* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 18th September , 2023

% ***Pronounced on: 8th November, 2023***

\+ **FAO (COMM) 55/2021 & CM APPL. 8069/2021**

BHARTI AIRTEL LTD. ..... Appellant

Through: Mr.Urfee Haider, Advocate.

Versus

JAMSHED KHAN & ANR. ..... Respondents

Through: Mr.Karan Luthra, Advocate with Mr.Naman Gowda, Advocate for R-1.

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

1. **The Appeal under Section 37 of the Arbitration and Conciliation Act, 1996** *(hereinafter referred to as "Act, 1996")* has been filed against the Order dated 25.01.2020 passed by the learned District Judge (Commercial Court), Tis Hazari Courts *vide* which the Objections under Section 34 of the Act, 1996 have been allowed and the Arbitral Award dated 21.12.2018 has been set aside partly.

2. **Facts in brief are that the** appellant/Bharti Airtel Ltd. *(the respondent before the learned Arbitrator hereinafter referred to as the* 'appellant*')* entered into a Licence Agreement with the respondent No. 1/Jamshed Khan *(the claimant before the learned Arbitrator hereinafter referred to as the* 'respondent No.1'*)* dated 22.01.2015 whereby the appellant was given a rooftop space of size 5 mtr. x 2 mtr. at property Number 1877, Block B, Sant Nagar, Burari, Delhi for a period of 9 years. As

per the Licence Agreement, the monthly licence fee for the first three years was Rs.15,000/- per month which was to be increased at the rate of 10% after every three years.

3. According to the respondent, the appellant had abandoned the Agreement and failed to perform its part as the appellant did not pay any Licence Fee with effect from 29.01.2015 in terms of Clause 3 of the Licence Agreement. Therefore, the arbitral proceedings in terms of the Licence Agreement, were commenced by the respondent No. 1/claimant and the learned Arbitrator was appointed by this Court under Section 11 of the Act, 1996 vide Order dated 06.12.2016.

4. The respondent No.1 claimed before the learned Arbitrator that pursuant to the Licence Agreement, it was entitled to an amount of Rs.4,12,000/- towards the arrears of Licence Fee w.e.f. 29.01.2015 till the date of filing of the claim i.e. 12.05.2017 @ Rs.15,000/- per month along with interest of Rs.57,000/- for the period 29.01.2015 till 12.05.2017 i.e. till the date of filing of the claim @ Rs.12% p.a. The respondent No. 1/claimant also claimed pendente lite and future interest at the rate of 12% p.a. on the aforesaid amount as well as damages w.e.f. 29.01.2015 and cost of the legal proceedings.

5. **The appellant took a defence** that it was due to the hindrances created by the neighbours of the respondent No. 1 and failure on part of the respondent No.1 to provide ingress and egress to the rooftop of the aforesaid premises that it was prevented from erecting the Tower. It was therefore, unable to perform its part of the Licence Agreement and accordingly, *vide* Notice dated 23.03.2015 the Licence Agreement was terminated. Hence, the claim of respondent No. 1 was liable to be dismissed with costs.

6. **The learned Arbitrator** after appreciating the evidence as led by both the parties, concluded that though the appellant had asserted that it had terminated the Agreement vide Notice dated 23.03.2015 but it was unable to prove its service. However, a reference was made to the reply dated 02.12.2015 of the appellant-Bharti Airtel Ltd. sent in response to Legal Notice of the respondent No.1 dated 09.11.2015, wherein, it was specifically mentioned that the copy of the earlier Termination Notice dated 23.03.2015 was annexed herewith. It was thus, held that the Notice of Termination was proved to be served on 02.12.2015 and it was concluded that the respondent No.1 should be entitled to one year licence fee till the termination of the Agreement. However, it was noticed that the respondent No. 1/claimant has wrongly claimed that he was a poor man and that there was space available on the rooftop when in fact, the roof had been licenced to M/s. Reliance Infratel Ltd. vide Licence Agreement dated 04.03.2008 and there was not enough space for the appellant to have erected its own Tower. Thus, it was held that the respondent No. 1/claimant was not entitled to any Licence Fee. Consequently, the claim of the respondent No. 1/claimant was dismissed vide Award dated 21.12.2018.

