The Project Director National Highways ... vs M. Hakeem on 20 July, 2021

Equivalent citations: AIR 2021 SUPREME COURT 3471, AIRONLINE 2021 SC 358

Author: R.F. Nariman

Bench: B.R. Gavai, R. F. Nariman

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13020 OF 2020]

THE PROJECT DIRECTOR,
NATIONAL HIGHWAYS NO.45 E AND 220
NATIONAL HIGHWAYS
AUTHORITY OF INDIA ...APPELLANT

VERSUS

M. HAKEEM & ANR. ...RESPONDENTS

WITH

CIVIL APPEAL NO. 2797 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13481 OF 2020]

CIVIL APPEAL NO. 2757 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.12987 OF 2020]

CIVIL APPEAL NO. 2758 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.12982 OF 2020]

CIVIL APPEAL NO. 2759 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.12986 OF 2020]

CIVIL APPEAL NO. 2760 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13011 OF 2020]

CIVIL APPEAL NO. 2761 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13017 OF 2020]

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Reason:

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CIVIL APPEAL NO. 2762 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13004 OF 2020]

CIVIL APPEAL NO. 2763 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13505 OF 2020]

CIVIL APPEAL NO. 2764 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13015 OF 2020]

CIVIL APPEAL NO. 2765 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13372 OF 2020]

CIVIL APPEAL NO. 2766 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13431 OF 2020]

CIVIL APPEAL NO. 2767 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13410 OF 2020]

CIVIL APPEAL NO. 2768 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13363 OF 2020]

CIVIL APPEAL NO. 2769 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13502 OF 2020]

CIVIL APPEAL NO. 2770 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13373 OF 2020]

CIVIL APPEAL NO. 2771 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13371 OF 2020]

CIVIL APPEAL NO. 2772 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13494 OF 2020]

CIVIL APPEAL NO. 2773 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13382 OF 2020]

CIVIL APPEAL NO. 2774 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13366 OF 2020]

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CIVIL APPEAL NO. 2775 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13303 OF 2020]

CIVIL APPEAL NO. 2776 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13477 OF 2020]

CIVIL APPEAL NO. 2777 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13235 OF 2020]

CIVIL APPEAL NO. 2778 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13354 OF 2020]

CIVIL APPEAL NO. 2779 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13408 OF 2020]

CIVIL APPEAL NO. 2780 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13292 OF 2020]

CIVIL APPEAL NO. 2781 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13236 OF 2020]

CIVIL APPEAL NO. 2782 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13632 OF 2020]

CIVIL APPEAL NO. 2783 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13269 OF 2020]

CIVIL APPEAL NO. 2784 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.14905 OF 2020]

CIVIL APPEAL NO. 2785 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.12988 OF 2020]

CIVIL APPEAL NO. 2786 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13936 OF 2020]

CIVIL APPEAL NO. 2787 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13232 OF 2020]

CIVIL APPEAL NO. 2788 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13002 OF 2020]

CIVIL APPEAL NO. 2789 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13013 OF 2020]

CIVIL APPEAL NO. 2790 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13231 OF 2020]

CIVIL APPEAL NO. 2791 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13330 OF 2020]

CIVIL APPEAL NO. 2792 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13234 OF 2020]

CIVIL APPEAL NO. 2793 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.12991 OF 2020]

CIVIL APPEAL NO. 2794 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13023 OF 2020]

CIVIL APPEAL NO. 2795 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.12995 OF 2020]

CIVIL APPEAL NO. 2796 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13451 OF 2020]

CIVIL APPEAL NO. 2798 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13369 OF 2020]

CIVIL APPEAL NO. 2799 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13359 OF 2020]

CIVIL APPEAL NO. 2800 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13291 OF 2020]

CIVIL APPEAL NO. 2801 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13459 OF 2020]

CIVIL APPEAL NO. 2802 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13425 OF 2020]

CIVIL APPEAL NO. 2803 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13563 OF 2020]

CIVIL APPEAL NO. 2804 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.14257 OF 2020]

CIVIL APPEAL NO. 2805 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13448 OF 2020]

CIVIL APPEAL NO. 2806 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13379 OF 2020]

CIVIL APPEAL NO. 2807 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.13922 OF 2020]

JUDGMENT

R.F. Nariman, J

1. Applications for substitution are allowed. Leave granted.

2. The appeals in the present case raise an interesting question of law – as to whether the power of a court under Section 34 of the Arbitration and Conciliation Act, 1996 [“Arbitration Act”] to “set aside” an award of an arbitrator would include the power to modify such an award. A Division Bench

of the Madras High Court has disposed of a large number of appeals filed under Section 37 of the said Act laying down as a matter of law that, at least insofar as arbitral awards made under the National Highways Act, 1956 ["National Highways Act"], Section 34 of the Arbitration Act must be so read as to permit modification of an arbitral award made under the National Highways Act so as to enhance compensation awarded by a learned Arbitrator.

3. The facts in all these appeals concern notifications issued under the provisions of the National Highways Act and awards passed thereunder. These notifications are all of the years 2009 onwards and consist of awards that have been made by the competent authority under the Act, who is a Special District Revenue Officer. In all these cases, awards were made based on the 'guideline value' of the lands in question and not on the basis of sale deeds of similar lands. The result is, in all these cases, that abysmally low amounts were granted by the competent authority. As an example, in SLP (Civil) No.13020 of 2020, amounts ranging from Rs.46.55 to 83.15 per square meter were awarded. In the arbitral award made by the District Collector in all these cases, being an appointee of the Government, no infirmity was found in the aforesaid award, as a result of which the same amount of compensation was given to all the claimants. In Section 34 petitions that were filed before the District and Sessions Judge, these amounts were enhanced to Rs.645 per square meter and the award of the Collector was therefore modified by the District Court in exercise of jurisdiction under Section 34 Arbitration Act to reflect these figures. In the appeal filed to the Division Bench, the aforesaid modification was upheld, with there being a remand order to fix compensation for certain trees and crops.

