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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.09.2021

CORAM:

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

C.M.A.No.506 of 2013
and M.P.No.1 of 2013

- 1.Union of India,
Rep. by its Chief Secretary,
Government of Union Territory of Puducherry,
Puducherry.
- 2.Secretary - Works,
Secretariat, Public Works Department,
Puducherry.
- 3.The Superintendent Engineer Circle I,
Public Works Department, Puducherry.
- 4.The Executive Engineer, NH Division,
Public Works Department, Puducherry.

..Appellants/Respondents

Vs.

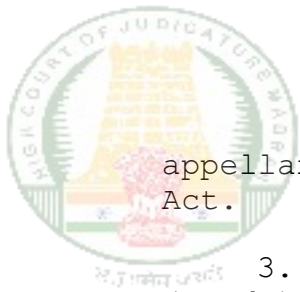
1. M.Nadarajan (Died)
2. N.Mangalam
3. N.Murugasamy
4. N.Balan
5. N.Selvaraj

..Respondents/Petitioners

Prayer: Civil Miscellaneous Appeal filed under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 seeking to set aside the orders dated 30.06.2011, made in A.O.P.No.63 of 2006, on the file of the learned Principal District Judge, Puducherry by allowing the above Civil Miscellaneous Appeal.

For Appellants : Ms.V.Usha
A.G.P. (Pondy)

For Respondents 2 to 5 : Mr.Virumandi
for M/s.Radha Gopalan



appellants under Section 37 of the Arbitration and Conciliation Act.

3. Heard Ms.V.Usha, learned Additional Government Pleader (Pondy) appearing for the appellants and Mr.Virumandi, learned counsel appearing for the respondents.

4. At the outset, the learned Additional Government Pleader appearing for the appellants would submit that the learned Principal District Judge, Puducherry under the impugned order dated 30.06.2011, ought not to have modified the arbitral award, as he does not have the power under Section 34 of the Arbitration and Conciliation Act to do so. In support of her submissions, she relied upon a latest decision of the Hon'ble Supreme Court in Project Director, National Highways Vs. M.Hakeem and another reported in 2021 SCC Online SC 473 and would submit that the learned District Judge exercising power under Section 34 of the Arbitration and Conciliation Act does not have power to modify the arbitral award. Further she would submit that even on merits, as seen from the arbitral award, there is no scope for any modification of compensation amount in favour of the respondents than what was passed by the Arbitrator under Section 3G of the National Highways Act.

5. However, the learned counsel appearing for the respondents would submit that the learned District Judge under the impugned order has rightly modified the arbitral award by granting enhancement of compensation in favour of the respondents based on the documentary evidence placed before the Arbitrator by the respondents.

6. As rightly submitted by the learned Additional Government Pleader appearing for the appellants, the arbitral award cannot be modified under Section 34 of the Arbitration and Conciliation Act. The law on this issue has been made clear that even in respect of land acquisition matters under the National Highways Act, 1956 by the latest decision of the Hon'ble Supreme Court in the case of Project Director, National Highways Vs. M.Hakeem reported in 2021 SCC Online SC 473. The relevant paragraphs of the said judgement reads as follows:

"39. As has been pointed out by us hereinabove, McDermott (supra) has been followed by this Court in Kinnari Mullick (supra). Also, in Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies Pvt. Ltd., 2021 SCC Online SC 157, a recent judgment of this Court also followed McDermott (supra) stating that there is no power to modify an arbitral award under Section 34 as follows:-



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(f) In law, where the Court sets aside the award passed by the majority members of the tribunal, the underlying disputes would require to be decided afresh in an appropriate proceeding.

Under Section 34 of the Arbitration Act, the Court may either dismiss the objections filed, and uphold the award, or set aside the award if the grounds contained in sub-sections (2) and (2A) are made out. There is no power to modify an arbitral award.

40. It can therefore be said that this question has now been settled finally by at least 3 decisions of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, 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', namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996.

41. A look at the Arbitration Acts of England, the United States, Canada, Australia and Singapore also lead to the same conclusion. In each of those legislative measures, there are express provisions which permit the varying of an award, unlike Section 34 of the present Act. In para 51, the learned Single Judge then refers to recourse to a court against an arbitral award, and argues that a statute cannot be interpreted in such manner as to make the remedy worse than the disease. As has been pointed out by us, the "disease" can only be cured in very limited circumstances thus limiting the remedy as well. Also, to assimilate the Section 34



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jurisdiction with the revisional jurisdiction under Section 115 of the Code of Civil Procedure, 1908 [the "CPC"], is again fallacious. 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, given the legislative scheme of the Arbitration Act, 1996. For all the aforesaid reasons, with great respect to the learned Single Judge, it is not correct in law and therefore stands overruled.

42. Coming to the submission in support of the impugned judgment that the fact that the Central Government appoints an arbitrator and the arbitration would therefore not be consensual, resulting in a government servant rubber stamping an award which then cannot be challenged on its merits, cannot possibly lead to the conclusion that, therefore, a challenge on merits must be provided driving a coach and four through Section 34 of the Arbitration Act, 1996. The impugned judgment is also incorrect on this score.

43. Col. Balasubramanian, however referred to a passage in Jaishri Laxmanrao Patil v. Chief Minister, 2021 SCC OnLine SC 362 (at paras 412 to 415). He argued that 'purposive construction' referred to by Bennion in his classic on Statutory Interpretation must be applied by us on the facts of this case as in legislations dealing with land acquisition, a pragmatic view is required to be taken and the law must be interpreted purposefully and realistically so that the benefit reaches the masses. We may only add that the judgment cited by Col. Balasubramanian is a judgment dealing with a constitutional provision - Article 342A of the Constitution. We must never forget the famous statement of Chief Justice Marshall in M'Culloch v. State of Maryland, 17 US 316 (1819) that "it is a constitution we are expounding" - and the Constitution is a living document governing the lives of millions of people, which is required to be interpreted in a flexible evolutionary manner to provide for the demands and compulsions of changing times and needs.



