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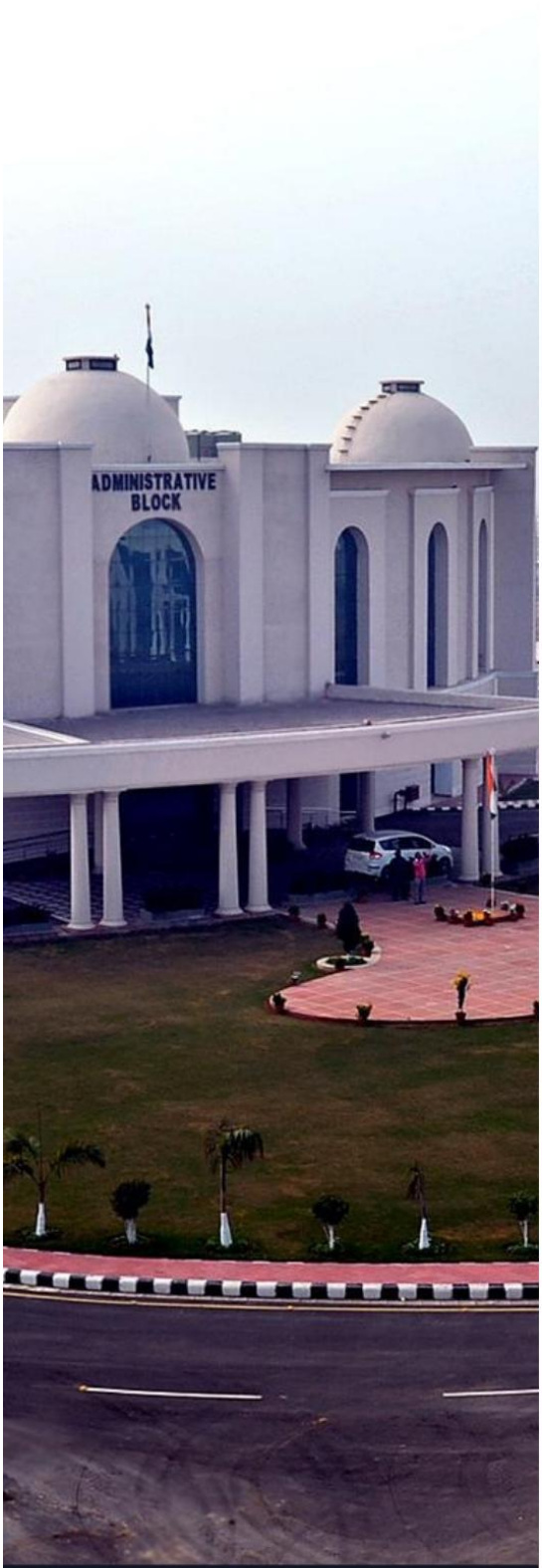

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THE OFFICIAL NEWSLETTER OF
CENTRE FOR ALTERNATIVE DISPUTE RESOLUTION,
RGNUL, PUNJAB

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CADR NEWSLETTER

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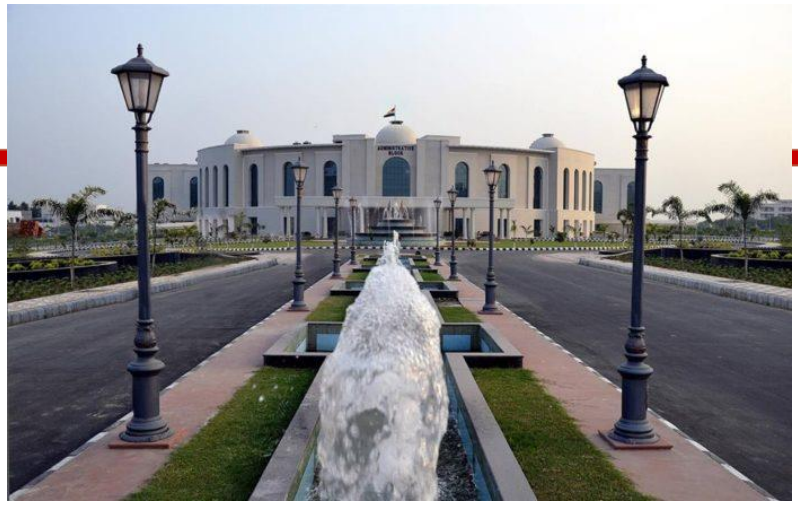
ABOUT US

The Centre for Alternative Dispute Resolution, RGNUL (CADR-RGNUL) is a research centre dedicated to research and capacity-building in ADR. The ultimate objective, at CADR, is to strengthen ADR mechanisms in the country by emerging as a platform that enables students and professionals to further their interests in the field.

