

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

ARBITRATION APPEAL 34 OF 2019
WITH
ARBITRATION APPEAL 26 OF 2019

ARBITRATION APPEAL 34 OF 2019

1. Secretary to the Government of India,
Ministry of Shipping, Road Transport and
Highways, New Delhi.
2. National Highways Authority of India
Through its Project Director,
Project Implementation Unit, Nagpur-I
Having its Registered office at Bunglow
No. 2, Shubhankar Apartment,
Plot No. 159, Ambazari Hill Top,
Ram Nagar, Nagpur 440 003

.APPELLANTS

...V E R S U S...

1. The Additional Commissioner, Nagpur
and Arbitrator under the National
Highway Act, 1956. Having office at Old
Secretariat Building, Civil Lines,
Nagpur – 440 001
2. The Sub-Divisional Officer,
Land Acquisition Officer and Competent
Authority : Sadak Arjuni,
District Nagpur
3. Sarjuprasad s/o. Sangamlal Gupta,
Aged Major, Occ. Business,
R/o. 461, Chandan Nagar,
Nagpur

...RESPONDENTS

ARBITRATION APPEAL 26 OF 2019

Sarjuprasad s/o. Sangamlal Gupta,
Aged about 60 yrs, Occ. Business,
R/o. 461, Chandan Nagar,
Nagpur

.APPELLANT

...VERSUS...

1. National Highways Authority of India
Through, its Project Director,
Project Implementation Unit,
Pandhurna (M.P) Having its
registered office at Bunglow
No. 2, Shubhankar Apartment,
Plot No. 159, Shubhankar Apartment,
Plot No. 159, Ambazari Hill Top,
Ram Nagar, Nagpur 330 033.
2. Union of India, Ministry of Road,
Transport and Highways, through
its Secretary, having office at –
Parivahan bhavan, 1,
Parliament Street, New Delhi – 110 001
3. The Sub Divisional Officer,
Land Acquisition Officer and
Competent Authority,
District Nagpur.
4. The Additional Commissioner,
Nagpur and Arbitrator under the
National Highways Act, 1956,
Having office at Old Secretariat
Building, Civil Lines,
Nagpur 440 001.

...RESPONDENTS

Mr. Ajay Ghare & Mr. A.A. Kathane, counsel for appellants in AA 34/2019.

Mr. N.R. Rode, AGP for respondents 1 & 2 in AA 34/2019.

Mr. Anand Jaiswal, senior counsel assisted by Mr. Y.R. Kinkhede & Mr. H.R. Gadia, for respondent 3 in AA 34/2019.

Mr. Anand Jaiswal, senior counsel assisted by Mr. Y.R. Kinkhede & Mr. H.R. Gadia, for appellant in AA 26/2019

Mr. Ajay Ghare & Mr. A.A. Kathane, counsel for respondent 1 in AA 26/2019

Mr. N.R. Rode, AGP for respondents 3 & 4 in AA 26/2019.

CORAM: ROHIT B. DEO, J.

PRONOUNCED ON :12:08.2022

JUDGMENT:

These appeals emanate from the judgment dated 5.4.2019, rendered by the Principal District Judge, Nagpur ("PDJ") in Civil Miscellaneous Application 688/2015, whereby the application preferred by the Government of India ("GOI") and the National Highways Authority of India ("NHAI"), under section 34 of the Arbitration and Conciliation Act, 1996 ("Act of 1996"), assailing the Award dated 20.5.2015, rendered by the Arbitrator in Arbitration Case 38/2011-12, is rejected, and further and additional relief is granted to the claimant Mr. Sarjuprasad Sangamamal Gupta ("Claimant") by modifying the Award.

2. The operative part of the judgment dated 5.4.2019 in Civil Miscellaneous Application 688/2015, reads thus:

[1] The application is rejected with no order as

to costs.

