

# Dispute Resolution Hotline

August 04, 2021

## COURTS CAN SET ASIDE OR UPHOLD AN ARBITRAL AWARD - NOT MODIFY

- Section 34 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") provides only for setting aside arbitral awards on very limited grounds;
- Section 34 of the Arbitration Act does not empower Courts to modify, revise or alter an arbitral award;
- Section 34 of the Arbitration Act is modelled on the UNCITRAL Model Law on International Commercial Arbitration, 1985 ("**UNCITRAL Model Law**"), under which no power to modify an arbitral award is given to a court hearing a challenge to an arbitral award;
- To assimilate the jurisdiction under Section 34 of the Arbitration Act with the revisional jurisdiction of the court under Section 115 of the Code of Civil Procedure, 1908 ("**CPC**") is fallacious.

A division bench of the Supreme Court of India in *Project Director, National Highway Authority of India v. MHakeem & Anr.*,<sup>1</sup> comprising of Justice R.F. Nariman and Justice B.R. Gavai, ruled in favour of minimum judicial interference and held that courts cannot modify, revise or alter an arbitral award under Section 34 of the Arbitration Act i.e. proceedings for setting aside the award.

### FACTUAL BACKGROUND

Under Section 3A of the National Highways Act, 1956 ("**NHA**"), if the Central Government is satisfied that any land is required for a public purpose such as the building, maintenance, management or operation of a national highway, they can declare their intention to acquire such land by way of publishing a notification in the Official Gazette.<sup>2</sup> After publishing a notification, the Central Government conducts surveys,<sup>3</sup> hears objections to the acquisition of the land,<sup>4</sup> declares the acquisition of the land<sup>5</sup> and then takes possession of the land.<sup>6</sup> However, before taking possession of the acquired land, the competent authority under the NHA determines the compensation to be provided to the land owner.<sup>7</sup> If the amount determined by the competent authority is not acceptable to either the National Highway Authority of India ("**NHAI**") or the land owner, either parties can make an application to the Central Government that will then appoint an arbitrator to determine the amount of compensation to be paid to the land owner.<sup>8</sup> If such an application is made, the provisions of the Arbitration Act apply subject to the provisions of the NHA.<sup>9</sup>

This case arose out of certain notifications issued under the NHA and the arbitral awards passed thereunder. The Special District Revenue Officer, who was the competent authority under the NHA, had determined very low compensation for the land owners. Accordingly, since the land owners were not satisfied with the compensation, the Central Government appointed the District Collector as an arbitrator. Under Section 3G (7) of the NHA, the competent authority and the arbitrator are obligated to, *inter alia*, take into account the market value of the land on the date of publication of the notification while determining the amount of compensation. However, in all the cases that were eventually challenged, the competent authority and the arbitrator had determined the compensation based on 'guideline value' of the lands in question (used for the purposes of stamp duty) and not on the basis of sale deeds of similar lands. It resulted in abysmally low amounts being granted as compensation by the competent authority, that were subsequently upheld by the arbitrator. Therefore, these arbitral awards were challenged under Section 34 of the Arbitration Act.

### Court proceedings:

The land owners challenged the arbitral awards under Section 34 of the Arbitration Act before the District Court. The District Court modified the arbitral awards and substantially increased the compensation. For example, in certain cases, the compensation awarded under the arbitral award ranged from INR 46.55 to INR 83.15 per square meter. These amounts were enhanced to INR 645 per square meter by the District Court. NHAI appealed against these orders before the Madras High Court. The Madras High Court upheld the modifications made to the arbitral awards by the District Court.<sup>10</sup> The judgement of the Madras High Court was then challenged before the Supreme Court.

### JUDGMENT OF THE SUPREME COURT

#### (i) Court does not have the power to modify an award:

The Supreme Court examined the scope of Section 34 of the Arbitration Act and held that it provides only for setting aside awards on very limited grounds. Further, the Apex Court also emphasized that Section 34 of the Arbitration Act uses the term "*recourse*" while stating that "*recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-sections (2) and (3).*" "*Recourse*" is the method of

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enforcing a right.<sup>11</sup> Therefore, when the right is itself limited, the enforcement of such a right will also be limited. Consequently, since Section 34 of the Arbitration Act only provides a right to challenge an arbitral award on limited grounds, the application to be made by any party under Section 34 of the Arbitration Act, can only to set aside an arbitral award.<sup>12</sup>

The Apex Court also held that it is settled law that when an arbitral award is challenged under Section 34 of the Arbitration Act, no challenge can be made on the merits of the arbitral award. The Supreme Court relied on the judgement in *MMTC Ltd. v. Vedanta Ltd.* wherein the Court had held that “*the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision.*”<sup>13</sup> The Supreme Court also placed reliance on judgements in *Ssangyong Engg. & Construction Co. Ltd. v. NHA*<sup>14</sup> and *Renusagar Power Co. Ltd. v. General Electric Co.*,<sup>15</sup> wherein the Court made similar observations holding that there could be no challenge on the merits of an arbitral award.

