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# CHALLENGING AN ARBITRAL AWARD- JURISDICTION OF COURTS

## A Arbitral award: Introduction

- 1 Arbitration is an Alternative Dispute Resolution Mechanism.
- 2 It is an option that may be exercised by the parties who have entered into an agreement which speaks of referral of disputes to arbitration.
- 3 In such case, the parties approach the arbitral tribunal, rather than moving the court, for adjudication of the disputes arising between them. The arbitral tribunal is constituted in terms of the arbitration clause as provided in the agreement.
- 4 On adjudication of the disputes, the tribunal passes an arbitral award. Either of the parties to arbitration, on being dissatisfied with the award, may file an application for setting aside of the award.

## B Challenging an arbitral award- Section 34

- 1 An arbitral award may be challenged before a court of appropriate jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996, as amended by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the Act).
- 2 An application for setting aside of the arbitral award may be made on any of the grounds of challenge available under such section. To begin with, it is important to enumerate such grounds of challenge available under sub-sections 34(2) and 34(2A).
- 3 Under Section 34(2), an award may be set aside by the court, if in such application, it is established on the basis of the record that:
  - A party was under some incapacity;
  - The arbitration agreement was not valid;
  - Proper notice was not served in relation to the arbitration proceedings;
  - The arbitral award deals with disputes not contemplated within the terms of submission;
  - The arbitral procedure provided for in the arbitration agreement was not followed;
  - Subject matter of dispute is not capable of settlement by arbitration;

- Arbitral award is in conflict with public policy of India.
  - The Explanation to Section 34(2) clarifies that an award shall be considered to be in conflict with the public policy of India, only if it was induced by fraud or corruption, was in violation of Section 75 or 81; was in contravention with fundamental policy of Indian law; is in conflict with the most basic notions of morality and justice.
- 4 Amendment of 2015 provided for an additional ground of challenge in the form of Section 34(2A) which states that an award may also be set aside if the court finds that the award is vitiated by patent illegality appearing on the face of the award.
  - 5 The main question that has found place in various debates on the scope of Section 34 is the jurisdiction of courts, more specifically, the limit of jurisdiction of courts in passing an order of setting aside an arbitral award. This question of jurisdiction has been viewed from various angles.

## C “If the Court finds”

- 1 The amended provisions of the Act put the weight of discretion upon the courts by using the terms “...if the court finds...” in Section 34(2)(b) and Section 34(2A).
- 2 This signifies that the intent is to give the authoritative power in the hands of the courts implying that it is upon the courts to decide whether or not the grounds on which the award has been challenged are valid. The final decision of setting aside should be the discretion of the court.
- 3 The main question, however, that arises is how broad is this power of discretion provided under the said provision.
- 4 This discretion is defined by the jurisdiction of the courts and the extent to which a court can interfere with the decision of the arbitrator/s.

## D Section 34(6)

- 1 For the sake of argument, the intent of the legislature in limiting the jurisdiction of the courts may be interpreted through Section 34(6) which provides that an application under Section 34 shall be disposed of expeditiously,



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latest within a period of one year from the date on which the notice of arbitration is served.

- 2 This implies that the courts shall not dive deep into the dispute between the parties while hearing an application for setting aside of the award and shall only deal with the facets and the grounds on which the award has been challenged.
- 3 *In Canara Nidhi Limited vs. M Shashikala (2019) 9 SCC 462*, while explaining the scope of Section 34 vis-à-vis Section 34(6), the Supreme Court stated that Section 34 application is a single issue proceeding and any exercise to frame issues would delay the proceedings. This means that the scope and jurisdiction under Section 34 is limited.

#### **E The limited jurisdiction of the courts**

- 1 The main principle underlying the limited jurisdiction of the courts is that the same dispute arising out of the same facts and between the same parties, should not be adjudicated twice.
- 2 Further, when the parties have mutually agreed to submit their cause before an alternate forum, the courts shall welcome such decision.
- 3 Once the arbitral tribunal has decided the dispute between the parties, after having heard the parties, considering their case from a neutral lens and appreciating each evidence presented before the tribunal, the courts shall not interfere into the region of the tribunal.
- 4 The essence of this argument is that dealing with the evidence and facts of the case does not lie within the role of the courts sitting in a Section 34 jurisdiction.

#### **F Reasoned award**

- 1 Although Section 34 does not expressly contemplate unreasonableness in an award as a ground of challenge for setting aside an award, it is mandatory for the tribunal to mention the reason for reaching the conclusion in an award.
- 2 Section 31(3) mentions that the arbitral award shall state the reasons upon which it is based unless, the parties have agreed that no reasons are to be given or the award is passed on agreed terms between the parties under Section 30 (Settlement).
- 3 Thus, by virtue of the provisions of Section 31(3), it becomes mandatory for the arbitral tribunal to state reasons for accepting or denying the claims and counter claims of the parties. Failure to do so may render the award incomplete and prone to challenge through an application for setting aside of the award.
- 4 Unreasonableness therefore becomes an important ground for setting aside an award. It is to be noted here that unreasonableness shall mean not only lack of reason but also lack of a rational reason.
- 5 Primacy of reasons has been expressly mentioned under Section 31(3). However, the court in Section 34 jurisdiction must first know the mind of the arbitrator before expressing its opinion on adequacy or inadequacy of reasons.
- 6 The Supreme Court in *Dyna Technologies vs. Crompton Greaves 2019 SCC OnLine SC 1656* has made the following observations:
  - The requirement of a reasoned award shall be fathomed through presence of three characteristics: proper, intelligible and adequate.
  - The jurisdiction in case of an application under Section 34 shall be used for ensuring that the requirement of a reasoned award is fulfilled. The same may be done either by transferring back the award to the tribunal for filling in the gaps and curing the curable defects, if there are any, such that the award may reach finality or by setting aside the award.
  - Interference with an award shall not be made in a “casual and cavalier” manner.
  - “The mandate of Section 34 is to respect the finality of the arbitral award”.

