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TO CHANGE OR NOT TO CHANGE? MODIFICATION OF ARBITRAL AWARDS UNDER SECTION 34

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It is well-known that the Arbitration and Conciliation Act, 1996, that is the law on arbitration in India, is based on the UNCITRAL Model Law on International Commercial Arbitration, 1985, that was adopted with the aim of assisting States to modernise their domestic laws on arbitration, while taking into consideration the needs of international commercial arbitration. The 1996 Act is the comprehensive and integrated successor of the Arbitration Act, 1940, and the Foreign Award (Recognition and Enforcement) Act, 1961.

Section 34 of the 1996 Act, is found under the Chapter 'RECOURSE AGAINST AN ARBITRAL AWARD' and provides for a challenge to the arbitral award. It is titled 'Application for setting aside arbitral award' and provides the grieving party an opportunity to apply to the Court for setting aside the arbitral award, on the grounds stated therein. The section states in clear terms that an award may be 'set aside' only on the grounds enumerated therein. There is a general consensus that the Courts in India have by and large adopted a pro-enforcement approach while dealing with petitions challenging the award under Section 34.

Provisions in the Act of 1940

Before proceeding further, it may be worthwhile to refer to the provisions of the Arbitration Act, 1940, that explicitly confer power on the Court to modify arbitral awards. It was provided that the Court could modify or correct an award in the following circumstances[1]:

(a) By striking out of it something not referred to arbitration;

(b) By amending imperfection in form or correcting any obvious error which can be amended without affecting the decision of the case;

(c) When the award contains clerical mistake or an error arising from an accidental slip or omission.

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1. *Parmat Dat v. Bipju*, AIR 1916 Lah. 4(5).

What is of significance is that under clause (b), the only power that the Court has is to amend any obvious error which can be amended without affecting the decision. It has no jurisdiction to enter into the merits of the dispute. If the imperfection in form or the error cannot be amended without affecting the decision of the Arbitrators, the award may be remitted or set aside, according to the relevant provisions of the Act[2].

When the Arbitrator, without appreciating the scope of the reference before him, had made an award, which was totally against the materials placed before him and any reasonable person in this position could not have arrived at such a finding on the materials, it was held that modification of the award by enhancing the amount awarded, would not be valid as that would amount to the taking of a decision contrary to that of the Arbitrator and thereby affecting his decision. The error is neither an obvious error nor an error of such a character that it can be corrected or amended or rectified without affecting the decision of the Arbitrator.[3]

The first clause of Section 15 of the 1940 Act has been replicated in the proviso to clause (2)(iv) of Section 34 of the 1996 Act, that holds that if the decision on matters submitted to arbitration can be separated from those submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set-aside. The partial setting aside of awards is dealt with subsequently.

Scope of the Power under Section 34

While noting the scope of the power of the Court under Section 34 of the 1996 Act, it has been held that very limited grounds of challenge are enumerated under the provision and a challenge to an award must squarely fit into any of the conditions prescribed therein. The Court exercising jurisdiction under Section 34 is not a Court of first appeal under the provisions of the Code of Civil Procedure. An appellate Court to which recourse is taken against a decree of the Trial Court has powers which are co-extensive with those of the Trial Court. A party which has failed in its claim before a Trial Judge can in appeal seek a reversal and in consequence, the passing of a decree in terms of the claim in the suit. The Court to which an arbitration petition challenging the award under Section 34 lies does not pass an order decreeing the claim.[4]

While a reading of the provision conveys that the only recourse that is available against an arbitral award is its setting aside and not modification, the practice, at times, is different. It is useful to note that the Supreme Court, in the case of *ONGC Ltd. v. Western Geco International Ltd.*[5], held that 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 is on the face of it, untenable resulting in miscarriage of justice, the adjudication will be open to challenge and may be cast away or modified depending upon whether the offending part is severable from the rest or not. It is important to note here that a number of judgments of the Supreme Court have categorically held that the Courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The Courts need to be cautious and should defer to the view taken by the arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under

2. *S.D. Singh*, Law of Arbitration, Eastern Book Company (1988).

3. AIR 1981 Cal. 341.

4. (2013) SCC OnLine Bom. 481.

5. (2014) 9 SCC 263.