4. Shri Tushar Mehta, learned Solicitor General of India, has taken us through the scheme of the National Highways Act, and has argued that since it was necessary to speed up the acquisition process for a very important public purpose, that is construction of national highways, the National Highways Act was amended in 1997 by the National Highway Laws (Amendment) Act, 1997 ["NH Amendment Act"], to include Sections 3 to 3J under which, notifications were issued under Sections 3A to 3D. Before vesting takes place of the land acquired under Section 3E, compensation is determined under Section 3G of the Act, which is an amount determined by the competent authority who is set up under Section 3(a) of the Act. Unlike the Land Acquisition Act, 1984 ["Land Acquisition Act"], if the amount determined by the competent authority is not acceptable to either the National Highways Authority of India ["NHAI"] or the land-owner, on application by either of the parties, the amount of compensation will be determined by an arbitrator who is appointed only by the Central Government. Then, subject to the provisions of the National Highways Act, the provisions of the Arbitration Act apply. The competent authority and the arbitrator, while determining the amount of compensation, must take into account, under Section 3G(7), the market value of the land on the date of publication of the notification under Section 3A, damage sustained and various other factors mentioned in the sub-section. Importantly, under Section 3J, the Land Acquisition Act does not apply to such acquisitions. The learned Solicitor General argued that, given the object sought to be achieved by the Act, a speedy procedure was provided by which a challenge to the arbitrator's award is then made only under Section 34 of the Arbitration Act, which, as has been held by a catena of judgments, is not a challenge on the merits of the award. The court's limited power under the said Section is wholly unlike the power of an appellate court under the Land Acquisition Act, and hence such power is only limited to either setting aside the award or remitting

the award to the arbitrator under Section 34(4) so as to eliminate any ground of challenge under Section 34. He argued that this was in contrast to the Arbitration Act, 1940 which contained a specific provision to remit an award under Section 15, and further argued that the Arbitration Act, 1996, being based on the UNCITRAL Model Law on International Commercial Arbitration, 1985, has specifically restricted the grounds of challenge and the consequent remedy, which is only to set aside or remit in limited circumstances. He argued, based on a reading of Section 34 itself as well as a number of judgments of this Court and High Courts that this well settled position cannot possibly be given a go-by when it comes to arbitration under the National Highways Act, in which either party can ask for the appointment of an arbitrator who is then appointed not by the parties, but by the Central Government. He attacked the Division Bench judgment, arguing that the fact that either party could approach the Central Government to appoint an arbitrator, unlike the Land Acquisition Act, and that it is the Central Government who appoints the arbitrator, the arbitration thus not being consensual in nature, would make no difference to the interpretation of Section 34 of the Arbitration Act in its application to the National Highways Act. He therefore argued that the impugned judgment was wrong on law and equally wrong in following an earlier Single Judge judgment of the Madras High Court in which it was held, in a situation not under the National Highways Act but under the Arbitration Act itself (arising from a consensual arbitration), that the court, under Section 34, can modify the arbitral award. He attacked the learned Single Judge's judgment in Gayatri Balaswamy v. ISG Novasoft Technologies Ltd., 2014 SCC OnLine Mad 6568 arguing that once the Supreme Court had laid down as a matter of law that no modification of an award is possible, it was not open to a single judge to differ from such view. He also argued that under Section 34, post setting aside of an award, a fresh arbitration could ensue as a matter of law, and it was not open to his client or anybody to thwart a fresh arbitration in case an award is set aside under Section 34.

5. Col. R. Balasubramanian, learned senior advocate appearing on behalf of the respondent in SLP (Civil) No. 12987 of 2020, raised by way of a preliminary point, that in at least three cases arising out of the same notification for the same village and the same purpose as in his case, the NHAI had deposited the compensation before the learned court concerned and the same was received by the claimants. The judgment of the learned District Judge was thus complied with. He also pointed out that in two other cases being, AROP No. 9,10,11 of 2014 and CMA No.650 to 680 of 2013, the NHAI had deposited the entire award amount with the accrued interest before the District Judge in accordance with the District Judge's judgment, no appeal being filed therefrom. He therefore argued that the NHAI being 'State' under Article 12 of the Constitution of India, cannot pick and choose as to when it will file appeals against certain District Judge judgments and not against others. On this ground alone, according to the learned senior advocate, all these appeals ought to be dismissed. On merits, he pointed out the facts of his case and the fact that an abysmally low sum had been given as compensation which was then raised by the District Judge, having regard to the relevant sale deeds in the vicinity. He then copiously read from the learned Single Judge's judgment of the Madras High Court in Gayatri Balaswamy's case and supported this line of reasoning. He also supported the impugned judgment to argue that even if the learned Single Judge in Gayatri Balaswamy had not laid down the law correctly so far as matters arising under the Arbitration Act are concerned, yet the impugned judgment correctly makes the distinction between consensual arbitration and an arbitrator appointed by the Central Government, who is none other than some government servant

who merely rubber stamps awards that are passed by yet another government servant. He argued that if Section 34 were to be construed in the manner suggested by the learned Solicitor General, then for a very grievous wrong there would be no remedy as all that the District Judge could then do in the Section 34 jurisdiction is to set aside the award, resulting in a fresh arbitration before either the self-same bureaucrat or another bureaucrat appointed by the Central Government. This being the case, these appeals even on merits ought to be dismissed.

6. Having heard learned counsel appearing on both sides, it is important to first set out the relevant sections under the National Highways Act. As has been argued by the learned Solicitor General, the National Highways Act was amended in 1997. Para 2 of the Statement of Objects and Reasons for this amendment is set out hereunder: -

> "STATEMENT OF OBJECTS AND REASONS One of the impediments in the speedy implementation of highways projects has been inordinate delay in the acquisition of land. In order to expedite the process of land acquisition, it is proposed that once the Central Government declares that the land is required for public purposes for development of a highway, that land will vest in the Government and only the amount by way of compensation is to be paid and any dispute relating to compensation will be subject to adjudication through the process of arbitration."

