

**CASE COMMENT: PROJECT DIRECTOR, NHAI V. M HAKEEM**

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**Arnab Paul\*****INTRODUCTION**

Several petitions were joined together by the Supreme Court of India in this case about the authority of a Court to change or increase the arbitral award during practising its jurisdiction under the Arbitration and Conciliation Act, 1996<sup>1</sup>. In the following commentary, I argue whether this court case was a lost chance to establish a doctrine or guidelines on the consequences of an award and should the courts possess the power to alter the award. I would also talk about the possibility of application of in-principle in-eligibility of an arbitrator as held in *Perkins Eastman Architects DPC and another v. HSCC (India)*<sup>2</sup> Ltd.

**BRIEF FACTS**

Various notices were published by the National Highway Act of 1956<sup>3</sup>, and in connection with this, several orders were issued by the competent authority. The competent authority in this regard is the Special District Revenue Officer (SDRO). SDRO has the authority to determine the amount of land compensation acquired for the construction of highways. If either party is not satisfied with the compensation provided by SDRO, the issue will be resolved through arbitration. In this case, the competent authority, whilst making these orders, used the guideline value of the said lands instead of the value based upon the sale deeds of other identical lands. As a result, SDRO had released a low and unreasonable amount in the form of compensation. Upon applying with the arbitral tribunal to challenge this compensation, the arbitral tribunal determined that the compensation granted was just and therefore SDRO's order was valid. For this reason, all other compensation claims were disposed of with a grant of the same amount of compensation.<sup>4</sup>

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<sup>1</sup> ACA 1996, s 34

<sup>2</sup> *Perkins Eastman Architects D.P.C. v. H.S.C.C. (India) Ltd*[2019] S.C.C. Online SC 1517

<sup>3</sup> National Highway Act 1956, s 3A

<sup>4</sup> Akash Krishnan, 'NHAI v. M Hakim: putting a quietus to issue of modification of arbitral awards'(leaders,1 November 2021)<<https://blog.ipleaders.in/nhai-v-m-hakim-putting-quietus-issue-modification-arbitral-awards/>> accessed on 21 July 2022

## CHRONOLOGY OF EVENTS

**Before the District Court:** Many petitions were made to the district and session judges to improve the rulings of the arbitral tribunal under section 34 of the 1996 Arbitration Mediation Act. The district court found that section 34 of the Arbitration Mediation Act empowered the court not only to dismiss the arbitral award but to amend it. Therefore, the court ruled that the remuneration awarded by the ruling was low and therefore raised the remuneration to Rs. 645 per square meter.<sup>5</sup>

**Before the Madras High Court:** The High Court at Madras has determined that, in this case, the court has the authority to increase the amount decided by the arbitral tribunal, as section 34 of the Arbitration and Conciliation Act of 1996 gives the court jurisdiction to change the ruling by the arbitral tribunal. Therefore, the High Court upheld the district court's order in this regard.<sup>6</sup>

**Before the Supreme Court:** The National Highway Authority of India appealed to the Honorable Supreme Court of India for an order to overturn the orders of the District Court and the High Court.<sup>7</sup>

## ISSUES

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1. Can the court amend the arbitral award under section 34 of the Arbitration Act.
2. Has the National Highway Authority of India taken any disadvantageous action by giving differential compensation to people in similar situations?<sup>8</sup>

## PARTIES` SUBMISSIONS

### APPELLANTS

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<sup>5</sup> ibid

<sup>6</sup> Akash Krishnan, 'NHAI v. M Hakim: putting a quietus to issue of modification of arbitral awards'(leaders, 1 November 2021)<<https://blog.ipleaders.in/nhai-v-m-hakim-putting-quietus-issue-modification-arbitral-awards/>> accessed on 21 July 2022

<sup>7</sup> ibid

<sup>8</sup> ibid

The appellant's counsels contended that the power of the Appellate court under the Land Acquisition Act<sup>9</sup> and the power under section 34 of the Arbitration Law are different as it is limited to either "overturning the ruling" or "refusing the ruling". In addition, they argued that the NHA's goal was to provide a rapid process in which an objection to an arbitral award would proceed only under section 34 of the Arbitration Act. This challenge is not based upon the merits of the award, as clarified by some of the decisions made by the Supreme Court. The appellants referred to the Arbitration Act of 1940<sup>10</sup>, arguing that section 15 explicitly empowers the arbitral tribunal to make/amend arbitral awards, but the Arbitration and Conciliation Act of 1996 is based on the UNCITRAL Model Law on International Commercial Arbitration, 1985,<sup>11</sup> the law explicitly limits the scope of alternative redressal and consequent remedies that can only be overruled or revoked in certain circumstances.<sup>12</sup>