[2] The award is thus not set aside as prayed for by the applicants, but it is modified as under:

[i] The applicants are directed to pay the non-applicant No. 3 the amount granted to him by the Arbitrator's award and in addition to it, 30% of the amount of the award as solatium as per the Section 23(2) of the Land Acquisition Act after deducting the 10% of the amount granted for the loss of easements right as per Section 3-G of the Highways Act.

[ii] The applicants shall pay amount calculated at the rate of 12% on the amount of compensation (market value) of the property acquired from the date of notification to the date of order of the competent authority for acquisition of land for National Highway as per Section 23(1-A) of the Land Acquisition Act.

[iii] The applicants shall pay interest at the rate of 9% on the amount payable under clauses 2[i] & 2[ii] from the date of notification under Section 3(d) of the Highways Act till the date of payment of enhanced compensation.

[iv] The amount already paid to the non-

applicant No. 3 shall be deducted from the said payable amount.

3. Arbitration Appeal 34/2019 is preferred by the GOI and the NHAI being aggrieved and dissatisfied with the judgment rendered by the learned PDJ in entirety while Arbitration Appeal 26/2019 is preferred by the claimant, who is dissatisfied with the judgment rendered by the learned PDJ to the limited extent the claimant is denied additional compensation @ 10% per annum and further to the extent the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, rehabilitation and Resettlement Act, 2013 ("Act of 2013") are not invoked.

4. Factual matrix:

4.1 Land admeasuring 0.28 H.R. which is part and portion of land assigned Survey 10/1, situated in village Panjari (Buz.), District Nagpur admeasuring 0.87 H.R. which was owned by the claimant is acquired under the provisions of the National Highways Act, 1956 ("NHAI Act") for widening, maintenance, management and

operation of section of NH-7 of the Nagpur – Hyderabad National Highway (“NH-7”) from K.M. 14.585 to K.M. 18.93.

4.2 Respondent 2 – as the competent authority, rendered award dated 6.8.2011 awarding compensation of Rs. 8,14,000/- (Rupees Eight Lac Fourteen Thousand) to the claimant for the land acquired.

4.3 Dissatisfied with the quantum of compensation awarded by the competent authority, the claimant preferred an application under section 3-G(5) of the NHAI Act for determination of compensation amount by the arbitrator (Arbitration Case 38/11-12).

4.4 Respondent 1 – arbitrator rendered award dated 20.5.2015, the operative part of which award reads thus:

i) The application is partly allowed.

ii) The non-applicants are directed to pay the applicant an amount of Rs. 85,55,800/- as compensation for the acquired land of 2200 Sq.Mtrs., less the

amount of Rs. 8,14,000/- already granted/received by the applicant.

iii) The non-applicants are also directed to pay to the applicant an additional amount of 10% of the total compensation amount for the loss of easement rights as per section 3G(2) of the National Highways Act, 1956, if not already paid.

iv) The non-applicants are further directed to pay the applicant an interest @9% p.a. on the enhanced compensation w.e.f. the date of notification under section 3D of the said Act till the date of payment of the enhanced compensation.

4.5 The NHAI assailed the award by preferring an application [Civil Miscellaneous Application 688/2015] under section 34 of the Act of 1996.

4.6 In Miscellaneous Civil Application 688/2015 preferred by the NHAI, the claimant preferred an application styled as “counter claim – arbitration application under section 34 of the Act of 1996” seeking

modification of the award dated 6.8.2011 and enhancement of the quantum of compensation.

4.7 The learned PDJ was pleased to decide Miscellaneous Civil Application 688/2015 by judgment dated 5.4.2019, the operative part of which is noted in paragraph 2 (supra).

4.8 While the NHAI is assailing the judgment of the learned PDJ in entirety, the claimant is aggrieved to the extent indicated supra.

5. The issues which fall for consideration in these appeals are;

(i) Is the award dated 20.5.2015, rendered by the arbitrator liable to be set aside under section 34 of the Act of 1996?

(ii) Whether recourse can be taken to the provisions of section 34(4) in order to give the arbitral tribunal an opportunity to resume the arbitration 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.

