

Is the Indian Arbitration and Conciliation Act 1996 special or general law? (National Highways Authority v Sayedabad Tea Company)

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Arbitration analysis: The Supreme Court of India in *National Highways Authority of India v Sayedabad Tea Company* dealt with arbitral appointments under section 11 of the Arbitration and Conciliation Act 1996 (ACA 1996), vis-a-vis section 3G(5) of the National Highways Act 1956 (the Highways Act), which provides for appointment of an arbitrator by the central government in special situations. The Supreme Court held that the Highways Act, being a special law, would have overriding effect on a general law such as ACA 1996. Siddharth Ratho, senior member, Payel Chatterjee and Sahil Kanuga of the International Dispute Resolution and Investigations Practice at Nishith Desai Associates consider the decision.

National Highways Authority of India v Sayedabad Tea Company 2019 SCC Online SC [1102](#)

What was the background?

The Highways Act is a comprehensive code enacted for *inter alia* acquisition of land and for determining compensation and disbursement, as determined by the competent authority under the Highways Act, to parties whose land may have been acquired. The compensation so determined, if unacceptable to any party, may be adjudicated by an arbitrator appointed by the Central Government under s 3G(5) of the Highways Act which provides: 'If the amount determined by the competent authority under sub-section (1) or sub-section (2) is not acceptable to either of the parties, the amount shall, on an application by either of the parties, be determined by the arbitrator to be appointed by the Central Government.' It is a settled position that provisions of special law prevail over general law.

The National Highways Authority of India (the NHAI) acquired a tea estate in 2007 in the exercise of its powers under the Highways Act (namely, s 3(D) of the Highways Act read with notification dated 22 November 2005). Sayedabad Tea Company (the Tea Company), being dissatisfied with the award of compensation determined by the competent authority, filed an application for appointment of an arbitrator under s 3G(5) of the Highways Act. The central government did not respond to the request within 30 days in accordance with the prescribed time-frame. The Tea Company moved an application under ACA 1996, s 11 before the High Court of Calcutta (the High Court). During the pendency of the s 11 application the central government appointed an arbitrator.

The High Court decision

The High Court held that the central government's power to appoint an arbitrator stood forfeited and any appointment during the pendency of proceedings before it was not a valid appointment. The matter was referred to the Chief Justice for the appointment of an arbitrator by order dated 6 July 2007 (the Order).

NHAI filed a review of the application against the Order, challenging the maintainability of the s 11 application. NHAI submitted that the Highways Act is a special enactment laying down the procedure for the ap-

pointment of an arbitrator where the power to do so is exclusively vested with the central government. The High Court dismissed the review petition on the ground of maintainability.

What did the parties contend?

NHAI, relying on a recent two-bench judgment of the Supreme Court of India (the Supreme Court) in *General Manager (Project), National Highways and Infrastructure Development Corporation Ltd v Prakash Chand Pradhan*, Civil Appeal No 5250 of 2018, submitted that:

- the Highways Act is a special enactment and a code in itself providing *inter alia* the procedure of acquisition of land as well as determination of compensation. The application needed to be moved under the Highways Act for the appointment of an arbitrator
- invoking ACA 1996, s 11 for the appointment of an arbitrator is in abrogation of the central government's powers under the Highways Act and such interference is not permissible

The Tea Company, relying on the literal interpretation of sub-section (6) of section 3G of the Highways Act, submitted that subject to provisions of the Highways Act, the provisions of ACA 1996 were applicable to arbitrations. In view of central government having failed to appoint the arbitrator within the prescribed time-frame, there was no legal impediment in relying on provisions of ACA 1996 (*Deep Trading Company v Indian Oil Corporation* 2013 94) SCC 35).

What did the Supreme Court decide?

The Supreme Court noted that in *Prakash Chand*, while dealing with the scope of sub-sections (5) and (6) of section 3G of the Highways Act, it was held that the Highways Act being a special enactment vesting exclusive powers with the central government for appointment, ACA 1996, s 11 was not applicable (usage of the term 'subject to' in the statute gave overriding effect to the Highways Act in relation to disputes for determining compensation). In the event the central government fails to appoint an an arbitrator within a reasonable time, parties could avail writ jurisdiction under article 226 of the Constitution or file suit.

The Supreme Court further added that the Highways Act being enacted under Entry 23 of the Union List of the Seventh Schedule of the Constitution, is a comprehensive code with exclusive powers to legislate with respect of highways declared as national highways. The Highways Act being a complete code, provided an in-built mechanism not only in initiating acquisition but also in determining compensation and the adjudication of the same by an arbitrator, appointed by central government, failing which by the court of law.

Re-affirming the settled principles of law that when a special law sets out a self-contained code, the application of the general law would stand excluded, the Supreme Court held that in view of exclusive powers being vested with the central government to appoint an arbitrator under section 3G(5) of the Highways Act, being a special enactment, the s 11 application filed before the High Court was not maintainable. The Supreme Court relied on the ratio in *Gujarat Urja Vikash Nigam Ltd v Essar Power Limited* (2008) 4 SCC 755, wherein statutory provisions of the Electricity Act 2003 adjudicating the dispute between the licensees and the generating companies were held to be a special enactment and ACA 1996, s 11 was not made available to the parties.

What are the practical implications of this decision?

This ruling has once again brought to the fore the discussion on special enactments overriding the provisions of a general law. While in this case, the court held the Highways Act to be special legislation and ACA 1996 to be general legislation, a three judge bench of the court had earlier in the case of *Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department* Civil Appeal No 11866 of 2018, held ACA 1996 to be special legislation while dealing with the question of the applicability of the Limitation Act 1963 (the Limita-

tion Act) to ACA 1996, *inter alia* holding that provisions of ACA 1996 would override the provisions of the Limitation Act.

The Supreme Court in this decision placed reliance upon the two-judge decision in *Essar Power* but not on the *Consolidated Engineering Enterprises* judgment. Such contrasting approaches may lead to uncertainty on how the ACA 1996 would be viewed i.e. as special or general legislation.

This ruling is yet another example of the infamous long delays, the judiciary taking 12 years to decide on the issue of appointment of arbitrators by central government or by the High Court. Interestingly, after having taken more than a decade to resolve the issue of appointment of an arbitrator, the Supreme Court has imposed a time limit of no more than six months, post Tea Company entering an appearance, to complete proceedings, even though no such time limit exists under the Highways Act.

Notably, the government is one of the biggest litigators and embroiled in numerous arbitrations. Special laws ousting the applicability of general laws has implications wherein the government may use its legislative powers to enact special statutes to circumvent the provisions of ACA 1996 and use it to its own advantage. Considering the current government's focus on ease of doing business in India and promoting arbitration, it is essential that a larger bench of the Supreme Court finally settles the law and adds clarity on the status of ACA 1996. Further conflicting decisions and ambiguity would lead to more chaos and uncertainty for the arbitration framework in India.

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