In its attempt to further the objective of providing quality research and information to the ADR fraternity, the CADR team is elated to present the eleventh Issue of the Third Volume of 'The CADR Newsletter'. The Newsletter initiative began with the observation that there exists a lacuna in the provision of information relating to ADR to the practicing community. With an aim to lessen this gap, the Newsletter has been comprehensively covering developments in the field of ADR, both national and international. The CADR Newsletter is a one-stop destination for all that one needs to know about the ADR world; a 'monthly dose' of ADR News!



ADR UPDATES

ARBITRATION

DOMESTIC ARBITRATION

1. **THE AMAZON-FUTURE ARBITRATION SAGA CONTINUES**

A slew of cases has been filed with courts of different jurisdiction by Amazon Inc. (Amazon) and the Future Retail Ltd (FRL). The Singapore International Arbitration Centre (SIAC) dismissed petitions filed by FRL seeking to lift the stay on its deal with Reliance Retail. Subsequent to this, The Delhi High Court refused to pass interim ruling against SIAC emergency order restraining the deal. Recently, the Supreme Court adjourned the hearing of the dispute to 11 January, 2022.

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2. **RULE 227A INTRODUCED IN THE GENERAL FINANCIAL RULE (GFR) TO INCLUDE AMOUNT PAYABLE IN ARBITRATION AWARD**

A new rule 227A has been added to the General Financial Rule to allow any ministry or department of the government to compensate the contractors by paying 75% of the net amount mentioned in an arbitral award against a bank guarantee when an arbitral award has been challenged. The objective of the rule is to rectify the liquidity crunch in the construction industry.

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3. **RELIANCE INFRASTRUCTURE TO EXECUTE 7100 CRORE ARBITRAL AWARD AGAINST DELHI METRO**

Delhi Airport Metro Express Private Ltd (DAMEPL), a subsidiary of the Reliance Industries Limited withdrew from a contract with The Delhi Metro in 2008 and received a favourable award in 2017. Subsequently, the Supreme Court in 2020 awarded Rs. 4662.37 crore to Reliance Infrastructure which has now grown to 7100 crores. Reliance Infrastructure Limited has approached the Delhi Court to execute the award.

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4. **SECTION 14 OF THE ARBITRATION AND CONCILIATION ACT CANNOT BE INVOKED TO PROVIDE ADJUDICATORY POWER TO SUBORDINATE COURTS**

The Calcutta High Court in *Regent Hirise Pvt. Ltd.* V. *Sanchita Chatterjee* held that Civil Courts of lower jurisdiction does not fall in the definition of court under Section 2(1)(e) of the Arbitration and Conciliation Act, 1996 while deciding a case of ineligibility of the arbitrator under Section 12(5).

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INTERNATIONAL COMMERCIAL ARBITRATION

1. THE LAW OF THE SEAT DETERMINES WHETHER A DISPUTE IS ARBITRABLE OR NOT AT THE PRE-AWARD STAGE: SINGAPORE HC

In a landmark judgment *Westbridge Ventures II Investment Holdings* v. *Anupam Mittal*, the High Court of Singapore decided that the law of the seat, and not the law governing the arbitration agreement, would apply in order to determine whether the parties' dispute was arbitrable at the pre-award stage.

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2. THE LAW COMMISSION OF ENGLAND AND WALES TO REVIEW THE ENGLISH ARBITRATION ACT 1996

On 30th November, the Law Commission of England and Wales announced that it would conduct a review of the Arbitration Act of 1996, which governs arbitrations in England, Wales and Northern Ireland. With the objective of keeping the UK at the forefront of international dispute resolution, the review is being carried as a part of the Law Commission's 14th Programme of Law Reform.

