



SUPREME COURT: CAN THE COURT MODIFY AN AWARD IN AN APPLICATION UNDER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996?

*The Project Director, National Highways No 45 E and 220, National Highway Authority of India v. M. Hakeem & Anr*¹

Recently, the Supreme Court considered whether the power of a court under Section 34 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) to set aside an award includes the power to modify such an award.

BACKGROUND AND FACTS

In 2009, under the aegis of National Highways Act, 1956 (**National Highways Act**) various notifications (**Notifications**) were issued by the central government to facilitate speedy land acquisition for construction of national highways. The National Highways Act and the Notifications *inter alia* provided that - (i) the compensation payable to the landowner for the acquired land would be computed by the 'competent authority'; (ii) if the amount determined by the competent authority was not acceptable to either the National Highways Authority of India (**NHAI**) or the landowner, upon an application by either party, the compensation would be determined by an arbitrator appointed by the Central Government; and (iii) subject to the provisions of the National Highways Act, the provisions of the Arbitration Act would apply to such arbitrations.

The appeals before the Supreme Court have similar circumstances i.e. the appeals arise from an award passed by the competent authority, namely, the Special District Revenue Officer, under the National Highways Act. In the subject appeals, the awards were made based on the "guideline value" of the concerned lands instead of being made based on sale deeds of similar lands². As a result, the compensation payable to the landowner was considerably lower than the sale value of similar lands.

¹ Civil Appeal No. 002756 of 2021, arising out of SLP (Civil) No 13020 of 2020

² The Division Bench of the Madras High Court in *The Project Director, National Highways No. 45E & 220 v. M. Vijayalakshmi & Anr.*, .M.A. (MD) Nos.560 of 2018 and 225 of 2019 etc., batch observed that "....the Basic Valuation Register prepared and maintained for the purpose of collecting stamp duty has no statutory base or force and it cannot be a basis to determine the market value under Section 23 of the 1894 Act. It was further held

The awarded amount was enhanced by the District and Sessions Judge (**Ld. Single Judge**) in an application filed under section 34 of the Act to challenge the award rendered by the competent authority³. Thus, the award was modified. In the appeal filed before the division bench, the modification of the award was upheld. Aggrieved by the order of the division bench of the Madras High Court, a special leave petition was filed before the Supreme Court.

FINDINGS

No challenge on the merits of an award

- The Supreme Court observed that the ‘competent authority’ under the National Highways Act is a person/authority appointed by the Central Government and in the event of a dispute, the arbitrator is appointed by the acquiring authority i.e., the Central Government. Thus, the landowner has no role to play in the appointment of the arbitrator. Although the arbitrator was not appointed by consent, the Supreme Court observed that the circumstance cannot pave way for a challenge on merits of an award under section 34 of the Arbitration Act. Relying upon *Ssangyong*⁴, *MMTC Ltd.*⁵, *Datar Switchgear*⁶, the Supreme Court observed that a proceeding under section 34 of the Arbitration Act does not contain any challenge on the merits of the award.

Power of the court to modify an award

With respect to the power of the court to modify the award in exercise of its jurisdiction under section 34 of the Arbitration Act, the Supreme Court observed as follows:

The right under section 34 is limited in nature.

- Section 34 allows “*recourse*” to a court against an arbitral award only by an application for setting aside such award in accordance with section 34 (2) and section 34 (3). “*Recourse*” is defined as the enforcement or method of enforcing a right⁷. Where the right is itself truncated, enforcement of such truncated right can also be only limited in nature. Given the limited grounds of challenge under sections 34 (2) and section 34(3), an application can only be made to set aside an award.

Power of the court under section 34 (4)

- Pursuant to section 34 (4), upon receipt of an application under section 34 (1), the court may adjourn the Section 34 proceedings and give the arbitral tribunal an opportunity to resume the arbitral proceedings or take such action as will eliminate the grounds for setting aside the arbitral award. Hence, it is the opinion of the arbitral tribunal which counts to eliminate the grounds for setting aside the award. In *Dyna Technologies*⁸, the Supreme Court *inter alia* held that the power vested under Section 34(4) of the Arbitration Act is to avoid a challenge based on a curable defect.

