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Neutral Citation No. - 2023:AHC-LKO:69836

Court No. - 19

Case :- APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 55 of 2022

Appellant :- Chandra Kishori
Respondent :- Union Of India Thru. Chairman Of National Highway Authority Of India And 2 Others
Counsel for Appellant :- Abhay Raj Singh
Counsel for Respondent :- Sarvesh Kumar Dubey,C.S.C.,Gantavya

And

Case :- APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 56 of 2022

Appellant :- Om Prakash
Respondent :- Chairman, National Highway Authority Of India, New Delhi And Others
Counsel for Appellant :- Abhay Raj Singh
Counsel for Respondent :- Sarvesh Kumar Dubey,C.S.C.,Gantavya

Hon'ble Jaspreet Singh,J.

1. Heard Shri Abhay Raj Singh, learned counsel for appellant and Ms. Suchiti Chandra, learned counsel for National Highway Authority of India, who has joined the proceedings through video conferencing.

2. Since both the appeals involve a common question of law and fact, hence both the appeals have been heard together and are being decided by this common judgment. For the sake of convenience, the Court shall be referring to the facts as they emerge from Appeal No. 55 of 2022, however, the relevant facts relating to the other appeal shall also be considered at the appropriate place.

3. The appellant, of the two appeals, are the land owners, whose land was acquired under the National Highway Authority of India Act, 1956 (hereinafter referred as NHAI Act, 1956) under Sections 3 A & 3 D of the NHAI Act, 1956.

4. Chandra Kishori, the appellant of Appeal No. 56 of 2022 was the recorded owner of Plot No. 546 situated in Village Bhikhra, Pargana Subeha, Tehsil Haidargarh, District Barabanki measuring 0.590 hectares. Similarly Om Prakash the appellant of Appeal No. 56 of 2022 was the recorded owner of Plot No. 254 measuring 0.0514 hectares situated in Village Gosupur, Pargana Subeha, Tehsil Haidargarh, District Barabanki.

5. The land of appellants of both the appeals were made the subject matter of notification issued under Section 3-A of the NHAI Act, 1956 dated 28.05.2012 and notification under Section 3-D was made on 15.3.2013 for widening of Lucknow-Sultanpur Highway from km. 35.670 to 64.100. The competent authority passed its award in terms of Section 3-G of the NHAI Act, 1956 and awarded a sum of Rs. 6,98,923 to Chandra Kishori vide award dated 11.7.2016 and a sum of Rs. 6,18,051/- to Om Prakash vide award dated 31.07.2015.

6. Being aggrieved both Chandra Kishori and Om Prakash escalated the matter by invoking the provisions of Section 3-G (5) and (6) and referred the matter for arbitration. The Arbitrator in terms of his award dated 19.9.2019 passed in Case No. 1689 of 2017 relating to Chandra Kishori and in Case No. 1690 of 2017 relating to Om Prakash did not find favour with the contentions of the appellant, of the two appeals, for enhancement of compensation and consequently, rejected their claim.

7. This award passed by Prescribed Authority dated 19.9.2019 both in case of Chandra Kishori and Om Prakash was further challenged by filing a petition under Section 34 of the Arbitration & Conciliation Act, 1996 before the District Judge, Barabanki.

8. The petition under Section 34 of the Act of 1996 preferred by Chandra Kishori was registered as Arbitration Act No. 33 of 2020 whereas the petition under Section 34 of the Act of 1996 filed by Om Prakash was registered as Arbitration Case No. 34 of 2020.

9. Both the petitions under Section 34 of the Act of 1996 relating to both the appellant in the respective appeals, was rejected by the Additional District Judge, Court No. 45, Barabanki by means of order dated 26.9.2022. It is being aggrieved against both the orders i.e., rejection of claim by the Arbitrator vide its award dated 19.9.2019 and the rejection of the petition under Section 34 by means of judgment dated 26.09.2022 that the appellant of two appeals have assailed it before this Court by means of instant two appeals preferred under Section 37 of the Act of 1996.