7. **Against the arbitral award, the respondent No. 1 preferred its Objections under Section 34 of the Act, 1996** wherein the learned District Judge (Commercial Court) accepted the conclusions of the learned Arbitrator that the Notice of Termination was proved to be served only with effect from December, 2015 but disagreed that no space was available on the rooftop for erection of the Tower. It was observed that the learned arbitrator had made certain presumptions regarding the space available and consequently, the Award was partially set aside and the payment of licence

fee at the rate of Rs.15,000/- per month for a period of 12 months i.e. Rs.1,80,000/- along with interest at the rate of 12% p.a. from 29.01.2015 till the date of payment, was allowed.

8. **Aggrieved, the Bharti Airtel Ltd., appellant herein has preferred the present Appeal under Section 37 of the Act, 1996** against the Order of the learned District Judge (Commercial Court) dated 25.01.2020.

9. **The appellant in its Written Submissions** has contended that the learned District Judge (Commercial Court) could not have awarded a sum of 1,80,000 to the respondent No.1 towards fees along with interest @12%p.a. from 29.01.2015 till the repayment of the amount. It is a settled position of law that under Section 34 of the Act, 1996, the Court cannot and should not rewrite the contract already executed between the parties. Reliance was placed on the *Haryana Urban Development Authority v. M/S Mehta Construction Company* (2022), *Project Director, National Highway Authority of India v. M. Hakeem & Anr*., (2021), *UHL Power Company Ltd. vs State of Himachal Pradesh and State of Himachal Pradesh vs UHL Company Ltd*. (2022), *Messrs. Scholastic India Private Limited v. Smt. Kanta Batra*, (FAO (COMM) 112/2022), in support of the scope of judicial interference under Section 34 of the Act, 1996.

10. **The respondent No.1 in its Written Submissions** has asserted that the findings of the learned Arbitrator were severable in nature and was on a completely different issue and hence, the award capable of being partly set aside. As the findings were based on no evidence and made in ignorance of pleadings of the parties, they were rightly set aside by the learned District Judge (Commercial Court) under Section 34 of the Act, 1996.

11. **Submissions heard on behalf of both the parties and the record has been perused.**

12. **At the outset,** it is pertinent to observe that the grounds on which an Arbitral Award can be challenged under Section 34 of the Act is limited and are circumscribed by Section itself and the judicial precedents interpreting the said provision.

Scope of Challenge under Section 34 of the Act, 1996: Patent illegality and Fundamental policy of Indian Law

13. The scope of a challenge under Section 34 and Section 37 of the Act, 1996 is limited to the grounds stipulated in Section 34 as held in *MMTC Limited v. Vedanta Ltd*, (2019) 4 SCC 163. The comprehensive judicial literature on the scope of interference on the ground of Public Policy under Section 34 was postulated in *Associate Builders v. DDA*, (2015) 3 SCC 49. The Apex Court placed reliance on the judgment of *ONGC v. Saw Pipes*, (2003) 5 SCC 705 to determine the contours of Public Policy wherein an award can be set aside if it is violative of '*The fundamental policy of Indian law'*, '*The interest of India'*, '*Justice or morality'* or leads to a '*Patent Illegality'*. For an award to be in line with the '*The fundamental policy of Indian law'*, the Tribunal should adopt a judicial approach which implies that the award must be fair, reasonable and objective. These grounds require an Arbitral Tribunal to deliver a reasoned award which is substantiated by evidence.

14. The ground of "*patent illegality*" is applied when there is a contravention of the substantive law of India, the Arbitration Act or the rules applicable to the substance of the dispute. In *Hindustan Zinc Limited v. Friends Coal Carbonisation*, (2006) 4 SCC 445, The Apex Court

referred to the principles laid down in *Saw Pipes* (supra) and clarified that it is open to the court to consider whether an award is against the specific terms of contract, and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

15. It was further held in *Associate Builders* (supra) that, when a decision is made to set aside an award on the basis of "public policy", the term "justice" simply refers to an Award that shocks the conscience of the court. A court cannot possibly include what it determines to be unfair, given the circumstances of a case, by replacing the Arbitrator's decision with what it sees as "just".