The Supreme Court also clarified the scope of Section 34 sub section (4), under which the court is empowered to adjourn the proceedings under Section 34 of the Arbitration Act 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.<sup>16</sup> The Court highlighted that even under Section 34 (4) of the Arbitration Act, the Court could only adjourn the proceedings under Section 34(4) so as to give the arbitral tribunal an opportunity to cure the defects. However, it was only the arbitral tribunal that could eliminate the grounds for setting aside the award.<sup>17</sup> Reliance was placed on *Kinnari Mullick v. Ghanshyam Das Damani*, wherein the Court held that the Parliament had not vested any power in the courts to remand the matter to the arbitral tribunal, except to adjourn the proceedings for the limited purpose mentioned in Section 34(4) of the Arbitration Act.<sup>18</sup>

The Supreme Court reiterated and emphasized on the principle of limited judicial interference in arbitration.<sup>19</sup> Reliance was placed on *McDermott International Inc. v. Bum Standard Co. Ltd.*, wherein the Apex Court had held that the Arbitration Act of 1996 had only created a supervisory role for the courts to review an arbitral award for the limited purposes of ensuring fairness, such as in cases of fraud or bias by the arbitrators, violation of natural justice, etc. The Apex Court categorically held that the court cannot correct the errors made by the arbitrators and that it can only set aside the award, keeping the supervisory role of the court at minimum level. The rationale is that parties voluntarily chose to opt for arbitration, excluding the jurisdiction of courts because they want expediency and finality.<sup>20</sup>

#### (ii) UNCITRAL Model Law & Arbitration Act, 1940:

The Supreme Court referred to the UNCITRAL Model Law and held that Section 34 of the Arbitration Act is modelled on the UNCITRAL Model Law, under which the courts have no power to modify an arbitral award while hearing a challenge to the arbitral award.<sup>21</sup>

The Supreme Court also drew a comparison with Sections 15 and 16 of the Arbitration Act, 1940 (“**1940 Arbitration Act**”), which prescribed that the court had the power to modify, correct or remit an award to the arbitral tribunal in the circumstances mentioned therein. The Court concluded that since the Arbitration Act does not specifically retain any provision like Sections 15 and 16 of the 1940 Arbitration Act, there was no legislative intent to include the powers to modify or remit the arbitral award, under the Arbitration Act.<sup>22</sup>

#### (iii) Section 115 of the CPC:

The Madras High Court had held that the jurisdiction under Section 34 of the Arbitration Act is almost like a revisional jurisdiction under Section 115 of the CPC and that the revisional jurisdiction normally includes the power to correct a patent illegality.<sup>23</sup> The Supreme Court dismissed this contention and held that the jurisdiction of the courts under Section 34 of the Arbitration Act cannot be assimilated with the revisional jurisdiction of courts under Section 115 of the CPC.<sup>24</sup> This is because Section 115 of the CPC categorically sets out 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 words do not find any place in Section 34 of the Arbitration Act.<sup>25</sup>

#### (iv) Article 136 of the Indian Constitution

Although the Supreme Court ruled in favour of the Appellant on law, they did not exercise their jurisdiction under Article 136 of the Indian Constitution and dismissed the appeal on facts. The Supreme Court observed that under the NHA compensation scheme, the arbitrator was appointed by the Central Government only. Therefore, the arbitration under the NHA was not a consensual process with both parties having a role in appointing the arbitrator.<sup>26</sup> This is because the land owner has no say in the appointment of the arbitrator and in fact, the arbitrator was appointed by the Central Government which is the very authority that is acquiring the land of the land owner.<sup>27</sup> The Supreme Court clarified that the NHA compensation scheme involving an arbitrator, though seems unfair, cannot lead to the conclusion that the arbitral awards made by such arbitrators can be challenged on merits under Section 34 of the Arbitration Act.<sup>28</sup>

Subject to the above clarification, the Supreme Court relied the judgement in *Taherakhatoon v. Salambin Mhammad*,<sup>29</sup> and held that even after a court declares the law as incorrect and sets aside the judgment on law, the court is not obligated to interfere with the judgment on facts “*if the justice of the case does not require interference under Article 136 of the Constitution of India*”.<sup>30</sup> Accordingly, the Supreme Court stated that the arbitrator had awarded compensation on a “*completely perverse basis*” since the metric to determine compensation was by taking into account the ‘guideline value’, which is relevant only for the purposes of stamp duty. The arbitrator should have taken into account similar sale deeds, which would have been reflective of the appropriate market value of the land.<sup>31</sup>