The court is not vested with the power to modify an award under UNCITRAL Model Law

- Section 34 is modelled on the *UNCITRAL Model Law*⁹, under which the court hearing a challenge against an award is not empowered to modify the award¹⁰. Given the limited judicial interference on extremely “*limited grounds*” not dealing with the merits of an award, the “*limited remedy*” under Section 34 is co-terminus with the “*limited right*”,

that evidence of bonafide sales between willing prudent vendor and prudent purchaser of the lands acquired or situated near by possessing same or similar advantageous features would furnish basis to determine market value. Thus, it was held that guideline value has no statutory force and cannot form any basis to determine the market value of the acquired lands. Applying the above decisions to the cases on hand can only lead to the conclusion that the District Collector could not have adopted the guideline value for determining the market value of the land that were acquired. Thus, the District Courts were right in interfering with the Award of the District Collectors.”

³ SLP (Civil) No.13020 of 2020

⁴ *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131

⁵ *MMTC Ltd. v. Vedanta Ltd.*, (2019) 4 SCC 163

⁶ *Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd.*, (2018) 3 SCC 133

⁷ P Ramanatha Aiyar’s Advanced Law Lexicon (3rd Edition)

⁸ *Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.*, (2019) 20 SCC 1

⁹ UNCITRAL Model Law on International Commercial Arbitration, 1985

¹⁰ Redfern and Hunter on International Arbitration (6th edition)

namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act.

Section 34 is not on the same footing as section 115 of the Civil Procedure Code

- The Supreme Court observed that the Ld. Single Judge erred in assimilating the Section 34 jurisdiction with the revisional jurisdiction under Section 115 of the Code of Civil Procedure, 1908 (**CPC**). Section 115 of the CPC expressly sets out the three grounds on which a revision may be entertained and then states that the High Court may make ‘such order as it thinks fit’. These latter words are missing in Section 34. The Supreme Court observed that the Ld. Single Judge did not set out the correct law and therefore, overruled the same.

The view of the Supreme Court in *McDermott International* is conclusive

- The Supreme Court observed that the issue raised in the appeals has been settled in *McDermott International Inc.*¹¹ (**McDermott**) and concurred that “..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 Applied]
- The Supreme Court observed that an earlier division bench of the Madras High Court in *Central Warehousing*¹² considered *McDermott* and held that the power of modification is not available under Section 34 of the Arbitration Act. However, *Central Warehousing* was not cited before the Ld. Single Judge despite being a binding judgment. Even otherwise therefore, the Ld. Single Judge’s judgment was rendered per incuriam. Applying the same reasoning, the Supreme Court also held that another decision of the Division Bench of the Madras High Court in *Gayatri Balasamy*¹³ suffered from the same infirmities as the said judgment held that the court can modify an award under section 34 of the Arbitration Act.
- The Supreme Court observed that *McDermott* has been followed in *Kinnari Mullick*¹⁴ and recently in *Dakshin Haryana*¹⁵. In *Dakshin Haryana*, the Supreme Court held that there is no power to modify an arbitral award under Section 34. The decision in *Mc Dermott* weighed in on the court.
- While the Supreme Court considered the judgments cited by the respondent¹⁶, it ruled out their applicability since (i) orders passed under Article 142 of the Constitution of India, 1908 do not constitute the ratio decidendi of a judgment; and (ii) the judgments did not consider if the power to vary an award can be found in Section 34 of the Arbitration Act. Further, the Supreme Court perused the judgments¹⁷ cited in *Gayatri Balasamy*¹⁸ and ruled out their applicability with reasoning.

Tracing the Arbitration Act, 1940 and foreign laws

- By way of Sections 15 and 16 of the erstwhile Arbitration Act, 1940 (**1940 Act**), the court was expressly given the power to modify or correct an award in the circumstances mentioned in Section 15, apart from the power to remit

¹¹ *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181

¹² *Central Warehousing Corpn. v. A.S.A. Transport*, 2007 SCC OnLine Mad 972

¹³ *ISG Novasoft Technologies Limited v. Gayatri Balasamy*, 2019 SCC OnLine Mad 15819:

“...A reasonable interpretation to Section 34 would only lead to an irresistible conclusion that the Court can modify or vary the award of the arbitrator if it is contrary to the material evidence adduced by the parties..”

¹⁴ *Kinnari Mullick v. Ghanshyam Das Damani*, (2018) 11 SCC 328

¹⁵ *Dakshin Haryana Biji Vitran Nigam Ltd. v. Navigant Technologies Pvt. Ltd.*, 2021 SCC OnLine SC 157

¹⁶ Cited by the Respondent in SLP (Civil) No. 12987 of 2020: *Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.*, (2007) 8 SCC 466; *DDA v. R.S. Sharma and Co.*, (2008) 13 SCC 80 and *Royal Education Society v. LIS (India) Construction Co. (P) Ltd.*, (2009) 2 SCC 261

¹⁷ *Gautam Constructions and Fisheries Ltd. v. National Bank for Agriculture & Rural Development*, (2000) 6 SCC 519; *Tata Hydro-Electric Power Supply Co. Ltd. v. Union of India*, (2003) 4 SCC 172;

Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445; and *Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy*, (2007) 2 SCC 720

¹⁸ *ISG Novasoft Technologies Limited v. Gayatri Balasamy*, 2019 SCC OnLine Mad 15819

an award under section 16. An award could be remitted, modified or otherwise set aside given the grounds contained in Section 30 of the 1940 Act, which were broader than the grounds in Section 34 of the Arbitration Act.