16. The scope of challenge of an arbitral award under 'patent illegality' as added in sub-Section 2A of Section 34 vide the Amendment in 2015 has been explained *in Ssangyong Engineering and Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131. It was observed that for the sub-Section 2A to be attracted there must be 'patent illegality' appearing on the face of award which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within the fundamental policy of Indian law, namely, the contravention of a statute not linked to public policy or public interest cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality. It was also made clear that re-appreciation of evidence which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award. **A change that has been brought in by the Amendment Act, 2015 is that the construction of the terms of a contract is primarily for an Arbitrator to decide, unless the Arbitrator construes the contract**

in a manner that no fair-minded or reasonable person would; in short that the Arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction and would fall within the new ground of patent illegality added under Section 34(2A).

17. The question which arises for the consideration of this court at this stage is whether the Award of the learned Arbitrator warranted judicial interference by the learned District Judge (Commercial Court). The facts of the case are being analysed in this limited context.

18. **Admittedly,** the parties entered into a Licence Agreement dated 22.01.2015 whereby the appellant took on licence a space of 5 mtr. x 2 mtr. for the purpose of erection of the tower at property number 1877, Block B, Sant Nagar, Burari, Delhi for a period of 9 years. The monthly licence fee for the first three years was Rs.15,000/- per month which was to be increased at the rate of 10% after every three years as per the agreement. It had been concurrently held that though the appellant/Bharti Airtel Ltd. claimed to have sent a Notice of Termination dated 23.03.2015 but its service could not be proved by the Appellant which was ultimately proved to have been served on 02.12.2015. It was therefore, concluded that the Licence Agreement can be deemed to be terminated one month after the service of legal notice i.e. with effect from 01.01.2016.

19. **The appellant has contended that** the respondent No.1 had failed to provide ingress and egress to the rooftop due to which it was constrained to terminate the licence agreement. Though the appellant/Bharti Airtel Ltd. in its evidence asserted that it was informed by its officials that ingress and egress was prevented but the learned Arbitrator observed that no officials

was examined to prove this aspect and the testimony of its representative i.e. Mr. Amit Bhatia, A.R. (RW1) was hearsay and thus, could not be believed. *The entire controversy that has arisen revolves around whether the appellant/Bharti Airtel Ltd. was provided the ingress and egress to the premises taken on licence.*

20. The appellant had produced a photograph before the learned Arbitrator at the stage of final arguments, wherein a tower is already shown to be constructed on the said rooftop. **In response,** the respondent No.1/claimant had placed on record the Licence Agreement dated 04.03.2008 vide which it had entered into an Agreement for 850 sq.feet of the terrace of the property in question with M/s. Reliance Infratel Ltd. for a period of 20 years i.e. till February 2028. As per the Licence Agreement dated 04.03.2008 between the respondent No.1/claimant and M/s. Reliance Infratel Ltd, the entire rooftop admeasuring 850 sq. feet had already been licenced to M/s.Reliance Infratel Ltd. in 2008 till 2028. Therefore, at the time of execution of the Licence Agreement with the appellant in January 2015, the entire roof had already been licensed to M/s.Reliance Infratel Ltd.

21. **The respondent No.1/claimant** had tried to build a case on the basis of rough plan of the site and on a photocopy of the undated letter from M/s. Reliance Infratel Ltd. giving "No-Objection" to the use of free space of 26 yards on the rooftop of the property by the Licensor i.e. respondent No.1/claimant. The respondent No.1/claimant thus asserted that it had the space of 5 mtr. x 2 mtr. available on the rooftop which it had validly licensed to the appellant/Bharti Airtel Ltd.

22. **Pertinently, the learned Arbitrator** considered in detail the rough site plan which approximately reflected the total area of the rooftop as 900

sq.feet and if the area occupied by Mumty was excluded, the area that remained was around 850 sq.feet which had been licensed to M/s. Reliance Infratel Ltd. The learned Arbitrator observed as under:-

> *"18….It is definite that the claimant has tried to behold the true facts from this Tribunal and has not approached it with clean hands. On perusal of the License Agreement dated 4th Mar 2008 it is crystal clear that the claimant has already given almost whole of the terrace to M/S Reliance Infratel Limited in the year 2008 though they may physically installed their structure in portion of the same. In my opinion though there may have some open space left by M/S Reliance Infratel Limited, the claimant did not have any legal right to grant a fresh Licence to the Respondent in the year 2015. The Reliance Infratel Limited has definitely not relinquished its rights in the open space of the terrace to it by the Licence Agreement dated 4th Mar 2008".*

23. It is observed that the learned Arbitrator has given a well reasoned finding to conclude that the rooftop which was licensed to the appellant in the year 2015 had already been licensed to M/s.Reliance Infratel Ltd. in 2008 till 2028. Once the space had already been licensed, there existed no free rooftop in respect of which the respondent No. 1 could have entered into an another License Agreement in January 2015 with the appellant/Bharti Airtel Ltd.

