The court cannot modify an award in set-aside proceedings (Supreme Court of India)

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Project Director, National Highways No. 45E and 220 National Highways Authority of India v. M Hakeem and another

Court: Supreme Court of India | **Case Number**: Civil Appeal No. 002756 of 2021 and connected matters | **Citation**: 2021 SCC OnLine SC 473 | **Bench**: RF Nariman & BR Gavai JJ | **Date**: 20 July 2021

Section 34 ACA sets forth the standards against which courts are to judge the arbitral award, the final "product" of the arbitral proceedings.[1] Does Section 34 ACA also include a power to modify the award?

Answering, no, the 2-judge bench in *Hakeem* noted that the point "stands concluded" by three prior decisions of the Supreme Court. Speaking for the court, Nariman J gave several other reasons as well.

However, exercising power under Article 142 of the Constitution of India,[2] the court upheld the modification of the awards in question.

A. Why did the question of power to modify an award arise?

Several arbitral awards were made under the National Highways Act, 1956[3]:

(a) Under this law, the government can acquire land to build, maintain, manage or operate a highway.

(b) The competent authority (that is, a government officer designated for such a purpose) determines the amount payable as compensation to the landowners.

(c) However, if the amount determined by the competent authority is not acceptable either to the government or the landowners, an arbitrator appointed by the government on either party's application determines the compensation.

(d) The batch of cases in *Hakeem* concerned land acquisition 2009 onwards. In all cases, "abysmally low amounts were granted by the competent authority", and the arbitrator (a government officer, i.e., the district collector) endorsed the compensation amount.

The landowners filed set-aside applications before the District and Sessions Judge, who enhanced the compensation and, thus, modified the awards.[4]

[1] Phraseology borrowed from commentary on Article 34 of Model Law in Howard M Hotlzmann & Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*, Wolters Kluwer.
[2] Article 142 of the Indian Constitution "is conceived to meet situations which cannot be effectively and appropriately tackled by the existing provisions of law." It states that the Supreme Court may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it.
[3] One of the laws enacted by the Indian Parliament to deal with the road network.
[4] Nariman J gave an illustration of a case where amounts ranging from INR 46.55 to 83.15 per square meter was made. In all cases the amounts were enhanced to INR 645 per square meter.

In appeal, a 2-judge bench upheld the modification. The matters reached the Supreme Court on NHAI's appeal.

B. The court gave ten reasons as to why Section 34 ACA does not provide the power to modify the award

First, the text itself of Section 34 ACA:

(a) Section 34 ACA is not an appellate provision. It provides "recourse" against an arbitral award only in accordance with Section 34 (2) ACA and Section 34 (3) ACA. "Recourse", *per* definition, is the enforcement or method of enforcing a right. Where the right is itself truncated, its enforcement can also be only limited in nature.

(b) Given the limited grounds of challenge, an application could be made only to set aside an award (and not modify).

(c) This becomes even clearer from Section 34 (4) ACA, under which the court may adjourn the set-aside proceedings and allow the arbitral tribunal to resume the proceedings or take such action as will eliminate the grounds for setting aside the arbitral award.

Second, Article 34 of the Model Law:

(a) Section 34 ACA is modelled on Article 34 of the Model Law. No power to modify an award is given to the court (also citing Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 6th ed., pp. 570[5]).

(b) The "statutory scheme" of Section 34 ACA "is in keeping with the UNCITRAL Model Law and the legislative policy of minimal judicial interference in arbitral awards."

Third, the Arbitration Act, 1940 had contrasting and broader provisions. The award could be remitted, modified or otherwise set aside.

Fourth, in set-aside proceedings, there is a prohibition against merits-based review (citing authorities).

Fifth, the point (if Section 34 ACA gives the power to modify) "stands concluded" and "settled finally by at least three decisions of this court":

(a) Nariman J cited paras 51 and 52 of *McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181,[6] where it has been held (*inter alia*) that the [set-aside] court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again.

(b) *Kinnari Mullick* v. *Ghanshyam Das*, (2018) 11 SCC 328[7] followed *McDermott's* statement of law.

[5] "…The reviewing court cannot alter the terms of an award nor can it decide the dispute on its own version of the merits. Unless the reviewing court has the power to remit the fault to the original tribunal, any new submission of the dispute to arbitration after annulment has to be undertaken by commencement of a new arbitration with a new arbitral tribunal."
[6] Supreme Court of India, BP Singh and SB Sinha JJ, 12 May 2006.
[7] Supreme Court of India, Dipak Misra, AM Khanwilkar & MM Shantanagoudar JJ, 20 April 2017.

(c) *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* … stating that there is no power to modify an arbitral award under Section 34."