10. Shri Abhay Raj Singh, learned counsel for appellants in the two appeals has primarily raised two points for consideration. It is submitted that in the case of both the appellants the land in question had already been declared as non-agricultural in terms of Section 143 of the U.P. Zamindari Abolition and Land Reforms Act, 1950, however, the competent authority had given the compensation treating it to be agricultural land. It is the case of the appellants that since the land was declared as non-agricultural, hence the rate for determining the compensation which ought to have been adopted was one for non-agricultural but by adopting the rate as applicable to agricultural land, the competent authority had erred. This issue was raised before the Arbitrator, who also affirmed the same. While assailing the aforesaid order passed by the Arbitrator in a petition under Section 34 of the Arbitration & Conciliation Act, 1996, however, it did not find favour with the Court and it dismissed the same.

11. It is urged that once the land was declared as a non-agricultural, the appellants were entitled to get compensation on the rates as applicable to non-agricultural land. The second limb of contention of learned counsel for appellant is that the learned District Judge while considering the petition under Section 34 of the Arbitration & Conciliation Act, 1996, has failed to exercise jurisdiction as vested in law, inasmuch as the petition of the appellant was dismissed on the ground that the issue regarding re-valuation is not within the domain of a dispute nor it is covered under any ground to be adjudicated in terms

of Section 34 of the Arbitration & Conciliation Act, 1996 and as such, this exercise of jurisdiction by the District Judge in exercise of powers under Section 34 of the Arbitration & Conciliation Act, 1996 is an erroneous exercise of jurisdiction resulting in sheer miscarriage of justice.

12. It is also urged that the appellants being aggrieved invoked the jurisdiction of this Court in terms of Section 37 of the Arbitration & Conciliation Act, 1996 and it has been stressed that the award passed by the Arbitrator and the failure of District Judge to look into the matter is apparently an error apparent on the fact of the record as the award suffered from patent illegality and was against the public policy and in these circumstances, the appeal deserves to be allowed.

13. Per contra, Ms. Chandra, learned counsel appearing for National Highway Authority of India through video conferencing, has submitted that mere change in the land use from agricultural to non-agricultural is not going to confer any benefit to the appellants inasmuch as on the date of acquisition the nature of the land as it stood on the revenue records, has to be seen. It is further submitted that even though the appellants may have got the land declared for non-agricultural purposes yet there was no material on record to suggest that any non-agricultural activities were being done. It is also stated by learned counsel for respondents that the land in question remained agricultural in the relevant revenue record and in sofar as the calculation of compensation is concerned, it has been done in accordance with Section 3-G (7) of the NHAI Act, 1956 read with Section 26 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, which is applicable and as such, this aspect has been carefully taken note by the Arbitrator so also by the court dealing with the petition under Section 34 of the Arbitration & Conciliation Act, 1996 and in view thereof there is no error apparent on the fact of the record for this Court to intervene and accordingly, the appeals deserve to be dismissed.

14. The Court has heard learned counsel for parties and also perused the material on record.

15. At the very outset, it would be relevant to notice the scope of a petition filed under Section 34 of the Arbitration & Conciliation Act, 1996 which delineate the circumstance and the grounds upon which the award may be set aside.

16. Section 34 of the Arbitration & Conciliation Act, 1996 reads as under:-

> **Application for setting aside arbitral awards.**
>
> (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 [1][establishes on the basis of the record of the arbitral tribunal 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.]

[(2A) 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 reappreciation 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.

[3][(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 the other party.]

17. Submission of learned counsel for appellants that the award was bad as it was against the public policy of India and that it also suffered from patent illegality and by ignoring this, the District Judge while affirming the award has committed an error. In order to examine the aforesaid aspect, it would be relevant to notice that the words 'patent illegality' and an award while is against 'the public policy of India', has certain connotations which have been elucidated by the Apex Court. It will be relevant to notice the recent decision of the Apex Court in ***Batliboi Environmental Engineers Limited Vs. HPCL and another [2023 SCC online SC 1208]*** and the relevant paragraphs 31, 32, 34 to 38, 41, 42 and 44 read as under:-

