

RECONCILING FINALITY AND CORRECTION: THE JUDICIAL POWER TO MODIFY ARBITRAL AWARDS AFTER GAYATRI BALASAMY AND THE ENFORCEABILITY OF ‘COURT-MODIFIED’ AWARDS UNDER THE NEW YORK CONVENTION

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Introduction

Few questions in Indian arbitration law have proved as stubborn as the one the Constitution Bench resolved in *Gayatri Balasamy v ISG Novasoft Technologies Ltd* [**“Balasamy”**], i.e., whether a court hearing a challenge under Section 34 of the Arbitration and Conciliation Act 1996 [**“1996 Act”**] may modify an arbitral award, or whether its remedial choices are exhausted by annulment, affirmation and remission.¹ Section 34 of the 1996 Act, is, by design, a provision of restraint. It permits recourse to a court ‘only by an application for setting aside’ of the award, confining the grounds of challenge to an exhaustive list, and is reinforced by Section 5 of the 1996 Act, which forbids judicial intervention save except where Part I expressly allows it.² On a plain reading, the Section contemplates no power of modification. However, for two decades, the courts have been divided, with one line, anchored in *Project Director, NHAI v M Hakeem*, insisting that the deliberate omission of the 1940 Act’s modification power forecloses any such reading,³ and another quietly varying awards, chiefly as to interest and quantum, to avoid the injustice of an all-or-nothing remedy.⁴

In *Balasamy*, a five-judge Bench led by Khanna CJI brought the divergence to a head, holding by four to one that a limited power of modification subsists, to which Viswanathan J. dissented.⁵ The

¹ *Gayatri Balasamy v ISG Novasoft Technologies Ltd* 2025 INSC 605 (*“Balasamy”*).

² Arbitration and Conciliation Act 1996, ss 34, 5 (*“1996 Act”*).

³ Arbitration Act 1940, ss 15–16 (*“1940 Act”*); *Project Director, NHAI v M Hakeem* (2021) 9 SCC 1 (*“Hakeem”*).

⁴ *Larsen Air Conditioning and Refrigeration Co v Union of India* (2023) 15 SCC 472; *SV Samudram v State of Karnataka* (2024) 3 SCC 623.

⁵ *Balasamy* (n 1).

decision matters less for its result than for its method, which is the willingness to read a remedial power into a statute that, on its face and by legislative history, omits it. It concerns the enforceability of Indian awards in foreign jurisdictions under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards [**“New York Convention”**], and with it, the credibility of India as a seat.⁶ This article maps what the majority decided and where its test is unstable, before developing its principal and original claim: that a court-modified, India-seated award is vulnerable, at the point of export, to being treated abroad as a national judgment rather than an arbitral award - a gap India can close only by statute.

The decision: a limited power located in Section 34

The majority did not hold that Section 34 of the 1996 Act confers a general power to modify; it held that a limited power subsists in four situations - severance of a separable invalid portion, correction of clerical, computational or typographical errors, adjustment of post-award interest in defined circumstances, and, exceptionally, the exercise of Article 142 of the Constitution.⁷ From the proviso to Section 34(2)(a)(iv) of the 1996 Act, which allows partial setting aside of separable matters lying beyond the reference, the majority inferred a broader inherent power of severance. It invoked the maxim *omne majus continet in se minus* to fold the smaller power to modify into the greater power to annul; and it drew on Mustill and Boyd for the proposition that a court may vary an award where the variation ‘follows inevitably’ from the tribunal’s own legal conclusion, tying correction to legal logic rather than merits reconsideration, and analogising it to the slip-rule jurisdiction under Section 152 of the Code of Civil Procedure 1908 [**“CPC”**].⁸

Viswanathan J. accepted the severance and the correction of the patent error, but parted company on the modification. To modify, he held, is to ‘change, vary or qualify’ an award, whereas to sever is merely to ‘separate’ its parts. Absent express authority, a court cannot do the former, for that is ‘tantamount to exercising the power of merits review’, the very function the parties contracted out of when they chose arbitration.⁹ The hardship said to justify the power, that its denial forces parties into fresh arbitration, proves too much, for Section 43(4) of the 1996 Act excludes the time spent

⁶ UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended 2006) art 34; Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 (‘New York Convention’).