7. The "competent authority" under the National Highways Act is defined in Section 3(a) as follows:

> 3. Definitions. — In this Act, unless the context otherwise requires, —
>
> (a) "competent authority" means any person or authority authorised by the Central Government, by notification in the Official Gazette, to perform the functions of the competent authority for such area as may be specified in the notification;

8. Section 3A of the Act states: -

> 3A. Power to acquire land, etc.— (1) Where the Central Government is satisfied that for a public purpose any land is required for the building, maintenance, management or operation of a national highway or part thereof, it may, by notification in the Official Gazette, declare its intention to acquire such land.
>
> (2) Every notification under sub-section (1) shall give a brief description of the land.
>
> (3) The competent authority shall cause the substance of the notification to be published in two local newspapers, one of which will be in a vernacular language.

9. After objections are then heard under Section 3C, the requisite declaration is made under Section 3D which reads as follows: -

> 3D. Declaration of acquisition. — (1) Where no objection under sub-section (1) of section 3C has been made to the competent authority within the period specified therein or where the competent authority has disallowed the objection under subsection (2) of that section, the competent authority shall, as soon as may be, submit a report accordingly to the Central Government and on receipt of such report, the Central Government shall declare, by notification in the Official Gazette, that the land should be acquired for the purpose or purposes mentioned in sub-section (1) of section 3A.
>
> (2) On the publication of the declaration under sub-section (1), the land shall vest absolutely in the Central Government free from all encumbrances.
>
> (3) Where in respect of any land, a notification has been published under sub-section (1) of section 3A for its acquisition but no declaration under sub-section (1) has been published within a period of one year from the date of publication of that notification, the said notification shall cease to have any effect:
>
> Provided that in computing the said period of one year, the period or periods during which any action or proceedings to be taken in pursuance of the notification issued under sub- section (1) of section 3A is stayed by an order of a court shall be excluded.
>
> (4) A declaration made by the Central Government under sub-section (1) shall not be called in question in any court or by any other authority.

10. Section 3G with which we are directly concerned and which speaks of the determination of an amount payable as compensation reads as follows: -

> 3G. Determination of amount payable as compensation.
>
> (1) Where any land is acquired under this Act, there shall be paid an amount which shall be determined by an order of the competent authority.
>
> (2) Where the right of user or any right in the nature of an easement on, any land is acquired under this Act, there shall be paid an amount to the owner and any other person whose right of enjoyment in that land has been affected in any manner whatsoever by reason of such acquisition an amount calculated at ten per cent, of the amount determined under sub-section (1), for that land.
>
> (3) Before proceeding to determine the amount under sub-

section (1) or sub-section (2), the competent authority shall give a public notice published in two local newspapers, one of which will be in a vernacular language inviting claims from all persons interested in the land to be acquired. (4) Such notice shall state the particulars of the land and shall require all persons interested in such land to appear in person or by an agent or by a legal

practitioner referred to in sub-section (2) of section 3C, before the competent authority, at a time and place and to state the nature of their respective interest in such land.

(5) If the amount determined by the competent authority under sub-section (1) or sub-section (2) is not acceptable to either of the parties, the amount shall, on an application by either of the parties, be determined by the arbitrator to be appointed by the Central Government— (6) Subject to the provisions of this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to every arbitration under this Act.

(7) The competent authority or the arbitrator while determining the amount under sub-section (1) or sub- section (5), as the case may be, shall take into consideration—

(a)the market value of the land on the date of publication of the notification under section 3A;

(b) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the severing of such land from other land;

(c) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the acquisition injuriously affecting his other immovable property in any manner, or his earnings;

(d) if, in consequences of the acquisition of the land, the person interested is compelled to change his residence or place of business, the reasonable expenses, if any, incidental to such change.

11. Section 3J then states:

> 3J. Land Acquisition Act 1 of 1894 not to apply. — Nothing in the Land Acquisition Act, 1894 shall apply to an acquisition under this Act.

12. It will be seen that the competent authority, as defined, is to first determine an amount which is payable by way of compensation for compulsory acquisition of land. Under Section 3G(5), if the amount determined by the said authority is not acceptable to either of the parties, the amount shall, on application by either of the parties, be determined by an arbitrator to be appointed by the Central Government. What is of importance is that the 'competent authority' is a person or authority authorised by the Central Government by notification to determine the amount of compensation. In the present case, a notification designating a Special District Revenue Officer as the competent authority has been made. The amount determined by the aforesaid authority has then to be sent to an arbitrator, on application by either of the parties. What is important to remember is that the aforesaid arbitration is not a consensual process with both parties having a hand in appointing the arbitrator. As a matter of fact, the land owner has no say in the appointment of the arbitrator, who is to be appointed only by the acquiring authority, that is the Central Government.

13. Section 34 of the Arbitration Act, 1996 occurs in Chapter VII under the title "Recourse against arbitral award". We are directly concerned with sub-sections (1) and (4) of Section 34 which are set

out hereunder.

34. Application for setting aside arbitral award. — (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

xxx xxx xxx (4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it 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.

xxx xxx xxx

14. What is important to note is that, far from Section 34 being in the nature of an appellate provision, it provides only for setting aside awards on very limited grounds, such grounds being contained in sub-sections (2) and (3) of Section 34. Secondly, as the marginal note of Section 34 indicates, "recourse" to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-sections (2) and (3). "Recourse" is defined by P Ramanatha Aiyar's Advanced Law Lexicon (3rd Edition) as the enforcement or method of enforcing a right. Where the right is itself truncated, enforcement of such truncated right can also be only limited in nature. What is clear from a reading of the said provisions is that, given the limited grounds of challenge under sub-sections (2) and (3), an application can only be made to set aside an award. This becomes even clearer when we see sub- section (4) under which, on receipt of an application under sub- section (1) of Section 34, the court may adjourn the Section 34 proceedings and give the arbitral tribunal an opportunity to resume the arbitral proceedings or take such action as will eliminate the grounds for setting aside the arbitral award. Here again, it is important to note that it is the opinion of the arbitral tribunal which counts in order to eliminate the grounds for setting aside the award, which may be indicated by the court hearing the Section 34 application.