> 31. … The foundation of arbitration is party autonomy. Parties have the freedom to enter into an agreement to settle their disputes/claims by an arbitral tribunal, whose decision is binding on the parties. 23 It is argued that the purpose of arbitration is fast and quick one-stop adjudication as an alternative to court adjudication, and therefore, post award interference by the courts is unwarranted, and an anathema that undermines the fundamental edifice of arbitration, which is consensual and voluntary departure from the right of a party to have its claim or dispute adjudicated by the judiciary. The process is informal, and need not be legalistic. Per contra, it is argued that party autonomy should not be treated as an absolute defence, as a party despite agreeing to refer the disputes/claims to a private tribunal consensually, does not barter away the constitutional and basic human right to have a fair and just resolution of the disputes. The court must exercise its powers when the award is unfair, arbitrary, perverse, or otherwise infirm in law. While arbitration is a private form of dispute resolution, the conduct of arbitral proceedings must meet the juristic requirements of due process and procedural fairness and reasonableness, to achieve a 'judicially' sound and objective outcome. If these requirements, which are equally fundamental to all forms of adjudication including arbitration, are not sufficiently accommodated in the arbitral proceedings and the outcome is marred, then the award should invite intervention by the court.
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> 32. To disentangle and balance the competing principles, the degree and scope of intervention of courts when an award is challenged by one or both parties needs to be stated. Reconciliation as a statement of law and in particular application in a particular case has not been an easy exercise. We begin by first referring to the views expressed by this Court in interpreting the width and scope of the post award interference by the courts under Section 34 of the A&C Act.

34. Sub-section (1) to Section 34 of the A&C Act requires that the recourse to a court against an arbitral award is to be made by a party filing an application for setting aside of an award in accordance with sub-sections (2) and (3) of Section 34. Sub-section (2) to Section 34 of the A&C Act stipulates seven grounds on which a court may set aside an arbitral award. Sub-section (2) consists of two clauses, (a) and (b). Clause (b) consists of two sub-clauses, namely, sub-clause (i) which states that when the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, and sub-clause (ii), which states that the court can set aside an arbitral award when the award is 'in conflict with public policy of India'. We shall subsequently examine the decisions of this Court interpreting 'in conflict with public policy of India' and the explanation.

35. Under sub-clause (a) to sub-section (2) to Section 34 of the A&C Act, a court can set aside an award on the grounds in sub-clauses (i) to (v) namely, when a party being under some incapacity; arbitration agreement is not valid under the law for the time being in force; when the party making an application under Section 34 is not given a proper notice of appointment of the arbitrator or the arbitration proceedings, or was unable to present its case; and when the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement between the parties, unless such agreement was in conflict with the mandatory and binding non-derogable provision, or was not in accordance with Part I of the A&C Act. Sub-clause (iv) states that the arbitral award can be set aside when it deals with a dispute not contemplated by, or not falling within the terms of submission of arbitration, or it contains a decision on matters beyond the scope of submission to arbitration. However, the proviso states that the decision in the matters submitted to arbitration can be separated from those not submitted, then that part of the arbitral award which contains the decision on the matter not submitted to arbitration can be set aside. In the present case, we are not required to examine sub-clauses to clause (a) to sub-section (2) to Section 34 of the A&C Act in detail. Hence, this decision should not be read as making any observation, even as obiter dicta on the said clauses.

36. Explanation to sub-clause (ii) to clause (b) to Section 34(2) of the A&C Act, as quoted above and before its substitution by Act No.3 of 2016, had postulated and declared for avoidance of doubt that an award is 'in conflict with the public policy of India', if the making of the award is induced or affected by fraud or corruption, or was in violation of Sections 75 or 81 of the A&C Act. Both Sections 75 and 81 of the A&C Act fall under Part III of the A&C Act, which deal with conciliation proceedings. Section 75 of the A&C Act relates to confidentiality of the settlement proceedings and Section 81 deals with admissibility of evidence in conciliation proceedings. Suffice it is to note at this stage that while 'fraud' and 'corruption' are two specific grounds under 'public policy',

these are not the sole and only grounds on which an award can be set aside on the ground of 'public policy'.

37. Act No. 3 of 2016 with retrospective effect from 23.10.2015 has substituted the explanation referred to above, by two new explanations that are differently worded.25 Sub-section (2-A) to Section 34 of the A&C Act, which was instituted by Act No. 3 of 2016 with retrospective effect from 23.10.2015, states that the arbitral award arising out of arbitrations other than international commercial arbitrations can be set aside by the court, if it is vitiated by patent illegality appearing on the face of the award. The proviso to sub-section (2-A) to Section 34 of the A&C Act also states that the award shall not be set aside merely on the ground of erroneous application of law or by reappreciation of evidence. The aforesaid sub-section need not be examined in the facts of the present case, as we are not required to interpret and apply the substituted explanations to (ii) to sub-clause (b) to 34(2) of the A & C Act in the present case.