⁷ Manu Tiwari, ‘The Balasamy Judgment: The Fading Principle of Finality in Arbitration?’ (*IBA Litigation Committee*, 29 October 2025) <<https://www.ibanet.org/balasamy-judgment-fading-principle-of-finality-in-arbitration>> accessed 6 June 2026.

⁸ Code of Civil Procedure 1908, s 152.

⁹ 1996 Act (n 2) s 34(2)(a)(iv), proviso; Sir Michael J Mustill and Stewart C Boyd, *Commercial Arbitration* (2nd edn, Butterworths 1989) 617; Code of Civil Procedure 1908, s 152 (‘CPC’).

in set-aside proceedings from limitation precisely because the legislature foresaw and accepted that re-arbitration may follow annulment.¹⁰

Slippage: severance as modification, and the limits of Article 142

The instability of the majority's position becomes apparent once four operations that tend to run together are kept apart. To set aside is to annul, in whole or in separable part; to remit under Section 34(4) of the 1996 Act is to return the matter to the tribunal; to sever is to excise a self-contained offending portion; to modify is to alter what the tribunal decided. The first three are consistent with a supervisory jurisdiction, but the fourth is not. The characterisation, it should be noted, runs the other way. The majority does not treat severance as a species of modification, but derives the narrower power to modify from the broader power to set aside. Invoking *omne majus continet in se minus* (*the greater contains the lesser*), it reasons that the authority to annul an award in part necessarily carries the authority to vary it, and that the practical effect of a partial setting aside is itself a modification. The difficulty lies not in that derivation but in the width the majority then gives to severance, for its inquiry ceases to be the excision of a self-contained portion on the face of the award and becomes an assessment of how the award was built. In doing so, it slips from the disciplined Mustill and Boyd standard, which variation only where it 'follows inevitably' from a legal conclusion, to an open-textured 'structural interdependence' test that asks whether the valid and invalid portions are 'intrinsically intertwined'.¹¹ The first looks to the face of the award; the second invites the Court into the evidentiary and reasoning matrix - whether quantum was assessed as a package, whether one head of claim shaped another.

The danger is that severance, a subtractive tool, turns into a reconstructive one. Seeking to reduce a tribunal award through severance compels the court to examine how the damages were calculated and whether the claims were interdependent, an exercise functionally indistinguishable from a merits review.¹² The test in the Delhi High Court, adopted by the dissent and lacking in the majority's formula, supplies the discipline that severance is available only where the offending part is based on different facts and obligations and its removal does not have a cascading effect on the

¹⁰ *Balasamy* (n 1).

¹¹ *ibid* (Viswanathan J); 1996 Act (n 2) s 43(4).

¹² Devanshu Sajlan, 'Severability and Slippage: Rethinking Judicial Modification in *Gayatri Balasamy*' (American Review of International Arbitration Blog, 5 February 2026) <<https://aria.law.columbia.edu/severability-and-slippage-rethinking-judicial-modification-in-gayatri-balasamy/>> accessed 6 June 2026.

rest.¹³ Severability is not new; Indian courts had long applied it to partial setting aside, but its extension from setting aside to modification is.¹⁴

The most constitutionally troubled part of the judgment is the resort to Article 142 of the Constitution.¹⁵ The line of decisions from *Prem Chand Garg*¹⁶ to *Supreme Court Bar Association v Union of India*¹⁷ consistently holds that it may supplement, but cannot supplant, substantive law, and cannot do that which a statute forbids, whether expressly or by necessary implication. *Shilpa Sailesh v Varun Sreenivasan*¹⁸ reiterated that it must be exercised in consonance with the policy of the applicable regime. If the 1996 Act read with Section 5 and the lack of a power of modification reflects a policy against curial variation, it is difficult to see how Article 142 of the Constitution can do precisely what the 1996 Act prohibits, especially when the power resides solely with the Supreme Court, creating an asymmetry with every other Section 34 forum and a standing incentive to litigate upwards in the hope of a discretionary adjustment.¹⁹