15. It is important to remember that Section 34 is modelled on the UNCITRAL Model Law on International Commercial Arbitration, 1985, under which no power to modify an award is given to a court hearing a challenge to an award. The relevant portion of the Model Law reads as follows:

> Article 34. Application for setting aside as exclusive recourse against arbitral award (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (2) of this article.
>
> xxx xxx xxx (4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

16. Redfern and Hunter on International Arbitration (6th edition), states that the Model Law does not permit modification of an award by the reviewing court (at page 570) as follows:

> "10.06 The purpose of challenging an award before a national court at the seat of arbitration is to have that court declare all, or part, of the award null and void. If an award is set aside or annulled by the relevant court, it will usually be treated as invalid, and accordingly unenforceable, not only by the courts of the seat of arbitration, but also by national courts elsewhere. This is because, under both the New York Convention and the Model Law, a competent court may refuse to grant recognition and enforcement of an award that has been set aside by a court of the seat of arbitration. It is important to note that, following complete annulment, the claimant can recommence proceedings because the award simply does not exist-that is, the status quo ante is restored. The reviewing court cannot alter the terms of an award nor can it decide the dispute based on its own vision of the merits. Unless the reviewing court has a 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."

17. The statutory scheme under Section 34 of the Arbitration Act, 1996 is in keeping with the UNCITRAL Model Law and the legislative policy of minimal judicial interference in arbitral awards.

18. By way of contrast, under Sections 15 and 16 of the Arbitration Act, 1940, the court is given the power to modify or correct an award in the circumstances mentioned in Section 15, apart from a power to remit the award under Section 16 as follows: -

> 15. Power of Court to modify award.

The Court may by order modify or correct an award-

(a) where it appears that a part of, the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or

(b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or

(c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

16. Power to remit award.

(1) The Court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit-

(a) where- the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred; or

(b) where the award is so indefinite as to be incapable of execution; or

(c) where an objection to the legality of the award is apparent upon the face of it., (2) Where an award is remitted under sub- section (1) the Court shall fix the time within which the arbitrator or umpire shall submit his decision to the Court: Provided that any time so fixed may be extended by subsequent order of the Court.

(3) An award remitted under sub- section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed.

19. As a result therefore, a judgment in terms of the award is given under Section 17 of the 1940 Act which reads as follows: -

> 17. Judgment in terms of award.

Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award.

20. Thus, under the scheme of the old Act, an award may be remitted, modified or otherwise set aside given the grounds contained in Section 30 of the 1940 Act, which are broader than the grounds contained in Section 34 of the 1996 Act.

21. It is settled law that a Section 34 proceeding does not contain any challenge on the merits of the award. This has been decided in MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163, at 167 as follows: -

> 14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision.

Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.

22. Likewise, in Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131, this Court under the caption "Section 34(2)(a) does not entail a challenge to an arbitral award on merits" referred to this Court's judgment in Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 [the "New York Convention"] and various other authorities to conclude that there could be no challenge on merits under the grounds mentioned in Section 34 - (see paras 34 to 48). This Court also held, in Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd., (2018) 3 SCC 133 (at 170), that the court hearing a Section 34 petition does not sit in appeal (see para 51).

23. As a matter of fact, the point raised in the appeals stands concluded in McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181, where this Court held: -

> 51. After the 1996 Act came into force, under Section 16 of the Act the party questioning the jurisdiction of the arbitrator has an obligation to raise the said question before the arbitrator. Such a question of jurisdiction could be raised if it is beyond the scope of his authority. It was required to be raised during arbitration proceedings or soon after initiation thereof. The jurisdictional question is required to be determined as a preliminary ground. A decision taken thereupon by the arbitrator would be the subject-matter of challenge under Section 34 of the Act. In the event the arbitrator opined that he had no jurisdiction in relation thereto an appeal thereagainst was provided for under Section 37 of the Act.
>
> 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, the 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.

24. This statement of the law was followed in Kinnari Mullick v. Ghanshyam Das Damani, (2018) 11 SCC 328 at page 334 (see para 15).

25. Also, in Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1, this Court held: -

> 36. At this juncture it must be noted that the legislative intention of providing Section 34(4) in the Arbitration Act was to make the award enforceable, after giving an opportunity to the Tribunal to undo the curable defects. This provision cannot be brushed aside and the High Court could not have proceeded further to determine the issue on merits.

> 37. In case of absence of reasoning the utility has been provided under Section 34(4) of the Arbitration Act to cure such defects. When there is complete perversity in the reasoning then only it can be challenged under the provisions of Section 34 of the Arbitration Act. The power vested under Section 34(4) of the Arbitration Act to cure defects can be utilised in cases where the arbitral award does not provide any reasoning or if the award has some gap in the reasoning or otherwise and that can be cured so as to avoid a challenge based on the aforesaid curable defects under Section 34 of the Arbitration Act. However, in this case such remand to the Tribunal would not be beneficial as this case has taken more than 25 years for its adjudication. It is in this state of affairs that we lament that the purpose of arbitration as an effective and expeditious forum itself stands effaced.

