



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

ARBITRATION APPEAL NO. 09 OF 2019

Shri Yadneshwar S/o. Gangadhar Anwane,
Aged about 65 years, Occ.: Builder,
Resident of Plot No.42, Behind Krishna
Sabhagruha, Kamgar Nagar, Nagpur -
440 009 (Original Non-applicant /
Respondent No.1 as per R.A.)

.... **APPELLANT.**

// VERSUS //

1. Shri Mahesh S/o. Vijay Deshmukh,
aged about 44 years, Occu.: Service,
Resident of Qr No.21/163, Type-II,
Near Ganpati Temple, Ordnance
Factory, Subhash Nagar, Bhusaval-
425203
(Original Applicant/Claimant as
per R.A.)

2. Shri K.J. Rohee (Retd. Justice)
The Arbitrator, Address : A-201,
Majestic Heights, N.I.T. Housing
Complex, Hill Road, Shivaji Nagar,
Nagpur.
(Original Non-applicant No.2/
Arbitrator as per R.A.)

.... **RESPONDENTS.**

Shri S.P.Kshirsagar, Advocate for Petitioner.
Shri N.S.Khubalkar, Advocate for Respondent No.1.

CORAM : ANIL S. KILOR, J.
DATED : OCTOBER 11, 2023.

ORAL JUDGMENT :

1. Heard.

2. This Court in a dispute arising out of the agreement relating to performance of contract regarding the sale of a new flat, appointed a Sole Arbitrator, who passed an award refusing the specific performance and directing the petitioner to refund the amount.

3. The said award was the subject matter of challenge in Civil Misc. Application No.1240 of 2016 filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act of 1996”) before the Principal District Judge, Nagpur, who has allowed the application and thereby modified the award vide judgment and order dated 05/02/2019, which is impugned in the present writ petition.

4. Shri Kshirsagar, learned counsel for the appellant submits that in view of the judgment of the Hon’ble Supreme Court of India in

the case of *NHAI ..vs.. M. Hakeem*, reported in **(2021) 9 SCC 1** and the judgment of the Division Bench of this Court passed in Arbitration Appeal No.06 of 2015 and other connected appeals, the Principal District Judge has no authority or power under Section 34 of the Act of 1996 to modify the award.

5. It is submitted that the District Court under Section 34 of the Act of 1996 can set aside the award or by adjourning the application for a period of time determined by the Court 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. Thus, he submits that the learned Principal District Judge has exceeded its powers and modified the award.

6. On the other hand, Shri Khubalkar, learned counsel for the respondent submits that the impugned judgment was passed on 05/02/2019, whereas the judgment in the case of *M. Hakim* (supra) was passed on 20/07/2021. He further submits that in the case of *M. Hakim* (supra) itself the Hon'ble Supreme Court held that it is not fair to send

back the matter for a *de novo* start and accordingly, the Hon'ble Supreme Court of India did not interfere with the order impugned in the said proceedings.

7. He has further relied upon the judgment of the Hon'ble Supreme Court of India in the case of *Tahera Khatoon ..vs. Salambin Mohammad*, reported in (1999) 2 SCC 635, wherein the Hon'ble Supreme Court has refused to interfere with the order, though special leave was granted, for the reason that justice of the case on facts does not require interference. He submits that the similar approach was adopted by the Hon'ble Supreme Court of India in the case of *Dyna Technologies (P) Ltd...vs..Crompton Greaves Ltd.*, reported in (2019) 20 SCC 1 considering the time period spent in the proceedings i.e. 25 years.

8. Shri Khubalkar, learned counsel for the respondent submits that the respondent is a poor person who has invested a huge amount for purchase of the flat in the year 2013 and since then he is waiting for justice to be done. It is therefore, submitted that considering the time span lapsed in this matter it would be futile to remand the matter back to

the Principal District Judge to decide the same afresh. He, therefore, prays to adopt the mode as adopted by the Hon'ble Supreme Court of India in the above referred cases and prays to dismiss the present petition.

9. In light of the rival contentions of the parties, I have perused the record and the impugned judgment and order.

10. The Hon'ble Supreme Court of India in the case of *M. Hakim* (supra) has observed thus :

“30. ...

118. This Court is inclined to follow the decisions in Central Warehousing Corpn., DDA, State Trading Corpn. of India Ltd., Bharti Cellular Ltd., Cybernetics Network (P) Ltd. and Asha Talwar. The guiding principle on this issue was laid down by the Supreme Court in McDermott International Inc., where the Court held:

“52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. 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, 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."

Although the Madras High Court in Gayatri Balaswamy appropriately noted that these observations in McDermott International Inc. were not in the context of the specific issue being dealt herewith, this Court is of the opinion that it is determinative of the Court's approach in an enquiry under Section 34 of the Act. Indeed, a Court, while modifying or varying the award would be doing nothing else but "correct[ing] the errors of the arbitrators". This is expressly against the diktat of McDermott International Inc. Further, if the power to remit the matter to the arbitrator is read into Section 34, it would render inexplicable the deliberate omission by Parliament of a provision analogous to Section 16 of the Arbitration Act, 1940 in the present Act. Section 16 of the 1940 Act specifically armed courts with the power to remit the matter to arbitration. Noticeably, the scope of remission under the present Act is confined to that prescribed in sub-section (4) of Section 34. Besides the Division Bench rulings of this Court in DDA, State Trading Corpn. of India Ltd., this was also noted by a Full Bench of the Bombay High Court in R.S. Jiwani v. Ircon International Ltd., where the Court held:

"28. An award can only be set aside under the provisions of Section 34 as there is no other provision except Section 33 which permits the arbitral tribunal to correct or interpret the award or pass additional award, that too, on limited grounds stated in Section 33..."