6. The learned counsel for NHAI Mr. Ajay Ghare would submit that answer to issue 1 presents no conundrum and patent illegality is writ large on the face of the record. Mr. Ajay Ghare would submit that the arbitral award is in conflict with the public policy of India. The frontal attack launched on the legality of the arbitral award is on the premise that the saledeeds dated 27.6.2008 and 2.4.2008, which constitute the only material on the basis of which the arbitrator determined the quantum of compensation, were not placed on record till the proceedings were closed for rendering award, and were taken on record behind the back of the NHAI after reserving the order, in circumstances bordering on the suspicious. Mr. Ajay Ghare would submit that the arbitrator acted in contravention of the mandatory provisions of section 24 and 28 of the Act of 1996, and that the manner in which the only material which constitutes the basis for the enhanced compensation was introduced in the proceedings renders the award vulnerable as in conflict with the fundamental policy of Indian law and with the most basic notions of morality or

justice.

7. The learned senior counsel for the claimant Mr. Anand Jaiswal with his usual fairness, did not join issues with the submission that the two saledeeds on which, and on which alone, the arbitrator relied to determine the quantum of compensation were not part of the record as on the date of the conclusion of hearing. Mr. Anand Jaiswal would submit, that in the absence of a specific structured ground in the application under section 34 of the Act of 1996, this Court may refrain from considering the submission premised on the breach of the principles of natural justice.

8. **Scrutiny of the record substantiates the submission of the NHAI that the only documentary evidence which constitutes *raison d'etre* for the enhanced compensation is introduced on record after the conclusion of the hearing, and behind the back of the NHAI:-**

8.1 While the competent authority awarded Rs. 8,14,000/- (Rupees Eight Lac Fourteen Thousand) as compensation for the land acquired, the arbitrator held the claimant entitled to compensation of Rs.85,55,800/-

(Rupees Eight Five Lac Fifty Five Thousand Eight Hundred) on the assumption that the claimant has established that the market rate of the land acquired is Rs. 3889/- (Rupees Three Thousand Eight Hundred Eighty Nine) per sq.mtr.. The arbitrator reasons thus:

“After going through the documents filed by applicant and written notes of arguments/reply filed by applicant and non-applicant no. 1 and 3, it is seen that the applicant is the owner of land bearing Survey No.9/1, area admeasuring 3.11 hectares of Mouza – Panjri (Buz.), out of the above land admeasuring 3.11 H.R., 0.22 H.R.. land has been acquired by the non-applicant no. 2 for widening of the National Highway No. 7 and has awarded an amount of Rs. 8,14,000/- towards compensation for acquisition of land admeasuring 0.22 H.R. out of land admeasuring 3.11 hectares from Survey No. 9/1 of Mouza – Panjri (Buz.), Tahsil Nagpur (Rural), Distt. Nagpur. The applicant has filed copy of sale transaction dated 27.6.2008 in respect of S.No. 43/2 of village Panjri (Buz.) executed between one Gopal Laxmanrao

Dondawar and Rajendrakumar Shivkishan Agrawal for an area admeasuirng 0.81 H.R. of open land for an amount of Rs. 3,15,00,000/-. The applicant has also filed the copy of sale transaction dated 2.4.2008 in respect of same survey no. and village executed between Navnirman Developers and Gopal Laxmanrao Kondawar for an area admeasuring 0.81 H.R. of open land from an amount of Rs. 3,00,00,000/-. Perusal of the sale transaction between Gopal laxmanrao Dondawar and Rajendrakumar Shivkishan Agrawal and Navnirman Developers and Gopal Kondawar shows that the land admeasuring 0.81 H.R. from S. No.43/2 of village Panjri (Buz.) for a consideration of Rs. 3,15,00,000/- and Rs. 3,00,00,000/- i.e. Rs. 3889/- per Sq.Mts. But the non-applicant no. 2 was not taken into consideration the above sale transactions while fixing the compensation of the land of applicant.