26. Some of the judgments of the High Courts are also instructive. A learned Single Judge of the Delhi High Court in Cybernetics Network Pvt. Ltd. v. Bisquare Technologies Pvt. Ltd., 2012 SCC OnLine Del 1155, held:

> 47. The next question that arises is whether the above claims as mentioned in para 44 that have been erroneously rejected by the learned Arbitrator can be allowed by this Court in exercise of its powers under Section 34(4) of the Act?
>
> 48. Under Section 34(4) of the Act, the Court while deciding a challenge to an arbitral award, can either "adjourn the proceedings for a period of time determined by it 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 the arbitral tribunal will eliminate the grounds for setting aside the arbitral award". This necessarily envisages the Court having to remit the matter to the Arbitral Tribunal. This is subject to the Court finding it appropriate to do so and a party requesting it to do so.
>
> 49. In Union of India v. Arctic India2007 (4) Arb LR 524 (Bom), a learned Single Judge of the Bombay High Court opined that the Court can modify the Award even if there is no express provision in the Act permitting it. The Court followed the decision of the Supreme Court in Krishna Bhagya Jala Nigam Ltd. v. Harischandra Reddy (2007) 2 SCC 720. A similar view has been taken by a learned Single Judge of this Court in Union of India v. Modern Laminators2008 (3) Arb LR 489 (Del). There the question was whether in light of the arbitrator having failed to decide the counter claim of the respondent in that case the Court could itself decide the counter claim. After discussing the case law, the Court concluded that it could modify the award but only to a limited extent. It held (Arb LR p. 496):
>
> "Such modification of award will be a species of 'setting aside' only and would be 'setting aside to a limited extent'. However, if the courts were to find that they cannot within the confines of interference permissible or on the material before the arbitrator are unable to modify and if the same would include further fact finding or adjudication of intricate questions of law the parties ought to be left to the forum of

their choice i.e. to be relegated under Section 34(4) of the Act to further arbitration or other civil remedies."

50. However, none of the above decisions categorically hold that where certain claims have been erroneously rejected by the Arbitrator, the Court can in exercise of its powers under Section 34(4) of the Act itself decide those claims. The Allahabad High Court has in Managing Director v. Asha Talwar2009 (5) ALJ 397, held that while exercising the powers to set aside an Award under Section 34 of the Act the Court does not have the jurisdiction to grant the original relief which was prayed for before the Arbitrator. The Allahabad High Court referred to the decision of the Supreme Court in McDermott International Inc. v. Burn Standard Co. Ltd.(2006) 11 SCC 181, where it was observed (SCC @ p. 208):

xxx xxx xxx

51. The view of the Allahabad High Court in Managing Director v. Asha Talwar appears to be consistent with the scheme of the Act, and in particular Section 34 thereof which is a departure from the scheme of Section 16 of the 1940 Act which perhaps gave the Court a wider amplitude of powers. Under Section 34(2) of the Act, the Court is empowered to set aside an arbitral award on the grounds specified therein. The remand to the Arbitrator under Section 34(4) is to a limited extent of requiring the Arbitral Tribunal "to eliminate the grounds for setting aside the arbitral award". There is no specific power granted to the Court to itself allow the claims originally made before the Arbitral Tribunal where it finds the Arbitral Tribunal erred in rejecting such claims. If such a power is recognised as falling within the ambit of Section 34(4) of the Act, then the Court will be acting no different from an appellate court which would be contrary to the legislative intent behind Section 34 of the Act. Accordingly, this Court declines to itself decide the claims of CNPL that have been wrongly rejected by the learned Arbitrator.

27. The Delhi High Court in Nussli Switzerland Ltd. v. Organizing Committee Commonwealth Games, 2014 SCC OnLine Del 4834, held: -

34. A party like the Organizing Committee which has its claims rejected, except a part, but which subsumes into the larger amount awarded in favour of the opposite party, even if succeeds in the objections to the award would at best have the award set aside for the reason the Arbitration and Conciliation Act, 1996 as distinct from the power of the Court under the Arbitration Act, 1940, does not empower the Court to modify an award. If a claim which has been rejected by an Arbitral Tribunal is found to be faulty, the Court seized of the objections under Section 34 of the Arbitration and Conciliation Act, 1996 has to set aside the award and leave the matter at that. It would be open to the party concerned to commence fresh proceedings (including arbitration) and for this view one may for purposes of convenience refer to sub-Section (4) of Section 43 of the Arbitration and Conciliation Act, 1996. It reads: -

> "43. Limitations-
>
> (1) xxxxx (2) xxxxx (3) xxxxx (4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963, for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted."

28. An instructive judgment of the Delhi High Court in Puri Construction P. Ltd. v. Larsen and Toubro Ltd., 2015 SCC OnLine Del 9126 deals with the authorities of the Madras and Calcutta High Courts on the one hand and the other High Courts dealing with this problem as follows: -

> 115. In these circumstances, this Court holds that the reliefs granted by the Tribunal cannot be sustained and are hereby set aside. The question that follows is whether this Court, exercising jurisdiction under Section 37 read with Section 34 of the Act, can modify, vary or remit the award. At the outset, it is noticed that there are divergent views on this issue.

Here, the Court notices a somewhat divergent approach of various High Courts. The case law is discussed in the following part of the judgment.

Authorities in Favour of the Power to Modify, Vary or Remit the award

116. A learned Single Judge of this Court in Bhasin Associates v. NBCC, (2005) ILR 2 Delhi 88 held that "the power to set aside an award when exercised by the Court would leave a vacuum if the said power was not understood to include the power to remand the matter back to the arbitrator". This view was subsequently adopted in Single Bench decisions in Union of India v. Modern Laminators Ltd., 2008 (3) ARB LR 489 (Delhi) (in the context of modification of the award), IFFCO Tokio General Insurance Co. Ltd. v. Indo Rama Synthetics Ltd. (decided on 20.01.2015) and Canara Bank v. Bharat Sanchar Nigam Ltd. (decided on 26.03.2015). In Modern Laminators, the Court relied upon the Supreme Court's decision in Numaligarh Refinery Ltd. v. Daelim Industrial Company Ltd., (2007) 8 SCC 466, noting that the Court therein had modified the award in terms of its findings; and the decision in Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy, AIR 2007 SC 817, where the interest rate awarded by the arbitrator was modified. The learned Single Judge in Canara Bank relied upon a decision of a Single Judge of the Madras High Court in Gayatri Balaswamy v. ISG Novasoft Technologies Ltd., (2015) 1 MLJ 5. The Court in Gayatri Balaswamy examined the issue in significant [sic] and held as follows:

> "Therefore, in my considered view, the expression 'recourse to a Court against an arbitral award' appearing in Section 34(1) cannot be construed to mean only a right to seek the setting aside of an award. Recourse against an arbitral award could be either for setting aside or for modifying or for enhancing or for varying or for revising an award. The expression 'application for setting aside such an award' appearing in Section 34(2) and (3) merely prescribes the form, in which, a person can seek