(d) *Dyna Technologies (P) Ltd.* v. *Crompton Greaves Ltd.*, (2019) 20 SCC 1[8] was also referred by Nariman J. He reproduced a passage from it where the court had discussed the "utility" of Section 34 (4) ACA (that is, to cure defects like a gap in or the absence of the tribunal's reasoning).

Sixth, the court noted that some of the judgments of the High Courts "are also instructive" and referred to three of Delhi High Court's decisions[9] which in turn had referred to several authorities.

Seventh, the court addressed the "sheet anchor" of NHAI's argument, that is, the judgment of a single judge of the Madras High Court in *Gayatri Balaswamy* v. *ISG Novasoft Technologies Ltd.*, 2014 SCC OnLine Mad 6568[10] that was upheld in appeal by a 2-judge bench:

(a) The single judge had referred to several judgments of the Supreme Court in which awards were modified. Referring to *McDermott's case*, the single judge had concluded that it did not settle the question finally because its observations were not in response to any pointed question. Nariman J examined each of the cases referred to in *Gayatri* and concluded that they were either made under the old Arbitration Act, 1940, or made exercising power under Article 142 Constitution of India, or their reasoning was infirm.

(b) Also, on the reference in *Gayatri* that a statute cannot be interpreted in a manner as to make the remedy worse than the disease, Nariman J said that the "disease" could only be cured in very limited circumstances, thus limiting the remedy as well.

(c) Further, *Gayatri* had "assimilate[d]" the Section 34 jurisdiction with the revisional jurisdiction under Section 115 of the Code of Civil Procedure, 1908. Nariman J said this was fallacious because Section 115 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 ACA.

Eighth, even apart from Indian precedent, the arbitral statutes of England, the United States, Canada, Australia and Singapore also lead to the same conclusion. They have express provisions that permit the varying of an award.

Ninth, the argument based on unfair appointment procedure (government servant rubber-stamping the award which cannot then be challenged on merits) was rejected, stating that it could not possibly lead to the conclusion that a challenge on merits must be provided driving a coach and four through Section 34 ACA.

[8] Supreme Court of India, NV Ramana, MM Shantanagoudar & Ajay Rastogi JJ, 18 December 2019.
[9] *Cybernetics Network Pvt. Ltd.* v. *Bisquare Technologies Pvt. Ltd.*, 2012 SCC OnLine Del 1155; *Nussli Switzerland Ltd.* v. *Organizing Committee Commonwealth Games*, 2014 SCC OnLine Del 483; and, *Puri Construction P. Ltd.* v. *Larsen and Toubro Ltd.*, 2015 SCC OnLine Del 9126.
[10] Decided on 02 September 2014 by V Ramasubramanian J.

Tenth, he rejected a submission that the doctrine of purposive construction[11] should be applied. He noted that "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." However, he added, "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."

C. Disposition: why was the award's modification not interfered with?

The court referred to *Taherakhatoon* v. *Salambin Mohammad*, (1999) 2 SCC 635 for the proposition that "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."

It declined to interfere with the modified award because:

(a) In several similar cases, similarly situated persons received much higher compensation, but NHAI did not appeal.

(b) It could not be overlooked that the arbitrator in Hakeem had awarded compensation on a perverse basis by taking "guideline value", which is only relevant for stamp duty purposes.

(c) Grave injustice would be done if the awards were set aside and the matter remanded "to the very government servant" who took into account depressed land values. Differential compensation cannot be awarded because a different public purpose is sought to be achieved.[12]

Categories: Section 34 ACA | Recourse Against Arbitral Award | Application for Setting Aside Arbitral Award | Article 142 Constitution of India | UNCITRAL Model Law | Article 34 Model Law | Modification of Arbitral Award | Finality of Arbitral Awards | Remand of Award | Remission of Award

[11] The submission was made based on a passage in *Jaishri Laxmanrao Patil* v. *Chief Minister*, 2021 SCC Online SC 362. *Jaishri*, in turn, had referred to a seven-Judge Bench judgment on principles of interpretation of Constitution in *Abhiram Singh* v. *CC Commachen*, (2017) 2 SCC 629. And in *Abhiram*, the court had reproduced a passage from Bennion's *Statutory Interpretation*, 6th Edn. Nariman J rejected the 'purposive construction' argument noting that the case cited dealt with a constitutional provision, and that there was a distinction between constitutional and statutory interpretation. He also referred to his own concurring judgement in *Eera* v. *State* (NCT of Delhi), (2017) 15 SCC 133, in which he had used the expression "creative interpretation". However, he had also said that "creative interpretation" has its limit: "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."

[12] Nariman J was referring here to the Land Acquisition Act that has a "wholesome regime of appeals" in contrast to the National Highways Act under which an arbitrator, an officer of the government appointed unilaterally, determines compensation which could be challenged only on limited grounds under Section 34 ACA.