38. The expression 'public policy' under Section 34 of the A&C Act is capable of both wide and narrow interpretation. Taking a broader interpretation, this Court in ***ONGC Limited. v. Saw Pipes Limited.***, held that the legislative intent was not to uphold an award if it is in contravention of provisions of an enactment, since it would be contrary to the basic concept of justice. The concept of 'public policy' connotes a matter which concerns public good and public interest. An award which is patently in violation of statutory provisions cannot be held to be in public interest. Thus, expanding on the scope and expanse of the jurisdiction of the court under Section 34 of the A&C Act, it was held that an award can be set aside if it is contrary to:

(a) fundamental policy of Indian law; or
(b) the interest of India; or
(c) justice or morality, or
(d) in addition, if it is patently illegal.

Nevertheless, the decision holds that mere error of fact or law in reaching the conclusion on the disputed question will not give jurisdiction to the court to interfere. However, this will depend on three aspects: (a) whether the reference was made in general terms for deciding the contractual dispute, in which case the award can be set aside if the award is based upon erroneous legal position; (b) this proposition will also hold good in case of a reasoned award, which on the face of it is erroneous on the legal proposition of law and/or its application; and (c) where a specific question of law is submitted to an arbitrator, erroneous decision on the point of law does not make the award bad, unless the court is satisfied that arbitrator had proceeded illegally. In the said case, the court set aside the award on the ground that the award had not taken into consideration the terms of the contract before arriving at the conclusion as to whether the party claiming the damages is entitled to the same. Reference was made to the

provisions of Sections 73 and 74 of the Contract Act, which relate to liquidated damages, general damages and penalty stipulations. This view had held the field for a long time and was applied in subsequent judgments of this Court in ***Hindustan Zinc Ltd. v. Friends Coal Carbonisation27 , Centrotrade Minerals and Metals Inc. v. Hindustan Copper Limited28 , Delhi Development Authority v. R.S. Sharma and Co29 ., J.G. Engineers (P) Ltd. v. Union of India and Another30, and Union of India v. L.S.N. Murthy.***

41. Subsequently, in ***ONGC Ltd. v. Western Geco International Ltd.***, a three Judge Bench of this Court observed that the Court, in ***Saw Pipes Ltd.***, did not examine what would constitute 'fundamental policy of Indian law'. The expression 'fundamental policy of Indian law' in the opinion of this Court includes all fundamental principles providing as basis for administration of justice and enforcement of law in this country. There were three distinct and fundamental juristic principles which form a part and parcel of 'fundamental policy of Indian law'. The first and the foremost principle is that in every determination by a court or an authority that affects rights of a citizen or leads to civil consequences, the court or authority must adopt a judicial approach. Fidelity to judicial approach entails that the court or authority should not act in an arbitrary, capricious or whimsical manner. The court or authority should act in a bona fide manner and deal with the subject in a fair, reasonable and objective manner. Decision should not be actuated by extraneous considerations. Secondly, the principles of natural justice should be followed. This would include the requirement that the arbitral tribunal must apply its mind to the attending facts and circumstances while taking the view one way or the other. Non- application of mind is a defect that is fatal to any adjudication. Application of mind is best done by recording reasons in support of the decision. As noticed above, Section 31(3)(a) of the A&C states that the arbitral award shall state the reasons on which it is based, unless the parties have agreed that no reasons are to be given. Sub-clauses (i) and (iii) to Section 34(2) also refer to different facets of natural justice. In a given case sub-clause to Section 34(2) and sub-clause (ii) to clause (b) to Section 34(2) may equally apply. Lastly, is the need to ensure that the decision is not perverse or irrational that no reasonable person would have arrived at the same or be sustained in a court of law. Perversity or irrationality of a decision is tested on the touchstone of Wednesbury principle of reasonableness. At the same time, it was cautioned that this Court was not attempting an exhaustive enumeration of what would constitute 'fundamental policy of Indian law', as a straightjacket definition is not possible. If on facts proved before them, the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which on the face of it, is untenable resulting in injustice, the adjudication made by an arbitral tribunal that enjoys considerable latitude and play at the joints in making awards, may be challenged and set aside.