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3. US COURT DENIES ENFORCEMENT OF A FOREIGN ARBITRATION AWARD ON GROUNDS OF SOVEREIGN IMMUNITY

In *Al-Qarqani* v. *Saudi Arabian Oil Company*, the US Fifth Circuit Court of Appeals rejected a petition which sought to enforce a foreign arbitration award against state-owned Saudi Arabian Oil Company, holding that it lacked subject matter jurisdiction. It ruled that the Saudi Arabian Oil Company constituted a foreign State under the Foreign Sovereign Immunities Act, and was hence immune from enforcement of the award in the courts of the United States.

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4. ENGLISH COURT RULES ON ITS JURISDICTION TO ALLOW COUNTERCLAIMS IN ENFORCEMENT PROCEEDINGS

Dismissing the defendant's application, the English Commercial Court in the case of *Selevision Co* v. *Bein Media Group LLC* held that it lacked the jurisdiction to allow a counterclaim in the relation to an application for leave to enforce a New York Convention Award. Resultantly, parties will not be permitted to raise new counterclaims at the enforcement stage of New York Convention awards.

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INVESTMENT ARBITRATION

1. ICSID TRIBUNAL ORDERS SPAIN TO PAY 23.5 MILLION EUROS TO JAPANESE RENEWABLES INVESTOR

An ICSID tribunal in the case *of JGC Holdings Corporation (formerly JGC Corporation)* v. *Kingdom of Spain* has ordered Spain to pay over €23.5 million to a Japanese investor after making a finding that changes to the state's renewable energy regime frustrated its legitimate expectations.

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2. KEYSTONE DEVELOPERS INVOKE ARBITRATION AGAINST US UNDER NAFTA SEEKING $15 BILLION IN DAMAGES

TC Energy Corp. have filed a request for Arbitration against US seeking $15 billion in damages as a consequence of President Joe Biden's decision to disallow a permit for the border-crossing oil pipeline even after construction began. The claim is being brought forth under the provisions of the North American Free Trade Agreement (NAFTA) that allow foreign companies to challenge U.S. policy decisions.

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3. US COURT REJECTS REQUEST FOR ANNULMENT OF ARBITRATION AWARDS IN FAVOUR OF PANAMA CANAL

A Florida Court has confirmed three arbitration awards in favour of the Panama Canal Authority (ACP) by rejecting requests for annulment of awards filed by the Grupo Unidos por el Canal (GUPC SA) consortium, which built the new locks and is part of the Spanish Sacyr. The Court declined to annul the award on the basis of the grounds alleged by the plaintiffs, which included that the arbitrators were biased and denied the opportunity to be heard.

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4. GOVERNMENT OF INDIA AGREES TO REFUND RS 7,900 CR RETRO TAX TO CAIRN ENERGY IN EXCHANGE FOR WITHDRAWAL OF ALL CLAIMS

In a recent development in the retrospective tax dispute between India and Cairn Energy PLC, the Indian government has accepted Cairn's undertakings which would allow for the refund of taxes. Complying with the requirements of the new Taxation Laws (Amendment) Bill 2021 which does away with the levy of retrospective taxation, the company has given undertakings indemnifying the Indian government against future claims and to

drop any legal proceedings anywhere in the world.

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MEDIATION

1. MEDIATION TO LIKELY RESOLVE THE PROTESTS AND CONTINUOUS STRIKES IN COLUMBIA

Subsequent to three sessions with third-party mediator Kevin Flanigan, the Student Workers of Columbia-United Auto Workers (SWC-UAW) and Columbia hint towards an agreement. Protesters are optimist that there will be meaningful progress on issues that are not yet resolved, starting with arbitration for discrimination and harassment cases, and dental care coverage.

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2. 911 MEDIATION RESPONSE PROGRAM TO BE UNDERTAKEN BY DAYTON, OHIO

Dayton, a city in the American state of Ohio, is planning on utilizing mediation as a tool to deal with minor/non-violent issues in the city. By encompassing almost 4-5% of the 911 calls in the area, this mediation initiative will greatly aid the authorities in reducing potentially escalatory interactions between the residents and the law enforcement agencies. Through this ADR process, the parties will be able to resolve the core of their issues, and the police resources will also be diverted in the more serious crisis calls.