24. Learned counsel on behalf of the respondent No. 1 had heavily relied on the No-Objection Letter, an undated letter, given to it by M/s. Reliance Infratel Ltd permitting the respondent No. 1/claimant to use the available space. However, the letter provides for a condition that *"Licensor has to provide sufficient space for access at shelter/DG installed by the licensee at any circumstances for their day to day operation"*. Even though the letter

has not been proved but all that the letter conveyed was that it had "No-Objection" to the open space being used by the Licensor, subject to the condition that sufficient space shall be made available for access at Shelter/DG installed.

25. The learned Arbitrator dealt with this aspect as under:

> *"Even the alleged letter filed by the claimant will be of no help to him as it only mentioned usage of the free space by the Licensor and it can not be stressed and interpreted by this averment that M/S Reliance Infratel Limited is no more a Licensee of the open space or that the Reliance Infratel Limited has given a permission to the claimant to give this open space in Licence to another communication company i.e., Respondent herein, who is definitely their competitor. Even if I go by the rough sketch filed by the claimant with his affidavit dated 24.11.2018, the open space is of size 18 ft. x 13 ft. It is relevant to note here that the required space by the Respondent to put its Tower was 5 mts. X 2 mts. And if I convert 5 mts. Into feets it comes out to be 16.6666 ft. If I see the photograph of the terrace and sketch filed by the claimant and exclude the area of side parapet walls and it is presumed that the respondent could have utilized the space of 5 mts. X 2 mts., then there will not be any space left for the employees of M/S. Reliance Infratel Limited to have access to its Tower and equipment. Whereas the letter produced by the claimant mentions that there should always be free access to its employees for change or removal of the Tower material and other day to day operation of the same. Thus in the totality of the facts and circumstances it can be safely inferred that the Claimant had no right to enter into a License Agreement with the respondent when he had already given it to M/S Reliance Infratel Limited way back in the year 2008. Therefore this license agreement Ex.CW-1/1 could not have been practically performed by the claimant as M/S Reliance Infratel Limited has never relinquished its rights given to its in their license agreement dt.04.03.2008 at any point of time. Thus the claimant cannot derived any right to claim the license from the respondent under the License Agreement*

Ex.CW-1/1, I, therefore decide this issue/term of reference against the claimant and in favour of the respondent".

26. Thus, the undated letter, as rightly interpreted by the learned Arbitrator, merely permitted respondent No.1 to use the leftover free space without causing any inconvenience to M/s. Reliance Infratel Ltd. and by no stretch of imagination can it be said that M/s. Reliance Infratel Ltd. through this undated and unproved Note gave up its balance free land to the respondent No. 1 to be let out to any third party. The Licensor may have been given right to use the space but it did not include the right to license this space to the third party. Moreover, the space was not defined as 26 yds. but is figured out by the respondent No. 1 by excluding the space where the tower of M/s.Reliance Infratel Ltd. was installed.

27. The respondent No. 1 in fact had not only misrepresented the facts and licensed the same space of 26 yards twice i.e. first to M/s.Reliance Infratel Ltd. and thereafter, to the appellant/Bharti Airtel Ltd. But also the space already licensed could not have been re-licensed to the appellant during the validity period of the First Licence agreement. Therefore, irrespective of whether ingress and egress was allowed to the appellant, the fact remains that the space sought to be licensed to the appellant, already stood licensed to M/s.Reliance Infratel Ltd. and was not available. Learned Arbitrator had thus, interpreted the terms of Agreement correctly and there existed no patent illegality or breach of fundamental policy.

28. Much had been argued on behalf of the respondent No.1/claimant that at the time of entering into the Agreement, the appellant/Bharti Airtel Ltd. had visited the site many a times and had satisfied itself about the

availability of space and thus, it cannot now take a plea that another Tower of M/s.Reliance Infratel Ltd. was already installed. This contention of the respondent No.1 is without any merit for the simple reason that even if the appellant had visited the site, it was not aware of the space already being licensed to M/s.Reliance Infratel Ltd. which was in the special knowledge of the respondent No.1 and the documents with respect thereto were produced before the learned Arbitrator only at the stage of final arguments; these facts did not find mention in the Notices or in the claims.