## RESPONDENTS

On the contrary, the respondents argued that if section 34 was interpreted in the manner proposed by the appellant then the only thing a district judge would be able to do with an arbitral award within the jurisdiction of section 34 was to set it aside and further they insisted that there was no remedy for any unjust awards being given as these cases would lead to new arbitration proceedings in front of the same bureaucracy or another officer appointed by the same central government. In addition to this, The High Court at Madras by the proceedings of *Gayatri Balaswamy v ISG Novasoft Technologies Ltd*<sup>13</sup> distinguished between consensual arbitration and central government-appointed arbitrators who only approve compensation granted by other government officials. Also, since such new arbitration will take place in front of similar bureaucrats appointed by the central government, it would be of no value to set aside the current ruling and initiate a new arbitration as proposed by the opposite counsel.<sup>14</sup>

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<sup>9</sup> The Right To Fair Compensation And Transparency In Land Acquisition, Rehabilitation And Resettlement Act 2013

<sup>10</sup> Arbitration and Conciliation Act 1940, s 15

<sup>11</sup> UNCITRAL Model Law on International Commercial Arbitration 1985

<sup>12</sup> Subroto Banerjee, 'India: Project Director, NHAI v M Hakeem: Analysis On Supreme Court's Power To Modify Arbitral Award' (Mondaq, 16 February 2022) <<https://www.mondaq.com/india/trials-appeals-compensation/1162216/project-director-nhai-v-m-hakeem-analysis-on-supreme-court39s-power-to-modify-arbitral-award>> accessed on 21 July 2022

<sup>13</sup> *Gayatri Balaswamy v. ISG Novasoft Technologies Ltd* [2014]SCC Online Mad 6568

<sup>14</sup> Subroto Banerjee, 'India: Project Director, NHAI v M Hakeem: Analysis On Supreme Court's Power To Modify Arbitral Award' (Mondaq, 16 February 2022) <<https://www.mondaq.com/india/trials-appeals-compensation/1162216/project-director-nhai-v-m-hakeem-analysis-on-supreme-court39s-power-to-modify-arbitral-award>> accessed on 21 July 2022

## LEGAL ASPECTS

### National Highway Act, 1956.

Para 2 of the statements of object and reasons, Section 3(a), Section 3A and Section 3G.

### Arbitration and Conciliation Act, 1996.

Section 34.

## JUDGEMENT IN BRIEF

The Apex Court, with regards to this case, decided that Section 34 of the Arbitration Act provides only restricted justifications on which an arbitral award may be overruled under subsections (2) and (3) of section 34. The arbitral tribunal pointed out that this section was based on the UNCITRAL model law<sup>15</sup> and that the policy of the legislature regarding this was to ensure minimum court intervention in the arbitration procedure. The court also recorded several rulings such as *SsangYong Engg & Construction Co. v. NHAI*<sup>16</sup> and *Renusagar Co. Ltd. v. General Electric Co.*<sup>17</sup> that an objection under Section 34 will not be on the merits of the dispute. Regarding this, the Court also referred to the previous case of *McDermott International Inc. v. Burn Standard Co.*<sup>18</sup> which dictates that the 1996 Act only provides for the directorial role of the courts, to analyse arbitral awards. Court intervention is acceptable in certain circumstances, for example in cases of violations of principles of natural justice. Courts are not to rectify the mistakes of arbitrators. The court also referred to the decision of the Delhi High Court in *Cybernetics Network Pvt. Ltd v Bisquare Technologies Pvt. Ltd*, in which the High court held that the jurisdiction of the courts under section 34 wasn't the same as that of the appellate court and, therefore, it is incapable of dealing with the cases already settled by the Arbitration Tribunal. If done so, the courts would act against the legal regime of section 34. Whilst referring to the case of *Gayathri Balaswamy*, which was cited by the respondents, the court ruled that the case it relied on in its judgment was such that the change in the ruling was in the application of power under section 142 of the Constitution<sup>19</sup>. The court concluded that it was wrong to apply this judicial trend in the words of Section 34 of the Arbitration, which gives judges the power to revise, change and modify awards. This would contradict a large

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<sup>15</sup> UNCITRAL Model Law on International Commercial Arbitration 1985

<sup>16</sup> *SsangYong Engg & Construction Co. v. NHAI* [2019]4 SCC 163

<sup>17</sup> *Renusagar Co. Ltd. v. General Electric Co.* [1994 ]Supp (1) SCC 644

<sup>18</sup> *McDermott International Inc. v. Burn Standard Co.* [2006] 11 SCC 181

<sup>19</sup> The Constitution of India 1950,s 142

number of rulings, as well as the scheme of the arbitration law, which sought to limit court interference. Therefore, the arbitrator considered that it was erroneous to read this judicial bias in the interpretation of section 34 of the arbitration as a power to amend, amend and alter awards. This would be inconsistent with many awards and arbitration regimes, which are intended to limit judicial intervention.<sup>20</sup>

