"ARBITRAL AWARD" AND "ORDER" — THE CONUNDRUM UNDER THE ARBITRATION AND CONCILIATION ACT, 1996

By

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Section 2(c) of the Arbitration and Conciliation Act, 1996 as amended by Act of 2015 and 2019 (hereinafter referred to as "*the Act*") defines *'arbitral award'* to include an interim award. Section 31(6) of the Act mentions *'interim arbitral award'*. Section 36 of the Act enables enforcement of an Arbitral Award in accordance with the provisions of Civil Procedure Code, 1908 ("*CPC*") as if such Arbitral Award were to be a decree of a Court.

Similarly, Section 37 of the Act discusses *'appealable orders',* and Section 17 of the Act enables the Arbitral Tribunal to pass *'interim orders'*. However, the word '*Order*' has not been defined anywhere in the Act. Section 2(14) of CPC on the other hand defines *'Order'* as a *"formal expression of any decision of a civil Court which is not a decree*".

From the above legislative scheme of things, it can be inferred that the Act did not contemplate *Orders*. All that the Act contemplated was an 'arbitral award' and 'interim arbitral award'. Ignoring this legislative mandate, if any '*Order*' is passed by the Arbitral Tribunal, during the course of arbitral proceedings, such orders are not enforceable under Section 36 of the Act. Despite this, Arbitral Tribunals constituted under the Act continue to pass '*Orders'*, pending the main arbitral award under Sections 16 and 31 of the Act. The passing of such orders is probably being done taking a cue from the language used in Section 37(2) of the Act, which enables an appeal against certain orders. This provision of law did not enable appeal against '*all other orders*' passed by the Arbitral Tribunal. But the 2019 Amendment to the Act recognized an Arbitral Tribunal to be akin to a Court to the extent of passing of orders under Section 17 of the Act. Such orders passed by the Tribunal shall be enforceable under CPC, 1908 as if it were an order of the Court. This language has not been incorporated in Section 16 of the Act.

This has created a conundrum in the minds of arbitration practitioners that the orders obtained by them from the Arbitral Tribunal are not enforceable under Section 36 of the Act. Another conundrum is that the Act provides only for enforcement of final awards through the method and manner provided under Order XXI of CPC, but there is no mechanism for orders being passed by the Arbitral Tribunal. From this it is clear, that orders being passed by Arbitral Tribunals are not enforceable orders and such orders become inept and futile for enforcement in a Court of law.

Under Section 16 of the Act, whenever there is a challenge to the jurisdiction of the Arbitral Tribunal, the Arbitral Tribunal has been given the power to rule on its own jurisdiction and if the Tribunal rules that it is competent to adjudicate the dispute under Section 16(5) and renders an arbitral award, such award can be challenged under Section 34 of the Act.

Under Section 37 of the Act, appealable orders have been defined. In the present context, we are concerned with sub-section (2) of Section 37 which enables the following:

(2) Appeal shall also lie to a Court from an order of the Arbitral Tribunal—

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16; or

(b) granting or refusing to grant an interim measure under Section 17.

From the above, it becomes apparent that an appeal shall lie under Section 37 of the Act, from the '*orders*' passed by the Arbitral Tribunal under Section 16(2) and 16(3), which read as follows:

16. Competence of Arbitral Tribunal to rule on its jurisdiction…….

(2) A plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

Any other '*orders*' passed by the Arbitral Tribunal from time to time, like the claim being barred by the law of limitation, non-arbitrability of a dispute, *etc.*, are not appealable under Section 37 of the Act. Similarly, they are not even challengeable under Section 34 of the Act. As such, Section 16(6) enables filing of an application by an aggrieved party under Section 34, to set aside the arbitral award passed under sub-sections (2) and (3) of Section 16 only. For all other orders passed by the Arbitral Tribunal pending the final award, there is no recourse or remedy contemplated under the Act.

This conundrum was addressed by the Supreme Court in *IFFCO Ltd. v. Bhadra Products*[1], speaking through Justice *Rohington Fali Nariman* that:

"Parliament may consider amending Section 34 of the A&C Act, so as to consolidate all interim awards together with the final arbitral award, so that one challenge under Section 34 can be made after delivery of the final arbitral award. Piecemeal challenges like piecemeal awards lead to unnecessary delay and additional expense" (Emphasis supplied)

In *Deep Industries Limited v. ONGC*[2] speaking through *Justice Rohington Fali Nariman*, once again it was reiterated that:

"If Section 16 application had been dismissed by the Ld. Arbitrator, no appeal is provided and the challenge to the Section 16 application being dismissed must await the passing of the final award at which stage it may be raised under Section 34." (Emphasis supplied)

A contra view has been taken by the Supreme Court in *Uttrakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Limited,*[3] speaking through *Justice Indu Malhotra* held that:

"If an application under Section 16 is filed on the ground of limitation before the Arbitral Tribunal, and if the said application is rejected, the arbitral proceedings would continue, and the Tribunal would make an award. Under sub-section (6) of Section 16, a party aggrieved by such an arbitral award can challenge the said award under Section 34." (Emphasis supplied)

From the overall analysis of all the above said judgments and the legislative scheme

1. (2018) 2 SCC 534 - Para 30
2. (2020) 15 SCC 706 - Para 22
3. (2020) 4 SCC 455 - Para 7.13 & 7.14

under the Act, it is clear that there is a grey area insofar as orders/interim awards are concerned, especially the challenge recourse. Certain orders/interim awards do not have a remedy of appeal, nor can they be challenged under the existing legislative scheme. That is why, the Supreme Court in the aforementioned decisions said that such interim awards have to await the final challenge under Section 34 of the Act. But, at the same time, in the Uttarakhand judgment[4] it has been held that such order/ interim award can be challenged under Section 34. This has created yet another conundrum to the arbitration practitioners.

Therefore, the following key issues are required to be addressed by the Legislature:

(a) The word "*Order*" is required to be defined under the Act.

(b) The word "*Partial Award*" is also required to be defined under the Act.

(c) The word "*Interim Award*" is also to be separated from the definition of "*Arbitral Award*" and needs to be defined separately.

(d) A provision in the Act should be provided to challenge orders/interim awards/partial awards that are made by the Arbitral Tribunal.

(e) The ambiguity under Sections 37 and 34 of the Act should be addressed by incorporating a proper provision or explanation as to what orders are appealable and what orders are challengeable, in the context of orders passed under Section 16 of the Act and the jurisdictional Courts for such challenge.

(f) The Legislature should incorporate the language introduced in Section 17 of the Act, that the orders passed by the Tribunal shall be enforceable under CPC, 1908 as if it were an order of the Court under Section 16 of the Act.

Early disposal of arbitration cases is surely necessary under the '*ease of doing business'* concept to infuse confidence in the litigant public. That does not mean that the parties to the Arbitration should be deprived of their right to challenge illegal orders passed by the Arbitral Tribunal which are required to be decided at the interim stage to protect their legitimate legal rights. Such natural rights cannot be deprived on the ground of speedy disposal of cases, as the saying goes, *"justice hurried is justice buried"*.

4. ibid.