On the basis of above sale transactions filed by the appliance, I arrive at the conclusion that price of the

land in question on the date of issuance of the notification u/s 3-A(1) of the National Highways Act, 1956, would be Rs. 3889/- per Sq.Mtrs. and the applicant is entitled to receive the compensation of Rs. 85,55,800/- for acquired land of 2200 Sq.Mtrs. less the amount of Rs.8,14,000/- already granted/received by the applicant.

8.2 It is indubitable that the only documentary material which is considered by the learned Arbitrator is the copy of saledeed dated 27.6.2008 in respect of Survey 43/2 of village Panjri (Buz.) between Mr. Gopal Kondawar and Mr. Rajendrakumar Agrawal and copy of saledeed dated 2.4.2008 between M/s. Navnirman Developers and Mr. Gopal Kondawar in respect of the same survey number and village.

8.3 The learned arbitrator heard the claimant and the NHAI on 22.4.2015 and closed the proceedings for rendering award. The order-sheet dated 22.4.2015 reveals that the date of rendering the award was not fixed. The award is rendered on 20.5.2015.

8.4 Record reveals that photocopies of the two saledeeds on which the arbitrator relied, were placed on record by the claimant alongwith Pursis dated 6.5.2015. It is disconcerting to note that the record does not reveal that the case was taken on board on 6.5.2015. The order-sheet makes no reference to the Pursis and the photocopies of the saledeeds which are placed on record. The manner in which the photocopies of the two saledeeds were introduced on record behind the back of the NHAI raises several disturbing questions and while I refrain from making any positive observation on the submission of NHAI that the integrity of the adjudication stands compromised, I am impelled to hold that the arbitrator clearly contravened the fundamental policy of Indian law and the award is in conflict with most basic notions of morality or justice.

9. The award contravenes the mandatory provisions of the Act of 1996:-

Section 24 of the Act of 1996, reads thus:

24. Hearings and written proceedings. - (1) Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation

of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials:

Provided that the arbitral tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held:

[Provided further that the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on day-to-day basis, and not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause.]

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purpose of inspection of documents, goods or other property.

(3) All statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

9.1 The statutory scheme is that the parties are entitled to sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of document, goods or other property. Sub-section 3 mandates that every statement, document or information supplied to the arbitral tribunal by one party

shall be communicated to the other party.

9.2 Section 28 of the Act of 1996, reads thus:

28. Rules application to substance of dispute. - (1) Where the place of arbitration is situate in India, -

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;

(b) in international commercial arbitration, -

(i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;

(iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(2) The arbitral tribunal shall decide *ex aequo et bono* or as amiable compositeur only if the parties have expressly authorised it to do so.

[(3) While deciding and making an award, the

arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.]

9.3 In domestic arbitration, the mandate is that the dispute shall be decided in accordance with the substantive law for the time being in force in India.

9.4 While strict rules of evidence may not apply to arbitration proceedings, it is well settled that the arbitrator cannot act in contravention of the principles of natural justice. Granting the utmost play in joints and latitude to the arbitrator, the acceptance on record of photocopies of saledeeds, after the conclusion of hearing, and behind the back of the NHAI, and relying on the documentary material surreptitiously introduced on record, cannot but, be held as patent illegality and the award is in contravention of the fundamental policy of Indian law and in conflict with the most basic notions of morality or justice.

10. In all fairness to the learned senior counsel Mr. Anand Jaiswal, to the extent the only documentary material

relied by the arbitrator, was introduced on the record, in circumstances which are suspicious to say the least, no arguments are advanced to defend the indefensible. However, the submission canvased by Mr. Anand Jaiswal is that it was necessary for NHAI to incorporate a specific and structured challenge in the application under section 34 of the Act of 1996. I have considered the averments in the application preferred by the NHAI under section 34 of the Act of 1996. While the NHAI has not specifically averred that the two saledeeds are surreptitiously introduced on record, the reliance on the saledeed is attacked on the premise that the saledeeds are not proved in accordance with law. The NHAI did aver that the two saledeeds were not placed on record before the competent authority.