> recourse against an arbitral award. The form, in which an application has to be made, cannot curtail the substantial right conferred by the statute. In other words, the right to have recourse to a Court, is a substantial right and that right is not liable to be curtailed, by the form in which the right has to be enforced or exercised. Hence, in my considered view, the power under Section 34(1) includes, within its ambit, the power to modify, vary or revise." The same view had been adopted earlier by Single Bench decisions of the Bombay High Court in Axios Navigation Co. Ltd. v. Indian Oil Corporation Limited, 2012 (114) BOM LR 392 and Angerlehner Structurals and Civil Engineering Co. v. Municipal Corporation of Greater Mumbai, 2013 (7) Bom CR 83 and a Division Bench of the Calcutta High Court in West Bengal Electronics Industries Development Corporation Ltd. v. Snehasis Bhowmick (in A.P.O. No. 240 of 2012).

Authorities holding there is no power to Modify, Vary or Remit the award xxx xxx xxx

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

> "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 (supra) 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 dictat 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 Delhi Development Authority, State Trading Corporation of India Ltd., this was also noted by a Full Bench of the Bombay High Court in R.S. Jiwani v. Ircon International Ltd., 2010 (1) Bom CR 529, where the Court held:

"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... It is also true that there are no parimateria 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 (supra) 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.

29. Thus, there can be no doubt that given the law laid down by this Court, Section 34 of the Arbitration Act, 1996 cannot be held to include within it a power to modify an award. The sheet anchor of the argument of the respondents is the judgment of the learned Single Judge in Gayatri Balaswamy (supra). This matter arose out of a claim for damages by an employee on account of sexual harassment at the workplace. The learned Single Judge referred to the power to modify or correct an award under Section 15 of the Arbitration Act, 1940 in para 29 of the judgment. Thereafter, a number of judgments of this Court were referred to in which awards were modified by this Court, presumably under the powers of this Court under Article 142 of the Constitution of India. In para 34, the learned Single Judge referred to para 52 in McDermott's case (supra) and then concluded that since the observations made in the said para were not given in answer to a pointed question as to whether the court had the power under Section 34 to modify or vary an award, this judgment cannot be said to have settled the answer to the question raised finally.

30. The first judgment of this Court referred to by the learned Single Judge is the judgment in Gautam Constructions and Fisheries Ltd. v. National Bank for Agriculture & Rural Development, (2000) 6 SCC 519. The learned Single Judge correctly pointed out that this judgment was under the Arbitration Act, 1940. In para 31, the learned Single Judge then went on to state that modifications were made in the award by the Supreme Court outside the provisions of Section 15 of the Arbitration Act, 1940 and that, therefore, the Supreme Court took the power of the Court to modify an Award for granted. The comment made in para 31 does not appear to be justified. Obviously, the power used was the power to do complete justice between the parties, which is a power relatable to the Constitution vested only in the Supreme Court of India as a final court of last resort under Article 142 of the Constitution of India.

31. The next judgment referred to in para 32 is the judgment in Tata Hydro-Electric Power Supply Co. Ltd. v. Union of India, (2003) 4 SCC 172. In para 21, this Court modified the award qua interest, granting interest at the same rate but with reference to a different period from that stated in the award. There is no doubt that the award was in fact "modified" by the Supreme Court – again referable to Article 142 of the Constitution of India.

32. Likewise, in Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445, the learned Single Judge correctly observed that the Supreme Court did not specifically address the issue as to whether the court has the power under Section 34 to modify the Award. In stating that the Supreme Court affixed a seal of approval on the decision of the trial court modifying the award would not be wholly correct. In para 12 only one ground was argued in the appeal, which ground found favour with this Court. In any case, a modification of an award upheld on facts without any discussion on the law does not carry the matter very much further.

33. In Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy, (2007) 2 SCC 720, a judgment of this Court referred to in para 36, this Court reduced the rate of interest for the pre-arbitration period, pendente lite and future interest. It also referred to a suggestion that a certain amount be reduced from the awarded amount from Rs.1.47 crores to Rs.1 crore, which the learned counsel for the respondent therein fairly accepted. Obviously, these orders were also made under Article 142 of the Constitution of India and do not carry the matter very much further. From these judgments, to deduce, in para 39, that the judicial trend appears to favour an interpretation which would read into Section 34 a power to modify, revise or vary an award is wholly incorrect. The observation found in McDermott's decision clearly bound the learned Single Judge and any decision to the contrary would be incorrect.

34. At this juncture, it is important to point out that an earlier Division Bench of the Madras High Court reported in Central Warehousing Corpn. v. A.S.A. Transport, 2007 SCC OnLine Mad 972 had specifically considered the judgment of this Court in McDermott (supra) and held: -

18. Though we are not in a position to concur with the reasoning of the learned single Judge, we are in complete agreement with the ultimate order of the learned single Judge in setting aside the award. However, the further direction given by the learned single Judge directing the appellant to appoint an arbitrator at Chennai and for conducting the arbitration are to be set aside as it cannot be given as an order of the Court. Useful reference can be had to the judgment of the Supreme Court in the case of Mcdermott International Inc. v. Burn Standard co.

Ltd., (2006) 11 SCC 181, wherein it was held that the 1996 Act makes provisions for 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. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. Hence, in an application taken out under section 34 of the Act, the Court can set aside the award leaving the parties free to begin the arbitration again if it is desired. 19. Therefore, the order of the learned single judge setting aside the award is confirmed for the reasons given by us. However, the other observations of the learned single Judge are set aside. The issue is left open to the parties to proceed further. The appeal is disposed of in the above terms. However, there is no order as to costs. The connected miscellaneous petition is closed.

35. This judgment was not cited before the learned Single Judge, being a binding Division Bench judgment, which specifically decided, following McDermott's case (supra), that the power of modification is not available under Section 34 of the Arbitration Act, 1996. Even otherwise therefore, the learned Single Judge's judgment was rendered per incuriam.