> 42. The decision of this Court in ***Associate Builders*** elaborately examined the question of public policy in the context of Section 34 of the A&C Act, specifically under the head 'fundamental policy of Indian law'. It was firstly held that the principle of judicial approach demands a decision to be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would not satisfy the said requirement.
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> 44. As observed previously, we need not examine the amendment made to the A&C Act vide Act No. 3 of 2016 with retrospective effect from 23.10.2015 and the judgments that deal with the amended Section 34 of the A&C Act. Pertinently, the amendment to Section 34 of the A&C Act was effected, pursuant to the observations of the Supplementary Report to Report No. 246 on Amendments to Arbitration and Conciliation Act, 1996 by the Law Commission of India, titled 'Public Policy – Developments post-Report No. 246' published in February 2015. This Supplementary Report observed that the power to review an arbitral award on merits under Section 34 of the A&C Act, as elucidated in the case of ***Western Geco***, subsequently followed in Associate Builders, is contrary to the object of the A&C Act and international practice on minimization of judicial intervention. A reference can also be conveniently made to ***MMTC Ltd. v. Vedanta Ltd., and Ssangyong Engg. & Construction Co. Ltd. v. National Highways Authority of India*** which examine the scope of intervention of courts under Section 34 of the A&C Act as amended by Act No. 3 of 2016. ***MMTC Ltd. and Ssangyong Engg.,*** and other judgments which deal with the amended Section 34 of the A&C Act that are not applicable in the present case.

18. The Apex Court in ***Batliboi (supra)*** has also noticed and followed the earlier decisions of the Apex Court in ***Oil & Natural Gas Corporation Ltd vs Saw Pipes Ltd (2003) 5 SCC 705*** and ***Associate Builders vs Delhi Development Authority (2015) 3 SCC 49***.

19. From the perusal of the aforesaid dictum and applying the principles to the instant case, this Court finds that where the land is acquired by the State, which is in the nature of compulsory acquisition, in exercise of its powers of eminent domain and the compensation which is payable as per the guiding factors enumerated in Section 3-G (7) of the NHAI Act, 1956 read with Section 26 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, apparently is an issue, which is absolutely core of the controversy, which requires consideration. Since the award passed by the Arbitrator in violation of the said provisions would

definitely be a ground to invoke the jurisdiction of the Court under Section 34 of the Act 1996 on the ground of ‘the Public Policy of India’. More so, where the land of a person, over which he has a constitutional right in terms of Article 300-A of the Constitution of India, is taken away by the State by compulsory acquisition and the requisite provisions for grant of compensation is not adhered then it would definitely incur the scrutiny of the Court in terms of Section 34 of the Arbitration & Conciliation Act, 1996.

20. At this stage, it will also be relevant to notice the scope of appeal under Section 37 of the Arbitration & Conciliation Act, 1996 and in this regard the decision of the Apex Court in ***MMTC Vs. Ltd. Vs. Vedanta Ltd. 2019 (4) SCC 163*** will be helpful and wherein the Apex Court has held as under:

> "10. Before proceeding further, we find it necessary to briefly revisit the existing position of law with respect to the scope of interference with an arbitral award in India, though we do not wish to burden this judgment by discussing the principles regarding the same in detail. Such interference may be undertaken in terms of Section 34 or Section 37 of the Arbitration and Conciliation Act, 1996 (for short ?the 1996 Act?). While the former deals with challenges to an arbitral award itself, the latter, inter alia, deals with appeals against an order made under Section 34 setting aside or refusing to set aside an arbitral award.
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> 11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the ?fundamental policy of Indian law? would

cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] reasonableness. Furthermore, ?patent illegality? itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Also see ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] ; Hindustan Zinc Ltd. v. Friends Coal Carbonisation [Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445] ; and McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181])

13. It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2-A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states 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.
>
> 14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."

21. Having noticed the contours of jurisdiction exercised by the Court in terms of Section 34 of the Arbitration & Conciliation Act, 1996 as well as powers of this Court in terms of Section 37 of the Arbitration & Conciliation Act, 1996, it will now be appropriate to consider the contention of the respective parties on merits.

