don't unnecessarily make, just to look good before the Arbitrator. If you have a claim of 60 crores, the counterclaim will be 1500 crores. And then when the Arbitrator rightly refuses it, that becomes a ground of challenge. See, my 1500 crore claim was rejected; so, there is bias. So I agree lawyers have to be more responsible, so I think but it's not just lawyers. I won't blame just lawyers, but are people viewing 34 and 37 as an appeal? They are, but it's up to the courts to enforce the law. So, lawyers will always try another chance, right? What's wrong with it. That's what they'll think. But we have a responsibility to the arbitration community and the arbitration process as well. And any option open to a lawyer for his or her Client, they will change it, as a last resort. So, even when the award is very strong, there'll still challenge in 34 because we know it will buy you at least two years' time. That's the problem. Those are the problems we need to fix. That is a different point.

AUDIENCE: Thank you, sir.

JUSTICE (RETD.) A. V. CHANDRASHEKHAR: I have one request to all of you, a sort of caution also, while trying cases, please go to paragraph 87(i). So, while preparing your pleadings, be distinct about your claims. Normally what Arbitrators, as former judges, would

do is, issues 1 to 5 are interrelated, and hence they are taken up together for common discussion. While arguing, you must say sir, while framing issues also, you must say there must be distinct issues. You will also argue. Sir, on no account this can be clubbed with others, if it is interpreted. This you will have to keep in mind and bring to the notice of the judges this particular paragraph. Otherwise, it will be very difficult. Then when it goes to Section 34, whether it is severable or not. So please keep this sermon.

Therefore, trial is most important in arbitration. Most of you have forgotten is trial, how to conduct a trial. I'm very sorry to say when confronting a document, you have written an email, would you accept this? No, this is not the way. Go to Section 145 of the Evidence Act, please say you are a son of so and so. You are working so and so. Because that document will conduct. So you had an opportunity to your email is this. You also know this person. So you had sent. You are in the habit of sending an email through your... Then you confront the document. Otherwise, if he says no, how do you get that document? You'll have to go to your evidence only. If that evidence is already concluded, how do you do all these things? These things be a *pakka* civil lawyer for becoming good arbitration lawyer. There is no subtitle. I hope Mr. Harish Narasappa would definitely.

HARISH NARASAPPA: I agree with you also to forget some of the CPC before you come to arbitration. Do that. I mean, I'm with Justice Chandrashekhar 100%. You need to know how to draft claims, for example. That you 'll only know if you draft if you drafted a claim. But you also need to unlearn a little bit of CPC before you come. Sir, for every small thing, they'll file one application. There's no need.

VINOD KUMAR: Harish, so I think the problem with most of the younger lawyers is that because the act says CPC and Evidence Act not applicable. They think that you don't have to look into it. The fundamentals are still applicable.

JUSTICE (RETD.) A. V. CHANDRASHEKHAR: No, the Legislators have formulated Section 19 of Arbitration and Conciliation Act in such a way they are they have not said that the provisions of CPC and Evidence Act are not applicable to the Arbitral Tribunal. That's it. The Arbitral Tribunal is not bound by it, therefore, go to the decision of ***Srei Engineering*** versus took 2018, 11 and you will have to see. There is the fulcrum of the whole arbitration is virtually dependent upon this. You have to Section 114(g) of the Evidence Act. If a very important document is withheld from the purview of the Tribunal, it is as good as you can draw an inference. If a witness who ought to be examined has not been examined, then an adverse inference under Section 140. You will have to...

HARISH NARASAPPA: What you are saying is absolutely right. So it becomes even more relevant now, particularly the paragraph on severance and how different claims are done and the modification power. I think it becomes even more important to ensure that your claim statement is drafted properly. The issues are drafted properly under Arbitrator deals with it in a fashion that makes sure that he or she does not. The award does not fall foul off this test in some fashion. So, I think it's important, I think, to be more and more careful about how the written submissions are made.

PRASANTH. V. G: I think we'll close with that. When they were saying that, I just recollected about an old joke. They say that in India, if somebody sues somebody else by saying, your dog bit me, the argument is I don't have a dog. Assuming I have a dog, it doesn't bite anybody. Assuming it bites everybody, it has not bitten you. Assuming it has bitten you, you have not suffered the injury. Assuming you have suffered the injury, you've not gone to hospital. Assuming you have gone to the hospital, you've not incurred this expense. So, that's the kind of adversarial litigation that we have, and I think in the arbitration, particularly on what evidence we need to lead, in fact, we are just thinking of formulating this with Justice Chandrashekhar's help as to what should be gleamed out of the Evidence Act and introduced as a training for the arbitration lawyers, not the entirety of the Evidence Act, but what should be taken out of it and made relevant and how trainings can be organized in the city of Bangalore. We are trying to sit with Justice Chandrashekhar and get some ideas around it. Otherwise in our adversarial system, everything is denied and mindlessly, and that's our traditional litigation. So, thank you so much. I don't know if there is a formal vote of thanks, but thank you so much for joining in. And I hope this discussion has thrown some light into the complexities that every judgement brings with it, and I think that's the beauty of law in its evolution. And I'm sure there is more to come. Thank you so much.

~~~END OF SESSION 3~~~