The export problem: a court-modified award abroad

The most consequential dimension of *Balasamy* is one that the majority did not address, which is the enforceability abroad of an award an Indian court has been modified. India operates a dual enforcement regime, where India-seated awards fall under Part I, which houses Section 34, while foreign awards are recognised under Part II, which gives effect to the New York Convention. Under the territoriality principle in *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc*, a foreign award cannot be challenged under Section 34 at all.²⁰ The modification power, therefore, does not disturb the enforcement of foreign awards within India, which continues under the narrow, pro-enforcement grounds of Sections 48 to 49 of the 1996 Act. The difficulty lies in the mirror image: the enforcement abroad of an India-seated award that a Section 34 court has varied. Article V(1)(e) of the New York Convention, and Section 48(1)(e) which mirrors it domestically, were drafted on a binary assumption that a seat court will either leave an award standing or set it

¹³ *NHAI v Trichy Thanjavur Expressway Ltd* 2023 SCC OnLine Del 5183; *Balasamy* (n 1) (Viswanathan J).

¹⁴ *RS Jivani v Itron International Ltd* 2009 SCC OnLine Bom 2021.; *JG Engineers (P) Ltd v Union of India* (2011) 5 SCC 758.

¹⁵ Constitution of India 1950, art 142(1).

¹⁶ *Prem Chand Garg v Excise Commr* AIR 1963 SC 996.

¹⁷ *Supreme Court Bar Association v Union of India* (1998) 4 SCC 409 [47]–[48].

¹⁸ *Shilpa Sailesh v Varun Sreenivasan* 2023 SCC OnLine SC 544; *Balasamy* (n 1) (Viswanathan J).

¹⁹ K Agarwal and T Dubey, ‘Arbitration’s USP at Stake? Supreme Court Settles the Debate Over Judicial Modification of Awards in India’ (*Kluwer Arbitration Blog*, 25 July 2025) <<https://legalblogs.wolterskluwer.com/arbitration-blog/arbitrations-usp-at-stake-supreme-court-settles-the-debate-over-judicial-modification-of-awards-in-india/>> accessed 6 June 2026.

²⁰ *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc* (2012) 9 SCC 552 (*BALCO*); 1996 Act (n 2) Pt II, ss 44–52.

aside. They do not contemplate a *tertium quid*: an award neither left intact nor annulled, but altered. When such a hybrid is tendered abroad, the award-debtor has a respectable objection that what is presented is not the tribunal's award but the court's judgment. The New York Convention governs the recognition of awards, not of foreign judgments.²¹ To this, the award-creditor, and the majority, have a ready answer that the doctrine of merger, on which the court's variation is read into the award so that a single, enforceable instrument survives. This objection is qualified, though not defeated, by Article VII of the New York Convention – the 'more favourable right' provision, which preserves any right an award holder may have to rely on the enforcement law of the country where recognition is sought. A foreign court could therefore, in principle, enforce a court-modified award under its own domestic law even where the New York Convention route is doubtful, but that avenue turns on the law of the enforcing forum, varies from state to state, and offers no assured or uniform solution.

This is the concern Viswanathan J. found convincing. Enforcement abroad will run into complications because objections will be taken that what is sought to be enforced is the judgment of the court, not the award. Enforcement of foreign judgments and enforcement of foreign awards are distinct legal concepts.²² Foreign awards travel on the New York Convention's near-automatic track across more than 170 Contracting States, whereas foreign judgments depend on the patchwork of reciprocity and comity, which in India, under Section 44A and Order XXI of the CPC, is confined to notified reciprocating territories.²³ Two points of precision are owed here. First, although Viswanathan J. was persuaded that enforcement abroad would run into complications, he did not decide the doctrine of merger. Having concluded that Section 34 confers no power to modify at all, he recorded the argument that merger has no application to an order of a Section 34 court, pressed on the strength of the holding in *Kunhayammed v State of Kerala*²⁴ [**'Kunhayammed'**], that the doctrine is not of universal or unlimited application. However, he expressly found it unnecessary to rule upon it. Secondly, the majority reached the opposite conclusion, and ruled that the contention that a court-modified award would be unenforceable under the New York Convention is misconceived, holding that the varied award is read as 'modified by the judgment/order' into a single instrument, and that recognising a limited power of modification leaves the enforcement of awards abroad unaffected. The dissent thus supplies no

²¹ New York Convention (n 5) art V(1)(e); 1996 Act (n 2) s 48(1)(e).