36. However, a later Division Bench of the High Court of Madras vide judgment dated August 8th, 2019 reported in ISG Novasoft Technologies Limited v. Gayatri Balasamy, 2019 SCC OnLine Mad 15819 agreed with the learned Single Judge, without adverting to the earlier Division Bench judgment of the same court, as follows:

> 41. It is no doubt true that the legislators did not intend to use the word "modify" anywhere in Section 34 of the Act but what was contemplated is only to "set aside" an award passed by the Arbitrator if it falls within the realm of Section 34 of the Act. It is trite that an arbitrator being a Judge chosen by the parties, his decision would ordinarily be final unless one or the other conditions contained in Section 34 of the Act is satisfied for the purpose of setting aside his award. The Court's jurisdiction in this behalf is to see whether the arbitrator has exceed his jurisdiction or not and therefore, the scope of judicial review of the arbitral award is a narrow one.
>
> 42. In order to arrive at a conclusion as to whether the Court, in exercise of power under Section 34 of the Act is entitled to modify or vary the award passed by the Arbitrator, the learned single Judge relied on several decisions. In para No. 30 of the order passed by the learned single Judge, reliance was placed on the decision of the Honourable Supreme court in Gautam Constructions and Fisheries Limited v. National Bank for Agriculture and Rural Development reported in (2000) 6 SCC 519. In that case, a single Judge of this Court upheld the claim for award of Rs.

400/- per square feet which was modified by the Division Bench of this Court and reduced it to Rs. 150/-. When the matter reached the Honourable Supreme Court, the rate was modified further to Rs. 250/- per square feet. By placing reliance on this decision, the learned single Judge held that the Court exercising jurisdiction under Section 34 of the Act has power to modify or vary the award passed by the Arbitrator. Similarly, reference was made in para No. 32 of the order of the learned single Judge to the decision of the Honourable Supreme Court in Tata Hydero Electric Power Supply Co. Ltd. v. Union of India, (2003) 4 SCC 172 in which also the Honourable Supreme Court, while reversing the judgment of the High Court, interfered with the award passed by the arbitrator in so far as it relates to payment of interest. For the very same proposition that the Court is empowered to

modify or vary the award passed by the arbitrator, reliance was placed on the decision of the Honourable Supreme Court in Hindustan Zinc Limited v. Friends Coal Carbonisation, (2006) 4 SCC 445 to drive home the point that the Court has power under Section 34 to modify the award passed by the Arbitrator. We are also in entire agreement with the reasoning of the learned single Judge that merely because the word "modify" or "vary" is not indicated in Section 34 of the Act, it will not take away the jurisdiction of the Court exercising under jurisdiction Section 34 of the Act to interfere with the award passed by an arbitrator partially. If such a power is not vested with the Court, it will only lead to multiplicity of proceedings, which is not intended by the legislature while framing Section 34 of the Act. A reasonable interpretation to Section 34 would only lead to an irresistible conclusion that the Court can modify or vary the award of the arbitrator if it is contrary to the material evidence adduced by the parties. Even otherwise, as contemplated under Section 34(2)(v)(b)(ii) of the Act, when the award passed by the Arbitrator is in conflict with the public policy in our Country, reversal or modification of such award passed by the arbitrator is well within the provisions contained under Section 34 of the Act itself. In the present case, as rightly observed by the learned single Judge, the non-constitution of a committee as per the direction of the Honourable Supreme Court in Vishaka case is to be regarded as a statutory violation and contravention of public policy prevailing in India and therefore, the appellant is entitled for a just and fair compensation.

37. This judgement suffers from the same infirmities as the learned Single Judge's judgement which it affirms.

38. Col. Balasubramanian also referred to three other judgments to buttress the very same submission, namely, Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd., (2007) 8 SCC 466; DDA v. R.S. Sharma and Co., (2008) 13 SCC 80 and Royal Education Society v. LIS (India) Construction Co. (P) Ltd., (2009) 2 SCC

261. Each of these judgments also does not carry the matter further in that, orders that are passed under Article 142 of the Constitution do not constitute the ratio decidendi of a judgment. Admittedly, there was no discussion on whether, as a matter of law, a power to vary an award can be found in Section 34 of the Arbitration, 1996.

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, 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 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.

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

45. "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 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.

46. 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.

47. However, this does not end the matter, as has rightly been pointed out by Col. Balasubramanian, learned senior advocate appearing on behalf of the respondent. In several cases, the NHAI has not filed appeals even in matters which are similar i.e., arising from the same Section 3A Notification, as a result of which certain land owners have got away with enhanced compensation given to them by the District Court. Also, we cannot shut our eyes to the fact the arbitrator has awarded compensation on a completely perverse basis i.e., by taking into account 'guideline value' which is relevant only for stamp duty purposes, and not taking into account sale deeds which would have reflected the proper market value of the land. Given the fact that the awards in all these cases are therefore perverse, the District Judge rightly interfered with the same.

48. 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.

49. This question was then answered stating:

> 52. There is no doubt that the learned Solicitor General, in the aforesaid two orders, has conceded the issue raised in these cases. This assumes importance in view of the plea of Shri Divan that the impugned judgments should be set aside on the ground that when the arbitral awards did not provide for solatium or interest, no Section 34 petition having been filed by the landowners on this score, the Division Bench judgments that are impugned before us ought not to have allowed solatium and/or interest. Ordinarily, we would have acceded to this plea, but given the fact that the Government itself is of the view that solatium and interest should be granted even in cases that arise between 1997 and 2015, in the interest of justice we decline to interfere with such orders, given our discretionary jurisdiction under Article 136 of

> the Constitution of India. We therefore declare that the provisions of the Land Acquisition Act relating to solatium and interest contained in Sections 23(1-A) and (2) and interest payable in terms of Section 28 proviso will apply to acquisitions made under the National Highways Act.

Consequently, the provision of Section 3-J is, to this extent, violative of Article 14 of the Constitution of India and, therefore, declared to be unconstitutional. Accordingly, appeal arising out of SLP (C) No. 9599 of 2019 is dismissed.