In support of these aforementioned observations, the court, in this case<sup>21</sup>, stated that in interpreting a statutory provision, a judge must put himself in the shoes of the legislature and then ask whether the legislature intended the outcome or not. The legislature has made it very clear that no authority to change an arbitral award should exist in the Arbitration Act of 1996, section 34. Only Parliament can change the above laws based on the findings of the courts.<sup>22</sup>

## COMMENTS

**Other Countries' Approach to Modification of Awards:** The court systems of Britain<sup>23</sup>, Australia<sup>24</sup>, and Singapore<sup>25</sup> have unequivocal rights to alter awards. These countries had embraced UNCITRAL Model Laws<sup>26</sup> that no longer provided for the authority of the courts to modify an arbitral award but have modified these practices to keep up with advancements in the present world.<sup>27</sup>

For illustration, in the U.K, If the application to challenge the arbitral award because of lack of jurisdiction is successful, the court has the authority to accept, amend, or revoke all or part of the arbitral award (section 67 (3)). If a proceeding based on irregularities is successful, the court reserves the right to return all or part of the ruling to the court for examination, withhold the ruling, or invalidate all or part of the ruling. (Section 68 (3)). .. When the lawsuit is

<sup>20</sup> Subroto Banerjee, 'India: Project Director, NHAI v M Hakeem: Analysis On Supreme Court's Power To Modify Arbitral Award'(Mondaq,16 February 2022) <<https://www.mondaq.com/india/trials-appeals-compensation/1162216/project-director-nhai-v-m-hakeem-analysis-on-supreme-court39s-power-to-modify-arbitral-award>> accessed on 21 July 2022

<sup>21</sup> *Project Director, NHAI v. M Hakeem* [2021] SCC Online SC 473

<sup>22</sup> Subroto Banerjee, 'India: Project Director, NHAI v M Hakeem: Analysis On Supreme Court's Power To Modify Arbitral Award'(Mondaq,16 February 2022) <<https://www.mondaq.com/india/trials-appeals-compensation/1162216/project-director-nhai-v-m-hakeem-analysis-on-supreme-court39s-power-to-modify-arbitral-award>> accessed on 21 July 2022

<sup>23</sup> United Kingdom Arbitration Act 1996,s 67,s 68 and s 69

<sup>24</sup> Australian Commercial Arbitration Act 2017, s 34

<sup>25</sup> Singapore Arbitration Act 2001,s 34A

<sup>26</sup> UNCITRAL Model Law on International Commercial Arbitration 1985

<sup>27</sup> Renu Gupta, 'Should Courts Have the Power to Modify Arbitral Award?'(LawStreetIndia, 9 December 2021) <<http://www.lawstreetindia.com/experts/column?sid=632>> accessed on 21 July 2022

successful In the event of a dispute from a legal point of view, the court may confirm or amend the ruling, return the ruling to the court, or suspend all or part of the ruling ( section 69(7)).<sup>28</sup> In India, High Courts at Madras,<sup>29</sup> , Telangana<sup>30</sup> and Andhra Pradesh<sup>31</sup> have determined that the court of section 34 may amend the judgment. .. The main reason these courts care about their views is that simply revoking a ruling puts them (applicants) in a much worse state than they intended or deserved before the arbitration began.

Paragraph 46 of *NHAI vs M Hakeem*<sup>32</sup> contains a court proposal for the parliament to amend the law to align it with worldwide laws. There is no real benefit in not granting the right to amend/modify the arbitral award, as it makes no sense to submit the parties to a new arbitration after the arbitral award has been revoked. In this sense, the parties should go to court and then opt for arbitration. Therefore, to keep up with the legal progress, the Parliament of India should consider empowering the courts to modify the arbitral awards. This will save the parties' time and money by not involving themselves in another trial.<sup>33</sup>

### CONSEQUENCES OF SETTING ASIDE AWARDS

The competent authority will indemnify the land owner when it acquires the land. Landowners consider the indemnity to be inadequate and are suing them in front of government-appointed arbitrators. The arbitrator cannot consider the proposal but will rule out inadequate damages and reserve the ruling. In other words, landowners deserve more remuneration. The government has in all likelihood acquired the land, but the applicants need to continue fighting for better compensation in a new arbitration proceeding. This is where the outcome of revoking an award becomes useful. This case could have been an opportunity to clarify the result of the abolition and how it will affect a new arbitrator. Will the government appoint a new court under the NH law? Will the new court initiate a new proceeding? If so, could the compensation given by the competent authority will be accepted? Will observations of Section 34 of the court on the merits of the matter constitute estoppel before the new tribunal So the court that at least found the verdict wrong and justified the increase in compensation can use these reasons to