29. It is nowhere the claim of the appellant that it required the space more than 5 mtr. x 2 mtr. which was available on the rooftop but the difficulty in the present situation was that respondent No. 1 did not have any right to licence the area which had already been licensed to M/s. Reliance Infratel Ltd.

30. The learned Arbitrator by way of a well-reasoned Order had rejected the contentions of the respondent No.1 and held that because of the aforesaid circumstances, he was not entitled to any licence fee.

31. The learned District Judge (Commercial Court) in the impugned order partly set aside the Award by observing that the controversy regarding insufficient space being left for installation, was never raised by the appellant and therefore, there arose no question of presuming that no space was left over for the installation of the Tower by the appellant. It was further observed that the learned Arbitrator made certain calculations and presumed that sufficient space was not there for the appellant to install the Tower when the appellant had not disputed that it had inspected the site before entering into the Licence Agreement and that the space needed by the appellant was duly mentioned in the agreement. The learned Arbitrator had

wrongly held that the NOC provided for the respondent No.1 to use the vacant space in a personal capacity only as there was no such restriction in the NOC. In light of the above observations, the findings of the learned Arbitrator in Issue no.3 were partly set aside and the respondent No.1 was held to be entitled to one year of license fee with interest @12% from 29.01.2015 till the date of payment.

32. In *Rashtriya Ispat Nigam Ltd. vs. Dewan Chand Ram Saran,* (2012) 5 SCC 306, the Court held as under:

> "*43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.*
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> *44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in SAIL v. Gupta Brother Steel Tubes Ltd.20 and which has been referred to above. Similar view has been taken later in Sumitomo Heavy Industries Ltd. v. ONGC Ltd.21 : to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.*
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> *45. This para 43 reads as follows: (Sumitomo case 21, SCC p. 313)*
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> *43. … The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwality Mfg. Corpn. vs. Central Warehousing Corpn. (2009) 5 SCC 142, the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter.*

The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding."

33. In *MSK Projects (I) (JV) Ltd. vs. State of Rajasthan*, (2011) 10 SCC 573, the Court held that **if the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error.** Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award.

34. In *McDermott International Inc. vs. Burn Standard Co. Ltd*. (2006) 11 SCC 181,, it was further noted that the **interpretation of a contract is a matter for the Arbitrator to determine, even if it gives rise to determination of a question of law. Once, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.** A reference may also be made to *Pure Helium India (P) Ltd. vs. Oil and Natural Gas Commission* (2003) 8 SCC 593 and *D.D. Sharma vs. Union of India* (2004) 5 SCC 325.

35. Thus, it can be concluded that the scope of grounds of challenge of an Award under Section 34 of the Act is limited and not equivalent to an Appeal.

36. From a perusal of the impugned Order, it is evinced that the leaned Single Judge re-appreciated the validity of the License Agreement between the respondent and the appellant. It has substituted its own reasoning for that of the learned Arbitrator's, as discussed above. It is a blatant case where the learned District Judge (Commercial Court) has re-interpreted the evidence led by the parties and has substituted its own reasoning with that of the learned Arbitrator. The learned Arbitrator by way of a well-reasoned Order had rejected the contentions of the respondent No.1 and held he was not entitled to any licence fee. Even if for the sake of arguments, it is conceded that its alternate interpretation could have been taken, but this is beyond the scope of Section 34 of the Act, 1996.

37. In the present case, the learned District Judge (Commercial Court) has in fact dealt with the matter as if it was an Appeal before him and has proceeded not only to set aside the Arbitral Award but has even granted damages and interest to the respondent No.1-claimant. It is a case of re-writing the Arbitral award, which is not permissible.

Partial setting aside and Modification of the Award

38. Another aspect that is imperative to discuss is whether Issue no.3 was severable in nature and the partial setting aside of the Award by the learned District Judge (Commercial Court) could have been done.

39. The question of severability of claims came up before the consideration of the Supreme Court in the case of *J.G. Engineers Pvt. Ltd. v. Union of India*, (2011) 5 SCC 758 wherein the doctrine of severability was

invoked and it was held that when the Award deals with several claims that can be said to be separate and distinct, the Court can segregate the Award on items that do not suffer from any infirmity and uphold the Award to that extent.