Section 34. Where two views are possible, the Court cannot interfere in the plausible view taken by the Arbitrator supported by reasoning.[6]

It may be understood from the above quoted judgments that the modification that is referred to by the Court essentially involves severing the offending part of the award, which results in the award being modified, and no more. However, the question that remains is whether Courts may modify the award in the manner of substituting parts of the award, made in the wisdom of the Arbitrator, with that arrived at by the wisdom of the Courts. It is seen that Courts have ventured to modify arbitral awards, while upholding them, in proceedings initiated under Section 34-an act that does not seem to be contemplated by the statute. However, there seems to be a deep divergence of judicial opinion on the power of Courts to modify arbitral awards under Section 34, which is yet to be conclusively settled by the Apex Court.

There has often been a reference to the old law of arbitration, *i.e.*, the Arbitration Act, 1940, which provided for the modification of arbitral awards by Courts. However, the Supreme Court had, in *Sundaram Finance v. NEPC India Ltd.*[7], emphasised that the 1996 Act is very different from the 1940 Act and the provisions of this Act have, therefore, to be interpreted and construed independently and, in fact, reference to the 1940 Act, may actually lead to misconstruction. While interpreting or attempting to apply provisions of the current Indian law of arbitration, it is most important not to recall former provisions of law nor as to how such provisions were applied by Courts.[8]

6. *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.*, 2019 SCC Online SC 1656.
7. (1999) 2 SCC 479.
8. *Fali S. Nariman*, Harmony amidst Disharmony, Hay House (2020).

Divergence of Judicial Opinion

To begin with, it is necessary to consider certain compelling judgments, that are from opposite ends of the spectrum. In *Ms. Gayatri Balaswamy v. ISG Novasoft Technologies Ltd.*[9], the Court after extensive appraisal of precedents, reasoned that the expression "recourse to a Court against an arbitral award" is a comprehensive and inclusive expression. Merely because such recourse is to be made in the form of an application to set aside the award, it cannot be construed that the power of the Court is limited by Section 34(1), only to set aside the award and to leave the parties in a position much worse than what they contemplated or deserved before the commencement of the arbitral proceeding. A narrow interpretation of Section 34(1) would actually spell doom for the arbitration regime and create a mischief.

Accordingly, it was said that recourse against an arbitral award could be either for setting aside or for modifying or for enhancing or for varying or for revising an award. The expression "application for setting aside such an award" appearing in Section 34(2) and (3) merely prescribes the form, in which, a person can seek recourse against an arbitral award. The right to have recourse to a Court, is a substantial right and that right is not liable to be curtailed, by the form in which the right has to be enforced or exercised.

An alternate explanation was provided too. As per the decision in *McDermott International Inc. v. Burn Standard Co. Ltd.*[10], the Court exercises under Section 34, only a supervisory role. According to the Court, it is almost like a revisional jurisdiction or may be little less in its scope than a revisional jurisdiction under Section 115 of the Code of Civil Procedure. But, a revisional

9. (2014) SCC OnLine Mad. 6568.
10. (2006) 11 SCC 181.

jurisdiction would normally include within its purview, a power to correct patent illegalities (Patent illegality is a ground to set aside the award). Section 34(1) comprises of two parts. The 'first is in clause (a), where the burden is on the party assailing the award to prove certain things. The second is in clause (b) of sub-section (1), where the Court tests the award with reference to certain parameters. It was opined that there would have been no necessity for splitting sub-section (1) of Section 34 into 2 clauses, one imposing an obligation upon the party to establish certain facts and another imposing a duty upon the Court to satisfy itself about a different set of factors, unless the jurisdiction sought to be conferred is revisional in nature, thereby extending power under Section 34 to include the power to modify.

It is pertinent to note that the High Court of Bombay, in *Anupam Engineers v. India Oil Corporation Ltd.*[11], opined that applications/ petitions under Section 34 of the Act for partial setting aside or modification of the award are maintainable.

On the other hand, in *State Trading Corporation of India Ltd. v. Toepfer International Asia Pte Ltd.*[12], a Division Bench of the Delhi High Court, while overruling previous decisions that had held that arbitral awards may be modified by a Court under Section 34, held that the legislative intent in Section 34 was to make the result of the annulment procedure prescribed therein potentially different from that in an appeal. Differentiating between an appeal and annulment, the Court elucidated that in appeal, the decision under review not only may be confirmed, but may also be modified. In annulment, on the other hand, the decision under review may either be invalidated in whole or in part or be left to stand if the plea for annulment is rejected. Annulment operates to negate a decision, in whole or in part, thereby depriving the portion negated of legal force and returning the parties, as to that portion, to their original litigating positions. Annulment can void, while appeal can modify. Section 34 is found to provide for annulment only on the grounds affecting legitimacy of the process of decision as distinct from substantive correctness of the contents of the decision. A remedy of appeal focuses upon both legitimacy of the process of decision and the substantive correctness of the decision. Annulment, in the case of arbitration focuses not on the correctness of decision but rather more narrowly considers whether, regardless of errors in application of law or determination of facts, the decision resulted from a legitimate process.