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3. TURKEY OFFERS MEDIATION SERVICES BETWEEN RUSSIA AND UKRAINE AMIDST RISING TENSIONS

Amidst rising tension between Russia and Ukraine over the amassing of Russian troops near the Ukrainian border, Turkey has extended to mediate between the two countries. With the USA warning Russia of consequences, the question of a possible mediation was brought up by the Turkish President, Recep Tayyip Erdogan.

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CASE ANALYSIS

DECODING SUPREME COURT'S 'LAKSHMAN REKHA' ON SECTION 34: ANALYSING NHAI v. M HAKEEM

-Rachit Somani

INTRODUCTION

In a ground-breaking decision of *National Highways Authority of India* v. *M. Hakeem & Anr.*, the Supreme Court has cleared the air around the interpretation of Section 34 of the Arbitration and Conciliation Act, 1996 ("ACA") by holding that 'setting aside' of an award does not mean or include modifying the award. The verdict comes as a breath of fresh air for the Indian arbitration jurisprudence as it reinforces the restricted interference approach followed by the Indian judiciary.

FACTUAL MATRIX OF THE CASE

The case dealt with a batch of petitions from various landowners whose lands were acquired by the Central government by issuing certain notifications under the provisions of the National Highways Act, 1956 ("NHA"). These notifications were issued during or after the year 2009 under Sections 3A to 3D of the NHA. Prior to taking possession of the acquired land under Section 3E, the compensation is to be determined under Section 3G by the competent authority established under Section 3(a) of the Act, a Special District Revenue Officer in this case.

The problem arose when the awards deciding the compensation to be provided turned out to be based on the 'guideline value' of the lands. These awards conveniently overlooking the sale deed of similar lands in the same area which provided for a far more realistic value. As a result, abysmally low amounts were awarded by the District Collector. These awards were challenged under Section 34 of ACA before District and Sessions Judge, who augmented the value of land to Rs. 645 per sq. meter, thereby modifying the Collector's award.

Further, the National Highways Authority of India ("NHAI") filed a large number of appeals under Section 37 of the ACA against these modifications but only to get them rejected

from a Division Bench of Madras High Court. The court upheld the District judge's order saying insofar as arbitral awards passed under NHA are concerned, Section 34 of the ACA shall be read as to allow alteration of an arbitral award so as to enhance meekly compensation awarded by an arbitrator.

ISSUE OF LAW

The major question of law before the Supreme Court was whether the power of a Court under Section 34 of the ACA to 'set aside' an award by arbitrator tribunal would also include the power to modify such an award?.

PLEADINGS PRESENTED BY THE PARTIES

The learned Solicitor General of India, Mr. Tushar Mehta, representing the petitioners, NHAI, argued that the court's power under the Section 34 of ACA is limited and different from that of an appellate court under the Land Acquisition Act, 1894. A court, under Section 34(4), can only either set aside or remit the arbitral award which is in contrast to the Arbitration Act, 1940 which had a separate provision to modify an award under its Section 15. He additionally substantiated this argument by arguing that ACA is based on the principles of the UNCITRAL Model Law on International Commercial Arbitration, 1985 "which has specifically restricted the grounds of challenge and the consequent remedy, which is only to set aside or remit in limited circumstances." He further argued that the Central Government is the final authority that appoints the arbitrator and that either party could approach them.This makes the process non-consensual in nature for both the parties and eventually makes no difference to the interpretation of Section 34 of ACA in its application to NHA. Lastly, he challenged the impugned judgment and the case law of *Gayatri Balaswamy* v. *ISG Novasoft Technologies Ltd.*, which the Division-Bench of Madras High Court had relied upon, to be bad in law and a clear defiance to the Supreme Court's decisions.