40. Similarly, in the case of *R.S. Jiwani (M/S.) v. Ircon International Ltd*., 2009 SCC OnLine Bom 2021 the Bombay High Court upheld the application of doctrine of severability to an Award. It was observed that it is difficult to prescribe legal panacea which, with regard to the applicability of the principle of severability can be applied uniformly to all cases. The judicial discretion vested in the court in terms of the provisions of Section 34 of the A&C Act, 1996 was held to take within its ambit, power to set aside an award partly or wholly depending on the facts and circumstances of the given case and it was held that the same is not intended to be whittled down or to divest the court of competent jurisdiction to apply the principle of severability to the award of the Arbitral Tribunal. Further, the proviso to section 34(2)(a)(iv) has to be read *ejusdem generis* to the main section, as in cases falling in that category, there would be an absolute duty on the court to invoke the principle of severability where the matter submitted to arbitration can clearly be separated from the matters not referred to arbitration and decision thereupon by the Arbitral Tribunal.

41. In this context, The Bombay High Court in the recent judgment of *National Highway Authority of India v. The Additional Commissioner, Nagpur*, 2022 SCC OnLine Bom 1688 noted the aspect of grave inconvenience highlighted in the aforesaid Full Bench judgment of Bombay High Court in the case of *R.S. Jiwani (M/S.)* (supra) and observed that if parties are required to go for arbitration afresh in its entirety on every

occasion, even when the Arbitral Award is only partly set aside, that the Arbitral Award is found liable to be set aside on some issues, it would lead to multiple rounds of litigation, going against the very purpose of alternative dispute redressal mechanisms like arbitration. The claimants would be forced to pursue numerous rounds of proceedings before the arbitrator and Courts, which cannot be countenanced, thereby indicating that the contention raised in this regard on behalf of the appellants is unsustainable. Thus, following the principle of severability of claims it was held that the Award may be set aside partially.

42. This court in the case of *National Highways Authority Of India vs Trichy Thanjavur Expressway Ltd.* 2023 SCC OnLine Del 5183 further explained the concept of severability of a claim under section 34. A reference was made to the case of Alcon Builders and M. Hakeem and it was observed that the expression "setting aside" as employed in Section 34 includes the power to annul a part of an award provided it is severable and does not impact or eclipse other components thereof.

43. The court in the case of *National Highways Authority Of India* (supra) recognised the complexity involved in partial setting aside of an award and observed that *"even though an award may be viewed as an agglomeration of the decisions rendered by an AT on various claims, the question of partial setting aside would ultimately depend on whether there is an inextricable link between the offending part of the award with any other part of the disposition. The power to partially sever an offending part of the award would ultimately depend on whether the said decision is independent and distinct and whether an annulment of that part would not disturb or impact any other finding or declaration that may have been returned by the AT. The*

question of severability would have to be decided bearing in mind whether the claims are interconnected or so intertwined that one cannot be segregated from the other. This for the obvious reason that if the part which is sought to be set aside is not found capable of standing independently, it would be legally impermissible to partially set aside the award."

44. Thus, the court under Section 34 of the Act, 1996 can set aside an Award partly if the same is severable in nature.

45. In the facts of the present case the learned District Judge (Commercial Court) has partly set aside Issue no.3 but what needs consideration is whether the same was severable in nature. The Issue no.3 framed by the learned Arbitrator read as follows:

"Whether the claimant is entitled to license fee @ 15,000/- p.m. w.e.f. 29-1-2015 till the filing of the statement of claim? (OPC)"

46. The learned Arbitrator initially observed that the respondent No.1 was entitled to License Fee for a period of one year from 29.1.2015 till the service of Notice in December 2015. However, the same was also denied in light of the prior Agreement of the respondent No.1 with M/s Reliance Infratel Ltd. in respect of the same premises which rendered the License Agreement with the appellant itself, invalid. It is observed that the question of whether the respondent No.1 was entitled to License Fee required an assessment of the validity of the License Agreement. Thus, the issue could not have been severed.

47. Thus, the learned District Judge (Commercial Court) has partly set aside Issue no.3 which is not severable in nature and the impugned Order is liable to be set aside on this ground alone. Moreover, the learned District

Judge (Commercial Court) has not only partly set aside the award but also modified the same to allow for License Fee and interest thereon.