In *Puri Construction P. Ltd. and others v. Larsen and Toubro Ltd. and another*[13], reliance had been placed on *McDermott International Inc.*, in which it was held by the Supreme Court that the 1996 Act makes provision for the supervisory role of Courts, for the review of the arbitral award only to ensure fairness. Intervention of the Court is envisaged in few circumstances only, like, in case of fraud or bias by the Arbitrators, violation of natural justice, *etc.* 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. So, scheme of the provision aims at keeping the supervisory role of the Court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the Court's jurisdiction by opting for arbitration. Surprisingly, the judgment in *McDermott's* case (supra), itself modified the impugned award, reducing the rate of interest awarded to 7.5% from 18%, citing furtherance of justice, given the long lapse of time.

11. 2010 (2) Mh. LJ 632.

12. (2014) SCC OnLine Del. 3426.

13. (2015) SCC OnLine Del. 9126.

Interestingly, the judgment in *Puri Construction's* case (supra), while acknowledging that the Madras High Court in *Gayatri Balaswamy's* case (supra). appropriately noted that the observations in *McDermott International Inc.'s* case (supra), were not in the context of the specific issue being dealt herewith, opined that it is determinative of the Court's approach in an enquiry under Section 34 of the Act. It was held that a Court, while modifying or varying the award would be doing nothing else but correcting the errors of the Arbitrators, which, it was said, is expressly against the dictate of *McDermott International Inc.'s* case (supra).

However, it is interesting to note that the Supreme Court in *McDermott's* case (supra), had held that that the 1996 Act makes provision for the supervisory role of Courts, for the review of the arbitral award only 'to ensure fairness'. It may safely be presumed that the modification of awards in the cases discussed has been carried on with the judicial intent of ensuring more fairness in the adjudication meted out to the parties. In this context, it would be useful to refer to certain decisions of the Supreme Court, in which arbitral awards were modified by the Court, to ascertain to the extent of modification and the reasons therefor.

Instances of Modification by the Supreme Court

In *Gautam Constructions and Fisheries Ltd. v. National Bank for Agriculture & Rural Development*[14], the Court, while partly allowing the appeals modified the award, in the context of the principle of quantum merit. The rate of Rs.250 per Sq.ft. for the extent of 12,090 Sq.ft., in respect of the construction of the basement area was allowed as reasonable, while subtracting the amount of Rs.150 per Sq.ft., for amenities, extra works, fittings *etc*., that were installed in other floors, under agreement, thereby calculating the total rate of construction at Rs.400 per Sq.ft.

In *Royal Education Society v. Lis (India) Construction Co. Pvt. Ltd.*[15] *the Court, on appeal against the judgment of the High Court affirming the award, modified the award, considering that the* building of an educational institution was a charitable cause for which the appellant Society had mobilised land and raised money from the donors, and the fact that the respondent contractor failed to complete the work assigned through the contract, for which time was clearly the essence, while not wishing to embark upon the merits of the claims and counter-claims raised by the parties before the Arbitral Tribunal. While rejecting the claim for the prolonged period of work, the Court allowed a sum of Rs.21,00,000/- in total, as against Rs.35,50,762.03, that had been awarded by the Tribunal.

The matter of *Balwant Singh v. Dungar Singh*[16] is different in the sense that the award was modified by the Court, with the consent of the parties, based on the further settlement arrived at, by the parties.

In the decision of the Supreme Court in *Krishna Bhagya Jala Nigam v. G. Harischandra Reddy*[17], it is observed in the judgment that the award of the Arbitrator is fair and equitable, and that the Court did not wish to interfere with the award except to say that after economic reforms in the country the interest regime had changed and the rates have substantially reduced, in light of which the Court reduced the rate of interest awarded by the Arbitrator.

As observed in the judgments cited above, there have not been definitive parameters for the modification of awards,

14. (2000) 6 SCC 519.

15. (2009) 2 SCC 261.

16. 2020 SCC OnLine SC 176.

17. (2007) 2 SCC 720.

and the Court modified awards for a number of varied reasons, in the light of the facts and circumstances of each case.

Partial Setting Aside of Awards

Section 32(2)(iv) of the 1996 Act empowers the Court to set aside the part of the award in respect of the dispute which was not referred to arbitration, the net result being that the portion of the award is to be set aside thereby, modifying the original award.