22. In sofar as the facts are concerned, there is not much dispute between the parties, inasmuch as both the appellant in the respective appeals were the recorded tenure holders and in both the cases, their land has been acquired in exercise of powers contained under Section 3-A and Section 3-D of the NHAI Act, 1956. The possession has also been taken by the National Highway Authority of India in terms of Section 3-D and once the acquisition is made then as a necessary corollary the determination of the amount payable as compensation to the appellants assumes great significance. In this regard, Section 3-G (7) of the NHAI Act, 1956 shall be important and is being reproduced hereafter for easy reference:-

> **Section 3 G (7) in The National Highways Act, 1956**
>
> [3G. Determination of amount payable as compensation.—
>
> (1) xxx
>
> (2) xxx

(3) xxx

(4) xxx

(5) xxx

(6) xxx

(7) The competent authority or the arbitrator while determining the amount under sub-section (1) or sub-section (5), as the case may be, shall take into consideration—
(a) the market value of the land on the date of publication of the notification under section 3A;
(b) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the severing of such land from other land;
(c) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the acquisition injuriously affecting his other immovable property in any manner, or his earnings;
(d) if, in consequences of the acquisition of the land, the person interested is compelled to change his residence or place of business, the reasonable expenses, if any, incidental to such change.]

23. Simultaneously it will also be relevant to notice Section 26 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, which reads as under:

26. Determination of market value of land by Collector.
(1) The Collector shall adopt the following criteria in assessing and determining the market value of the land, namely:—
(a) the market value, if any, specified in the Indian Stamp Act, 1899 (2 of 1899) for the registration of sale deeds or agreements to sell, as the case may be, in the area, where the land is situated; or
(b) the average sale price for similar type of land situated in the nearest village or nearest vicinity area; or
(c) consented amount of compensation as agreed upon under sub-section *(2)* of section 2 in case of acquisition of lands for private companies or for public private partnership projects,
whichever is higher:
Provided that the date for determination of market value shall be the date on which the notification has been issued under section 11.
Explanation 1.—The average sale price referred to in clause *(b)* shall be determined taking into account the sale deeds or the agreements to sell registered for similar type of area in the near village or near vicinity area during immediately preceding three years of the year in which such acquisition of land is proposed to be made.
Explanation 2.—For determining the average sale price referred to in *Explanation* 1, one-half of the total number of sale deeds or the agreements to sell in which the highest sale price has been mentioned shall be taken into account.

> *Explanation* 3.—While determining the market value under this section and the average sale price referred to in *Explanation* 1 or *Explanation* 2, any price paid as compensation for land acquired under the provisions of this Act on an earlier occasion in the district shall not be taken into consideration.
> *Explanation* 4.—While determining the market value under this section and the average sale price referred to in *Explanation* 1 or *Explanation* 2, any price paid, which in the opinion of the Collector is not indicative of actual prevailing market value may be discounted for the purposes of calculating market value.
> (2) The market value calculated as per sub-section *(1)* shall be multiplied by a factor to be specified in the First Schedule.
> (3) Where the market value under sub-section *(1)* or sub-section *(2)* cannot be determined for the reason that—
> (a) the land is situated in such area where the transactions in land are restricted by or under any other law for the time being in force in that area; or
> (b) the registered sale deeds or agreements to sell as mentioned in clause *(a)* of sub-section *(1)* for similar land are not available for the immediately preceding three years; or
> (c) the market value has not been specified under the Indian Stamp Act, 1899 (2 of 1899) by the appropriate authority,
> the State Government concerned shall specify the floor price or minimum price per unit area of the said land based on the price calculated in the manner specified in sub-section *(1)* in respect of similar types of land situated in the immediate adjoining areas:
> Provided that in a case where the Requiring Body offers its shares to the owners of the lands (whose lands have been acquired) as a part compensation, for acquisition of land, such shares in no case shall exceed twenty-five per cent, of the value so calculated under sub-section *(1)* or sub-section *(2)* or sub-section *(3)* as the case may be:
> Provided further that the Requiring Body shall in no case compel any owner of the land (whose land has been acquired) to take its shares, the value of which is deductible in the value of the land calculated under sub-section *(1)*:
> Provided also that the Collector shall, before initiation of any land acquisition proceedings in any area, take all necessary steps to revise and update the market value of the land on the basis of the prevalent market rate in that area:
> Provided also that the appropriate Government shall ensure that the market value determined for acquisition of any land or property of an educational institution established and administered by a religious or linguistic minority shall be such as would not restrict or abrogate the right to establish and administer educational institutions of their choice.