I am inclined to hold that there is sufficient factual foundation in the application for the ground which is canvased. That apart, on principle, in exercise of jurisdiction under section 37 of the Act of 1996, this Court cannot remain a mute spectator and turn a blind eye to the egregious illegality in the award. I am not inclined to accept the submission of Mr.

Anand Jaiswal that in the absence of specific and structured challenge in the application under section 34 of Act of 1996, I should refrain from considering the objection to the manner in which vital evidence is introduced on record. I cannot, and will not, brush under the carpet the substantiated objection that the only documentary evidence which is relied by the arbitrator is introduced on record behind the back of NHAI and in a manner dangerously bordering on the clandestine.

11. Learned counsel Mr. Ajay Ghare and learned senior counsel Mr. Anand Jaiswal have invited my attention to plethora of decisions articulating the scope and ambit of section 34 of the Act of 1996. Further, certain decisions are pressed in service to explain the contours of the power available to Court under section 34(4) of the Act of 1996.

The irrefutable facts are too glaring to warrant consideration of the various decisions considering the scope of judicial intervention in arbitration awards and I would refrain from indulging in such platitudinous exercise. The decisions which according to the learned counsel for the parties throw light on the power of the Court under section 34(4) of the Act

of 1996 shall be considered, to the extent relevant.

Section 34 of the Act of 1996 reads thus:

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).

(2) An arbitral award may be set aside by the Court only if -

(a) the party making the application [establishes on the basis of the record of the arbitral award that]-

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or

the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that -

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1. - For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, -

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2 – For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute]

[(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on

the ground of an erroneous application of the law or by re-appreciation of evidence.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(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.

[(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously and in any event, within a period of one year from the date on which the notice referred to in sub-section(5) is served upon other party.]

12. I have no hesitation in holding that the arbitration award is vitiated on account of patent illegality. The

mandatory provisions of the Act of 1996 are breached. The contravention of the principles of natural justice shocks judicial conscious considering that the only documentary material relied on is introduced on record after the conclusion of hearing, surreptitiously. The award contravenes the fundamental policy of Indian law and militates against the basic notions of morality and justice.

13. Having so observed, the next question which needs to be answered is whether the application preferred by the claimant under section 34(4) of the Act of 1996, in the present appeal, deserves to be allowed, as is submitted with some conviction by Mr. Anand Jaiswal.

14. Mr. Anand Jaiswal would submit that the legislative intent in enacting sub-section (4) is to ensure that wherever possible, the tribunal must be given an opportunity to eliminate the grounds for setting aside the arbitral award, in the interest of avoiding protracted litigation and multiplicity of proceedings which would result in if the award is set aside and the parties are driven to start the entire process from the inception. Mr. Anand Jaiswal would submit that till such time

the award is not set aside, and the deficiencies in the award are curable, the power under section 34(4) of the Act of 1996 ought to be exercised. Mr. Anand Jaiswal would argue, that even if it is assumed that the saledeeds on which the award is based were introduced on record after the conclusion of hearing and that NHAI did not have the opportunity to respond to the saledeeds or to attack the relevance or admissibility of the saledeeds or to demonstrate that the subject lands are not comparable to the land acquired, the defect is procedural and can be cured by remanding the matter to the arbitrator with a direction that the NHAI be given the opportunity to respond to the saledeeds.

15. Mr. Anand Jaiswal would invite my attention to the following observations of the Apex Court in *Kinnari Mullick and another vs. Ghanshyam Das Damani*, (2018)11 SCC 328 (*"Kinnari Mullick"*).

"17. In the present case, the learned Single Judge had set aside the award vide judgment dated 07.03.2014. Indeed, the respondent carried the matter in appeal before the Division Bench. Even if we were to assume for the sake of argument, without expressing any opinion either way on the correctness of this assumption, that the appeal was in continuum

of the application under [Section 34](#) for setting aside of the award and therefore, the Division Bench could be requested by the party to the arbitral proceedings to exercise its discretion under [Section 34\(4\)](#) of the Act, the fact remains that no formal written application was filed by the respondent before the Division Bench for that purpose. In other words, the respondent did not make such a request before the learned Single Judge in the first instance and also failed to do so before the Division Bench rejected the appeal of the respondent”.