- The Supreme Court observed that the law of arbitration in England, the United States, Canada, Australia, and Singapore provides express provisions for the varying of an award, unlike Section 34 of the Arbitration Act.

Parliament did not intend for section 34 to provide the power of modification

- With respect to the principles of interpretation of statutes, the Supreme Court observed that “*purposive construction*” of statutes is referred to as the theory of “*creative interpretation*”¹⁹. However, even “*creative interpretation*” has its boundaries.
- The Supreme Court held that while interpreting a statutory provision, a judge must put himself in the shoes of Parliament and then ask whether Parliament intended this result. Parliament intended that no power of modification of an award exists in section 34 of the Arbitration Act. Further, the Supreme Court observed that it would lie on Parliament to amend section 34 in the light of the experience of the courts under the Arbitration Act and to bring it in line with foreign legislations.

Perversity of the subject Awards

- Relying upon *Taherakhatoon*²⁰, the Supreme Court observed that even after declaring the law and setting aside the High Court judgment on law, the court need not interfere with the judgment on facts, if the justice of the case does not require interference under Article 136 of the Constitution of India.
- The Supreme Court *inter alia* observed that (i) in similar cases, NHAI has allowed similarly situated persons to receive compensation at a much higher rate than awarded; (ii) NHAI had not filed appeals in similar matters and thus, certain land owners have benefitted with the enhanced compensation given to them by the District Court; (iii) the arbitrator has awarded compensation on a completely perverse basis i.e., by considering ‘guideline value’ which is relevant only for stamp duty purposes, and not taking into account sale deeds which would have reflected the proper market value of the land; (iv) “*Given the fact that the awards in all these cases are perverse, the District Judge rightly interfered with the same*”; (v) most of the awards in these cases were made 7-10 years ago and therefore, it would be unfair to send the cases for a *de novo* start before the very arbitrator or some other arbitrator appointed by the Central Government.
- In view of the above, the appeals were “*dismissed on facts*” with no order as to costs.

CONCLUSION

As discussed above, the lower courts enhanced the awarded compensation and modified the award under section 34 of the Act. In the present appeals, the Supreme Court held that the power of the court under section 34 of the Act does not include the power to modify the award. Therefore, given the law that has been laid down by the apex court in this judgment, the lower courts may have exceeded their jurisdiction in modifying the award. At the same time, since the Supreme Court declined to exercise jurisdiction under Article 136 of the Constitution of India based on the facts, it is unclear whether it has recognized the orders of the lower court in view of the present facts.

The Supreme Court observed that it would be unfair to send the cases for a fresh start before an arbitral tribunal since the subject awards were made 7-10 years ago. The question that arises is – would the Supreme Court have concluded differently on facts if the present case reached the apex court without the said delay.

While the facts in this case have been dealt with from the lens of the National Highways Act, the findings of the apex court will now apply in cases across a much broader spectrum.

The Supreme Court held that “*it is only for Parliament to amend the aforesaid provision in the light of the experience of the courts in the working of the Arbitration Act, 1996, and bring it in line with other legislations the world over*”²¹. It remains

¹⁹ *Eera v. State (NCT of Delhi)*, (2017) 15 SCC 133,

²⁰ *Taherakhatoon v. Salambin Mohammad*, (1999) 2 SCC 635

²¹ Para 46, *The Project Director, National Highways No 45 E and 220, National Highway Authority of India v. M. Hakeem & Anr.*, C.M.A. (MD) Nos.560 of 2018 and 225 of 2019 etc., batch

to be seen whether parliament will now consider expanding the scope of section 34 of the Act to include the power to modify an award. If parliament introduces a change to this effect, it will potentially back track all efforts to establish India as an arbitration friendly jurisdiction with minimal court intervention. It may result in a series of snags including conflicting provisions, prolonged dispute resolution, and dilute the very objective of the Arbitration Act as it stands today. Nonetheless, while courts in the country had previously taken different views on whether section 34 includes the power to modify an award, the present decision has sought to put the issue at rest and clarify the law until such time as parliament introduces an amendment.

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