24. Having taken a look at the aforesaid provisions, this Court finds that while determining the compensation, the authority is required to take into consideration the market value of the land on the date of publication of the notification under Section 3-A of the NHAI Act,

1956. In order to determine the market value, it will also have to be seen what was the nature of the land, which is sought to be acquired. The record would indicate that in sofar as the land in both the appeals are concerned, the same on the date of notification was recoded in the names of the respective appellant and a declaration in terms of Section 143 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 was already made by means of order dated 4.11.2011 passed by the SDM concerned relating to the case of Om Prakash, while it was done vide order dated 15.04.2011 relating to Chandra Kishori.

25. It will also be relevant to notice that wherever the Collector makes or publishes rate list regarding ascertaining the market value for the purposes of stamp duty, the same also becomes applicable as provided under Section 26 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. It is not disputed between the parties that land in question was non-agricultural. Once this is the admitted position, it cannot be said that the Arbitrator was justified in calculating the compensation in respect of the land so acquired of the appellants treating it to be agricultural, even though if the order of declaration under Section 143 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 was not reflected in the revenue records since it is the duty of the Collector of the District to maintain the revenue records and on account of his lapse the landowner cannot be penalized.

26. From the provisions of Section 3-G(7) of the NHAI Act, 1956 read with Section 26 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, it would be clear that compensation is made in respect of the land which is acquired and the status of the land is to be seen in context with the nature and the category in which it is recorded on the date of notification under Section 3-A of the NHAI Act, 1956. The provisions for grant of compensation, which have been noticed here-in-above also indicates that once the land is acquired at the given rate noticing the status and nature of the land as recorded on the date of notification any improvement made on the said land is then assessed

and calculated to determine the final compensation which includes various factors such as **(a)** the average sale price for same type of land situate in the nearest village or vicinity; **(b)** the damages sustained by the person interested by reason of taking of any standing crop or trees, which may be on the land at the time of taking possession; **(c)** the damages, if any, sustained by a person interested at the time of Collector's taking possession which affects his other immovable property; **(d)** damages in case, if suffered relating to the acquisition by virtue of which the person interested is compelled to change his residence or place of business and reasonable expenses incidental to such change and any other ground which in the interest of equity justice and is beneficial to the affected families.

27. In the instant case, the basic flaw while calculating the compensation made by the competent authority, which has been affirmed by Arbitrator and not considered under Section 34 of the Arbitration & Conciliation Act, 1996 is that it calculated the compensation for the land acquired and treating it to be agricultural while it was a land declared for non-agricultural purposes. Once the land was declared as non-agricultural land and the order of the competent SDM was placed before the Arbitrator and was not denied nor found to be fabricated or having been set aside by any superior court then it was the duty of the Arbitrator as well as the Court under Section 34 of the Arbitration & Conciliation Act, 1996 to have examined this aspect.

28. At this stage, it may also be relevant to notice that a similar issue was considered by this Court in ***Arbitration Appeal No. 1 of 2019 National Highway Authority of India Vs. Pankaj Singh and others decided on 22.1.2020*** wherein this Court has held as under:-

> "The submission of learned counsel for the appellant is that in the notification under Section 3-A, the parcel of land relating to the respondents was shown as agricultural and, therefore, the land ought to be considered to be agricultural does not find favour with this Court. It would be relevant to note that the declaration made by the Competent Authority was prior to the date of the notification dated 18.12.2013. In case if the entry regarding the aforesaid land not being recorded as non-agricultural land in the revenue record then it may be some sort of lapse on the part of the

revenue authority, however, such lapse cannot deprive or change the effect of a judicial order passed by the Competent Authority whereby the land is declared to be non-agricultural.

The Court had pin-pointedly put a query to the learned counsel for the appellant to indicate under what are the different heads under which the compensation of the acquired land is awarded.