The Supreme Court also stated in several similar cases, the NHA had allowed similarly situated persons to receive

compensation at a much higher rate than what was awarded. The Supreme Court relied on the judgement in *Nagpur Improvement Trust v. Vithal Rao*,<sup>32</sup> to hold that the State cannot make classifications on the basis of the public purpose for which the land is being acquired and cannot provide differential compensations accordingly. The Supreme Court also relied on the fact that most of the arbitral awards were made 7-10 years ago, and that it would not be fair to remand these cases back to the same arbitrator or some other arbitrator unilaterally appointed by the Central Government. Accordingly, the Supreme Court refused to exercise their jurisdiction under Article 136 of the Indian Constitution and dismissed the appeal on facts.<sup>33</sup>

## CONCLUSION

This judgement upholds the primary principle of arbitration, that is, minimum judicial interference. However, it also opens up questions for practical consideration. For instance, there have been scenarios wherein the courts have modified arbitral awards to rectify errors and that has been a more practically tenable option. The Supreme Court in this decision, has referred to the past judgments of the Apex Court where awards were modified and held that such modifications were made using powers under Article 142 of the Indian Constitution that provides wide powers to the Supreme Court to pass any order necessary for doing complete justice.<sup>34</sup> Even this decision is an example of a situation where the modification of the arbitral award was considered as a more suitable way of resolving the issue. So, while holding that arbitral awards cannot be modified, the Supreme Court does not interfere with the modifications that were made by the District Court, in the “*interest of justice*”.

Going forward, if there are errors in an arbitral award that has been passed and the simpler approach is to modify the arbitral award, the parties would be left with two options. Either they can arbitrate afresh, or they can approach the Supreme Court by way of a special leave petition under Article 136 of the Indian Constitution. It is likely that the parties would opt for the second option and start approaching the Supreme Court for any kind of modification that has to be made to the arbitral award, be it minor or major. This consequent incessant use of Article 136 may be against the object and purpose of Article 136 of the Indian Constitution.

While on one hand it may be said that this judgement propagates speedy disposal of disputes by upholding the finality of arbitral awards and the choice of the parties to resort to arbitration, on the other hand, it creates procedural issues and delays in matters that could have been resolved faster with the intervention by courts to modify the arbitral award, as was the situation in this decision.

— Aparimita Pratap, Ashish Kabra & Vyapak Desai

You can direct your queries or comments to the authors

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<sup>1</sup> 2021 SCC OnLine SC 473

<sup>2</sup> Section 3A, National Highways Act, 1956

<sup>3</sup> Section 3B, National Highways Act, 1956

<sup>4</sup> Section 3C, National Highways Act, 1956

<sup>5</sup> Section 3D, National Highways Act, 1956

<sup>6</sup> Section 3E, National Highways Act, 1956

<sup>7</sup> Section 3G, National Highways Act, 1956:

“3G. Determination of amount payable as compensation.—

(1) Where any land is acquired under this Act, there shall be paid an amount which shall be determined by an order of the competent authority.

...

(5) If the amount determined by the competent authority under sub-section (1) or sub-section (2) is not acceptable to either of the parties, the amount shall, on an application by either of the parties, be determined by the arbitrator to be appointed by the Central Government—

(6) Subject to the provisions of this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to every arbitration under this Act.”

<sup>8</sup> *Ibid*

<sup>9</sup> *Ibid*

<sup>10</sup> 2020 SCC OnLine Mad 1119

<sup>11</sup> 2021 SCC OnLine SC 473, Paragraph 14

<sup>12</sup> *Ibid*

<sup>13</sup> (2019) 4 SCC 163, Paragraph 14

<sup>14</sup> (2019) 15 SCC 131, Paragraphs 43 & 44

<sup>15</sup> 1994 Supp (1) SCC 644, Paragraph 100

<sup>16</sup> Section 34(4), Arbitration Act, 1996:

“(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.”

<sup>17</sup> 2021 SCC OnLine SC 473, Paragraph 14

<sup>18</sup> (2018) 11 SCC 328, Paragraph 15

<sup>19</sup> 2021 SCC OnLine SC 473, Paragraph 17

<sup>20</sup> (2006) 11 SCC 181, Paragraph 52

<sup>21</sup> Section 34, UNCITRAL Model Law on International Commercial Arbitration, 1985:

“Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

...

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.”

<sup>22</sup> 2021 SCC OnLine SC 473, Paragraphs 20 and 46

<sup>23</sup> 2020 SCC OnLine Mad 1119, Paragraph 60

<sup>24</sup> 2021 SCC OnLine SC 473, Paragraph 41

<sup>25</sup> *Ibid*

<sup>26</sup> 2021 SCC OnLine SC 473, Paragraph 12

<sup>27</sup> *Ibid*

<sup>28</sup> 2021 SCC OnLine SC 473, Paragraph 42

<sup>29</sup> (1999) 2 SCC 635, Paragraph 20

<sup>30</sup> 2021 SCC OnLine SC 473, Paragraph 57

<sup>31</sup> 2021 SCC OnLine SC 473, Paragraph 47

<sup>32</sup> (1973) 1 SCC 500, Paragraphs 26-30

<sup>33</sup> 2021 SCC OnLine SC 473, Paragraph 58

<sup>34</sup> “142. Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc

*(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe*  
*(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself*

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