35. It is also true that there are no pari materia provisions like Sections 15 and 16 of the Act of 1940 in the 1996 Act but still the provisions of Section 34 read together, sufficiently indicate vesting of vast powers in the court to set aside an award and even to adjourn a matter and such acts and deeds by the Arbitral Tribunal at the instance of the party which would help in removing the grounds of attack for setting aside the arbitral award.”

On the other hand, the Calcutta High Court in Snehasis Bhowmick did not analyse this distinction, or the specific observations of the Supreme Court in McDermott International Inc. quoted above. Further, the decisions in Numaligarh Refinery and Harishchandra Reddy did not discuss the Court's power to modify, vary or remit the award under Section 34 of the Act. Therefore, in light of the dictum in McDermott International Inc. and the difference in provisions of the 1940 Act and the present Act, this Court holds that the power to modify, vary or remit the award does not exist under Section 34 of the Act.” (emphasis in original)

11. Similarly, the Division Bench of this Court in the case of

Rishabhkumar Babulal Jejan (supra) has held thus :

“35. To consider the aforesaid position reference needs to be made to the facts in M.Hakeem & Another (supra). Therein, various lands were acquired under the Act of 1956 and compensation was granted by the Competent Authority. The award passed by the District Collector maintained the same amount of compensation that was granted by the Competent Authority. The landowners then filed the petitions under Section 34 of the Act of 1996 and the District Court enhanced the amount of compensation to Rs.645/- per square meter. Thus modifying the award

passed by the Collector under Section 34 of the Act of 1996, the Division Bench in appeal upheld the said modification in the award. The National Highways Authority challenged the aforesaid adjudication before the Hon'ble Supreme Court. The question considered by the Hon'ble Supreme Court was whether an award as passed could be modified in exercise of jurisdiction under Section 34 of the Act of 1996. It was held that the scope of Section 34 of the Act of 1996 would not include within it a power to modify an award. The Hon'ble Supreme Court referred to certain earlier decisions rendered by it and noticed that modifications in the award passed therein were in exercise of jurisdiction under Article 142 of the Constitution of India for doing complete justice between the parties. It then held that the judgment of the learned Single Judge of the Madras High Court in Gayatri Balaswamy Versus ISG Novasoft Technologies Limited [2014 SCC Online Madras 6568] permitting such modification did not lay down the correct law and was thus overruled. It was observed in clear terms that "if one were to include the power to modify an award in Section 34, one would be crossing the Laxmanrekha and doing what according to the justice of a case ought to be done". Parliament had very clearly intended that no power of modification of an award existed in Section 34 of the Act of 1996.

Having held so the Hon'ble Supreme Court considered the facts of the case before it and noticed that in other similar cases the National Highways Authority had disbursed compensation to similarly situated persons at a higher rate than that what was awarded. In that view of the matter the Hon'ble Supreme Court declined to exercise jurisdiction under Article 136 of the Constitution of India in the facts of said cases. It also observed that if the justice of the case did not require interference under Article 136 of the Constitution of India, the Supreme Court need not interfere with the judgment on facts.

It is thus clear from the aforesaid decision that (a) it has been held in clear terms that it is not permissible for the Court to modify an award while exercising jurisdiction under Section 34 of the Act of 1996. Doing so would result in crossing the Laxmanrekha even if that may be required to be done according to the justice of a case and (b) interference with the judgment of the High Court was declined in the facts of that case after noticing that National Highways Authority had permitted other similarly situated persons to receive compensation at a much higher rate than what was awarded to them. In our view, therefore, the aforesaid decision clearly recognizes the absence of any power with the Court to modify an award in exercise of jurisdiction under Section 34 of the Act of 1996.”

12. In light of the above referred observations, there is no element of doubt that there is no power with the District Judge under Section 34 of the Act of 1996 to modify the award and therefore, the only jurisdiction under Section 34 of the Act of 1996 is that the Court may set aside the award or refuse to set aside on the ground contemplated therein.

13. The other course that is permissible for the Court to follow is under Section 34(4) of the Act of 1996, wherein on the request made by a party the Court may adjourn the proceedings for a period of time determined by the Court 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.

14. In the present matter, admittedly, neither the learned Principal District Judge set aside the award or refused to set aside the award. Even he has not adopted course as provided in sub-section (4) of Section 34 of the Act of 1996.

15. In that view of the matter, I have no hesitation to hold that the learned Principal District Judge by passing the impugned judgment and order and thereby modifying the arbitral award exceeded its jurisdiction and thereby committed error.

16. In the facts and circumstances of this case the judgments cited by the respondent are distinguishable and of no help to the respondent.

17. In the circumstances, the only option left with this Court to remand the matter back to the learned Principal District Judge to decide

the same afresh.

18. Accordingly, I pass the following order :

- i) The appeal is partly allowed.
- ii) The judgment and order dated 05/02/2009 passed by the Principal District Judge Nagpur in Civil M.A. No. 1240 of 2016 is hereby quashed and set aside.
- iii) The Civil Misc. M.A.No.1240 of 2016 is restored back to its file.
- iv) The learned Principal District Judge shall decide the application afresh within three months from today, after hearing both the parties.

The Arbitration Appeal is **disposed of** accordingly. No order as to costs.

JUDGE

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