The learned counsel for the appellant has submitted that the compensation is awarded on the basis of the nature of the land either in the category of the agricultural or non-agricultural.

The learned counsel has further submitted that even assuming the land was not agricultural on the date of the notification yet the fact remains that there was no non-agricultural activity prevalent or noticed and unless and until it could be established that the land in question was being used for some non-agricultural activity till then the enhanced compensation under the head of non-agricultural land is not payable to the respondents.

The learned counsel for the respondents has submitted that the aforesaid contention is fallacious, inasmuch as, the nature of the land which is acquired is taken to be, by, its character of whether it is agricultural or non-agricultural. It has been submitted that in case if the nature of the land is non-agricultural and some non-agricultural activities are going on then only difference would be that as far as the compensation of the land is concerned it will be given as per the rates applicable to the non-agricultural land while any improvements or activities done can be compensated by assessing its valuation, however, it does not mean that unless and until any activity is being done till then the nature of the land would not change.

The Court finds that the submission of the learned counsel for the respondents has substance.

The land is acquired on the basis of the nature which is recorded in the revenue records as in the present case. The land may or may not be used for any purpose but the fact is that if the nature of the land is recorded as non agricultural, then some particular rate as notified for non-agricultural land would be applicable thereto.

Even assuming if the land is agricultural and so recorded in the revenue record yet if utilized for certain non-agricultural activities, on that account, the compensation will be paid on the land treating it to be agricultural and separate compensation would be determined by valuing the improvements such as some construction whether residential or otherwise and as such that would be the manner in which the compensation be calculated broadly.

Once a declaration has been issued by the competent authority under section the effect and consequence of the aforesaid declaration is also provided in the said Section 143, inasmuch as, it is excluded from the clutches of the U.P.Z.A. & L.R. Act in so far as the matters regarding succession is concerned and the land holder is exempted from payment of any revenue. That being so, on the date of notification under Section 3-A the declaration under Section 143 had been made.

> In the aforesaid backdrop the nature of the land which was for the non-agricultural purpose has rightly been put under the aforesaid category and compensation has been awarded in light thereto which is applicable to non-agricultural land. Had there been any improvement that would have been calculated separately, however, that is not the case in the matter at hand."

29. The aforesaid decision of this Court was approved by the Apex Court in Special Leave Petition No. 8607 of 2021 vide its order dated 9.7.2021.

30. In light of the aforesaid discussions and provisions of law considered above, this Court is clearly of the opinion that the Arbitrator committed an error in failing to consider this aspect of the matter relating to the nature and status of land on the date of notification including ignoring the order passed by the SDM under Section 143 of the U.P. Zamindari Abolition and Land Reforms Act, 1950, and it was the duty of the Arbitrator to have noticed the provisions and the manner in which the compensation is to be computed so that the land which has been taken away of the appellants, they are appropriately compensated as per the provisions of law.

31. This Court further finds that the Additional District Judge while considering the petition under Section 34 of the Arbitration & Conciliation Act, 1996 also erred in holding that it does not have the power to interfere with the award which requires re-calculation as it is apparent that the Additional District Judge did not apply the settled legal principles applicable and defining the realm of jurisdiction, the Court exercises, while adjudicating a petition under Section 34 of the Act of 1996..

32. Thus for the aforesaid reasons, the appeals are allowed. The judgment dated 26.9.2022 passed by the Additional District Judge Court 45, Barabanki in Arbitration Case No. 33 of 2020 and Arbitration Case No.34 of 2020 are set aside and also the award dated 26.9.2022 passed in Case No. 1689 of 2017 relating to Chandra Kishori and award in Case No. 1690 of 2017 relating to Om Prakash is also set aside.

33. The Arbitrator shall re-determine the compensation afresh in light of the observations made by this Court including taking note of the evidence already produced and placed on record by the parties in light of the provisions contained under Section 3-G(7) of the NHAI Act, 1956 read with Section 26 and 28 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 expeditiously as possible and preferably within a period of six months from the date a copy of this order is placed before the authorities concerned. It is clarified that the appellants shall not be permitted to lead any fresh evidence. Subject to the above observations, ***both the appeals are allowed.*** In the facts and circumstances of the case, there shall no order as to costs.

34. The record of the court below be returned forthwith.

Order Date :- 16.10.2023

Virendra