²² *Balasamy* (n 1).

²³ CPC (n 8) s 44A, O XXI rr 22–23.

²⁴ *Kunhayammed v State of Kerala* (2000) 6 SCC 359 [44].

reasoning on merger to be borrowed; the objection developed here must therefore meet the majority's holding on its own terms, which the following paragraph attempts.

The doctrine of merger does not rescue the modified award; it restates the problem, for it concedes that the operative instrument is the court's order. The basis for that concession lies in the internal logic of merger itself. If the doctrine operates, the arbitral award does not stand alongside the Section 34 court's order; it merges into that order, which then becomes the sole operative instrument, much as a decree of a superior court subsumes the decision under appeal. What is then available to be carried abroad is, on the doctrine's own terms, the court's order and the New York Convention provides for the recognition and enforcement of arbitral awards, not of the judgments or orders of national courts. The majority's contrary assurance, that the varied award is simply read as modified and remains an award, is a proposition of Indian law about how an Indian instrument is to be characterised. It may bind courts within the Indian hierarchy, but it cannot bind an enforcing court abroad, which will apply its own law and Article V of the New York Convention and decide for itself whether what is tendered is the tribunal's award or the variation of a national court. Nor is merger the automatic solvent that the argument assumes. As was pressed before the Court, and as *Kunhayammed* confirms, the doctrine is not of universal or unlimited application, and it is at its weakest where the reviewing forum's jurisdiction is not co-extensive with that of the body under review, as a Section 34 court's supervisory jurisdiction is not co-extensive with the arbitral tribunal's adjudicatory mandate.²⁵ Where the modification is mere severance, the surviving residue is genuinely the tribunal's award and the objection is weak, but for variations of quantum or interest, which are the very modifications the majority sanctioned, the instrument carried abroad is materially the court's product, and the risk the dissent identified is real and unresolved.

The fix India lacks: a statutory deeming provision

The jurisdictions that confer an express power to vary an award have not left this consequence to chance. They pair the power with a deeming provision that re-clothes the varied instrument as the tribunal's award. The paradigm is Section 71(2) of the English Arbitration Act 1996, under which a variation has effect as part of the tribunal's award; New Zealand and Kenya also have clauses that are functionally identical.²⁶ The 1996 Act contains no such provision. The majority recognised a power of modification without enacting, because a court cannot enact a mechanism that would

²⁵ *Kunhayammed v State of Kerala* (2000) 6 SCC 359 [44]; *Balasamy* (n 1) (Viswanathan J).

²⁶ Arbitration Act 1996 (UK), s 71(2); Arbitration Act 1996 (New Zealand), sch 2, cl 5(7); Arbitration Act 1995 (Kenya), s 39(5).

make the power workable transnationally, which is precisely why the dissent thought the matter best left to Parliament.²⁷

A comparative survey also punctures the rhetoric that *Balasamy* merely aligns India with arbitration-friendly jurisdictions. England permits a court to confirm, vary, set aside or remit, but only on the tightly defined grounds of want of jurisdiction, serious irregularity or a point of law, and couples any variation with the Section 71(2) deeming clause.²⁸ The United States is stricter still. The Federal Arbitration Act permits confirmation, vacatur on enumerated grounds and correction of clerical or computational error only, and *Hall Street Associates v Mattel* holds those grounds exclusive and incapable of contractual expansion.²⁹ Singapore, whose law tracks the Model Law, confines curial intervention to setting aside and has repeatedly disclaimed any appellate or merits-review function.³⁰

The jurisdictions India aspires to emulate either deny a modification power or confer it by statute with an enforcement-preserving clause. *Balasamy* does neither - it creates the power judicially and omits the safeguard. The anomaly is sharpened by India's own foreign-award jurisprudence, from *Renusagar* to *Vijay Karia*, which has been studiously pro-enforcement and minimalist.³¹ An interventionist turn at the seat, unaccompanied by the architecture that keeps a varied award enforceable abroad, sits awkwardly with that record.