<sup>28</sup> Renu Gupta, 'Should Courts Have the Power to Modify Arbitral Award?'(LawStreetIndia, 9 December 2021) < <http://www.lawstreetindia.com/experts/column?sid=632>> accessed on 21 July 2022

<sup>29</sup> *Gayatri Balaswamy v. ISG Novasoft Technologies Ltd* [2014]SCC Online Mad 6568

<sup>30</sup> *Saptarishi Hotels (P) Ltd. v. National Institute of Tourism & Hospitality Management*(Telangana High Court, 11 October 2019)

<sup>31</sup> *Kurra Venkateswara Rao v. Competent Authority* (Andhra Pradesh High Court, 1 May 2020)

<sup>32</sup> *Project Director, NHAI v. M Hakeem* [2021] SCC Online SC 473

<sup>33</sup> Renu Gupta, 'Should Courts Have the Power to Modify Arbitral Award?'(LawStreetIndia, 9 December 2021) < <http://www.lawstreetindia.com/experts/column?sid=632>> accessed on 21 July 2022

protect the interests of property owners? Can the parties file the same defences in the new court or file a new petition? Will the proofs be renewed? Will everything be removed from the previous process? There is also the issue of estoppel, which can affect the new arbitration.<sup>34</sup>

### **In-Principle In-eligibility For Appointment as an Arbitrator - Does It Apply To Arbitrations under NH Act?**

In *Perkins EDPC v. HSCC*<sup>35</sup> Ltd, the Court decided that anyone interested in a decision or grant rendered by an arbitrator has no right to appoint an arbitrator, regardless of whatever the parties agreed at the time of the conclusion of the contract.<sup>36</sup>

In *NHAI vs Sayedabad Tea Co. Ltd*<sup>37</sup> on of August 27, 2019, the court recognized that the provisions of the arbitration law apply to any arbitration under NH law to the extent that NH is silent on it. As there is no separate provision under the NH Act opposing the appointment of an arbitrator, Section 12 of the Arbitration Act remains in place? The central government is an interested party in the arbitrations arising from NH law and appointments made by it should not come into force after *Perkins Eastman*<sup>38</sup>. However, in *Railways Electrification v. M/s ECI-SPIC-SMo-MCML (JV)*<sup>39</sup>, The court upheld the validity of the arbitration clause if one party is unilaterally authorized to appoint arbitrator forms an arbitration college and the other party can choose from Congress. The court ruled that the panel balanced the unilateral powers of the parties appointing the arbitrator. Therefore, this decision provides a solution for the central government to establish an arbitral tribunal and at the same time appoint an arbitrator under NH law, rather than unilaterally appointing a single arbitrator and going against the decision in *Perkins Eastman*.<sup>40</sup>

### **CONCLUSION**

Three main interpretations can be construed from this case. First, section 34 the of Arbitration and conciliation Act of 1996 prevents the Court to rule on merit and change the decision of the

<sup>34</sup> Renu Gupta, 'Should Courts Have the Power to Modify Arbitral Award?'(LawStreetIndia, 9 December 2021) < <http://www.lawstreetindia.com/experts/column?sid=632>> accessed on 21 July 2022

<sup>35</sup> *Perkins Eastman Architects D.P.C. v. H.S.C.C. (India) Ltd*[2019] S.C.C. Online SC 1517

<sup>36</sup> Renu Gupta, 'Should Courts Have the Power to Modify Arbitral Award?'(LawStreetIndia, 9 December 2021) < <http://www.lawstreetindia.com/experts/column?sid=632>> accessed on 21 July 2022

<sup>37</sup> *National Highways Authority Of India vs Sayedabad Tea Co. Ltd and Ors*(Supreme Court of India,27 August 2019)

<sup>38</sup> *Perkins Eastman Architects D.P.C. v. H.S.C.C. (India) Ltd*[2019] S.C.C. Online SC 1517

<sup>39</sup> *Railways Electrification v. M/s ECI-SPIC-SMo-MCML (JV)*(Supreme Court of India,17 December 2019)

<sup>40</sup> Renu Gupta, 'Should Courts Have the Power to Modify Arbitral Award?'(LawStreetIndia, 9 December 2021) < <http://www.lawstreetindia.com/experts/column?sid=632>> accessed on 21 July 2022

arbitrator secondly, there can be no difference in conduct towards people and the payment of money to compensate people in a similar situation and finally, the Supreme Court, in this case, ended a years-long confusion regarding the Court's authority under aforementioned Act' section 34 and explained the status of the law in this matter and now the burden is shifted towards the legislature to amend the present law to keep up with the worldwide practices and to ensure justice to the parties as well.



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