50. As has been stated by us, the object of the NH Amendment Act, 1997 is to expedite the process of acquisition. This has been achieved by cutting down the period for hearing of objections from 30 days under Section 5A of the Land Acquisition Act to 21 days under Section 3C of the National Highways Act. Further, unlike the Land Acquisition Act, the moment a notification under Section 3D(2) of the National Highways Act (equivalent to Section 6 Land Acquisition Act) is made, the land vests absolutely in the Central Government free from all encumbrances. Thereafter, where land has vested in the Central Government and the amount determined by the competent authority under Section 3G as compensation has been deposited by the Central Government in accordance with Section 3H(1), the competent authority may then direct that possession be taken within 60 days of service of notice by it.

51. Also, injunctions against highway projects have now become impossible to obtain in view of Section 20A of the Specific Relief Act, which has been introduced w.e.f. 01.10.2018. The said provision reads as follows:

> 20A. Special provisions for contract relating to infrastructure project. — (1) No injunction shall be granted by a court in a suit under this Act involving a contract relating to an infrastructure project specified in the Schedule, where granting injunction would cause impediment or delay in the progress or completion of such infrastructure project.

Explanation. —For the purposes of this section, section 20B and clause (ha) of section 41, the expression “infrastructure project” means the category of projects and infrastructure Sub-Sectors specified in the Schedule.

(2) The Central Government may, depending upon the requirement for development of infrastructure projects, and if it considers necessary or expedient to do so, by notification in the Official Gazette, amend the Schedule relating to any Category of projects or Infrastructure Sub-Sectors.

(3) Every notification issued under this Act by the Central Government shall be laid, as soon as may be after it is issued, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or both Houses agree that the

notification should not be made, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification.

52. Under the Schedule, Category No. 1 deals with 'Transport' and under 'Infrastructure Sub-Sectors' listed in this category, clause (a) reads 'Road and Bridges'.

53. 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 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.

54. There can be no doubt that differential compensation cannot be awarded on the ground that a different public purpose is sought to be achieved. Also, the legislature cannot say that, however laudable the public purpose and however important it is to expedite the process of land acquisition, differential compensation is to be paid depending upon the public purpose involved or the statute involved.

55. Take the case of a single owner of land who has two parcels of land adjacent to each other. One parcel of land abuts the national highway, whereas the other parcel of land is at some distance from the national highway. Can it be said that the land which abuts the national highway, and which is acquired under the National Highways Act, will yield a compensation much lesser than the adjacent land which is acquired under the Land Acquisition Act only because in the former case, an award is by a government servant which cannot be challenged on merits, as opposed to an award made under Part III of the Land Acquisition Act by the reference Court with two appeals in which the merits of the award can be gone into? There can be no doubt that discrimination would be writ large in such cases.

56. As a matter of fact, 7 learned Judges of this Court in Nagpur Improvement Trust v. Vithal Rao, (1973) 1 SCC 500 held as follows: -

> 26. It is now well-settled that the State can make a reasonable classification for the purpose of legislation. It is equally well-settled that the classification in order to be reasonable must satisfy two tests: (i) the classification must be founded on intelligible differentia and (ii) the differentia must have a rational relation with the object sought to be achieved by the legislation in question. In this connection it must be borne in mind that the object itself should be lawful.

The object itself cannot be discriminatory, for otherwise, for instance, if the object is to discriminate against one section of the minority the discrimination cannot be justified on the ground that there is

a reasonable classification because it has rational relation to the object sought to be achieved.

27. What can be reasonable classification for the purpose of determining compensation if the object of the legislation is to compulsorily acquire land for public purposes?

28. It would not be disputed that different principles of compensation cannot be formulated for lands acquired on the basis that the owner is old or young, healthy or ill, tall or short, or whether the owner has inherited the property or built it with his own efforts, or whether the owner is politician or an advocate. Why is this sort of classification not sustainable? Because the object being to compulsorily acquire for a public purpose, the object is equally achieved whether the land belongs to one type of owner or another type.

29. Can classification be made on the basis of the public purpose for the purpose of compensation for which land is acquired? In other words can the Legislature lay down different principles of compensation for lands acquired say for a hospital or a school or a Government building? Can the Legislature say that for a hospital land will be acquired at 50% of the market value, for a school at 60% of the value and for a Government building at 70% of the market value? All three objects are public purposes and as far as the owner is concerned it does not matter to him whether it is one public purpose or the other. Article 14 confers an individual right and in order to justify a classification there should be something which justifies a different treatment to this individual right. It seems to us that ordinarily a classification based on the public purpose is not permissible under Article 14 for the purpose of determining compensation. The position is different when the owner of the land himself is the recipient of benefits from an improvement scheme, and the benefit to him is taken into consideration in fixing compensation. Can classification be made on the basis of the authority acquiring the land? In other words can different principles of compensation be laid if the land is acquired for or by an Improvement Trust or Municipal Corporation or the Government? It seems to us that the answer is in the negative because as far as the owner is concerned it does not matter to him whether the land is acquired by one authority or the other.

30. It is equally immaterial whether it is one Acquisition Act or another Acquisition Act under which the land is acquired. If the existence of two Acts could enable the State to give one owner different treatment from another equally situated the owner who is discriminated against, can claim the protection of Article 14.

57. 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.

58. Given the fact that in several similar cases, the NHAI has allowed similarly situated persons to receive compensation at a much higher rate than awarded, and given the law laid down in Nagpur Improvement Trust (supra), we decline to exercise our jurisdiction under Article 136 in favour of the appellants on the facts of these cases. Also, given the fact that most of the awards in these cases were

made 7-10 years ago, it would not, at this distance in time, be fair to send back these cases for a de novo start before the very arbitrator or some other arbitrator not consensually appointed, but appointed by the Central Government. The appeals are, therefore, dismissed on facts with no order as to costs.

.....J. (R. F. Nariman) .....J. (B.R. Gavai) New Delhi, July 20, 2021.