16. Mr. Anand Jaiswal would then invite my attention to the decision in ***Som Datt Builders Limited vs. State of Kerla, (2009) 10 SCC 259 (“Som Datt Builders”)*** and in particular to the following observations:

“26. In what we have discussed above, it cannot be said that High Court was wrong in observing that no reasons have been assigned by the arbitral tribunal as to whether the period of completion extended by the employer for 18½ months was due to reasons not attributable to the claimant. However, in our view, the High Court ought to have given the arbitral tribunal an opportunity to give reasons. This course is available under [Section 34\(4\)](#) of the Act which reads thus :

*"34. (1)-(3) * * **

(4). On receipt of an application under subsection(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."

17. Mr. Anand Jaiswal would then press in service the decisions of learned Single Judges of this Court in ***Harinarayan G. Bajaj vs. LKP Securities Ltd & another, 2004 SCC OnLine Bom 216 (Harinarayan Bajaj)*** and would rely on the following articulation in the said decision.

"29. Power under Sub-section (4) can be exercised in order to give to the Arbitral Tribunal an opportunity to resume the arbitral proceedings or take such action as would eliminate the grounds for setting aside the arbitral award. In the present case, there is no dispute that the respondent No. 1 purchased 55,000 shares of ARBL on the NSE on behalf of the petitioner. As the petitioner failed in his obligation to pay the margin money required as demanded by the respondent No. 1, the transaction was closed out under bye-law No. 5(b) of Chapter X of the bye-laws of the National Stock Exchange. When the transaction is closed out, the trading member is entitled to recover any expenses incurred or any loss arising on account of such transaction and the close out from the constituent. Thus, the respondent No. 1 also is entitled to recover the loss. The decision of the Arbitral Tribunal holding that the petitioner was liable to pay to the respondent a sum of Rs. 99,96,138.82 is contrary to the bye laws of the NSE for the reasons mentioned in this judgment and in particular paragraph Nos. 14 to 21 hereof setting aside the award without anything else may bar the remedy of the respondent No. 1 to claim this loss. Hence, exercise of power under [Section 34\(4\)](#) appears to be a proper course to

follow. Accordingly, the matter is sent back to the Arbitral Tribunal to decide the matter afresh and determine how much amount the petitioner is liable to pay to the respondent No. 1 under bye-law No. 5(b) of Chapter X of the Bye-laws of the National Stock Exchange.

18. Mr. Anand Jaiswal would further rely on decision of the learned Single Judge in ***Angel Capital & Debt Market Limited vs. Sharad Munot, 2012(6)AIR Bom R 629*** to buttress the submission that the power of remand must be exercised in the factual matrix instead setting the clock back and driving the claimant to initiate the entire process afresh.

19. The observations in ***Kinnari Mullick and Som Datt Builders*** are in the context of the failure of the arbitrator to record supporting reasons for the findings arrived at.

20. In ***Harinarayan Bajaj***, the learned Single Judge exercise power under sub-section(4) and directed the arbitral tribunal to determine the liability under by-law 5(b) of the National Stock Exchange.

21. Mr. Ajay Ghare has invited my attention to the decision of the Apex Court in ***I-Pay Clearing Services Private Limited vs. ICICI Bank Limited, (2022)3 SCC 121*** (*"I-Pay*

Clearing Services”) to emphasize that the discretionary power under section 34(4) must be exercised keeping in mind the grounds raised while challenging the award, the grounds raised in the application filed under section 34(4) of the Act of 1996 and the reply thereto and that remand cannot be directed at the askance of the litigant.