- If an award is found to be unintelligible, it shall be equivalent to providing no reasons at all.
- *Dyna Technologies* was a clarification in the nature of a precedent in terms of explaining what are the main ingredients of a reasoned award.
- 7 *State of West Bengal vs. Bharat Vanijya Eastern Private Limited* held that as long as there is a logical link between the manner in which the facts are recorded and the decision on such facts, reasons can very well be implied. The court must not overlap its jurisdiction in setting aside an award if the link is established.

#### **G Supreme Court’s view on the issue**

- 1 The jurisdictional aspect in provisions of Section 34 is a law which keeps extending its boundaries.
- 2 The credit for development on the issue of jurisdiction of courts in a Section 34 application can be majorly attributed to the Apex Court.
- 3 Supreme Court has time and again clarified the position of courts in as far as deciding the limit within which a court can interfere with an arbitral award.
- 4 The Supreme Court’s view, through various judicial precedents can be analysed by dividing them into two rays: pre-amendment and post amendment.
- 5 Prior to the amendment of 2015, the court had wider powers as compared to now when the regime has been updated and the scope of Section 34 has been limited.
- 6 In *Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd. (2003) 5 SCC 705*, the Supreme Court interpreted clause (v) (Arbitral Award may be set aside when the composition of Arbitral Tribunal was not in conformity with the agreement) of Section 34(2)(a) and clause (ii) (When the Arbitral Award was in conflict with the public policy of India) of Section 34(2)(b).
  - In relation to the former, the Court held that if the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, then it would mean to have acted beyond its jurisdiction and hence the award would be patently illegal and liable to be set aside under Section 34.
  - It broadened the scope of litigation under Section 34. Every alleged error of application of statutory provisions in an award now attracted a floodgate of challenge to the same.
- 7 In *Associate Builders vs. Delhi Development Authority(2015) 3 SCC 49* the Supreme Court appreciated the fact that the judgment in *Saw Pipes* was consistently followed till date.
  - The Supreme Court also explained that the term “patent illegality” in relation to Section 28 of the Act and referred to the sub-heads under which an award could be set aside which are contravention of:
    - (i) the substantive law of India;
    - (ii) the Arbitration & Conciliation Act;
    - (iii) the terms of the contract.
  - It further clarified the scope of interpretation of most basic notions of morality and justice.
  - Strong reliance can be placed on *Associate Builders* for reinforcing that the Arbitrator is the last word on facts, including on the quality and quantity of evidence.
- 8 Scope of judicial intervention under Section 34 has been further narrowed down in the Amendment Act of 2015. For example, clarification as to when an award is in conflict with the Public Policy of India was provided, thus limiting the scope of liberal interpretation.
- 9 Post the amendment, the Supreme Court took a very strict view in matters of interpretation of Section 34 and there has since been a flow in plethora of judgments which held that the courts could not interfere with an award unreasonably.



- 10 The court cannot set aside an award if it is well reasoned inspite of the fact that the court thinks that an alternative view could have been provided in the award.
- 11 In such light, *South East Asia Marine Engineering and Constructions Limited (Seamec) vs. Oil India Limited* 2020 SCC OnLine SC 451 can be referred to. It held that merits of interpretation provided in an award is not to be examined, until it is found that such interpretation was not reasonably possible.
- 12 In *Parsa Kente Collieries Ltd. vs. Rajasthan Rajya Vidyut Utpadan Nigam Limited*(2019) 7 SCC 236 Supreme Court answered the question that once the award of an arbitrator has been confirmed by the commercial court, can it be interfered with by the Division Bench, in an appeal under Section 37 of the Act. The question was negated with the following observations:
- When the view taken by the arbitrator is both possible and plausible, an award cannot be set aside by the court merely because another view can be taken. The court exceeds its jurisdiction if it does so.
  - When the arbitrator has not appreciated the material/evidence on record rightly, in that case, the court may set aside the award.
  - The arbitrator must decide in accordance with the terms of the contract and if it fails to do so, the court is within its powers to set aside the award.
- When a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected.
  - Interpretation of the terms of the agreement does not involve any element of public policy. An award may be set aside on the grounds of public policy only when there is patent illegality apparent on the face of the award.
  - An award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score.
  - Similar view is taken by this Court in the cases of *National Highways Authority of India vs. ITD Cementation India Limited*(2015) 14 SCC 21 and *Steel Authority of India Limited vs. Gupta Brother Steel Tubes Limited*(2009) 10 SCC 63.
- 13 Thus, an observation of the Supreme Court’s decisions lead to the conclusion that for an award to be set aside, a ground of patent illegality has to be apparent on the face of the award and should be one that does not involve a fact-finding exercise beyond what the award reflects.
- 14 The courts’ jurisdiction shall be dictated by the statute and courts may set aside an award merely after conformity of presence of one or more of the grounds available under section 34. Moreover, interpretation of such provision shall be literal and not liberal.