Recommendations and the way forward

The deficiencies are of legislative architecture rather than of judicial good faith, and the moment is opportune: the Expert Committee chaired by Dr. T K Viswanathan has recommended a recalibration of the framework, and a draft amendment bill is under consideration.³² The Committee's relevance to the present argument is direct rather than incidental. It did not leave modification untouched but recommended that the courts be conferred an express power to set aside or vary an award, framed broadly by reference to the ends of justice, and the draft bill carries that proposal forward. That the reform vehicle already contemplates a power of variation is

²⁷ *Balasamy* (n 1).

²⁸ Arbitration Act 1996 (UK) (n 22) ss 67–69, 71(2).

²⁹ Federal Arbitration Act, 9 USC ss 9–11; *Hall Street Associates LLC v Mattel Inc* 552 US 576 (2008).

³⁰ International Arbitration Act 1994 (Singapore), s 24, First Schedule (Model Law) art 34; *AKN v ALC* [2015] SGCA 18 [37]–[39].

³¹ *Renusagar Power Co Ltd v General Electric Co* 1994 Supp (1) SCC 644; *Vijay Karia v Prysmian Cavi E Sistemi SRL* (2020) 11 SCC 1.

³² Expert Committee to Examine the Working of the Arbitration Law (T K Viswanathan, Chair), *Report* (Ministry of Law and Justice 2024); Draft Arbitration and Conciliation (Amendment) Bill 2024.

precisely why the drafting choices urged here matter. An open, ends-of-justice formulation would reproduce at the statutory level, the very indeterminacy that afflicts the judgment, and the opportunity would indeed be missed were the power conferred without confining it and without the enforcement, preserving clause discussed below. Parliament should decide expressly whether a power of modification is to exist, and if it is conferred, tie it to a closed and narrow list, namely severance of separable invalid portions, and correction of patent computational or clerical error, with nothing that requires reconsidering the tribunal's reasoning. The fact that the 1940 Act conferred such a power, and that the 76th Law Commission Report did not recommend its retention, should be confronted squarely rather than circumvented by implication.³³

Any statutory power of variation must carry a deeming provision modelled on Section 71(2) of the English Act, without which the export gap will persist, and India-seated awards will bear a latent defect at the point of foreign enforcement.³⁴ The severability inquiry should be anchored to a disciplined, face-of-the-award test rather than an open-ended structural one. Moreover, the use of Article 142 to modify awards should be expressly disclaimed, or at least confined to genuine residual injustice the statutory grounds cannot reach. Where modification is unwarranted, the existing safety valves such as correction under Section 33 and remission under Section 34(4), now exercisable on an oral request and, where appropriate, *suo motu*, cure defects without compromising the award's arbitral character or its New York Convention enforceability.³⁵

Conclusion

Gayatri Balasamy is a landmark for what it settles and a cautionary tale for how it settles it. The majority's instinct that an all-or-nothing remedy can work real injustice, and that forcing parties into re-arbitration to cure a separable defect or a patent error is wasteful, is sound and humane. The execution is another matter. Section 34 nowhere grants a power to modify awards. The omission was deliberate, yet the Court has read one into the statute anyway, without settling on a single test for when it applies. Sometimes, the inquiry turns on legal error, sometimes on a vaguer question of whether the disputed portion is too interdependent with the rest of the award to be severed. Article 142 is then brought in as a backstop, with little said about its limits. Flexibility has been gained, but at a real cost to the predictability that arbitration exists to provide. A modification carried out at the seat, without a statutory clause deeming it equivalent to what the arbitrators themselves produced, risks more than mere doctrinal untidiness. It can turn a portable, New York

³³ Law Commission of India, *The Arbitration Act 1940* (Law Com No 76, 1978).

³⁴ Arbitration Act 1996 (UK) (n 22) s 71(2).

³⁵ 1996 Act (n 2) ss 33, 34(4).

Convention-backed award into something closer to a domestic judgment, and a domestic judgment does not travel the way an arbitral award does. Until that is done, the reconciliation of finality and correction will remain a work in progress rather than an accomplished fact.