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44. The distinction between constitutional and statutory interpretation was felicitously put by Justice Aharon Barak, President of the Supreme Court of Israel thus:

"The task of expounding a Constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A Constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind."

45. This quote has been cited in *Rameshwar Prasad (VI) v. Union of India*, (2006) 2 SCC 1 (at pages 91, 92).

46. "Purposive construction" of statutes, relevant in the present context, is referred to in a recent concurring judgment by Nariman, J. in *Eera v. State (NCT of Delhi)*, (2017) 15 SCC 133, as the theory of "creative interpretation". However, even "creative interpretation" has its limits, which have been laid down in the aforesaid judgment as follows:

"139. A reading of the Act as a whole in the light of the Statement of Objects and Reasons thus makes it clear that the intention of the legislator was to focus on children, as commonly understood i.e. persons



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who are physically under the age of 18 years. The golden rule in determining whether the judiciary has crossed the Lakshman Rekha in the guise of interpreting a statute is really whether a Judge has only ironed out the creases that he found in a statute in the light of its object, or whether he has altered the material of which the Act is woven. In short, the difference is the well-known philosophical difference between "is" and "ought". Does the Judge put himself in the place of the legislator and ask himself whether the legislator intended a certain result, or does he state that this must have been the intent of the legislator and infuse what he thinks should have been done had he been the legislator. If the latter, it is clear that the Judge then would add something more than what there is in the statute by way of a supposed intention of the legislator and would go beyond creative interpretation of legislation to legislating itself. It is at this point that the Judge crosses the Lakshman Rekha and becomes a legislator, stating what the law ought to be instead of what the law is.

47. Quite obviously if one were to include the power to modify an award in Section 34, one would be crossing the Lakshman Rekha and doing what, according to the justice of a case, ought to be done. In interpreting a statutory provision, a Judge must put himself in the shoes of Parliament and then ask whether Parliament intended this result. Parliament very clearly intended that no power of modification of an award exists in Section 34 of the Arbitration Act, 1996. 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



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Act, 1996, and bring it in line with other legislations the world over.

49. There is no doubt that, as argued by Col. Balasubramanian, the arbitral award in these cases is given by a government servant appointed by the Central Government, the result being the rubber stamping of compensation awarded on a completely perverse basis. Given the fact that, in these petitions at least, the constitutional validity of the NH Amendment Act, 1997 has not been challenged, we must proceed on the basis that grave injustice would be done if we were to interfere on facts, set aside the awards and remand the matter to the very government servant who took into account depressed land values which were relevant for purposes of stamp duty only. It may be mentioned at this juncture that a limited challenge was made to Section 3J of the National Highways Act when it excluded the provisions of the Land Acquisition Act in the context of solatium and interest not being granted under the National Highways Act. Thus, in *Union of India v. Tarsem Singh*, (2019) 9 SCC 304, this Court dealt with a batch of appeals in which the question was set out thus:-

1. ... A batch of appeals before us by the Union of India question the view of the Punjab and Haryana High Court which is that the non-grant of solatium and interest to lands acquired under the National Highways Act, which is available if lands are acquired under the Land Acquisition Act, is bad in law, and consequently that Section 3-J of the National Highways Act, 1956 be struck down as being violative of Article 14 of the Constitution of India to this extent.

54. It can be seen from the aforesaid provisions that the speeding up of acquisition of land needed for national highways has been achieved. The challenge process to an award passed will, of necessity, take its own time, both under Section 3G of this Act as well as under the provisions of the Land Acquisition



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Act. This being the case, it is a little difficult to appreciate as to why the wholesome regime of appeals under the Land Acquisition Act has been replaced by a regime in which an award passed by an Arbitrator, who is not consensually appointed but appointed by the Central Government, can only be challenged not on merits, but on the limited grounds contained in Section 34 of the Arbitration Act, 1996.

58. Given the fact that the NH Amendment Act, 1997 has not been challenged before us, we refrain from saying anything more. Suffice it to say that, as has been held in *Taherakhatoon v. Salambin Mohammad*, (1999) 2 SCC 635 (at para 20), even after we declare the law and set aside the High Court judgment on law, we 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..."

7. Since the law is well settled, there is no scope for modification of the arbitral award, the learned Principal District Judge, Puducherry under the impugned order has erroneously given a go-by to the settled law by modifying the arbitral award by granting additional compensation to the respondents. No appeal has been filed by the respondents aggrieved by the order dated 30.06.2011, which is subject matter in this appeal. This being the case, this Court has got no other go but to allow the appeal filed by the appellants in terms of the judgement of the Hon'ble Supreme Court referred to supra as the learned Principal District Judge, Puducherry has erroneously modified the arbitral award, which he does have the legal power to do so under Section 34 of the Arbitration and Conciliation Act.

8. For the aforesaid reasons, the impugned order dated 30.06.2011, passed by the learned Principal District Judge, Puducherry in A.O.P.No.63 of 2006 is hereby set aside and the appeal is allowed. Consequently, the connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar



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To

The Principal District Judge,
Puducherry.

Copy to:

The Section Officer,
VR Section, High Court,
Madras.

+1cc to the Government Pleader for Puducherry in Sr No.48263

C.M.A.No.506 of 2013
and M.P.No.1 of 2013

SRA (CO)
PR (23/11/2021)