



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.10.2021

CORAM:

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

C.M.A. No. 3724 of 2019 and
C.M.P. No. 21320 of 2019

The Project Director,
NH 7, NHAH, Krishnagiri,
Presently at
NHAH

D.No.212-3/D3-1, Sri Nagar Colony,
Narasothipatti, Salem - 636 004.

... Appellant/2nd Respondent

Vs

1. R. Jayakumar ..1st Respondent/Petitioner
2. The Competent Authority and Special
District Revenue Officer(LA)
National Highways 7 and 46,
Salem and Dharmapuri Districts at
Krishnagiri. ... 3rd Respondent/1st Respondent

Prayer: Civil Miscellaneous Appeal filed under Section 37(1) & (2) of the Arbitration and Conciliation Act, 1996, to set aside the order and Decree made in Arbitration O.P. No. 146 of 2013 dated 27.02.2019 on the file of the Principal District Judge, Salem.

For Appellant : Mr. Su. Srinivasan

For Respondent 1 : Mr. E.C. Ramesh

For Respondent 2 : No Appearance

JUDGMENT

This appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1966, challenging the order dated 27.02.2019 passed by the learned Principal District Judge, Salem, in A.O.P. No. 146 of 2013 under Section 34 of the Arbitration and Conciliation Act, 1966, wherein the learned Principal District Judge, Salem has modified the Arbitral award dated 27.10.2003 passed by the District Collector under the National Highways Act, who has determined the compensation payable to the first respondent for the acquisition of his lands



by the Appellant.

2. Under the impugned order, the learned Principal District Judge has passed the following order in A.O.P. No. 146 of 2013:

"In fine the award passed by Arbitrator in proceedings Na.Ka.28/2003(B2), dated 25.08.2007 is confirmed with regard to the market value of Rs.3,14,037/- and the respondents concerned are directed to pay 12% on the supra market value per annum from the date of notification to the date of the award of the competent authority or the date of taking possession of property whichever is earlier; also directed to pay 30% solatium on the market value. The respondents are directed to pay a cost of Rs.20,000/- to the petitioner."

3. As seen from the aforementioned order, though the learned Principal District Judge has confirmed the Arbitral award dated 27.10.2003 passed by the District Collector, in addition to that, he has modified the same by directing the Appellant to pay 12% interest on the additional market value from the date of notification to the date of the award and has also directed the Appellant to pay 30% solatium on the market value and has also directed the Appellant to pay a cost of Rs. 20,000/- (Rupees Twenty Thousand only).

4. It is now well settled as per the recent decision of the Hon'ble Supreme Court in the case of Project Director, National Highways vs. M.Hakeem and another reported in 2021 SCC Online SC 473 that an arbitral award cannot be modified by a court exercising power under section 34 of the Arbitration and Conciliation Act. The relevant paragraphs of the said decision are extracted hereunder:

"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:-

(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,



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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 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



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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 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



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

49. There is no doubt that, as argued by



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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 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



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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..."

5. In view of the law laid down by the Honourable Supreme Court by the aforesaid decision, the learned Principal District Judge under the impugned order dated 27.02.2019 passed in A.O.P.No. 146 of 2013 ought not to have modified the Arbitral award dated 27.10.2003 passed by the District Collector in favour of the first respondent under the National Highways Act.

6. Therefore the impugned order dated 27.02.2019 passed in A.O.P.No.146 of 2013 will have to be necessarily set aside and the Arbitral Award dated 27.10.2003 will have to be confirmed. Accordingly, this appeal is allowed and the impugned order dated 27.02.2019 passed in A.O.P.No.146 of 2013 by the learned Principal District Judge, Salem is hereby set aside and the Arbitral Award dated 27.10.2003 is hereby confirmed. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

rgi/nl

To

1. Principal District Judge, Salem.

2. The Section Officer,
V.R.Section, High Court, Madras - 104.



3. Special District Revenue Officer (LA)
National Highways 7 and 46,
Salem and Dharmapuri Districts at
Krishnagiri.

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+1cc to Mr.SU.Srinivasan, Advocate, S.R.No.54096
+1cc to Mr.E.C.Ramesh, Advocate, S.R.No.53857
+1cc to the Government Pleader, S.R.No.53977

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C.M.P. No. 21320 of 2019

SVI (CO)
CB(01/11/2021)