The respondent's case was presented by learned senior advocate Col. R. Balasubramanian, who at the outset pointed out that there have been at least three instances arising out of these same notifications where the NHAI have deposited the modified compensation before the concerned court and readily complied with the learned District Judge's order. He advocated that NHAI being 'State' under Article 12 of the Constitution of India cannot pick and choose as to when they may file an appeal against certain orders of a District Court and conform with certain other orders arising out of the same dispute. Coming to the merits of the case, he followed the line of reasoning laid down by the learned single

judge in the *Gayatri Balaswamy* case which distinguished between a consensual arbitration and an arbitrator appointed by the Central Government, who would be none other than some government servant who merely rubber stamps the awards that are passed by yet another government servant. He argued that if the interpretation of Section 34 is read in this rigid manner, then the District Judge would have no other option than setting aside the award and starting a fresh arbitration that would, in all probability, take place before the same bureaucrat or some another government-appointed officeholder and this endless loop of unfairness would continue.

COURT FINDING AND BREAKDOWN OF THE JUDGEMENT

- **NHA restrict the rights of a landowner** – While dealing with the issue of the arbitration being non-consensual in nature, the Supreme Court cleared that according to Section 3G (5) of the NHA, the landowner has limited rights and he has zero say in the appointment of the arbitrator, hence, rendering the point of consent baseless.
- **Legislature's intent on Section 34 is well-defined** – Refuting the arguments put forward by the respondents regarding comprehensively reading Section 34 of the ACA, the Apex Court observed that the policymakers have framed the section with a clear intent to keep only a few limited grounds on which an award can be challenged. To substantiate this opinion, the Court highlighted the stark contrast between the powers of remitting, modifying and correcting an award provided in Sections 15 and 16 of old Arbitration Act, 1940 and the new Section 34 of the ACA, 1996 which allows only for setting aside, that too on limited parameters.
- **Well-settled position of law in earlier case laws** – The Supreme Court noted that it is a well-established principle of law that Section 34 cannot cause a challenge on the merits of the award and quoted the *MMTC Ltd.* v. *M/S. Vedanta Ltd.* and *Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI* which refers to another decision of this same Court in *Renusagar Power Co. Ltd.* v. *General Electric Co.* Various decisions of High Courts, such as *Cybernetics Network Pvt. Ltd.* v. *Bisquare Technologies Pvt. Ltd.* and *Nussli Switzerland Ltd.* v. *Organizing Committee Commonwealth Games* of Delhi High Court were held to be instructive in elaborating Section 34(4).
- **McDermott ruling decisively set the boundaries** – The bench referred to the pioneering judgment of *McDermott International Inc.* v. *Burn Standard Co. Ltd.* authored by (Retd.) J. SB Sinha. The judgement effectively laid down that the ACA envisages for a very controlled judicial intervention in the process of arbitration. This line of reasoning was

followed and supported in *Dakshin Haryana Bijli Vitran Nigam Ltd.* v. *Navigant Technologies Pvt. Ltd.* which stated that "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.".

THE VERDICT AND THE WAY FORWARD

The Apex Court, at the very outset, settled that Section 3G(6) of NHA provides that subject to the provisions of this Act, the provisions of ACA shall equally apply to every arbitration under this Act and hence, there is no exceptional reading of ACA with NHA required for the purpose of this judgment. The Court, while dismissing the appeals of NHAI without any costs didn't allow the Legislature to go scot-free and sharply stated that the legislature cannot get away with paying differential compensation to landowners, irrespective of how praiseworthy the public purpose and the need for expediting the process is. The court has settled a major point of interpretation of the law in loud and clear words that were being misconstrued by various High Courts. That being said, the Parliament needs to relook the Section 34 of ACA and resolve the 'set aside or nothing' approach by inculcating a reviewing court (probably the High Courts) to modify an award in certain specific scenarios.

The verdict delivered by the Division Bench of Justices RF Nariman and BR Gavai is a once in a blue moon happenstance where the topmost court of the land shows restraint in exercising its powers for the right reasons. The judgment reiterates the trust in one of the fundamental principles of arbitration, i.e., 'minimal judicial interference' being upheld and comes as shining armour at a time when India is projecting itself as a pro-arbitration and less judicial meddling nation. The thought which encapsulates the whole judgment was this beautiful remark by Justice Nariman which reads "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.".

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