In *R.S. Jiwani v. Ircon International Ltd.*[18] in which the power of the Court to partially set aside awards was deliberated at length by a three-Judges Bench of the High Court of Bombay, it was interpreted that the judicial discretion vested in the Court in terms of the provisions of Section 34 of the Arbitration and Conciliation Act, 1996 takes within its ambit power to set aside an award partly or wholly depending on the facts and circumstances of the given case. The Court explained that in *stricto sensu* the proviso to Section 34(2)(iv) may not literally apply to the entire provision of Section 34(2) but can certainly be taken as a yardstick for rest of the provision insofar as exercise of judicial discretion of the Court is concerned. The Court observed that a party may be satisfied with major part of the award but is still entitled to challenge a limited part of the award. It is obligatory on the Court to deal with such a petition under Section 34(1)(2) of the Act. It was reasoned that, in such cases, compelling the parties, particularly a party who had succeeded, to undergo the arbitral process all over again does not appear to be in conformity with the scheme of the Act. Thus, an award may be only partially set aside, if the part of the award that is liable to be set aside may be severable from the other part of the award that holds good.

18. 2009 SCC OnLine Bom. 2021.

Principles of Statutory Interpretation to Aid

It is well known that all statutes have to be considered in light of the object and purport of the Act.[19] In this light, it is necessary to keep in mind the objectives of the 1996 Act, one of which is to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration. It cannot be construed that the power of the Court is limited by Section 34(1), only to set aside the award and to leave the parties in a position much worse than what they contemplated or deserved before the commencement of the arbitral proceeding. A statute cannot be interpreted in such a manner as to make the remedy worse than the disease. A narrow interpretation of Section 34(1) would actually spell doom for the arbitration regime and actually create a mischief.[20] In this context, there is a need to strike a balance between non-interference by Courts in order to further the objective of the Act, with the uncompromisable aspects of justice and reasonability in adjudication.

It is a well-settled principle that a statute should not be interpreted in a manner that would render it osseous and nugatory. Though the literal rule of interpretation, till some time ago, was treated as the 'golden rule', it is now the doctrine of purposive interpretation which, as held by the Supreme Court, is predominant, particularly in those cases where literal interpretation may not serve the purpose or may lead to absurdity. If it brings an end which is in variance with the purpose of the statute, that cannot be countenanced.[21] It may be counterproductive to remit the matter to arbitration after considerable resources have already been invested in the impugned award. While it

19. (2008) 7 SCC 502.

20. Supra 9.

21. (2016) 3 SCC 619.

may be argued that remission of the award is available under the 1996 Act and the Court may remit awards for reconsideration, instead of modifying them itself, it has to be appreciated that remitting the award to the Arbitrator to reconsider issues that do not substantially impinge on the decision of the Arbitrator, may lead to duplication of procedures and costs, alongwith an unwarranted lag of time, that are sought to be avoided, failing which the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.

Where the plain and literal interpretation of a statutory provision produces a manifestly absurd and unjust result, the Court might modify the language used by the Legislature or even do some violence to it so as to achieve the obvious intention of the Legislature and produce rational construction and just results,[22] as has apparently been interpreted by the High Court of India, in the case of *R.S. Jiwani v. Ircon International Ltd.*[23]

Conclusion

Hence, while modification of arbitral awards by the Court has been the practice, the modification must not be in the nature of substantially altering the award of the Arbitrator (that may call for a re-appreciation of evidence, which is held to be impermissible), but may be permissible only to the extent of correcting patent errors and modifying certain terms such as the rates of interest, so as to make it fair and just to both the parties, as long as the decision of the Arbitrator is not replaced with the view of the Court. A case in point here is that of *Krishna Bhagya Jala Nigam*, as referred to above. It goes without saying that the implied power of the Court to modify arbitral awards must be used sparingly, only in exceptional circumstances.

The Court does not have the power to modify foreign awards in the process of enforcement. The only limited power is in the proviso to Section 48(1)(c) of the Act, wherein the Court may separate the part of the Award which contains decision on matters submitted to arbitration from the one which were beyond the scope of the submission to arbitration, and enforce only that portion of the Award.[24] It may be added as caution that the power of the Court to modify the award under Section 34 may not be applied to awards arising out of international commercial arbitrations in India, as a measure against the excessive interference of the Court, that otherwise would amount to transgressing the limited scope of interference that has been provided in the international instruments of arbitration, to which India is a party. It must be understood that the approach of the Court in modifying awards in proceedings initiated to set them aside might have an unfavourable impact on the idea of India as a viable seat for international arbitrations.

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22. (1985) 1 SCC 591.

23. Supra 19.

24. 2019 SCC OnLine Del. 8350.