22. Mr. Ajay Ghare bring to my notice the decision of the Apex Court in ***Dr. A. Parthsarathi & Ors vs. E Springs Avenues Pvt. Ltd & Ors, 2022 LiveLaw (SC) 199*** which articulates thus:

“By the impugned judgment and order passed by the High Court in exercise of power under Section 37 of the Arbitration and Conciliation Act, 1996, the High Court has set aside the award passed by the learned Arbitrator and has remanded the matter to the Arbitrator for fresh decision. As per the law laid down by this Court in the case of Kinnari Mullick and Anr. Vs. Ghanshyam Das Damani (2018) 11 SCC 328 and I-Pay Clearing Services Pvt. Ltd. Vs. ICICI Bank Ltd. (2022) SCC OnLine SC 4, the same is wholly impermissible. Only two options are available to the Court considering the appeal under Section 37 of the Arbitration Act. The High Court either may relegate the parties for fresh arbitration or to consider the appeal on merits on the basis of the material available on record within the scope and ambit of the jurisdiction under Section 37 of the Arbitration Act. However, the High Court has no jurisdiction to remand the matter to the same Arbitrator unless it is consented by both the parties that the matter

be remanded to the same Arbitrator”.

23. I need not delve deeper in the narrative, and the counter narrative, on the availability of power under sub-section(4) of section 34 of the Act of 1996 to remand the matter while considering an appeal under section 37 of the Act of 1996. I would assume, arguendo, that the Court of appeal can exercise power under sub-section(4) of section 34 if a case is made out for exercise of power. The issue is not whether the power is available. The seminal issue is whether in the factual matrix, I should exercise discretionary power.

24. Sub-section 4 provides that the Court may “where it is appropriate” (emphasize supplied) 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 arbitral proceedings or to take such other action which will eliminate the grounds for setting aside the arbitral award.

25. The use of the expression “where it is appropriate” conveys that the power is discretionary. It would be apposite to note the following observations of the Apex Court in *I-Pay*

Clearing Services.

“39. Further, [Section 34\(4\)](#) of the Act itself makes it clear that it is the discretion vested with the Court for remitting the matter to Arbitral Tribunal to give an opportunity to resume the proceedings or not. The words “where it is appropriate” itself indicate that it is the discretion to be exercised by the Court, to remit the matter when requested by a party. When application is filed under [Section 34\(4\)](#) of the Act, the same is to be considered keeping in mind the grounds raised in the application under [Section 34\(1\)](#) of the Act by the party, who has questioned the award of the Arbitral Tribunal and the grounds raised in the application filed under [Section 34\(4\)](#) of the Act and the reply thereto.

40. Merely because an application is filed under [Section 34\(4\)](#) of the Act by a party, it is not always obligatory on the part of the Court to remit the matter to Arbitral Tribunal. The discretionary power conferred under [Section 34\(4\)](#) of the Act, is to be exercised where there is inadequate reasoning or to fill up the gaps in the reasoning, in support of the findings which are already recorded in the award.

26. The discretion to remand the matter must be exercised judiciously. Assuming that in an appeal under section 37 of the Act of 1996, such power is available, the power will have to be exercised in an appropriate case and there cannot be a cut and dried or straight jacket formula governing the exercise of the discretionary power.

27. Mr. Anand Jaiswal did make a strenuous attempt to persuade me to hold that the power of remand will have to be exercised since the defect can be cured by giving opportunity to the claimant to prove the saledeeds in accordance with law, and to the NHAI, to rebut. I am afraid, the submission is too simplistic and misses the point that the integrity of the proceedings stands compromised. The fact that crucial evidence, and indeed, the only evidence which is the basis of the award, was permitted to be introduced on record after the conclusion of the hearing, and there is nothing in the entire record including the order-sheets to indicate how the saledeeds came on record, there is something more than meets the eye.

28. In the light and view of, the consideration supra, I am not inclined to allow the application preferred by the claimant under section 34(4) of the Act of 1996, and the same stands rejected.

29. The judgment of the learned PDJ is clearly unsustainable and is quashed. The arbitral award dated

5.4.2019, in Civil Miscellaneous Application 688/2015 is set aside, with liberty to the parties to take recourse to such remedy as is available in law.

30. The appeals are disposed of in the aforestated terms.

JUDGE

belkhede