48. In the decision of *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181, the Apex Court interpreted the scope of interference under Section 34 and observed that 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. The scheme of the provision aims at keeping the supervisory role of the court to the minimum 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. Under Section 34(2) of the Act 1996 the court is empowered to set aside an Arbitral Award on the grounds specified therein. 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 would be acting no different from an appellate court which would be contrary to the legislative intent of the Section 34 of the Act, 1996. The Court shall decline to decide the claim that had been rejected even if wrongly by the learned Arbitrator.

49. In the decision of *Dyna Technologies (P) Ltd. v. Cromption Greaves Ltd.*, (2019) 20 SCC 1, the Supreme Court noted that only when there is complete perversity in the reasoning then it can be challenged under the provisions of Section 34 of the Act. The power vested under Section 34(4) of the Act, 1996 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 the challenge based on the aforesaid curable defects under Section 34 of the Act.

50. This Court in *Nussli Switzerland Ltd. v. Organizing Committee, Commonwealth Games*, 2014 SCC OnLine Del 4834 observed that if a party succeeds in the Objections to the Award, the court at best can set aside the award under Section 34 of the Act, 1996, but it does not empower the court to modify an award. It would be open to the party concerned to commence fresh proceedings (including arbitration).

51. The decision of *McDermott International* (supra) has been referred to by the Supreme Court in *Kinnari Mullick v. Ghanshyam Das Damani*, (2018) 11 SCC 328 and in *Dakshin Haryna Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd*., (2021) 7 SCC 657 and it has been held that there is no power with the court to modify an Arbitral Award. To recognise such power to modify, revive or vary the Award under Section 34 of the Act would be to ignore the previous law contained in 1940 Act and also to ignore that 1996 Act was enacted on UNCITRAL Model Law on International Commercial Arbitration, 1985 which 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 coterminous with the "limited right" namely either to set aside an Award or to remand the matter under the circumstances mentioned in Section 34 of the Act, 1996.

52. In its recent judgment in *National Highway Authority of India v. M. Hakeem*, (2021) 9 SCC 1, the three Judges Bench of the Apex Court referred to *Redfern and Hunter on International Arbitration (6 Edn.)* in regard to setting aside of an Award wherein it was observed that the purpose of

challenging an Award before the National Court at the seat of arbitration is to have that court declare all, or part, of the Award as 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 be the courts of the seat of arbitration, but also by National Courts elsewhere. Following complete annulment, the claimant can recommence proceedings because the Award simply does not exist - i.e. 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. Any new submission of the dispute to arbitration after annulment, has to be undertaken by commencement of new arbitration with a new Arbitral Tribunal.

53. In the decision of *M. Hakeem* (supra) the Apex Court reaffirmed that if one were to include the power to modify an Award under Section 34 of the Act, 1996, one would be crossing the Laxman Rekha as the Parliament clearly intended to confer no power of modification of an award under Section 34 of the Act, 1996. While entertaining appeals under Section 34 of the Act, 1996 the court is not actually sitting as a Court of appeal over the award of the Arbitral Tribunal and therefore, the court would not re-appreciate or re-assess the evidence.

54. Further, regarding the power to modify an Award, the court in R.S. Jiwani (M/S.) (supra) made a reference to the decision of the Apex Court of India in *NHAI v. M. Hakeem*, (2021) 9 SCC 1 wherein it was observed as under:

> *"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."

55. It thus settled the law and held that the Court does not possess the power to modify an Arbitral Award while hearing a challenge under Section 34 of the Act.

56. Accordingly, it is observed that the learned District Judge (Commercial Court) should have passed a decree for fresh arbitration proceedings to be instituted when it partially set aside the award instead of practically re-writing the Award itself.

57. In view of the above discussion, the Order of the learned District Judge (Commercial Court) dated 25.01.2020 allowing the Objections under Section 34 of the Act, 1996 cannot be sustained and we hereby set aside the same. The Award dated 21.12.2018 is upheld.

58. The Appeal is accordingly allowed and the pending applications, if any, are also disposed of.

(NEENA BANSAL KRISHNA)
JUDGE

(SURESH KUMAR KAIT)
JUDGE

NOVEMBER 08, 2023
akb/nk