

14th December, 2020

POWER OF ARBITRATOR TO INTERPRET AND STRIKE DOWN THE TERMS OF THE CONTRACT

1. Introduction

Arbitration proceedings provide greater control of the process vis-à-vis court hearing. The non-judicial nature of arbitration makes it a preferred option which is much speedier method as compared to the adjudication of the courts, the confidentiality and better control over arbitration process makes it more desirable for the parties to refer dispute before an arbitrator.

2. Can Arbitrator interpret the terms of Contract?

The powers of the arbitrator to interpret the terms of the contract and decide the issues before it, are larger than the powers of the trial courts while deciding the contract related disputes. The important reasons for providing such extra powers include, the non - requirement of legal qualifications for an arbitrator and to respect finality to the arbitration awards. Courts in India have been consistently recognizing the authority of the arbitrators to interpret the contract and decide the issues pending before them.

Supreme Court of India while deciding *McDermott International Inc Vs Burn Standard Co Ltd.*, (2006) 11 SCC 181 categorically stated that interpretation of a contract is a matter for arbitrator to determine, even if it gives rise to determination of a question of law. It further clarified that since contract can be express or implied, the arbitrator cannot be said to have misdirected himself in passing the award by taking into consideration the conduct of parties. Hence the arbitrator can take into consideration the nature of contract, correspondences exchanged between the parties, nature of the arbitration agreement, scope of the arbitration agreement, recitals in the contract and the conduct of the parties while determining the contract clauses. It also reconfirmed that once it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not interfere in the award unless it is found that there exists any bar on the face of the award.

3. Interference of Courts:

It is settled law that courts should not interfere with awards merely because an alternative view on the facts or interpretation of the contracts exists. The Supreme Court of India has consistently held that courts should not interfere with the view taken by an arbitral tribunal, unless an award portrays perversity unpardonable under Section 34 of the Arbitration and Conciliation Act, 1996 (for short “Arbitration Act”).

Arbitrator while adjudicating the disputes arising from the breach of terms of contract, has to read the contract in hand as a whole document and as far as possible it should be mutually explanatory in the light of Indian Contract Act, meaning thereby, that any interpretation given by arbitrator should not violate the underlying Principles of Indian Contract Act and should not deviate from the intention of the parties or evidence produced by the parties. Recently, a three-judge bench of the Supreme Court in *South East Asia Marine Engineering and Constructions Ltd. (Seamec Ltd.) v. Oil India Limited*, (2020) 5 SCC 164, has set aside an arbitral award on the ground that the interpretation adopted by the arbitral tribunal was not a possible interpretation of the contract and therefore, did not pass the muster under Section 34 of the Arbitration Act. The said Judgment is discussed in brief as under:

a. Brief Facts:

The Appellant was awarded work pursuant to a tender floated by the Oil India Limited. The contract was for the purpose of well drilling and other auxiliary operations in a State. During the subsistence of the operations, the price of the High-Speed Diesel (HSD), one of the essential materials for carrying out the drilling operations, increased by the Government Circulation. Appellant raised a claim of the increased price of HSD, in pursuance to the “change in law” clause in the contract (clause 23), Respondent rejected such claim, aggrieved by the same Appellant invoked the arbitration clause.

b. Before Arbitral Tribunal:



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Majority View held that increase in HSD price cannot be termed as 'law' but had the "force of law" and thus fell within the ambit of Clause 23 of the contract and allowed the claim along with 10 % interest per annum. Minority view of the Arbitral Tribunal was that the executive orders would not come within ambit of clause 23. *Clause 23 read as – "Subsequent to the date of price of bid opening if there is a change in or enactment of any law or interpretation of existing law, which results in additional cost/ reduction in cost to contractor on account of the operation under the contract, the company/contractor shall reimburse/pay contractor/company for such additional/reduced cost actually incurred"*

c Before District Judge:

Thereafter being aggrieved by the award, Oil India Limited challenged the said Award under Section 34 of the Arbitration Act before the District Judge. District Judge upheld the Award passed by the Arbitral Tribunal.

d Before the High Court:

Aggrieved by the aforesaid Order, an Appeal was preferred under Section 37 of the Arbitration Act before the High Court. High Court allowed the appeal and set aside the award passed by the Arbitral Tribunal. The High Court held that the interpretation of the terms of the contract by the arbitral tribunal was erroneous and against the public policy of India. As regards the scope of judicial review under Section 37 of the Arbitration Act, the High Court held that it had the power to set aside the award in view of the fact that the award overlooked the terms and conditions of the contract. Aggrieved by the said order of the High Court, the appellant approached the Supreme Court.

e Before Supreme Court:

The Supreme Court held that the interpretation of the arbitral tribunal to expand the meaning of clause 23 to include change in the rate of HSD, was not a possible interpretation of the contract as the appellant did not introduce any evidence which provided the same. It was further held that other contractual terms also suggested that the interpretation of clause 23 as suggested by the arbitral tribunal was perverse. Accordingly, the Supreme Court did not interfere with the order passed by the High Court and the Appeal was dismissed and the claim stood rejected.

4 Powers of Arbitrator:

Following points can be inferred on the powers of the Arbitrator to interpret and Strike down the terms of contract.

- a Arbitrator cannot go beyond the terms of contract as the contract is a law created by parties for themselves and its sanctity is governed by the Indian Contract Act, 1872.
- b Arbitrator while deciding the dispute can only interpret the Terms of Contract in light of the intentions of parties reflected in the Documentary Evidence produced before him.
- c When the intention of the parties is not clear from the terms of contract, then the arbitrator may use the documents revolving around the contract to infer whether or not parties have agreed to a broad interpretation of the particular or disputed clauses in question or not.
- d The thumb rule of interpretation is that document forming a written contract should be read as whole and so far as should be mutually explanatory.
- e Arbitrator is a judge chosen by the parties hence his decision is final, therefore courts refrain from re-appraise the evidences.
- f Courts can only interfere with the award when the:
 - Reasoning given by the arbitrator is bad, unjust.

- Award given in contrary to the proposition/mandate of law.
 - When Arbitrator exceeds its power and have gone beyond the terms of contract.
 - Passed an award in absence of evidence or contrary to the mutually agreed terms of contract.
 - When the clauses/terms of a contract is contrary to the Contract Act.
 - Courts cannot substitute arbitrator's interpretation with its own interpretation as long as the interpretation of the arbitrator is a possible one.
 - Arbitrator while interpreting the contact has to adhere to the policy of Contract Act and can set aside only those terms which are void or void-ab-initio as per the Indian Contract Act subject to the agreement or contract between the parties.
- g Principle of Kompetenz Kompetenz: Arbitrator has the power to decide whether or not he has the jurisdiction over the matter or not, even if validity of contract itself is in question. (Principle of Kompetenz Kompetenz is reflected under Section 16 of the Arbitration Act) and if any party is aggrieved by this order of jurisdiction then they may challenge the order in Appeal under Section 37(2) of the Arbitration Act.

5 Conclusion:

On one hand parties prefer Arbitration for better control over their matter as Arbitrator itself is a creature of contract hence also referred as an umpire and has to work within the four concerns of the contract but on the other hand Arbitrator hands are anchored as he is not a court and cannot do equities between the parties. Irrespective of such draw back, parties still prefer arbitration as it's a speedier remedy than the overburdened courts.